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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Plaintiff,

v.

AUGUSTINE AGUON,

Defendant.

) Criminal Case No. 96-201

) **DECISION AND ORDER**
) **GRANTING DEFENDANT'S**
) **MOTION TO DISMISS**

On November 18, 1996, this matter came before the Court on Defendant Agustin Aguon's motion to dismiss due to alleged violations of his 5th Amendment protection against double jeopardy. The Court has reviewed the Defendant's motion, the Government's response, and applicable C.N.M.I. statutes, and now renders its decision.

I. FACTS

In April of 1996, Richard B. Seman, Acting Director^{1/} of the Division of Fish and Wildlife (DFW), notified Defendant that he had been found to have violated Fish and Game Laws of the C.N.M.I. and that he had been assessed a civil fine of \$1,000.00 for each violation. See Notice of

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^{1/} Mr. Seman's official position is Assistant Director of Fish and Wildlife.

1 Violation and Forfeiture (April 29, 1996) (Notice^{2/}). Citing 2 CMC § 5109(c) of the Fish, Game,
2 and Endangered Species Act (Act), Acting Director Seman informed Defendant that “[o]n 07
3 December 1995 . . . [Defendant was] found to be in possession of two (2) dead fruit bats, and (2) two
4 live juvenile bats that were later confiscated at [his] residence in Papago Village on December 14,
5 1995.” The Notice goes on to identify three sections of the DFW Hunting Regulations: (1) Part 3,
6 section (1)(c) (requiring persons possessing game animals to carry either a valid license or a
7 “certificate of origin” letter), (2) Part 3, section (1) (b) (prohibiting the taking of game without a
8 hunting license^{3/}, and (3) Part 3, section (9) (prohibiting the possession of captive local wildlife
9 without a permit). Finally, the Notice informed the Defendant that he had been assessed a \$3,000.00
10 civil fine and that the fruit bats found in his possession had been forfeited to the Government. The
11 Defendant was given an option either to pay a civil fine in the amount of \$3,000.00 to the
12 Commonwealth Treasury or to submit a written request of appeal to the Director within fourteen (14)
13 days of the notice.

14 On May 7, 1996, Defendant submitted his request for appeal and subsequently appeared at a
15 June 15, 1996 hearing to offer testimony about the violations entered against him. Acting Director
16 Seman presided over the hearing. During the hearing, Defendant’s attorney, Mr. Charles Rotbart,
17 spoke on behalf of the Defendant and informed Acting Director Seman that DFW employees were
18 responsible for the violations DFW had attributed to Defendant. In response to this revelation, the
19 Acting Director concluded the hearing and rescheduled it so that the DFW staff allegedly involved
20 in the event of December 7, 1995 could be present.

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23 ^{2/} The Court notes that the Notice sent to the Defendant is a poorly drafted document and appears
24 not to have received adequate attention from an attorney prior to delivery. Although not dispositive of
25 this matter, the Court recommends that future notices of violation be reviewed by an attorney prior to
26 delivery.

26 ^{3/} The Notice actually listed Part 3, section (3)(b)(1) of the DFW Regulations (prohibiting the
27 “taking” of coconut crabs measuring less than three (3) inches across the back). However, this
28 appears to have been a clerical error because factual allegations of coconut crab possession were not
29 contained in the Notice.

1 However, a rehearing never occurred, and the \$3,000.00 fine assessed by Acting Director
2 Seman was never collected. Rather, acting on advice of Special Assistant Attorney General Richard
3 Folta (DFW counsel), the Acting Director rescinded the administrative hearings. Several months
4 later, on September 11, 1996, Mr. Folta filed the Information commencing the present criminal action
5 against the Defendant. The Information similarly alleges that the Defendant was found in possession
6 of two dead fruit bats and two live juvenile bats in violation of DFW Hunting Regulations, Part 3.
7 section 1(b) and (c), and section 9. The Information further states that the alleged violations are
8 punishable under 2 CMC § 5109 of the Commonwealth Code.

9 On October 16, 1996, Defendant filed a motion to dismiss alleging that DFW's rescission of
10 the pending administrative proceeding against the Defendant and the subsequent filing of this criminal
11 action violates his Fifth Amendment protection from double jeopardy. It is the Defendant's position
12 that Double Jeopardy concerns arise in this criminal setting because jeopardy attached in the prior civil
13 matter because Defendant had received the Notice assessing a \$3,000.00 fine against him, and had
14 been compelled to offer evidence at an appellate hearing. In response, the Government contends,
15 without citation to legal authority^{4/}, that the prior administrative proceeding never put the Defendant
16 in jeopardy and that the present criminal proceeding places Defendant in jeopardy for the first time.

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25 ^{4/} Under our system of American Jurisprudence, the decisions of the Commonwealth Judiciary
26 greatly depend upon strong advocacy usually demonstrated by thorough legal briefing from both parties.
27 The Court is concerned that the Government's response to this motion to dismiss has failed to address
28 any of the case law cited by the Defendant. In fact, the Government's papers lack any evidence of legal
research on the double jeopardy issue at all. Such a lack of preparation by Government attorneys or
attorneys in private practice is unacceptable.

1 criminal punishment and a civil sanction⁵¹. *Halper supra*, at 1901. According to *Halper*, the notion
2 of punishment associated with the Double Jeopardy Clause “cuts across the division between the civil
3 and the criminal law,” and requires courts to evaluate civil penalties to see if they constitute
4 punishment, or are merely remedial. *Id.* Thus, this Court must determine that the administrative.
5 civil penalties assessed against the Defendant for violation of DFW regulations are punitive before
6 it can be said that double jeopardy concerns exist.

7 8 **A. DFW Civil Penalties Are Punitive**

9 The *Halper* Court evaluated the punitive nature of a civil sanction through a “proportionality
10 test” by asking whether the amount of the civil sanction matched or greatly exceeded the cost to the
11 government. *Id.* (sanction found to be punitive when civil suit against Defendant for filing \$585.00
12 worth of false medicaid claims resulted in a \$130,000 civil sanction). Civil sanctions are considered
13 punitive if the amount greatly outweighs government costs.

14 In 1993, the U.S. Supreme Court revisited the issue of whether a civil sanction, this time
15 involving forfeiture, was punitive in nature. *Austin v. U.S.*, 113 S.Ct. 2801, 2806 (1993). The *Austin*
16 Court employed this two part test to determine whether a civil forfeiture under 21 U.S.C.A. §§
17 881(a)(4)(7) constituted punishment: (1) whether forfeiture has historically been perceived as punitive.
18 and (2) whether forfeiture under the particular statute is properly considered punitive. *Id.* at 2806.
19 The Court decided that forfeitures historically have been viewed as punitive, and that the forfeiture
20 provisions in 21 U.S.C.A. § 881 were punitive because the provisions focused on the culpability of
21 the owner by providing an innocent-owner defense to forfeiture. *Id.* at 2811

22 The Ninth Circuit Court of Appeals has extracted the following three principles from the
23 *Austin* case:

24 First, because of “the historical understanding of forfeiture as punishment” . . . there
25 is a strong presumption that any forfeiture statute does not serve *solely* a remedial
 purpose. Second, where such a statute focuses on the culpability of the property owner

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⁵¹ The *Halper* principle applies whether civil penalty or criminal penalty comes first. *U.S. v.*
Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 2977 (1990).

1 by exempting innocent owners or lienholders, it is likely that the enactment serves at
2 least in part to deter and punish guilty conduct. Finally, where Congress has tied
3 forfeiture directly to the commission of specified offenses, it is reasonable to presume
that the forfeiture is at least partially intended as an additional deterrent to or
punishment for those violations of law.

4 *U.S. v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1221 (9th Cir. 1994).

5 In the case at bar, the April 29th Notice included two separate penalties. First, the Notice
6 informed the Defendant that he had been found in violation of several DFW regulations and had been
7 assessed a \$3,000.00 fine (\$1,000 for each violation). Second, it explained that the bats previously
8 confiscated from him would be forfeited to the C.N.M.I. government pursuant to 2 CMC § 5109 (f).
9 In the Court's view, the *Austin* test, as employed by the Ninth Circuit, is the proper test to apply to
10 the forfeiture portion of the civil penalties in this case. Whereas, the *Halper* proportionality test
11 should govern the Court's determination of the monetary penalty assessed here.

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13 1. Fruit Bat Forfeiture Merely Remedial

14 The first part of the *Austin* test concerning the historical perception of forfeiture has been
15 decided by the U.S. Supreme Court: "We conclude, therefore that forfeiture generally and statutory
16 *in rem* forfeiture in particular, at least in part, as punishment." *Austin* at 1206 -10. Therefore, this
17 Court is left only to decide whether the forfeiture provision contained in DFW law is punitive in
18 nature. According to *U.S. Currency*, the Ninth Circuit favors a presumption of punitiveness when
19 it comes to interpreting forfeiture statutes. However, *U.S. Currency* also places great weight on
20 whether the forfeiture statute focuses on culpability of the property owner by exempting innocent
21 offenders. If so, the forfeiture provision is viewed as a punishment for guilty conduct.

22 With this in mind, the Court has reviewed the forfeiture statute at issue in the case at bar.
23 One of the primary responsibilities of the Director^{6/} of Fish and Wildlife is "the protection of fish,
24 game, and endangered and threatened species." 2 CMC § 5104. In order to carry out this

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27 ^{6/} Pursuant to Section 106(a)(b) of Executive Order 94-3 (June 24, 1994), the titles of "Director
of DLNR" and "Chief of DFW" have been changed to "Secretary" and "Director" respectively.
Therefore, the term "Chief" as it appears in 2 CMC §§ 5109 *et seq.* Shall be read to mean "Director of
DFW."

1 responsibility, Acting Director Seman confiscated all four fruit bats pursuant to 2 CMC § 5909
2 entitled Enforcement, Remedies, and Penalties. Specifically, §5109(f)(1) provides:

3 All fish, game, or threatened or endangered species, or part thereof, or any item made
4 of any threatened or endangered species in whole or in part, taken, possessed . . . shall
5 be subject to forfeiture to the Commonwealth. The Chief is authorized to give the
aging program administrator all fish, game or threatened or endangered species seized
or confiscated for consumption by the elderly.

6 2 CMC § 5109(f). Significantly, this forfeiture provision makes no exemption for persons either
7 innocently possessing the species protected by the Act, or innocently purchasing items made from
8 them. To the contrary, it is clear that the Legislature aimed to eradicate all potential for commercial
9 gain by denying possession of such species to both culpable hunters and innocent possessors of the
10 products made from threatened or endangered species. Clearly, the primary goals of the forfeiture
11 provision of the Act are to return captive species to the wild and to eliminate the incentive for taking
12 such wildlife. In the present matter, the forfeiture provision had the desired remedial effect of
13 depriving the hunter any opportunity to reap the benefit of his hunt and apparently, of preserving the
14 lives of two juvenile fruit bats. Therefore, the Court finds that the forfeiture penalty contained in the
15 Notice served a remedial purpose and in no way punished the Defendant.

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17 2. \$3,000 Fine Punitive in Nature

18 In addition to the forfeiture of four fruit bats, Acting Director Seman assessed three \$1,000.00
19 fines against the Defendant pursuant to 2 CMC § 5109(c):

20 Any person not subject to [commercial fines] who knowingly and willfully violates any
21 regulation or order issued under this chapter relating to fish or game, or any term of
22 any license or permit issued under this chapter relating to fish or game, may be
assessed a civil penalty by the Chief of not more than \$1,000 for each violation. Any
such person who otherwise commits any such violation may be assessed a civil penalty
by the chief of not more than \$100.

23 As written, the statute provides for a ten-fold increase in the amount of money which the Chief may
24 assess against persons who willfully, as opposed to innocently, violate DFW regulations. This \$100
25 amount marks the ceiling of cost to the government as determined by the Legislature. Therefore, the
26 additional \$900 per violation represents a punishment or a deterrent assessed against culpable
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1 defendants. Accordingly, the monetary fine assessed against Defendant constitutes a punitive sanction
2 triggering double jeopardy concerns.

3 4 **B. Jeopardy Did Attach**

5 The Double Jeopardy Clause will bar a second prosecution only if jeopardy has attached in the
6 prior proceeding. In most civil actions, jeopardy attaches when the government collects the penalty.
7 *U.S. v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991). In *Sanchez-Escareno*, prior to the
8 commencement of criminal charges, United States Customs officials arrested defendants and assessed
9 large civil fines against them for possessing marijuana. *Id.* at 194. Although the defendants
10 acknowledged the civil fines by executing promissory notes, the 5th Circuit Court of Appeals held
11 that execution of promissory notes to assure payment of civil penalties would not constitute
12 punishment under the Double Jeopardy Clause in the absence of either *a judgment or a payment* by
13 the defendants. *Id.* at 201 (emphasis added) (citing *Ex Parte Lange*, 85 U.S. 163 (1873) (when a
14 defendant “fully suffered one of the alternative punishments to which alone the law subjected him,
15 the power of the court to punish further was gone”)).

16 In reaching this determination, the *Sanchez-Escareno* court recalled that “the constitutional
17 prohibition against double jeopardy was designed to protect an individual from being subjected to the
18 hazards of trial and possible conviction more than once for an alleged offense.” *Sanchez-Escarena*
19 at 202 (quoting *Green v. U.S.*, 78 S.Ct. 221, 223 (1957)). In concluding that jeopardy had not
20 attached, the court noted that the government “had yet to subject the defendants to trial at all or to
21 exact any form of punishment whatsoever. However, the court added, “if the government attempts
22 to collect on the notes, jeopardy would attach when the court begins to hear evidence in that action.”
23 *Id.* at 203.

24 In the case at bar, Defendant received a Notice of Violation and Forfeiture from the Acting
25 Director of DFW on April 29, 1996. Had he paid the civil penalty prior to the rescission of the
26 administrative proceeding, jeopardy would have attached and the Double Jeopardy Clause would act
27 to strip this Court of any authority to enforce the second, criminal proceeding. However, the

1 Defendant averted the fourteen day fine payment deadline by filing an administrative appeal pursuant
2 to the Notice instead. During the appeal process, the Acting Director chose to discontinue the
3 administrative proceeding on the advice of Mr. Folta, thus abandoning his attempts to collect the civil
4 penalty.

5 Since jeopardy did not attach via the payment of the fine, the only question left to resolve is
6 whether DFW's issuance of the Notice containing the fine, and subsequent commencement of an
7 administrative "appeal", caused jeopardy to attach. According to the undisputed facts, DFW did
8 more than merely assess a \$3,000.00 fine against the Defendant. According to the terms of the
9 Notice, Acting Director Seman made an administrative determination of culpability by stating that the
10 Defendant "was hereby found to be in violation of the Fish and Game Laws of the CNMI." Mr.
11 Seman's Notice went on to explain that the Defendant would have a right to "appeal" to the Director
12 or to pay the \$3,000.00 fine within a fourteen day period. Finally, the Notice concludes that a
13 "failure to pay the fine may result in further legal action against you."

14 From these facts, it is clear that the CNMI government had taken significant steps toward
15 collecting the fines assessed against the Defendant, and had begun to hear evidence at the appellate
16 level of the administrative proceeding. Thus, by the time the Government discontinued the
17 administrative process, the Defendant had already faced an administrative judgment and had been
18 subjected to the hazards of trial during the administrative appeal hearing on June 15, 1996. In other
19 words, the Government had begun to exact a form of punishment upon the Defendant. Therefore,
20 the Court holds that jeopardy attached during this administrative proceeding when the Defendant was
21 required to face an administrative appeal hearing in order to avoid the payment of a \$3,000.00
22 punitive fine, regardless of the Government's subsequent rescission of the administrative proceeding
23 prior to collection of the fine.^{7/} Accordingly, the Court finds that the current criminal case pending
24 against the Defendant must be dismissed as it will place him in jeopardy for the second time.

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27 ^{7/} The Court will not express an opinion at this time as to whether the previously rescinded
28 administrative proceeding against the Defendant may be reinstated.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court finds:

3 1. The forfeiture portion of the civil penalty assessed against the Defendant is remedial, as
4 opposed to punitive in nature, and thus does not raise double jeopardy concerns.

5 2. The 3,000.00 civil penalty raises double jeopardy concerns because it is punitive in nature.

6 3. Jeopardy attached during the administrative appeal hearing prior to the rescission of the
7 administrative process when the Defendant was required to face an administrative appeal hearing in
8 order to avoid the payment of a \$3,000.00 punitive fine.

9 4. So that the Defendant may not be twice placed in jeopardy for the same offense, this
10 criminal matter is hereby DISMISSED.

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12 So ORDERED this 13th day of January, 1997.

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16 ALEXANDRO C. CASTRO, Presiding Judge
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