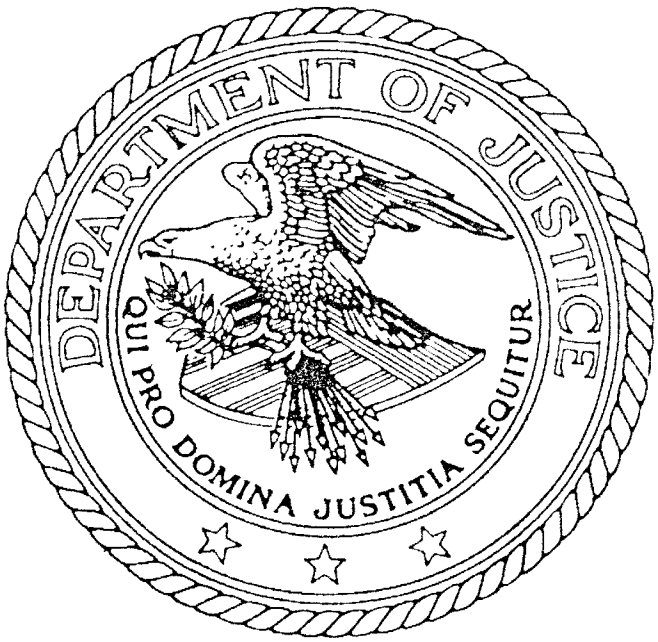
U.S. Department of Justice
Washington, D.C.

Government Response to Forfeiture Challenges Under the Excessive Fines Clause in Light of *Austin/Alexander*



Asset Forfeiture Office
Criminal Division
United States Department of Justice
Washington, D.C. 20530

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

January 7, 1994

MEMORANDUM

TO: All United States Attorneys
All Section Chiefs and Office Directors, Criminal Division
All Asset Forfeiture Components

FROM: Jo Ann Harris
Assistant Attorney General

SUBJECT: Government Response to Forfeiture Challenges Under the Excessive Fines Clause in Light of Austin/Alexander

On June 28, 1993, the Supreme Court unanimously held that civil and criminal forfeitures for violations of the criminal laws are subject to the Excessive Fines Clause of the Eighth Amendment. See Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801 (1993) (civil forfeiture); Alexander v. United States, ___ U.S. ___, 113 S.Ct. 2766 (1993) (criminal forfeiture). The Court declined to set a standard against which challenges to forfeitures under the Excessive Fines Clause are to be judged. Moreover, the Court had no occasion to address other issues that necessarily follow from its holding, such as allocation of the burden of proof on the issue of excessiveness.

The attached memorandum has been prepared by the Asset Forfeiture Office, Criminal Division (AFO), to provide guidance and uniformity in responding to excessiveness challenges under Austin and Alexander. A desirable and legally supportable standard by which excessiveness challenges to civil and criminal forfeitures may be judged is set forth at page 18 of the memorandum. Other related issues are comprehensively addressed therein.

Forfeiture attorneys are urged to rely on this memorandum in addressing excessive challenges to promote uniformity in response and to facilitate the orderly development of case law. In this light, it is important that AFO be advised of any intended departures from positions stated in the memorandum and provided with copies of all decisions, favorable or adverse, addressing issues discussed in the memorandum. In turn, AFO will keep you advised of developments in the area around the country. As always, AFO attorneys are available for consultation and coordination in responding to excessiveness issues.

Memoranda addressing Double Jeopardy issues in the wake of Austin and Alexander and procedural issues arising under the recent Supreme Court decision in United States v. James Daniel Good Real Property, No. 92-1180, 62 U.S.L.W. 4013 (Dec. 13, 1993) are being prepared by AFO and will be released in the future.

Attachment

Governmental Response to Forfeiture Challenges Under the Excessive Fines Clause in Light of Austin/Alexander

Note: The proposed "standard" by which challenges under the Excessive Fines Clause will be judged appears at page 18 of the attached memorandum.

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On June 28, 1993, the Supreme Court unanimously held that civil and criminal forfeitures for violations of the criminal laws are subject to the Excessive Fines Clause of the Eighth Amendment. See Austin v. United States, ___ U.S. ___, 113 S.Ct. 2801 (1993) (civil forfeiture); Alexander v. United States, ___ U.S. ___, 113 S.Ct. 2766 (1993) (criminal forfeiture).[1] Despite their unanimity, the Justices expressly declined to establish a standard for determining whether a given forfeiture is

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[1]In Austin, the Justices filed three separate opinions stating somewhat different rationales for their unanimous holding. The five-Justice majority opinion was written by Justice Blackmun; Justice Scalia filed an individual concurring opinion; Justice Kennedy filed a concurring opinion in which Chief Justice Rehnquist and Justice Thomas joined.

In Alexander, the Justices unanimously agreed on the applicability of the Excessive Fines Clause to criminal forfeiture without extended discussion. However, they split 5-4 over whether forfeiting the assets of an "adult entertainment" business constituted a "prior restraint" in violation of the First Amendment. The five-Justice majority opinion, written by Chief Justice Rehnquist, held that the forfeiture did not violate the First Amendment. Justice Kennedy, joined by Justices Blackmun and Stevens, and in part by Justice Souter, filed an opinion dissenting as to the First Amendment issue. Justice Souter filed an opinion separately dissenting on the First Amendment issue.

constitutionally "excessive." Austin, 113 S.Ct. at 2812 (majority opinion of Blackmun, J.). They instead remanded both cases to the United States Court of Appeals for the Eighth Circuit to address this question in the first instance. Id.; Alexander, 113 S.Ct. at 2776 (majority opinion of Rehnquist, C.J.).

The absence of a defined standard is causing a problem for federal attorneys who are being required to respond to numerous constitutional challenges to forfeitures under Austin and Alexander. The purpose of this memorandum is to examine closely the opinions in Austin and Alexander, and prior case law discussing the Eighth Amendment in the forfeiture context, and to suggest a legally supportable standard. It must be emphasized that this is an advocacy document, not a neutral presentation of the applicable case law. It is intended to assist federal attorneys in developing and advancing legally supportable arguments on all discernable issues regarding application of the Excessive Fines Clause in the forfeiture context. Thus, much of the discussion assumes an argumentative, rather than expository, style.

Finally, it should be noted that the discussion is necessarily general in scope given that it is addressed to an issue of first impression. Nothing stated herein should foreclose the government from taking an inconsistent position if a particular case truly warrants such a departure. Moreover, the standards or "factors" suggested are tentative and based on preliminary research and consideration; they may be refined or amended as future developments warrant.

I. "Proceeds" and "Corpus Delicti" Property v. Other Kinds of Property

The clearest distinction that may be drawn in determining whether a given forfeiture is constitutionally excessive is between: (1) the category that consists of both proceeds of crime (or property traceable to such proceeds) and what might be termed "corpus delicti" property; and (2) all other forms of property subject to forfeiture (e.g., property facilitating or intended to facilitate a criminal violation, property affording a source of influence over a RICO enterprise). Forfeiture of the proceeds of crime, or property traceable to such proceeds, should never be considered constitutionally excessive. The same is true of what may be described as "corpus delicti" property (e.g., the corpus of tainted money laundered in a money laundering or the unreported currency in a currency-transaction reporting offense (18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1)); obscene materials (18 U.S.C. § 1467(a)(1)); child pornography (18 U.S.C. §§ 2253(a)(1) and 2254(a)(1)); illegal controlled substances (21 U.S.C. §§ 881(a)(1) and (f)(1)). It is only as to other forms of property -- property legitimately acquired but "tainted" by its use or

involvement in criminal activity -- that excessiveness issues may properly arise.

Forfeiture of criminal proceeds[2] property from a non-innocent owner[3] cannot possibly be considered "punishment" or a "fine" for Eighth Amendment purposes since it merely leaves the owner in the same position he would be in had no crime been committed. Depriving a bank robber of his criminal proceeds would not be considered punitive in any degree for the simple reason that "[t]he money, though in [the robber's] possession, is not rightfully his . . . ." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989). Forfeiture of the proceeds does not require the robber to give up anything in which he had a lawful ownership interest. The same is true, for example, as regards the "non-innocent" owner deprived of the proceeds of fraud, the earnings from illegal drug trafficking, the laundered proceeds of any of "specified unlawful activity" as defined in 18 U.S.C. § 1956(c)(7) (or the fees or commissions earned by the money launderer himself). Only to the extent a forfeiture works a deprivation of property lawfully-acquired may a person be said to be subject to "punishment" or a "fine".

The pre-Austin/Alexander case law supports this distinction between forfeiture of the proceeds of crime and all other forms of property. For example, in United States v. Sarbello, 985 F.2d 716, 723 n.12 (3d Cir. 1993), the unanimous panel noted that concern [over "proportionality" or "excessiveness"] simply does not arise in the context of § 1963(a)(1) and (a)(3), the 'fruits of the crime' criminal RICO forfeitures, which are almost by definition keyed to the nature and magnitude of the crime." (Emphasis added). The same view was expressed by the unanimous panel in United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989) which stated that "[w]hen the district court orders that the defendant forfeit the

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[2]The term "criminal proceeds" or "proceeds" shall be used herein to designate both the direct proceeds of criminal activity and any property traceable to such proceeds.

[3]The term "non-innocent" owner is used to denote an owner who cannot make an affirmative defense to forfeiture based on his or her state of mind, and preventive actions, vis-a-vis illegal use of the property in question. For example, in civil forfeitures of real property under the drug statutes, an owner may assert, as an affirmative defense, that he or she had no knowledge and/or did not consent to the illegal use involving the property. See 21 U.S.C. § 881(a)(7). An owner who has such knowledge and/or who consents to the illegal use of the property (e.g., by failing to take reasonable steps to prevent it) is considered a "non-innocent" owner even though he or she may not be guilty of a criminal offense as a matter of law.

profits gained from illegal activity, it is hard to imagine how such a forfeiture could constitute cruel and unusual punishment." Indeed, the panel in Feldman noted that:

> The jury found that Feldman had received $1,986,990 in insurance proceeds from the . . . arsons. Forfeiture of that amount was not excessive.

Id. (emphasis added).[4] This rule, that forfeiture of criminal proceeds or other ill-gotten gain is never excessive under the Eighth Amendment, applies as well to forfeiture of any accretion or appreciation in the value of property purchased with criminal proceeds or otherwise illegally acquired. Such forfeitures serve to ensure that the criminal element realizes no "return" on its tainted investments and, as in the case of "proceeds" forfeitures themselves, leave the owner in the same position he would have been in had no crime been committed.[5]

There are occasional comments in the criminal forfeiture case law to the effect that courts may only forfeit the "tainted" portion of property acquired through or as a result of criminal

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[4]Accord United States v. Porcelli, 865 F.2d 1352, 1366 (2d Cir.), cert. denied, 493 U.S. 810 (1989) ("We note, too, that the forfeiture verdict simply deprives [defendant] of the fruits of his crime . . . ."); United States v. Horak, 833 F.2d 1235, 1241 n.4 (7th Cir. 1987) ("we think it highly unlikely that criminal forfeiture orders properly entered under [§ 1963](a)(1) reaching proceeds of racketeering activity could constitute cruel and unusual punishment violating the Eighth Amendment"); United States v. Connor, 752 F.2d 566, 577 (11th Cir.), cert. denied sub nom. Taylor v. United States, 474 U.S. 821 (1985) ("This [excessiveness] argument will not stand up. The forfeiture is for the exact amount of money which each defendant illegally received in violation of Title 18, Section 1962").

[5]United States v. Bucuvalas, 970 F.2d 937, 946-48 (1st Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1382-83 (1993); United States v. One 1980 Rolls Royce, 905 F.2d 89, 91 (5th Cir. 1990) ("We agree that any profits, appreciation, or income from drug money proceeds [are] forfeitable -- profits from tainted proceeds are still tainted"); United States v. Angiulo, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 498 U.S. 845 (1990).

activity.[6] For example, in United States v. Horak, 833 F.2d at 1243, the panel remanded to the district court that part of the forfeiture order decreeing that the defendant forfeit as RICO "proceeds" his gross income and bonuses and all corporate contributions to his pension and profit-sharing plans during the period of his racketeering conduct. It explained its decision to remand as follows:

> [A] remand is necessary for the district court to consider whether Horak's salary, bonuses and profit-sharing and pension plans were in fact [an interest] "acquired or maintained" in violation of [RICO]. We do not believe that it is sufficient under section [1963](a)(1) for the court to determine that Horak's racketeering activities "enhanced" his performance as [corporate] manager, thus affecting the enumerated interests. Instead, on remand, the court must determine what portion of Horak's interests would not have been acquired or maintained "but for" his racketeering activities. That is, in order to win a forfeiture order, the government must show on remand that Horak's racketeering activities were a cause in fact of the acquisition or maintenance of these interests or some portion of them. For example, if the

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[6]See, e.g., United States v. Angiulo, 897 F.2d at 1212-13 ("proceeds or profits . . . are only subject to forfeiture to the extent they are tainted by the racketeering activity"; "forfeitures under [18 U.S.C. § 1963(a)(1)] are limited to property interests that would not have been acquired or maintained but for the defendant's racketeering activities"); United States v. Porcelli, 865 F.2d at 1365 ("The court below erred in not determining the extent of Porcelli's interest in these properties [acquired with racketeering proceeds] that he would not have acquired or maintained but for his fraudulent scheme"); United States v. Zang, 703 F.2d 1186, 1195 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983) ("the entire building is not necessarily subject to forfeiture," however, "the [enterprise's] interest in the building which was acquired by racketeering funds is subject to forfeiture under [18 U.S.C. § 1963(a)(1)]"). But see United States v. Washington, 797 F.2d 1461, 1477 (9th Cir. 1986) (finding that the following jury instruction was adequate: "you must find that the proceeds or profits derived from racketeering activity provided all of or some substantial and significant part of the consideration used to acquire or to maintain the property interest thought to be forfeitable").

> government can prove that Horak would have been fired in 1981 but for his landing the Fox Lake contract (which he accomplished by violating [RICO]), the court should order forfeiture of his entire salary thereafter and such other emoluments of his employment as would have been lost by the firing. But, if the government can prove only that Horak received a bonus for his landing of the Fox Lake contract, then only that bonus is forfeitable under [1963](a)(1). Presumably, the pension and profit-sharing issues are also subject to a "but for" test.

(Emphasis added).[7] These cases merely restate the prevalent view that where property is legitimately acquired in part, or is purchased in part with legitimate proceeds, only that portion of the property illegally acquired or traceable to the illegal proceeds will be subject to forfeiture.[8] Nothing in these cases

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[7]Accord United States v. Angiulo, 897 F.2d at 1213; United States v. Ofchinick, 883 F.2d 1172, 1183 (3d Cir. 1989) (adopting the "but for" test of Horak and Porcelli).

[8]United States v. One 1980 Rolls Royce, 905 F.2d at 91-92 ("we conclude that a court should not . . . permit the complete forfeiture . . . when there is evidence that the properties were purchased at least in part with legitimate funds"); United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 639-40 (1st Cir. 1988) ("We agree that the interest acquired as a result of mortgage payments made with the proceeds of drug transactions should be forfeited . . . . [but not] that forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment"). However, once the government makes a prima facie case that the property was illegally acquired, the burden is on the opposing party to show what part, if any, was legitimately acquired. See United States v. One Parcel of Real Property, 921 F.2d 370, 375 (1st Cir. 1990); United States v. One 1987 Mercedes 560 SEL, 919 F.2d 327, 331 (5th Cir. 1990).

It should be noted that one circuit has held that:

> As to a wrongdoer, any amount of the invested proceeds traceable to drug activities forfeits the entire property. We have never held that as to a wrongdoer only the funds traceable to illegal activities may be forfeited. If one is an innocent owner, no amount of that person's or entity's funds are forfeitable. On the other hand, if one is a wrongdoer, the full value of the real property is forfeitable

suggests that a court may reduce a forfeiture to less than that portion traceable to illegal activity based on mitigating considerations under the Eighth Amendment or otherwise.

Austin is not inconsistent with this view that the forfeiture of criminal proceeds is always proportionate under the Eighth Amendment. Austin involved only the forfeiture of a "facilitating" conveyance (the mobile home) pursuant to 21 U.S.C. § 881(a)(4) and "facilitating" real property (the auto body repair shop) pursuant to 21 U.S.C. § 881(a)(7), not the forfeiture of criminal proceeds pursuant to 21 U.S.C. § 881(a)(6). Justice Blackmun's majority opinion -- written with startling breadth given that the Court was navigating essentially uncharted constitutional waters[9] -- at times suggests that all forfeitures are "punitive", at least in part, for purposes of the Eighth Amendment,[10] although he later focuses solely on the "facilitating" property provisions of 21 U.S.C. 881(a)(4) and (a)(7).[11] None of the Justices addressed the "proceeds"

> because some of the funds invested are traceable as the statute [21 U.S.C. § 881(a)(6)] dictates.

United States v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, FL, 933 F.2d 976, 981-82 (11th Cir. 1991) (forfeiting entire amount of real property, part of which was purchased with legitimate funds provided by one co-owner and the remainder of the purchase price was paid with drug proceeds provided by other co-owner; first owner knowingly invested and commingled his legitimate funds with drug proceeds provided by second co-owner and thus was not an "innocent owner" under the statute). Moreover, property "involved in" a money laundering violation may be forfeitable in its entirety notwithstanding the fact that the laundering violation involved a mixture of illegal proceeds and legitimate funds. See United States v. One 1987 Mercedes Benz 300E, 820 F. Supp. 248, 252-53 (E.D. Va. 1993).

[9]See Austin, 113 S.Ct. at 2804 ("We have had occasion to consider [the Excessive Fines] Clause only once before"). The four concurring Justices took issue with the breadth of Justice Blackmun's opinion. 113 S.Ct. at 2812 (concurring opinion of Scalia, J.); 113 S.Ct. at 2815 (concurring opinion of Kennedy, J.).

[10]113 S.Ct. at 2810 ("We conclude, therefore, that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment." (footnote omitted)).

[11]113 S.Ct. at 2810-12.

provision of 21 U.S.C. § 881(a)(6), nor were they required to. Justice Blackmun, however, arguably allows for exemption of such forfeitures from the Excessive Fines Clause when he states for the majority:

> Finally, it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

113 S.Ct. at 2812 n.14 (emphasis added). For reasons previously stated, forfeiture of criminal proceeds cannot by any stretch of imagination or logic be characterized as "punitive"; it is entirely "remedial" and serves merely to place the non-innocent owner in the same position as if no crime had ever been committed. As such, it "cannot be considered 'excessive' in any event." Id.

The same analysis holds true for the criminal forfeiture of "substitute assets" of a defendant in place of the actual traceable criminal proceeds themselves. Such forfeitures are permitted in the "proceeds" context for any of three different reasons. First, proceeds are fungible and serve to augment the defendant's net worth; thus, the recovery of any assets from the defendant, equal in value to the criminal proceeds, will serve the purpose of eliminating the illegal gain.[12] Second, criminal forfeitures are in personam, not in rem, and forfeiture imposes liability against the defendant personally; the action is, therefore, not jurisdictionally confined to a proceeding solely against the precise proceeds derived from the criminal offense.[13] Third, a number of criminal forfeiture statutes expressly provide for forfeiture of "substitute assets" where the

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[12]United States v. Ginsburg, 773 F.2d 798, 802 (7th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); United States v. Connor, 752 F.2d at 576.

[13]United States v. Argie, 907 F.2d 627, 629 (6th Cir. 1990); United States v. Robilotto, 828 F.2d 940, 948-49 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); United States v. Amend, 791 F.2d 1120, 1127 n.6 (4th Cir.), cert. denied, 479 U.S. 930 (1986); United States v. Ginsburg, 773 F.2d at 801-02; United States v. Connor, 752 F.2d at 576.

defendant, by his own act or omission, has rendered the traceable proceeds not subject to forfeiture for any of five reasons.[14]

Forfeiture of "substitute assets" in place of the actual illegal "proceeds" is arguably remedial because the forfeiture functions to remove the extent of "unjust enrichment" which the defendant realized from the criminal activity. For every illegal dollar earned, the defendant was able to save a legitimate dollar. If the law were otherwise, a defendant could simply spend, dissipate, or launder his criminal proceeds while safeguarding his legitimate income, knowing that the government might not be able to trace the former and could not forfeit the latter. Thus, the forfeiture of every legitimate dollar in substitution for every dollar in criminal proceeds serves the same remedial purpose of putting the defendant in the same economic position as if no crime had ever been committed.

The forfeiture of criminal proceeds -- or substitute assets in place of such proceeds -- may be usefully analogized to the remedy of "disgorgement" in securities and commodities law, and civil RICO actions brought by the government.[15] Disgorgement "is a method of forcing a defendant to give up the amount by which he was unjustly enriched" and its "paramount purpose . . . is to make sure that wrongdoers will not profit from their wrongdoing."[16] The important point here, and the reason for drawing this analogy, is that disgorgement "is remedial and not punitive." SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) (emphasis added).

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[14]See, e.g., 18 U.S.C. 1963(m); 21 U.S.C. § 853(p).

[15]See generally 3 A.R. Bromberg & L.D. Lowenfels, Securities Fraud & Commodities Fraud § 7.4(1022)-(1029) (1992). See also United States v. Private Sanitation Industry Association, 793 F. Supp. 1114, 1151-52 (E.D.N.Y. 1992) (applying disgorgement in a civil RICO action, but noting that the government may thereby only recover the ill-gotten gain; divestiture of the defendant's interest in the RICO enterprise, without compensation, requires a forfeiture under § 1963); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1449 (E.D.N.Y. 1988), aff'd on other grounds, 879 F.2d 20 (2d Cir. 1989) ("if the government succeeds in this action in proving that the defendants have violated RICO, it would be within the broad equitable powers of the Court to fashion relief requiring the defendants to disgorge any ill-gotten gains").

[16]SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987), cert. denied sub nom. Transatlantic Financial Co., S.A. v. SEC, 486 U.S. 1015 (1988).

Finally, there should never be a proportionality problem with respect to that category of forfeitable property that might be described as "corpus delicti" property. This category includes, for example, the tainted money laundered in a money laundering offense or the unreported currency in a currency-transaction reporting offense (18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1); 31 U.S.C. § 5317(c)); obscene materials (18 U.S.C. § 1467(a)(1)); child pornography (18 U.S.C. §§ 2253(a)(1) and 2254(a)(1)); and illegal controlled substances (21 U.S.C. §§ 881(a)(1) and (f)(1)). Such property, although technically not "proceeds", constitutes the very "body" or material substance that is absolutely essential to the commission of the crime in question.[17] The forfeiture of such property, at least from the hands of a non-innocent owner, can never be deemed to be constitutionally excessive or disproportionate. Indeed, the majority in Austin alluded to the "remedial" forfeiture of "dangerous or illegal items from society," as approved in United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984), and did not purport to overrule or modify this rule. Austin, 113 S.Ct. at 2811. The Court merely noted that forfeiture of mere "facilitating" property (e.g., a car used to transport illegal liquor)[18] does not fall within this rule.

II. Other Kinds of Property

Based on the foregoing discussion, it should be clear that issues of "excessiveness" or "proportionality" arise only with respect to property that is neither "proceeds" nor "corpus delicti" property, primarily property used or intended to be used

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[17]See Black's Law Dictionary, at 344 (6th ed. 1990) (defining "corpus delicti" as including "[t]he body (material substance) upon which a crime has been committed"). See also United States v. United States Currency in the Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars ($145,139), 803 F. Supp. 592, 597, 600 (E.D.N.Y. 1992) (observing, in rejecting double jeopardy challenge, that "[m]oney forfeited for violation of the currency reporting statute becomes an instrumentality of the crime at the moment the traveler fails to report it"; applying same statement to Eighth Amendment challenge).

[18]See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (noting the distinction between "contraband per se" and "only derivative contraband" and stating that this distinction is reflected in the Pennsylvania statute's requirement of mandatory forfeiture of "illegal [(i.e., untaxed)] liquor and stills" and only discretionary forfeiture of such things as automobiles used to transport untaxed liquor). This part of the opinion in One 1958 Plymouth Sedan was cited with approval by the Austin majority. Austin, 113 S.Ct. at 2811.

in facilitating commission of a criminal violation. As noted earlier, the opinions in Austin and Alexander fail to articulate a majority standard for determining challenges to forfeitures under the Excessive Fines Clause. The opinions, however, do offer "hints" regarding the standard. Moreover, pre-Austin/Alexander case law in the majority of circuits affords guidance as to the kinds of cases that should pass constitutional scrutiny under the Excessive Fines Clause and some of the factors that the courts should consider. A review of this case law leads to a suggested standard for review of civil or criminal forfeiture of "non-proceeds" property.

a. Austin/Alexander

As noted, the various opinions in Austin and Alexander offer helpful "hints" as to what standard the Supreme Court might approve for resolving challenges to forfeitures under the Excessive Fines Clause. Justice Scalia, concurring in Austin, went so far as to suggest that the standard by which civil in rem forfeitures of property should be judged:

> The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.
>
> * * * *
>
> The relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable?

113 S.Ct. at 2815 (emphasis in original) (concurring opinion of Scalia, J.).[19] This opinion bears a strong resemblance to the "substantial connection" test applicable to civil forfeitures of drug-related "facilitating" property in a majority of the Circuits;[20] thus, if the forfeiture satisfies the "substantial

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[19]It is noteworthy that the forfeiture of criminal proceeds would always meet this standard.

[20]The "substantial connection" test has been stated as follows:

> Under the substantial connection test, the property either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At minimum, the property must have more than an

connection" test under existing law, it arguably satisfies the "excessiveness" standard articulated by Justice Scalia concurring in Austin. If it fails to meet that standard, the forfeiture would be both statutorily and constitutionally impermissible in a majority of the circuits.

The Austin majority, per Justice Blackmun, declined the invitation to set a standard. 113 S.Ct. at 2812. It did, however, address Justice Scalia's proposed standard as follows:

> Justice Scalia suggests that the sole measure of an in rem forfeiture's excessiveness is the relationship between the forfeited property and the offense. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining
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>
> incidental or fortuitous connection to the criminal activity.

United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990). Other circuits applying the "substantial connection" test are: United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F.2d 1428, 1440 (11th Cir. 1991); United States v. Parcel of Land and Residence at 38 Emery Street, Merrimac, Mass., 914 F.2d 1, 3-4 (1st Cir. 1990); United States v. One Parcel of Land, Known as Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam); United States v. Premises Known as 3639-2nd Street, N.E., Minneapolis, Minn., 869 F.2d 1093, 1096-97 (8th Cir. 1989); United States v. Premises Known as 526 Liscum Drive, 866 F.2d 213, 216 (6th Cir. 1988). But see United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Ill., 903 F.2d 490, 494 (7th Cir. 1990), cert. denied sub nom. Born v. United States, 498 U.S. 1126 (1991) (rejecting "substantial connection" test in favor of requiring a "nexus [that] is more than incidental or fortuitous"); United States v. Premises and Real Property at 4492 South Livonia Road, Livonia, NY, 889 F.2d 1258, 1269 (2d Cir. 1989) (adopting a "sufficient nexus" test; citing cases). See also United States v. RD 1, Box 1, Thompsontown, 952 F.2d 53, 56-57 and n.5 (3d Cir. 1991) (declining to adopt standard but discussing cases and observing that "the distinctions made and their applications often appear to be semantical"); United States v. Approximately 50 Acres of Real Property, 920 F.2d 900, 902 (11th Cir. 1991) (per curiam) (differences "semantic"); United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, 903 F.2d at 494 ("the differences between [the various standards] appear largely to be semantic rather than practical").

> whether the forfeiture of Austin's property was excessive.

113 S.Ct. at 2812 n.15 (majority opinion of Blackmun, J.) (emphasis added; citation omitted). Government attorneys should thus be free to argue that the Scalia standard -- the connection between the property and the offense -- is, if not the standard, at least the predominant factor to be considered in resolving a challenge to a forfeiture[21] under the Excessive Fines Clause.

The majority opinion in Alexander also gives a hint of what the standard should be at least in some cases. There, the petitioner had been convicted of obscenity-based RICO offenses, involving just four magazines and three videotapes that the jury had determined to be obscene. However, "[m]ultiple copies of these magazines and videos . . . were distributed throughout petitioner's adult entertainment empire." 113 S.Ct. at 2770. The majority rejected the argument that forfeiture of the petitioner's entire business empire, and almost $9 million dollars in moneys acquired through racketeering activity, on the basis of the few materials that the jury ultimately determined to be obscene, was constitutionally "excessive":

> It is somewhat misleading, we think, to characterize the racketeering crimes for which petitioner was convicted as involving just a few materials ultimately found to be obscene. Petitioner was convicted of creating and managing what the District Court described as "an enormous racketeering enterprise." It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was "excessive" must be considered.

113 S.Ct. at 2776 (majority opinion of Rehnquist, C.J.) (emphasis added; citation omitted).[22]

The above-quoted statement from Alexander implies that the Court would be disinclined to find a forfeiture constitutionally

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[21]Justice Scalia limited this proposed standard to cases involving civil in rem forfeitures. As discussed infra at 55-57, however, we believe that the same standard should apply to both civil in rem forfeitures and criminal in personam forfeitures.

[22]It is noteworthy that the four dissenting Justices did not take issue with this statement.

"excessive" where there are indications of: (1) extensive criminal activities; (2) conducted over a substantial period of time. This may prove to be extremely important in any case where the specific offense giving rise to the forfeiture, viewed in a vacuum, seems relatively minor but there are indicia that criminal activities, involving the property, have been conducted over a substantial period of time. It is not uncommon, for example, for authorities to find relatively limited quantities of illegal drugs when they arrest a drug trafficker and/or search his base of operations but to uncover evidence indicating that the arrestee had been engaged in drug dealing involving the property for an extended period of time (e.g., hidden storage areas, triple-beam or electronic scales; packaging materials; ledger books; sizable quantities of currency). The foregoing statement from the majority opinion in Alexander strongly suggests a willingness to look beyond the parameters of the specific crime giving rise to the forfeiture and to consider evidence that the crime was not an isolated occurrence, but part of a continuing pattern of offenses over a period of time. It is against this "global" background that excessiveness challenges should be evaluated under Alexander.

This is not to suggest that the Alexander standard is the only standard, or even the predominant standard, to be applied in all cases. It is but one standard that may be applied where circumstances permit. Quite obviously, a criminal violation that is inarguably an isolated, "one-time" occurrence may also support a forfeiture that is non-excessive under either the standard proposed by Justice Scalia concurring in Austin or under the factors discussed below. The statement in Alexander, however, clearly supports the propriety of evaluating the offense giving rise to forfeiture by considering the totality of circumstances relative to the criminal conduct in question.

b. Pre-Austin/Alexander Case Law

Forfeiture case law predating the decisions in Austin and Alexander contains a fairly extensive discussion of the Eighth Amendment generally and, often, the Excessive Fines Clause in particular. The extent of this body of law, particularly civil case law, is somewhat surprising given the pre-Austin view in the majority of circuits that the Eighth Amendment had absolutely no application to civil forfeitures. Courts nonetheless often opined in dicta that a particular civil forfeiture would not violate the Excessive Fines Clause assuming arguendo that the Eighth Amendment did apply to civil forfeitures. A legally supportable "standard" for testing challenges to forfeitures under the Excessive Fines Clause may be synthesized from the case law and the "hints" given in Austin and Alexander concerning the standard. Moreover, a number of "rules" may be gleaned from this case law to guide the parties and the courts in applying this

standard. The constitutional "standard" and the various "rules" are discussed below.

1. Should Solem v. Helm Provide the Standard?: Before addressing the proposed standard (infra at 18), it is necessary to state what the standard should not be. Several circuits have suggested that the Supreme Court's decision in Solem v. Helm, 463 U.S. 277 (1983) ought to provide the standard against which Eighth Amendment challenges to forfeitures should be measured. For example, a panel of the Ninth Circuit in an oft-cited criminal forfeiture case, stated that:

> The district court must, consistent with Solem, consider (1) the harshness of the penalty in light of the gravity of the offense; (2) sentences imposed for other offenses in the federal system; and (3) sentences imposed for the same or similar offenses in other jurisdictions.

United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (footnote and citation omitted).[23]

More recent cases, however, cast doubt on Solem's continuing viability. Indeed, in Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680, 2686 (1991), Justice Scalia, joined by Chief Justice Rehnquist, concluded that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Three other Justices limited Solem, explaining that the second and third Solem factors -- the intra- and inter-jurisdictional comparisons of sentences -- "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality" and serve merely "to validate an initial judgment that a sentence is grossly disproportionate to a crime." 111 S.Ct. at 2707 (concurring opinion of Kennedy, J., joined by O'Connor J. and Souter, J.). Thus, a majority of the Court would overrule or limit the Solem criteria.

These doubts are reflected in recent forfeiture cases as well. In United States v. Bucuvalas, a panel of the First Circuit stated:

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[23]Accord United States v. Harris, 903 F.2d 770, 778 (10th Cir. 1990). See also United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, NY, 954 F.2d 29, 38 (2d Cir.), cert. denied sub nom. Levin v. United States, ___ U.S. ___, 113 S.Ct. 55 (1992) (applying Solem in analyzing challenge under the Cruel and Unusual Punishment Clause, but not under Excessive Fines Clause).

> [Appellant] relies on Busher, 817 F.2d 1409 (9th Cir. 1987) which was premised on the three-part test set out in Solem v. Helm,
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> . . . . In addition to a gross disproportionality determination, Solem would require a comparison of the forfeitures imposed for comparable offenses in Massachusetts and in other jurisdictions. Recently, however, in a significant curtailment of Solem, a majority of the Court favored either dispensing with the Solem test in all non-capital cases, or reaching Solem's inter- and intra-jurisdictional analyses only "in the rare case in which the threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin v. Michigan, ___ U.S. ___, ___, 111 S.Ct. 2680, 2707 (1991).

970 F.2d at 946 n.15 (emphasis added in part).

Similarly, a panel of the Third Circuit in United States v. Sarbello recently stated that:

> The Solem standard . . . was placed in question by the Court's recent decision in Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed. 2d 836 (1991). Harmelin involved a state law conviction for possession of cocaine and a resulting sentence of a mandatory term of life imprisonment without possibility of parole. The defendant alleged that the mandatory sentence was unconstitutionally cruel and unusual because it was "significantly disproportionate" to his offense, and because the mandatory nature of the statute preempted possible mitigation by the court, making inconsequential any inquiry into the potentially mitigating circumstances of the particular case. The Court issued five separate and partially conflicting opinions, none of which represented a majority of the justices, and which ranged from a repudiation of Solem's extension of eighth amendment proportionality to non-capital cases, (Scalia, J. joined by Rehnquist, C.J.), to a recognition of a "narrow" and sparing proportionality doctrine, (Kennedy, J., joined by O'Connor, J., and Souter, J., concurring in part and concurring in the

> judgment), to an approval of the Solem factors (White, J., dissenting, joined by Blackmun, J., and Stevens, J., and Marshall, J., (writing separately)). Despite the lack of clear directive from the Supreme Court, some form of eighth amendment proportionality review of appropriate non-capital sentences, such as those made pursuant to § 1963(a)(2) of RICO, is warranted in light of the Court's majority opinion in Harmelin.

985 F.2d at 723 (emphasis added; footnote omitted).

There are additional reasons for doubting Solem's application to forfeiture cases. First, the standard was readily available for adoption in Austin and Alexander yet not a single member of the Court embraced it. In fact, the Court expressly declined to adopt any standard. Second, the Solem standard was developed under the Cruel and Unusual Punishments Clause; there is no reason why it should automatically translate as the standard for determining challenges under the Excessive Fines Clause.[24]

For these reasons, we oppose adopting the Solem factors as the standard by which challenges to forfeitures under the Excessive Fines Clause are to be tested.[25]

2. A General Multi-Factor Standard: Several circuits have addressed the Excessive Fines Clause, the Cruel and Unusual Punishments Clause, and/or the Eighth Amendment generally, in the forfeiture context. These statements, when made in criminal forfeiture cases and clearly not dicta in the context of the particular case, have the force of law since the Eighth Amendment has uniformly been held to apply to criminal forfeiture even prior to Alexander. See Alexander, 113 S.Ct. at 2776 n.4. Most circuits also have addressed the Excessive Fines Clause or at least the Eighth Amendment in the civil forfeiture context. However, these statements generally qualify as dicta since the

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[24]But see Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300-01 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (proposing that Solem factors be "adapted" to a challenge under the Excessive Fines Clause).

[25]The factors comprising the Solem standard are discussed in greater detail infra at 29-39 (nature of the crime) and 44-48 (comparative sentences).

majority view prior to Austin was that the Eighth Amendment did not apply to civil forfeitures.[26]

We have reviewed the case law predating Austin and Alexander, along with the "hints" of a standard contained in those cases, and synthesized the following suggested standard for determining challenges to civil and criminal forfeitures under the Excessive Fines Clause of the Eighth Amendment:

> **A civil or criminal forfeiture should not violate the Eighth Amendment where:**
>
> **A. The criminal activity involving the property has been sufficiently extensive in terms of time and/or spatial use of the property; or**
>
> **B. The role of the property was integral or indispensable to the commission of the crime(s) in question; or**
>
> **C. The particular property was deliberately selected to secure a special advantage in the commission of the crime(s).**

Note that these factors are in the alternative; any one of them, if sufficiently strong, will suffice to justify the forfeiture. Note also that the factors inherently turn on decisions made by the property owner; it is therefore the owner -- not the government or the courts -- who determines the scope of the forfeiture under this standard. Moreover, these factors comport

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[26]The lone exception was the Second Circuit which held in United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, NY, 954 F.2d at 35, that "Eighth Amendment protections attach when an individual is subjected to a civil sanction classified as punitive under [United States v.] Halper, [490 U.S. 435 (1989)]." Because the panel had earlier held that the civil forfeiture in that case would qualify as "punitive" under Halper, 954 F.2d at 34-38, it addressed the appellant's Eighth Amendment arguments on the merits. It concluded that forfeiture of the defendant real property in the circumstances of that case violated neither the Cruel and Unusual Punishment Clause nor the Excessive Fines Clause of the Eighth Amendment. Id. at 38-39.

with the "hints" afforded by the opinions in Austin and Alexander.[27] These factors are discussed seriatim below.

Courts applying this standard should be mindful that forfeiture, civil or criminal, may serve a punitive as well as a remedial purpose, thus justifying rather sizable disparities between the value of the property to be forfeited and the degree of its involvement in the offense. Moreover, there are a number of "special considerations" that arise when the Eighth Amendment is applied to forfeitures under certain provisions of the RICO and drug criminal forfeiture statutes. The individual factors constituting the standard and these additional considerations are discussed seriatim below.

Before beginning that discussion, however, it should be noted that every effort has been made to suggest a standard that is consistent with Congressional intent and historical usage. The purpose of the suggested standard is to afford guidance and promote uniformity in approach. The standard is not absolutely binding on federal attorneys and should not be understood as excluding advocacy of additional factors as circumstances and developments in the case law dictate. **Please notify the Asset Forfeiture Office, Criminal Division, of any planned departures from this standard or of any case law adopting, rejecting, or modifying this standard.** Such notification will help prevent development of adverse case law where the departure is legally problematic, avoid the taking of inconsistent legal positions, and ensure centralized communication and coordination of advocacy positions.

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[27]The first factor -- regarding extent of the property's involvement -- reflects the statement from the majority opinion in Alexander that "[i]t is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was 'excessive' must be considered." 113 S.Ct. at 2776 (majority opinion of Rehnquist, C.J.). The second factor, of course, coincides with the standard proposed by Justice Scalia in his concurring opinion in Austin: "The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense" and "The relevant inquiry for an excessive forfeiture under [21 U.S.C. § 881] is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?." 113 S.Ct. at 2815. The third factor also coincides with the standard proposed by Justice Scalia in that it is the wrongdoer's deliberate and purposeful selection of the particular property, not simply its inherent nature, that provides the requisite "close relationship" to the offense.

A. Extent of Criminal Activity: Several courts have justified the forfeiture of relatively valuable property, in its entirety, based at least in part upon the extent of the underlying criminal activity involving the property, both temporally and spatially. For example, a panel of the First Circuit, in dictum, stated that the forfeiture of a claimant's one-third interest in a 16-acre oceanside estate valued at $1,000,000 would comport with the Eighth Amendment based, in part, on "the prodigious extent of his unlawful agricultural activities" in cultivating 385 marijuana plants on several plots scattered across the estate. One Parcel of Real Property . . . Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, RI, 960 F.2d 200, 207 (1st Cir. 1992).[28]

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[28]Accord United States v. Certain Real Property 566 Hendrickson Boulevard, Clawson, Oakland County, Michigan, 986 F.2d 990, 997-98 (6th Cir. 1993) (affirming forfeiture of claimant's home valued at $65,000 based on evidence that claimant remodeled attic to accommodate indoor marijuana cultivation operation, removed approximately 40 plants just before search, search uncovered 27 plastic pots (two of which contained marijuana plants), plant food, seedling starter kits, "grow" lights, potting soil, black plastic irrigation pipes, a fan, and a 24-hour timer; "the line at which forfeiture becomes disproportionate punishment or an excessive fine has not been crossed in this case" and "the forfeiture was not . . . unconstitutionally harsh when balanced against the nature of claimant's crime and the extent of his unlawful agricultural activities"); United States v. On Leong Chinese Merchants Association Building, 918 F.2d 1289, 1296 (7th Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 52 (1991) (affirming forfeiture of a three-story historical landmark building in Chicago's Chinatown which was raided four times between 1984 and 1988 and each time police found gambling on either the second floor or in the basement; the building had been modified to accommodate gambling and to obstruct and monitor access by outsiders; "The facts of this case establish that the gambling activity within the Building was not confined. Given the extent of the gambling activity, forfeiture of the entire Building was justified."); United States v. 141st Street Corporation, 911 F.2d 870, 881 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991) (affirming forfeiture of six-story, 141-unit apartment building in New York City; "[T]he line at which forfeiture becomes disproportionate punishment, or an excessive fine certainly has not been crossed in this case where apartments on every floor of the building -- amounting to at least one third of all of the apartments in the building -- were used for narcotics trafficking. Furthermore, addicts regularly smoked crack in the hallways. Thus, common areas of the building also were involved in these illicit activities."); United States v. A Parcel of Land With A Building Located Thereon at 40 Moon Hill Road, Northbridge, Mass., 884

Forfeiture attorneys should rely on any evidence that supports an inference of continuing criminal conduct, regardless of whether only a single offense provides the predicate for forfeiture. For example, the presence of drug distribution paraphernalia in drug cases strongly supports the inference that the single distribution crime on which the forfeiture is predicated was not, in fact, an aberrant, isolated, "one-time" occurrence.[29] The presence of "flash paper", parlay cards,

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F.2d 41, 44 (1st Cir. 1989) (affirming forfeiture of 17.9-acre property from which police had seized approximately 80 growing marijuana plants in three separate fields, approximately 50 drying plants in the home and an open machinery shed, and marijuana seed; "Far from [being] a de minimis violation, this evidence is consistent with a large-scale, high-volume marijuana production operation, carried out on several segments of appellant's property" (emphasis added)); United States v. Tax Lot 1500, 861 F.2d 232, 235 (9th Cir. 1988) (affirming forfeiture of real property worth $94,810 on which 143 marijuana plants, mostly an inch high or less, were found growing on a deck over the garage and in a small (2½-5') garden adjacent to the house; the total area used for marijuana cultivation was less than 200 square feet; "Given this extensive operation, we find no need to go into the relative values of crop and real property"; footnote omitted); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982) (affirming forfeiture of motel that defendant purchased knowing it had been used over three decades for prostitution purposes and defendant thereafter continued the prostitution operations, bribing local officials to do so; "The evidence in this case, establishing that [defendant] operated the [motel] as a place of prostitution during the entire period of his ownership and corrupted local officials to maintain his business, demonstrates the magnitude of his offense. The forfeiture does not contravene the eighth amendment.").

[29]United States v. Premises Known as 3639-2d St., N.E., Minneapolis, Minn, 869 F.2d at 1096 (affirming forfeiture of house; "the house was admittedly used in the sale of drugs; indeed, a triple beam scale, sifting device and covered bowl with cocaine residue, a baggie containing cocaine, and a balance pan, spoon, straw, razor blade, and drug notes were found in the house"). Accord Segura v. United States, 468 U.S. 796, 801 (1984) ("In the process, the agents observed, in a bedroom in plain view, a triple-beam scale, jars of lactose, and numerous small cellophane bags, all accouterments of drug trafficking"); United States v. Gordon, 987 F.2d 902, 906 (2d Cir. 1993) ("A search of his house revealed a triple-beam scale, which is often used by narcotics traffickers"); United States v. Robinson, 978 F.2d 1554, 1567 (10th Cir. 1992) ("Crack cocaine was found 'drying' on paper towels in the kitchen, sitting on triple-beam

ledger books, etc. would support an inference of a continuing gambling operation.[30] Courts have similarly relied upon structural modifications to property as justifying full forfeiture.[31] Simply stated, inventive use of circumstantial evidence may justify an inference of continuity for virtually any crime for which forfeiture is authorized.

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scales and packaged, in both the kitchen and living room areas. . . . We have noted that these items are 'tools of the trade' for those who deal in drugs"); United States v. Fortenberry, 973 F.2d 661, 664 (8th Cir. 1992) (after controlled delivery of parcel containing cocaine, agents searched house and discovered the unopened parcel, an O'Haus triple-beam balance scale, sandwich-sized plastic bags, a telephone pager, and a rifle. "While Fortenberry is correct that the items found in his home all have innocent uses, it was equally possible for the jury to conclude that they were drug paraphernalia and used in furtherance of a crime"); United States v. Midgett, 972 F.2d 64, 65 (4th Cir. 1992). ("As a result of the search, officers discovered the following evidence of drug trafficking: two zip-lock plastic storage bags containing approximately sixty-six grams of cocaine; one plastic baggie containing approximately eight grams of psilocin; three boxes of Glad zip-lock sandwich bags; aluminum foil wrap; one bottle of inositol powder; and a set of triple-beam scales"); United States v. Carwell, 939 F.2d 545, 546 (8th Cir. 1991). ("There was also substantial evidence at trial tending to establish that Carwell was involved in the distribution of cocaine. Along with the relatively small amount of cocaine found in her house, law enforcement officers also found about $9,000 cash in a woman's purse and, in a filing cabinet in the basement, 224.88 grams of marijuana, a triple-beam scale, razor blades, and plastic baggies.").

[30]See, e.g., United States v. Balistrieri, 779 F.2d 1191, 1211 (7th Cir. 1985), cert. denied sub nom. DiSalvo v. United States, 475 U.S. 1095 (1986).

[31]See, e.g., United States v. Certain Real Property 566 Hendrickson Boulevard, Clawson, Oakland County, Michigan, 986 F.2d at 999 (citing, inter alia, the fact that "the claimant turned his entire attic area into a growing room for marijuana"); United States v. On Leong Chinese Merchants Association Building, 918 F.2d at 1296 (citing inter alia, that "[t]he [property] itself had been modified to harbor the gambling activity, as it was equipped with a camera and electronically-activated gates to monitor outsiders"). See also United States v. 141st Street Corporation, 911 F.2d at 873 (affirming forfeiture of six-story, 141-unit apartment building; noting, in the statement of facts, that the building had been wired with an alarm system from a central connection box on the roof to alert occupants of police presence).

It is noteworthy that the evidence of "intended" continuity -- e.g., plans of future criminal activity -- may be relied on to establish evidence of "extent."[32] This may be important as to inchoate offenses (e.g. conspiracies and attempts) where the forfeiture may be premised on such violations. For example, the criminal forfeiture of a 10-acre tract of real property worth $30,000 was upheld against an Eighth Amendment challenge where the evidence indicated that the defendant had purchased a 55-gallon drum of a methamphetamine precursor and a search of the property revealed the makings of a "meth lab" and "recipes" for the making of methamphetamine; the panel rejected the argument that it should consider the fact that no methamphetamine was ever produced on the property.[33]

Although the temporal extent of the underlying criminal activity is one factor that may be weighed in determining whether a given forfeiture is constitutionally excessive, the cessation of the underlying criminal conduct prior to seizure is immaterial. United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (forfeiture, "as with any punishment for criminal conduct, may be imposed despite the cessation of the criminal conduct charged in the indictment"). See also United States v. Premises Known as 3639-2d St., N.E., Minneapolis, Minn, 869 F.2d at 1096 ("we find no requirement of a continuing drug business or ongoing operation"). Forfeiture is imposed for the criminal activity that occurred or that would have occurred on the property and the cessation of such activity prior to seizure should not be considered as mitigating to any extent the full scope of forfeiture.

B. "Integral" Role of the Property: Other courts have emphasized whether the property played an "integral" or "indispensable" role in the offense, more so than the extent of the unlawful activity involving the property, in justifying forfeiture of an entire property under the Eighth Amendment. For example, a panel of the Seventh Circuit affirmed the criminal forfeiture of a condominium which served as a "mail drop" and the situs of a telephone-call forwarding device for an "escort service" prostitution ring; the condominium otherwise remained empty and unused. The panel unanimously rejected the defendant's

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[32]See, e.g., United States v. Premises Known as 3639-2d St., N.E., Minneapolis, Minn, 869 F.2d at 1093 (affirming forfeiture of house based on single sale of two ounces of cocaine; noting that the confidential informant who purchased the cocaine from the claimant stated via affidavit that he had gone to claimant's house several times to discuss future drug deals of larger amounts of cocaine) and case cited in note 33, infra.

[33]United States v. Monroe, 866 F.2d 1357, 1366-67 (11th Cir. 1989).

argument that the forfeiture should be limited to less than the entire condominium:

> [T]he forfeiture of the entire condominium was not grossly disproportionate to the offense committed. This is especially true in view of the importance the condominium played in the prostitution enterprise. The call-forwarding procedure, involving the use of telephones in one place and the receipt of those calls in another, was instrumental to the successful operation of the escort business and was designed to thwart police raids which had plagued the operation.
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> . . . . Given the importance of [the] condominium to the continuing successful operation of the enterprise which concerned prostitution business, we find [that] forfeiture of [the] entire condominium . . . was appropriate.

United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988) (emphasis added in part; citation omitted).

Similarly, a panel of the First Circuit affirmed the forfeiture of corporate properties where the corporation was used by the individual defendants to conceal from licensing authorities their ownership interests in numerous "adult entertainment businesses" in Boston's "Combat Zone" and to evade the payment of back taxes. The panel stated that "[t]he jury had ample evidence, none of which was challenged on appeal, from which to infer that the forfeited [corporate] properties were an indispensable component of defendants' longstanding scheme to deprive the City of Boston of licenses and the Commonwealth of Massachusetts of back taxes." United States v. Bucuvalas, 970 F.2d at 946.

C. Deliberate Selection to Secure a Special Advantage: Courts alternatively have emphasized the deliberate selection of property to secure a special advantage in the criminal conduct as justification under the Eighth Amendment for forfeiting entire properties. For example, a panel of the Ninth Circuit rejected an argument that it should exercise "judicial restraint" to avoid forfeiture of an entire tract of property on which 143 marijuana plants were found growing over a garage and in a small garden adjacent to the house. It emphasized the deliberate selection of the owner in using his own private property for the cultivation operation:

> The district court concluded that [judicial] restraint was inappropriate in this case. We agree. [Claimant] chose to conduct his small farming operations on his own land which was subject to the risk of forfeiture. Some of his colleagues in the same business planted their crops on land already owned by the United States and managed somewhat randomly by various federal agencies. These growers faced the constant risk of losing their crop, but not that of losing their land. [Claimant] chose to keep his crop close to home. At the time of forfeiture, [claimant] had 143 plants growing over his garage and in his garden. The district court correctly concluded that this was not a case for judicial restraint.

United States v. Tax Lot 1500, 861 F.2d at 235 (emphasis added). A panel of the Eleventh Circuit reached a similar result where the property owner had directed drug traffickers away from his business and to his residence in order to consummate a drug transaction:

> [Claimant] arranged the cocaine delivery such that his driveway was used to facilitate a narcotics transaction. [Claimant] declined to have the sale occur on unknown territory and led the perpetrators away from his restaurant and to his residence. It cannot be said that the use of the property was incidental or fortuitous to the planned exchange [of money for cocaine].

United States v. Real Property and Residence at 3097 S.W. 111th Avenue, Miami, FL, 921 F.2d 1551, 1557 (11th Cir. 1991).

Nearly every use of property is to some extent "deliberate"[34] -- but courts are unlikely to find that any "deliberate use" will justify forfeiture of the entire property under the Eighth Amendment. The issue is one of degree and the determination is likely to turn on whether the property was deliberately put to a particular use in order to secure a special advantage in the commission of the offense. It is, therefore,

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[34]The only exception would appear to be a use that was purely accidental and unintended. It is unlikely that courts would approve forfeiture of an entire property based upon its purely accidental involvement in criminal conduct (e.g., an "air-drop" of drugs that misses its intended target -- real property owned by a conspirator -- and lands on a neighbor's property).

difficult, if not impossible, to articulate a "bright-line" standard between forfeitures that would pass scrutiny under the Eighth Amendment and those that would not. At the extremes, it is quite easy to surmise that mere coincidental use of a car to "transport" a tiny remnant of a marijuana cigarette in the ashtray while the owner goes about his/her legitimate business would be less likely to pass constitutional muster than the conscious selection of a particular car, from among several available, to transport a sizable quantity of contraband based on its unique features or markings (e.g., use of a motor van bearing corporate markings to provide an appearance of legitimacy in the transportation of contraband) or a statement by the owner that he/she does not want to engage in particular conduct at a given location and would prefer to move to his/her home.[35]

Between these extremes, the issue of whether a particular forfeiture is constitutionally excessive will likely turn on the strength of the government's evidence supporting the inference that the use of the particular property in the criminal event was sufficiently "deliberate" to justify forfeiture of the property in its entirety. The particular features of the property, any modifications to the property to accommodate the criminal activity, statements made by the owners regarding use of the property in the criminal conduct, and the manner in which the property was used are all factors that may be relied upon in arguing that forfeiture of the property does not contravene the Eighth Amendment. As these examples suggest, direct evidence as regards deliberate selection (modifications, statements, etc.) should be introduced whenever possible so as to build a record

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[35]The third factor ("deliberate selection") is closely related to the second factor ("integral" or "indispensable" to the offense). Under the second factor, property may be forfeited in its entirety if, by its inherent nature, it is "integral" or "indispensable" to the commission of the criminal offense. For example, real property used in the cultivation of marijuana is, by its very nature, integral or indispensable to the commission of the offense. Under the third factor, it is the wrongdoer's deliberate and purposeful choice of the property, more than its inherent nature, that arguably renders it "integral" or "indispensable" to the offense. For example, if the wrongdoer refuses to engage in criminal conduct at a particular location and insists that it occur on his or her property, it is the deliberate and conscious choice of the property that renders it subject to forfeiture regardless of whether the courts view the property as inherently suited to commission of the offense. Similarly, the deliberate choice of a particular vehicle, from several available to a conspiracy, for use in transporting drugs would render the vehicle "integral" or "indispensable" to the offense notwithstanding the availability of alternative modes of conveyance.

for appeal. Moreover, counsel should avoid assertions of "deliberate selection" where the evidence supporting such assertions is weak or indeterminate. Unless the forfeiture in such marginal cases can be justified on the basis of one of the other factors, the prudent exercise of prosecutorial discretion would counsel declining the forfeiture so as to avoid development of adverse precedent.

Alternatively, a forfeiture may be justified under the Eighth Amendment where a property owner, who was not personally involved in the criminal activity, has been sufficiently negligent in the sense of failing to take all reasonable steps to prevent the illegal use of the property by others. See Austin, 113 S.Ct. at 2808 (majority opinion of Blackmun, J.) (citing forfeitures based on "the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence").[36] The "negligence" issue, like the "purposeful" use issue is likely to be viewed as a matter of degree -- with the determination turning on what measures were reasonably available to the property owner to prevent the illegal use of the property under the circumstances. Clearly, an owner who knows of illegal use of the property but who thereafter fails to take any reasonably effective and available measures to prevent it will fare worst under this standard.

* * * *

The foregoing discussion makes plain that the extent of the property's involvement in the criminal activity, the integral or indispensable role of the property in the criminal activity, and the purposeful use of the particular property in the offense are all factors relevant to a determination of whether a particular forfeiture violates the Excessive Fines Clause of the Eighth Amendment. The three factors under the proposed standard are true alternatives: only one of them must be satisfied to justify a forfeiture under the Excessive Fines Clause.

D. Punitive Effect of the Forfeiture: Even where all of the foregoing factors are present and satisfied in a particular case, a court may still be reluctant to order forfeiture of an entire property based on its view that not all of the property was involved in the offense. Counsel may point out to the court that substantial disparities between the extent of the property forfeited and the circumstances of the underlying offense may be justified by the fact that both civil and criminal forfeitures may serve punitive purposes, at least in part. Prior to Austin, this argument was foreclosed by the government's belief that all civil forfeitures were remedial and only criminal forfeitures

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[36]An extended discussion of this issue appears infra at 48-50.

were considered punitive. Austin negates this belief and clearly holds that a civil forfeiture may be justified as serving a punitive purpose at least in part.[37] Thus, counsel are now free to argue that a civil forfeiture should "hurt" a defendant, so long as the punishment imposed is not so extreme as to be constitutionally excessive.

Courts have tolerated rather substantial disparities in the value of property to be forfeited and the value of the property involved in the offense on this basis. For example, a panel of the First Circuit dismissed a corporate appellant's reliance on the fact that forfeiture of the corporate assets "grossly exceeded" the value of the business licenses and back taxes of which it deprived the City of Boston and the Commonwealth of Massachusetts.[38] The panel noted that "such pecuniary discrepancies naturally result from the congressional intendment that criminal forfeitures under RICO are to serve punitive rather than compensatory purposes."[39] Moreover, a panel of the Ninth Circuit has noted that:

> [F]orfeiture is not rendered unconstitutional because it exceeds the harm to all victims or the benefit to the defendant. After all, RICO's forfeiture provisions are intended to be punitive. The eighth amendment prohibits only those forfeitures that, in light of all of the relevant circumstances, are grossly disproportionate to the offense committed.

United States v. Busher, 817 F.2d at 1415 (emphasis added in part). Similarly, in United States v. Porcelli, 865 F.2d at 1366, the court held that a forfeiture verdict, amounting to the equivalent of treble damages, did not violate the Cruel and Unusual Punishments Clause; it described triple damages as "something rather commonly known first in antitrust cases and now in civil RICO." Id. See also United States v. One Parcel of Real Property . . . Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, RI, 960 F.2d at 207 (forfeiting claimant's one-third interest in $1,800,000 estate based on his cultivation of

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[37]See Austin, 113 S.Ct. at 2810 (the Court "consistently has recognized that forfeiture serves, at least in part, to punish the owner") (majority opinion of Blackmun, J.); Alexander, 113 S.Ct. at 2775 ("The in personam criminal forfeiture at issue here is clearly a form of monetary punishment") (majority opinion of Rehnquist, C.J.).

[38]United States v. Bucuvalas, 970 F.2d at 945-46.

[39]Id. at 946 (emphasis in original).

385 marijuana plants growing in several plots scattered about the estate).

It may be significant that only three days before Austin and Alexander were decided the Supreme Court upheld an award of $10 million dollars in punitive damages, in addition to an award of only $19,000 in actual damages, against a due process challenge. See TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ___, 113 S.Ct. 2711 (1993).[40] The punitive damages were 526 times larger than the actual damages. 113 S.Ct. at 2718 (plurality opinion of Stevens, J.). In an argument virtually identical to one that would be advanced under the Excessive Fines Clause of the Eighth Amendment, the appellant argued that this disparity was so "grossly excessive" as to violate the substantive component of the due process clause. 113 S.Ct. at 2721.

Justice Stevens, writing for a three-Justice plurality, concluded that the punitive damages award was not "grossly excessive" when viewed against the potential future harm the defendant's conduct might have caused, the fact that the scheme employed in the instant case was part of a larger pattern of fraud, trickery and deceit, and the defendant's wealth. 113 S.Ct. at 2722-23 (plurality opinion of Stevens, J., joined in this part by Blackmun, J., and Rehnquist, C.J.). Justice Kennedy, concurring, concluded that "it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence." 113 S.Ct. at 2726 (concurring opinion of Kennedy, J.) (emphasis added). Justice Scalia, joined by Justice Thomas, concurred in the judgment but only on grounds that the state court's determination of reasonableness comported with procedural due process; he rejected the plurality's acceptance and application of a substantive due process right to "reasonable" punitive damage awards. 113 S.Ct. at 2726-28 (concurring opinion).[41]

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[40]The award of punitive damages arose from a counterclaim for tortious slander of title under state law.

[41]Justice O'Connor dissented and advocated that awards of punitive damages should be judged against: (1) the relationship between the punitive damages and the compensatory damages; (2) awards of punitive damages upheld against defendants in the same jurisdiction; (3) awards upheld for similar torts in other jurisdictions; and (4) legislatively designated penalties for similar misconduct. 113 S.Ct. at 2732 (dissenting opinion of O'Connor, J., joined in this part by White, J.). She added that "these factors by no means exhaust the due process inquiry." Id.

Although TXO Production Corp. was decided under the Due Process Clause, four Justices concluded that the award of exemplary damages was "reasonable" and not "grossly excessive" in view of the punitive and deterrent purpose to be served by such damages. Given that the entire Court in Austin recognized that a civil forfeiture may also serve a punitive purpose, useful guidance may be drawn from TXO Production Corp. in determining whether a particular forfeiture violates the Excessive Fines Clause. First, it may be argued that extremely sizable disparities between actual harm and the value of the judgment are justified in light of the punitive purpose to be served. Second, government counsel may argue, where nothing in the record suggests otherwise, that the wrongdoer would have engaged in future misconduct and consider the actual harm that would have resulted from such misconduct in determining whether the "punitive" recovery was reasonable. Third, counsel may properly emphasize the wrongdoer's wealth in arguing that the scope of forfeiture should be sufficiently large to serve its purposes of punishment and deterrence.[42]

Counsel are advised to exercise caution in advancing an argument based on "punitive purpose" in a civil forfeiture case. The Double Jeopardy implications of such an argument vis-a-vis a related criminal prosecution should be considered. A separate memorandum discussing the Double Jeopardy implications of Austin will follow this memorandum.

3. Additional Considerations: There are additional "factors" in the case law that may be relied upon to support full forfeiture in a particular case. These factors, however, have not been included in the previously discussed standard, which should apply in all cases, for various reasons discussed below. Counsel are free to rely on these additional factors in individual cases; however, these factors, if cited at all, should be discussed only as additional considerations justifying full forfeiture -- wholly apart from and in addition to the factors comprising the previously discussed standard. Counsel should emphasize that these additional factors and considerations are not part of the standard for general application.

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[42]The three dissenting Justices in TXO Production Corp. would have no problem in considering the wealth of the wrongdoer in determining whether a remedy is sufficiently large to serve its punitive and deterrent purposes. 113 S.Ct. at 2737-38 (dissenting opinion of O'Connor, J., joined in this part by White and Souter, JJ.). See also Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. at 300 (opinion of O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

A. The Nature of the Crime: Numerous courts have cited the nature of the criminal activity as a factor justifying forfeiture of relatively valuable property.[43] Indeed, the Second Circuit, the only pre-Austin circuit to hold that the Eighth Amendment applied to civil forfeitures, upheld the forfeiture of claimant's equity interest of $68,000 in a condominium from which claimant twice sold cocaine for a total of $250. The panel relied in part on the fact that "[t]he Supreme Court has recognized the serious threat to individuals and society posed by drug offenses in the context of an Eighth Amendment analysis." United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, NY, 954 F.2d at 38-39. Congress, however, has already considered it the nature of the criminal activity by (1) determining the crimes to which the forfeiture remedy is to apply; and (2) by varying the extent or scope of forfeiture for particular crimes.[44] As set forth below, courts owe "substantial deference" to this determination. We accordingly omitted the nature of the crime as a factor for consideration under the Eighth Amendment standard previously stated, supra at 18. Counsel are nonetheless free to argue this factor as additional support where appropriate in light of the following discussion.

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[43]United States v. Sarbello, 985 F.2d at 724-25 (remanding RICO forfeiture for proportionality analysis; court must "weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach" and "the nature . . . of the crime and its harmful social dimension"); United States v. Certain Real Property 566 Hendrickson Boulevard, Clawson, Oakland County, Mich., 986 F.2d at 999 (upholding forfeiture of real property worth $65,000 where claimant's husband had remodeled his attic to accommodate a marijuana "grow" operation; husband removed nearly forty "starter" plants prior to search; officers seized 27 black plastic pots, two of which contained marijuana plants, plant foods, seedling starter kits, grow lights, potting soil, black plastic irrigation pipes, a fan, and a twenty-four hour timer; "the forfeiture was not 'grossly disproportionate' nor was it unconstitutionally harsh when balanced against the nature of claimant's crime . . . ."); United States v. One Parcel of Real Property . . . Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, RI, 960 F.2d at 207 (affirming forfeiture of claimant's one-third interest in 16-acre oceanside estate, having an estimated value of $1,800,000, based on cultivation of 385 marijuana plants in several plots scattered about the estate; "it is clear beyond peradventure that the forfeiture of [claimant's] one-third interest . . ., though valuable, was not unconstitutionally harsh when balanced against the nature of his crime . . . .").

[44]See discussion infra at 36-36.

As the above-quoted statement from 38 Whalers Cove suggests, courts evaluate the nature of the crime by looking beyond the confines of the individual offense giving rise to forfeiture and focusing instead on the impact on society of the type of criminal activity generally.[45] The Supreme Court, in Solem v. Helm, 463 U.S. at 292, specifically stated that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."

More recently, Justice Kennedy, joined by Justices O'Connor and Souter, found that the defendant's sentence of life imprisonment without possibility of parole for mere possession of 672 grams of cocaine was not constitutionally disproportionate, stating:

> Petitioner was convicted of possession of more than 650 grams (over 1.5 pounds) of cocaine. This amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses. From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in Solem. Possession, use, and distribution of illegal drugs represents "one of the greatest problems affecting the health and welfare of our population." Treasury Employees v. Von Raab, 489 U.S. 656, 668 (1989). Petitioner's suggestion that his crime was nonviolent and victimless . . . is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.
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> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. Studies bear out these possibilities, and demonstrate a direct nexus between illegal drugs and crimes of violence. To mention but a few examples, 57 percent of a national sample of males arrested in 1989

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[45] United States v. Sarbello, 985 F.2d at 725 (the "factors essential to a proportionality analysis" include "the nature and extent of the crime and its harmful social dimension");

> for homicide tested positive for illegal drugs. The comparable statistics for assault, robbery, and weapons arrests were 55, 73 and 63 percent, respectively. In Detroit, Michigan in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. Fifty-one percent of males and seventy-one percent of females tested positive for cocaine. And last year an estimated 60 percent of the homicides in Detroit were drug-related, primarily cocaine-related.
>
> These and other facts and reports detailing the pernicious effects of the drug epidemic in this country do not establish that Michigan's penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine -- in terms of violence, crime, and social displacement -- is momentous enough to warrant the deterrence and retribution of a life sentence without parole.

Harmelin v. Michigan, 111 S.Ct. at 2705-06 (concurring opinion of Kennedy, J., joined by O'Connor and Souter, JJ.) (emphasis added in part; citations omitted in part).

Moreover, courts are willing to consider the prospective or threatened harm posed to society by the criminal activity generally. Id. 111 S.Ct. at 2706 (citing the "threat posed to the individual and society by possession of this large an amount of cocaine" (emphasis added)). See also id., 111 S.Ct. at 2698:

> But surely whether it is a "grave" offense merely to possess a significant quantity of drugs -- thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute -- depends entirely on how odious and socially threatening one believes drug use to be.

(opinion of Scalia, J. joined by Rehnquist, C.J.; (emphasis added)).

Equally important, the portion of Justice Kennedy's opinion in Harmelin clearly underscores the propriety of relying on empirical scientific and social studies to establish the serious nature of the underlying criminal offense. Statements regarding the relative seriousness of the crime are most common in the case law on drug offenses as the foregoing examples serve to illustrate. Numerous studies are available concerning the deleterious social consequences of drug trafficking and drug abuse. Many of them are cited, and their findings summarized, in the publication of the Department of Justice, Bureau of Justice Statistics entitled Drugs, Crime, and the Justice System: A National Report (Dec. 1992) (NCJ-133652).[46] Other studies have been collected by the Asset Forfeiture Office, Criminal Division (202-514-1263). In the area of non-drug offenses, empirical data and studies may be most readily available from the law enforcement agency with jurisdiction over the particular offense (e.g., the effects of illegal immigration on the national economy; the effects of bank fraud or other fraudulent conduct; the effects of currency reporting violations). Another useful source of statements concerning the relative seriousness of the underlying crime are statements made in the legislative histories of the substantive criminal statutes in question. In short, counsel should exploit every conceivable resource available to them in arguing the seriousness of the crime.

Extreme caution should be exercised, however, in emphasizing the nature of the underlying crime as a factor justifying forfeiture under the Eighth Amendment. Congress has authorized forfeiture for a wide variety of federal crimes, ranging from drug offenses to immigration offenses,[47] copyright infringement violations,[48] offenses involving altered identification numbers on motor vehicles and motor vehicle parts,[49] the shipment or transportation of "unmarked" prison-made goods,[50] illegal

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[46]The publication states that additional copies are available through the:

Bureau of Justice Statistics
Clearinghouse
Box 6000
Rockville, MD 20850
(800) 732-3277.

[47]8 U.S.C. § 1324(b).

[48]17 U.S.C. § 509.

[49]18 U.S.C. § 512. See also 18 U.S.C. § 982(a)(5)(A).

[50]18 U.S.C. § 1762(b).

gambling businesses,[51] fraud offenses affecting financial institutions,[52] "carjackings" and other motor vehicle crimes,[53] customs offenses,[54] exportation of war materials or other articles in violation of law,[55] internal revenue offenses,[56] and currency reporting violations,[57] to name but a few examples. In addition, both the RICO forfeiture statute, 18 U.S.C. § 1963, and the money laundering forfeiture statutes, 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1), authorize forfeitures for RICO violations and money laundering violations premised on underlying violations of numerous state, federal and even foreign laws.[58] No one would suggest that all of these crimes are equally serious either in terms of their individual attributes or their impact on society generally. Does this mean that courts should more readily find that forfeitures are constitutionally excessive based on their subjective opinions of which of these crimes are more or less serious in nature than others? Not at all.

The Supreme Court has consistently stated that in evaluating Eighth Amendment challenges courts grant "substantial deference" to the legislative judgment as to what sanctions are appropriate for the criminal conduct in question.[59] Most recently, a majority of the Court reiterated the substantial degree of deference to be accorded legislative judgments as to the appropriate penalties. See Harmelin v. Michigan, 111 S.Ct. at

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[51] 18 U.S.C. § 1955(d).

[52] 18 U.S.C. §§ 981(a)(1)(C)-(E); 982(a)(2)(A) and (a)(3)-(4).

[53] 18 U.S.C. §§ 981(a)(1)(F) and 982(a)(5).

[54] 19 U.S.C. § 1595a.

[55] 22 U.S.C. § 401.

[56] 26 U.S.C. § 7302.

[57] 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1); 31 U.S.C. § 5317(c).

[58] See 18 U.S.C. §§ 1961(1) (listing RICO "predicate" crimes) and 1956(c)(7) (listing "predicate" crimes for money laundering violations under 18 U.S.C. §§ 1956 or 1957).

[59] Solem, 463 U.S. at 290 ("[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"); Rummel v. Estelle, 445 U.S. 263, 275-76 (1980) ("the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts").

2703-07 (concurring opinion of Kennedy, J., joined by O'Connor and Souter, JJ.). Indeed, Justice Scalia, joined by Chief Justice Rehnquist, decried the use of a "proportionality" principle that permits judges to impose their subjective values against the considered judgment of the legislatures in determining what penalty "fits" the particular crime:

> . . . . The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that some assemblage of men and women has considered proportionate -- and to say that it is not. For that real world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.
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> * * * *
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> The difficulty of assessing [the] gravity [of the offense] is demonstrated in the very context of the present case: Petitioner acknowledges that a mandatory life sentence might not be "grossly excessive" for possession of cocaine with intent to distribute . . . . But surely whether it is a "grave" offense merely to possess a significant quantity of drugs -- thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute -- depends entirely upon how odious and socially threatening one believes drug use to be. Would it be "grossly excessive" to provide life imprisonment for "mere possession" of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as "grave" as the possible dissemination of heavy weapons. Who are we to say no? The Members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.

111 S.Ct. at 2697-98 (emphasis added in part).[60]

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[60] Accord Rummel v. Estelle, 445 U.S. at 274 ("'Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual [judges]'") (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (opinion of White, J.).

There is an additional reason, and one of enormous importance, for courts to give substantial deference to the legislative judgment as to the appropriateness of the forfeiture penalty for particular crimes: Congress itself has varied the maximum scope of potential forfeiture among the various crimes arguably to comport with its assessment of the relative gravity of the particular offense vis-a-vis other federal offenses authorizing forfeiture. For example, Congress has limited forfeitures for transportation of illegal gambling devices, copyright infringement, altering identification numbers of motor vehicles and motor vehicle parts, and shipment of "unmarked" prison-made goods solely to the illegal goods or articles themselves and, in one instance, the devices used in committing the offense;[61] it has limited forfeiture for immigration offenses to the conveyances (the vehicle, vessel, or aircraft) involved in the violations;[62] and it has limited forfeitures for illegal importation and exportation violations and for violations of the Lacey Act to the conveyances used in the violation and the goods or wildlife involved in the violation.[63] It is only with respect to the most serious offenses -- drugs, money laundering, RICO, sexual exploitation of children -- that Congress has expanded the scope of forfeiture to include such categories as "facilitating" real or personal property or an interest or property right in an "enterprise" operated in violation of RICO.[64] Thus, Congress has carefully tailored the scope of forfeiture to "fit" the nature of the underlying offense and courts should grant substantial deference to the Congressional judgment.

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[61]15 U.S.C. § 1177 (illegal gambling devices); 17 U.S.C. § 509 (copyright infringement; includes devices used in producing copies in violation of the copyright laws); 18 U.S.C. § 512 (altering identification numbers for motor vehicles and motor vehicle parts); 18 U.S.C. § 1762 (transportation or shipment of "unmarked" prison-made goods).

[62]See 8 U.S.C. § 1324(b).

[63]16 U.S.C. § 3374(a); 19 U.S.C. § 1595a(a); 22 U.S.C. § 401(a).

[64]18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1) (money laundering/currency reporting); 18 U.S.C. § 1963(a)(2) (RICO); 18 U.S.C. § 2253(a)(3) and 2254(a)(2) (sexual exploitation of children); 21 U.S.C. §§ 853(a)(2)-(3) and 881(a)(4),(6),(7) and (11) (drugs). See also 18 U.S.C. § 1467(a)(3) (authorizing forfeiture of "facilitating" real or personal property but authorizing the court to take into consideration "the nature, scope, and proportionality of the use of the property in the offense").

This is not to ignore the fact that violations of any given criminal statute vary in their relative seriousness. A given violation of a particular criminal statute is commonly viewed as more or less serious than another given violation. For example, one bank robbery may be viewed as more serious than another depending on such factors as the amount of money taken, the degree of force applied, and the severity of any physical harm inflicted in the commission of the offense. Moreover, persons commonly view one kind of crime as "more serious" than another (for example, murder is generally viewed as more serious than crimes against property). Courts, however, should be reluctant to mitigate forfeitures based on such comparisons for the following reasons.

First, permitting mitigation based on such comparisons is to invite the judiciary to engage in precisely the kind of subjective value judgments that Justice Scalia decried in his concurring opinion in Harmelin v. Michigan, 111 S.Ct. at 2697-98 (quoted supra at 35). As noted, the Congress has determined the scope of forfeiture appropriate for the particular offense based upon its collective judgment of relative seriousness. To mitigate a forfeiture based upon subjective evaluations of relative seriousness is to violate the substantial deference that the Supreme Court has held should be accorded the legislative judgment.

Second, forfeiture is imposed not as punishment for the underlying crime itself but as a sanction for the knowing involvement of property in the commission of the crime. One offender may commit a most serious drug offense without involving any of his or her property, for example by importing an enormous amount of heroin on foot or by common carrier. Courts may not order forfeiture -- or enhance the scope of forfeiture -- in such cases notwithstanding the highly serious nature of the underlying crime precisely because the wrongdoer was careful not to involve his or her valuable property in the commission of the offense. Another offender may commit what some might consider a relatively minor drug offense, for example by maintaining an ongoing marijuana cultivation operation in the attic of his home. The court should not mitigate the forfeiture based simply on its subjective assessment that the marijuana offense in the case before it is less serious than the aforementioned heroin importation offense. Rather, it should forfeit the home based upon the wrongdoer's knowing involvement of the residence in the commission of a continuing drug offense. As one panel has noted, nothing forced the owner to use his home as opposed to public property, or a separate tract of real property of lesser value, to cultivate the marijuana; it was the owner's conscious choice

to involve the his residence that placed it in jeopardy.[65] The sanction of forfeiture is imposed precisely as a consequence of that deliberate choice.

As these examples illustrate, forfeiture is imposed not as punishment for the underlying crime, but to enforce a social duty of care not to involve one's private property in the commission of crime. Indeed, it is the conscious choice made by the property owner -- not the seriousness of the underlying offense -- that entirely controls the scope of potential loss. The scope of forfeiture will be larger, smaller, or even non-existent depending solely on that choice. Forfeitures, therefore, differ markedly from traditional criminal sanctions such as terms of imprisonment or fines. For one thing, the sanction of forfeiture may be avoided entirely notwithstanding commission of a criminal offense. For another, the ultimate scope of the forfeiture sanction rests solely within the control of the property owner and has nothing to do with the exercise of discretion by the courts. A court may not enhance a forfeiture beyond the scope determined by the owner's decision, nor impose a forfeiture where no private property was involved in the criminal activity, even as to offenses that the court considers most serious and deserving of the most severe sanctions; it should, therefore, be enormously reluctant to mitigate a forfeiture based on its subjective judgment as to the relative seriousness of the underlying criminal activity. To do so is to undermine the unique purposes served by the sanction of forfeiture and simply to indulge the subjective judgments that Justice Scalia warned

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[65] See United States v. Tax Lot 1500, 861 F.2d at 235 (affirming forfeiture of real property valued at $94,810 based on the cultivation of 143 marijuana plants):

> [Claimant] chose to conduct his small farming operations on his own land which was subject to the risk of forfeiture. Some of his colleagues in the same business planted their crops on land already owned by the United States and managed somewhat randomly by various federal agencies. These growers faced the constant risk of losing their crop, but not that of losing their land. [Claimant] chose to keep his crop close to home. At the time of forfeiture, [claimant] had 143 plants growing over his garage and in his garden. The district court correctly concluded that this was not a case for judicial restraint.

(Emphasis added).

against in Harmelin v. Michigan, 111 S.Ct. at 2697-98 (quoted supra at 35).

Courts must, of course, follow the constitutional imperative and mitigate a forfeiture that violates the Excessive Fines Clause of the Eighth Amendment. As the foregoing paragraphs make clear, however, such cases should be quite rare and involve only the most egregious circumstances. Indeed, mitigation of a forfeiture sanction determined to be appropriate by the collective judgment of the Congress should be undertaken only where the imposition of the forfeiture sanction would shock the conscience or, as one panel has said, where the forfeiture sanction, in justice, may be said to be "more criminal than the crime." Sarbello, 985 F.2d at 724.[66]

Finally, there are occasional comments made in the Eighth Amendment case law to the effect that a crime is not sufficiently "serious in nature" to the extent that it is non-violent. See, e.g., United States v. Sarbello, 985 F.2d at 724 ("the offenses charged were non-violent and appear to be without irreversible or serious collateral consequence"); United States v. Busher, 817 F.2d at 1415 ("In considering the harm caused by defendant's conduct, it is certainly appropriate to take into account its magnitude: . . . whether physical harm to persons was inflicted, threatened or risked . . . ."). These statements should not be interpreted as requiring that some degree of physical harm exist before an offense may be deemed sufficiently serious in nature under the Eighth Amendment to permit imposition of a forfeiture penalty to its fullest extent. The Supreme Court has held that:

> [T]he presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal. A high official in a large corporation can commit undeniably serious crimes in the area of antitrust, bribery, or clean air or water standards without coming close to any "violent" or short-term "life-threatening" behavior.

Rummel v. Estelle, 445 U.S. at 275. Moreover, Rummel establishes that "attempts" are to be treated as equally serious in nature as completed offenses. Id. at 276 ("if Rummel had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands; yet Rummel would be no less blameworthy, only less skillful, than if he had succeeded").

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[66]See discussion infra at 58-59.

B. Extent of the Taint; Legitimately Acquired or Used Property: The fact that "facilitating" or "source of influence" property was legitimately acquired should be irrelevant to whether the property is properly forfeitable under the Eighth Amendment. Such property, by its inherent nature, should have been legitimately acquired for it otherwise would be subject to forfeiture as "proceeds" property under the most commonly used forfeiture statutes.[67] To consider the legitimate acquisition of "facilitating" or "source of influence" property to be a mitigating factor under the Excessive Fines Clause is simply to confuse two alternative and entirely independent theories of forfeiture. Thus, it should be argued that the legitimate acquisition of property has no place in Eighth Amendment analysis.

The same is true as regards the primary legitimate use of property. The fact that property is primarily used for legitimate purposes should neither spare nor mitigate its forfeiture where the property squarely satisfies any of the alternative factors under the aforementioned Eighth Amendment standard (i.e., the property facilitated or afforded a source of influence over extensive criminal activity, it played an integral or indispensable role in the commission of the criminal activity, and/or it was deliberately selected to secure a special advantage in the commission of the criminal act).

One court has held that legitimate acquisition or primary legitimate use of "facilitating" or "source of influence" property does not even suffice to constitute a prima facie showing of disproportionality:

> In his argument [appellant] focused on the nexus between the property and the illegal conduct, Littlefield, 821 F.2d at 1368, to support his contention that the forfeiture was grossly disproportionate under the eighth amendment. First, [appellant] points out that the warehouse system [used to store and distribute marijuana] itself only occupies 1.5 of the 5.5 acres of the property forfeited. He argues that he ran a

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[67]Indeed, it is only in the context of a "proceeds" forfeiture against property that was acquired with a mixture of illegal proceeds and legitimate funds that the "extent of the taint" merits any consideration whatsoever. See note 8 supra and accompanying text. In such cases, the portion of the property's value attributable to the illegal proceeds is subject to forfeiture as "proceeds" property; it is only the remaining portion that is subject to forfeiture as "facilitating" or "source of influence" property.

> legitimate business from the warehouse and that the property in question was used only tangentially for criminal activity. His disproportionality argument centers on a discussion of whether the forfeiture of an otherwise legitimate enterprise is per se disproportionate in violation of the eighth amendment, even though [21 U.S.C. § 853(a)(2)] mandates such a forfeiture. To prove an eighth amendment violation, however, [appellant] needs to show a gross disproportionality between the offense for which he was convicted and his entire penalty, Solem, 463 U.S. at 288, which includes the forfeiture of the whole lot. Busher, 817 F.2d at 1415. [Appellant] has not done so.
>
> Second, [appellant] argues that the warehouse system was neither erected nor maintained through illegal proceeds. Again, this contention, without more, does not prove a gross disproportionality between the offense and the entire penalty. The fruits of illegal activity do not enter into the statutory requirements under [21 U.S.C. § 853(a)(2)], nor do they per se indicate an eighth amendment violation.
>
> [Appellant] seems to be linking the requirements for forfeiture under § 853(a)(1) to his eighth amendment argument. Section 853(a)(1) provides for the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a)(1). This statutory requirement is irrelevant to a discussion of both a forfeiture under § 853(a)(2) and a disproportionate penalty under the eighth amendment.

United States v. Vriner, 921 F.2d 710, 713-14 and n.7 (7th Cir. 1991).

It should be possible in many cases to turn the "primary legitimate use" of "facilitating" or "source of influence" property from a mitigating factor into an "aggravating" factor justifying forfeiture of the property in question in its entirety. Quite often, property serves to "facilitate" criminal activity precisely because of its primary legitimate use. Indeed, such property is valued by the criminal element as a

"front" to conceal criminal activities and/or as a conduit through which illegal proceeds may be laundered and made to appear legitimate. Perhaps the strongest statement of this theory appears in United States v. Schifferli:

> [W]e hold that there was a substantial connection between Dr. Schifferli's office building and his drug offenses. Dr. Schifferli was convicted of illegally distributing and dispensing controlled substances by writing prescriptions that lacked legitimate medical purposes. Dr. Schifferli used his dentist office over forty times during a four-month period to write illegal prescriptions for eight individuals. Dr. Schifferli's dentist office was hardly incidental to these illegalities; on the contrary, it provided an air of legitimacy and protection from outside scrutiny, precisely because a dentist office is where prescriptions are usually written. Thus, the office was actually used in the course of his crimes and made the crimes "more or less free from obstruction or hindrance."
>
> This case admittedly differs from the typical factual setting for § 881(a)(7) forfeitures, in which a drug dealer uses real property, often a home, to store or sell illegal drugs. However, this difference strengthens, not weakens, our holding.... Here, the function of the property -- a dentist's office -- is directly related to Dr. Schifferli's illegal writing of prescriptions. If Dr. Schifferli did not have a dentist office, he could not hold himself out as a dentist and would not have had the ability to write illegal prescriptions. Dr. Schifferli emphasizes that the vast majority of the activity on the subject property was the legitimate practice of dentistry and that only twenty percent of the illegal prescriptions were written on the property. This argument overlooks the fact that **in virtually all cases**, the property subject to forfeiture also has legitimate uses. Section 881(a)(7) would be eviscerated if the presence of any legitimate use for the property defeated forfeiture.

895 F.2d at 991 (emphasis added).[68] As noted, this theory applies with particular force in money laundering forfeitures where legitimate property is often used to conceal the illegal

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[68]Accord United States v. Rivera, 884 F.2d 544, 546-47 (11th Cir. 1989), cert. denied, 494 U.S. 1018 (1990) (drug-trafficking enterprise operating out of five-acre horse ranch; "[the] horse breeding business and the horses . . . on hand were used as a cover for [the] drug trafficking activities"; "[a] jury could have found beyond a reasonable doubt that the horse breeding business was simply a front for . . . drug trafficking, a device that might help . . . avoid detection"); United States v. Parcel of Property Located at 155 Bemis Road, Manchester, NH, 760 F. Supp. 245, 251 (D.N.H. 1991) (drug trafficker used brother-in-law's legitimate business as purported source of employment and to obtain checks appearing to be legitimate funds in order to purchase house and car; "Here, the repeated use by [the drug trafficker] of the alleged status of an employee of State Scale and of the [business] address may well have served to provide 'cover' for his illegal drug transactions. And the use of State Scale checks and the [business] address in connection with his purchase of real and personal property suggests the probability that the adoption of such 'fronts' well serve to assist him in the laundering of the proceeds of such drug transactions."). See also United States v. 30 Ironwood Court, 776 F. Supp. 1242, 1245 (N.D. Ill. 1991) ("[Claimant] chose his home as the place to conduct the prohibited transaction -- and given the very special place that our Fourth Amendment jurisprudence gives to a person's home, it cannot be gainsaid that carrying out an illegal transaction in the comparative privacy of one's home 'facilitates' that transaction in any normal sense of the statutory term").

nature of the transaction or the illicit origin of the funds.[69] Counsel are urged to advocate this theory whenever appropriate.

C. Sentences Imposed in the Same or Other Jurisdictions: As noted earlier,[70] several courts, in addressing the Eighth Amendment in the context of civil or criminal forfeitures, have applied the three factors set forth by the Supreme Court in Solem v. Helm, 463 U.S. at 290-92. This adherence to the Solem factors has been criticized generally[71] and questioned in the context of forfeiture in particular.[72] This part of the memorandum addresses the second and third Solem factors: a comparison of sentences imposed on criminals in the same jurisdiction and a

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[69]See, e.g., United States v. Certain Accounts, Together with All Monies on Deposit Therein, 795 F. Supp. 391, 396-97 (S.D. Fla. 1992) ("'Innocent' funds are typically a prerequisite to the successful completion of money laundering, the essence of which is the purposeful mixture of tainted money with funds otherwise above suspicion. The more innocent the funds appear to be, the more difficult the crime becomes to detect. Therefore, funds are not immune from forfeiture solely because they are derived from innocent sources ...."); United States v. Certain Funds on Deposit in Account No. 01-0-71417, Located at the Bank of New York, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) ("Criminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue."); United States v. All Monies ($477,048.62) in Account No. 90-3617-3, Israel Discount Bank, New York, NY, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991) ("There is probable cause to believe that the Ontivero account was being used to help launder drug proceeds. As such, both the legitimate and tainted money in the account aided that end. The account provided a repository for the drug proceeds in which the legitimate money could provide a 'cover' for those proceeds, thus making it more difficult to trace the proceeds."). But see United States v. $448,342.85, 969 F.2d 474, 476-77 (7th Cir. 1992) (affirming summary judgment for claimant where complaint alleged that account, not the "clean" funds in the account, facilitated the laundering; distinguishing foregoing cases on this basis).

[70]See discussion supra at 14-17.

[71]See Harmelin v. Michigan, 111 S.Ct. at 2686 and 2696-98 (opinion of Scalia, J., joined by Rehnquist, C.J.), 111 S.Ct. at 2705-07 (concurring opinion of Kennedy, J., joined by O'Connor and Souter, JJ.).

[72]United States v. Sarbello, 985 F.2d at 722-23; United States v. Bucuvalas, 970 F.2d at 946 n.15.

comparison of sentences imposed on criminals in other jurisdictions.[73]

It must be noted initially that, assuming arguendo that the Solem factors apply at all in the forfeiture context, their application should be limited to only those instances in which the claimant or defendant makes a threshold showing of disproportionality. A majority of the Supreme Court in Harmelin favored either: (1) dispensing with the Solem test in all non-capital cases;[74] or (2) reaching Solem's intra- and inter-jurisdictional analyses only "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[75] Thus, the serious nature or gravity of the offense may alone be sufficient to establish proportionality and to dispense with consideration of the second and third Solem factors.[76]

But there is an additional reason why the second and third Solem factors should not apply to forfeitures at all. Forfeitures are entirely distinct from the standard elements of a criminal sentence: e.g., terms of imprisonment and fines. As explained by a panel of the Fifth Circuit:

> [T]he rationale that motivated Congress to reinstitute the forfeiture penalty [in RICO] indicates that it was enacted to serve a purpose other than that of a criminal sentence involving a fine or imprisonment. In consideration of the ineffectiveness of prior penalties in dislodging organized crime, Congress revived the penalty of criminal forfeiture to deprive those convicted of racketeering activity of their economic base so that they could not so easily continue illegal activities.

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[73]The first Solem factor -- the nature or gravity of the offense giving rise to forfeiture -- is discussed supra at 30-39.

[74]Harmelin, 111 S.Ct. at 2686 and 2696-98 (opinion of Scalia, J., joined by Rehnquist, C.J.).

[75]Harmelin, 111 S.Ct. at 2707 (concurring opinion of Kennedy, J., joined by O'Connor and Souter, JJ).

[76]Id. at 2707 ("In light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed.").

United States v. L'Hoste, 609 F.2d 796, 814 (5th Cir.), cert. denied, 449 U.S. 833 (1980) (citations omitted).

Moreover, forfeiture is sui generis because the scope of the penalty is controlled entirely, not by the court, but by the wrongdoing owner who determines what, if any, property is used in committing the offense. Although traditional criminal penalties of terms of imprisonment and fines may be varied in scope by the sentencing court upon consideration of such factors as the nature of the offense, the degree of defendant's culpability, defendant's acceptance of responsibility, etc., the scope of the forfeiture is determined solely by the property involved in the offense -- a determination made by the owner, not the court. Similarly, while a court is free to increase a fine above the minimum set for a particular offense, it can neither impose a forfeiture where no property was used in the offense nor increase the scope of the forfeiture beyond the property involved in the offense even if it feels that the value of such property does not adequately reflect the seriousness of the crime, the defendant's culpability, etc. Finally, it is generally impossible for a person found guilty of a crime to avoid some form of punishment involving such traditional components as terms of imprisonment, fines, probation, community service, etc.; however, the same person may avoid forfeiture altogether by the simple expedient of involving none of his or her private property in the commission of the criminal offense.

This distinction between forfeitures and other criminal sanctions is further underscored by the fact that Congress has consistently reiterated its intention that forfeitures, whether civil or criminal, are to be imposed in addition to or wholly apart from any fine, term of imprisonment, or other criminal penalty that may be imposed (or imposable) for the underlying criminal offense. Certain criminal forfeiture statutes expressly provide that the forfeiture is to be imposed "in addition to any other sentence imposed." 18 U.S.C. § 1963(a); 18 U.S.C. § 3554 (addressing both RICO and the drug statute); 21 U.S.C. § 853(a). Other criminal forfeiture statutes are not so explicit but mandate that forfeiture be imposed upon conviction and make no exceptions for considering the term of imprisonment or fine imposed. 18 U.S.C. §§ 982(a), 1467(a), 2253(a). Moreover, both the Sentencing Guidelines and the pertinent statutes treat forfeitures as something separate and apart from fines and terms of imprisonment and make no provision for consideration of a forfeiture in imposing a sentence.[77]

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[77]See Federal Sentencing Guidelines Manual § 5E1.4 (1993 ed.) (providing simply that "[f]orfeiture is to be imposed on a convicted defendant as provided by statute" (emphasis added)). See also 18 U.S.C. § 3553(a) (setting forth factors which may be considered in imposing a criminal sentence).

Civil forfeiture statutes make no express provision for considering any term of imprisonment or fine that may have been imposed for the relevant criminal offense nor should they since civil forfeitures may be imposed independent of any conviction for the underlying offense. Congress nonetheless provided for a stay of the civil forfeiture proceeding pending the outcome of any related criminal prosecution in the most commonly used civil forfeiture statutes. See, e.g., 18 U.S.C. §§ 981(g) and 2254(h); 21 U.S.C. § 881(i). Congress accordingly contemplated that where the government brings a parallel civil forfeiture action and related criminal prosecution, the civil forfeiture may be imposed sometime after completion of the criminal prosecution and the imposition of any criminal sentence therein.

Some courts nonetheless have compared forfeitures to the fines authorized for the relevant criminal offense in analyzing a challenge to the forfeiture under the Eighth Amendment.[78] These courts are divided over whether the court should consider only the maximum penalties applicable to the offense[79] or the penalties that would be imposed under the Sentencing Guidelines,[80] or both.[81]

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[78]United States v. Smith, 966 F.2d 1045, 1056 (6th Cir. 1992); United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, NY, 954 F.2d at 39; United States v. Vriner, 921 F.2d at 713; United States v. Monroe, 866 F.2d at 1367; United States v. Busher, 817 F.2d at 1415.

See also United States v. Pryba, 900 F.2d 748, 757 (4th Cir.), cert. denied, 498 U.S. 924 (1990) (justifying RICO forfeiture of 12 businesses, with total sales of $2 million in a single fiscal year, on basis of sale or rental of $105.30 worth of material found to be obscene; "such [a proportionality] analysis is not required because appellants did not receive a sentence of sufficient severity to trigger proportionality review" (citations omitted)).

[79]See United States v. Smith, 966 F.2d at 1056; United States v. Monroe, 866 F.2d at 1367.

[80]See United States v. Vriner, 921 F.2d at 713 (noting, inter alia, that defendant received less than the maximum term of imprisonment under the Sentencing Guidelines); United States v. Real Property: 835 Seventh Street, Renssalaer, Renssalaer County, NY, 820 F. Supp. 688, 694 (N.D.N.Y. 1993).

[81]United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, NY, 954 F.2d at 39 (analyzing both maximum penalties under federal and state laws and the penalties under the Sentencing Guidelines).

It may be beneficial in particular cases to emphasize that the value of the forfeiture, compared to the applicable criminal penalties of fines and terms of imprisonment, is not excessive. If so, counsel may cite this as additional support justifying the forfeiture. However, counsel must not advocate such a comparison as part of the Eighth Amendment standard. Forfeitures are distinct from fines and terms of imprisonment and Congress specifically contemplated that they would be imposed in addition to, and irrespective of, any such penalties imposed against the property owner. As previously stated, supra at 33-36, Congress has tailored the scope of the forfeiture remedy to correspond with its view of the relative seriousness of the underlying criminal conduct and courts owe "substantial deference" to this determination.

Finally, it makes no sense whatsoever to compare federal forfeiture remedies with penalties for similar offenses under state law as contemplated by the third Solem factor. Many federal offenses for which forfeiture is authorized have no corollaries under state law (e.g., immigration, import and export offenses, proceeds of foreign drug offenses, etc.). But even where such a corollary exists under state law, there are sound reasons not to consider the state law penalties in evaluating a forfeiture under the Eighth Amendment. First, many states do not have forfeitures for such corollary offenses and one cannot discern from this omission whether the states in question believe that forfeiture is inappropriate for such offenses or simply never considered the issue. Second, even where the state authorizes forfeiture for a corollary offense, many state forfeiture remedies have been dormant and unused from the time of enactment and the state legislature accordingly has had no reason to reconsider or enlarge the scope of the remedy. A final and related point is that made by Justice Scalia in criticizing the third Solem factor, a point that has particular pertinence in the context of forfeiture:

> As for the third factor mentioned by Solem -- the character of the sentences imposed by other States for the same crime -- it must be acknowledged that [it] can be applied with clarity and ease. The only difficulty is that it has no conceivable relevance to the Eighth Amendment. That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward -- punishing, for example, the killing of endangered wild animals for which

> other States are offering a bounty. What greater disproportion could there be than that? "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." Rummel, 445 U.S. at 282. Diversity not only in policy, but in the means of implementing policy, is the very raison d'etre of our federal system. Though the different needs and concerns of other States may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense, . . . nothing in the Constitution requires Michigan to follow suit. The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.

Harmelin, 111 S. Ct. at 2698-99 (opinion of Scalia, J., joined by Rehnquist, C.J.) (emphasis in original; citations omitted in part). Some state statutes provide for expansive forfeitures for virtually every crime while others provide for little, if any, forfeiture at all. Given this disparity, it seems futile to incorporate into the Eighth Amendment standard applicable to forfeitures, a need to compare the scope of the federal forfeiture with forfeitures for corollary offenses under state law.

D. Culpability of the Owner: A number of courts have cited the "culpability" of the owner as a factor for consideration in determining whether a given forfeiture is "excessive."[82] The Supreme Court in Austin found that forfeiture generally and

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[82]See, e.g., United States v. Sarbello, 985 F.2d at 724 ("Other helpful inquiries might include . . . the defendant's motive and culpability . . . ."); United States v. Busher, 817 F.2d at 1415 ("With regard to the defendant's culpability, Solem observed that, among other things, the defendant's state of mind and his motive in committing the crime should be considered"). Accord United States v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, WI., 943 F.2d 721, 728 and n.7 (7th Cir. 1991) (citing "the circumstances surrounding the defendant's criminal conduct" and "his motive in committing the crime" as "factors which are typically considered in determining proportionality" in criminal forfeiture cases); United States v. Vriner, 921 F.2d at 713 n.5 (dictum; same).

forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) in particular are premised on "the culpability of the owner."[83] This statement must be considered in light of the conclusion in Austin that forfeiture may properly be imposed "on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."[84] Indeed, the Court noted that forfeiture has been "justified" on grounds that even an "innocent" owner "may be held accountable for the wrongs of others to whom he entrusts his property" and explained that "this theory of vicarious liability is premised on the idea that the owner has been negligent."[85]

As Austin makes clear, an owner may be held "vicariously" liable in forfeiture, at least under several commonly used civil forfeiture statutes, for the wrongs committed by others to whom he or she negligently entrusted the property.[86] The overriding standard of culpability necessary to justify a forfeiture, therefore, should be one of negligence. Moreover, no distinctions should be drawn in terms of culpability between an owner who personally engages in criminal wrongdoing involving the property and one who negligently permits his or her property to be used by others in criminal activity. The latter is vicariously liable or culpable to the same extent as the former.[87] Any effort by the courts to mitigate a forfeiture

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[83]113 S.Ct. at 2812 (citing "the historical understanding of forfeiture as punishment [and] the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner").

[84]113 S.Ct. at 2808.

[85]113 S.Ct. at 2809-10 (emphasis added).

[86]Cf. United States v. 141st Street Corp., 911 F.2d at 880-81:

> In the present case, we fail to see how the Eighth Amendment's proportionality requirement applies. Neither [the claimant corporation] not its agents has been charged with or convicted of a crime. The [criminal] actions of the tenants, not [the claimant], rendered the building subject to forfeiture. Under these circumstances, we agree . . . that proportionality review, which asks whether a defendant deserves punishment, is irrelevant.

(Citations omitted).

[87]Moreover, because, under Austin, negligent, non-participating property owners are "vicariously" liable to the same extent as the criminal wrongdoers themselves, courts should

based on the fact that a "non-innocent" owner was not personally involved in the underlying crime should be strongly resisted on this basis.

A few cases cite the receipt of benefits from the criminal activity by the property owner as a consideration in determining whether or not a given forfeiture is constitutionally excessive.[88] None of these cases suggest that the receipt or non-receipt of criminally-derived benefits by the property owner is in any way dispositive of the "excessiveness" issue. Indeed, full forfeiture has been awarded on the basis of inchoate criminal offenses in which any anticipated benefits were never realized by the criminal wrongdoers or the owners.[89] Moreover, the Supreme Court has dismissed the receipt of benefits as irrelevant to an Eighth Amendment determination: "if [defendant] had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands; yet [defendant] would be no less blameworthy, only less skillful, than if he had succeeded." Rummel v. Estelle, 445 U.S. at 276. Thus, while the receipt of criminally-derived benefits may be argued as relevant evidence of an owner's culpability;[90] the non-receipt of benefits by an owner is simply immaterial and should not mitigate the owner's culpability to any extent.

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not properly be able to consider degrees of negligence (e.g., "gross" negligence vs. "mere" negligence) as factors justifying mitigation of forfeiture.

[88]United States v. Premises Known as 318 South Third Street, Minneapolis, Minn, 988 F.2d 822, 829 (8th Cir. 1993) ("The [owner] knowingly permitted gambling at the real property, and collected a percentage of the profits from the 'illegal gambling business'"); United States v. Sarbello, 985 F.2d at 724 ("Other helpful inquiries might include an assessment of the personal benefit reaped by the [owner]"); United States v. Busher, 817 F.2d at 1415 ("the court may consider the benefit reaped by the [owner]").

[89]See United States v. RD 1, Box 1, Thompsontown, 952 F.2d at 58-59 (money intended for use in drug transaction, but never so used, is subject to forfeiture; citing cases); United States v. Monroe, 866 F.2d at 1367 (refusing to consider the fact that no methamphetamine was actually produced on real property on which the makings of a production laboratory was discovered).

[90]As noted supra at 22, courts may legitimately consider future or anticipated criminal activity in determining whether a particular forfeiture violates the Excessive Fines Clause. It logically follows that courts may also consider benefits that the owner would have received but for termination of the criminal activity.

E. Value of Drugs or Contraband vs. Value of the Property: There are isolated statements in the case law to the effect that courts should compare the value of the drugs or contraband involved in an offense with the value of the property to be forfeited in order to determine whether the forfeiture is constitutionally excessive. For example, a panel of the Ninth Circuit remanded a marijuana cultivation case for a determination of whether forfeiture of the entire property on which the marijuana was growing, together with other punishments imposed on the defendant, would violate the Eighth Amendment. United States v. Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987). The panel stated that:

> In making that determination, the court is not limited to the factors specifically mentioned in Busher, but may take into account other relevant considerations, including the value of the illegal drugs cultivated on the property, and the nexus between the portion of the property actually used to grow the marijuana plants and the rest of the land.

(Emphasis added).[91] Other courts, however, have disagreed with this suggestion.

In United States v. Bucuvalas, 970 F.2d at 946, the panel rejected as immaterial any comparison between the value of contraband compared and the value of the property:

> Without attempting to establish the actual loss to its victims, [defendant corporation] bases its entire disproportionality assessment on the bare contention that the value of its forfeited property grossly exceeded the value of the licenses and back taxes of which it deprived the City of Boston and the Commonwealth of Massachusetts. . . . The Busher court itself recognized that bald assertions of this nature are insufficient, noting that such pecuniary discrepancies naturally result from the congressional intendment that criminal forfeitures under RICO are to serve punitive rather than compensatory purposes. Busher, 817 F.2d at 1415.

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[91] Accord United States v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, WI., 943 F.2d at 728 n.7 (citing Busher and Littlefield factors).

(Emphasis in original).

Moreover, the Ninth Circuit held subsequent to Littlefield that forfeiture of an entire parcel of property was justified by the fact that appellant's marijuana "grow" operation, consisting of 143 plants growing in an area of less than 200 square feet, was so extensive as to obviate any need to compare the value of the marijuana against that of the real property:

> Given this extensive operation, we find no need to go into the relative values of [the marijuana] crop and [the] real property.

United States v. Tax Lot 1500, 861 F.2d at 235.

Further support for this view may be found in the Supreme Court's decision in Rummel v. Estelle. The Court noted that:

> In an attempt to provide us with objective criteria against which we might measure the proportionality of his life sentence, Rummel points to certain characteristics of his offenses that allegedly render them "petty." . . . . Rummel cites the "small" amount of money taken in each of his crimes. But to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen $5,000, $50,000, or $500,000, rather than the $120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed "subjective," and therefore properly within the province of legislatures, not courts. Moreover, if Rummel had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands; yet Rummel would be no less blameworthy, only less skillful, than if he had succeeded.

445 U.S. at 275-76 (majority opinion of Rehnquist, J.).

Finally, in the case of drug forfeitures, comparing the value of drugs to the value of the property being forfeited makes no sense at all. It is well known that the average cost of a dosage unit of "crack" cocaine is but a small fraction of the cost of a dosage unit of heroin; yet it is difficult to argue that one is more socially harmful and costly than the other. Even as to individual drugs, the price varies dramatically

according to place of origin, place of sale, and time of sale.[92] Moreover, drug prices increase at each stage of trafficking notwithstanding a typical corresponding drop in purity at each level.[93] Finally, comparing the value of drugs seized to the value of the property to be forfeited ignores completely evidence of past drug trafficking or intent to engage in future drug dealing and also bears no relation to the social harms and costs associated with abuse of a particular drug.

Courts nonetheless have occasionally relied on such comparisons in adjudicating constitutional challenges to forfeiture. In United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, NY, 954 F.2d at 36, the panel held as follows regarding determinations whether a civil drug forfeiture of real property constituted "punishment" for purposes of the Double Jeopardy Clause:

> Where the seized property is not itself an instrumentality of crime . . . and its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is punitive in nature. In using the value of the drugs as a rough measuring stick, we follow the Halper Court's decision to evaluate the value obtained by Halper's criminal conduct. We also note that the Sentencing Commission, through the Guidelines, has utilized the weight of drugs and, implicitly, their value to differentiate between punishments for violations of the narcotics law.

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[92]See price data set forth in Addendum A.

[93]Ten kilograms of opium from Mexico is valued at $15,000 to $80,000. After the opium is transformed into heroin of 40% to 70% purity, it sells at the wholesale level in the United States for $70,000 to $140,000 per kilogram. The heroin then reaches the mid-level stage of U.S. distribution, where its purity is reduced of 20% to 70% and it sells in the range of $160,000 to $700,000 per kilogram. Finally, "Black Tar" heroin, derived from Mexican opium, of 20% to 60% purity sells on the street for $275,000 to $1,250,000 per kilogram. Thus, the street price of the heroin is between 153 and 183 times the price at cultivation. Bureau of Justice Statistics, Drugs, Crime and the Justice System: A National Report, at 54 (Dec. 1992).

(Emphasis in original). The panel, however, did not address the following two considerations.

First, the offense at issue in United States v. Halper, 490 U.S. 435 (1989), involved false claims against the government that resulted in the offender receiving unjustified Medicare payments from the government. The social harm resulting from the offense, therefore, could realistically be evaluated by looking solely to the "value" realized by the wrongdoer in terms of the monetary loss to the government and ultimately to the taxpaying public. Illegal drug trafficking, by contrast, obviously entails a multitude of social harms and costs of an entirely different dimension (e.g., health costs, drug-addicted infants, AIDS, drug treatment and rehabilitation, prison and criminal justice costs, lowered productivity among drug abusers). The "value" of the illegal drugs in a particular case bears absolutely no proximate relationship to these harms and costs.

Second, the Sentencing Guidelines do indeed utilize the weight of drugs to differentiate between punishments for drug violations. The "gross weight" gradations used in the Guidelines are based on similar gradations used in the "mandatory minimum" penalty provisions of the drug statutes, e.g., 21 U.S.C. § 841(b)(1)(A)-(B). See Federal Sentencing Guidelines Manual § 2D1.1(c) and Application Note 10 (1993) ("The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences"). Congress, in turn, based the quantities used in the "mandatory minimum" penalty provisions not on the value of the drugs involved in the offense, but rather on the quantities of a particular drug that are normally involved in trafficking conducted by high-level and retail-level offenders. See H.R. Rep. No. 845 Pt. I, 99th Cong., 2d Sess. at 12 (1986). The Supreme Court specifically upheld this weight-based scheme as rational in Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919, 1927-28 (1991). Contrary to the above-quoted view of the Second Circuit in Whalers Cove, the weight-based penalty gradations have absolutely no correlation whatsoever to the value of the drug involved in the offense. This fact is illustrated by the majority opinion in Chapman which noted that the gross weight of 100 "doses" of LSD -- which presumably would have the same value[94] -- varied considerably depending upon the "carrier medium" used (e.g., sugar cube, blotter paper, gelatin capsule). 111 S.Ct. at 1924 n.2. For example, 100 doses of LSD using sugar cubes as a "carrier medium" weighed 227 grams while 100 doses of LSD using blotter paper as a "carrier medium" weighed only 1.4 grams. Id. Quite obviously, the "gross weight" gradations used

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[94]The majority opinion in Chapman noted that "LSD is not sold by weight, but by dose." 111 S.Ct. at 1928.

in the Sentencing Guidelines have absolutely no correlation to the "value" of the drugs involved in the offense.

4. Should the Same Standards or Factors Apply to Civil and Criminal Forfeitures?: The Austin and Alexander opinions do not address whether the same standards or factors should apply to civil and criminal forfeitures. However, the Austin majority, perhaps significantly, rejects any "technical distinction" between in rem and in personam forfeitures.[95] Thus, it would seem to follow that the same standards or factors ought to apply to both civil and criminal forfeitures in resolving challenges under the Excessive Fines Clause.

Justice Scalia, however, in his lone concurring opinion in Austin, suggests that different standards may apply to civil in rem forfeitures than to criminal in personam forfeitures: "[T]he excessiveness analysis [for in rem civil forfeitures] must be different from that applicable to monetary fines and, perhaps, to in personam forfeitures." 113 S.Ct. at 2814 (emphasis added). Scalia based this statement on the following analysis:

> In the case of a monetary fine, . . . the touchstone is value of the fine in relation to the offense. And in Alexander v. United States, we indicated that the same is true for in personam forfeiture. ___ U.S., at ___, 113 S. Ct., at 2783 (slip op., at 14).
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> Here, however, the offense of which petitioner has been convicted is not relevant to the forfeiture. Section § [sic] 881 requires only that the Government show probable cause that the property was used for the prohibited purpose. . . . Unlike monetary fines, statutory in rem forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been

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[95]"We do not understand the Government to rely separately on the technical distinction between proceedings in rem and proceedings in personam, but we note that any such reliance would be misplaced. . . . [F]orfeiture proceedings historically have been understood as imposing punishment despite their in rem nature." 113 S.Ct. at 2808-09 n.9 (majority opinion of Blackmun, J.).

Moreover, as noted at note 10 supra, the majority opinion at times suggests that all forfeitures must be understood as serving, at least in part, the purpose of punishment.

> "tainted" by unlawful use, to which issue the value of the property is irrelevant. . . . The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.

113 S.Ct. at 2814-15 (concurring opinion of Scalia, J.) (emphasis in original).

The statement in Alexander to which Justice Scalia refers in the above-quoted passage is apparently that "[t]he in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different for Eighth Amendment purposes, from a traditional 'fine.'" Alexander, 113 S.Ct. at 2775-76, (majority opinion of Rehnquist, C.J.). However, this statement appears only as part of the majority's rationale for holding that criminal forfeitures are subject to the Excessive Fines Clause. It in no way suggests that criminal forfeitures must be analyzed under the same standard as "fines" under the Eighth Amendment, while civil forfeitures are to be measured under some different standard.[96] Indeed, Justice Scalia undermines, if not

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[96]Forfeitures, whether criminal or civil, are fundamentally different in application and effect from criminal fines. A "fine" is a statutorily authorized penalty, within a prescribed range, the value of which varies according to such factors as the seriousness of the offense, the culpability of the defendant, the defendant's criminal history, etc. The court alone determines the appropriate fine within the prescribed range. The scope or value of a forfeiture, however, is controlled entirely by the criminal non-innocent owner who alone determines what property is involved in a criminal offense. It has nothing at all to do with such factors as the relative seriousness of the particular violation, the owner's relative degree of culpability, or the owner's criminal history. A highly culpable owner may use nearly worthless property in the commission of a very serious violation just as a less culpable owner may use extremely valuable property in the commission of a relatively minor violation of the same criminal statute. In either case, the scope or value of the forfeiture will vary only according to the worth of the property involved in the offense. Thus, Justice Scalia's statement -- that "[u]nlike monetary fines, statutory in rem forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant," (Austin, 113 S.Ct. at 2815) -- applies with equal force to criminal in personam forfeitures.

Both criminal and civil forfeitures should accordingly be evaluated against the same standard under the Excessive Fines

contradicts, his own rationale for proposing that civil in rem forfeiture are to be measured by a different standard than criminal in personam forfeitures when he states, earlier in his opinion in Austin, that "the [civil] in rem forfeiture in this case is a fine." 113 S.Ct. at 2814 (emphasis in original). If this statement is to be taken literally, it would seem that both civil in rem forfeitures, at least to the extent that they are subject to a statutory "innocent owner" defense, and criminal in personam forfeitures are to be treated alike under the Eighth Amendment. This is not to say that they should necessarily be analyzed under the same standard as "fines"; it is only to point out that different standards are not required based on the form of forfeiture, civil or criminal, standing alone.

5. Burden of Establishing "Excessiveness": The courts that have addressed the issue have uniformly held that the claimant in a civil forfeiture, or the defendant in a criminal forfeiture, bears the burden of establishing "excessiveness" in the first instance. For example, a unanimous panel of the Seventh Circuit, in reviewing an Eighth Amendment challenge to a civil forfeiture, held that a claimant must meet a fairly demanding burden in challenging a forfeiture under the Excessive Fines Clause:

> If this Court were to treat civil forfeitures in the same manner as criminal forfeitures, then the same rules would govern both types of forfeiture. Regardless of the type of forfeiture, a claimant would be required to prove (rather than merely suggest) disproportionality. A claimant who argued, as [claimant] does in the present case, that the district court's forfeiture order was per se disproportionate under the Eighth Amendment would not prevail. United States v. Vriner, 921 F.2d 710, 712-13 (7th Cir. 1991) . . . . [Claimant] is not entitled to prevail on this issue because his disproportionality argument, like the defendant's argument in . . . Vriner, . . . does not extend beyond the contention that the government failed to show that his entire property was connected to drug activity.
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> . . . [Claimant] does not attempt to explain why the forfeiture is alleged to run afoul of the Constitution. . . . His argument constitutes little more than the mere suggestion that the Court should consider whether the district court's forfeiture order may have been excessive. . . . What is missing from

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Clause.

> [claimant's] argument is an explanation of why the forfeiture order which was entered in the present case was excessive under the Eighth Amendment's excessive fines clause or its cruel and unusual punishment clause. [Claimant] mentions but does not discuss, weigh, or attempt to assign a value to the factors which are typically considered in determining proportionality. See United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), and United States v. Vriner, 921 F.2d 710, 713, n. 5 (7th Cir. 1991).

United States v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, WI, 943 F.2d at 728 (emphasis added in part; footnotes omitted).[97]

III. Excessive Forfeitures Are To Be Found Only in the Rarest or Most Extreme Cases

It seems clear that only in the rarest and most extreme cases will forfeitures be held to violate the Excessive Fines Clause. The Sarbello panel, in the most recent circuit court case to address criminal forfeitures under the Excessive Fines Clause, stated that "[t]he language of the eighth amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime." 985 F.2d at 724 (emphasis added). This view was echoed by Judge, now Chief Judge, Arnold of the Eighth Circuit, who stated that:

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[97]Accord United States v. Sarbello, 985 F.2d at 724 (criminal RICO forfeiture; "We . . . recognize a presumption of 100% forfeiture under § 1963(a)(2), which may be rebutted by a prima facie showing of disproportionality. . . . [T]he burden of mitigating a draconian forfeiture verdict rests with the defendant" (citations omitted)); United States v. Bucuvalas, 970 F.2d at 946 (criminal RICO forfeiture; "we conclude that [defendant] cannot succeed on the showing required to support the 'initial inference of gross disproportionality' needed for a successful Eighth Amendment challenge"); United States v. Vriner, 921 F.2d at 713 ("[Defendant] needs to show a gross disproportionality between the offense for which he was convicted and his entire penalty, . . . which includes the forfeiture of the whole lot"; citation omitted)); United States v. Pryba, 900 F.2d at 757 ("Even if we thought a proportional analysis was required, appellants have failed to proffer the information that would be required for such an undertaking"); United States v. Walsh, 700 F.2d 846, 857 (2d Cir.), cert. denied, 464 U.S. 825 (1983) ("The burden of moving to ameliorate the harshness of a forfeiture verdict . . . rests on the defendant. The government [is] under no obligation to present evidence of the degree to which . . . assets were 'tainted' by [the] illegal activities").

> We are not . . . foreclosing the possibility that a given use of the forfeiture statutes may violate the Excessive Fines Clause of the Eighth Amendment. Just as a life sentence for a traffic violation would be so disproportionate as to violate the Cruel and Unusual Punishments Clause, so one can imagine applications of the forfeiture statutes that would be so draconian as to violate the Excessive Fines Clause.

United States v. Premises Known as 3639-2d St., N.E., Minneapolis, Minn., 869 F.2d at 1098 (concurring opinion). It is noteworthy that Judge Arnold made this remark while concurring in the civil forfeiture of a tract of residential real property from which the claimant had sold two ounces of cocaine and on which police discovered small amounts of cocaine, cocaine distribution paraphernalia, and more than $12,000 in currency. It seems that if forfeitures are to be declared excessive only where the forfeiture would be the equivalent of a life sentence for a traffic violation and where "in justice the punishment is more criminal than the crime," then successful challenges should be rare indeed.

IV. Whether Corporations Are Protected

The issue of whether corporations and other non-personal legal entities (e.g., partnerships) are protected by the Eighth Amendment generally and the Excessive Fines Clause in particular is unresolved. See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. at 276 n.22 ("nor shall we decide whether the Eighth Amendment protects corporations as well as individuals"); Bucuvalas, 970 F.2d at 946 ("We bypass the unresolved question of whether a corporation may assert an Eighth Amendment claim"). Full consideration of this issue is beyond the scope of this memorandum. Counsel faced with assertion of an Eighth Amendment defense by a corporation or other non-personal legal entity in a forfeiture case may seek assistance from the Asset Forfeiture Office, Criminal Division, in preparing a response.

V. Whether Courts Have Discretion to Mitigate An Excessive Forfeiture

The final issue for consideration is whether courts have authority to mitigate a forfeiture found to be constitutionally

excessive. The uniform rule appears to be that courts possess such discretion.[98]

Indeed, the only case arguably to the contrary is the pre-Austin civil forfeiture decision in United States v. Premises Known as 318 South Third Street, Minneapolis, Minn., 988 F.2d at 822. There, the claimant argued that forfeiture of its real property violated both the Eighth Amendment and the plain meaning of the "illegal gambling business" forfeiture statute, 18 U.S.C. § 1955(d). Id. at 827. The panel, citing Eighth Circuit precedent, first held that the Eighth Amendment does not apply to in rem civil forfeitures, id., a holding no longer valid in view of Austin. Having disposed of the constitutional issue, the panel then turned to an analysis of the forfeiture statute. It held that courts have statutory discretion over forfeitures under section 1955(d) but suggested that this discretion is limited only to permitting or dismissing the forfeiture:

> The statute provides that "[a]ny property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." . . . . We think that a literal reading of the clause "may be seized and forfeited" allows the courts some discretion in ordering forfeitures. The language is permissive as opposed to the mandatory provisions found in some other forfeiture statutes. [Citing 18 U.S.C. § 1963(a), 21 U.S.C. §§ 848(a)(2) and 881(a).] Rather than requiring the automatic forfeitures that those statutes demand, the plain language of section 1955(d) leaves room for judicial discretion.
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> Congress's choice of this alternative, more equivocal, language for the forfeiture provision in section 1955 is significant. Other courts that have considered the issue have agreed that the language "may be seized

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[98] United States v. Sarbello, 985 F.2d at 718 ("We hold that the court may reduce the statutory penalty in order to conform to the eighth amendment"); United States v. Busher, 817 F.2d at 1415 ("Even though the statute provides no discretion, the district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds"). See also United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980) ("[Section 1963(c) of RICO] permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision").

> and forfeited" should be read to allow discretion in determining whether to allow or refuse forfeitures. We think that Congress's employment of the word "may" in the forfeiture provision at issue, rather than the more commonly used "shall," compels a finding that forfeitures are not mandated by the statute, but are left to the discretion of the courts. Therefore, we hold that a court can refuse a forfeiture if it seems to work a disproportionate penalty in light of the peculiar facts of a particular case.

Id. at 827-28 (citations and footnote omitted; emphasis added in part). The panel found further support for this conclusion in the legislative history of section 1955. Id. at 828.

It must be emphasized that the panel was only addressing the court's statutory authority over forfeitures under section 1955(d) and did not reach what, if any, discretion a court may have if it found that a particular forfeiture was excessive under the Eighth Amendment. Indeed, consideration of the latter topic was foreclosed by the panel's conclusion that the Eighth Amendment simply did not apply. Courts, therefore, arguably have discretion to mitigate a forfeiture so as to stay within constitutional bounds, regardless of whatever statutory authority they may lack or possess.[99] This conclusion seems to follow from the fact that if a defendant's criminal sentence is found to violate the Cruel and Unusual Punishment Clause, the remedy is not to dismiss the criminal prosecution but to mitigate the sentence so as to conform to constitutional limitations.[100]

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[99]See cases cited in note 98 supra.

[100]See, e.g., Helm v. Solem, 684 F.2d 582, 587 (8th Cir. 1982) (after finding that sentence violated the Cruel and Unusual Punishment Clause, remanding to district court with instruction to issue requested writ of habeas corpus if state had not resentenced petitioner within sixty days), aff'd sub nom. Solem v. Helm, 463 U.S. 277 (1983).

Id., at 54 (citing DEA, Illegal drug wholesale/resale prices report, 1985 to March 1988 and Illegal drug price/purity report, United States, Calendar year 1988 through June 1991, at 2 (Oct. 1991).

DEA provided the Narcotic and Dangerous Drug Section, Criminal Division, with additional data on the price per kilogram of cocaine for 1989 through 1992 as follows:

	1989	1990	1991	1992
	(Prices in thousands of dollars)			
National Range	$11 - 35	$11 - 40	$11 - 40	$11 - 42
Miami	$16 - 22	$16 - 25	$14 - 25	$13.5 - 25
New York	$17 - 25	$20 - 38.5	$14 - 29	$12.5 - 35
Chicago	$19 - 25	$18 - 35	$18 - 30	$17.5 - 37
Los Angeles	$14 - 20	$14 - 32	$12 - 28	$11 - 20

ADDENDUM A

Variance in Prices for Controlled Substances

A published and publicly available source, citing DEA data, indicates that the wholesale prices for marijuana and cocaine, at any given time, varies by country of origin with the mid-1991 price per pound of Mexican marijuana between $350 to $1,600; of Colombian marijuana between $800 and $1,000; of Thai marijuana between $2,000 and $3,000; of Jamaican marijuana between $1,500 and $2,000 for "commercial grade" or $2,000 to $3,000 for "sinsemilla"; of out-door grown domestic marijuana between $450 and $2,000; and of indoor-grown domestic marijuana between $500 and $5,000. Bureau of Justice Statistics, Drugs, Crime and the Justice System: A National Report, at 54 (Dec. 1992) (citing DEA report From the source to the street: Mid-1991 prices for cannabis, cocaine, and heroin, at 2, 5-6).[1] The mid-1991 wholesale price per kilogram for cocaine ranged from $1,000 to $2,500 for Bolivian cocaine; from $800 to $1,500 for Colombian cocaine; and from $3,000 to $8,500 for Peruvian cocaine. Id.

The same source indicates that retail price per gram of cocaine varied by place of sale and over time from 1986 to 1991 as follows:

	1986	1987	1988	1989	1990
National Range	$80-120	$80-120	$50-120	$35-125	$35-175
Miami	$50-60	$50-60	$55-85	$50-80	$35-80
New York	$70-100	$80-100	$50-90	$50-80	$50-80
Chicago	$100	$100	$75-100	$70-100	$60-100
Los Angeles	$100	$100	$50-100	$60-125	$80-125

	1st-Half 1991
National Range	$40-175
Miami	$60-70
New York	$50-90
Chicago	$100-140
Los Angeles	$80-125

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[1]The Narcotic and Dangerous Drug Section, Criminal Division, contacted DEA to confirm these figures and was told that the figures varied somewhat from those published in the above-cited report. According to DEA, the mid-1991 price per pound of Mexican marijuana was between $400 and $1,600 and the mid-1991 price per pound of outdoor-grown domestic marijuana was between $400 and $3,000. All other figures were correct.