RECENT AND PENDING DECISIONS OF THE SUPREME COURT
ON ASSET FORFEITURE

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I. **Kaley and Luis**


*Kaley* and *Luis* dealt with issues at the periphery of a much larger issue: when does the defendant get to contest the probable cause for the pre-trial restraint of his property.

The rule that most circuits follow – it has not yet reached the Supreme Court – comes from cases called *Jones and Farmer* from the Tenth and Fourth Circuits.

- *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered);

- *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (following *Jones*; same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case);

Under *Jones-Farmer*, a defendant only gets a pre-trial hearing if he first shows that he lacks any other source of funds with which to retain counsel

- That is, if his Sixth Amendment rights are implicated.

The rule strikes a balance between the Government’s desire to avoid giving the defendant a preview of its case and exposing its witnesses and the defendant’s right to have a vehicle for seeking the release of any property that was not lawfully restrained in time for it to do him some good.

- In general, he has to wait to contest forfeitability after he’s convicted, but if his Sixth Amendment rights are in jeopardy, he needs the money now.
Under *Monsanto*, of course, even if the defendant gets the hearing, if the Government re-establishes probable cause, the money remains restrained.

- *United States v. Monsanto*, 491 U.S. 600, 616 (1989) (rejecting Sixth Amendment challenge to pre-trial restraining order restricting defendant’s use of forfeitable property);

Neither *Kaley* nor *Luis* changed any of that

- As I said, they dealt at the periphery.

*Kaley* addressed this question: if the defendant gets a hearing, exactly what is it that he gets to challenge: is it only the probable cause to believe that the property would be subject to forfeiture, or can he also challenge the grand jury’s finding of probable cause to believe that the underlying crime was committed.

- *Kaley* held that it’s only the former; the defendant cannot challenge the probable cause for the underlying crime.

- It would have been more consequential if it had gone the other way

- But as it was, it resolved a split in the circuits in which only the Second and DC Circuits had taken the broader view, so it changed the law only in those two circuits.

In *Luis*, the question had to do with the *consequences* of the probable cause finding.

- Again, it didn't change the *Jones-Farmer* rule;

- The defendant only gets a hearing if he shows that he lacks other funds with which to retain counsel

- The question was, if he gets the *Monsanto* hearing, and shows that there was no probable cause to believe the property was traceable to the offense, can the Government nevertheless retain it under a statute that authorizes the pre-trial restraint of substitute assets

- The Court held that it could not: the Sixth Amendment trumps the Government’s interest in retaining untainted property for forfeiture and restitution.

- So the amount needed for attorney’s fees must be released even if there is authority to restrain substitute assets
That’s an interesting point of constitutional law, but as a practical matter, it only applies if there is a statute (or case law) allowing the Government to restrain substitute assets in the first place

— If there is no such authority, the property would have to be released in its entirety without regard to how much of it the defendant needs to retain counsel

So as a practical matter, Luis only makes a difference when the Government invokes Section 1345 (which is extremely rare; I’m aware of only 3 cases in the past 25 years), or in the Fourth Circuit, which permits, by case law, the pretrial restraint of substitute assets.

That’s not exactly a sea change in the law

— In fact, there was a time a decade ago when DOJ, as a matter of policy, exempted attorney’s fees from the pre-trial restraint of substitute assets in the Fourth Circuit.

— Luis therefore simply reinstated that policy as a matter of constitutional law

Going forward, the real impact of Luis may be felt in terms of legislation

The reason Congress has been reluctant to authorize the pre-trial restraint of substitute assets by statute was the concern that the defendant should have the funds available to hire counsel.

— Now that that issue has been resolved by Luis

— that is, even if there is legislative authority to restrain untainted property, it must be released if the defendant’s Sixth Amendment rights are implicated

— there is no longer any reason for Congress not to expand the restraining order statutes to authorize the pre-trial restraint of substitute assets across the board.

II. Forfeiture and Restitution / Hot Topics

Q. What is the issue in United States v. Honeycutt, the issue on which the Supreme Court will hear argument on March 29, 2017?

The hot topic in forfeiture law right now is joint and several liability
It was no issue at all until two years ago because every circuit had held that all of the defendants convicted in a criminal case are jointly and severally liable to pay a forfeiture judgment equal to the proceeds of the offense,

- Regardless of how much or how little any one of them personally obtained.
- So if two defendants were convicted of defrauding the victim of $1 million, they were jointly and severally liable for the $1 million, even if one of them pocketed almost all of it and the other virtually nothing.
- Some statutes say this explicitly, but in most cases joint and several liability is a creature of the case law
- Some courts base it on *Pinkerton* liability (especially in conspiracy and RICO cases)
- Others say it is what Congress meant when it said that the defendants must forfeit proceeds obtained “directly or indirectly”

Then came the D.C. Circuit’s decision in *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), which rejected both of the rationales adopted by the other circuits

- To resolve the split in the circuits, the Supreme Court granted *cert.* in *Honeycutt*, which was a Sixth Circuit case that applied the majority rule.

- *United States v. Honeycutt*, 816 F.3d 362 (6th Cir. 2016) (if there is joint and several liability under RICO, there must be under § 853 as well; no need to consider the D.C. Circuit’s reasoning in *Cano-Flores*), *cert. granted*, 2016 WL 4078900 (U.S. Dec. 9, 2016);

An adverse decision for the Government in *Honeycutt* would indeed be a game-changer in that it would change what has been well-established law throughout the country for decades and force the courts to engage in a new round of fact-finding in every criminal forfeiture case with more than one defendant

- That is, the court would not only have to determine the total proceeds of the offense, but how much each defendant personally obtained.

There are two important points to keep in mind as the *Honeycutt* argument unfolds
One is what is not at issue:

— All circuits agree, and have agreed for decades, that a court may issue a forfeiture order in the form of a personal money judgment even if all of the proceeds of the offense have been dissipated – spent on wine, women and song

— So the issue in *Honeycutt* is the distribution of that liability among the defendants, not whether they are liable at all

The other point is that it is not necessary for the Supreme Court to upend settled law regarding joint and several liability to address the concern that actually underlies the *Cano-Flores* decision

— That is, whether it is fair to hold a minor participant liable for the full amount of the proceeds of an offense

— Abolishing joint and several liability (unless Congress imposes it by statute) would be one way to address that concern, but it would be taking a hammer to swat the fly

— The way other circuits have dealt that problem more narrowly is to hold that imposing joint and several liability on a minor player can, in certain factual situations, violate that defendant’s rights under the Excessive Fines Clause of the Eighth Amendment

— That is the law in the Second, Fourth and Eighth Circuits

- *United States v. Jalaram, Inc.*, 599 F.3d 347, 354-56 (4th Cir. 2010) (rejecting the Government’s argument that the forfeiture of proceeds can never be disproportional and that an Eighth Amendment analysis is unnecessary; a forfeiture based on joint and several liability could be disproportional if the defendant’s role in the offense were truly minor; but holding that given the seriousness of the offense and the defendant’s central role over a period of six months, the forfeiture was not excessive);

- *United States v. Bonventre*, 646 Fed. Appx. 73 (2nd Cir. 2016) (implicitly acknowledging that forfeiture based on joint and several liability could be excessive if applied to a minor player, but holding that a person who provided technical support vital to the success of a fraud scheme is not such a minor player, even if he was not at the core of the scheme);

- *United States v. Van Brocklin*, 115 F.3d 587, 602 (8th Cir. 1997) (money judgment equal to entire amount realized as proceeds of bank fraud scheme is excessive as applied to a minor participant who, unlike her codefendants, reaped little benefit personally);
Unfortunately, the Supreme Court sometimes takes the sledgehammer approach when interpreting a criminal statute to avoid a result that it does not like, when a narrower approach would have sufficed

— That’s what happened in 2007 when it held in Santos that the word “proceeds” in the money laundering statute meant “net profits” instead of “gross proceeds”

• United States v. Santos, 553 U.S. 507 (2008);

— That solved the particular problem in the case before it, but it had host of unintended consequences for the enforcement of the money laundering statutes that upended the law across the country

— Ultimately, Congress had to legislatively overrule the decision by enacting a definition of “proceeds” in 2009; see 18 U.S.C. § 1956(c)(9)

We can only hope that if the Supreme Court thinks that minor players should not always be jointly and severally liable in criminal forfeiture cases it takes the narrow approach of the Second, Fourth and Eighth Circuits and bases its ruling on the Eighth Amendment, rather than abolishing the joint and several liability rule across the board and forcing Congress to reenact it.

Forfeiture and Restitution

Q. What is the status of the interplay between forfeiture and restitution?

More generally, there has been a lot of litigation over whether, as the Government argues, forfeiture and restitution are both mandatory,

— Or whether, as the defendant argues, the defendant is entitled to credit against the forfeiture order for the amount that he pays in restitution and vice versa.

As far as the litigation is concerned, that issue has now been resolved

— Every circuit has agreed with the Government that forfeiture and restitution serve different purposes – one imposes punishment, the other is remedial – and that both are mandatory

— Thus the defendant is not entitled to credit one against the other
Moreover, they hold that the courts lack the authority to tell the AG how to apply the forfeited funds.

Now, as a practical matter, DOJ takes the view that victims come first, and that forfeited funds will be applied to restitution.

Nevertheless, from the Government’s perspective it’s important to maintain the distinction between forfeiture and restitution and to obtain both orders from the court for a couple of reasons.

One is that the tools of forfeiture are more powerful in terms of preserving property for the benefit of victims than the restitution statutes are:

- Forfeiture provides for pretrial seizure or restraint; restitution does not.
- Forfeiture provides for the post-conviction ex parte seizure of traceable property and substitute assets; restitution does not.

Second, forfeiture has well-defined procedures for excluding the property interests of third parties:

- There is no parallel statutory scheme to guarantee that property available for restitution actually belongs to the defendant and not to a third party.

Finally, making both forfeiture and restitution mandatory, even if the Government intends to apply the forfeited funds to restitution, prevents a well-heeled defendant from enjoying a windfall:

- For example, if a wealthy defendant defrauds someone of $100,000, and is able to use the forfeited proceeds to pay restitution, he suffers no pecuniary penalty.
- Financially, he’s back where he was before he committed the crime.
- To serve forfeiture’s purpose as a form of punishment, the defendant must be made to pay restitution from his own funds, while forfeiting the proceeds of his crime to the Government.

III. Civil Forfeiture

Q. In a recent statement concurring in the Supreme Court’s denial of cert. in a state asset forfeiture case, Justice Clarence Thomas called for a
reevaluation of whether civil forfeiture comports with due process. What is your reaction?

Justice Thomas focused on the purported “abuse” of civil forfeiture that occurs when state and local police seize currency during traffic stops, process it for forfeiture, and use the money to fund police operations.


Virtually all of the recent criticisms of civil forfeiture have concerned seizures by the state and local police

– it is true that in those cases, the police use civil forfeiture as the means of taking small amounts of money from people carrying cash, but that doesn’t mean that every civil forfeiture case involves either the local police or small amounts of money

– it fact, it is quite the opposite

I could argue that there is in fact no abuse

– that the due process protections built into the federal forfeiture statutes are more than adequate to prevent civil forfeiture from being used improperly when the police seize cash during a traffic stop

– but that isn’t my point

– my point is that whatever you think of using civil forfeiture to seize small amounts of money in those situations, they represent a small fraction of all federal civil forfeiture cases

In fact, the larger point is that civil forfeiture is an absolutely essential law enforcement tool in a wide variety of cases that have nothing to do with state or local police and are not controversial

**When would you use civil forfeiture?**

1. when the property is seized but the forfeiture is unopposed

   – in a great many cases, the administrative forfeiture is commenced when there is a parallel criminal case, and the defendant’s default allows the property to be disposed of with minimal storage costs and use of judicial resources
2. when the wrongdoer is dead or is incompetent to stand trial;
   — in fraud cases, the Government has used civil forfeiture to recover the property for the victims where the defendant died or committed suicide before trial

3. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;
   — there are many examples of this which I’ll return to in a minute

4. when the statute of limitations has run on the criminal case;

5. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;
   — this comes up all the time in drug cases when law enforcement recovers money from a courier who truly doesn’t know who the drug dealer is who employed him to transport the money

6. when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture;
   — if the defendant is charged with fraud but pleads only to a tax offense, the only way to ensure that the court has the power to order the forfeiture of the fraud proceeds is have the defendant agree not to contest a parallel civil forfeiture action
     
     - United States v. Pollard, ___ F.3d ___, 2017 WL 908244 (9th Cir. Mar. 8, 2017) (defendant’s waiver of his right to appeal an illegal sentence is not binding on either the defendant or the appellate court; thus, a defendant may appeal a forfeiture based on an offense for which there is no statutory forfeiture authority, notwithstanding his agreement to the forfeiture);

7. when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court;

8. when there is no criminal case because the interests of justice do not require a conviction;

9. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;

10. when the defendant uses someone else’s property to commit the crime and that person is not an innocent owner.
— If someone, like the defendant’s wife, knowingly allows her property to be used to commit a crime, we need a way to recover it without having to indict the wife;

— It’s called civil forfeiture

If there were no civil forfeiture, or if Congress makes the burdens so high that it becomes impossible to use, we would not have the civil forfeiture option in all of those cases.

Let me give some examples:

— doctor in Ohio obtains drug proceeds from selling prescriptions for pain killers, puts the money in a bank account and flees to Pakistan

— defendant in Oklahoma is indicted for selling useless drugs to terminally-ill cancer patients flees to Mexico

— the only way to recover the money that the defendants left behind in those case was to file a civil forfeiture action


Or take a case where the crime was committed from abroad but it violated US law and the USG has an interest in recovering the proceeds

In the *MegaUpload* case, a person called Kim Dotcom used computer servers in the United States to steal copyrighted property of the entertainment industry while remaining outside the United States

— he is opposing extradition, but meanwhile the Government has filed a civil forfeiture action to recover the proceeds of his offense which are in New Zealand and other countries

*United States v. All Assets Listed in Attachment A (MegaUpload, Ltd.), 89 F. Supp.3d 813 (E.D. Va. 2015) (under 28 U.S.C. § 1355(b)(2) court in the U.S. has jurisdiction over property located abroad if the acts giving rise to civil forfeiture occurred, at least in part, in the district, even if the perpetrators themselves never entered the U.S. but acted entirely from abroad, aff’d *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016);*
Civil forfeiture turns out to be essential when we’re dealing with corrupt leaders of foreign countries who launder their money through the US financial system

— the best-known example maybe that of the former prime minister of Ukraine laundered his money through a Caribbean bank before depositing it in San Francisco

  • United States v. All Assets Held at Bank Julius Baer & Co., 959 F. Supp.2d 81, 93 (D.D.C. 2013);

— The case I worked on last year involved former Nigerian General Abacha who stole billions from his country’s treasury, moved the money through US banks, and ultimately caused it to be deposited in accounts in Europe

— The case I worked on involved a civil forfeiture action that the US filed in the District of Columbia against $287 million that passed through the US before being deposited in a bank account in Jersey in the Channel Islands

— The US obtained a default judgment when the Abacha family did not file a claim in the US, and then asked the court in Jersey to enforce the judgment

  • Doraville Properties Corporation v Her Majesty’s Attorney General [2016] JRC128, Royal Court, Bailiwick of Jersey, (July 2016)

Other cases involve fraud committed against the US or against countries receiving US aid money

— Right now, the Government has a civil forfeiture action pending in this courthouse in a case where someone in Afghanistan stole $70 million in U.S. Government aid and deposits the money into an Afghan bank account

— Last month Judge Moss issued an order forfeiting the bulk of the money to the U.S.

  • United States v. $70,990,605, ___ F.3d ___, 2017 WL 573499 (D.D.C. Feb. 13, 2017) (§ 981(k) gives the account holder statutory standing to contest the forfeiture of the funds in the correspondent account, but if the foreign bank has already released funds in the foreign account to the account holder so that he is suffering no injury, he lacks Article III standing);

  • United States v. $70,990,605, 305 F.R.D. 20 (D.D.C. 2015) (explaining how § 981(k) allows the Government to recover funds deposited into a bank in Afghanistan by filing a civil forfeiture action against the Afghan bank’s account at a bank in New York); United States v. Sum of $70,990,605, 128 F. Supp.3d 350,
354-55 (D.D.C. 2015) (explaining the purpose and legislative history of § 981(k) and how it operates);

Finally, the Government uses civil forfeiture to intercept or recover property being sent from or through the US to finance terrorism or in violation of sanctions against countries such as Iran and North Korea.

My point is that if Congress disagrees with the way the adoptive forfeiture program works or disagrees with the way the state and local police are using civil forfeiture, it should deal with that problem

— and not undo 200+ years of practice that have made civil forfeiture an essential law enforcement tool in all of the instances that I’ve mentioned.