

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
v.)
(1) CARLOS A. RAFAEL,)
Defendant.)
_____)

Criminal No. 16-10124-WGY

**UNITED STATES’ MOTION FOR RECONSIDERATION OF
FORFEITABILITY OF VESSELS AND PERMITS**

The United States of America, by its attorney, William D. Weinreb, Acting United States Attorney for the District of Massachusetts, respectfully seeks this Court’s reconsideration pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure. Within 14 days, the Court may correct a sentence that resulted from arithmetical, technical, or other clear error. On October 11, 2017, this Court issued a Memorandum and Order Concerning Forfeiture (*see* Docket No. 254), granting in part the United States’ Motion for Preliminary Order of Forfeiture, seeking to forfeit 13 vessels and permits with an approximate value of \$30,000,000. Based on the Court’s reliance on the maximum fine allowable under the sentencing guidelines, the proposed forfeiture of all 13 vessels and permits is constitutional.

BACKGROUND

On March 15, 2017, the United States Attorney for the District of Massachusetts filed a twenty-eight-count Superseding Information, charging defendant Carlos A. Rafael (the “Defendant”) with Conspiracy to Commit Offenses Against the United States, in violation of 16 U.S.C. §§ 3372(d), 3373(d), and 18 U.S.C. § 371 (Count One); False Labeling and Fish Identification, in violation of 16 U.S.C. §§ 3372(d), and 3373(d) (Counts Two through Twenty-Four); Falsifying Federal Records, in violation of 18 U.S.C. § 1519 (Counts Twenty-Five and

Twenty-Six); Bulk Cash Smuggling, in violation of 31 U.S.C. § 5332(a), and 18 U.S.C. § 2 (Count Twenty-Seven); and Tax Evasion, in violation of 26 U.S.C. § 7201 (Count Twenty-Eight). The Superseding Information also included a False Labeling and Fish Identification Forfeiture Allegation, pursuant to 16 U.S.C. § 3374(a), and 28 U.S.C. § 2461(c), which provided notice that the United States intended to seek the forfeiture, upon conviction of the Defendant of one or more of the offenses alleged in Counts Two through Twenty-Six of the Superseding Information. Specifically, 16 U.S.C. § 3374(a) provides that the following is subject to forfeiture:

all fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased in violation of 16 U.S.C. § 3372(d), or any regulation issued pursuant thereto; and/or (2) all vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants involved in such offenses if (A) the owner of such vessel, vehicle, aircraft or equipment was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of due care should have known that such vessel, vehicle, aircraft, or equipment would be used in a criminal violation of the Lacey Act, and (B) the violation involved the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants.

Here, there are 13 vessels and permits (collectively, the “Vessels and Permits”) that were involved in the Lacey Act violations identified in the Superseding Indictment and subject to forfeiture.

On March 30, 2017, at a hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the Defendant pled guilty to Counts One through Twenty-Eight of the Superseding Information, pursuant to a written plea agreement that he signed on March 30, 2017. *See* Docket No. 102. In Section 9 of the plea agreement, the Defendant admitted that the Vessels and Permits were subject to forfeiture but preserved the right to challenge such forfeiture on Eighth Amendment grounds.

On July 13, 2017, the United States filed a Motion for Preliminary Order of Forfeiture against the Vessels and Permits, and on August 1, 2017, the United States filed an Amended

Motion for Preliminary Order of Forfeiture against the Vessels and Permits, noting that the Defendant intended to challenge the forfeiture of the Vessels and Permits on Eighth Amendment grounds. *See* Docket Nos. 123, 145. On August 14, 2017, the Defendant filed an opposition, requesting a briefing schedule and delay of the issuance of the requested Preliminary Order of Forfeiture. *See* Docket No. 157. This Court ordered the Defendant to file an opposition to the motion by September 18, 2017, but issued the Preliminary Order of Forfeiture against the Vessels and Permits. *See* Docket Nos. 176, 177. On September 18, 2017, the Defendant filed his opposition, arguing that the Vessels and Permits should not be forfeited because the proposed forfeiture of the Vessels and Permits was disproportionate to the maximum fine for Lacey Act violations; the Defendant was not within the class of defendants to whom the Lacey Act was principally directed; the Defendant's conduct did not harm others; and forfeiture of the Vessels and Permits would deprive the Defendant of his livelihood. The Defendant also argued that the Court should enter an order of forfeiture in the amount of \$2.8 million in lieu of forfeiture of the Vessels and Permits. On September 25, 2017, the United States requested leave to file a reply brief, and on September 29, 2017, the United States filed its reply brief, which was restructured based on the questions posed by the Court during the September 25, 2017 hearing. On October 11, 2017, the Court issued a Memorandum and Order, concluding that the United States' proposed forfeiture of the Vessels and Permits violated the Eighth Amendment and ordered the forfeiture of four vessels and permits with an approximate value of \$2,258,850.

ARGUMENT

I. Forfeiture of the 13 Vessels and Permits Does Not Grossly Exceed the Recommended Penalties Under the Sentencing Guidelines.

The Court's Memorandum and Order incorrectly relies on the premise that \$200,000 is the maximum fine allowable under the sentencing guidelines. Based on the Defendant's offense level

of 24 and according to U.S.S.G. § 5E1.2(c)(3) (Fine Table), the maximum fine is \$200,000.

However, Commentary Note 4 states the following:

The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (*e.g.*, by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.

(emphasis added). The Court, based on Note 4, had discretion to depart upward from the Fine Table and impose a fine equal to twice the amount of gain or loss resulting from the Defendant's offense conduct. Other courts have applied Note 4 when determining whether to impose a fine that exceeds U.S.S.G. § 5E1.2(c)(3). *See United States v. Chusid*, 372 F.3d 113, 118 (2nd Cir. 2004) (considering Note 4 and remanding to the district court "for the sole purpose of allowing it to impose a fine within the range set forth by Guidelines Sections 5E1.2(c)(2) and (c)(3), or to reimpose [sic] a fine under 18 U.S.C. § 3571 with reasons justifying its decision to upwardly depart from that range."); *United States v. Garrison*, 133 F.3d 831, 852 (11th Cir. 1998) (quoting U.S.S.G. § 5E1.2, n.4) ("In departing upward in [the applicable] fine, the district judge specifically relied on the Sentencing Guidelines [Note 4], providing that '[w]here ... two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.'"); *United States v. Skodnek*, 933 F. Supp. 1108, 1123 (D. Mass. 1996) (citing U.S.S.G. § 5E1.2, n.4) ("where a sentence within the applicable fine guideline range would be insufficient to ensure both the

disgorgement of any gain from the offense that otherwise would not be disgorged (e.g. by restitution or forfeiture) and an adequate punitive fine, an upward departure may be warranted.”)

Here, the Defendant violated the Lacey Act, and he pled guilty to 26 counts involving Lacey Act violations. The Lacey Act carries a maximum statutory fine of \$250,000 per offense. Therefore, the maximum fine that could have been imposed here under the Lacey Act is \$6.5 million. Moreover, this Court found that the Defendant’s offense conduct encompassed at least **728,812** pounds of fish (over 364 tons). *See* Memorandum and Order at 9. This Court also made a finding that the market value of the fish involved in the offense conduct was at least \$3.5 million – even though the Defendant argued that the estimated retail value of the fish, taking into account costs, was \$1,451,226. *See* Sentencing Hearing Transcript at 22, attached hereto at Exhibit 1. Relying solely on the Court’s analysis of the maximum fine under the sentencing guidelines in determining proportionality, if the Court considered Note 4, and, at base, considered the Defendant’s gain to be at least the retail amount he conceded (*i.e.*, \$1,451,226), the proposed forfeiture of all 13 vessels and permits is approximately ten (10) times that of the maximum fine under the sentencing guidelines.¹

¹ To the extent that the Court perceived it was constitutionally constrained by the constitutionally permissible guidelines sentencing range, both the United States Supreme Court and the First Circuit have held that the defendant is not required to admit facts upon which a sentence is based nor is a jury required to make findings of fact upon which a sentence is based. *See United States v. Doe*, 741 F.3d 217, 234 (1st Cir. 2013), *petition for cert. filed* (Jun. 2, 2014 (No. 13-10728) (judicial fact-finding is permissible to determine a Guidelines sentence within the default statutory maximum); *United States v. Platte*, 577 F.3d 387, 392 (1st Cir. 2009) (“we have held with monotonous regularity that as long as a defendant’s sentence comes within the maximum established by the jury’s verdict, a sentencing court’s preponderance-of-the-evidence fact finding, even though it may pave the way for a stiffer sentence within that maximum, does not violate the *Apprendi* principle....[A] sentencing court may lawfully determine drug quantity by a preponderance of the evidence and use the quantity so determined in constructing a defendant’s sentence as long as the sentence ultimately imposed does not exceed the maximum sentence made applicable by the jury’s verdict and the statute of conviction.”); *United States v. Sanchez-Badillo*, 540 F.3d 24, 34 (1st Cir. 2008) (“we reject [the defendant’s] claim that the drug quantity

Just as Note 4 allows for the consideration of the defendant's gain resulting from his offense conduct, consideration of the defendant's gain in an Eighth Amendment analysis is important when determining proportionality. Courts have regularly held that it is constitutional to require a defendant to forfeit the total amount of proceeds the Defendant obtained. *See Libretti v.*

calculation must be proven beyond a reasonable doubt, pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), so long as the resulting sentence does not exceed the statutory maximum based on the facts found by the jury"); *United States v. Pierre*, 484 F.3d 75, 88 (1st Cir. 2007) (rejecting defendant's claim that a drug quantity finding not supported by a jury verdict violated his Fifth Amendment due process and Sixth Amendment jury trial rights: "Our prior caselaw forecloses any such argument. *See United States v. Yeje-Cabrera*, 430 F.3d 1, 17-18 (1st Cir. 2005) ('Since *Booker* we have made it clear that the district courts may make drug quantity determinations for sentencing purposes...')"); *United States v. Pérez-Ruiz*, 421 F.3d 11, 14-15 (1st Cir. 2005) (rejecting the claim that 'the district judge violated the Sixth Amendment by himself making the determinations as to drug quantity and other enhancements'); *United States v. Anderson*, 452 F.3d 87, 92 n.3 (1st Cir. 2006) (rejecting defendant's claim that a firearm enhancement could not be applied in absence of evidence established beyond a reasonable doubt: "*Booker* does not...change the applicable burden from preponderance of the evidence to proof beyond a reasonable doubt. *See Yeje-Cabrera*, 430 F.3d at 17 ('[T]he *Booker* error 'is not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system.'") (internal quotation marks omitted)); *Yeje-Cabrera*, 430 F.3d at 23 (After *Booker*, "[t]he district court was not 'constrained' by the jury's verdict [on quantity], as it thought it was...Instead, it could (and should) have found [the defendant] responsible for the amount of cocaine established by a preponderance of the evidence against him—though of course, the ultimate sentence may not exceed the statutory maximum of 20 years."); *United States v. Picanso*, 333 F.3d 21, 25-26 (1st Cir. 2003) (except to the limited extent that under *Apprendi*, the jury's quantity verdict fixed the statutory maximum sentence, the district court was not bound by the jury's quantity finding: "A jury determination as to the quantity of drugs for which the defendant is responsible does not prevent the district court from finding a larger amount in the course of determining the guideline sentence. The reason is straightforward. In making its own quantity determination for the purpose of determining the statutory maximum, the jury asks what quantity has been proved beyond a reasonable doubt. By contrast, in fixing the guideline sentence, the district court is supposed to ask whether the government has proven the pertinent amount by a preponderance of the evidence.") (internal citation omitted); *United States v. Wilson*, 185 F. App'x. 6, 9 (1st Cir. 2006) (per curiam) (rejecting defendant's argument that, under *Blakely*, his Sixth Amendment rights were violated when the district court enhanced his Guidelines sentence based on judicially-found facts, because "*Blakely* claims are now viewed through the lens of [*Booker*], [and] [u]nder *Booker*, a judge may do such fact finding in determining the Guidelines range. Nothing in *Booker* requires submission of such facts to a jury so long as the Guidelines are not mandatory.") (internal quotation marks and citations omitted).

United States, 516 U.S. 29, 39 (1995) (“Congress conceived of forfeiture as punishment for the commission of various ... crimes.”); *United States v. Martin*, 662 F.3d 301, 309 (4th Cir.2011) (“[T]he substantive purpose of criminal forfeiture is ... to deprive criminals of the fruits of their illegal acts and deter future crimes.”); *United States v. Powell*, 2 F. App’x 290, 294 (4th Cir. 2001) (“The forfeiture of proceeds relieves the defendant of his illegal gain, and therefore cannot be excessive”). Similarly, forfeiting facilitating property where the value is less than the defendant’s gain should not be deemed a constitutional violation. *United States v. Betancourt*, 422 F.3d 240, 250-51 (5th Cir. 2005) (“the Eighth Amendment has no application to the forfeiture of property acquired with proceeds”; the forfeiture of a winning lottery ticket purchased with drug proceeds therefore could not violate the Excessive Fines Clause, regardless of the value of the lottery winnings; that the forfeiture greatly exceeded the maximum statutory fine is irrelevant); *United States v. Real Prop. Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 874-75 (9th Cir. 2001) (the Eighth Amendment does not apply to the forfeiture of proceeds; all property traceable to such proceeds is forfeitable even though the property doubled in value due to appreciation); *United States v. Powell*, 2 Fed. Appx. 290, 294 (4th Cir. 2001) (following pre-*Bajakajian* cases holding that the forfeiture of proceeds is never excessive; for this purpose, proceeds and property traceable to proceeds are the same thing); *United States v. 1948 S. Martin Luther King Dr.*, 270 F.3d 1102, 1115 (7th Cir. 2001) (Eighth Amendment does not apply to forfeiture of property purchased with proceeds).

II. The Court Erred in Disregarding the Maximum Fine Under the Lacey Act in Determining Proportionality.

The Court incorrectly disregarded the maximum statutory fine under the Lacey Act in its gross disproportionality analysis. The cases relied upon by the Court do not state that the statutory fine is inapplicable in making a gross disproportionality assessment. While the First Circuit has

held that the maximum guidelines fine is to be given greater weight, both is to be considered. *See United States v. Castello*, 611 F.3d 116, 123 (2d Cir. 2010) (greater weight should be given to the Guidelines than the statutory minimum). Other circuits also look to the maximum statutory fine to determine constitutionality. *See United States v. \$134,750 in United States Currency*, 535 Fed. Appx. 232, 240-42 (4th Cir. 2013) (“Thus, [t]here is a strong presumption of constitutionality where the value of a forfeiture falls within the fine range prescribed by Congress or the Guidelines...That the forfeiture amount falls within the fine range authorized by Congress raises a presumption of constitutionality.”) (alteration in original); *United States v. Malewicka*, 664 F.3d 1099, 1106-08 (7th Cir. 2011) (emphasizing that legislative judgments as to the maximum penalty should be respected in the Eighth Amendment analysis and holding that given the maximum statutory fine, forfeiture of 100% of structured funds is not excessive); *United States v. \$79,650 Seized from Bank of Am.*, 650 F.3d 381, 385, 388 (4th Cir. 2011) (the court must look to the maximum statutory fine when conducting the Eighth Amendment analysis); *United States v. Deskins*, Case No. 1:13CR00025, 2014 WL 670910, at *3 (W.D. Va. Feb. 20, 2014) (“The forfeiture amount should be compared to the maximum statutory fine rather than the maximum fine suggested under the Sentencing Guidelines”); *United States v. Young*, Case No. 2:11cr304, 2014 WL 494576, at *4 -5 (W.D. Pa. Feb. 6, 2014) (“The amount the government seeks to forfeit compared with the maximum fine permitted under the statutes therefore does not violate the Eighth Amendment”).²

² This Court concluded that the Defendant’s right, title, and interest in four vessels and 34 permits shall be forfeited to the United States. The United States’ Motion for Preliminary Order of Forfeiture sought to forfeit all permits attached to each of the vessels subject to forfeiture, and each vessel has a series of permits that are part of a larger suite of permits. Although the Defendant provided the Court with an exhibit identifying all of the permits that are attached to each vessel, after further research and due diligence, the Defendant’s exhibit does not accurately reflect all of the permits attached to each vessel. Accordingly, the United States seeks clarification of the

Respectfully submitted,

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Dated: October 25, 2017

LOCAL RULE 7.1 CERTIFICATION

I, Doreen M. Rachal, Assistant United States Attorney, hereby certify that, on October 25, 2017, the United States conferred with counsel for the Defendant, Carlos A. Rafael, prior to filing the herein motion.

/s/ Doreen M. Rachal
DOREEN M. RACHAL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Doreen M. Rachal, Assistant United States Attorney, hereby certify that this document, filed through the Electronic Court Filing system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Doreen M. Rachal
DOREEN M. RACHAL
Assistant United States Attorney

Dated: October 25, 2017

Court's Order and respectfully requests that the Order be modified to reflect that all permits attached to each vessel shall be deemed forfeited to the United States.