

Statement of E.E. (Bo) Edwards

**on behalf of
National Association of Criminal Defense Lawyers**

**before
Committee on the Judiciary, U.S. House of Representatives**

**Regarding Bi-Partisan Bill to Provide a More Just and
Uniform Procedure for Federal Civil Asset Forfeitures
("Civil Asset Forfeiture Reform Act of 1997")**

June 11, 1997

Mr. Chairman, Mr. Conyers, Other Distinguished Members of the Committee:

I am pleased to speak to you again on behalf of all the innocent property owners of our nation in urging favorable action of this important bi-partisan Civil Forfeiture Reform Act. I am here to urge you to hold the line and resist attempts by the Department of Justice and the Department of Treasury to render the significant and much-needed reform provisions in this bill a mirage, an illusion promising protection to owners of private property, but not delivering. And I submit to you that all of the truly meaningful reforms contained in this bill are sorely needed not just to afford a proper measure of protection to the concept of private ownership of property, which has contributed so much to the growth and strength of our nation throughout history, but also to help restore faith and respect in the government itself, and in its law enforcement institutions. To be sure, long-time abuse of innocent citizens and their rights to private property ownership through the forfeiture laws has engendered grave mistrust and disrespect for our system of justice. This should be of vital concern to us all.

At your hearing last July, you also heard from innocent victims of the broad-sweeping and unjust forfeiture statutes, including Willie Jones, a former client of mine, who was a victim of a so-called "interdiction" program at the Nashville International Airport. He simply fit the government's "profile." That case is an example of the abusive application of forfeiture laws to citizens traveling through our airports and highways.

Today, I want to tell you of another prime example of asset forfeiture injustice, this time involving the abuse of Treasury's "currency transaction violation-forfeiture statute." 18 U.S.C. sec. 981. The victim is an elderly family doctor in a small town in Northwest Alabama, who almost lost his life savings due to the pressure placed on law enforcement to seize and forfeit property, and because current law affords too little protection to innocent property owners.

had attended Chambers Academy before he moved to Haleyville. He decided to do what he could to save the school.

In February 1988 he contacted Joseph Lett, an old friend and former neighbor who was, in 1988, president of First Bank, a bank with offices in Roanoke and Wadley, Alabama, both towns only a short distance from Lafayette. Dr. Lowe had Mr. Lett create an account in the name of CCEF (Chambers County Educational Foundation, the non-profit organization which owned and operated the school), and he placed the proceeds of several certificates of deposit (CD's) in it. His initial deposit was roughly \$1.3 million, but by 1990 Dr. Lowe had placed approximately \$2.5 million on deposit in the CCEF account at First Bank. From the start, he had all interest earned by the account paid monthly to Chambers Academy. And from the start, Dr. Lowe expressed his wish that his name not be placed on the account in any way because he wished to remain anonymous.

From the account's inception to its seizure in June 1991, Dr. Lowe was responsible for \$452,500 in interest being paid to Chambers Academy. In addition, in late 1990 and early 1991, Dr. Lowe began an effort to help the school retire its debt and, so the doctor hoped, become self-sustaining. With that aim in mind, Dr. Lowe contributed \$456,000 of the principal from the account to the school in 1991. Thus, from February 1988 until June 1991, the school received a total of \$908,539 in principal and interest. School officials agree that the school would not have survived without Dr. Lowe's benevolence.

Dr. Lowe claimed no charitable contribution deductions on his income tax returns from 1988 through 1991. Tax benefits had nothing to do with his motivation. His purpose is clearly revealed in a letter which Dr. Lowe wrote to the CCEF Board in April 1990, many months before the events central to this case:

Without Chambers Academy being in the county, I fear that the future would look very bleak for Lafayette and the

would bring the money to First Bank. On November 14, 1990, Dr. Lowe, his wife and daughter loaded the trunk of their car with the boxes of money and started out for Lafayette and Roanoke (about 20 miles further down the road). They developed car trouble and were after dark getting to Roanoke. Since the bank was closed, they obtained directions and drove to Joseph Lett's home, arriving about 8:00 p.m.. As the district court found, Dr. Lowe transferred the cash to Mr. Lett for deposit to the CCEF account, and Mr. Lett issued Dr. Lowe a typewritten receipt for the deposit. The receipt stated:

November 14, 1990

Received of R.T. Lowe \$315,291.00 for deposit for the benefit of Chambers County Education Foundation.

/s/

Joseph C. Lett
First Bank

The Lowes then borrowed a car from the Letts and drove back to Haleyville that night.

3. *First Bank's Handling of the Funds.*

This cash transaction was the only time Dr. Lowe ever deposited currency in any First Bank account. All other deposits were by bank or cashier's check. When he transferred the currency to First Bank president Joseph Lett on November 14, 1990, he fully "expected that it would be deposited in the CCEF account."

Joseph Lett sat up with the money for most of the night after the Lowes departed. He considered that the currency was the property of First Bank once he received it and issued the deposit receipt, and he was responsible for it. The next morning, when the time lock opened the vault, he put the currency in the bank vault.

Over the ensuing six weeks or so, Mr. Lett took \$205,300 of the total \$316,911, went to area banks, and purchased various bank and cashier's checks payable to CCEF in amounts of less than \$10,000. He then credited the checks to the CCEF account. The balance of the cash deposit was credited to the CCEF account through internal First Bank

and that First Bank would not file a CTR on the full amount of currency received. In determining to use this procedure, I thought at the time that no statute or regulation would be violated and no CTR would be required. I did not discuss this decision with Dr. Lowe or anyone else. I was not pressured, threatened, or coerced to follow this procedure and not file a CTR by Dr. Lowe or anyone. I decided on this procedure voluntarily and independently.

8. At the time I determined that the bank would follow this procedure of crediting the CCEF account in small increments through a series of intra-bank and inter-bank transactions, and thereby not be required to file a CTR, I considered Dr. Lowe's desire to remain anonymous. He had emphasized that desire to me from the time in late 1987 or early 1988 when he first discussed establishing a fund to aid the school. I believe then and still believe that Dr. Lowe was sincere in his wish for anonymity and that he had no ulterior motive other than a desire for privacy. I had asked him about any tax problem relating to the money. He had said there was none, and I believed him. I had known Dr. Lowe for many years, and he had been a good customer at whatever bank I was with for years. I simply wanted to do what I could to maintain his anonymity. At the time I convinced myself that I could handle the money as I did and in so doing, there would be no requirement of filing a CTR. I recognize now that a CTR should have been filed for the initial transaction when I received the currency for deposit on November 14, 1990. At the time, however, no one else caused First Bank not to file a CTR. The procedure I used simply resulted in my belief that a CTR was not necessary.

Mr. Lett explained that his concern was that several employees in the bank would have seen the documents relating to the transaction, and despite cautioning employees about confidentiality, in a small town, someone would have discussed it. "[C]ertainly a transaction of that size, yes, sir, it would have gotten out at the beauty shop or somewhere else."

6. *Partial Summary Judgment*

Dr. Lowe moved for judgment on the pleadings and for summary judgment in April 1994. He contended (1) that the facts alleged in the complaint did not state a basis for any forfeiture because, by definition, transactions between banks such as described in the complaint are exempt from the Currency Transaction Report [CTR] requirement, 31 C.F.R. §103.22(b)(1)(ii), and Dr. Lowe's one-time transfer of his cash to a bank official for deposit was perfectly legal and gave rise to a reporting duty on the bank, not the depositor, 31 C.F.R. §103.22; (2) that no structuring occurred as a matter of law, and, therefore, no forfeiture would lie under 18 U.S.C. §981; and (3) that the funds in the defendant account not related to a cash transaction were not forfeitable under any legal theory.

On June 23, 1994, the district court granted summary judgment as to all funds in the CCEF account with the exception of \$316,911 plus accrued interest (*United States v. Account No. 50-2830-2*, 857 F.Supp. 1534 (M.D. Ala. 1994)). The court found that "there is no evidence in the present case that the money was obtained through illegal means," *Id.* at 1540, and "because structuring is the only legal violation upon which forfeiture of the entire account was sought," the bulk of the account, which was not part of any alleged structuring, could not be forfeited. *Id.*

The court denied summary judgment as to the \$316,911 not based on any conclusion that the actions of Joseph Lett in buying cashiers checks constituted illegal structuring as alleged in the complaint, but based on a new theory raised by the court. The court reasoned that Dr. Lowe's concern about anonymity and his queries to Mr. Lett about the bank's reporting requirements constituted "sufficient facts from which a jury could find that because of his desire to remain anonymous, Dr. Lowe influenced Mr. Lett not to file a CTR on the \$316,911 cash deposit and in doing so, possibly violated §5324(a)(1)" *Id.*, at 1539.

To establish that the tax issue was entirely fallacious, Dr. Lowe called Grant McDonald, a Birmingham C.P.A., who represented Dr. Lowe when the I.R.S. audited his tax returns for the period 1987 through 1991. McDonald explained that a closing agreement had been reached between Dr. Lowe and the I.R.S. for that period, and the I.R.S. had agreed that there was a *net over-reporting* of his professional income by Dr. Lowe for that five years of "about 23 thousand dollars." Thus, there was no "valid claim that Dr. Lowe owed any tax on the \$316,911 for the years '87 through '91." I.R.S. group manager David Warren also conceded in his testimony that the I.R.S. does not contend that any tax was owed on the \$316,911 for '87 through '91.

Mr. McDonald described Dr. Lowe's tax circumstances at the time he made the cash deposit in November 1990. In 1989 the I.R.S. had completed an audit of Dr. Lowe's returns for 1983 through 1986. Dr. Lowe had met with I.R.S. officials without any professional assistance, either legal or accounting. According to I.R.S. work papers, the I.R.S. found that Dr. Lowe was not knowledgeable on tax matter and kept poor records. Using its own estimation, the I.R.S. determined that Dr. Lowe owed an additional \$57,000 in taxes for the four years. In addition, the I.R.S. assessed \$59,000 in penalties and interest. Dr. Lowe paid the full amount immediately without question. Mr. McDonald expressed the opinion that much of the penalty could have been avoided with proper professional assistance. For example, in the 1987 through 1991 audit with Mr. McDonald, no penalty was assessed for 1988, 1989, 1990 or 1991.

In 1989 an accountant, Alexander Walton, Jr. of Lafayette, prepared both Dr. Lowe's tax return and that for Chambers Academy (or CCEF). The accountant reported all interest paid on the defendant account by First Bank as income to the school and included it on the school's return. He did not include the income on Dr. Lowe's return or claim any charitable contribution deduction. The 1989 tax return was the last one filed prior to the cash deposit at First Bank. Thus, with the accountant's treatment of the interest and the I.R.S. paid in full for its audit a year earlier, there was no reason in

exhortation,"; and (3) the Excessive Fines Clause of the Eighth Amendment does not apply to a forfeiture under §981 when a CTR is not filed "so long as the amount forfeited is no more than the defendant currency." According, the court held \$316,911, plus accrued interest thereon, forfeit.

9. *Where The District Court Went Wrong*

The government did not establish probable cause for the forfeiture. The record is insufficient in three significant ways. First, the government's complaint alleged but one basis for forfeiture under § 981, *i.e.*, that the defendant property was involved in structuring violations by First Bank president Joseph Lett and his son, bank vice president Michael Lett. But the defendant \$316,911 was deposited in a single, lump sum deposit which did not violate federal law, and the Treasury regulations applicable here expressly exempt transactions between domestic banks from reporting requirements. Thus, no CTR was required for the several less than \$10,000 cashier's checks obtained by the Letts, and no structuring occurred.

Second, the district court did not find probable cause based on structuring, but on the bank's failure to file a CTR, a basis for forfeiture not alleged by the government in its complaint. Additionally, the government was not aware of the evidence relating to the bank's failure to file until after the case had been instituted. 19 U.S.C. § 1615 requires probable cause to be shown for the institution of the action which many courts, including district courts in this circuit, have held to limit probable cause to facts known as of the filing of the complaint. Thus, the district court's finding of probable cause does not satisfy the standard of § 1615.

Third, the district court based its finding of probable cause upon the claimant's having requested anonymity in establishing the defendant account to aide Chambers Academy, a small private school in his hometown. The court found that the banker was influenced by that request. But the duty to file a CTR is on the bank, not the depositor. The cash deposit is not contraband, and the offense is the withholding of the information

10. *The Court of Appeals' Opinion*

On July 31, 1996, in an unpublished opinion, the United States Court of Appeals for the Eleventh Circuit reversed the forfeiture judgment and remanded the case for the entry of judgment in favor of Dr. Richard Lowe. The court held that the proof in the case had not demonstrated "any substantial connection between anything [Dr.] Lowe knew and the bank's failure to file a CTR on the cash deposit." In what is an excellent example of how a standard of proof higher than a preponderance affords a needed additional layer of protection to innocent property owners, the Court of Appeals stated: "[W]e are left with the definite and firm conviction that a mistake was committed when the district court found that a *preponderance* of the evidence did not support the conclusion that Lowe lacked knowledge that [bank president] Lett would break up the cash deposit in an attempt to avoid federal currency reporting requirements." The court concluded that the proof established that Dr. Lowe did not have actual knowledge that the bank would not file a CTR, and therefore, Dr. Lowe was an "innocent owner" under 18 U.S.C. §981(a)(2).

In the end, Dr. Lowe regained all of his savings, but the battle for the restoration of his assets ran from June 1991 until the last of the funds were returned earlier this year (February 1997). This case offers many valuable lessons regarding the reform of forfeiture laws.

TEACHINGS FROM THE LOWE CASE

1. *The Burden of Proof*

From the standpoint of a private citizen undertaking a project which is not only innocent in itself, but is worthy of considerable praise, it is shocking to learn that the government has the authority and the desire to seize and forfeit your assets. But it is more than shocking -- it is contemptible -- that such a citizen stands to lose the case on

19 U.S.C. §1615, which applies to all drug (§881) and currency violation (§981) forfeitures, provides that "probable cause shall be first shown *for the institution* of such suit or action" Some courts have read this language to mean what it says. That is, the government must demonstrate on the day the forfeiture case is filed in district court that it possessed proof establishing probable cause to believe the property in question is subject to forfeiture. (See, e.g., *United States v. \$91,960.00*, 897 F.2d 1457, 1462 (8th Cir. 1990); *United States v. Monkey*, 725 F.2d 1007, 1011 (5th Cir. 1984)). The government should not be allowed to use depositions and discovery to make a case when it had no case at the outset.

In Dr. Lowe's case, the investigating agents and the prosecuting attorney did not learn that no CTR had been filed until months after the case was began. When they became convinced that their theory of "structuring" violations was legally without merit, they simply changed theories in mid-stream.

In addition, some courts have correctly asserted that the Federal Rules of Evidence is applicable to the government's effort to establish probable cause for the case to go forward (and therefore, in cases of personal property, for the government to maintain possession of the property). I urge you to resist any attempt to weaken this bill by adding an exemption from the Rules of Evidence. No exemption is now in the law. That should not change.

It is reasonable to require the government to have an actual case based on competent evidence showing probable cause before it is justified in holding private property under its control while it undertakes to forfeit it. To allow otherwise is to encourage seizure-spawned witch hunts such as both the Willie Jones case and the case of Dr. Richard Lowe are shameful examples

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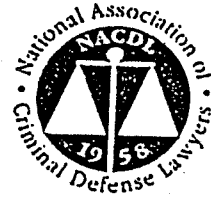
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