

October 4, 2018

**United States Court of Appeals
for the Federal Circuit**

JEFFREY NATHAN SCHIRRIPA
Plaintiff - Appellant

V.

UNITED STATES OF AMERICA
Defendant - Appellee

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United States Court of Appeals
For The Federal Circuit

No. 2017-2477

On Appeal from the United States Court of Federal Claims in Civil Action No. 1:16-cv-01073-LKG, as decided by the Honorable Judge Lydia Kay Griggsby.

Representing the United States: Lauren S. Moore, *Attorney of Record*, Steven J. Gillingham, *Assistant Director*, Robert E. Kirschman, Jr., *Director*, Chad A. Readler, *Acting Assistant Attorney General*; Commercial Litigation Branch, Civil Division, United States Department of Justice; Washington, D.C.

**APPELLANT'S NONCONFIDENTIAL PETITION
FOR PANEL RE-EARING AND REHEARING EN**

SUBMITTED BY:
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FRAP 35,
FRAP 35(c)(4)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Jeffrey N. Schirripa, pro se v. United States of America

No. 17-2477

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Jeffrey Nathan Schirripa certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

None

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

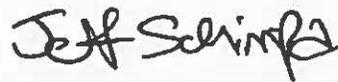
4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

None

10/4/2018

Date



Signature of counsel

Jeffrey Nathan Schirripa

Printed name of counsel

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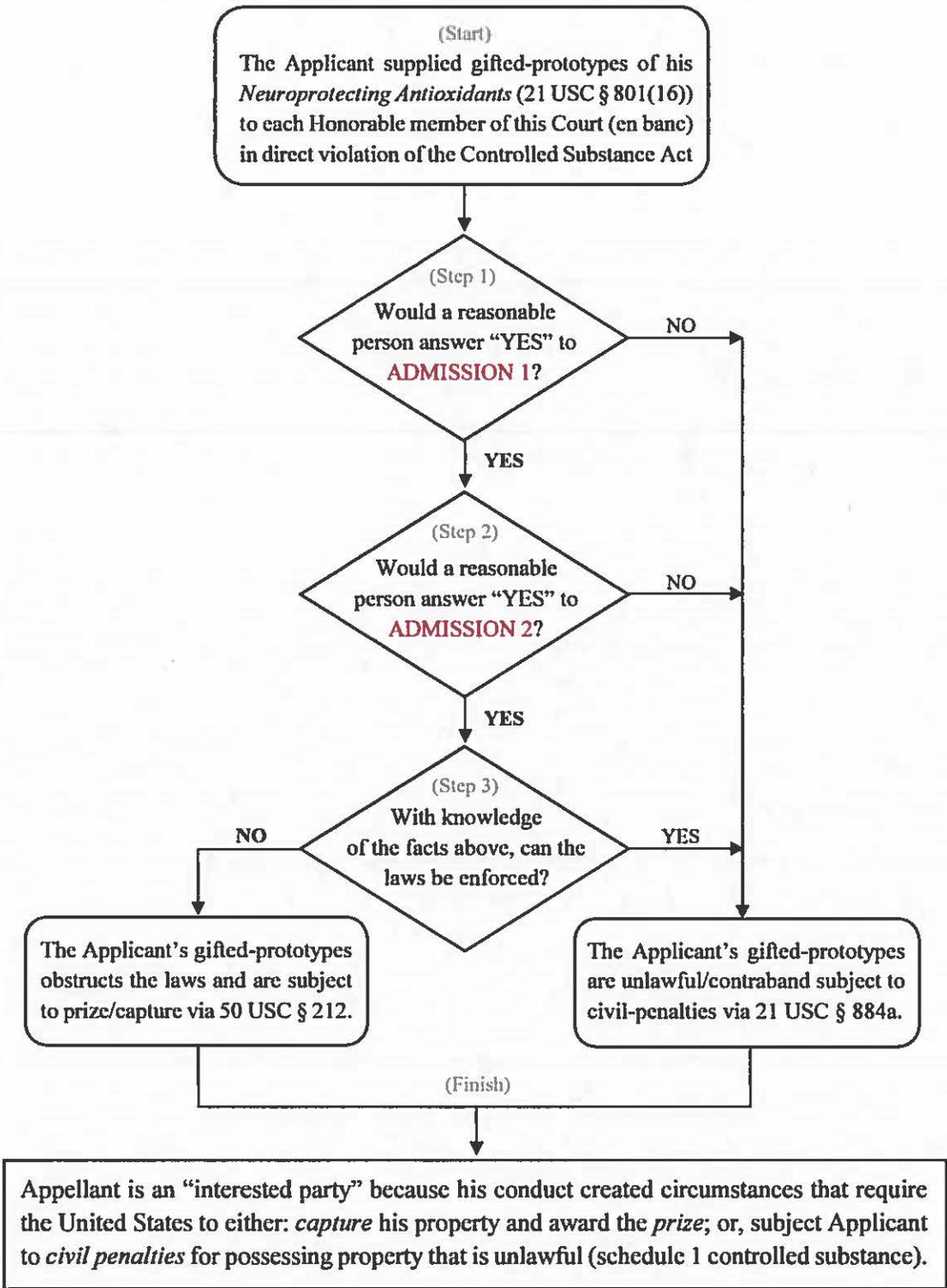
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STATEMENT OF COUNSEL: Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting questions of exceptional importance:

1. Does the circumstances created by Appellant’s *Memorandum in Support of Rehearing En Banc*¹ demonstrate the existence of extraordinary circumstances in which the United States is obligated to perform the nondiscretionary duty of faithfully enforcing Federal law (as seen below)?



¹ Please see: Appx1 (attached); and also, Entry No. 32, at A25 and, A28.

FACTS OVERLOOKED BY THE PANEL

The only facts capable of demonstrating the merits of Applicant's implied-contract and bid-protest claims were set forth in his motion for judicial notice. Because this Honorable Court declined to take notice of such facts, the Applicant was deprived of the ability to demonstrate how such facts directly contradict the Claims Court's determination that he set forth no facts to validate his claims.

POINTS OF LAW MISAPREHENDED BY THE PANEL

The U.S. Supreme Court² has maintained that absent some clear indication that the legislature's intent was to bind itself contractually, a law is not intended to create private contract rights. In this case, Appellant relies on this Court's previous determination³ that Congress's use of the word "shall" is fairly interpreted (in the statutory context below) as being mandatory/binding in nature.

As applied to *Agwiak*,⁵ 50 USC §§ 212-215⁴ shows that Congress used the word "*shall*" with the intention of creating a nondiscretionary obligation (on the part of the United States) to perform specific actions when certain conditions are met. Specifically, whenever "*any person*" supplies information and "*any property of whatsoever kind or description*" that is capable of inciting resistance against the laws... The United States "*shall*" initiate confiscation proceedings (for the equal benefit of the United States and informer), *capture* any such property and, award the *prize*.

Similar to the Claims Courts' precedent concerning unilateral-prize contracts,⁵ Appellant asserts that the aforementioned statutes are an offer to enter a unilateral-*prize* contract because it requires an actual-offeror to supply property/information in return for the United States promise to consider all entries (i.e. institute confiscation proceedings) and award the *prize* (for any property *captured*).

² *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)

³ *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)

⁴ 50 USC § 212: *any property* of whatsoever kind or description... that promotes resistance against the laws... *shall* be lawful subject to *prize and capture wherever found*.

50 USC § 213: Such *prizes and capture shall* be condemned in a District Court of the United States... into which they may be taken and proceedings first instituted.

50 USC § 215: ... *any person* may file an information with such attorney (U.S. Attorney General, or U.S. Attorney for the judicial district), in which case the proceedings *shall* be for the use of such informer and the United States in equal parts.

⁵ *Lucas v. United States*, 25 Cl. Ct. 298, 304-04 (1992)

ARGUMENT FOR REHEARING

The only facts capable of demonstrating the existence of an implied-contract (50 USC §§ 212-215) are set forth in Appellant's motion for judicial notice. Because (both) the Claims Court and this Honorable Court have declined to take notice of the observable/verifiable facts contained therein, it cannot be argued that the Applicant has been denied his procedural-right to present facts which the Court(s) "*must take judicial notice of*" under FRE 201(c)(2) and/or be heard under FRE 201(e).

ARGUMENT IN SUPPORT OF REHEARING EN BANC

Despite the unusual/unprecedented nature of the Appellant's implied-contract claims, the tangible evidence provided to (and previously discarded by) this Honorable Court would lead a reasonable person to believe that extraordinary circumstances exist which require the immediate intervention by this entire Court (en banc).

CONCLUSION

As a matter of first impression, the Appellant has been denied procedural-due process and is justly entitled to an opportunity to present the facts set forth in his motion for judicial notice and/or be heard on the propriety of taking judicial notice. Understanding that procedural due-process is an absolute lynchpin to our judicial system, this Honorable Court must grant this petition and comply with the federal rules of evidence (rule 201).

PRAYER FOR RELIEF

Appellant prays the Court's mandate will be vacated and the decision to deny his Emergency Motion to be heard via FRE 201(e) will be reversed and granted.

CERTIFICATE OF SERVICE

I, Jeffrey N. Schirripa, hereby declare under penalty of perjury that on this 4th day of October 2017, have caused the foregoing "APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC" to be delivered to (via USPS Certified Mail) and served upon the following recipients:

Clerk of the Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W. (Room 401)
Washington, D.C. 20439

- & -

Lauren S. Moore
U.S. Department of Justice
Commercial Litigation Branch,
P.O. Box 480,
Ben Franklin Station;
Washington, D.C. 20044



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10/4/2018

Date

APPENDIX

United States Court of Appeals for the Federal Circuit

No. 2017-2477

MEMORANDUM IN SUPPORT OF REHEARING ENBANC

To prove the existence of a unilateral-*prize* contract (50 USC §§ 212-215), Jeffrey N. Schirripa (Appellant) hereby provides the United States (Appellee) and this Court with property subject to *capture* (50 USC § 212), and information (50 USC § 215) to initiate condemnation proceedings. In accordance with the rule of law,² Appellant's "Emergency Motion" must be granted/expedited.

CONFIDENTIAL PROPERTY

See also: Entry No. 32, at A27

CONFIDENTIAL INFORMATION

See also: Entry No. 32, at A25

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

JEFFREY NATHAN SCHIRRIPA,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2017-2477

Appeal from the United States Court of Federal
Claims in No. 1:16-cv-01073-LKG, Judge Lydia Kay
Griggsby.

Decided: August 24, 2018

JEFFREY NATHAN SCHIRRIPA, Kinnelon, NJ, pro se.

LAUREN MOORE, Commercial Litigation Branch, Civil
Division, United States Department of Justice, Washing-
ton, DC, for defendant-appellee. Also represented by
CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., STEVEN J.
GILLINGHAM.

Before NEWMAN, TARANTO, and STOLL, *Circuit Judges*.

PER CURIAM.

Jeffrey Nathan Schirripa filed suit in the United States Court of Federal Claims, alleging bid protest, breach of contract, and Fifth Amendment taking claims against the United States. He also seeks to enjoin the government from enforcing the Controlled Substances Act against his actions and from pursuing criminal charges against him. The court dismissed the complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.¹ We affirm.

BACKGROUND

This is the third appeal by Mr. Schirripa on related actions. See *Schirripa v. United States*, 615 F. App'x 687 (Fed. Cir. 2015); and *Schirripa v. United States*, 570 F. App'x 938 (Fed. Cir. 2014).

In the present action, Mr. Schirripa states in his complaint that he mailed samples of cannabinoids to the U.S. Department of Justice ("DOJ") and the U.S. District Court for the District of New Jersey, in January of 2015. The next month, the DOJ confirmed receipt of Mr. Schirripa's mailing and stated that the mailing could be construed as a violation of 21 U.S.C. § 844(a), which concerns the possession of a controlled substance, and/or a violation of 18 U.S.C. § 1716, which prohibits the mailing of certain items.

The Court of Federal Claims dismissed the action, and Mr. Schirripa appeals, arguing that the court erred in

¹ *Schirripa v. United States*, No. 16-1073C, 2017 WL 2537370, at *1 (Fed. Cl. June 9, 2017) ("Fed. Cl. Op."), *reconsideration denied*, No. 16-1073C, 2017 WL 3097812 (Fed. Cl. July 21, 2017).

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its assessment of his breach of contract and bid protest claims.

We give plenary review to dismissal for lack of jurisdiction. *Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1378 (Fed. Cir. 2017). Also, *pro se* complaints are “to be liberally construed” and “held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). However, there must always be jurisdiction. *Sanders v. United States*, 252 F.3d 1329, 1333 (Fed. Cir. 2001); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

DISCUSSION

The Implied Unilateral Contract Claim

The Tucker Act provides jurisdiction of:

any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). To recover damages, there must be “a separate source of substantive law that creates the right to money damages” against the United States. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005); see also *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–73 (2003).

Mr. Schirripa alleged breach of a unilateral contract with the United States that formed upon his mailing of the cannabinoid samples. The court held that a unilateral contract was not formed or implied by unsolicited mailings to the Department of Justice and the District Court. Fed. Cl. Op. at *7–8.

On appeal, Mr. Schirripa argues that “a plain reading of the statutes (50 USC §§ 212–215) clearly shows that Congress intended to bind the United States in a unilateral-prize contract . . .” Schirripa Br. at 7 (footnote omitted). He states that he “met the extraordinary (essential) elements of the contract,” *id.*, that “the property and information provided by Appellant is inherently capable of inciting resistance against the laws of the United States - requiring Appellee to *capture* the property and award the *prize* to Appellant” or, in the alternative, “arrest Appellant for violating the Controlled Substances Act” and forfeit his property. *Id.* at 8–9 (italics in original).

The statutes Mr. Schirripa cites for “unilateral-prize contract” formation, 50 U.S.C. §§ 212, 213, and 215, are as follows:

§ 212. Whenever during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person, or his agent, attorney, or employee, purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person engaged therein; or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawful subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned.

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§ 213. Such prizes and capture shall be condemned in the district court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted.

§ 215. The Attorney General, or the United States attorney for any judicial district in which such property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts.

These statutes were enacted in 1861, and “aimed exclusively at the seizure and confiscation of property used in aid of the Rebellion, ‘not to punish the owner for any crime, but to weaken the insurrection.’” *Oakes v. United States*, 174 U.S. 778, 790–91 (1899) (quoting *Kirk v. Lynd*, 106 U.S. 315, 316 (1882)).

Congress enacted these statutes to weaken the Confederate States by authorizing the President to seize property aiding the Confederacy in its insurrection. See *Union Ins. Co. v. United States*, 73 U.S. 759, 763 (1867) (“It is sufficiently obvious that the general object of the enactment was to promote the suppression of rebellion by subjecting property employed in aid of it with the owner’s consent, to confiscation.”); *Conrad v. Waples*, 96 U.S. 279, 285 (1877) (“That of 1861 applied only to property acquired with intent to use or employ the same, or to suffer the same to be used or employed, in aiding or abetting the insurrection, or in resisting the laws . . .”). These statutes did not and do not support a theory of unilateral contract with the government by mailing it an unsolicited item.

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discussed *supra*, these statutes have no relation to any contract theory or any government bid or procurement practice.

The Court of Federal Claims thoroughly considered Mr. Schirripa's arguments and theories, and fully explained their inapplicability.

The Takings Claim

In the proceedings below, Mr. Schirripa also alleged that the government's potential enforcement of the Controlled Substances Act against his mailing of cannabinoid samples constituted a regulatory taking, in violation of the Fifth Amendment. The court also dismissed this claim.

A takings claim must be predicated upon lawful governmental action, yet Mr. Schirripa pled the opposite when he alleged that the government's "unconstitutional and prejudicial classification . . . has consequently enabl[ed] the Controlled Substance [sic] Act (21 U.S.C. § 881(a)) to prohibit and affirmatively forfeit all property rights secured in U.S. Patent No. 6630507." Fed. Cl. Op. at *8 (emphases and footnote omitted) (quoting Am. Compl. at 4).

The takings claim is not discussed by Mr. Schirripa, and any appeal of that claim is deemed waived.

CONCLUSION

The decision of the Court of Federal Claims is affirmed. Mr. Schirripa's motion to take judicial notice is denied. See ECF No. 24.

AFFIRMED

No costs.

In compliance with FRAP 35, Jeffrey N. Schirripa (Appellant) hereby submits three (3) nonconfidential copies and eighteen (18) Confidential copies of his Petition for Rehearing and Rehearing En Banc.

Please feel free to contact me directly with any questions/concerns.

Thank you in advance.

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OCT 09 2018

United States Court of Appeals
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