

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-4942  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LAND LAFAYETTE PARISH, A parcel of  
property located at Route 2, Box 233-Al Lafayette,  
Louisiana with all appurtenances and improvements  
thereon, ET AL.,

Defendants,

HERBERT L. HUGHES, SR.,

Claimant-Appellant.

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Appeal from the United States District Court  
for the Western District of Louisiana

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(92-CV-1774)

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(June 3, 1994)

Before THORNBERRY, DAVIS, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:\*

**Facts and Prior Proceedings**

As a result of a joint state and federal investigation,  
Herbert L. Hughes, Sr. was convicted in federal district court of

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

possession of cocaine with intent to distribute in violation of various provisions of Title 21 of the United States Code.<sup>1</sup> Hughes appealed his conviction to this Court, and the conviction was affirmed. Based on the facts surrounding his conviction, the federal government initiated a civil forfeiture action seeking forfeiture of Hughes' residential home, some jewelry and \$8,540 in currency. In a verified complaint, the United States alleged that each of these defendant properties represented proceeds of Hughes' cocaine trafficking and, further, that the real estate was used to facilitate his trafficking. The district court issued a warrant for arrest in rem of the property owned by Hughes, and the clerk of the court published a notice of the arrest. Hughes responded but failed to assert an ownership interest in the defendant currency and jewelry and flatly denied ever having an ownership interest in the defendant real estate.

Shortly thereafter, the government discovered that Hughes had sold the defendant real estate to Wesley and Florita Syrie. The Syries had signed a promissory note for \$100,000 as payment for the sale. As a result of this discovery, the Government applied to the district court to seize the promissory note executed by the Syries. The district court issued a seizure warrant after finding probable cause to believe that the promissory note and the money paid pursuant to the note represented proceeds of Hughes' narcotics trafficking. The Government supplemented its original forfeiture complaint, adding the promissory note as a defendant property in

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<sup>1</sup> All state court matters involving Hughes were dismissed.

the forfeiture action. The Government followed all requisite procedural guidelines, however, Hughes filed no claim to the defendant promissory note, nor did he file an answer to the Government's supplemental complaint. Instead, Hughes filed a motion for summary judgment and objections to the Government's motion to supplement the original forfeiture complaint.

In response, the Government filed a motion to strike Hughes's answer to the complaint, a motion for default judgment, and a counter-motion for summary judgment. The motions for default judgment and to strike Hughes's answer were based on the Government's theory that Hughes lacked standing to challenge the forfeiture because he failed to assert an interest in the property by filing a verified claim. In the alternative, the Government moved for summary judgment, asserting that there was probable cause to believe that the defendant properties represented proceeds from narcotics trafficking or that the property was used to facilitate narcotics trafficking and that Hughes had not contested the factual basis underlying the proceeding.

The district court implicitly denied the Government's motion for default and to strike the answer, and granted, without elaboration, the Government's motion for summary judgment and ordered all of the property forfeited to the Government. Hughes timely appeals to this Court, arguing that summary judgment on behalf of the United States was improper.<sup>2</sup>

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<sup>2</sup> We pause to note that the Government urges on appeal that Hughes lacks standing to contest the property forfeitures because he has not met either of the standing requirements--standing under

## Discussion

This Court reviews an order granting summary judgment de novo. **Abbot v. Equity Group, Inc.**, 2 F.3d 613,618-619 (5th Cir. 1993). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. **Campbell v. Sonat Offshore Drilling, Inc.**, 979 F.2d 1115, 1118-19 (5th Cir. 1992). If the moving party carries that burden, the party opposing a motion for summary judgment must set forth specific facts showing the existence of a genuine issue for trial. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Section 881(a)(7) of Title 21 provides for the forfeiture to the United States of real property "used . . . to facilitate the commission of, a [drug] violation punishable by more than one year's imprisonment." "The Government bears the initial burden of demonstrating probable cause to believe that the . . . house was used to distribute or store illegal drugs." **United States v. Lot 9, Block 2 of Donnybrook Place**, 919 F.2d 994, 997-98 (5th Cir. 1990). To satisfy this burden, the Government must provide "a reasonable ground for believing that the house was used for illegal purposes." **Id.** at 998. "If un rebutted, a showing of probable cause alone will support a forfeiture." **United States v. Little**

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Article III or statutory standing. We find no need to address this argument because the district court's opinion can be affirmed on the basis of summary judgment. **See Murray v. Ford Motor Co.**, 770 F.2d 461, 464 (5th Cir. 1985).

**Al**, 712 F.2d 133, 136 (5th Cir. 1983).<sup>3</sup> The Government asserts that its summary judgment evidence established that the defendant properties were proceeds from Hughes's drug trafficking, thereby clearly establishing probable cause for the forfeiture of the defendant properties. The Government showed that, on several occasions, Hughes sold cocaine to a confidential informant or to undercover law enforcement officials at the house in question. Hughes was unemployed but financed the purchase of the residence. His tax returns evidence a joint taxable income of \$4,180 for the years 1985-88, but a review of his financial records showed a lifestyle that included expenditure of at least \$335,393.41 during the same time period. The currency and jewelry in question were removed from Hughes's residence. Clearly, the Government has carried its summary judgment burden of setting forth un rebutted facts sufficient to establish probable cause for the forfeiture of Hughes's properties.

Once probable cause has been established by the Government, the burden of proof shifts to Hughes to establish by a preponderance of the evidence that the confiscated property is not subject to forfeiture or that an affirmative defense to the forfeiture applies. 19 U.S.C. § 1615; **Little Al**, 712 F.2d at 136.

Therefore, the next step in the analysis is to determine

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<sup>3</sup> Probable cause in this context is defined as "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." **See United States v. Monkey**, 725 F.2d 1007 (5th Cir. 1984).

whether Hughes set forth facts showing the existence of a genuine issue for trial sufficient to preclude summary judgment.

Hughes's first argument is that the Government did not have jurisdiction to seize the property. Hughes relies primarily on **Scarabin v. Drug Enforcement Administration**, 966 F.2d 989 (5th Cir. 1992). In **Scarabin**, this Court noted that a proceeding in rem is a proceeding against the property and in order to undertake the administrative forfeiture, the federal agency must have physical control over the property. **Scarabin**, 966 F.2d at 993. "The basic requirement of jurisdiction in rem is that a Court must have exclusive possession or control over the property in order to consider the suit and grant or deny the relief sought." **Scarabin**, 966 F.2d at 994. "A federal agency cannot obtain jurisdiction over the res when a state court obtains jurisdiction first and never relinquishes that jurisdiction." **Scarabin**, 966 F.2d at 993. In this case, the Government via the United States Marshal's Service had physical custody over the seized property by taking possession pursuant to the warrants issued. In addition, neither the residence nor the defendant promissory note was ever seized by state authorities or subjected to state court jurisdiction. Also, unlike **Scarabin**, all state court proceedings against Hughes had been dismissed prior to the federal seizure of any defendant property. Therefore, with regard to his first argument, Hughes has not demonstrated a genuine issue of material fact sufficient to preclude summary judgment.

Hughes further challenges the verification of the Government's complaint, asserting that, although a technical violation, the Government failed to use the proper form for its complaint verification. Because these facts were not contested by Hughes in his summary judgment materials, this Court will not consider the issue on appeal. **Alford v. Dean Witter Reynolds, Inc.**, 975 F.2d 1161 (5th Cir. 1992). We do not consider issues raised for the first time on appeal unless the issue is a purely legal one and it is necessary to hear it to prevent a miscarriage of justice. **Id.**

Hughes also argues that the Government was not timely in bringing the forfeiture action. Specifically, Hughes complains that the Government was allowed to institute forfeiture proceedings nearly three years after his initial arrest. This argument has no merit. Laches is an affirmative defense which must be raised in the pleadings in the district court. Fed. R. Civ. P. 8(c) and 12; **United States v. One (1) 1963, Hatteras Yacht Ann Marie**, 584 F.2d 72, 76 (5th Cir. 1978). Hughes did not raise a timeliness issue in the district court. Since the issue was never made in the district court, this Court will not consider the issue on appeal. **Id.**

#### **Conclusion**

Based on the foregoing, we affirm the grant of summary judgment by the district court.

AFFIRMED.