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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASSIE WILL-DARNALL,

Defendant.

SANDRA WILL,

Third Party Claimant.

Case No.: 5:24-CR-00292-PCP

THIRD PARTY CLAIMANT SANDRA WILL'S OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Court: Courtroom 8, 4th Floor
Hearing Date: October 15, 2025
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INTRODUCTION

Third Party Claimant Sandra Will petitioned the Court to conduct an ancillary proceeding under 21 U.S.C. § 853(n) and Federal Rule of Criminal Procedure 32.2(c) after the government gave her notice that it intended to forfeit two homes—306 Los Gatos Almaden Way and 111 Belwood Gateway—in Los Gatos as a result of criminal conduct by her daughter, defendant Cassie Will-Darnall. Dkt. 65, Third Party Claimant Sandra Will's Petition For Ancillary Proceeding ("Anc. Pet.").

Most pressing to Ms. Will was the property at 306 Los Gatos Almaden Way, the home she has owned since 1991 and lived in since 1995. Despite acknowledging "since the start that Will owns the Almaden property," the government nonetheless sought to forfeit the home. Dkt. 77, Government's Notice of Motion and Motion to Dismiss or for Summary Judgment ("Gov. Motion") at 2. It was only after significant stress and the quick filing of the ancillary petition at considerable expense did the government backtrack from its intent to forfeit the Almaden home, explaining to the Court it "now relinquishes the forfeiture of the Almaden Property in this case," and asking this Court to "remove the Almaden Property" from the final order of forfeiture. Gov. Motion at 2, 20.

But the government continues to seek forfeiture of the Belwood home, moving this Court to either dismiss Ms. Will's petition or grant it summary judgment. But as set forth in the Ancillary Petition and below, Ms. Will had a superior right to the property at the time of Ms. Will-Darnall's fraud in 2020 and so the preliminary order of forfeiture must be amended to remove both the Almaden and Bellwood homes.

Ultimately, this Court must "'heed[ ] the Supreme Court's…admonition that '[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenues from innocent but hapless owners ..., or a tool wielded to punish those who associate with criminals, [rather] than a component of a system of justice.'" *United States v. Lester*, 85 F.3d 1409, 1413 (9th Cir. 1996) (quoting *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring)). The government's efforts to forfeit the properties are precisely that: an effort to punish Ms. Will for the criminal deeds of her daughter by taking away a home that has no nexus whatsoever to criminal conduct.

This Court should deny the government's motions and amend the preliminary order of forfeiture to remove both the Belwood and Almaden properties.

ARGUMENT

To prevail at an ancillary proceeding, a petitioner must show by a preponderance of the evidence that she either (1) has a "legal right, title, or interest in the property" that was "vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or (2) is "a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(A), (B). If that standard is met, the district court should "amend the order of forfeiture" to accommodate those interests. 21 U.S.C. § 853(n)(6).

In her petition, Ms. Will raised a claim under 21 U.S.C. § 853(n)(6)(A) as to both the Almaden and Bellwood homes, asserting that her interests in the properties were superior to Ms. Will-Darnall's interests at the time of the fraud in May 2020. Ms. Will thus asked the Court to amend the forfeiture order to remove the properties. Anc. Pet. at 10-12. She also explained why forfeiting the homes would constitute an unconstitutionally excessive fine. Anc. Pet. at 12-15.

The government asserts that Ms. Will's petition should be dismissed as to the Belwood home and, without citing or discussing the standards of Federal Rule of Civil Procedure 56 at all, seeks summary judgment. Finally, it argues that Ms. Will lacks standing to assert a constitutional challenge to the forfeiture of the properties. Gov. Motion at 19. As set forth below, the government's arguments should be rejected.

A. The ancillary petition states a plausible claim for relief as to the Bellwood home.

Federal Rule of Criminal Procedure 32.2(c)(1)(A) permits a court to "dismiss the [ancillary] petition "for lack of standing, for failure to state a claim, or for any other lawful reason." A motion to dismiss "a third-party petition in a forfeiture proceeding prior to discovery or a hearing should be treated like a motion to dismiss a civil complaint under Federal Rule of Civil Procedure 12(b)." *Willis Mgmt. (Vermont), Ltd. v. United States*, 652 F.3d 236, 241–42 (2d Cir. 2011) (quotations and citations omitted). Rule 12(b), in turn, permits a district court to dismiss a claim for a variety of reasons including, as raised by the government here, for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

"The focus of any Rule 12(b)(6) dismissal…is the complaint." *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998). This Court must treat "all allegations of material fact…as true and construed in the light most favorable to the nonmoving party." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). That means a Court must consider "the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also United States v. Egan*, 811 F. Supp. 2d 829, 833 (S.D.N.Y. 2011) (when considering government motion to dismiss ancillary petition, court "accepts as true all factual allegations in the petitions and draws all reasonable inferences in favor of the Claimants"). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Sprewell*, 266 F.3d at 988. A complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

The ancillary petition meets this standard. It explains that Ms. Will's interests in the Belwood home were "superior" to any interests belonging to Ms. Will-Darnall at the time of the bank fraud in 2020. Anc. Pet. at 11-12. More specifically, the petition explains that in April 2012, Ms. Will's daughter married Sheri Darnall. Anc. Pet. at 2. The couple purchased the home, and it was placed in their names in 2013. Anc. Pet. at 2. When the couple filed for divorce in January 2016, Ms. Will-Darnall bought out her ex-wife's share of the home. Anc. Pet. at 2. Ms. Will took out a home equity line of credit ("HELOC") of approximately $500,000 from Bank of America, and gave much of that money, as well as other cash, to her daughter to enable her to purchase Ms. Darnall's share of the home. Anc. Pet. at 2-3. In 2018, Ms. Will took out a $1 million loan from Bank of America, the proceeds of which were used to repay the HELOC and then repay the mortgage on the Belwood home. Anc. Pet. at 3. To document the nearly $1 million Ms. Will had lent her daughter, a promissory note was signed on February 7, 2018; in 2019, a deed of trust was placed on the Belwood home in favor of Ms. Will to secure that promissory note. Anc. Pet. at 3. At the time of the bank fraud in 2020, Ms. Will was the mortgagee of the Belwood home as Ms. Will had taken out debt to purchase the Belwood home, and was contractually responsible to Bank of America to make payments on the loan used to buy the property. Anc. Pet. at 4.

The petition thus alleged enough facts to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. That is all that is needed to survive a Rule 12(b)(6) motion to dismiss. Thus, the government's motion to dismiss should be denied.

B. Should the Court construe the motion to dismiss as a motion for summary judgment, it should reject the government's motion and grant Ms. Will summary judgment.

As an alternative to dismissing the petition, the government seeks summary judgment, but it does not seriously grapple with the legal standard, contained in Federal Rule of Civil Procedure 56, that applies to such motions; indeed, it does not even cite the Rule or apply it to this case. Given the clear conflict between Federal Rule of Criminal Procedure 32.2 and Federal Rule of Civil Procedure 12 on the issue of the timing of a summary judgment motion during an ancillary proceeding, this Court should deny the government's motion for summary judgment. However, should the Court apply the standards for summary judgment set forth in Rule 56, it should reject the government's motion and instead grant summary judgment in favor of Ms. Will.

1. In an ancillary proceeding, a motion for summary judgment is only appropriate after a Court has ruled on a motion to dismiss.

As noted earlier, Federal Rule of Criminal Procedure 32.2(c)(1)(A) permits a court to "dismiss the [ancillary] petition "for lack of standing, for failure to state a claim, or for any other lawful reason." A motion to dismiss an ancillary petition is treated like a motion to dismiss a civil complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Willis*, 652 F.3d at 241–42. Federal Rule of Civil Procedure 12(d) states that a motion raised under Rule 12(b)(6) that includes "matters outside the pleadings…must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). The government relies on that provision when it suggests—without any argument—that the Court should grant it summary judgment as to the Belwood property. Gov. Motion at 11.

But that suggestion contradicts the plain language of Federal Rule of Criminal Procedure 32.2(c)(1)(B), which explains that only "*After* disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary

judgment under Federal Rule of Civil Procedure 56." Fed. R. Crim. P. 32.2(c)(1)(B) (emphasis added). In other words, in an ancillary petition, a summary judgment motion can only be considered after a motion to dismiss is ruled upon and, in some instances, after discovery has been taken, all of which must occur before any hearing on the petition.

The Court should reject the government's efforts to graft Federal Rule of Civil Procedure 12(d) onto Federal Rule of Criminal Procedure 32.2(c), and convert the government's motion to dismiss into a motion for summary judgment. As a matter of statutory interpretation, "to the extent that statutes can be harmonized, they should be, but in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one." *Hellon & Assocs., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992); *see also United States v. Hernandez-Garcia*, 44 F.4th 1157, 1164 (9th Cir. 2022) ("the later and more specific statute usually controls if two statutes conflict.") (quotations and citations omitted). Nor does a court "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005).

Here, the more specific statute that governs ancillary proceedings—Federal Rule of Criminal Procedure 32.2—should control over the more general one, Federal Rule of Civil Procedure 12, that covers all civil cases. Because Rule 32.2 makes no reference to Federal Rule of Civil Procedure 12(d), this Court should deny the government's request to convert its motion to dismiss into a motion for summary judgment.

2. The Court should deem the government's request for summary judgment waived because it provides no argument or case law to support its request.

Even if the Court wanted to consider whether or not to grant summary judgment, the government has failed to equip the Court with any law or analysis by which to make a ruling.

Although the government captions its brief as a "motion to dismiss or for summary judgment," nowhere does it brief cite Rule 56, the applicable standards to such motions, or one of the myriad cases discussing summary judgment. "A party urging" a court to provide legal relief "has an obligation to argue why" it should, "and to cite appropriate authority to support that argument." *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991). "It is not the obligation of this court

to research and construct the legal arguments open to parties, especially when they are represented by counsel." *United States v. Brown*, 899 F.2d 677, 679 (7th Cir. 1990). The Ninth Circuit has made clear that when a party "present[s] no case law or argument in support" of a legal claim, a court may "deem the argument waived." *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997).

Because the government fails to cite case law or argument in support of its request for summary judgment as to the forfeiture of the Belwood property, the Court should deem the claim waived.

3. If the Court considers the merits, Ms. Will had a superior interest at the time of the fraud and so summary judgment should be granted to Ms. Will.

Should the Court decide to address the merits of the petition as to the Belwood property, it should grant summary judgment to Ms. Will because she has demonstrated there is "no genuine dispute as to any material fact" concerning her superior interest in the home at the time of the bank fraud in May 2020.

Under Federal Rule of Civil Procedure 56(a), "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of fact for trial." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001). They "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The "inferences to be drawn from the underlying facts…must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotations and citations omitted).

As explained in the petition, Ms. Will explained that her interest in the Belwood property was superior to Ms. Will-Darnall at the time of the bank fraud on May 20, 2020. Anc. Pet. at 11-12. The government disagrees, arguing that "Under California law, a beneficiary to a deed of trust (a secured lender) does not have a superior interest to the trustor or settlor (the homeowner)." Gov. Motion at 12. Ms. Will acknowledges that a "deed of trust carries none of the incidents of ownership of the

property, other than the trustee's right to convey upon default, and in the absence of a special agreement conveys no right of possession to the trustee or beneficiary." *Bailey v. Citibank, N.A.*, 66 Cal. App. 5th 335, 353 (2021). But the government's focus on the existence of the deed of trust fails to account for the fact that Ms. Will's interest in the home predated the deed. Ms. Will's interest in the home stemmed from the money she put into the house to buy out Ms. Will-Darnall's ex-wife's share of the home, and then from the money used to pay off the mortgage on the home, all of which took place before the fraud occurred in May 2020, and before the deed was recorded in 2019. *See* Anc. Pet. at 2-4, 11-12.

Timing is crucial. "Because forfeitable property vests in the government immediately upon the commission of a criminal act, a third party may prevail under § 853(n)(6)(A) only by establishing that he 'had a legal interest in the forfeited property before the underlying crime was committed'—that is, 'before the government's interest vested.'" *United States v. Watts*, 786 F.3d 152, 166 (2d Cir. 2015) (quoting *United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007)). At the time of the fraud, Ms. Will had an interest—worth approximately $1 million—in the Bellwood home, secured by a deed of trust. That means Ms. Will has carried her burden under 21 U.S.C. § 853(n)(6)(A) and is entitled to judgment as a matter of law. The forfeiture order thus must be amended to remove the Belwood home.

C. The Court should decline the government's invitation to issue an advisory opinion on whether Ms. Will is a "bona fide purchaser for value" under § 853(n)(6)(B).

The government spends a significant number of pages in its brief arguing that Ms. Will is not a bona fide purchaser for value of the Belwood property, and thus cannot meet the standard in § 853(n)(6)(B). Gov. Motion at 13-18. Of course, as the government itself recognizes, Ms. Will has never claimed that she is a bona fide purchaser, nor sought relief under § 853(n)(6)(B). Gov. Motion at 14; *see also* Anc. Pet. at 11-12.

It is clear why the government is nonetheless refuting a claim not raised by Ms. Will: it wants to focus on the 2020 quitclaim deed—a transaction that occurred *after* Ms. Will-Darnall's criminal conduct—which it asserts was a "fraudulent transfer" made with Ms. Will's knowledge that her daughter was attempting "to hide the Belwood Property from a creditor, namely the government."

Gov. Motion at 14, 18. With that accusation, the government introduces into the record numerous documents and records concerning an unrelated, out of state criminal case from a decade ago having nothing to do with Ms. Will or the relevant legal issues. This Court should reject the government's request for an advisory opinion on a claim not raised in Ms. Will's petition.

A federal court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). Here, the government seeks an advisory opinion that Ms. Will is not entitled to relief under § 853(n)(6)(B), on the basis of the 2020 quitclaim deed, despite the fact she has never asserted such a claim or relied on the 2020 quitclaim deed at all. That is due to the simple fact that "to qualify for relief under § 853(n)(6)(A), Claimants' legal interest, if any, must have been vested in Claimants at the time" of the crime. *United States v. Hooper*, 229 F.3d 818, 821 (9th Cir. 2000). "Forfeiture relates back to the time of the criminal acts giving rise to the forfeiture," and the government's "interest in the property vests at the time the defendant commits the crime." *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007). Anything occurring *after* the criminal act is effectively irrelevant for purposes of analyzing a claim brought under § 853(n)(6)(A), the sole ground for relief alleged by Ms. Will in her petition. *See Watts*, 786 F.3d at 166 (when "the petitioner obtains his interest in the property after the commission of the crime giving rise to forfeiture, he may defend his right to the property *only* under § 853(n)(6)(B)") (emphasis added). Because § 853(n)(6)(B) and the 2020 quitclaim deed are irrelevant, this Court should decline to consider the government's arguments on the point.[1]

The Court should also reject the government's arguments on this issue—and in particular, its claim that Ms. Will "should have known" the transfer of the Belwood Property was an effort to shield the property from the government—for another reason: they are based entirely on speculation. Gov. Motion at 18. The government presents not a single shred of evidence that Ms. Will was aware in 2020 that her daughter engaged in bank fraud, would have to forfeit money to the government, or was

[1] Similarly, the government argues that Ms. Will "could (but does not) argue that she had an interest in the Belwood Property that had vested before Will-Darnall's crimes based on the 2019 Deed of Trust" and that this "argument (if made) would fail" because Ms. Will's vested interest in the home was extinguished after Ms. Will-Darnall repaid her mother the value of the 2019 promissory note. Gov. Motion at 13. Since, as the government concedes, Ms. Will has never made that claim or argument, there is no need for the Court to consider the issue.

trying to shield her assets. The government's claim that "Will-Darnall consulted individuals, including likely her parents, in strategies to hide property from the government" is not based on any actual evidence of Will-Darnall engaging in such conduct, let alone her mother's knowledge of any such activity. Gov. Motion at 18.

The government's efforts to slander an 88 year old woman accused of no criminal wrongdoing—after it tried to forfeit her house of more than 30 years only to abandon that request when challenged in court after considerable stress and expense to Ms. Will—should be rejected.

D. Ms. Will has standing to raise a constitutional challenge to the forfeiture.

Ms. Will's petition also asserted that forfeiting the properties would amount to an unconstitutional fine in violation of the Eighth Amendment's prohibition on "excessive fines." U.S. CONST. AMEND. VIII; *see* Anc. Pet. at 12-15. The government, however, claims that Ms. Will lacks standing to assert a constitutional violation. Gov. Motion at 19. To the extent the government claims Ms. Will has no standing as a third party claimant to assert an Eighth Amendment claim, it is clearly wrong.

Forfeitures are "fines" under the Eighth Amendment when they "constitute punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). A "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. Both "owners" and "claimants who assert possessory interests in the forfeited property" have standing to challenge a forfeiture order under the Eighth Amendment even if they are not a criminal defendant. *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1119 (9th Cir. 2004). A claimant may even raise an Eighth Amendment challenge in a civil forfeiture proceeding "as a party 'punished' by the forfeiture," notwithstanding the nonexistence of a criminal case. *Id.* at 1121; *see also Hudson v. United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures."). Because Ms. Will is both an "owner" and a "claimant" of the properties, she has standing to challenge the constitutionality of the forfeitures under the Eighth Amendment.

The cases cited by the government for the proposition that Ms. Will cannot assert a constitutional challenge to the forfeiture of the Bellwood property do not withstand scrutiny upon

closer inspection, as none of them deal with the Eighth Amendment claim raised by Ms. Will here. *See* Gov. Motion at 19 (citing cases).

For example, in *United States v. Espada*, 128 F. Supp. 3d 555 (E.D.N.Y. 2015), the claimant asserted the constitutional rights of her husband, arguing that a preliminary order of forfeiture was entered in violation of *his* Sixth Amendment rights. 128 F. Supp. 3d at 557. The district court rejected that argument, noting the wife could not "vicariously assert constitutional claims" on her husband's behalf. *Id.* But it clarified the wife "*could* raise constitutional challenges on her own behalf." *Id.* at 557 n. 1 (emphasis in original). And it quoted an Eighth Circuit case noting that if a court forfeited an "entire estate despite a valid claim of partial ownership by a third party," the result "would also punish the third party, against whom no jury has returned a verdict of guilt, and may therefore raise constitutional questions." *Id.* (quoting *United States v. Totaro*, 345 F.3d 989, 997 (8th Cir. 2003) (quotations omitted)).

Similarly, in *United States v. Tarraf*, 725 F. Supp. 2d 625 (E.D. Mich. 2010) the district court rejected the efforts of third party claimants to "assert the *Defendant's* Eighth Amendment rights," noting "had [the defendant] wished to assert an Eighth Amendment Excessive Fines defense, he should have argued as much during his criminal proceeding." *Tarraf*, 725 F. Supp. 2d at 635 (emphasis added).

In *United States v. Porchay*, 533 F.3d 704 (8th Cir. 2008) the Eighth Circuit found a third party could not raise a Fourth Amendment challenge to how the government seized property it later forfeited, noting that "a third party to the forfeiture has no standing to challenge the legality of the seizure *under the Fourth Amendment*." *Porchay*, 533 F.3d at 710 (emphasis added).

In *United States v. Coffman*, 612 Fed. Appx. 278 (6th Cir. 2015), the third party claimant raised an Eighth Amendment challenge to the final order of forfeiture, issued after an ancillary proceeding, seemingly for the first time on appeal. There, the claimant had been charged criminally with her husband; the husband was convicted but the claimant acquitted by jury. She then sought an ancillary petition to contest the forfeiture of certain property on her own behalf, as well as on behalf of certain entities with legal rights in the forfeited properties. The district court issued a final order of forfeiture. *Coffman*, 612 Fed. Appx. at 281-82. On appeal, she asserted the forfeiture proceeding violated her

right against double jeopardy, given her acquittal on the criminal charges, and separately constituted an excessive punishment. The Sixth Circuit rejected the argument by noting the claimants could not "now, after having intervened in the proceedings, claim that the order of forfeiture operates as a fine, even if they eventually lose what they believe are their assets." *Coffman*, 612 Fed. Appx. at 289. The briefs submitted by the parties do not indicate that any challenge under the Eighth Amendment was raised by the claimants before the district court, and the appellate arguments focused on whether the Eighth Amendment was violated given the fact the claimant was acquitted. *See* 2014 WL 1512661 (Appellant's Opening Brief); 2014 WL 3556188 (Government's Answering Brief); 2014 WL 3795363 (Appellant's Reply Brief).

Here, Ms. Will is asserting *her* rights under the Eighth Amendment to be free from excessive fines; she is not vicariously asserting the rights of Ms. Will-Darnall. *See Espada*, 128 F. Supp. 3d at 557 n. 1. Thus, this Court can consider her Eighth Amendment claim. As explained in Ms. Will's petition, forfeiting the Bellwood home would be an unconstitutionally excessive fine given the fact she has not been charged with a crime or accused of any wrongdoing. Anc. Pet. at 13. Because the government has other remedies to recoup the money taken by Ms. Will-Darnall, including restitution with interest which can be enforced through liens and wage garnishment, forfeiting the Bellwood home is disproportionate and unconstitutional. *See* Anc. Pet. at 13-15.

The government responds that "courts routinely hold that imposition of restitution and forfeiture together in a single judgment does not constitute an excessive fine because requiring a defendant to disgorge no more than twice the proceeds of her crimes cannot be disproportionate to the harm inflicted on the defendant's victims." Gov. Motion at 19.[2] It cites a Ninth Circuit case, *United States v. Newman*, 659 F.3d 1235 (9th Cir. 2011) which it asserts found "forcing defendant to

[2] The government faults Ms. Will for "mistakenly claiming that the fines for Counts One and Two are $1,000,000, and $250,000, respectively. In fact, Congress authorized for both Counts fines twice the amount sought by the government in forfeiture, here. 18 U.S.C. § 3571(d)." Gov. Motion at 20. But Ms. Will-Darnall was told personally in the Information (prepared by the government), the guilty plea application form (prepared by her attorney), and at her change of plea hearing (by the Court) that the maximum punishments were $1 million and $250,000 specifically; no one mentioned to her specifically that the law allowed a fine up to the greater of twice the gross gain or loss. *See* Dkt. 1 at 10 (Information); Dkt. 34 at 2-3 (Amended Submission in Advance of Change of Plea Hearing); Dkt. 40 at 14 (change of plea hearing transcript).

pay both forfeiture and restitution 'at worst' forces him to disgorge twice the value of the proceeds of his crime, which 'is in no way disproportionate to the harm inflicted on government and society.'" Gov. Motion at 19 (quoting *Newman*, 659 F.3d at 1241). But as Ms. Will explained in her petition, *Newman* noted the "constitutional limits" to forfeiture—including "the constitutional limit defined by the Excessive Fines Clause of the Eighth Amendment"—were "not at issue here" as "neither Defendant asserts that the district court's forfeiture orders implicate constitutional considerations." *Newman*, 659 F.3d at 1241, n. 4; *see also* Anc. Pet. at 15. In other words, the Ninth Circuit's decision in *Newman* does not foreclose the constitutional challenge raised by Ms. Will in her petition.

Thus, Ms. Will can assert her Eighth Amendment rights to challenge to the forfeiture. Because forfeiting the Bellwood home is disproportionate to the gravity of the offense, in part because of the availability of other government remedies to collect money illegally obtained by Ms. Will-Darnall, forfeiture of the Belwood home would be unconstitutional.

CONCLUSION

Ms. Will respectfully requests this Court conduct an ancillary proceeding and amend the forfeiture order to remove both 306 Los Gatos Almaden and 111 Belwood Gateway.

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Respectfully submitted,

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