

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 19 2020

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

In re: ANY AND ALL FUNDS HELD IN
REPUBLIC BANK OF ARIZONA
ACCOUNTS XXXX1889, XXXX2592,
XXXX1938, XXXX2912, AND
XXXX2500,

No. 19-56510

D.C. No.
2:18-cv-06742-RGK-PJW

UNITED STATES OF AMERICA,

MEMORANDUM*

Plaintiff-Appellee,

v.

JAMES LARKIN, Real Party in Interest
Defendant; JOHN BRUNST, Real Party in
Interest Defendant; MICHAEL LACEY,
Real Party in Interest Defendant; SCOTT
SPEAR, Real Party in Interest Defendant,

Movants-Appellants.

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Submitted August 11, 2020**
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN and CALLAHAN, Circuit Judges, and M. WATSON, ***
District Judge.

Appellants appeal from the district court's denial of their self-styled "Motion to Vacate or Modify Seizure Warrants." Notwithstanding that title, Appellants' motion can only be characterized as a motion for return of property under Federal Rule of Criminal Procedure 41(g).¹

Even assuming the district court did not err in exercising jurisdiction over the Rule 41(g) motion due to the ongoing civil forfeiture proceedings, *see United States v. United States Currency \$83,310.78*, 851 F.3d 1231 (9th Cir. 1988), we have no appellate jurisdiction to review the merits of the district court's denial.

*** The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

¹ Appellants challenged the legality of the seizure warrants under the First, Fourth, Fifth, and Sixth Amendments. They argued their First and Fourth Amendment rights were violated because the seized assets were proceeds of publishing activity and were protected from pre-trial seizure by the First Amendment or, at the very least, that the First, Fourth, and Fifth Amendments required heightened procedural safeguards (such as a pre- or post-seizure hearing) to justify pretrial seizure. Under the Fourth Amendment, Appellants argued the warrant affidavits contained false statements and material omissions, entitling them to a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). As to the Sixth Amendment, they argued the seizures of untainted funds prevented them from hiring counsel of choice. Appellants do not challenge on appeal the district court's findings regarding the sufficiency of the warrant or whether the seizure violated the Sixth Amendment, focusing only on their First Amendment related arguments.

It is well settled in this Circuit that the test set forth in *DiBella v. United States*, 369 U.S. 121 (1962), for determining appellate jurisdiction applies even when seizure warrants are challenged under the First Amendment. *Andersen v. United States*, 298 F.3d 804, 808–09 (9th Cir. 2002) (“Although *DiBella* and *DeMassa* dealt with Fourth Amendment rights, the broad proscription against interlocutory review that those cases establish applies with equal force to First Amendment claims. . . . [W]e conclude that the Supreme Court would apply the *DiBella* rule even to a First Amendment claim.”). And the pending criminal proceedings mean the second *DiBella* factor for immediate review—that the motion be in no way tied to a criminal prosecution *in esse*—is lacking here. *DiBella*, 369 U.S. at 131–32; *Andersen*, 298 F.3d at 807–08; *Bridges v. United States*, 237 F.3d 1039, 1040–41 (9th Cir. 2001); *United States v. Storage Spaces Designated Nos. 8 and 49 Located at 277 E. Douglas, Visalia, Cal.*, 777 F.2d 1363, 1365 (9th Cir. 1985). Thus, this Court has no jurisdiction over the interlocutory order under 28 U.S.C. § 1291.

Appellants’ arguments concerning 28 U.S.C. § 1292(a)(1) and the Collateral Order Doctrine fare no better. Because Appellants do not appeal from a preliminary injunction order, § 1292(a)(1) is inapplicable. *See Andersen*, 298 F.3d at 807; *DeMassa v. Nunez*, 747 F.2d 1283, 1286–88 (9th Cir. 1984); *United States v. Pantelidis*, 335 F.3d 226, 232–33 (3d Cir. 2003). And the Collateral Order

Doctrine does not apply because the district court's decision is neither final nor separate from the merits of the criminal case. *See In re Sealed Case*, 716 F.3d 603, 611 (D.C. Cir. 2013); *Simons v. United States*, 592 F.2d 251, 252 (5th Cir. 1979); *United States v. Quintana-Aguayo*, 235 F.3d 682, 684–85 (1st Cir. 2000); *Application of Leahy*, 298 F.2d 233, 234 (9th Cir. 1958).

Accordingly, this appeal is **DISMISSED** for lack of jurisdiction.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 50px; height: 20px;" type="text"/>	<input style="width: 50px; height: 20px;" type="text"/>	\$ <input style="width: 50px; height: 20px;" type="text"/>	\$ <input style="width: 50px; height: 20px;" type="text"/>
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