

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2018

5
6 (Argued: April 12, 2019 Decided: November 7, 2019)

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8 Docket Nos. 18-858-cr(L), 18-1199-cr(CON)

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10 _____
11 UNITED STATES OF AMERICA,

12
13 *Appellee,*

14
15 v.

16
17 JAMES BROME, AKA TROUBLE, AKA B,

18
19 *Defendant-Appellant.**
20 _____
21

22
23 Before:

24
25 CALABRESI, LIVINGSTON, and LOHIER, *Circuit Judges.*
26

27 James Brome appeals from an order of the United States District Court
28 for the Western District of New York (Siragusa, J.) denying his challenge to
29 the administrative forfeiture of \$21,019. In this opinion, we address and reject
30 Brome's argument that the Government failed to provide him with adequate
31 notice of the administrative forfeiture action while he was in prison, in
32 violation of his due process rights. We hold that the Government generally
33 must demonstrate the existence of procedures reasonably calculated to ensure
34 that a prisoner receives notice of the forfeiture action. In a separate summary
35 order filed simultaneously with this opinion, we dispose of Brome's

* The Clerk of Court is directed to amend the official caption to conform with the
above.

1 remaining challenge to the District Court’s denial of his motion to reduce his
2 sentence under 18 U.S.C. § 3582(c)(2). **AFFIRMED.**

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4 STEVEN Y. YUROWITZ, Newman & Greenberg LLP,
5 New York, NY, *for Defendant-Appellant* James Brome.

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7 SEAN C. ELDRIDGE, Assistant United States Attorney
8 (Mary C. Baumgarten, Assistant United States
9 Attorney, *on the brief*), *for* James P. Kennedy, Jr.,
10 United States Attorney for the Western District of
11 New York, Rochester, NY, *for Appellee* United States
12 of America.

13
14 PER CURIAM:

15 James Brome appeals from an order of the United States District Court
16 for the Western District of New York (Siragusa, L.) denying his challenge to
17 the administrative forfeiture of \$21,019 found in his pocket upon arrest. In
18 this opinion, we address and reject Brome’s argument that the Drug
19 Enforcement Administration (DEA) failed to provide him with adequate
20 notice of the administrative forfeiture action while he was in prison, in
21 violation of the Due Process Clause of the Fifth Amendment. We hold that
22 the Government generally must demonstrate the existence of procedures
23 reasonably calculated to ensure that a prisoner receives notice of the forfeiture
24 action. In a separate summary order filed simultaneously with this opinion,

1 we dispose of Brome's remaining challenge to the District Court's denial of
2 his motion to reduce his sentence under 18 U.S.C. § 3582(c)(2).

3 BACKGROUND

4 Shortly after midnight on September 12, 2010, a police officer with the
5 Lyons Police Department in Wayne County, New York stopped a car driven
6 by Brome's common-law wife with Brome in the passenger seat. After
7 running identification checks, the officer learned that neither Brome nor his
8 wife had a valid driver's license and that Brome was on parole for a felony
9 weapons conviction. Both Brome and his wife were asked to step out of the
10 car and were patted down for weapons. The officer seized \$21,019 in cash
11 from Brome's pockets.

12 For reasons not relevant here, the local district attorney's office declined
13 to proceed with a state forfeiture action relating to the seized cash, and on
14 October 7, 2010, the DEA adopted the seizure and proceeded with a federal
15 forfeiture action under 18 U.S.C. § 983 and 19 U.S.C. § 1607. Consistent with
16 these statutory provisions, the DEA attempted to send notice of its forfeiture
17 to Brome. On November 3, 2010, the DEA mailed notice to Brome's last
18 known home address, but the mail was returned unopened. Notice of the

1 cash seizure was also published in the *Wall Street Journal* three times in three
2 consecutive weeks that same month.

3 On November 30, 2010, the DEA arrested Brome on state narcotics
4 charges, and he was detained in the Wayne County jail facility. That same
5 day, the DEA sent notice of the forfeiture again to Brome's home address. On
6 December 27, 2010, it sent notice by certified mail and first class mail to Brome
7 in the Wayne County jail where he was actually located. The notice mailed to
8 the jail incorrectly listed the date of seizure as October 7, 2010, rather than the
9 actual seizure date of September 12, 2010.

10 By February 22, 2011, Brome had not filed a claim for the seized cash, so
11 the DEA administratively forfeited it under federal law. In May 2011 a
12 federal grand jury indicted Brome for conspiring to possess with intent to
13 distribute cocaine and cocaine base, and the state charges against him were
14 dropped.

15 Over two years later, on September 16, 2013, Brome, proceeding pro se,
16 moved in the District Court pursuant to Rule 41(g) of the Federal Rules of
17 Criminal Procedure for the return of the seized cash. The District Court
18 denied the motion, and Brome appealed. Construing Brome's motion as a

1 challenge to the sufficiency of the DEA’s notice, a panel of this Court vacated
2 the District Court’s denial and instructed it on remand to determine in the
3 first instance whether the notices had been adequate. See United States v.
4 Brome, 646 F. App’x 70, 73 (2d Cir. 2016).

5 On remand, the Government submitted an affidavit from an officer
6 employed at the Wayne County jail where Brome was detained. The affidavit
7 described the inmate mail logging and distribution system in operation there
8 at the time the DEA attempted to send notice to Brome and explained that an
9 officer would distribute the mail by calling the name of each inmate who
10 received mail on a particular day. Def. App’x 74–75. Attached to the affidavit
11 was a printout of the mail log for December 29, 2010, showing that the Wayne
12 County jail had received two envelopes from the DEA addressed to Brome
13 that day. Def. App’x 77.

14 Relying on the Government’s affidavit and citing Dusenbery v. United
15 States, 534 U.S. 161 (2002), the District Court found that the DEA’s notice to
16 Brome at the Wayne County jail “was reasonably calculated to apprise Brome
17 of the administrative forfeiture.” Def. App’x 86. It therefore denied Brome’s
18 Rule 41(g) motion, and this appeal followed.

1 is enough that it “attempt to provide actual notice.” Dusenbery, 534 U.S. at
2 170.

3 But that does not end our inquiry. Even after Dusenbery, a split
4 persists among the courts of appeals regarding what constitutes adequate
5 notice to prisoners. In particular, there is no “single view” about whether a
6 presumption exists “that notice sent by mail to the institution in which the
7 addressee-prisoner is housed” is reasonably calculated to apprise an
8 incarcerated petitioner of the forfeiture action. Nunley v. Dep’t of Justice, 425
9 F.3d 1132, 1137–38 (8th Cir. 2005). The First, Sixth, Seventh and Tenth Circuits
10 have held that such a presumption exists when the notice is by certified mail
11 to the proper prison facility. See Chairez v. United States, 355 F.3d 1099,
12 1101–02 (7th Cir. 2004); Whiting v. United States, 231 F.3d 70, 76–77 (1st Cir.
13 2000); United States v. Real Property (“Tree Top”), 129 F.3d 1266 (Table), at *2
14 (6th Cir. 1997); United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996). The
15 Third and Fourth Circuits have declined to apply any presumption. Instead,
16 they place the onus squarely on the Government to show that the correctional
17 facility’s internal procedures for delivering mail are reasonably calculated to
18 notify the prisoner. See United States v. Minor, 228 F.3d 352, 358 (4th Cir.

1 2000); United States v. One Toshiba Color Television, 213 F.3d 147, 155 (3d
2 Cir. 2000) (en banc). The Eighth Circuit, meanwhile, has charted a somewhat
3 different course. It rejects the concept of an “irrebuttable presumption” that a
4 prison’s mail delivery procedures are adequate, and instead places the burden
5 on the prisoner to demonstrate the inadequacy of the procedures. See
6 Nunley, 425 F.3d at 1137–38.

7 Joining the Third and Fourth Circuits, we hold that the Government
8 generally must demonstrate the existence of procedures reasonably calculated
9 to ensure that a prisoner receives notice of the forfeiture action. To be clear,
10 the Government is not obliged to prove actual notice, such as a signed receipt
11 from the served prisoner, One Toshiba Color Television, 213 F.3d at 155, and
12 it needs only to attempt to provide such notice, Dusenbery, 534 U.S. at 170.
13 Nor do we require the Government to engage in any “heroic efforts” to notify
14 a prisoner about a forfeiture proceeding. Id. It will ordinarily suffice if the
15 Government demonstrates that it sent notice by certified return receipt to the
16 correctional facility where the prisoner is detained and that the facility’s mail
17 distribution procedures are reasonably calculated to deliver the mail to the
18 prisoner. Id. But the point is that we will not simply presume that the

1 Government satisfies its burden by representing that it sent notice by direct
2 mail. Instead, we agree with the Third Circuit that “whether a particular
3 method of notice is reasonable depends on the particular circumstances.”
4 One Toshiba Color Television, 213 F.3d at 153 (quoting Tulsa Prof’l Collection
5 Servs. v. Pope, 485 U.S. 478, 484 (1988)).

6 With these principles in mind, we agree with the District Court that the
7 Government showed that its notice to the Wayne County jail where Brome
8 was detained was “reasonably calculated under all the circumstances” to
9 apprise Brome “of the pendency of the cash forfeiture.” Dusenbery, 534 U.S.
10 at 168. We note that the mail procedures at the jail, including its use of a
11 mailroom “logbook” and the distribution of mail during a mail call, are
12 similar in every relevant way to those approved in Dusenbery. See id. at 169.
13 The December 27, 2010 notice was sent by certified mail, return receipt
14 requested, to James S. Brome, Prisoner ID No. 101700, Wayne County Jail,
15 7368 New York 31, Lyons, NY, 14489. And the mail was accepted for delivery
16 by an employee at the jail, who signed for it. Written notice was also sent by
17 first class mail, received at the facility, and entered into the incoming mail log.
18 We therefore agree with the District Court that notice here was “reasonably

1 calculated to apprise Brome of the administrative forfeiture action.”¹ Def.

2 App’x 86.

3 Brome disputes that sending the notice to the jail was “reasonably
4 calculated” to apprise him of the forfeiture action. First, he argues that the
5 DEA was required to know at the time it sent notice that the mail distribution
6 procedures at the Wayne County jail were adequate. This cannot be right
7 since the Supreme Court in Dusenbery itself relied on after-the-fact testimony
8 of a corrections officer, not any federal official’s subjective knowledge of the
9 prison’s notice procedures, to determine in that case that notice satisfied due
10 process. See 534 U.S. at 165–66, 169. So long as the Government has the
11 burden of showing that its methods were “reasonably calculated” to inform
12 the prisoner of the forfeiture, imposing such a knowledge requirement is
13 unnecessary. Second, Brome argues that the notices were not “reasonably
14 calculated” to apprise him of the forfeiture action because they incorrectly
15 listed the funds’ “seizure date” as October 7, 2010, the date the DEA adopted
16 the seizure from local authorities. We disagree. The notices included enough

¹ It therefore goes almost without saying that we would consider the notice here adequate under any of the rules announced by our sister circuits.

1 other identifying information, such as the exact amount of money at issue and
2 the place where it was seized, that we easily conclude that due process was
3 not offended by the minor error. Despite the error, Brome was fully able to
4 understand the “pendency of the cash forfeiture.” See id. at 168. We
5 therefore affirm the District Court’s dismissal of Brome’s challenge to the
6 adequacy of the Government’s notice.

7 **CONCLUSION**

8 For the foregoing reasons and those set forth in the accompanying
9 summary order, we AFFIRM the order of the District Court.