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Izabella Redzisz

UNITED STATES V. DAVIS

648 F.3D 84 (2D CIR. 2011)

I. INTRODUCTION

In *United States v. Davis*, Sharyl R. Davis appealed the forfeiture of a Camille Pissarro painting she had owned for over twenty years, titled Le Marché,[1] to the United States government.[2] The government sought forfeiture of Le Marché pursuant to 19 U.S.C. § 1595a, which calls for the seizure and forfeiture of items that are introduced into the United States "contrary to law," if they are "stolen, smuggled, or clandestinely imported or introduced."[3] On appeal, Davis primarily argued that the district court erred by refusing to apply the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) to the government's forfeiture claim.[4] Davis also argued that the district court erred by denying her motion for attorney's fees after two of the government's three forfeiture claims were dismissed at summary judgment.[5] The Court of

1. Camille Pissarro, *Le Marché* ("The Market"), *available at* http://www.camille-pissarro.org/Le-Marche.html. Pissarro was a Nineteenth Century Impressionist painter known for depicting scenes of French life. *Camille Pissarro Biography*, CAMILLE PISSARRO: THE COMPLETED WORKS, http://www.camille-pissarro.org/biography.html (last visited Nov. 20, 2011).

2. United States v. Davis, 648 F.3d 84 (2d Cir. 2011).

3. 19 U.S.C. § 1595a(C)(1)(A) (2006).

4. *Davis*, 648 F.3d at 92; *see also* 18 U.S.C. § 983 (2006) (CAFRA offers some protections to forfeiture defendants by raising the government's burden of proof and by contemplating an innocent owner defense).

5. *Davis*, 648 F.3d at 97-98.

Appeals for the Second Circuit affirmed the district court's judgment concluding that forfeiture was appropriate, as well as its order denying Davis attorney's fees.[6]

II. BACKGROUND

Le Marché was stolen from the Musée Faure, a museum located in Aix-les-Bains, France, in 1981.[7] The painting later resurfaced in Texas, where Emil Guelton consigned it to J. Adelman Antiques and Art Gallery.[8] In 1985, the gallery sold Le Marché for $8,500 to a corporation that was partially controlled by Davis.[9] Davis eventually took personal ownership of Le Marché and displayed it in her home for years before consigning it to Sotheby's for auction.[10] French authorities became aware of the auction and informed the United States that Le Marché had been stolen from the Musée Faure more than twenty years earlier.[11] The United States Department of Homeland Security became involved, and asked Sotheby's to withdraw the painting from auction.[12]

French authorities reopened their investigation into the theft and questioned Guelton, who admitted to selling Le Marché to the Texas gallery.[13] A museum guard who was on duty the day Le Marché was stolen also identified Guelton as the thief.[14] With Guelton's admission and the guard's identification, the United

6. *Id.* at 98.

7. *Id.* at 87. A second piece, the Renoir oil painting *Buste de Femme*, was also stolen from the museum that day. Kate Taylor, *Treasured Pissarro Print Turns Into Costly Headache*, N.Y. TIMES, June 9, 2011, at C1, *available at* http://www.nytimes.com/2011/06/09/arts/design/buyer-of-stolen-pissarro-work-suffers-hefty-loss.html?_r=3&hpw. A Japanese collector purchased the painting from Sotheby's in 1987 for $154,000. Sotheby's is apparently looking into the matter. *Id.*

8. *Davis*, 648 F. 3d at 87.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Davis*, 648 F.3d at 87. The guard had seen Guelton leave the museum with something hidden under his coat moments before she realized the painting was gone. *Id.*

States government filed a complaint in the Southern District of New York seeking civil forfeiture of Le Marché.[15]

III. DISTRICT COURT PROCEEDINGS

At the district court level, the government alleged three bases for forfeiture.[16] First, the government sought forfeiture pursuant to § 1595a, which is a customs statute that was enacted as part of the Tariff Act of 1930.[17] Section 1595a authorizes the forfeiture of "merchandise which is introduced . . . into the United States contrary to law . . . if [the merchandise] . . . is stolen, smuggled, or clandestinely imported or introduced."[18] To satisfy the "contrary to law" requirement of the statute, the government alleged a violation of the National Stolen Property Act (NSPA).[19] The NSPA criminalizes the possession or sale of stolen goods valued at $5,000 or more that have moved in interstate or foreign commerce, with knowledge that the goods were stolen.[20] To fulfill the statute's "is stolen, smuggled, or clandestinely imported or introduced" requirement, the government alleged that Guelton took Le Marché without permission from the Musée Faure.[21] The government's second and third forfeiture claims were based on 18

15. *Id.*
16. *Id.* at 88.
17. *Id.*
18. 19 U.S.C. § 1595a(C)(1)(A).
19. *Davis*, 648 F.3d at 88.
20. 18 U.S.C. § 2314 provides:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods . . . of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud . . . [s]hall be fined . . . or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 provides:

> [w]hoever receives, posses, conceals, stores, barters, sells, or disposes of any goods . . . $5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined . . . or imprisoned not more than ten years, or both.

21. *Davis*, 648 F.3d at 88.

U.S.C. § 981.[22] Under § 981, property that is "derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' is forfeitable to the United States."[23] To support its § 981 claims, the government asserted that Le Marché constituted the proceeds of Guelton's theft.[24]

The government moved for summary judgment on its § 1595a claim, and Davis filed a cross-motion for summary judgment on all three of the government's forfeiture claims.[25] Davis asserted that because she was the "innocent owner" of Le Marché, she was entitled to keep the painting.[26] To support her defense, Davis pointed to CAFRA, which states that "[a]n innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." [27] The district court concluded that the forfeiture action brought pursuant to § 1595a was not subject to CAFRA, and thus not subject to an innocent-owner defense.[28] The court also determined that the government made a showing of probable cause for forfeiture based on the museum guard's eyewitness testimony and Guelton's admissions.[29] Because the government met its initial burden, the burden then shifted to Davis to establish by a preponderance of the evidence that Le Marché was not stolen merchandise introduced into the United States contrary to law.[30] However, the district court awarded Davis summary judgment on the government's forfeiture claims brought under § 981, finding that CAFRA's innocent-owner defense applied to those claims.[31]

A jury trial was held to resolve the remaining issues of material fact: whether Davis could demonstrate that Le Marché was not

22. *Id.*
23. 18 U.S.C. § 981(a)(1)(C) (2006).
24. *Davis*, 648 F.3d at 88.
25. *Id.*
26. *Id.*
27. 18 U.S.C. § 983(d).
28. *Davis*, 648 F.3d at 88.
29. *Id.*
30. *Id.*
31. *Id.*; *see also* 18 U.S.C. § 983(d)(3)(A) (stating that an "innocent owner" means "a person who, at the time that person acquired the interest in the property . . . was a bona fide purchaser for value . . . and did not know and was reasonably without cause to believe that the property was subject to forfeiture").

transported in interstate or foreign commerce with knowledge that it was stolen.[32] The jury returned a unanimous verdict in favor of the government.[33] The jury found that Davis failed to prove (1) that Le Marché was not the work of art stolen from the museum, (2) that Le Marché was not transported in interstate or foreign commerce by Guelton, and (3) that Guelton did not "receive, possess, conceal, store, barter, sell, or dispose of" Le Marché with knowledge that it was stolen after it crossed a United States border.[34]

The district court entered a final judgment in favor of the government concluding that forfeiture of the painting was appropriate, and denied Davis's motion for attorney's fees.[35]

IV. LEGAL ANALYSIS

On appeal, Davis argued that the government failed to demonstrate probable cause to believe that Le Marché was subject to forfeiture under § 1595a, and that "she was entitled to additional substantive and procedural protections that the district court found inapplicable to forfeiture actions brought pursuant" to § 1595a.[36] The court also briefly addressed Davis's constitutional challenges to the forfeiture of Le Marché, as well Davis's request for attorney's fees.[37]

A. Section 1595a and the National Stolen Property Act

Section 1595a authorizes the forfeiture of merchandise "introduced into the United States 'contrary to law,' if that property 'is stolen, smuggled, or clandestinely imported or

32. *Davis*, 648 F.3d at 88.

33. *Id.* The guard's testimony that she saw Guelton leaving the museum on the day of the theft with something hidden under his coat was crucial. *Id.* Evidence also showed without question that Guelton transported the painting to the United States, where he consigned it to the gallery. *Id.*

34. *Id.* at 88-89.

35. *Id.* at 89.

36. *Id.* This refers to CAFRA's protections.

37. *Id.*

introduced."[38] On appeal, the government again alleged that Guelton violated the NSPA by stealing Le Marché, transporting it into the United States, and consigning it to the Adelman gallery, in order to satisfy § 1595a's "contrary to law" requirement.[39] On appeal, Davis argued that the district court erred three times in its application of the NSPA to her case.[40] Davis argued that: (1) "contrary to law" referred only to violations of customs laws, not to violations of the NSPA; (2) summary judgment should not have been granted to the government regarding Le Marché's value when it entered the United States; and (3) Le Marché was no longer stolen property within the meaning of § 1595a(c) when the government sought forfeiture, and was therefore not subject to forfeiture.[41]

1. The Meaning of "Contrary to Law"

Under § 1595a(c), property is only subject to forfeiture if it is introduced into the United States "contrary to law."[42] Davis argued for a narrow reading of the statute's language, and asked the court to interpret "'contrary to law" as "contrary to customs law."[43] The court, however, chose to read the statute literally, stating that "'[i]t is axiomatic that the plain meaning of a statute controls its interpretation.'"[44] It determined that the phrase "contrary to law" should be interpreted broadly to mean "'illegal; unlawful; conflicting with established law,'" and that nothing in the statute's text limited a broad definition of the term "law."[45] If Congress had intended to limit the scope of the definition of "law" to "customs law," the court reasoned, it would have done so

38. 19 U.S.C. § 1595a(c)(1)(A).

39. *Davis*, 648 F.3d at 89.

40. *Id.*

41. *Id.* at 89; *see also* § 1595a(c)(1)(A) (stating that "[t]he merchandise shall be seized and forfeited if it . . . is stolen, smuggled, or clandestinely imported or introduced").

42. *Davis*, 648 F.3d at 89.

43. *Id.*

44. *Id.* (quoting Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999).

45. *Id.*

explicitly.[46] Therefore, a violation of the NSPA, as alleged by the government, sufficed to meet the "contrary to law" requirement of § 1595a.[47]

2. *The Value of Le Marché*

To find a violation of the NSPA, the object in question must be valued at a minimum of $5,000 at the time it enters the United States.[48] Davis argued that the court erred by granting summary judgment for the government on this issue.[49]

The Second Circuit concluded that the district court properly granted summary judgment in favor of the government because the evidence presented by Davis failed to raise a genuine issue of material fact regarding Le Marché's value.[50] The court explained that the fact that Le Marché sold for $8,500, or "seventy percent above the statutory minimum" shortly after its importation into the United States was strong evidence that it was worth *at least* $5,000 at the time Guelton brought it into the country.[51] Though Davis attempted to challenge Le Marché's value through the use of expert witnesses, the court determined that her witnesses did not actually shed any light on the painting's value.[52] Because Davis

46. *Id.*

47. *Id.* at 90. The court elaborated, stating "there is a strong argument that . . . 'contrary to law' . . . means exactly what it says: the government may seize and forfeit merchandise that is introduced into the United States illegally, unlawfully, or in a manner conflicting with established law, regardless or whether the law violated relates to customs enforcement." *Id.*

48. *Davis*, 648 F.3d at 90.

49. *Id.*

50. *Id.*

51. *Id.* (emphasis added).

52. *Id.* at 90-91. When deposed, expert appraiser Alex Rosenberg asserted that Le Marché's $8,500 price tag was not low enough to trigger the suspicion that it was stolen. *Davis*, 648 F.3d at 91. The court determined that this assertion did nothing to prove that Le Marché was worth less than $5,000 when it entered the country, but in fact suggested that it was sold for its fair market value or less in 1985. *Id.* Art expert Gilbert Edelson was also deposed, and stated that the vast majority of prints sold in the United States are sold for less than $5,000. *Id.* However, he was silent as to Le Marché's value specifically, and the court determined that his statements also failed to combat the

was not able to present evidence proving that Le Marché was worth *less* than $5,000 at the time it was imported into the United States, the court held that summary judgment valuing that painting at at least $5,000 at the time of its entry into the country was proper.[53]

3. *The Meaning of "Is Stolen"*

Pursuant to § 1595a, property "shall be seized and forfeited if it is stolen, smuggled, or clandestinely imported or introduced" into the United States.[54] Davis argued that the phrase "is stolen" required the court to determine whether the painting was stolen property at the time of *forfeiture*, rather than at the time of its entry into the country.[55] The court rejected Davis's argument, finding instead that the "text of [the] statute makes clear that 'is stolen' refers to the status of the property at the time of its introduction into the United States."[56] The court stated that, because § 1595a is a customs statute "aimed at regulating the flow of goods into and out of the country," it is concerned only with the status of goods as they enter the United States, "not with what happens to them after they get here."[57] The court concluded that Davis's interpretation of the word "is" and the time period to which it refers would "[shift] the statute's focus away from the border in a manner that would produce absurd results."[58]

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government's evidence that Le Marché met the $5,000 threshold when it entered the country. *Id.*

53. *Id.* (emphasis added).
54. 19 U.S.C. 1595a(c)(1)(A).
55. *Davis*, 648 F.3d at 91 (emphasis added).
56. *Id.*
57. *Id.* at 92.
58. *Id.*

B. *The Effect of the Civil Asset Forfeiture Reform Act of 2000 on § 1595a*

Davis claimed that CAFRA's protections were applicable to the government's forfeiture action brought under § 1595a.[59] However, CAFRA expressly excludes forfeiture actions brought pursuant to Title 19 from the benefit of its protections in what is known as its "customs carve-out."[60] Davis essentially argued that because the underlying law applied to the forfeiture claim was the NSPA, a Title 18 statute, CAFRA's protections should apply.[61] The court concluded that CAFRA was inapplicable.[62]

CAFRA was enacted as Congress's response to concerns regarding the "broad scope of the government's civil forfeiture authority."[63] The court suggested that civil forfeiture claimants "are rarely afforded the same protections that are applicable in criminal forfeiture proceedings" because "[c]ivil in rem forfeiture proceedings are based in part on the 'legal fiction' that '[i]t is the property which is proceeded against, and . . . held guilty and condemned as though it were conscious instead of inanimate and insentient.'"[64] CAFRA provides some claimants with a more favorable burden of proof and an innocent-owner defense, among other things.[65] The court reviewed Davis's question of statutory interpretation de novo.[66] The court determined that CAFRA's protections, namely its innocent-owner defense and its more favorable burden of proof, did not apply to the government's § 1595a forfeiture action.[67]

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59. *Id.* at 92. These protections include CAFRA's owner-friendly preponderance of the evidence burden of proof and its innocent owner defense. 18 U.S.C. § 983(c)(1)-(d).

60. See 18 U.S.C. § 983(i)(2)(A) (excluding the Tariff Act of 1930 or any law codified in title 19).

61. *Davis*, 648 F.3d at 92.

62. *Id.* at 95.

63. *Id.* at 92.

64. *Id.* at 92 (quoting Various Items of Pers. Prop. v. United States, 282 U.S. 577, 581 (1931)).

65. *Id.* at 92-93.

66. *Id.* at 93.

67. *Davis*, 648 F.3d at 95-96.

1. Innocent-Owner Defense

The court concluded that Davis's argument that government's forfeiture claim was subject to CAFRA's innocent-owner defense was without merit.[68] Section 1595a does not provide for an innocent-owner defense in itself, and CAFRA "expressly excludes forfeiture actions brought under Title 19 from its innocent owner provisions."[69]

According to the court, § 1595a was enacted with a clear intent on the part of Congress to "require forfeiture of property regardless of the owner's culpability."[70] To bolster that determination, the court pointed to a case decided by the Supreme Court shortly after the adoption of § 1595a as part of the Tariff Act of 1930; the case states in part that "forfeiture may be enforced even against innocent owners. . . . The penalty is at times a hard one, but it is imposed by the statute in terms too clear to be misread."[71] The court also pointed to the fact that no reference to an innocent-owner defense was ever incorporated into § 1595a, despite subsequent amendments to the statute.[72] The court stated "'[g]iven Congress's recent attention to civil forfeiture, 'there is no reason to believe that the omission . . . was anything but deliberate.'"[73]

Nevertheless, Davis urged the court to apply CAFRA's innocent-owner defense.[74] CAFRA's innocent-owner provision applies to "any civil forfeiture statute," which is defined to include "any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a

68. *Id.* at 95.

69. *Id.*

70. *Id.* at 93.

71. *Id.* (quoting Gen. Motors Acceptance Corp. v. United States, 286 U.S. 49, 57 (1932)).

72. *Id.*

73. *Davis*, 648 F.3d at 93-94 (quoting United States v. An Antique Platter of Gold, 184 F. 3d 131, 138-139 (2d Cir. 1999)).

74. *Id.* at 94; *see* 18 U.S.C. § 983(d)(1) (stating in relevant part, "[a]n innocent owner's interest in property shall not be forfeited under any civil forfeiture statute").

criminal offense."[75] However, CAFRA excludes from that definition "the Tariff Act of 1930 or any other provision of law codified in title 19."[76] According to the court, "that language could not be more clear: for purposes of CAFRA, the Tariff Act of 1930 and the statutory provisions contained in Title 19—including *Section 1595a*—are not 'civil forfeiture statutes.'"[77] Because § 1595a is not a civil forfeiture statute as defined by CAFRA, forfeiture actions brought pursuant to § 1595a are not subject to CAFRA's innocent-owner defense.[78]

2. *Burden of Proof*

Davis argued that the district court erred by applying the burden of proof standard found in 19 U.S.C. § 1615 to her case, rather than CAFRA's owner-friendly favorable burden of proof.[79] The burden-of-proof provision of 19 U.S.C. § 1615[80] governs forfeiture actions brought pursuant to § 1595a, as required by 19 U.S.C. § 1600.[81] In this case, United States Immigration and Customs Enforcement officers seized Le Marché while acting under § 1595a, a customs statute.[82] The court determined that because § 1595a does not specify its own burden of proof standard, the

75. 18 U.S.C. § 983(d)(1).

76. 18 U.S.C. § 983(i)(2)(A). This provision of the statute is known as the "customs carve-out." *Davis*, 648 F.3d at 94.

77. *Davis*, 648 F.3d at 94.

78. *Id.* at 95. The court elaborated, stating "[i]gnoring the customs carve-out would violate our obligation to follow the law rather than make it." *Id.* at 94-95.

79. *Id.*; *see also* 18 U.S.C. § 983(c) (stating "the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture," and that "if the Government's theory of forfeiture is that the property . . . was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense").

80. Section 1615 requires the government show that there is probable cause to subject the property to forfeiture. 19 U.S.C. § 1615.

81. *Davis*, 648 F.3d at 96; *see* 19 U.S.C. § 1600 (stating "the procedures set forth in Sections 1602 through 1619 of this title shall apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures").

82. *Davis*, 648 F.3d at 96.

burden of proof established in § 1615 applies.[83] The court explained that because it previously held that § 1595a was not a civil forfeiture statute as defined by CAFRA, CAFRA's heightened burden of proof was inapplicable.[84] The court held that the district court was correct to apply the pre-CAFRA burden-shifting approach of § 1615 to Davis's case.[85]

C. *The Constitutionality of the Forfeiture*

Davis argued that forfeiture of Le Marché violated the Excessive Fines clause of the Eight Amendment as well as the Takings Clause of the Fifth Amendment.[86] The court concluded that the forfeiture did not violate either clause.[87]

1. *The Excessive Fines Clause*

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed."[88] The court defined a fine as "'a payment to a sovereign as punishment for some offense.'"[89] According to that definition, only punitive forfeitures can be considered a fine pursuant to the Eighth Amendment.[90] The court determined that the forfeiture of Le Marché was remedial rather than punitive for two reasons: first, the government's customs claim was not connected to any criminal prosecution; and second, the forfeiture proceeding was brought under a customs law, which "weighs strongly in favor of characterizing the forfeiture as remedial."[91] Because the forfeiture of Le Marché was remedial,

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* 96-97.
88. *Davis*, 648 F.3d at 96 (citing U.S. CONST. amend. VIII).
89. *Id.* (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).
90. *Id.* (citing Von Hofe v. United States, 492 F.3d 175, 182 (2d Cir. 2007)).
91. *Id.* at 96-97; *see also Platter of Gold*, 184 F.3d at 139-40 (finding that the forfeiture of an antique gold platter that was misdeclared upon entry into the United States did not violate the Excessive Fines clause of the Eighth

the court concluded that Davis's claim under the Excessive Fines Clause failed.[92]

2. The Takings Clause

The court ruled that Davis's argument that she was entitled to compensation for the forfeiture of Le Marché under the Takings Clause of the Fifth Amendment also failed.[93] Although the Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law,"[94] the court acknowledged that the "Supreme Court has made clear that '[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority.'"[95] Thus, the court determined that if the government acts pursuant to a forfeiture statute, "'it may seize personal property without compensating the owner.'"[96] The court held that, because the government acted pursuant to the forfeiture provision, it was entitled to seize Le Marché without compensating Davis.[97]

D. Attorney's Fees Under 28 U.S.C. § 2465(b)(1)(A)

Though a prevailing litigant is usually not entitled to collect attorney's fees, CAFRA authorizes the courts to provide fees and other costs to claimants who "'substantially prevail' in a 'civil proceeding to forfeit property.'"[98] Davis argued that her success in

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Amendment because: (1) the forfeiture was not part of a criminal prosecution; and (2) the forfeiture was brought pursuant to a non-punitive customs statute).

92. *Davis*, 648 F.3d at 97.

93. *Id.*

94. U.S. CONST. amend. X.

95. *Davis*, 648 F.3d at 97 (quoting Bennis v. Michigan, 516 U.S. 442, 452 (1996)).

96. *Id.* (quoting Redford v. U.S. Dep't of Treas., 691 F.2d 471, 473 (10th Cir. 1982)).

97. *Id.*

98. *Id.* (quoting 28 U.S.C. § 2465(b)(1)(A)(2006)). Section 2465(b)(1)(A) states "in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for . . . reasonable attorney fees and other litigation costs reasonably incurred by the claimant."

winning summary judgment on two of the government's three forfeiture claims made her a prevailing party, and thus that the district court erred in denying her attorney's fees.[99]

The court determined that Davis did not substantially prevail solely because she defeated two of the government's forfeiture claims.[100] The court reasoned that Davis's partial victory only "narrowed the issues presented in [the] case," and did not "entitle her to retain ownership of Le Marché."[101] The court further reasoned that Davis did not "substantially prevail" because she did not obtain any of the relief she sought; Davis's aim was to retain title to Le Marché, but the result of the litigation was that title vested in the United States.[102] Therefore, the court concluded, Davis did not "substantially prevail" within the meaning of § 2465(b)(1)(A) and was not entitled to attorney's fees.[103]

V. FUTURE IMPLICATIONS

As a case involving art theft, *Davis* is somewhat unusual. Many of the published opinions associated with stolen art focus on works that were taken from Jewish Europeans by Nazis during World War II.[104] *Davis* is unique in that the theft of Le Marché took place relatively recently, and the painting's return was pursued by a government, rather than by the painting's original owner.[105] Despite legislative intent to protect owners of forfeitable property through CAFRA, the government's forfeiture authority is still broad. Some consider the government's forfeiture power to be problematic on its face, particularly because it deprives citizens of

99. *Id.*

100. *Davis*, 648 F.3d at 97.

101. *Id.* at 98.

102. *Id.*

103. *Id.*

104. *See generally* Jennifer Anglim Kreder, *The Choice Between Civil & Criminal Remedies in Stolen Art Litigation*, 38 Vand. J. Transnat'l L. 1199 (2005).

105. This is not to suggest that forfeiture of artwork does not occur. Rather, the lack of published case law in this area may be because owners of property that is subject to forfeiture would prefer to relinquish the property than to litigate against the government, with its seemingly unlimited resources.

private property in a country that places great value on property rights.[106] Moreover, CAFRA's customs carve-out makes it even easier for the government to seize property by imposing only a low burden of proof on the government and by refusing to allow for an innocent owner defense. It is unclear whether the customs carve-out is a way for the government's forfeiture power to go unchecked, or whether it is a legitimate and reasonable way for the United States to protect its borders.

When a work of art becomes the focus of a customs-based forfeiture proceeding, as in *Davis*, there is some discrepancy as to the burden of proof the government must satisfy in order to successfully seize the work. In *Davis*, the government relied on the NSPA, a criminal statute, to satisfy the "contrary to law" requirement of § 1595a, a civil forfeiture statute. On its own, the NSPA contains a scienter requirement: the government must prove that someone[107] *knew* the item in question was stolen, converted, or taken by fraud.[108] Because the NSPA is a criminal statute, it is logical to assume that the government must satisfy the criminal burden of proof of beyond a reasonable doubt to successfully prove knowledge under the NSPA. However, should that still be the case when the NSPA is used in conjunction with a forfeiture claim, under which the highest burden of proof the government is ever required to meet is a preponderance of the

106. *See* Chip Mellor, *Civil Forfeiture Laws & the Continued Assault on Private Property*, FORBES.COM (June 8, 2011 5:30 PM), http://www.forbes.com/2011/06/08/property-civil-forfeiture.html. *See also* Barclay Thomas Johnson, *Restoring Civility-The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 Ind. L. Rev. 1045 (2002).

107. As evidenced by *Davis*, that "someone" does not have to be the person who ultimately ends up with possession of the property. Under the NSPA, knowledge applies to "[w]hoever transports, transmits, or transfers" the stolen property in interstate or foreign commerce. 18 U.S.C. § 2314. As the court concluded, whether Davis knew Le Marché was stolen was irrelevant; it was the thief who was responsible for transporting the painting into the United States, and it was his knowledge that was crucial. *Davis*, 648 F.3d at 92.

108. 18 U.S.C. § 2314 (stating "[w]hoever transports, transmits, or transfers in interstate commerce any goods, wares, merchandise . . . of the value of $5,000 or more, *knowing* the same to have been stolen, converted, or taken by fraud") (emphasis added).

evidence?[109] Some case law suggests that the answer should be yes.[110] The *Davis* court placed particular emphasis on Guelton's responsibility for transporting Le Marché into the United because, as the thief, he clearly knew that Le Marché was stolen, and his knowledge easily satisfied the NSPA's scienter requirement.

Though knowledge was readily provable in *Davis*, the U.S. government has also initiated art forfeiture proceedings in which it did not allege that anyone ever knew that the property was stolen.[111] For example, in March of 2010 the government returned an ancient Egyptian sarcophagus to Egypt after it was intercepted by a customs official at Miami International Airport in October of 2008.[112] The sarcophagus was not accompanied by any paperwork

109. In a forfeiture claim brought pursuant to § 1595a, the government's burden of proof is low; it is only required to show that there is probable cause to subject the property to forfeiture. 19 U.S.C. § 1615. When CAFRA's protections apply, the government's burden of proof is raised; it must establish that the property is subject to forfeiture by a preponderance of the evidence. 18 U.S.C. 983(C).

110. *See e.g.* United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009). In *Portrait of Wally*, the government sought forfeiture of a painting taken from an Austrian gallery owner by Nazis during World War II. After a series of transactions, the painting ended up at an Austrian museum, and was imported into the United States on loan to the Museum of Modern Art in New York. *Id.* at 238-46. The government sought forfeiture under § 1595a, and, as in Davis, satisfied the statute's contrary to law requirement by alleging that the painting was imported into the United States in violation of the NSPA. *Id.* at 250. The court remanded the case to determine whether the art dealer who acquired the painting and eventually sold it to the Austrian museum knew that it was stolen when he agreed to import it into the United States. *Id.* at 276.

111. *See e.g.* Jennifer Mann, *Government Sues to Seize St. Louis Museum's Mummy Mask*, STLTODAY.COM (Mar, 17, 2011, 12:05 AM) http://www.stltoday.com/news/local/metro/article_98d72244-9976-5b8a-a73d-5c211c6a771b.html. The government is seeking forfeiture of the museum's 3,200 year-old mummy mask of Ka-Nefer-Nefer, which the museum purchased in 1998 for almost $500,000. *Id.* The government claims that the mask was stolen from Egypt, and the museum claims that it thoroughly researched the mask before purchasing it (it contacted INTERPOL and consulted the Art Loss Register), and considers itself to be the mask's rightful owner.

112. David Gill, *Egyptian Sarcophagus Returned*, LOOTING MATTERS (Mar. 13, 2010, 9:34 PM) http://lootingmatters.blogspot.com/2010/03/egyptian-sarcophagus-returned.html. *See also* David Gill, *Miami Law: Missing the Point?*, LOOTING MATTERS (Mar. 18, 2010, 10:12 PM)

that could document how and when it left Egypt.[113] In order to seize the sarcophagus as imported stolen property, the government alleged violations of Egyptian export laws, as opposed to violations of a statute like the NSPA, to satisfy § 1595a's "contrary to law" requirement.[114] The implication derived from the sarcophagus case is that the government does not even have to allege violations of United States law to successfully seize property. The ability to draw on the domestic laws of foreign countries could allow the government's forfeiture power to extend even further than it already does when CAFRA's protections do not apply. As a result, it is possible that more innocent owners would be deprived of property due to potential hesitancy to defend against uncertain foreign law, especially when the government's burden of proof is so low.

CAFRA's customs carve-out is also problematic when viewed in light of scholarly suggestions that even CAFRA's heightened burden of proof is still not high enough to offer real protection to innocent owners.[115] Barclay Thomas Johnson suggests that an even higher standard of proof should be imposed on the government because of the "punitive and quasi-criminal nature" of civil forfeitures.[116] Thomas suggests that the burden of proof

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http://lootingmatters.blogspot.com/2010/03/miami-and-coffin.html. The sarcophagus was purchased from a Spanish antiquities dealer by a United States citizen and imported into the United States via Ireland. *Id.* The sarcophagus was reportedly already sold to a Canadian collector when it was intercepted. *Id.*

113. *Looting Matters: Why has a Coffin Been Returned to Egypt?*, PR NEWSWIRE (Mar. 19, 2010) http://www.prnewswire.com/news-releases/looting-matters-why-has-a-coffin-been-returned-to-egypt-88563512.html.

114. Gill, *supra* note 112. Because no paperwork could be produce to establish any credible provenance for the sarcophagus, it was considered owned by Egypt pursuant to its Cultural Patrimony Laws. *Id.* Thus, the sarcophagus became stolen property when it was exported from Egypt without permission and in violation of its export laws. *Id. See also* United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus, Dating to the Third Intermediate Period, 09-23030 CIV (S.D. Fla., filed Oct. 8, 2009) (on file with author). For a discussion on Egypt's Cultural Patrimony Laws, *see* United States v. Schultz, 333 F.3d 393 (2d Cir. 2003).

115. Johnson, *supra* note 106, at 1075-79.

116. *Id.* at 1076. Ultimately, the government is alleging that a crime has been committed. *Id.*

placed on the government under CAFRA should be raised from preponderance of the evidence to a showing of clear and convincing evidence that the property is subject to forfeiture, because "there is significant reason to believe that there is an unacceptable risk of error that exists that innocent parties will be deprived of property, and that raising the burden would mitigate [that] risk."[117]

If the government's burden of proof is *still* too low when CAFRA's protections apply, what does that say about the government's even lower burden in forfeiture proceedings that are not subject to CAFRA because of its customs carve-out? On one hand, the government may be wholly justified in seeking to protect its borders stringently, especially considering that forfeiture is aimed primarily at controlling the flow of narcotics in the United States.[118] On the other hand, civil forfeiture is also a way for the government to generate revenue,[119] which calls into question its real motivations for pursuing forfeiture.[120] Is forfeiture in danger of being used improperly and "become[ing] more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused . . . than a component of a system of justice?"[121]

Despite the "caveat emptor"[122] implications of *Davis*, it seems unlikely that the case will have much effect on the art market or

117. *Id.* at 1076-78. Some states have enacted legislation that requires the government to satisfy a higher burden of proof than preponderance of the evidence. *Id.* at 1076.

118. *See generally* Johnson, *supra* note 106.

119. In 2008 the U.S. Department of Justice's Asset Forfeiture Fund contained more than one billion dollars in forfeited assets. Mellor, *supra* note 106. In 2008 it was reported that the Bureau of Alcohol, Tobacco, Firearms, and Explosives "had ordered Leatherman multi-tools inscribed with the letters ATF—'Asset Forfeiture' and 'Always Think Forfeiture.'" *Id.*

120. Johnson, *supra* note 106, at 1069-70. While revenue was not a factor in *Davis*, the United States' return of Le Marché to France may have fostered goodwill between the two countries. Perhaps there is some political advantage to be gained from actively pursuing the forfeiture of art and antiquities that enter the United States from other countries.

121. *Bennis*, 516 U.S. at 456 (Thomas, J., concurring).

122. Commonly translated to mean "Let the buyer beware."

art-based litigation. Art theft does not show signs of slowing,[123] and a work's provenance is often incomplete and difficult to ascertain.[124] It seems that the most an art collector can do to avoid future litigation is to purchase works that have a solid provenance, and to consult the various systems that are designed to report and track stolen art, such as the Art Loss Register,[125] the National

123. *See* Charlotte Burns, *Art Thefts on the Rise Across North America*, THE ART NEWSPAPER (Aug. 24, 2011), http://www.theartnewspaper.com/articles/Art-thefts-on-the-rise-across-North-America/24420. The FBI estimates that international art crime is worth more than six billion dollars annually. *Id.* Art crime headlines were particularly prominent in the United States during the summer of 2011. *See* Richard Perez-Pena, *Sommelier Stole Art Openly, Police Say*, N.Y. TIMES, July 15, 2011, A17, *available at* http://www.nytimes.com/2011/07/16/nyregion/theft-of-picasso-by-nj-man-was-direct-police-say.html.

124. Provenance is "an art historical term referring to the history of the ownership of a particular work of art." PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 298 (2d ed. 2008). "In an ideal situation, the provenance can be traced back to the artist," but that is not always possible, especially when the work is very old. *Id.* Though museums and reputable auction houses like Sotheby's regularly engage in provenance research, the same may not be true with smaller galleries and dealers. *See id.* at 298-99. Moreover, the art world is relatively secretive, especially where large sums of money are concerned; owners and purchasers often prefer to remain anonymous, as can be seen in the provenance information provided in almost any auction catalogue. *See e.g. Upcoming Auctions*, CHRISTIES.COM, http://www.christies.com/calendar/ (last visited Nov. 30, 2011). Davis contacted a Pissarro expert to authenticate Le Marché before she purchased it from the Adelman gallery, but there is no evidence that anyone attempted to establish where Le Marché came from or whether Guelton held valid title to the painting. *Taylor*, supra note 7. Le Marché was estimated to be worth $60,000 to $80,000 when it appeared in Sotheby's catalog. *Id.*

125. The Art Loss Register allows anyone to electronically register a lost or stolen item, to register a possession, and to conduct research to determine if an item is lost or stolen. THE ART LOSS REGISTER, http://www.artloss.com (last visited Nov. 20, 2011). However, even certification from the Art Loss Register that an object has not been reported stolen may prove ineffective, especially where antiquities are concerned. *See* David Gill, *Art Loss Register & Antiquities*, LOOTING MATTERS (July 14, 2010, 9:51 PM), http://lootingmatters.blogspot.com/2010/07/art-loss-register-and-antiquities.html.

Stolen Art File (NSAF),[126] and Interpol's international database of stolen works.[127] However, provenance can be fabricated and stolen works can go unreported. The decision to buy art is driven largely by emotion rather than logic; the legal risks buyers face will be outweighed by the passion they feel for the works they purchase.

VI. CONCLUSION

The Second Circuit affirmed the district court's judgment in full.[128] The court found that forfeiture of Le Marché was appropriate and could not be precluded by an innocent-owner defense.[129] The court also found that the forfeiture was not unconstitutional under the Excessive Fines clause of the Eighth Amendment or the Takings Clause of the Fifth Amendment.[130] Finally, the court found that Davis was not entitled to attorney's fees.[131]

*Izabella Redzisz**

126. Developed by the FBI, the NSAF is a computerized index containing images and physical descriptions of stolen objects, as reported to the FBI by law enforcement agencies all over the United States and abroad. NATIONAL STOLEN ART FILE (NSAF), www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file (last visited Nov. 20, 2011). An object must meet certain criteria to be added to the NSAF index: it must be uniquely identifiable, have historical or artistic significance, and be worth at least $2,000. *Id.*

127. Internet access to the database is now available. *Press Release*, INTERPOL, INTERPOL creates online access to global stolen works of art database to reduce illicit trade (Aug. 17, 2009), *available at* http://www.interpol.int/public/ICPO/PressReleases/PR2009/PR200978.asp. For a list of provenance Web sites, *see* JESSICA L. DARRABY, 1 ART, ARTIFACT, ARCHITECTURE AND MUSEUM LAW § 2:58 (2010).

128. *Davis*, 648 F.3d at 98.

129. *Id.*

130. *Id.*

131. *Id.*

* J.D. Candidate 2013, DePaul University College of Law; B.A. 2009, College of Wooster. I would like to thank Professor Patty Gerstenblith for her valuable time and advice.