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Failure to Report Transport of Currency Out of the Country: Forfeiture of Currency in *United States v. Bajakajian* Constitutes a Violation of the Excessive Fines Clause

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Summary

On July 8, 1994, the grand jury in *United States v. Bajakajian*¹ returned a three count indictment against the defendant. One charged the defendant with violation of 31 U.S.C. §§ 5316(a)(1)(A) and 5322(a) for transporting currency of more than \$10,000 outside of the United States without filing a report with the United States Customs Service. The second count charged the defendant with making a false material statement to the United States Customs Service in violation of 18 U.S.C. § 1001. The third sought the forfeiture of the \$357,144.00 discovered by the Customs Service under 18 U.S.C. § 982(a)(1). After the defendant pled guilty to failure to report the currency, the United States District Court for the Central District of California determined that the defendant was required to forfeit only \$15,000.00 of the \$357,144.00. On appeal by the United States, the Court of Appeals held that: (1) the forfeiture violated the excessive fines clause, but (2) since the defendant failed to file a cross-appeal requesting modification of the district court order that he forfeit \$15,000.00, it precluded the Court of Appeals from setting aside the forfeiture order as unconstitutional. On June 22, 1998, the United States Supreme Court decided that full forfeiture of \$357,144.00 would violate the Excessive Fines Clause.² This report will not be updated.

The United States Supreme Court granted *certiorari* in *United States v. Bajakajian*,³ on May 27, 1997. The issue which was presented on appeal to the Supreme Court was: whether section 982(a)(1) is unconstitutional *per se* under the Eighth Amendment's

¹ 84 F.3d 334 (9th Cir. 1996).

² *United States v. Bajakajian*, 66 U.S.L.W. 4514 (U.S. June 23, 1998).

³ 117 S. Ct. 1841 (1997).

Excessive Fines Clause⁴ insofar as it subjects to criminal forfeiture currency that is about to be transported out of the United States without filing the required report when neither the source nor the intended use of the currency is unlawful. On June 22, 1998, in a 5-4 decision, the U.S. Supreme Court decided that the fine was grossly disproportional.⁵ Bajakajian’s crime was solely a reporting offense.⁶ It was lawful to take the currency out of the country if that action had been reported,⁷ the money was lawfully obtained, and the money was to be used to pay a lawful debt.⁸ The harm caused by the reporting violation was “minimal”, and the maximum fine that could have been imposed under the Sentencing Guidelines was \$5,000.⁹ The Court also established a test for whether a fine is “excessive” which is one of proportionality, and best reflects the constitutional standard.¹⁰

Purposes of the Statute

The United States sought forfeiture of the currency pursuant to 18 U.S.C. § 982, which requires forfeiture upon a criminal conviction under 31 U.S.C. § 5316. Section 982(a)(1) of Title 18 provides that “[t]he court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31 ... shall order that the person forfeit to the United States any property, real or personal, involved in such, or any property traceable to such property.” Hence, according to the terms of 18 U.S.C. § 982(a)(1), the seized currency is subject to forfeiture as “property involved in such offense.”¹¹

Eighth Amendment

This, however, does not address the issue of whether such forfeiture is “excessive” within the meaning of the Eighth Amendment. The forfeiture is considered unconstitutional if it does not survive scrutiny under the Excessive Fines Clause of the

⁴ The Eighth Amendment provides that “Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII.

⁵ 66 U.S.L.W. at 4519.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 4518-19.

¹¹ Unlike the decision in *United States v. Bajakajian*, 84 F.3d 334, 337 (9th Cir. 1996), several courts have held that unreported currency becomes an instrumentality of the crime. *United States v. \$83,132.00 in U.S. Currency*, No. 95-Cv-2844, 1996 WL 599725 (E.D.N.Y. Oct. 11, 1996); *United States v. United States Currency*, 18 F.3d 73 (2d Cir. 1994), *cert. denied*, 513 U.S. 815 (1994).

Eighth Amendment.¹² The “purpose of the Eighth Amendment, ... was to limit the government’s power to punish.”¹³ “The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense’.”¹⁴

Case Law Leading To *Bajakajian*

In *Austin v. United States*, the Court declined the invitation to establish “a multi factor test” for determining whether a forfeiture violates the Excessive Fines Clause.¹⁵ The Court believed that it would be more prudent for the lower courts to consider this question in the first instance.¹⁶ In *United States v. Real Property Located in El Dorado County*,¹⁷ the Court of Appeals for the Ninth Circuit addressed the issue and established a two-pronged test for determining whether a forfeiture is unconstitutionally excessive under the Eighth Amendment.¹⁸ Since *Austin* was decided, several federal courts have formulated a variety of multi factor tests for determining whether a forfeiture violates the Excessive Fines Clause¹⁹ and generally, some form of the two-pronged test has been followed. In the Ninth Circuit, a forfeiture is constitutional under the Excessive Fines Clause if: (1) “under the ‘instrumentality’ (or ‘nexus’) test, the forfeited property must have a sufficiently close relationship to the illegal activity” and (2) “under the ‘proportionality’ test, forfeiture of the property must not impose upon the owner a penalty

¹² *United States v. Bajakajian*, 84 F.3d at 336.

¹³ *Austin v. United States*, 509 U.S. 602, 609 (1993) (holding that criminal forfeiture is a form of monetary punishment subject to the Eighth Amendment’s Excessive Fines Clause); *United States v. Sarbello*, 985 F.2d 716, 717-718 (3d Cir. 1993) (held that a court may reduce an otherwise mandatory 100% statutory criminal forfeiture on the basis of an analysis which proportions the seriousness of the offense to the severity of the criminal sanction in order to conform to the Excessive Fines Clause of the Eighth Amendment).

¹⁴ *Austin*, *supra* at 609-610.

¹⁵ 509 U.S. 602, 622 (1993).

¹⁶ *Id.*

¹⁷ 59 F.3d 974 (9th Cir. 1995).

¹⁸ *Id.* at 982.

¹⁹ *See, e.g., United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1286-87 (N.D. Ga. 1995) (evidence showed that truck was not the instrumentality of the crime, and, thus, forfeiture would violate the Eighth Amendment); *United States v. Milbrand*, 58 F.3d 841, 846 (2d Cir. 1995) (court applied a three-part instrumentality test which took into consideration five factors in deciding that forfeiture of farm upon which owner’s son grew marijuana did not violate the excessive fines clause of the Eighth Amendment, where entire farm was used to further his advanced drug enterprise); *United States v. One Parcel Property Located at 427 & 429 Hall Street*, 853 F. Supp. 1389, 1399-1400 (M.D. Ala. 1994); *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725, 734-35 (C.D. Cal. 1994).

grossly disproportionate to his offense.”²⁰ In applying this test in the *Bajakajian* case, the Ninth Circuit held that the forfeiture violated the Excessive Fines Clause.²¹

In *United States v. Delgado*,²² the district court did not agree with the Ninth Circuit. The court said that it need not determine whether the unreported currency is an “instrumentality” of the crime because the instrumentality test is not required for a criminal *in personam* forfeiture.²³ Further, the court said that it would not follow *Bajakajian* on several other grounds. “First, *Bajakajian* is contrary to Eleventh Circuit law because the Eleventh Circuit applies a proportionality test, not an instrumentality test, in civil *in rem* forfeiture cases....(civil *in rem* forfeiture under 21 U.S.C. § 881(a)(7) is designed to punish [the] individual, accordingly [the] instrumentality test is inappropriate). Although *Bajakajian* involves the criminal forfeiture of unreported currency, the Ninth Circuit test was developed in the civil *in rem* context.... Second, *Bajakajian* is factually distinguishable because the District Court found that the funds were lawfully acquired and were intended for a lawful purpose. Third, the Ninth Circuit’s holding effectively obviates a portion of a statute enacted by Congress, with which result this Court respectfully does not agree.”²⁴ Therefore, the defendants’ motion to dismiss the Forfeiture Count because, as argued by the defendants, it would be “excessive” in an Eighth Amendment sense was denied.

Since the lower courts have not been consistent regarding whether section 982(a)(1) is unconstitutional *per se* under the Eighth Amendment’s Fines Clause insofar as it subjects to criminal forfeiture currency that is about to be transported out of the United States without filing the required report, the Supreme Court had the opportunity to address this issue when it rendered its decision in *United States v. Bajakajian*.

The Supreme Court struck down the fine as unconstitutional and in effect held that the government cannot always seize and keep all of the money that people try to take outside of the United States without filing the proper reports.²⁵ The Court held that a federal statute that always subjects such money to forfeiture violates the Constitution’s

²⁰ 59 F.3d at 982.

²¹ 84 F.3d at 337-38 (the court held that all currency forfeitures are unconstitutional when the crime for which forfeiture is ordered is simply a failure to report under 31 U.S.C. 5316 because unreported currency can never be an instrumentality of that crime and can, therefore, never satisfy the two-prong test as applied in the Ninth Circuit).

²² 959 F. Supp. 1523 (S.D. Fla. 1997).

²³ U. S. Customs Inspectors, using X-rays, found currency concealed in defendants’ luggage checked for a flight from Miami to Bogota, Colombia. Subsequent investigation by Customs revealed that the defendants had \$237,282.00 in U.S. currency on their persons and in their luggage that they were attempting to remove from the United States without reporting. At the sentencing hearing, the defendants’ counsel conceded that dismissal of the forfeiture count would be improper, but asserted that forfeiture of the entire amount seized would violate the Eighth Amendment. Unlike *Bajakajian*, the court found that the defendants did not establish that the currency was lawful proceeds nor was intended to be used for lawful activities.

²⁴ 959 F. Supp. at 1528.

²⁵ 66 U.S.L.W. at 4516.

ban on excessive fines.²⁶ It stated that the forfeiture in this case amounts to a fine, and some forfeitures are so disproportional to the offense they violate the Eighth Amendment's ban on excessive fines.²⁷

The Court said that in order to develop a constitutional excessiveness standard, there are two considerations that are particularly relevant: (1) "... judgments about the appropriate punishment for an offense belong in the first instance to the legislature;" and (2) "... any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents."²⁸

Writing for the minority, Justice Kennedy said "[f]or the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows."²⁹

It would appear that if the currency represents lawful proceeds which will be used for lawful activities, this could be a significant factor in determining whether the forfeiture *per se* is "grossly disproportionate" to the harm involved. The Court previously had provided mixed signals regarding how judges should determine whether a forfeiture violates the Eighth Amendment's ban on excessive fines.

It is not clear what effect the decision will have on cases in which proceeds from illegal drug activity are seized especially when the seizures are not considered punishment and therefore not treated as fines. However, the Court did provide important new guidelines on distinguishing when forfeiture should be treated as fines and measured for excessiveness.

²⁶ *Id.*

²⁷ *Id.* at 4518-19.

²⁸ *Id.* at 4518. The Court said its "holding that full forfeiture would be excessive reflects no judgment that 'a forfeiture of even \$15,000 would have suffered from a gross disproportion,' nor does it 'affir[m] the reduced \$15,000 forfeiture on *de novo* review.' Those issues are simply not before us. ...[R]espondent did not cross-appeal the \$15,000 forfeiture ordered by the District Court. The Court of Appeals thus declined to address the \$15,000 forfeiture, and that question is not properly presented here either." *Id.* at 4519, n.11.

²⁹ *Id.* at 4521.

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