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United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF TEXAS
DALLAS, TEXAS 75221

February 7, 1966

AIRMAIL

Mr. Carl W. Belcher, Chief
General Crimes Section
Criminal Division
Department of Justice
Washington, D.C. 20530

ATTN: Joseph J. Cella

Re: One 6.5 mm. Mannlicher Carcano Military Rifle, Model 91-38, Serial No. C2766 With Appurtenances, and One .38 Special S & W Victory Model Revolver, Serial No. V510210, With Appurtenances
Dept. Ref.: FMV:CWB:pem 129-11

Dear Mr. Belcher:

I enclose one copy each of the Government's supplemental and reply brief and Government's additional requested conclusions of law, which I have today filed with the District Clerk in accordance with the Court's pre-trial order in the captioned case. I also enclose one copy of Claimant John King's supplemental and reply brief which has just been delivered to my office.

Very truly yours,

Melvin M. Diggs
United States Attorney

B. H. Timmins, Jr., Assistant
United States Attorney

Enclosures

29-11
DEPARTMENT OF JUSTICE
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RMD

29-11

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA, Libelant, v. ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES, Respondents.	CIVIL NO. 3-1171

GOVERNMENT'S SUPPLEMENTAL AND REPLY BRIEF

I N D E X

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UNITED STATES OF AMERICA, Libelant, v. ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES, Respondents.	CIVIL NO. 3-1171

GOVERNMENT'S SUPPLEMENTAL AND REPLY BRIEF

This brief is supplemental to that filed at the time of the pretrial conference on January 27, 1966, to cover matters raised during the pretrial conference and matters not raised by the pleadings but introduced by claimant's brief. It is also in reply to some matters raised by claimant's brief but covered only in a general way in the government's pretrial brief. Matters covered herein are:

I. Reply to Argument of Claimant.

II. Effect, if any, of Public Law 89-318 on Question of Forfeiture.

III. Constitutionality of Forfeiture Proceedings Under 15 U.S.C. 905(b) as Applied to This Case.

IV. Effect on These Proceedings of Supreme Court's Holding That Forfeiture Proceedings Are Quasi-Criminal.

I. Reply to Argument of Claimant.

Claimant on pages 2 and 3 of his brief filed on pretrial lists three defects (or difficulties) in the government's assertion that the giving of a fictitious name by Lee Harvey Oswald and the use of this fictitious name by the firearms dealers resulted in a failure to keep the records required of licensed firearms dealers and therefore resulted in violations of provisions of the Federal Firearms Act and of regulations promulgated thereunder. In numbers one and two, the claimant completely overlooks the provisions of 18 U.S.C. 2 concerning inducing or procuring the commission of an offense

and concerning causing an act to be done. We have covered this matter in detail on pages 9 through 12 of our pretrial brief. Also, in item number 2 claimant infers that although the government might by law or regulation require the furnishing of information such as the name of the purchaser of firearms, it is powerless to object if the information is false. This is covered on pages 10 and 16 of our pretrial brief wherein we cite Hensley v. United States, 171 F. 2d 78 (9th Cir. 1948), cert. den. 336 U.S. 904, that the government does not have to tolerate the furnishing of false information. This case involved the showing of fictitious names as the purchasers of liquors. In item three the claimant, in effect, asserts that the firearm, which is the subject of the false entry in the required records, is not involved in the violation of the Federal Firearms Act or regulations but that it is the record which is so involved. The government's position on this is set out on pages 12 and 13 of our pretrial brief wherein we cite numerous cases where property has been forfeited because of false entries in required records relating to liquors. In some of these cases liquors were forfeited and in others, automobiles were forfeited.

It is the claimant's position that the firearms were not involved in the violation where the violation was the false entry in the record of disposition of the firearm. In addition to the cited cases declaring forfeiture of liquors involved in record keeping violations concerning such liquors, there are numerous cases holding that money is forfeited as involved in the law violation of engaging in the business of accepting wagers and failing to pay the special tax required by 26 U.S.C. 4411. United States v. Currency in the Amount of $2,223.40, 157 F. Supp. 300 (N.D. N.Y. 1957); United States v. $1,508.40, 158 F. Supp. 916 (S.D. Ill. 1958); United States v. $4,298.80, 179 F. Supp. 251 (D. Md. 1959); United States v. Leveson, 262 F. 2d 659 (5th Cir. 1959); United States v. Frank, 265 F. 2d 529 (5th Cir. 1959). In Mardirosian v. United States, 337 F. 2d 759 (1st Cir. 1964), the Court stated that there is no merit to the position that bookmaking records, bet slips, run-down slips, pencils, and an adding machine were not seizable as the means of committing the offense of engaging in wagering without payment of the special tax. In United States v. Ryan, 284 U.S. 167, 172, 76 L. Ed. 224 (1931), trade fixtures of a soft drink parlor were forfeited as implements

and connected instruments in the operation of a saloon selling untaxpaid distilled spirits. The Court in sustaining the forfeiture said,

> "We are not called upon to give a strained interpretation in order to avoid a forfeiture. Statutes to prevent fraud on the revenue are construed less narrowly, even though a forfeiture results, * * *."

Claimant cites United States v. Lane Motor Company, 344 U.S. 630, 97 L. Ed. 622 (1953), in which forfeiture was denied where the automobile was used only in commuting to an illicit distillery. The Court, in effect, held that this limited use of commuting did not make the vehicle "involved in the violation." Automobiles have been held "involved in the violation" in many instances where such did not transport contraband but were used as an "active aid" in a violation. See United States v. 1962 Ford, 234 F. Supp. 798 (W.D. Va. 1964); United States v. G.M.A.C., 239 F.2d 102 (5th Cir. 1956); United States v. 1960 Ford, 203 F. Supp. 387 (N.D. Ala. 1961); all of which distinguish the Lane Motor Company case.

On page 7 of his brief claimant quotes from Kreuter v. United States, 201 F.2d 33 (10th Cir. 1952), at page 35, saying that a person may adopt an assumed name. Claimant ends his quotation too soon and omits the most important language of the Court at that part. The omitted part is,

> "But he must not use it /the fictitious name/ to defraud others through a mistake of identity."

This case is not actually in point since G. W. Kreuter used the fictitious name of W. L. Davis to endorse and negotiate a counterfeit check. The offense would have been present had the defendant used his own name.

There is cited in the Kreuter case, supra, the case of Kropp Forge Company v. Employer's Liability Assurance Corporation, Ltd., 159 F. 2d 536 (7th Cir. 1947), in which a male employee of Kropp and his wife set up under an assumed name, sent false invoices for goods to Kropp for which receipts and payment were issued by the husband. The plaintiff was defrauded of $12,477.35 by this scheme. The insurance covered losses by checks payable to a fictitious payee. The Court held that the name assumed by the husband and wife in this case was fictitious.

In Part D of the claimant's pretrial brief, he attempts to set up as a defense to forfeiture that the claimant, John J. King, was an innocent person

and then cites cases where relief apparently had been given innocent persons. The government answers this by saying (a) King knew, when he purchased his claimed interest in the guns, that he was purchasing a right to a lawsuit, and (b) the cases cited do not hold that the innocence of a claimant is a factor in determining the question of forfeiture.

The claimant, John J. King, knew when he purchased his claimed interest in the respondent guns that the guns were subject to adverse claims. The Bills of Sale, Exhibits 16 and 17 of the Stipulation of Facts, show the possibility that John J. King might not get possession of the guns. These Bills of Sale use the language

> "If and when buyer obtains possession of the above described personal property, free of all adverse claims thereto * * *."

These Bills of Sale also provide for Mr. King's being unable to obtain possession of such guns.

The innocence of a claimant to property has never been a factor in determining the question of forfeiture. It is the guilt or innocence of the "thing" which is determinative in an "in rem" action. To consider the innocence of the claimant would be to destroy the "in rem" nature of the proceedings for forfeiture. In Goldsmith, Jr.-Grant Company v. United States, 254 U.S. 505, 65 L.Ed. 376 (1921) at page 511, it is said:

> "In other words, it is the ruling of that case /Dobbins Distillery v. United States, 96 U.S. 395/ that the thing is primarily considered the offender."

and on page 513,

> "It is the illegal use that is the material consideration,--it is that which works the forfeiture, the guilt or innocence of its owner being accidental."

In United States v. One 1941 Ford 2-ton Truck, 95 F. Supp. 214 (W.D. Mo. 1951), cited by claimant on page 11 of his pretrial brief, relief was not granted because of innocence of the claimant, but because the government failed to prove "involvement" of the vehicle. The government attempted to prove that the seized automobile was used in conveying loads of liquor. The Court concluded that the evidence was not convincing. The Court's discussion of the innocence or lack of knowledge of the claimant was in consideration of Remission of Forfeiture.

The statements on page 12 of the claimant's pretrial brief concerning United States v. One 1936 Model Ford, 307 U.S. 219, 83 L.Ed. 1249 (1939),

also were in consideration of Remission of Forfeiture. There was no question about forfeiture but after forfeiture the Commercial Credit Company sought relief in asking a forgiveness of the forfeiture as to them and their interest as a lienholder. The finance company had dealt with a "straw purchaser" who had a good reputation but who fronted for a liquor violator. The Court in considering whether or not to grant remission under what is now 18 U.S.C. 3617 stated that the finance company could not have the burden of checking on a person [the true purchaser] concerning whose existence they knew nothing.

In United States v. One Model H, Farmall Tractor, 51 F. Supp. 603 (W.D. Tenn. 1943), cited on page 15 of claimant's pretrial brief, the tractor had been stolen by the persons using such in the violation. It was held that the claimant finance company would be denied due process of law if their interests were forfeited since they had no dealings with the thief who used the tractor in the violation.

The due process of law prohibition has never been extended to an innocent spouse whose husband used family property in a violation resulting in forfeiture of such property. In United States v. One Ferguson Farm Tractor, 125 F. Supp. 580 (E.D. Va. 1954), the wife owned a farm and equipment and operated such with her husband. The husband used the tractor in a liquor law violation resulting in its seizure. The Court held that the wife, in giving her husband uncontrolled use of the tractor, assumed the risk of its use in a law violation. A similar holding was made in Jones v. United States, 330 F. 2d 809 (10th Cir. 1964).

If the firearms involved in the record violations were purchased with the separate funds of Lee Harvey Oswald, his wife would not have any interest therein and his estate would not be considered since the forfeiture occurred prior to his death. If the firearms were purchased with community funds, the wife would be bound by the action of the husband since the husband would have control of such property. Article 4619 V.A.T.S.; Speer's Marital Rights in Texas, Fourth Edition, Section 354, page 510.

The discussion of the purposes of the forfeiture provisions of the Federal Firearms Act as given by claimant on page 13 of his pretrial brief is much more narrow than as shown in the full report on the enactment of 15 U.S.C. 905(b). The report does contain the quotation given by claimant but also states:

> "The purpose of the bill is to give express authority to law enforcement officials for the seizure, forfeiture, and disposition of firearms and ammunition involved in violations of the Federal Firearms Act."

The letter from the Acting Secretary of the Treasury, in which the language used by claimant appears, uses the expression quoted above and then, in the second paragraph of such letter, compares other laws enforced by the Treasury in which firearms are seized and concerning which forfeiture provisions are made. The letter shows that the enactment of the bill will provide procedures under the Federal Firearms Act similar to those applicable to firearms seized under other laws. The explanation of the bill, when considered as a whole, does not support the narrow construction urged by claimant. (U. S. Code Congressional Service, 1950-2, page 1907.)

II. Effect, if any, of Public Law 89-318 on Question of Forfeiture.

Initially, it should be noted that H.R. 9545, which became Public Law 89-318, was introduced in the House on June 29, 1965, and passed on September 7, 1965. The Bill was reported in the Senate October 4, 1965, and passed on October 18, 1965. Administrative proceedings to forfeit the weapons in question were instituted on August 16, 1965. Proceedings to judicially forfeit these weapons were commenced on September 10, 1965, the claimant having filed the requisite claim and cost bond.

There is nothing in the committee reports or the debates showing that the Congress was specifically informed of the pending forfeiture proceedings at the time of the enactment of P.L. 89-318. Conversely, there is no indication that the Congress was not so informed. It is true that while P.L. 89-318 does not refer to the assassination weapons or to any other specific item, the discussions in the House and Senate centered mainly around such weapons. It is apparent, however, that this came about because the claimant in the present forfeiture proceeding was said to have made an arrangement with Mrs. Oswald to purchase the rifle and pistol in question from Mrs. Oswald. Cong. Rec., House, Sept. 7, 1965, pp. 22158-22160. In the Senate consideration of the measure, the claimant's statement before the Senate Judiciary Committee was ordered to be printed in the Record. Cong. Rec., Senate, Oct. 18, 1965, p. 26302. The House quite properly discussed the matter of

compensation to the claimant in the event the United States acquired title to the weapons under the legislation. If, however, the pending forfeiture proceedings terminate favorably to the United States, that consideration will be moot. In this connection, it is of more than passing interest to note that the claimant's statement before the Senate Judiciary Committee concludes with this language:

> "It (H.R. 9545) represents a totally unjustified waste of the taxpayers' money. It should not be enacted."

As is more fully discussed hereafter, the forfeiture proceedings, if the government prevails, will result in the perfection of the government's title to these weapons without the expenditure of any of the taxpayers' money.

There is no inconsistency between the remedies afforded the United States under Public Law 89-318, approved November 2, 1965, and those sought by the forfeiture proceedings insofar as the weapons in question are concerned. That enactment itself does not purport to vest title to any "items of evidence" which were considered by the President's Commission on the Assassination of President Kennedy. On the contrary, the Attorney General is authorized to determine, from time to time, which particular items should be acquired and preserved by the United States. The statute further provides that whenever the Attorney General determines that any particular item or items should be so acquired and preserved, all right, title, and interest in and to such item or items shall be vested in the United States upon the publication of that determination in the Federal Register.

It is at once apparent that Congress did not have any particular items in mind when it passed this legislation.1/ Exactly 3,154 numbered Commission exhibits and numerous other exhibits were considered by the Commission 2/ all or any part of which could conceivably fall within the ambit of Public Law 89-318. That being the situation, Congress recognized the necessity for permitting the Attorney General to determine which item or items should be

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1/ By letter dated November 7, 1964, the General Counsel of the President's Commission on the Assassination requested the Attorney General to assist the Commission in making certain that "a substantial number of physical items of evidence" should remain in the possession of the Government. The Attorney General's letter of June 17, 1965 to the Speaker, House of Representatives, urging enactment of the legislation, makes reference to "numerous items of physical evidence" including the weapons in question and "many other exhibits." (H.R. 813, 89th Cong. 1st Sess.)

2/ Hearings before the President's Commission on the Assassination of President Kennedy, Vols. XVI to XXVI.

acquired. Actually, that statute in no way vests any title to any item in the United States. Only after the Attorney General makes his determination as to the acquisition of any particular item and upon publication of that determination in the Federal Register does title to the item vest in the United States. Should the United States acquire title to any of the items of evidence by gift or, for example, if the forfeiture proceedings terminate favorably to the United States, the statute still is operative with respect to the remaining items.

Section 3 of Public Law 89-318 provides that the United States Court of Claims or the United States District Court for the judicial district wherein the claimant resides shall have jurisdiction to hear and determine any claim for just compensation for any item or interest therein acquired by the United States pursuant to the statute. In novise, however, can it be said that Congress made provision for the payment of compensation for any item acquired in any other manner. In short, Public Law 89-318 does not provide the exclusive remedy by which the United States could obtain title to the weapons in question or any other items of physical evidence involved. Indeed, title to these weapons had already vested in the United States when this legislation was enacted.

Forfeiture of property seized occurs at the time of the illegal use bringing about its forfeiture. United States v. Stowell, 133 U.S. 1 (1890). The forfeiture of these two firearms, therefore, occurred at the time they became involved in the record keeping violations of the Federal Firearms Act. 3/ We can hardly ascribe to the Congress an intention to disburse public funds to acquire property the United States already owns.

There are here alternative remedies available to the United States. Clearly, Public Law 89-318 does not provide the exclusive remedy. To conclude that such is the case is to ignore the plain meaning of the legislation as well as its legislative history. And it cannot be said that by enacting this legislation Congress repealed by implication the time-honored statutes providing

3/ Between March 12, 1963 and March 20, 1963 as to the rifle; during the period from January 27, 1963 to March 30, 1963 as to the revolver (see paragraph III of the Libel of Information).

for forfeiture in appropriate cases. The cardinal rule is that repeals by implication are not favored. Posadas v. National City Bank, 296 U.S. 497 (1936). At page 503, the Court said:

> "There are two well-settled categories of repeals by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; * * *."

Neither condition exists here. There is no "irreconcilable conflict." Public Law 89-318 is a limited statute with specific reference to the exercise of the power of eminent domain in a prescribed manner and has nothing to do with a broad enactment providing for the forfeiture of property because of illegal use. Indeed, there is no conflict, irreconcilable or otherwise. The two can be harmonized and both can stand, have force, application, operation and effect. If the United States is successful in the libel proceeding, no right, title or interest in the weapons could pass to the United States under Public Law 89-318. And, of course, the intention of the legislature to repeal "must be clear and manifest." Red Rock v. Henry, 106 U.S. 596, 601, 602, 27 L.Ed. 251 (1883); Rosenberg v. United States, 346 U.S. 273, 294, 97 L.Ed. 1607 (1953). Here the statute and its legislative history are completely silent in this respect. Too, Public Law 89-318 covers none of the subject of the forfeiture statute and obviously was not intended as a substitute.

The Court of Appeals for the Fifth Circuit gave effect to a general forfeiture statute in United States v. Carey, 183 F. 2d 273 (5th Cir. 1950), as against a claim that there was a specific forfeiture statute applicable to the conduct complained of. There was a criminal prosecution under 26 U.S.C. 3253 (1939 Code); however, a companion forfeiture action was brought under 26 U.S.C. 3116 and 3321 (1939 Code) which are 26 U.S.C. 7302 and 7301, respectively, of the 1954 revision of the Code. Section 3253 provided for forfeiture of some of the property involved in the violation of that section; however, forfeiture of an automobile was not so provided. Forfeiture action against an automobile was brought under the general sections (3116 and 3321). The Court stated that Congress in enacting Section 3116, intended to aid law

enforcement, and the limited construction urged by the claimant would tend to nullify the effectiveness of the statute as an enforcing measure. The Court held that the general section was available notwithstanding the existence of the more specific provision.

We urge that, since there was no express repeal in Public Law 89-318, as implied repeals are not favored, and as the forfeiture of the respondent firearms occurred prior to the enactment of Public Law 89-318, the Court rule that the enactment of this statute had no effect on this forfeiture proceeding.

III. Constitutionality of Forfeiture Proceeding Under 15 U.S.C. 905(b) as Applied to This Case.

On pages 23 through 26 of his pretrial brief, claimant attempts to establish that the forfeiture sought in this cause would be contrary to provisions of the Fifth Amendment to the Constitution of the United States as (1) depriving him of property without due process of law, and as (2) taking private property for public use without just compensation. Claimant recognizes that the reported cases are against his contention but he relegates these landmark cases to a "former era." Claimant also attacks the time honored distinction between actions "in rem" and actions "in personam."

In Goldsmith, Jr.-Grant Company v. United States, 254 U.S. 505, 511, 65 L.Ed. 376 (1921), cited by the claimant as basing its action in upholding a forfeiture as constitutional on the "in rem fiction," the Court stated:

> "But whether the reason * * * be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."

In United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964), an attack similar to this was made on a forfeiture sought under 49 U.S.C. 782. The Court considered the "in rem fiction" of Goldsmith-Jr.-Grant Company, supra, and said (pg. 1022):

> "* * * We prefer, however, to consider the statutory enactments on grounds more suitable than those which stem from the fiction of an in rem proceeding."

The Court then stated:

> "* * * Where Congress, in the implementation of its constitutional powers, provides for penalties such as forfeitures, such action is not a taking of property in a constitutional sense. It is not an instance of eminent domain, in which property is taken because the use of such property is beneficial to the public. Rather, the property interest is infringed because Congress has deemed it necessary in order to preserve other incidents of the public welfare. As such, it represents a federal exercise of a police power to which the constitutional requirement of compensation is inapplicable. See Hamilton v. Kentucky Distillers Co., 251 U.S. 146, 156-157, 40 S.Ct. 106, 64 L.Ed. 194 (1919); United States v. One 1961 Cadillac Hardtop Automobile, supra, 207 F. Supp. at 699."

The Fort Worth Division of this Court was concerned with the question of the constitutionality of a forfeiture law in Fisburn v. Jackson, et al, 55 F. 2d 934 (N.D. Tex. 1932), and concluded,

> "That Congress has the power to pass such an act providing for such a forfeiture as the one here undertaken is well settled."

The action of the Dallas Division of this Court was sustained in Associates Investment Company v. United States, 220 F. 2d 885 (5th Cir. 1955), the Appellate Court saying, with authorities (pg. 888):

> "* * * However, it is well settled that such deprivation /Forfeiture/ is not a denial of due process of law, or a taking of private property for public use without fair compensation."

The Supreme Court has repeatedly held that there is no constitutional objection to enforcing a penalty by forfeiture of offending property. Waterloo Distillery Corporation v. United States, 282 U.S. 577, 75 L.Ed. 558 (1931); United States v. One Ford Coupe, 272 U.S. 321, 71 L.Ed. 279 (1926); Goldsmith,Jr.-Grant Company v. United States, supra.

IV. Effect on These Proceedings of the Supreme Court's Holding That Forfeiture Proceedings Are Quasi-Criminal.

In One Plymouth Sedan v. Pennsylvania, ____ U.S. ____, 14 L.Ed. 2d 170 (1965), the Supreme Court had under consideration the question of whether or not evidence obtained through an unreasonable search and seizure was subject to the constitutional rule requiring exclusion where the case under consideration was that of civil forfeiture. The Court held that the exclusionary rule is applicable because a proceeding for the forfeiture of property used in violating a criminal law is quasi-criminal in character.

This holding of the Court is not new. On the contrary, the Court relied on Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746 (1886), which held the forfeiture action to be civil in form but criminal in nature. The exclusionary rule had been applied in the Boyd case where the Court said (116 U.S. 634, 29 L.Ed. 752):

> "* * * suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature, - we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself * * *."

The Boyd case holding that forfeiture actions are quasi-criminal in nature and the effect thereof has not been extended, in the past, beyond its effect on search and seizure and on compelling testimony of an incriminating nature. Although Coffey v. United States, 116 U.S. 436, 29 L.Ed. 684 (1886), held action in a criminal case res judicata in a companion civil forfeiture case, this case (Coffey) has been avoided, limited, and distinguished to such an extent that one Appellate Court stated that it "has received a distinctly unfavorable press." See United States v. Burch, 294 F.2d 1 (5th Cir. 1961). Courts have preferred the distinction between criminal prosecutions and civil penalties as shown in Helvering v. Mitchell, 303 U.S. 391, 82 L.Ed. 917 (1938).

Two additional factors exist concerning which different standards are applied in criminal and in civil proceedings. These are (1) the degree of proof required by the government and (2) the proof of criminal intent, if any such proof is required.

The Court of Appeals for the Fifth Circuit has held in the following, among other cases, that in a forfeiture action the government has the burden of proving the material allegations of the libel by a preponderance of the evidence and not beyond a reasonable doubt.

Anderson v. United States, 185 F.2d 343 (5th Cir. 1950); United States v. 2265 One-Gallon Paraffined Tin Cans, 260 F.2d 105 (5th Cir. 1958); Stagner v. United States, 187 F.2d 992 (5th Cir. 1952); Burt v. United States, 283 F.2d 473 (5th Cir. 1960); United States v. Burch, 294 F.2d 1 (5th Cir. 1961);

Patenotte v. United States, 266 F.2d 647 (5th Cir. 1959); United States v. Bryan, 265 F.2d 698 (5th Cir. 1959). The Supreme Court held the same in Lilienthal's Tobacco v. United States, 97 U.S. 237, 24 L.Ed. 901 (1878).

In United States v. 2265 One-Gallon Paraffined Tin Cans, supra, the Court of Appeals for the Fifth Circuit stated that the district court had erroneously relied on decisions dealing with criminal prosecutions rather than those dealing with forfeitures in matters of intent. In this case the claimant asserted as a defense to the property that he held such for sale /to the violator/ and not with intent to use such in a law violation. The Court of Appeals applied civil proceeding rules and held that the intent of the seller to sell the property to a violator for use in the violation would support a forfeiture. This was against the holding in a criminal case, Stroud v. United States, 199 F.2d 923 (5th Cir. 1952), that the intent of the claimant to violate was determinative and not the intent of the person to whom sold.

In criminal law a person is generally presumed to have intended the normal and reasonable consequences of his acts. Graus v. United States, 160 F.2d 746 (5th Cir. 1947); Jencks v. United States, 226 F.2d 540 (5th Cir. 1955), reversed on other grounds. This is the only criminal intent required to be proved in offenses not requiring wilfulness or some specific intent. In Bridgeforth v. United States, 233 F.2d 451 (6th Cir. 1956), criminal prosecution was brought under 26 U.S.C. 7262 providing a fine of from $1,000 to $5,000 for any person doing any act which makes him liable for special tax to engage in accepting wagers without having paid such tax. The Appellate Court stated that in a criminal prosecution under this statute neither intent to evade nor wilfulness is required as proof of guilt.

In United States v. Pace, 209 F. Supp. 592 (D. Del. 1962), affirmed 339 F.2d 264 (3rd Cir. 1964), prosecution was under 26 U.S.C. 7203, which proscribes wilful failure to pay a tax, make a return, keep records, etc. The Court stated that the term "wilful" means that the offense must be deliberately and knowingly committed and also with a bad motive or evil intent. Authority cited is United States v. Palermo, 259 F.2d 872 (3rd Cir. 1958).

Particular attention is invited to the fact that Section 905(b) of Title 15, United States Code, providing forfeiture of firearms involved in any violation of the Federal Firearms Act, is not a part of some other clause

or provision providing punishment to persons or defining a crime. It is also to be noted that neither this forfeiture section nor the penalty section, 15 U.S.C. 905(a), uses the word "wilful" or any other language indicative of specific criminal intent.

Lee Harvey Oswald voluntarily used the fictitious name of A. Hidell or A. J. Hidell in ordering the respondent firearms. It must be presumed that he intended the natural and reasonable consequences of this act, that is, that the firearms dealers would show the names A. Hidell and A. J. Hidell on their sales records, invoices, shipping records, etc. This intent will support the forfeiture in this case, and it is not necessary, in the absence of a wilfulness requirement, that the government also show that Lee Harvey Oswald used the fictitious names for some evil purpose. We believe that the evil purpose did exist. That is that Lee Harvey Oswald gave the fictitious names in an effort to preclude the tracing of these weapons to him because he at that time harbored thoughts of using the weapons in homicides. We believe that this evil motive is shown by the subsequent uses of these weapons in killing and in injuring human beings. Proof of this evil motive, however, is not required of the government.

It might be argued that Lee Harvey Oswald did not know of the requirement on firearms dealers to keep records. Proof of this knowledge is also not a part of our case. In United States v. West, 146 F. Supp. 202 (N.D. Ohio 1957), the defendant testified that he did not know that the possession of a sawed-off shotgun was a violation of the law. The Court stated that under Sections 5841 and 5861 of Title 26, U.S.C., scienter was not a necessary element of the offense.

In this forfeiture case, scienter is not a necessary element of the offense. As recent as November 26, 1965, the Court of Appeals for the Fifth Circuit, in United States v. Fisher, No. 22056 (not yet in advance sheets of Federal Reporter), stated that in this forfeiture action against an automobile used in transporting a contraband firearm, statutes defining the weapons covered by the National Firearms Act should be construed as any other revenue statute, that is, to ascertain that was the intent and purpose of Congress. The Federal Firearms Act is a statute enacted to regulate interstate commerce in firearms and ammunition. Such a statute should be given construction to

accomplish this purpose. Construction should not be given which would impose burdens on the government which were not clearly intended. Proof of scienter and wilfulness is not imposed by the Congress and should not be imposed by the Court because of the quasi-criminal nature of the proceedings.

Conclusion

The parties have stipulated to facts which will support an order of forfeiture. We have shown that Public Law 89-318 does not affect this forfeiture action and that a forfeiture in this case would not be unconstitutional. We have also shown that this action is not affected by the recent Supreme Court's holding forfeiture actions to be quasi-criminal because this classification is not new, has been the holding of the Supreme Court since the year 1886, and has not caused the Courts to impose more stringent requirements as to measure of proof or as to intent.

Public Law 89-318 applies to many items of property and does not become useless because not applied to these firearms. Any declaration of forfeiture in this case will relate back to the time of involvement in the violation; therefore, it is the government's position that such firearms became forfeited prior to the passage of Public Law 89-318.

A declaration of forfeiture does not terminate all rights of the claimant since he may still petition the Attorney General for remission of the forfeiture. Florida Dealers and Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960). This Court, however, does not have jurisdiction to grant the equitable relief of remission or mitigation of forfeiture. Associates Investment Company v. United States, 220 F.2d 885 (5th Cir. 1955); United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (M.D. Ill. 1964).

We again respectfully urge the Court to declare the respondent firearms forfeited to the United States.

Respectfully submitted,

MELVIN H. DIGGS
United States Attorney

By: B. H. Timmins, Jr.
Assistant United States Attorney

Of Counsel
James F. Goulding
Assistant Regional Counsel, I.R.S.

This is to certify that a copy of this brief has been served on the claimant John J. King by mailing a copy thereof to his attorney of record.

B. H. Timmins, Jr.

(Date)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA, Libelant, v. ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES, Respondents.	)	CIVIL NO. 3-1171

GOVERNMENT'S ADDITIONAL REQUESTED CONCLUSIONS OF LAW

Pursuant to the Pretrial Order entered in this cause on January 27, 1966, the Libelant now requests the court to make the following additional conclusions of law:

12. Statute providing forfeiture of firearm or ammunition involved in any violation of the provisions of the Federal Firearms Act or any rules or regulations promulgated thereunder is not unconstitutional, as applied in this case, as being contrary to requirements of the Fifth Amendment to the Constitution relating to due process of law and taking of private property without just compensation.

13. Although these forfeiture proceedings are quasi-criminal in nature, the Libelant is not put to any greater burden of establishing evil intent or motive and the voluntary doing of the act bringing about the forfeiture, or causing it to be done, is sufficient intent since a person is presumed to intend the natural and reasonable consequences of his act.

Respectfully submitted,

MELVIN M. DICUS
United States Attorney

By: _____
R. H. Timmins, Jr.
Assistant United States Attorney

Of Counsel
James F. Goulding
Assistant Regional Counsel
Internal Revenue Service

TABLE OF CASES

CIVIL NO. 3-1171

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA,

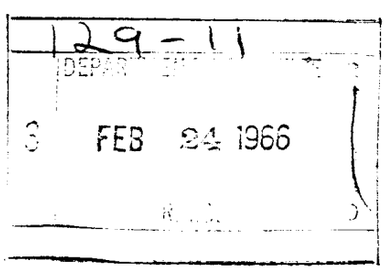
Libelant,

v.

ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES,

Respondents.

SUPPLEMENTAL AND REPLY BRIEF OF CLAIMANT



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Attorneys for Claimant

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

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UNITED STATES OF AMERICA, Libelant, v. ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES, Respondents.	*	CIVIL NO. 3-1171

SUPPLEMENTAL AND REPLY BRIEF OF CLAIMANT

In this brief Claimant does not restate all of his original arguments but supplements only some of them and replies to the Government's arguments.

The organization of Claimant's briefs into separate sections seems necessary in view of the number of legal points involved, but we do not believe that it should prevent all of the legal questions from being considered in

the light of what this case really is. The nature of this case is self-evident. The Congress has passed a statute providing that these weapons may be obtained by paying just compensation. The Congressional action and the Attorney General's action show clearly that the desire to acquire the weapons is completely unrelated to the Federal Firearms Act or any policy behind it. This is simply an attempt to avoid payment for the historical objects sought. Admittedly, this statement is not legal argument, but Claimant submits that it is helpful to retain some realism in considering the detailed legal questions presented by the parties.

I. THE LIBEL IN THIS ACTION DOES NOT ALLEGE ANY INTENT TO DECEIVE OR WILFULLNESS ON THE PART OF LEE HARVEY OSWALD. SUCH INTENT WOULD BE NECESSARY TO THE GOVERNMENT'S CASE IN ALL EVENTS.

If we assume that a violation by a criminal act were shown and that the forfeiture provision of 15 U. S. C. § 905(b) were applicable to a record-keeping violation, and if we even further assume that this action punishing Claimant King may be brought without showing any violation or intent

on his part, the Government's case for forfeiture of the weapons is still deficient in that it has not even alleged that Lee Harvey Oswald used the name "Hidell" with any intent to deceive or mislead.

We are dealing with a situation where the statute does not by any express provision purport to regulate the name which a purchaser should use in ordering a rifle. The Government seeks to construct such a provision by drawing upon a claimed purpose of weapon-tracing behind the statute. It is undoubtedly true that the use of a name other than that customarily used by a person could be made willfully with an intent to conceal the identity of the recipient of the weapon. That is the type of situation presented in the numerous cases cited in the Government's original brief for the proposition that the use of a fictitious or assumed name for this purpose is prohibited. In fact, most of those cases involved statutes containing an express requirement that the prosecution establish willfulness or intent to mislead. For example, United States v. Warszower, 113 F. 2d 100 (2d Cir. 1940) involved prosecution for violation of a statute which provided "whoever shall willfully and knowingly use * * *

any passport, the issue of which was secured in any way by reason of any false statement , . . ." 113 F. 2d 100, at 101. Dear Wing Jung v. United States, 312 F. 2d 73 (9th Cir. 1962) involved prosecution for making false statements in matters before the Immigration and Naturalization Service in violation of 18 U.S.C. § 1001, which includes in its provisions that such false statements must be made "knowingly and willfully." It seems probable that the distinction between a fictitious name and an assumed name for the purpose of this action is more reasonably treated as an issue as to whether the name was used with a fraudulent intent.

Even if the numerous other difficulties in the Government's case could be overcome, the cases cited by it of use of a second name with intent to defraud or conceal are wholly inapplicable here, where the libel charges no intent to conceal the identity of the recipient, no willfullness or any other similar element necessary to show that the name "Hidell" was not used merely through capriciousness, eccentricity, love of mystery, madness, or whatever.

Even if we can somehow conceive of this action for punishment as being dependent, not upon the acts or intentions of the parties who would in fact be punished, but upon the acts and intentions of one long dead, no intention or willfullness has even been alleged against the dead man. Such intention would be necessary to create a crime not defined in the statute by drawing upon its purposes to say that anyone who misleads the licensed dealer with an intent to defeat those purposes shall be guilty of a crime. That we are dealing with punishment by a quasi-criminal action is established by One Plymouth Sedan v. Pennsylvania, 380 U. S. 693, 14 L. ed. 2d 170, 85 S. Ct. 1246 (1965).

II. SECTION 903(d) OF THE FEDERAL FIREARMS ACT IMPOSES DUTIES ONLY ON DEALERS AND IMPOSES NONE UPON PURCHASERS.

The Government's brief recognizes that § 903(d) of the Federal Firearms Act is phrased entirely in terms of duties imposed upon dealers and contains no language similar to the Internal Revenue Code provision prohibiting procuring of a false entry (26 U. S. C. § 7206) and providing that "property to which such false or fraudulent instrument relates shall be forfeited" (26 U. S. C. § 7303(8)). The

Government, however, attempts to bridge this gap in its argument with the provisions of § 2 of Title 18 U.S.C., which provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Here again, the Government is making an entirely novel contention. Section 2 of Title 18 deals with meting out punishment and has never been applied in forfeiture actions which were not regarded as actions for punishment when § 2 of Title 18 was enacted in 1948. The Government has cited numerous cases as standing for the principles that one who procures another to commit an offense is guilty as a principal, that an actor who commits the offense can be an innocent agent whose conviction is not a prerequisite to conviction of the one who causes the offense to be committed, and that the defendant need not be within the ambit of the statute, it being sufficient for conviction if the one who is caused to commit the violation is within the statute.

A reading of these cases reveals that all are criminal prosecutions brought to punish a party guilty of an offense and are not remotely concerned with any forfeiture actions.

By its express terms, § 2 of Title 18 applies only to such actions for punishment, both of the clauses of that section providing that the person who causes the act is "punishable as a principal." Now, the Government contends that this is not an action to punish. If this be so, the statute upon which it relies to bridge an obvious gap in its case is wholly inapplicable.

If the Government should concede that this is an action to punish, then it wholly fails by reason of the absence of any charge whatsoever showing that Claimant King is "punishable."

This whole attempt to use § 2 of Title 18 is but another part of a fantastic effort to concoct out of unrelated, inapplicable statutory fragments a law that Congress has never written, i.e., a law providing that all guns ordered by purchasers under an assumed or fictitious name are forfeited to the United States.

III. EVEN ASSUMING THAT THERE WAS A VIOLATION OF THE FEDERAL FIREARMS ACT ENTITLING THE UNITED STATES TO IMPOSE FINE OR IMPRISONMENT ON LEE HARVEY OSWALD, THE FORFEITURE PROVISIONS OF 15 U.S.C. § 905(b) DO NOT APPLY TO RECORD KEEPING VIOLATIONS.

The violation alleged to have occurred in this action is the violation of a record keeping requirement imposed only upon licensed dealers, as that term is defined in the Act. The Government's initial brief has recognized that the United States would have a twofold burden in this action even if Lee Harvey Oswald were the claimant: it must allege and prove both [i] a violation of the Federal Firearms Act, and [ii] that the forfeiture provisions of the Act apply to weapons as to which an allegedly improper entry appears in the records of the licensed dealer.

For the purposes of this section of Claimant's reply brief, we may assume, arguendo, that a violation of the Federal Firearms Act has been shown and proceed to consider only the question as to whether the statute provides for forfeiture of the weapons for this particular record keeping violation. Both the Government and the Claimant recognize that there are no cases dealing with this question. We are,

accordingly, dealing with a matter of initial statutory construction.

Claimant has fully developed in its original brief the point that neither the sale, shipment, nor receipt of the firearms here involved was a violation. It thus follows that under the literal language of § 905(b), the firearms were not "involved in" the violation of the statutory provision requiring licensed dealers to keep records.

In this case of initial impression, it is appropriate to consider the general application of the construction urged by the Government, and whether such general application would or would not comport with the result Congress may reasonably be presumed to have intended in enacting the statutory amendment which subsequently became § 905(b). We must recognize that in the ordinary course of events 99% of the violations of the record keeping requirement would be the fault of the licensed dealer. For example, the dealer might erroneously enter faulty descriptions of the weapons in his records; he might destroy his records before the required ten-year period; or the dealer might fail to make his entries "not later than the close of business on the day next succeeding the day on which the

transaction occurs." 26 C.F.R. § 177.51. The violations would be caused by the dealers, and would always involve only their records. Yet, the application of the forfeiture provision as here attempted would levy the penalty, fine or deterrent, not upon the dealer who caused the violation, but upon innocent purchasers all over the country. Certainly, the courts should not stretch the construction of a statute beyond what its express language will reasonably support upon the basis of a presumed intent by Congress to deprive innocent purchasers of weapons by reason of the fault of licensed dealers.

The words "involved in," as used in the forfeiture provisions of 15 U.S.C. § 905(b), literally apply only where the shipment, transportation, purchase, or receipt of the weapons, as prohibited by § 902, constitutes a violation of the Act. The Government's answering construction argument to this contention is essentially the proposition that:

> If the weapons had not been sold, there could have been no false record entry.

This type of reasoning is lacking in basic logic, even aside from the point that such argument presumes a very strange

intent on the part of the Congress of the United States. We are not dealing with a question of remote causation, but with whether guns are "involved in" record keeping. If a "moonshiner" does not commute to his illicit still, he obviously cannot produce the illicit "moonshine," but that does not permit forfeiture of his commuting automobile as being used in the illegal operation. United States v. Lane Motor Company, 199 F. 2d 495 (10th Cir. 1952), affirmed 344 U. S. 630, 97 L. ed. 622, 73 Sup. Ct. 459.

The Claimant's construction of § 905(b) finds additional support in the cases cited in the Government's original brief.

Lewis v. United States, 170 F. 2d 43 (9th Cir. 1948), cited at page 9 of the Government's original brief, dealt with the statute which specifically prohibited the procuring of a false entry, and, most important, provided:

> "(2) Forfeiture. The property to which such false or fraudulent instrument relates shall be forfeited."

This provision of 26 U.S.C.§ 3793(a) of the 1939 Internal Revenue Code, now embodied in 26 U.S.C. 7303(8), applies to violations of the Internal Revenue laws, not to the Federal Firearms Act. It was originally enacted in 1868 (15 Stat. 165), over eighty years prior to the enactment of § 905(b)

in 1950. It shows how the Congress would have written § 905(b) if it had intended to forfeit property to which a false entry relates.

The same provision of present 26 U.S.C. § 7303(8) was involved in Thacher's Distilled Spirits, 103 U. S. 679 (1880). The statute, as quoted in that decision, then read as follows:

> '"Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry or document required by the provisions of the internal revenue laws, or by any regulations made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years, and the property to which such false and fraudulent instrument relates shall be forfeited.'" [Emphasis added.]

The legislative history cited in Claimant's original brief clearly reflects that Congress had no such broad provision in mind.

Also, the case of One 1941 Buick Sedan v. United States 158 F. 2d 445 (10th Cir. 1946) and the cases cited in the footnote on page 13 of the Government's original brief concern statutes and situations presenting no analogy. The general framework of these statutes was developed during

Prohibition. See United States v. 3,935 Cases of Distilled Spirits, 55 F. Supp. 84 (D.C. Minn. 1944). And the approach of these cases clearly carries forward the concept of the illegality of the whole business operation where the appropriate records are not kept and/or taxes are not paid. In other words, the "moonshiner's" operation is treated as an illegal business just as that of the bootlegger had been. The charge made in the Buick case, supra, was summarized by the Court as " . . . carrying on the business of a retail liquor dealer without keeping the books and records required . . . ," 158 F. 2d 445, at 446. The purport of the decisions is that any property used in carrying on this illegal business is forfeitable.

In the present case there is clearly no basis for finding that there was an illegal business. Lee Harvey Oswald was not in business, and the Government does not contend that the firearms dealers were guilty of even technical violations, much less of operating illegal businesses. Accordingly, even if the broader terms of the statutes involved in these cases were applicable to the Federal Firearms Act, they would not support the claimed forfeiture.

IV. FORFEITURE OF THE WEAPONS WOULD EITHER DEPRIVE CLAIMANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW OR CONSTITUTE A TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A sovereign may exact fines and other properties as punishment. In such an instance, no compensation is due. The Government may take property for a valid public purpose without proving any fault or criminal conduct entitling it to punish, but in that case must give compensation. The constitutional difficulty of the Government's position here is that the taking cannot be justified as punishment since the owner is not even charged with wrongdoing. On the other hand, it cannot be upheld as an exercise of eminent domain since no compensation is provided.

Claimant's original brief developed the point that the present Supreme Court would not support the fining and punishment of the innocent upon the basis of the legal fiction that no punishment of persons was involved but that only the guilt of an inanimate object was involved. The case of One Plymouth Sedan v. Pennsylvania, 380 U. S. 693, 14 L. ed. 2d 170, 85 S. Ct.1246 (1965), cited by the Court upon the pretrial conference, shows that the Claimant's forecasting

ability in this matter has been better than Claimant's legal research.

In One Plymouth Sedan v. Pennsylvania, supra, the Court held that the search and seizure provisions of the Fourth Amendment, as applied to the States by the Fourteenth Amendment, were applicable to a forfeiture proceeding against the automobile. The Court recognized that the Fourth Amendment would not be applicable if the forfeiture were not in the nature of a criminal proceeding to punish for an offense. As a necessary point in reaching its conclusion, the Court held that forfeiture proceedings were in the nature of criminal proceedings, analogous to fines. In other words, the Court took a completely realistic view and did not avoid the impact of its decision by resorting to the fiction that no person was being punished, but instead, only an automobile was being tried. As in our case, the Court dealt with property which was not contraband in nature.

In the earlier case of Goldsmith, Jr.--Grant Co. v. United States, 254 U. S. 505, 65 L. ed. 377 (1921), the Court, not unnaturally, experienced some difficulty in upholding the taking of an innocent man's property without compensation by

reason of the alleged wrong of another, stating:

> " . . . Its words, taken literally, forfeit property illicitly used, though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. . . ." [354 U. S. 505, at 510]

After considerable discussion of the ancient doctrine of the guilt of inanimate objects, the Court upheld the taking squarely upon the proposition that "the thing is primarily considered the offender, . . ." [at p. 511] " . . . the guilt or innocence of its owner being immaterial, . . ." [at p. 513].

The Plymouth case, prior to its consideration by the United States Supreme Court, had been decided by the Pennsylvania Supreme Court in line with the Goldsmith decision: Commonwealth v. One 1958 Plymouth Sedan, 414 Pa. 540, 201 A. 2d 427 (1964). The Supreme Court of Pennsylvania there relied upon the same fiction to hold the illegal search and seizure immaterial, stating:

> "This proceeding is not a criminal proceeding (Commonwealth v. One 1927 Graham Truck, 165 Pa. Super. 1, 67 A.2d 655; Commonwealth v. One 1939

Cadillac Sedan, supra) but a civil proceeding in rem (Commonwealth v. One Five-Passenger Overland Sedan, 90 Pa. Super. 376) and is directed to the confiscation of the property itself on the theory that the property is the offender." [201 A. 2d 427, at 429]

However, when this case reached the United States Supreme Court, the Court clearly renounced this fiction which was the sole support of both Goldsmith and the Pennsylvania decision in One Plymouth Sedan, stating;

"Finally, as Mr. Justice Bradley aptly pointed out in Boyd, a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. In this case McGonigle, the driver and owner of the automobile, was arrested and charged with a criminal offense against the Pennsylvania liquor laws. The record does not disclose what particular offense or offenses he was charged with committing. If convicted of any one of the possible offenses involved, however, he would be subject, if a first offender, to a minimum penalty of a $100 fine and a maximum penalty of a $500 fine. In this forfeiture proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1,000, a higher amount than the maximum fine in the criminal proceeding. It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts." [Emphasis added] [One Plymouth Sedan v. Pennsylvania, 380 U. S. 693, 14 L. ed. 2d 170, at 175, 85 S. Ct. 1246]

It will be noted that, if the Supreme Court had chosen to follow the theory urged by the Government here, there could have been no illegal search and seizure as the automobile would have become the property of the State of Pennsylvania before the search when it was first used in the illegal transportation.

When the present forfeiture action is viewed in the light of a quasi-criminal action, as required by the Plymouth case, it can no longer stand. There can be no possible basis for exacting a criminal penalty from a claimant against whom no charges have even been made. Punishment of the innocent, in any guise, cannot be reconciled with the requirements of due process. Robinson v. California, 370 U. S. 660, 8 L. ed. 2d 758, 82 S. Ct. 1417 (1962). This action, then, stands simply as one to take the property of an innocent party without compensation.

It is difficult to conceive of any legal fiction more dangerous to liberty than one which would permit the Executive Branch, acting ex parte, to decide whom to punish and whom not to punish and then effect the punishment without the showing of any guilt or complicity in any type of

adversary proceeding. Even if the guilt of Oswald were the governing question and this were somehow considered an action for punishment of Oswald, the punishment of a man obviously unable to defend cannot be reconciled with any of the numerous requirements of due process.

This is not in any way analogous to the authority of a prosecutor to determine which cases to prosecute and which cases to drop. There, the prosecutor must at least prove some guilt, fault or negligence in the cases which are brought. Here, under the Government's contention, the Treasury may in its own chamber, without hearing from the party to be punished, decide that a person having in his possession, however, innocently, property once used in violation of the Federal Firearms Act is to be subject to an onerous penalty far exceeding most fines. The Treasury Department can look at unproved charges, consider the personality or the politics of the person to be punished, or anything else concerning this person, then, upon making a decision to exact what may be severe punishment, as is the case here, proceed to obtain such punishment in the courts regardless of the complete innocence of the party to be punished. In the light of the Plymouth case, it is obvious that this procedure cannot be permitted to stand.

the acquisition and preservation of these very weapons. Reference is here made to Claimant's original brief, which sets forth the nature of this legislation and the purpose of its enactment.

Any forfeiture of the weapons would either deprive Claimant of his property without compensation or would punish him without process in violation of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

KILGORE & KILGORE

By William C. Garrett
William C. Garrett

By Eugene R. Lyerly
Eugene R. Lyerly

This is to certify that a copy of this brief has been served on Libelant by ~~mailing~~ delivering a copy thereof to B. H. Timmins, Jr., Assistant United States Attorney, Dallas, Texas.

William C. Garrett
William C. Garrett

February 7, 1966

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA, Libelant, v. ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES, Respondents.	CIVIL NO. CA-3-1171

CLAIM OF OWNER

TO SAID HONORABLE COURT:

AND NOW appears JOHN J. KING, intervening for himself as owner of one 6.5 mm. Mannlicher-Carcano Military Rifle, Model 91-38, Serial No. C2766, with appurtenances, and one .38 Special S&W Victory Model revolver, Serial No. V510210, with appurtenances, before this Honorable Court, and makes claim to the said one 6.5 mm. Mannlicher-Carcano Military Rifle, Model 91-38, Serial No. C2766, with appurtenances and one .38 Special S&W Victory Model revolver, Serial No. V510210, with appurtenances, as the same are proceeded against ~~at~~ the instance of the United States of America, the Libelant, and the said Claimant, John J. King, avers that he was, at the time of the filing of the Libel herein, and still is, the true and bona fide sole owner of said

one 6.5 mm. Mannlicher-Carcano Military Rifle, Model 91-38, Serial No. C2766, with appurtenances, and one .38 Special S&W Victory Model revolver, Serial No. V510210, with appurtenances, and that no other person is the owner thereof;

WHEREFORE, he prays to defend accordingly.

John J. King

KILGORE & KILGORE
William C. Garrett
Charles F. Hawkins
1800 First National Bank Building
Dallas, Texas 75202

Proctors and Attorneys for Claimant

Of Counsel:
HOLMBERG & POULSON
James S. Holmberg
1700 Broadway
Denver, Colorado 80202

THE STATE OF COLORADO)
)
COUNTY OF D E N V E R)

John J. King, being duly sworn, deposes and says that he is the claimant described in and who executed the foregoing claim; that he has read said claim and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

John J. King

SWORN TO BEFORE ME this
4th day of October, 1965.

Notary Public

My commission expires Oct. 13, 1966

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA, Libelant, v. ONE 6.5 mm. MANNLICHER-CARCANO MILITARY RIFLE, MODEL 91-38, SERIAL NO. C2766, WITH APPURTENANCES, AND ONE .38 SPECIAL S&W VICTORY MODEL REVOLVER, SERIAL NO. V510210, WITH APPURTENANCES, Respondents.	)	CIVIL NO. 3-1171

GOVERNMENT'S REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes the United States of America by and through its attorney, B. H. Timmins, Jr., Assistant United States Attorney for the Northern District of Texas, and requests the Court to make the following findings of fact and conclusions of law.

I. Findings of Fact

1. That on November 22, 1963, in Dallas, Texas, officers of the Dallas Police Department seized and detained the respondent 6.5 mm. Manlicher-Carcano Military Rifle, Model 91-38, serial number C2766, with appurtenances, and the respondent .38 Special S&W Victory Model Revolver, Serial No. V510210, with appurtenances, which respondents are hereinafter referred to as the "rifle" and the "revolver," respectively. (Alleged in libel; admitted in claimant's answer.)

2. That at sometime after November 22, 1963, and prior to the institution of this forfeiture action, alcohol and tobacco tax officers of the Internal Revenue Service adopted the seizure of the rifle and of the revolver as property seized as forfeited to the United States. (Paragraph II, page 5 of claimant's answer admits government's publication of notice of seizure of respondent firearms as forfeited.)

3. The Internal Revenue Service commenced administrative forfeiture proceedings against the rifle and the revolver in accordance with Section 7325, Title 26, United States Code, and thereafter, the claimant John J. King filed a claim and a bond for costs as required by that statute. (Alleged in libel of information; admitted in paragraph II, page 5, of claimant's answer.)

4. The respondent rifle and revolver were in the possession of agents of the Federal Government at the time the libel was filed and were stored within the Dallas Division of the Northern District of Texas. (Stipulation of Facts #6, #37; allegation in libel; admitted in answer.)

5. The rifle was purchased on or about March 20, 1963, by Lee Harvey Oswald from Klein's Sporting Goods Company, Inc., Chicago, Illinois, a dealer in firearms holding a license under the provisions of the Federal Firearms Act (15 U.S.C. 901, et seq.) (Stipulation of Fact #9, 10, 11, 21.)

6. The revolver was purchased at sometime during the period January 27, 1963 and March 13, 1963, by Lee Harvey Oswald from Seaport Traders, Inc., Los Angeles, California, a dealer in firearms holding a license under the provisions of the Federal Firearms Act (15 U.S.C. 901, et seq.) (Stipulation of Fact #12, 13, 14, 24.)

7. In the purchases of the rifle and of the revolver Lee Harvey Oswald used the name of "A. Hidell" and "A. J. Hidell," respectively, and used the address of Post Office Box 2915, Dallas, Texas. (Stipulation of Fact #10, 11, 18, 12, 19.)

8. Post Office Box 2915, Dallas, Texas, was rented by Lee Harvey Oswald during the period October 9, 1962 to May 14, 1963, using the name Lee H. Oswald. (Stipulation of Fact #15, 16, 17.)

9. The licensed dealers in firearms who sold the rifle and the revolver to Lee Harvey Oswald did not know that the purchaser was Lee Harvey Oswald, but knew only the name "A. Hidell" or "A. J. Hidell" as shown in the purchase orders. (Stipulation of Fact #36.)

10. The licensed dealers in firearms kept records of the receipt and disposition of firearms as required by Section 903(d), Title 15, U.S.C., and showed the purchaser of the rifle on such records as "A. Hidell," and the purchaser of the revolver as "A. J. Hidell." (Stipulation of Fact #22, 23, 25, 26.)

11. The licensed dealers in firearms shipped the rifle and the revolver to "Hidell" but these respondent firearms were actually received by Lee Harvey Oswald. (Stipulation of Fact #27.)

12. The wife of Lee Harvey Oswald first heard of the name "Hidell" after May 29, 1963, while the name was being used in connection with pro-Castro activity in New Orleans, Louisiana. (Stipulation of Fact #20.)

13. Lee Harvey Oswald had not used the name "A. Hidell" or "A. J. Hidell" in referring to the person Lee Harvey Oswald to such an extent as to be also known as "Hidell" during January to March 1963, when he purchased and received the respondent rifle and revolver. Lee Harvey Oswald was not also known as "A. Hidell," or "A. J. Hidell," or "Hidell" when he ordered the respondents rifle and revolver from the licensed firearms dealers. The use of the name "Hidell" by Lee Harvey Oswald constituted the use of a fictitious name. (Stipulation of Fact #20.)

14. Lee Harvey Oswald, by ordering the rifle and the revolver in a fictitious name, caused the sellers of these firearms to show, on their required records of disposition of firearms, a fictitious name as the purchaser rather than the true name of such purchaser, and thereby caused a violation of provisions of Chapter 18, Title 15, United States Code.

15. The rifle and the revolver were the subject of a fictitious entry in the required records of disposition and were therefore involved in violations of the record keeping provisions of the Federal Firearms Act (15 U.S.C. 903(d)).

16. The rifle and the revolver became forfeited to the United States because of their having been involved in violations of provisions of the Federal Firearms Act.

17. Claimant, John J. King, acquired his interest, if any, in the rifle and the revolver with knowledge that these firearms were in the possession of the United States and subject to claims adverse to him or to the person selling such firearms to him. (Stipulation of Fact Nos. 30, 31, and Exhibit described in Stipulation No. 30.)

18. Forfeiture of the rifle and of the revolver took effect immediately upon their involvement in the violation of the Federal Firearms Act in March 1963,

and the right to the property vested in the United States at that time. The firearms became property of the United States and the claimant, John J. King, acquired no interest therein as a result of his attempted purchase of such from Marina Oswald.