

## FOURTH CIRCUIT UPDATE

July 17, 2006

### ***United States v. Alamoudi*, Docket No. 05-4359 (26 June 2006)**

Case concerns the extent of the Government's authority to seek forfeiture of substitute assets following the entry of a plea agreement and a consent order of forfeiture. Court of Appeals affirms the district court's grant of the Government's motion for forfeiture of substitute assets.

Defendant was convicted of engaging in prohibited financial transactions with Libya (50 U.S.C. § 1705), unlawfully obtaining naturalization (18 U.S.C. § 1425(a)), and corruptly endeavoring to impede the due administration of the internal revenue laws (26 U.S.C. § 7212(a)). Defendant agreed, as part of the plea agreement, to forfeit \$910,000 in property related to his criminal activity. He also agreed to "waive all constitutional and statutory challenges in any manner . . . to any forfeiture carried out in accordance with this plea agreement on any grounds." The court accepted the plea agreement and entered a consent order of forfeiture in which Defendant agreed to forfeit \$340,000 in cash already confiscated by British authorities, as well as an additional \$570,000.

After a year and a half, the Government moved for forfeiture of substitute assets, stating that it was unable to locate the additional \$570,000, despite diligent effort. The Government requested forfeiture of three parcels of real property and an automobile. The district court granted the Government's motion.

The Court of Appeals concluded that nothing in the plea agreement or consent order expressly prohibited the Government from seeking forfeiture of substitute assets. Therefore, it held that the statutory scheme controls the outcome of the issue.

When a defendant is convicted of violating 50 U.S.C. § 1705, the court is required to order forfeiture of the property as part of the sentence, pursuant to 28 U.S.C. § 2461(c). To carry out such a forfeiture, the court must follow the procedures set out in 21 U.S.C. § 853. The Court of Appeals concluded that, pursuant to 21 U.S.C. § 853, when the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property.

Defendant also argued that the district court violated his Sixth Amendment rights by permitting forfeiture of substitute assets based on facts not found by a jury beyond a reasonable doubt, in violation of *Booker*. The Court held that, because there is no statutory or other limit on the amount of a forfeiture, a forfeiture order can never violate *Booker*. "The Sixth Amendment applies neither to criminal forfeitures in general nor to a district court's order permitting the forfeiture of substitute assets in an appropriate case."

### ***Buckner v. Polk*, Docket No. 05-14 (26 June 2006)**

Habeas appeal by North Carolina death row inmate. The Court rejected defendant's

arguments that: (1) he presented evidence of his actual innocence of the crime; (2) he received ineffective assistance of counsel at sentencing; (3) the prosecutor's argument referencing his post-arrest silence violated his Fifth Amendment rights. Judge Gregory dissented with respect to the issue of ineffective assistance on the grounds that the trial attorneys were ineffective in failing to pursue evidence of Defendant's psychological trauma.

***United States v. Perez-Pena*, Docket No. 05-5054 (30 June 2006)**

The Government appealed in this illegal re-entry case from the E.D.N.C. after the district court imposed a below-guidelines sentence primarily to avoid an "unwarranted sentence disparity" between Perez-Pena and defendants who had participated in a "fast track" program. The Court of Appeals found the sentence unreasonable, vacating and remanding for resentencing.

Perez-Pena originally had been deported after being convicted in Florida of the felony of committing a lewd, lascivious, or indecent act upon a child (sexual intercourse with a 12-year-old on several occasions when he was 21 years old). The trial court sentenced him to 24 months, which was 13 months less than the low end of his guideline range.

The Court of Appeals held that it was error in this post- *Booker* case to impose a below-guideline sentence to account for sentences received by defendants participating in fast-track programs.

***United States v. Smith*, Docket No. 04-4574 & 05-4575 (30 June 2006)**

Defendants Smith and Smallwood appealed their convictions and sentences arising from a large crack cocaine conspiracy and murder. They argued that the trial court erred by rehabilitating government witnesses and frequently interrupting defense counsel's cross-examination and that venue was lacking.

Court reviewed the first issue for plain error and found none.

Defendants argued that venue was not proper in the Eastern District of Virginia, because many of the events related to the drug conspiracy occurred outside of Virginia, and the victim was murdered in Washington, DC. The Court held that venue was proper, because various acts in furtherance of the drug conspiracy took place in the Eastern District of Virginia and, although the defendants killed the victim in D.C., the drug conspiracy, an essential element of the murder conviction under 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 924(j), involved acts perpetrated in the Eastern District.