

OCT 05 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

VAL JOHNSON,

Defendant - Appellee.

No. 11-10201

D.C. No. 2:10-cr-00077-JCM-RJJ-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted September 11, 2012
San Francisco, California

Before: WALLACE, THOMAS, and BERZON, Circuit Judges.

The United States appeals from the sentence imposed by the district court order denying forfeiture. We have jurisdiction under 28 U.S.C. § 1291. We vacate the district court's sentence and remand for further proceedings consistent with *United States v. Newman*, 659 F.3d 1235 (9th Cir. 2011).

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Under *Newman*, the district court had no discretion to reduce or eliminate forfeiture. *Id.* at 1240. However, if the district court determines there is reason to question the accuracy of the stipulated forfeiture amount, it should take evidence of the amount of the proceeds. *See id.* at 1245-46.

Though decided after the district court entered its sentence, *Newman* did not announce a new constitutional rule of criminal procedure, and therefore is not barred from retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989). *See Reina-Rodriguez v. United States*, 655 F.3d 1182, 1187 (9th Cir. 2011).

Johnson waived any Eighth Amendment challenge to his forfeiture amount in his plea memorandum. *See United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004).

Sentence **VACATED** and action **REMANDED**.