

inference where the privilege is claimed by a *party to a civil cause*." *Id.* at 318 (citation omitted)(emphasis in original). Elaborating on the principle set forth in *Palmigiano* the Court of Appeals for the First Circuit explained that

civil proceedings are governed by a different set of Fifth Amendment principles [than are criminal proceedings]. In civil cases, the state may not force incriminating testimony from a citizen by threatening penalties or automatic unfavorable judgments. But this principle does not control when the only consequence of silence is the danger that the trier of fact will treat silence as evidence of guilt.

Arthurs v. Stern, 560 F.2d 477, 478 (1st Cir. 1977) (citations and footnote omitted), *cert. denied*, 434 U.S. 1034 (1978). In addition, ``there [is not] anything inherently repugnant to due process in requiring the [claimants] to choose between giving testimony at the . . . hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of [their property]." *Id.* at 478-79. Simply because the claimants have something to lose if they are forced to make this choice is insufficient support for their motion to stay these proceedings. The court must also take into consideration the strong public interest in preventing individuals from profiting from the sale of illegal substances. *See United States v. \$250,000 in United States Currency*, 808 F.2d 895, 901 (1st Cir. 1987). Here the claimants have articulated no reason for this court to stay this forfeiture proceeding other than a blanket assertion of their Fifth and Fourteenth Amendment rights. ``A blanket assertion of the privilege [against compulsory self-incrimination] is no defense to the forfeiture proceeding." *Id.*; *see also Stern*, 560 F.2d at 480. Nor have claimants made out a due process claim. *See United States v. Kordel*, 397 U.S. 1, 11 (1970). Accordingly, the claimants' motion to continue is **DENIED**.

II. Motion for Partial Summary Judgment

The government seeks summary judgment on its forfeiture claims against the following items of property: (1) one Coachman 5th Wheel travel trailer; (2) \$13,840 in United States currency; (3) one black and maroon Kawasaki motorcycle; (4) one red Yamaha motorcycle; and (5) one 1985 Harley Davidson motorcycle.²

² Claimant Williams's claim against one maroon Suzuki motorcycle is not at issue in this motion because the government concedes that there are genuine factual issues for trial as to that motorcycle. *See* Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment at 3-4.

21 U.S.C. ' 881(a)(4) and (6) provide that property used for or derived from the sale of controlled substances is subject to forfeiture to the United States.³ The First Circuit has recently summarized the requirements of this section:

[T]he government first must establish probable cause to believe that the defendant property constitutes the proceeds of drug trafficking. Once probable cause is shown, the burden then shifts to the claimant to prove by a preponderance of the evidence that the property is not the proceeds of narcotics sales. To establish probable cause, the government must only show a `` ` reasonable ground for belief of guilt; supported by less than prima facie proof but more than mere suspicion." This showing can be made with circumstantial evidence or evidence that would be inadmissible at trial, so long as the evidence is reliable. Furthermore, the government need not trace the property to

³ 21 U.S.C. ' 881(a)(4) and (6) provide in relevant part:

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 [in violation of this subchapter].

....

(6) All moneys . . . 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 . . . used or intended to be used to facilitate

specific drug transactions. Rather, all that is required is that a court be able to look at the "aggregate" of the facts and find reasonable grounds to believe that the property probably was derived from drug transactions.

United States v. Parcels of Land, 903 F.2d 36, 38-39 (1st Cir. 1990) (citations omitted).

any violation of this subchapter

I conclude that evidence offered through affidavits in support of the motion establishes that three of the five defendant properties in issue were either acquired with the proceeds of drug trafficking activity or were used or intended for use to facilitate such activities. The affidavits in essence indicate the following:⁴ Late in the afternoon of July 25, 1989 a car driven by one Wayne Fish and in which an undercover agent with the Bureau of Intergovernmental Drug Enforcement ("BIDE") was riding as a passenger pulled up near the defendant Coachman trailer which was located in a park and campground in Freeport. Affidavit of Gerard Brady & 1-2; Affidavit of William Jipson & 1. Their mission was to obtain for the undercover agent a quarter of a pound of marijuana for \$475. Affidavit of William Jipson & 2. Fish walked to and knocked on the door of the trailer, returned to the car when no one responded and, with the agent, drove away. Affidavit of Gerard Brady & 2; Affidavit of William Jipson & 2. Approximately one-half hour later both claimants arrived by car at the trailer, parked and went inside. Affidavit of Gerard Brady & 3. Moments later claimant Robert Williams returned to the car, removed from the trunk a large black trash bag which appeared to contain something and brought it into the trailer. *Id.* A little more than an hour later Fish again arrived at the trailer, this time alone, and went inside where he stayed for approximately five minutes. *Id.* & 4. Both claimants were inside the trailer at the time. *Id.* When Fish left he drove away and minutes later rejoined the BIDE undercover agent to whom he then sold for \$475 a bag of marijuana which he had with him. *Id.* & 5; Affidavit of William Jipson & 3. About the same time as this transaction took place, both claimants left the trailer and drove away. Affidavit of Gerard Brady & 5; Affidavit of

⁴ Although the claimants filed an objection they failed to support it with a statement of material facts, any affidavits or other documents setting forth or evidencing facts on which the objection is based, or a memorandum of law in accordance with Local Rule 19(c). As a consequence, all material facts set forth in the government's statement which are supported by appropriate record citations are deemed admitted. *See* Local Rule 19(b)(2); *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984). Not all of the government's assertions of material fact are supported by the record.

William Jipson & 3. Soon thereafter the trailer, which had been under surveillance from approximately 5:00 p.m. that day by other BIDE agents, was secured pending the issuance of a search warrant. Affidavit of Gerard Brady && 1, 6. A warranted search of the trailer later the same evening yielded 29 plastic bags of marijuana weighing, exclusive of packaging, 3,575.5 grams or 7.8 pounds. Affidavit of William Jipson && 4, 6. Also found were scales, a pistol, a loaded magazine, currency totalling \$13,840 and a number of documents including two notebooks containing records of numerous drug transactions indicating that their owner typically dealt in multiples of hundreds and thousands of dollars. *Id.* && 6-7 and Exhs. 1-12 thereto. The same trash bag which Williams had earlier carried into the trailer was found in the trailer during the search and contained at that time at least five pounds of marijuana. Affidavit of Gerard Brady & 3. Claimant Randall Beals purchased the trailer in March, 1989 and the motorcycles between June, 1986 and March, 1989.⁵ Affidavit of William Jipson Exhs. 2-4, 7-11. Title to all of the vehicles resided exclusively in Beals according to motor vehicle registry records. *Id.* Exhs. 4-5, 8, 10-11. Both claimants were arrested on July 26, 1989 and charged in state court with trafficking in marijuana. Affidavit of Wayne Syphers & 1; Affidavit of Gerard Brady & 7; Affidavit of William Jipson & 8. At the time of his arrest Beals, a carpenter, indicated that he had last been employed in January, 1989. Affidavit of Wayne Syphers & 1 and Exh. 1 thereto. Williams indicated that his only employment was that of a part-time laborer. Affidavit of William Jipson & 8 and Exh. 12 thereto.

⁵ Beals paid \$11,000 for the trailer at the time of purchase, \$700 for the Harley when he purchased it in late November, 1988 and \$700 for the Kawasaki when he bought it in March, 1989. Although he purchased the Yamaha new for an undisclosed sum in June, 1986, he financed the purchase through a bank loan which he paid off in June, 1988.

This evidence supports, directly or by inference, probable cause findings that Beals acquired and paid for the trailer and the Kawasaki motorcycle with the proceeds of drug trafficking, that the trailer was used by the claimants to facilitate drug trafficking and that the currency was either the proceeds of their drug trafficking activity or was used to facilitate that activity. Thus, the evidence submitted by the government on these items is more than enough to shift to the claimants the burden of proving that the defendant property was not derived from drug transactions. This the claimants have not done. Accordingly, I conclude that there is no genuine issue as to any material fact and that the government is entitled to judgment as a matter of law as to the trailer, the Kawasaki motorcycle and the currency which is the subject of this motion.

The evidence introduced by the government, however, has failed to establish probable cause to believe that the proceeds of drug transactions were used to purchase the Harley motorcycle in late 1988 and the Yamaha motorcycle in June, 1986, the latter having been financed through a bank loan which was paid off in June, 1988. Nothing in the record suggests or allows for the inference that Beals was entirely without legitimate means to pay \$700 for the Harley in November, 1988 and to make payments on the purchase of the Yamaha between June, 1986 and June, 1988, all prior in time to the termination of his last lawful employment in January, 1989. Any such suggestion or inference must be based on mere suspicion which will not support probable cause. Accordingly, I conclude that the government has failed to sustain its burden as to the Yamaha and Harley motorcycles.

For the foregoing reasons I recommend that the plaintiff's motion for partial summary judgment be **GRANTED** as to the Coachman trailer, Kawasaki motorcycle and the currency and **DENIED** as to the Harley and Yamaha motorcycles.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 19th day of July, 1990.

*David M. Cohen
United States Magistrate*