IN THE IOWA SUPREME COURT

NO. 16-0440
CIVIL

IN THE MATTER OF PROPERTY SEIZED FROM JEAN CARLOS HERRERA AND FERNANDO RODRIGUEZ

JEAN CARLOS HERRERA AND FERNANDO RODRIGUEZ

CLAIMANTS-APPELLANTS.

APPEAL FROM THE IOWA DISTRICT COURT OF POTTAWATTAMIE COUNTY
HONORABLE MARK J. EVELOFF AND HONORABLE GREG W. STEENSLAND

APPELLANT'S APPLICATION FOR FURTHER REVIEW FROM THE COURT OF APPEALS DECISION OF OCTOBER 11, 2017

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QUESTIONS PRESENTED FOR REVIEW

I. A. WHETHER APPROPRIATE REMEDY FOR PROPERTY OWNER WHO MERELY OBJECTS TO PROVIDING INFORMATION IN CLAIM ON GROUNDS THAT SUCH INFORMATION WOULD BE FRUIT OF THE POISONOUS TREE AND SUBJECT TO EXCLUSION FROM USE TO FORFEIT PROPERTY, AND WHO ALSO MOVES TO SUPPRESS EVIDENCE OBTAINED BY UNLAWFUL DETENTION, SEARCH AND SEIZURE, IS THE COMPLETE DISMISSAL OF HIS CLAIM AND OBJECTION TO FORFEITURE?

B. STATED DIFFERENTLY, WHAT PROCEDURE SHOULD IOWA LOWER COURTS FOLLOW WHEN A MOTION TO SUPPRESS EVIDENCE OBTAINED DIRECTLY AND DERIVATIVELY FROM AN ALLEGED ILLEGAL SEARCH AND SEIZURE IS MADE BY A PROPERTY OWNER WITH STANDING TO RAISE THOSE ISSUES?

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The Iowa Supreme Court should grant further review in this case because the Court of Appeals decision conflicts with this court's decision in In the Matter of Property Seized from Sharon Kay Flowers, 474 N.W. 2d 546 (Iowa 1991) on the important issue of a citizen's right to legitimately contest an unlawful search and seizure (without being subjected to a further intrusion) and to not have illegally obtained information used to forfeit their property. The decision also conflicts with In re Aronson, 440 N.W. 2d 394, 397 (Iowa 1989) which recognized a claim of ownership gave standing in a forfeiture case. To the extent the Iowa Supreme Court has not explicitly addressed how a property owner with standing to contest the legality of a search and seizure in a forfeiture action should be allowed to do so, that is an important question of law that only the Iowa Supreme Court can settle.

If the Iowa Supreme Court does not take this case, then persons who wish to contest the legality of searches and seizures in forfeiture cases will be in jeopardy of losing their property rights by contesting the legality of the search that led to its seizure, and they will further be compelled to make statements under oath to be heard on objections to the search, seizure, and refusal to return seized property. The procedure the Court of Appeals established puts persons whose property has been illegally seized in the position of having to subject themselves to a further

invasion of their privacy, and forces them to choose between invoking their right to be free from an unconstitutional search and seizure, and to not have property forfeited on such illicit fruit, while also compelling them to either waive their Fifth Amendment right to silence or have their right to defend the forfeiture of their property taken away by judicial fiat[1]. The remedy of dismissal of the forfeiture defendant's right to be heard works an unacceptable penalty upon their right to contest the search and seizure predicating forfeiture and their constitutional right to remain silent in the face of an unspecified general allegation of criminal wrongdoing. This creates a situation where the court, in a forfeiture proceeding wherein no information derived from an illegal search and seizure may be used to support the forfeiture, is without a party to raise the issue for the court in an adversarial proceeding.

[1] This type of impermissible choice was addressed in Simmons v. U.S., 390 U.S. 377 (1968)(intolerable to require waiver of Fifth Amendment to assert Fourth Amendment).

BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

I. A. WHETHER APPROPRIATE REMEDY FOR PROPERTY OWNER WHO MERELY OBJECTS TO PROVIDING INFORMATION IN CLAIM ON GROUNDS THAT SUCH INFORMATION WOULD BE FRUIT OF THE POISONOUS TREE AND SUBJECT TO EXCLUSION FROM USE TO FORFEIT PROPERTY, AND WHO ALSO MOVES TO SUPPRESS EVIDENCE OBTAINED BY UNLAWFUL DETENTION, SEARCH AND SEIZURE, IS THE COMPLETE DISMISSAL OF HIS CLAIM AND OBJECTION TO FORFEITURE?

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On September 12, 2015, Jean Carlos Herrera was stopped by an IDOT vehicle enforcement officer for allegedly speeding in Pottawattamie County on I-80. He was operating a vehicle owned by Fernando Rodriguez, who was not present during the stop. Mr. Herrera was subjected to the stereotypical drug interdiction stop outlawed by this Court in Pardee. In re Pardee, 872 N.W. 2d 384 (Iowa 2015). No drugs were found in the vehicle, but the vehicle and its contents were impounded and described on a Notice of Seizure for Forfeiture as property the State wanted to forfeit. That Notice was served on Herrera on September 12 and mailed to Rodriguez. On September 23 Rodriguez moved for a probable cause hearing pursuant to Iowa Code Section 809A.12(3) to determine the legality of the seizure and retention of his vehicle. On September 26 Rodriguez also served the

appropriate parties with a sworn claim for return of his seized vehicle, asserting it was not subject to forfeiture and was exempt from forfeiture under Iowa Code Section 809A.5, the "innocent owner" provision. On October 1 the State filed an In Rem Forfeiture Complaint seeking forfeiture of the vehicle and contents.

Herrera filed a timely sworn answer. Herrera asserted he had a "legal ownership and possessory interest" in the items seized from the vehicle, including the currency. Herrera then advised of the following:

> 1. With this answer we are also filing a motion asserting that the vehicle stop, the subsequent detention and seizure, and the search of that vehicle, violated the prohibition against unreasonable searches and seizures found in the Fourth Amendment to the United States Constitution and the corresponding provision of the Iowa Constitution.
>
> 2. The exclusionary rule under the Fourth Amendment and Iowa Constitution applies in forfeiture proceedings. See In the Matter of Property Seized from Sharon Kay Flowers, 474 N.W. 2d 546 (Iowa 1991).
>
> 3. By virtue of the application of the exclusionary rule, further statements concerning the vehicle and its contents would constitute derivative evidence also subject to the exclusionary rule. Consequently, until there is a determination on the motion to suppress, we object to providing further information for the reason that such further information would be the product of the original search and seizure that we believe violated constitutional rights.

A separate motion to suppress was also filed asserting the warrantless stop, detention, search and seizure were conducted in violation of the U.S. and Iowa Constitutions and that the burden was on the State to establish an exception to the

warrant requirement. The Motion to Suppress was set for hearing on December 10, 2015. Prior to the suppression hearing, the State did not challenge the answer to the forfeiture complaint, or resist the suppression motion.

At the December 10, 2015, hearing on the Motion to Suppress, the State, for the first time, orally challenged the sufficiency of the answer. (A33-35)[2]. In response to the State's surprise oral motion, counsel for the property owners argued that the owners did file and assert an ownership interest, and stated:

> Mr. Stowers: And then we did file an answer which asserts an ownership and possessory interest. At the end of the thing it says, we certify under penalty of perjury, so, um, and then it's signed.
>
> And then the other thing is that it's always been my position in these cases that—and there is case law we can provide to the court to this effect—that when you have the allegation that there's been an unlawful search and seizure of the property that they're seeking to forfeit, that part of the remedy for that violation is protecting the claimant against being required to divulge further information to support their claim to get their property back if the property was, indeed, unlawfully searched and seized. Because part of the remedy on a Fourth Amendment violation is a suppression of the evidence and the fruits of that. So if you start to require somebody who's claiming a Fourth Amendment violation to come into court and say all sorts of things of an evidentiary nature above and beyond what maybe is known already or is claimed already, then you're getting into the issue of requiring somebody to give fruit of the violation that they're claiming.

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[2] Ironically, the State orally argued that this Court in In re Aronson, 440 N.W.2d 394 (Iowa 1994) had held "an ownership or property interest is necessary threshold to establish standing…" (A35 lines 5-10). That reading is consistent with how Herrera and his counsel read Aronson.

> Now if the Motion to Suppress is denied, then somebody could be required at that point to come back in and amend their claim and their answer. But if you required it now, you would be essentially violating the very thing that they're—you'd be sort of prejudging the issue of the violation. So we think it's not appropriate to require detailed disclosures when there's a Fourth Amendment issue that has to be taken up first.

(A36-37).

The parties then conducted a full suppression hearing and briefed both the so-called "standing" issue and the search and seizure issues after the hearing. Herrera and Rodriguez argued that their assertion of ownership gave them the right to be heard and that the proper procedure was to decide the motion to suppress first before requiring any further information be provided because their answer would be fruit of the alleged violation and unnecessary at the time. (A100-106). *They urged the Court to not impermissibly punish them for their constitutional objections, but to rule upon them first.* If the objections were denied, they then asserted the Court could order the answer amended without any prejudice to the State. They also pointed out that if the answer was somehow insufficient and the Court felt it needed to be amended now, the "proper remedy is to allow an amendment of the answer, rather than an order of forfeiture under 809A.16" as the State requested. (A106).

On February 9, 2016, the trial court issued a ruling finding that the claim was insufficient because it did not include all the detail described in Iowa Code

Section 809A.13(4)[3] and that as a result Claimants were "*not entitled to a forfeiture hearing, and evidentiary questions are rendered moot*." (A147). The trial court then said, "[t]herefore, in accordance with Iowa Code 809A.16(3), the property claimed to be owned by Claimant is hereby forfeited to the State and the Motion to Suppress is Denied." (A147). Even the Court of Appeals found this automatic forfeiture was improper, but remanded for the State to submit papers under 809A.16(3), which provides:

> Except as provided in subsection 1, if a proper claim is not timely filed in an action in rem, or if a proper answer is not timely filed in response to a complaint, the prosecuting attorney may apply for an order of forfeiture and an allocation of forfeited property pursuant to section 809A.17. Under such circumstance and upon a determination by the court that the state's written application established the court's jurisdiction the giving of a proper notice, and facts sufficient to show probable cause for forfeiture, the court shall order the property forfeited to the state[4].

There are so many aspects to the problem posed if the Court of Appeals decision stands that it is hard to know where to begin.

1. Herrera, who has had property seized and held by the State has every bit of standing to contest the search and seizure and the effort to forfeit his property based upon tainted evidence under any definition of "standing" applicable in the search and seizure caselaw and property law.

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[3] Under 809A.13(4)(d) the claim filed by the owner or interest holder is to include "the date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property."

[4] Chapter 809A is a mess of draftsmanship. Although not expressed, one has to presume the property owner would get their property returned if probable cause were found lacking. See 809A.12(4).

There is no question that Herrera, who was stopped, detained, had the vehicle he was driving searched, and property that he possessed and owned seized, had the right to challenge the search and seizure under Article 1, Section 8 of the Iowa Constitution and the Fourth Amendment. There is also no serious dispute that Herrera was among the only class of persons who could file a claim under the Code because he was an "owner or interest holder," making him a "claimant". Iowa Code Section 809A.11(1); 809A.13(3). He also had a "sufficient stake" in the matter to obtain judicial resolution because his ownership interest was personal and he would be injuriously affected by forfeiture. Alons v. Iowa District Court for Woodbury County, 698 N.W.2d 865 (Iowa 2005); City of Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 475 (Iowa 2004). Every federal case, (a laundry list provided in the reply brief), holds a colorable claim of ownership gives standing to contest forfeiture. See U.S. v. $148,840 in U.S. Currency, 521 F.3d 1268, 1276 (10th Cir. 2008). Again, caselaw recognizes that objecting to providing details explaining the ownership interest, or asserting silence, does not defeat standing. U.S. v. $557,933.89 in U.S. Funds, 287 F.3d 66, 79 (2d Cir. 2002); U.S. v. $304,980, in U.S. Currency, 732 F.3d 812, 818 (7th Cir. 2013); $148,840 in U.S. Currency, 521 F.3d at 1273-78:

> The government cannot prevent every person unwilling to completely explain his relationship to property that he claims to *own*, and that is found in his possession and control, from merely *contesting* a

> forfeiture of that property in court. It may well be that forfeiture ultimately will prove appropriate, but we find it obvious that such a claimant risks injury within the meaning of Article III and thus may have his day in court. We thus hold that when a claimant has asserted an ownership interest in the res at issue and has provided some evidence tending to support the existence of that ownership interest, the claimant has standing to challenge the forfeiture.

U.S. v. $148,840.00 in U.S. Currency, 521 F.3d 1268, 1276 (10th Cir. 2008). In fact, this Court *has already chosen* to follow the federal standard for "standing" to contest forfeiture when it decided In re Aronson, 440 N.W. 2d 394, 397 (Iowa 1989) and held:

> To have standing to contest forfeiture, one must be a "claimant." A "claimant" is one who claims to own the article or merchandise or to have an interest therein. The plaintiffs are not "claimants" because they have alleged no specific property interest in the forfeited items.

(quoting Baker v. U.S., 722 F.2d 517 (9th Cir. 1983) (internal quotations and citations omitted). Aronson involved claimants who asserted no ownership interest whatsoever, and they were said to have no standing for that reason. Here, Herrera claimed ownership interest and did not provide explanation for that interest.

2. Furnishing Details About Acquisition of An Ownership Interest Would Be Fruit of an Illegal Search and Ongoing Illegal Seizure.

Courts have long held that statements, admissions or confessions induced while in the midst of an ongoing Fourth Amendment violation (Brown v. Illinois, 422 U.S. 590 (1975) and its progeny), or when a person is confronted with evidence obtained in violation of the Fourth Amendment (U.S. v. Timmann, 741

F.3d 1170, 1182 (11th Cir. 2013)(citing Fahy v. State of Conn., 375 U.S. 85, 91 (1963)) or when a person is required to make statements as the result of a Fourth Amendment violation (Matter of Flowers, 474 N.W.2d 546, 548 (Iowa 1991)(inference form silence was fruit)) are exploitive of the primary illegality and fruit of the poisonous tree.

The Iowa Court of Appeals, with little analysis and citation to one, inapposite case, declares otherwise. The Court of Appeals creates an incorrect and dangerous precedent in which the averments required by Iowa Code Section 809A.13 could never be fruit of the State's Fourth Amendment violation.

Herrera asserted his currency was seized in violation of his constitutional rights. He therefore objected to offering additional information in his Answer as fruit of the violation. The trial court never ruled on Herrera's objections. It never determined 1) whether the seizure was unlawful and 2) if so whether the statements compelled by Iowa Code Section 809A.13 are exploitive of the illegal seizure. The district court simply threw out Herrera's claim for not complying with the text of 809A.13.

On appeal, though the trial court did not rule on the objections, the Court of Appeals held statements made by a claimant seeking return of property illegally seized are never fruit of the poisonous tree. Their ruling creates a per se rule that such statements are never fruit and never subject to objection. The ruling runs

afoul of settled law and deprives Herrera the ability to rectify the State's violation of his rights.

In concluding that the statements required by Iowa Code Section 809A.13 are never fruit, the Court of Appeals proclaims:

> We reject the premise that any statements Herrera would have to make to file a proper answer were derivative of the purportedly illegal traffic stop. While the traffic stop was but-for cause of the need to file an answer to the resulting forfeiture proceeding, any statements made in support of a claim to the forfeited property are not derivative within the meaning of the relevant case law.

Matter of Herrera, No. 16-0440, 2017 WL 4570541, at *4 (Iowa Ct. App. Oct. 11, 2017). The Court of Appeals then quotes at length from U.S. v. Duchi, 944 F.2d 391 (8th Cir. 1991), without discussing the application of Duchi to this case.

In Duchi, the issue was whether the government could use trial testimony Duchi gave at his girlfriend's trial, in his own retrial. Id. at 393. Duchi claimed the Fourth Amendment prohibited the use of his testimony in his second trial. Id. Duchi argued that his testimony in his girlfriend's case would not have been required but for the original illegal search and seizure. Id. Duchi took the stand in his girlfriend's case not his own. Id. at 395-396. He did so voluntarily (unsubpoenaed), upon the advice of counsel. Id. The Government did not compel nor seek Duchi's testimony. Id. Thus, there was no government exploitation of the prior Fourth Amendment violation. Duchi's decision to testify in his girlfriend's

case was not sufficiently related to the illegal government conduct to warrant imposition of the exclusionary rule. Id. at 395.

To make this point, the 8th Circuit in artfully analogized Duchi to the Defendant in New York v. Harris. Id. The Duchi Court's discussion of Harris quoted almost in full[5] by the Iowa Court of Appeals, is their basis for holding statements required by Iowa Code Section 809A.13 are not fruit. New York v. Harris, is distinguishable and bears no factual resemblance to this case. Harris involved an arrest *with probable cause*, effectuated by illegally entering Harris's home violating Payton v. New York, 445 U.S. 573, 639 (1980)(holding police cannot make a warrantless, nonconsensual entry into a person's home to effectuate a routine felony arrest). However, the Supreme Court held the interrogation of Harris at the police station was not exploitive of the unconstitutional entry of his home, because he was lawfully detained at the time. Id. at 20. Once Harris was removed from home where the police had no right to be, the situation became no different than if Harris was arrested on the sidewalk. All illegality ended. The Supreme Court explained,

> We do hold that the station house statement was admissible because Harris was in legal custody, as the dissent concedes, and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact the arrest was made in the house rather than someplace else.

[5] As discussed later, the Court of Appeals omitted the final, critical paragraph of the analysis.

Id.

Harris is a red herring. The Iowa Court of Appeal's left out the critical final paragraph of the Duchi Court's, Harris analysis:

> Likewise, in this case, Duchi's statements were not the "fruit" of the earlier illegal search. The Government did not exploit its unconstitutional conduct to obtain Duchi's statements, as that term is used in *Wong Sun*. Instead, Duchi made a conscious and voluntary choice to aid his girlfriend and co-defendant by testifying in her behalf. Nothing about the illegal search led the Government to this testimony and the Government did not use an advantage gained by its illegal activity to obtain Duchi's statements.

Id.

Here the police illegally seized property from Herrera. The State retained his property, and sought its forfeiture unless Herrera made statements about the property in a sworn answer if he hoped to get the property released. This is classic exploitation. If a person has to make statements to get illegally seized property released, then those statements are the product of the illegal seizure which continues at the time the statements are made.

The starting point in the analysis is Matter of Flowers, 474 N.W.2d 546 (Iowa 1991). In Flowers, the Iowa Supreme Court recognized the exclusionary rule applied in forfeiture cases. Id. at 548. Specifically, the Court held, "In establishing a right to forfeiture, however, the State may not rely on evidence obtained in violation of fourth amendment protections nor derived from such violations." Id. The Court also noted,

> We need not consider the property claimants' additional argument that their rights guaranteed by the fifth amendment to the federal constitution were also violated by the district court's willingness to draw adverse inferences from their reliance on fifth amendment privilege while testifying at the hearing. It appears that the inferences would, in the present case, be derivative of the underlying fourth amendment violation and should not be considered on that basis.

Id. Normally, a Court in a civil case is entitled to draw adverse inferences from a litigant's invocation of silence. However, the Iowa Supreme Court stated Flowers invocation of her Fifth Amendment rights at trial could not be considered at all because it was fruit of the underlying Fourth Amendment violation. If Flowers Fifth Amendment objection at trial is itself fruit, it is illogical to conclude that Herrera could not object in his Answer that the statements required by 809A.13 are fruit.

It is black letter law that admissions induced through the use of illegally seized evidence are fruit of the poisonous tree and must be suppressed. U.S. v. Timmann, 741 F.3d 1170, 1182 (11th Cir. 2013)(citing Fahy v. State of Conn., 375 U.S. 85, 91, 84 S.Ct. 229, 232, 11 L.Ed.2d 171 (1963); Amado-Gonzalez v. U.S., 391 F.2d 308, 318 (5th Cir. 1968).

Moreover, the United States Supreme Court has long held that statements secured during ongoing police illegality are fruit of the Fourth Amendment violation. In Brown v. Illinois, 422 U.S. 590 (1975), the Defendant was arrested without a warrant or probable cause. Id. at 591. He was then interrogated for hours

at a police station and eventually confessed to murder. Id. at 593-597. The Illinois Supreme Court upheld Brown's conviction finding his confession admissible because he had been mirandized. The U.S. Supreme Court reversed finding the confession was the fruit of Brown's unlawful continued detention ongoing during the confession. Id.

A recent forfeiture case from the 9th Circuit Court of Appeals is particularly illustrative. In U.S. v. $186,416.00 in U.S. Currency, 590 F.3d 942 (9th Cir. 2010), the Los Angeles Police Department unlawfully obtained a search warrant for the offices of the United Medical Caregivers Clinic (UMCC), a marijuana dispensary. $186,416.00 in U.S. Currency at 945-947. The LAPD seized cash from the clinic. Id. The Chief Executive Officer of the UMCC, filed an application in California state court for return of the seized cash, along with a declaration in support of the application. Id. That declaration was used in subsequent federal forfeiture proceedings to prove the cash was used in violation of federal law. Id. The Ninth Circuit held that the declaration was fruit of the poisonous tree. Id. at 951. It is worth quoting their rationale at length:

> To determine whether evidence, such as the Feil declaration, is subject to exclusion as the fruit of a constitutional violation, we must ask whether the evidence has been obtained "by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (internal quotation marks omitted).

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As a preliminary step, it is plain that the Feil declaration was the product of the LAPD's illegal activity. See New York v. Harris, 495 U.S. 14, 19, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990). "There is no question of 'attenuation' until the connection between the primary illegality and the evidence obtained is established." Crawford, 372 F.3d at 1058 (quotation marks omitted). As the Supreme Court has recognized, "most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity." Crews, 445 U.S. at 471, 100 S.Ct. 1244. This case is no exception. The LAPD's illegal search revealed the defendant currency and allowed for its seizure. Feil, in turn, submitted his declaration for the express purpose of securing the return of the illegally seized currency. This being so, there indisputably is a strong connection between the unlawful search and the Feil declaration.

The question then becomes whether the attenuated basis exception applies. We observe that UMCC does not dispute, nor would there be grounds for doing so, that Feil's declaration was "voluntary," in the sense pertinent to the Fifth Amendment. Nevertheless, whether a statement is voluntary is merely a "threshold requirement" for admissibility. Brown, 422 U.S. at 604, 95 S.Ct. 2254. For the "causal chain" between the illegality and the subsequent statement to be broken, the statement also must be "sufficiently an act of free will to purge the primary taint." Id. at 602, 95 S.Ct. 2254 (quoting Wong Sun, 371 U.S. at 486, 83 S.Ct. 407). To guide this inquiry, the Brown Court identified several factors relevant to whether a statement is sufficiently attenuated from the illegality as to be admissible: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603–04, 95 S.Ct. 2254 (footnotes and internal citation omitted). The Court also emphasized that the Fourth Amendment cannot turn on any single "talismanic test," given the diverse "possibilities of misconduct" that exist. Id. at 603, 95 S.Ct. 2254.

With this in mind, we now determine "[w]hether the twin aims of deterrence and judicial integrity warrant application of the exclusionary rule" under the unique facts of the present

case. Crawford, 372 F.3d at 1054. Applying the factors put forth by the Supreme Court in Brown, we consider, first, that Feil executed his declaration on May 12, 2005, nearly two months after the illegal search of UMCC. While this is a relatively long time, "there is no 'bright-line' test for temporal proximity" in an attenuation analysis. United States v. Reed, 349 F.3d 457, 463 (7th Cir.2003). Rather, we must consider whether intervening circumstances may have purged the Feil declaration of taint from the illegal search. Brown, 422 U.S. at 603–04, 95 S.Ct. 2254.

Under this factor, we do not find any intervening circumstances that would allow us to say that Feil made "an unconstrained, independent decision that was completely unrelated to the initial unlawful violation." United States v. Washington, 387 F.3d 1060, 1074 (9th Cir.2004) (internal quotation marks and brackets omitted). Far from making an "unconstrained, independent decision" to file his declaration, Feil had to offer a declaration of ownership on UMCC's behalf, or else UMCC would have lost all hope of rectifying the "initial unlawful violation" by the LAPD. Id. This is so because at the time UMCC filed its motion for return of the seized currency in state court, with the Feil declaration attached, such a filing appeared to be its only option for regaining the currency unlawfully seized by the LAPD. Feil's declaration, therefore, was not only closely tied to the LAPD's illegal activity but was virtually compelled by it.

In addition, when discussing the first two attenuation factors, we have held that "[i]t is not enough for Fourth Amendment attenuation that [a] statement be uncoerced; the defendant's 'free will' must also be sufficient to render inapplicable the deterrence and judicial integrity purposes that justify excluding his statement." United States v. Perez–Esparza, 609 F.2d 1284, 1289 (9th Cir.1979). Considering Feil in place of "the defendant" referenced in our precedent, we conclude that Feil's act was not one of free will that would overcome our substantial interests in deterring official illegality and upholding judicial integrity. As we have discussed, Feil could obtain return of UMCC's illegally seized money only by asserting UMCC's ownership interest in the currency, thereby leaving his decision well short of being a product of an "unconstrained" and "independent" free will. Washington, 387 F.3d at 1074. At the same time, substantial deterrence interests will be served by refusing to allow the

> government to rely on the Feil declaration, given law enforcement's strong incentive to prevail in forfeiture actions.

United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, 950–52 (9th Cir. 2010).

Statements made voluntarily out of court to regain illegally seized property are fruit. In State v. Jefferson, 297 Kan. 1151 (Kansas 2013) the Kansas Supreme Court held that Kansas police detectives illegally seized a murder suspect's car, held it and then exploited the seizure to obtain incriminating statements weeks later. Jefferson at 1165-1166.

> Although this court summarily affirmed the panel's decision in Kirby, we now disapprove of any language in Kirby suggesting a defendant's act of contacting law enforcement officers to retrieve the defendant's illegally seized property is "purely personal" and will automatically constitute an act of free will sufficient to purge the taint of an illegal seizure. Further, we find the facts of this case distinguishable from the facts in Kirby.
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> In Kirby, law enforcement officers clearly were interested in the defendant's vehicle from the time of the stop and remained interested in the vehicle as demonstrated by the inventory search. Here, in contrast, the detectives' actions indicate they developed an interest in the vehicle only after Jefferson ran from them and could not be located. These facts do not support the State's assertion that the detectives believed evidence of the crime remained in Jefferson's car more than a month after Jackson's shooting.
>
> Consequently, we have no hesitancy in concluding here that the detectives exploited their illegal seizure of Jefferson's car to obtain his incriminating statements. And the State has failed to establish under the totality of the circumstances that Jefferson's statements are sufficiently attenuated from the preceding illegal seizure.

Id. at 1165-1166.

Other courts have held a Defendant's statements made during a criminal trial, while not legally compelled, but induced in response to the government's introduction of illegally obtained confessions were fruit of those confessions. In Harrison v. United States, 392 U.S. 219, 222-226 (1968)[6] three confessions were illegally obtained, though Harrison lost his suppression motion. Id. The government introduced the illegal confessions at trial and Harrison took the stand to rebut those confessions. Id. On appeal the Supreme Court held that Harrison's confessions were illegally obtained and his trial testimony in response was fruit of the poisonous tree. Id.

In this case Herrera objected to answering the forfeiture complaint in full in reliance on the exclusionary rule and urged that his answer would be fruit because the State continued to hold his illegally seized property. He sought a ruling on that issue. As in Flowers, Brown, $186,416.00 in U.S. Currency, Harrison and Jefferson, the illegality was and is still ongoing. Therefore, Herrera should be permitted to object based upon his 4th Amendment violation. His objections should be resolved first by the trial court through a motion to suppress.

[6] Distinguished in Duchi, but not discussed by the Iowa Court of Appeals.

3. The Exclusionary Rule Prohibits Use of an Illegal Search and Seizure to Support Property Forfeiture, Meaning the Court Must Adjudicate the Legality of the Search and Seizure in Deciding Forfeiture.

It has been established since the 1800s that a forfeiture may not be predicated upon evidence procured in violation of the Fourth Amendment. Boyd v. U.S., 116 U.S. 616 (1886). That was reaffirmed in One 1958 Plymouth Sedan which upheld application of the exclusionary rule in forfeiture cases. One 1958 Plymouth Sedan v. Com. Of Pa., 380 U.S. 693 (1965). That rule does not only mean that the tainted evidence may not be used at the forfeiture hearing, it means the evidence may not be used at all, including to support probable cause to bring the action. See, Vance v. U.S., 676 F.2d 183 (5th Cir. 1982)(holding the exclusionary rule applies to forfeiture proceedings, so probable cause cannot rest upon tainted evidence); U.S. v. $186,416.00 in U.S. Currency, 590 F.3d 942 (9th Cir. 2010). Probable cause may be supported only by facts "untainted" by any prior illegality); U.S. v. U.S. Currency $31,828, 760 F.2d 228 (8th Cir. 1985)("the forfeiture can proceed if the government can show probable cause with untainted evidence"); U.S. v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66 (2nd Cir. 2002); In re Forfeiture of 1999 Dodge Intrepid, 934 So.2d 669 (FL 2nd DCA 2006); State v. Nineteen Thousand Two Hundred and Thirty-Eight Dollars in U.S. Currency, 755 P.2d 1161, 1171 (AZ App. 1987).

The manner to contest a search and seizure is to file a motion to suppress, hold a hearing, and seek a ruling on the motion. In this case, the primary person to do that is Herrera, and he did exactly that. Presented with the issue, the lower court is not free to disregard it, throw Herrera out of court, declare his motion to suppress moot, and forfeit the property based on illegally secured evidence as occurred here. Surely, Herrera has every right to be heard on the question of whether his property may be forfeited upon tainted evidence.

CONCLUSION

The Iowa Supreme Court should grant further review and rule that Herrera's motion to suppress should be heard and decided prior to any determinations with respect to the sufficiency of his claim or any ruling on the merits.

CERTIFICATE OF FILING

The undersigned does hereby certify that she electronically filed Appellant's Application for Further Review with the Clerk of the Iowa Supreme Court by using the EDMS filing system on the 31st day of October, 2017.

CERTIFICATE OF SERVICE

On the 31st day of October, 2017, the undersigned party served Appellant's Application for Further Review on all other parties to this appeal by using the EDMS filing system.

Bridget Chambers

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 5,598 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman in 14 point font size.

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