

1 I immediately left my office and went to that location. I conferred with Mr. Gajo and with
2 police officers. I learned that the police had a search warrant issued by the Superior Court of Guam
3 authorizing officers of the Guam Police Department (hereinafter referred to as "GPD") to search
4 Mr. Gajo's residence and automotive repair facility for suspected evidence of violations of the
5 Guam Controlled Substances Act and to seize drugs, evidence supporting criminal conduct and
6 fruits of drug activity. I then had private discussions with Mr. Gajo concerning his rights, exposure
7 to punishment and options.

8
9 After consulting with Mr. Gajo for approximately two hours¹, I discussed with GPD
10 officers their objectives. GPD officers informed me that they wanted cooperation from Mr. Gajo
11 concerning a substantial drug target believed known by Gajo and other information concerning
12 GPD officers involved in the distribution of drugs known to Gajo. GPD officers informed me that
13 they had used a ruse to lure Mr. Gajo from his shop so as not to be noticed. I then returned and
14 informed Mr. Gajo about the objectives of GPD. After long discussion and contemplation, Mr.
15 Gajo decided that he would cooperate with GPD and could provide information concerning the
16 perpetrator of an unsolved homicide. We commenced to negotiate a Plea Agreement for protection
17 of Mr. Gajo and Mr. Gajo's property interests. GPD officers contacted the Chief Deputy Attorney
18 General of Guam Mr. Philip J. Tydingco. Mr. Tydingco arrived at GPD's Tiyan offices at near
19 11:00 p.m. and negotiations occurred. When Defendant proposed terms, Mr. Tydingco rejected
20 some terms and an ultimate agreement was reached that was beneficial to both the government and
21

22
23 ¹ Due to Guam Rules of Professional Conduct Rule 1.6 Responding Part is limited to the
24 scope of disclosure made here, though more full and complete disclosure will be made is
25 necessary to protect Responding Party's interest to the extent the Rule allows at time of
hearing.

1 defendant and a wise and prudent arrangement for both. I asked Mr. Tydingco if we needed federal
2 approval of the agreement and he stated, "No, this is our matter." Mr. Tydingco prepared the Plea
3 Agreement on a computer at GPD and presented it to me and my client for review and
4 endorsement. After private review, Mr. Gajo signed the agreement. A true and correct copy of the
5 Plea Agreement is attached hereto as "Exhibit A," and incorporated herein by this reference.
6 Following the endorsement of the Plea Agreement, GPD officers interviewed Mr. Gajo in support
7 of his cooperation. Thereafter we went to search Mr. Gajo's residence and auto shop. While at the
8 automotive shop, Mr. Gajo gave to GPD officer Frank M. Santos a backpack containing drug
9 proceeds. Officer Santos took custody of the property, counted out the sum of Thirty Thousand
10 Dollars (\$30,000.00) and presented the funds to me. A GPD Evidence/Property Custody Receipt
11 (herein "Custody Receipt") was prepared by Officer Santos. A true and correct copy is attached
12 hereto as "Exhibit B," and incorporated herein by this reference. I did not receive any money from
13 Mr. Gajo that evening or thereafter. The only funds I have received were given to me by GPD. My
14 duties that night and early morning concluded at Tiyan GPD offices at around 5:45 a.m. Then and
15 until my replacement, I provided numerous hours of services to Mr. Gajo on the promise made in
16 the Plea Agreement Exhibit B.
17

18 Almost immediately after the signing of the Plea Agreement Exhibit B, information about
19 Mr. Gajo's arrest and cooperation leaked into public knowledge. Mr. Gajo and I informed GPD of
20 the leaks and despite substantial efforts neither Mr. Gajo or I were able to have GPD cure the
21 problem.
22

23 On March 1, 2010, I received a phone call from Assistant United States Attorneys Jeffrey
24 Strand and Karon V. Johnson, wanting to meet with my client under his "so called Plea
25

1 Agreement" and faxed to me a copy under a cover sheet, a true and correct copy of which is
2 attached hereto as "Exhibit C." That same day, Mr. Gajo replaced me as his counsel. Attached
3 hereto as "Exhibit D" is a true and correct copy of a letter from Attorney David J. Lujan so
4 informing me and demanding that I give Mr. Lujan the money received under the Plea Agreement,
5 incorporated herein by this reference. I have not paid the money to Mr. Lujan as the fee was a
6 fixed fee completely earned when paid by the government of Guam on January 15, 2010. Since
7 January 15, 2010, and before being informed of potential federal forfeiture proceedings I spent the
8 funds received on my regular expenses. Those funds were fully spent in March 2010.

9
10 ARGUMENT

11 **A. GUAM AND THE FEDERAL GOVERNMENT ARE THE SAME**
12 **SOVEREIGN.**

13 Guam is an unincorporated territory of the United States continuing to operate under the
14 supervision of the United States. In Grafton v. United States, 206 U.S. 333, 27 S.Ct. 749, 51
15 L.Ed. 1084 (1907). There the United States Supreme Court stated,

16 When a territorial government enacts and **enforces** criminal laws to govern its political
17 inhabitants, it is not acting as an independent political community like a State, but as "an
18 agency of the federal government." *Domenech v. National City Bank*, 294 U.S. 199, 204-
19 205, 55 S.Ct. 366, 369, 79 L.Ed. 857. Thus a federal Territory and the Nation, as in a City
20 and a State, "[t]here is but one system of government or laws operating within [its]
21 limits." *Benner v. Porter*, 9 How. 235, 242, 13 L.Ed. 119. City and State, or Territory and
22 Nation, are not two separate sovereigns to whom the citizens owe separate allegiance in
23 any meaningful sense, but one alone. (Bold typeface added here for emphasis.)

24 See also, Guam v. Okada, 715 F.2d 1347 (9th Cir. 1983) and Sakamoto v. Duty Free
25 Shoppers, Ltd., D.C.Guam 1983, 613 F.Supp. 381, aff'd. 764 F.2d 1285, cert. den. 106
S.Ct. 1457, 89 L.Ed.2d 715 (Because Guam is an unincorporated territory having only
powers given it by Congress, it is in essence an instrumentality of the federal
government.)

///

1 forfeited to the criminal justice agency making the seizure;". (Emphasis Added). See 9 GCA §
2 67.502.1(a)(6).

3 **2. GovGuam Had a Legal Right to Official Use of the Forfeited Funds:** Guam's statutory
4 scheme allows the agency seizing the funds to use the seized and forfeited funds "for official use".
5 9 GCA § 67.502.1(d). The Guam Police Department ("GPD") seized the Funds and Gajo
6 consented to its forfeiture. GPD used a portion of the forfeited funds to implement the terms of the
7 Plea Agreement; an official use of the Funds. (See: Exhibit A, Custody Receipt transferring the
8 Funds to GPD, GPD's acceptance of Funds, and GPD's transfer of the Funds to CCV.) Under
9 Guam's forfeiture statutes, whichever law enforcement agency of GovGuam seizes the cash first
10 may use it after forfeiture is effected. 9 GCA §67.502.1(d). Thus GovGuam lawfully used the
11 forfeited funds to support and implement the terms of the Plea Agreement.
12

13 **3. After Drug Proceeds are Seized, Forfeited and Used by GovGuam the Justice**
14 **Department Has no Further Right to Forfeiture of Said Funds:** When seized and forfeited
15 funds have been used by GovGuam, no further seizure may be effected. It is axiomatic that after
16 funds are forfeited to a government entity with the right to seize and use said funds, the funds can
17 no longer be described as drug proceeds subject to forfeiture. CCV obtained the Funds from
18 GovGuam who had a legal right to seize, forfeit and to own the Funds and to use it. No illegal taint
19 remained associated with Funds when CCV received it from GovGuam – the Funds were
20 GovGuam property and no longer that of the defendant Gajo, and therefore, were no longer drug
21 proceeds subject to forfeiture or arrest. It is axiomatic that once the funds are in government
22 possession the passage of the funds to the government discontinues the forfeitable character of the
23 funds and the persons or entities to which the government passes the funds are an innocent owner.
24
25

Moreover, when a forfeiture is effected and abandoned by returning the property to a claimant, a new forfeiture cannot be effected as is being attempted now. The Big Ann, 13 U.S. (9 Cranch) 289, 290, 3 L.Ed. 734 (1815).

The warrant is therefore improper and should be quashed.

C. THIS COURT LACKS JURISDICTION

1. **The Superior Court Maintains Jurisdiction over the *Res*:** The Funds were the subject of a Superior Court of Guam warrant. The Funds were seized and forfeited to GovGuam pursuant to the Plea Agreement for a Superior Court of Guam action. Under these circumstances, the Superior Court of Guam established jurisdiction over the Funds and continues to maintain its jurisdiction over the Funds in order to implement the terms of the Plea Agreement. Scarabin v. DEA, 966 F.2d 989, 993 (5th Cir. 1992).

From the moment of seizure the state district court had exclusive control over the *res* by virtue of issuing the search warrant that procured the seized funds and never relinquished that control to the DEA or any other agency or person. A federal agency cannot obtain jurisdiction over the *res*—and thus cannot find the *res* administratively forfeit—when a state court obtains jurisdiction first and never relinquishes that jurisdiction.

Id.

This Court cannot therefore exercise concurrent *in rem* jurisdiction over the same *res* as the Superior Court of Guam. "A common-law rule of long standing prohibits a court, whether state or federal, from assuming *in rem* jurisdiction over a *res* that is already under the *in rem* jurisdiction of another court." USA v. One 1985 Cadillac Seville, and \$434,097.00, 866 F.2d 1142, 1145 (9th Cir. 1988).

The basic requirement of jurisdiction *in rem* (and *quasi in rem*, for that matter) 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. (Fn omitted). The long-accepted purpose of this rule is to avoid conflicts in the administration of justice and the unseemliness of two courts vying

1 Under Santobello v. New York, 404 U.S. 257, 261-62, 92 S.Ct. 495, 30 L.Ed.2d 427
2 (1971), a criminal defendant has a due process right to enforce the terms of his plea
3 agreement. See also Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003) ("[The
4 defendant's] due process rights conferred by the federal constitution allow [him] to enforce
5 the terms of the plea agreement.").

6 The line of cases following Santobello, *supra*, In re Arnett, 804 F.2d 1200, 1203 (11th Cir.
7 1986), United States v. Bank of New York, 14 F.3d 756 (2nd Cir. 1994), Schwartz v. United States,
8 976 F.2d 213 (4th Cir. 1992), and United States v. De La Mata, 535 F.3d 1267 (11th Cir. 2008),
9 make clear that the terms of plea agreements effecting forfeiture actions are as enforceable as any
10 other term of a plea agreement.

11 Kenrick Gajo entered into a Plea Agreement with the federal government – GovGuam (See
12 argument at Section A, and Grafton, *supra*, Territorial government and federal government are the
13 same sovereign for purposes of enforcement of laws), which required the government would
14 forfeit the money Gajo would lead them to discover and in return the government agreed " The
15 Government will not seek criminal or civil forfeiture of Gajo's real property, bank accounts, the
16 cash in is (sic 'his') wallet at the time of his arrest, his or his wife's vehicles, automotive shop or
17 personal property not contraband." (See Exhibit B Plea Agreement page 2, item 9.C.) "The
18 Government further agrees that only \$30,000.00 out of the \$140,000.00 to \$150,000.00 or more of
19 cash whose location will be provided to the Government during its search will not be subject to
20 forfeiture in order for that amount (\$30,000) to be used to pay his (Gajo's) attorney fees. (See
21 Exhibit B Plea Agreement page 2, item 9.D.) These conditions were subject to a condition
22 precedent that Gajo cooperate and assist the government to arrest and prosecute Gajo's drug
23 source, a person involved in a 1998 homicide to a level of success as solely determined by the
24 government. (See Exhibit B Plea Agreement page 1, item 9.) After debriefing Gajo about his
25

1 knowledge of the criminal matters described in the Plea Agreement, during which Gajo made
2 statements that disclosed his and others unlawful activities to law enforcement, the government
3 proceeded to conduct the search of the premises. After confiscating to its possession the Funds as
4 demonstrated by the Custody Receipt Exhibit A, the government paid the sum of \$30,000.00 to
5 CCV. Such payment was recognition that Gajo had performed his bargain for the government and
6 was then entitled to its performance. The fact that Gajo cannot now provide further assistance is
7 the result of publicity of Gajo's cooperation by the leak of information by GPD and the forfeiture
8 actions brought by the United States. However, Gajo is entitled to enforce the promise of the Plea
9 Agreement as well as CCV the intended Third Party beneficiary of the contract. (*See Buckley*
10 *supra*, "a negotiated plea agreement is a form of contract, and it is interpreted according to general
11 contract principles." *Id.*, at 695. "In Buckley's case, only one of the remedies appears to us to be
12 viable. Buckley has already fulfilled his obligations under the plea agreement, ... In so doing, he
13 has "paid in a coin that the state cannot refund. [citation omitted.] Rescission of the plea agreement
14 cannot repair the harm caused by the ... breach." *Id.*, at 699.)

16 In the instant matter based on the promises in the Plea Agreement Exhibit B, Gajo 'paid in
17 a coin' in cooperation which cannot be given back. So too, CCV provided services as counsel and
18 Third Party Beneficiary which cannot be given back, at least not without Gajo be forced to pay the
19 fees from his own resources all to the breach of Gajo's agreement unless GovGuam pays his fees
20 from some other source of money simultaneous to the taking by forfeiture instantly contemplated.

22 Due Process rights of both Gajo as a defendant and CCV as a Third Party Beneficiary
23 require that the Plea Agreement must be enforced in the manner that Mr. Tydingcoo on behalf of the
24 single sovereign federal government has promised. Neither Gajo nor CCV should be subjected to

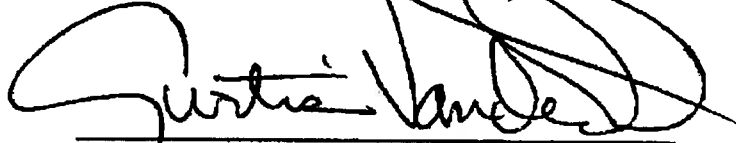
1 suffer the harms arising from this turf war between the Department of Justice federal government
2 and the Territorial federal government GovGuam.

3 CONCLUSION

4 For the reasons stated above, this court lacks jurisdiction over this matter and if it had
5 jurisdiction is required to enforce the Plea Agreement Exhibit B. CCV is an innocent owner of the
6 Funds and the court should say as much in protection of the Due Process rights of both Gajo and
7 CCV. The federal government has compromised its rights to forfeiture through its Territorial
8 servant Chief Deputy Attorney General Philip J. Tydingco and therefore this action violates the
9 rights of Gajo and CCV.
10

11 DATED: Friday, June 25, 2010.

12 THE VANDEVELD LAW OFFICES, P.C.

13 

14 Mr. Curtis C. Van de veld, Esq.
15 Responding Party, Pro Se
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19

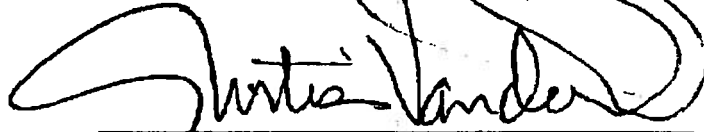
20 **VERIFICATION**

21 I, Curtis C. Van de veld, Esq., hereby declare and state that I have read the foregoing
22 document and its contents, that I state the facts therein of my own personal knowledge and belief
23
24
25

1 under penalty of perjury of the laws of Guam and the United States and further declare that I am
2 competent to testify to the same if called upon to do so.

3 DATED: Friday, June 25, 2010.

4 THE VANDEVELD LAW OFFICES, P.C.

5 

6
7 Mr. Curtis C. Van de veld, Esq.
8 Responding Party, Pro Se

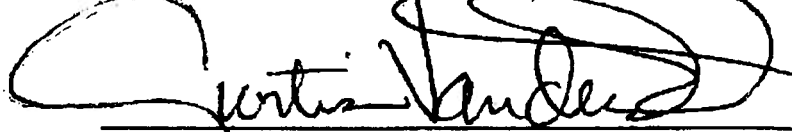
9 **CERTIFICATE OF SERVICE**

10 I, CURTIS C. VAN DE VELD, certify that I caused a copy of the foregoing
11 document here filed, to be served on counsel for Plaintiff UNITED STATES OF AMERICA on
12 Friday, June 25, 2010, via hand delivery at the following address:

13 Ms. Karon V. Johnson, Esq.
14 Assistant U.S. Attorney
15 U.S. Attorney's Office, District Of Guam
16 Criminal Division, 6th Floor, Sirena Plaza
108 Hernan Cortes Avenue
Hagåtña, Guam 96910

17 Dated: Friday, June 25, 2010.

18 THE VANDEVELD LAW OFFICES, P.C.

19 

20
21 Mr. Curtis C. Van de veld, Esq.
22 Responding Party, Pro Se

GUAM POLICE DEPARTMENT EVIDENCE/PROPERTY CUSTODY RECEIPT

1. CLASSIFICATION Confiscated Antitank	2. CASE No. 1409-33168	3. DIVISION CIS	4. PROPERTY No.	5. LAB No.
6. NAME OF PERSON FROM WHOM PROPERTY IS OBTAINED SA OWNER known - Cafe <input type="checkbox"/> OTHER		7. ADDRESS Lot -1 Block -1 St. 16 Bello Rd., Barrigada		
8. LOCATION OF PROPERTY WHEN OBTAINED Within south warehouse office of aforementioned address.		9. PHONE: (H) _____ (W) _____		
10. PURPOSE FOR WHICH OBTAINED <input checked="" type="checkbox"/> EVIDENCE <input type="checkbox"/> FOUND <input type="checkbox"/> IMPOUNDED <input type="checkbox"/> ANALYSIS (Attach Evidence Analysis Request Form, G.O. 85-11) <input type="checkbox"/> OTHER (Specify): _____			11. DATE/TIME OBTAINED 11/15/10 2:45am	

12. ITEM NO.	13. QUANTITY	14. DESCRIPTION OF PROPERTY	15. DISPOSAL ACTION
1	1	\$30,000 U.S. Currency, \$20.00 denominations. AS NOTHING FOLLOWS AS	

16. CHAIN OF CUSTODY				
ITEM NO.	DATE & TIME	RELINQUISHED BY	RECEIVED BY	PURPOSE OF CHANGE OF CUSTODY
#1	11/15/10 2:45am	Name (type or print): 1/15/10 GAO Signature: <i>[Signature]</i>	Name (type or print): S/A F.M. Santos #1216 Signature: <i>[Signature]</i>	
#2	11/15/10 2:45am	Name (type or print): S/A F.M. Santos #1216 Signature: <i>[Signature]</i>	Name (type or print): Curtis Vandewall Signature: <i>[Signature]</i>	
		Name (type or print): Signature:	Name (type or print): Signature:	

CHAIN OF CUSTODY CONTINUED ON REVERSE

DO NOT WRITE IN THIS SPACE

CL3

CS No.

PROP No.

LOB

Responding Party "Exhibit B"

**PLEA AGREEMENT BETWEEN KENRICK O. GAJO AND THE
PEOPLE/GOVERNMENT OF GUAM**

Mr. Kenrick O. Gajo (Gajo) and his counsel, Mr. Curtis Van De Veld, Esq., and the People/Government of Guam (Government) hereby agree to the following terms and conditions:

1. Gajo shall be charged by the Government with two counts of possession with intent to deliver a schedule I, II, or III controlled substance (crystal methamphetamine or ice) as a First Degree Felony, which occurred on or about December 2009 and January 2010 in the Territory of Guam, and may face no more than fifteen (15) years imprisonment.
2. Gajo however desires to cooperate and assist the Government with the investigation of his drug sources and cohorts, as well as with a homicide that occurred on or about 1998.
3. Gajo's cooperation and direct assistance includes but is not limited to the following:
4. Gajo shall provide truthful information and full disclosure to the Government about of his knowledge of criminal conduct involving himself and others, including Gajo's drug sources of crystal methamphetamine (ice) and the location of approximately \$140,000 to \$160,000 cash or more related to his involvement with the distribution and/or sale of said controlled substances.
5. Gajo shall provide truthful information and full disclosure to the Government about his knowledge of criminal conduct related by one or more individuals involved in the 1998 homicide of a female found near Route 15.
6. Gajo agrees to fully cooperate and provide direct assistance to the Government in its operation and investigation of the criminal offenses of paragraph 4 above (e.g., drug buys, recording, etc.)
7. Gajo agrees to fully cooperate and provide direct assistance to the Government in its operation and investigation of the criminal offenses of paragraph 5.
8. Gajo also agrees to consent to a search of his residence or home, vehicles, and his automotive shop for illegal drugs or controlled substances, drug proceeds, drug paraphernalia, firearms, or other contraband.
9. If Gajo's cooperation and assistance leads to the arrest and prosecution of one or more of his drug sources, or the arrest and prosecution of one or more individuals in the aforementioned 1998 homicide, as determined solely by the Government, the People will agree to the following:

- a. Gajo will only plead guilty to a possession of a Schedule I, II or III controlled substance (crystal methamphetamine or ice) as a Third Degree Felony,
- b. Gajo will not serve jail or be imprisoned for the possession conviction above in a.
- c. The Government will not seek criminal or civil forfeiture of Gajo's real property, bank accounts, the cash in his wallet at the time of his arrest, his or his wife's vehicles, automotive shop or personal property not contraband.
- d. The Government agrees that only \$30,000 out of the \$140,000 to \$150,000 or more cash whose location will be provided to the Government during its search will not be subject to forfeiture in order for that amount (\$30,000) to be used to pay his attorney fees.
- e. The Government agrees that use immunity will be provided to Gajo for any drug or drug related criminal offense, but no immunity of any sort for a homicide case.

SO AGREED this 15th day of January 2010:

PEOPLE/GOVERNMENT OF GUAM
OFFICE OF THE ATTORNEY GENERAL

BY:
DATE:

[Signature]
Jan 15, 2010

KENRICK O. GAJO

BY:
DATE:

[Signature]
1/15/10

CURTIS VAN DEVELD

BY:
DATE:

[Signature]
Jan 15, 2010

[Signature]