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Criminal Forfeiture Case Law Updates

Forfeiting assets has increasingly become a goal of federal and state law enforcement operations. In 2014, for example, DOJ took \$4.5 billion through forfeitures, up from \$580 million in 2005.¹

This increased focus on what has become known as “policing for profit” has brought scrutiny from the public, the legislature, and, more recently, the courts.

The goal of this article is to provide defense counsel with recent updates to forfeiture law, primarily focusing on issues related to pretrial seizure and attorney’s fees from cases such as *Kaley v. United States* (SCOTUS), *Luis v. United States* (SCOTUS) and *United States v. Chamberlain* (Fourth Circuit). This article also discusses the current and potential future impact of the Supreme Court’s recent decisions in *Honeycutt v. United States* and *Timbs v. Indiana*.

To fully understand the changes to the legal landscape wrought by recent cases, it is important to lay some groundwork by briefly setting forth the difference between civil and criminal forfeiture and discussing the majority and dissenting opinions in two seminal forfeiture cases, *Monsanto* and *Caplin & Drysdale*.

I. Background

a. Statutory Background

Civil asset forfeiture has long existed in the United States. By contrast, criminal forfeiture was essentially

outlawed by the First Congress and was only established in American law in 1970.²

The primary conceptual difference between civil and criminal forfeiture is that civil forfeiture operates under the idea that property involved in or obtained through crime is itself “guilty” (i.e., contraband), whereas the purpose of criminal forfeiture is punishment.³

The concept underlying civil, or “in rem,” forfeiture is that no one can own contraband, and, absent any legitimate owner, contraband is “owned” by the government from its creation. Civil forfeitures thus merely restore property to its “rightful owner,” the government. For example, heroin generally cannot legally belong to anyone, so the only entity entitled to possess or “own” it is the government. Moreover, because the contraband is owned by the government from its creation, any proceeds from its sale also belong to the government. Contraband and proceeds from the sale of contraband are generally referred to as “tainted” assets.

Criminal forfeiture, by contrast, punishes individuals. It does so not only by taking tainted assets from those convicted of crime, but also by taking “substitute assets” from convicted people if they have disposed of or otherwise dissipated tainted property such that it is not available for forfeiture at the time of conviction. This substitution is defined by law at 21 U.S.C. § 853(p), and it can only occur when that subsection is satisfied.⁴

Procedurally, criminal forfeiture proceedings operate as an adjunct to the criminal prosecution and are instituted by the filing of a forfeiture notice in an indictment or information. Civil forfeiture proceed-

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ings are instituted by the filing of a civil complaint, with the subject property as the defendant. The government also has the authority to seek “administrative forfeitures,” with the property owner’s consent.

b. *Monsanto and Caplin & Drysdale*

The U.S. Supreme Court has referred to preliminary injunctions as “the nuclear weapon of the law”⁵⁵ and has further recognized that “erroneous deprivation of the right to counsel of choice ... unquestionably qualifies as ‘structural error.’”⁵⁶ Yet in the context of both civil and criminal forfeiture, pretrial seizures have become common due to the Supreme Court’s 1989 holdings in *Monsanto* and *Caplin & Drysdale*. Those cases allow pretrial and postverdict seizures of tainted assets needed to hire counsel on a probable cause showing that the assets in question will be forfeitable upon conviction, even if those assets are needed to hire counsel.

A detailed analysis of the related *Monsanto* and *Caplin & Drysdale* opinions is beyond the scope of this article. However, it is noteworthy that the majority’s rationale is based, in part, on the determination that “the government has a legitimate interest in depriving criminals of economic power ... to retain counsel of choice.”⁵⁷ The Court noted that this concept is “unsettling,” but referenced “the harsh reality that the quality of a criminal defendant’s representation frequently may turn on his ability to retain the best counsel money can buy.”⁵⁸ The majority recognized that the pretrial seizure “provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly.” But it found that “[c]ases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise.”⁵⁹

The four dissenting justices authored an opinion that every criminal defense lawyer should study. Ultimately, the dissent believed that

it is unseemly and unjust for the government to beggar those it prosecutes in order to disable their defense at trial. ... [The majority fails to recognize the] devastating consequences of attorney’s fee forfeiture for the integrity of our adversarial system of justice.¹⁰⁰

It is impossible to know the degree to which *Monsanto* and *Caplin & Drysdale* have contributed to the vir-

tual non-existence of federal criminal jury trials today. Fortunately, however, the current Supreme Court has recently provided some (albeit narrow) limitations to the government’s forfeiture powers, which are discussed below.

II. Recent Developments in Forfeiture Law

In 2014 and 2016, the Supreme Court addressed criminal forfeiture issues related to pretrial seizures, and, in 2017, the Fourth Circuit issued a unanimous en banc decision that ended the anomalous practice in the Fourth Circuit of allowing the government to restrain untainted assets pretrial pursuant to the criminal forfeiture statutes. Then in February 2019, the Court addressed whether the Excessive Fines Clause of the Eighth Amendment applies to the States. In so doing, the Court may have provided new force to Eighth Amendment challenges to federal and state monetary punishments and pretrial seizures and restraints in advance of such punishments.

The following discusses each of those cases.

a. *Kaley*

Since *Monsanto* and *Caplin & Drysdale*, courts have struggled to protect defendants’ right to counsel by allowing defendants to challenge grand jury probable cause determinations related to forfeiture in two respects: (1) whether probable cause exists to believe that the defendants committed the crime alleged; and (2) whether probable cause exists to believe that the restrained funds have the requisite connection to that alleged offense.

In 2014, the Supreme Court addressed the first of these challenges in *Kaley v. United States*.¹¹ In a 6-3 decision,¹² the Court held that, just as defendants cannot challenge the charges on the ground that the grand jury lacked probable cause to indict, defendants cannot challenge the probable cause determination that the defendant committed an offense permitting forfeiture.

Importantly, although the Court did not decide whether defendants could challenge a grand jury’s finding that the property listed in the forfeiture count is connected to the alleged offense, the Court indicated its support for such challenges, noting with favor that “the lower courts ... have uniformly allowed the defendant to litigate” this issue. The Court

explained that “the tracing of assets is a technical matter far removed from the grand jury’s core competence and traditional function.”¹³

Thus, under *Kaley*, although defense lawyers can no longer challenge pretrial seizures on the ground that the grand jury lacked probable cause to believe that the defendant committed the charged offense, lawyers can still challenge the grand jury’s probable cause determination related to traceability. Because a quick reading of *Kaley* may suggest otherwise, lawyers should be prepared to defend such challenges and to explain the limited nature of the *Kaley* holding.

b. *Luis*

Unlike 21 U.S.C. § 853(e)(1), which limits pretrial restraints to *tainted* assets, in 18 U.S.C. § 1345(b)(2)(B)(i), Congress authorized pretrial restraint of *untainted* assets through the commencement of a civil action for a restraining order on untainted assets belonging to a criminal defendant accused of violating federal health care or banking laws.

In *Luis*, the question was whether, before conviction, the government may utilize § 1345(b)(2)(B)(i) to restrain untainted assets that a defendant needs to hire counsel.¹⁴ The case produced four opinions, each of which is discussed below.

i. The Decision

a. Plurality

A four-justice plurality of the Supreme Court determined that the Sixth Amendment prohibits preconviction restraint of assets not tainted by criminal conduct and needed to pay “a reasonable fee for the assistance of counsel.”¹⁵ The plurality referred to untainted or substitute assets as “innocent assets,”¹⁶ and it highlighted three “basic considerations” leading to its holding.

First, the court balanced the interests at issue and found that the “fundamental Sixth Amendment right to assistance of counsel” outweighs both “the government’s interest in securing its punishment of choice [i.e., forfeiture], as well as a victim’s interest in securing restitution.”¹⁷ The plurality explained, these government interests do not “enjoy constitutional protection,” and thus, “compared to the right of counsel of choice, they lie somewhat further from the heart of a fair, effective criminal justice system.”¹⁸

Second, the plurality noted that the common law provides no support

for allowing the government to deprive an accused (but not convicted) person of his right to spend his own legitimately earned funds on his defense; rather, the “relevant, common law legal tradition ... argues to the contrary.”¹⁹

Third, in echoing the *Caplin & Drysdale* dissent, the plurality noted:

[A]s a practical matter, accepting the government’s position [w]ould erode the right to counsel considerably. ... [D]efendants, often rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. ... [Thus,] accepting the government’s views would render less effective the basic right the Sixth Amendment seeks to protect.²⁰

The plurality distinguished *Monsanto* and *Caplin & Drysdale* on the ground that those cases dealt with pretrial restraint of *tainted* assets, whereas *Luis*’ restrained assets are *untainted*.²¹

In sum, under the plurality opinion in *Luis*, a defendant has a right to use untainted assets (which the Court referred to as “innocent assets”) to pay a reasonable attorney fee. The Court noted that district courts will be responsible for determining both the need for release of assets and for determining the reasonableness of the fee.

Pretrial seizures and restraints in advance of forfeiture have an adverse effect on the fairness of the criminal justice system.

Importantly, although the *Luis* plurality limits defendants to challenging pretrial restraints of untainted assets *needed to hire counsel*, this limitation only applies when the government utilizes § 1345(b)(2)(B)(i) to restrain such assets. As discussed below, the government may not restrain untainted assets pursuant to the typical criminal forfeiture pretrial restraint statute, 21 U.S.C. § 853(e)(1). Thus, when the government restrains untainted assets pretrial pursuant to § 853, the defendant can challenge the restraint irrespective of whether the restrained assets are needed to hire counsel.

b. Concurrence

Justice Thomas cast the deciding concurring vote in *Luis*. He rejected

the plurality’s balancing test, and instead proposed a straightforward rule under which “[a] criminal defendant’s untainted assets are protected [by the Sixth Amendment] from government interference before trial and judgment,” full stop.²²

Under this proposed bright line rule, any pretrial restraint upon untainted or substitute assets would be unconstitutional.²³ This broader rule would not only protect attorney’s fees; it would render unconstitutional any preconviction restraint or seizure (or any law authorizing preconviction restraint or seizure) of untainted assets in anticipation of forfeiture.

The Court in *Luis* was not asked to find § 1345 unconstitutional on this ground, so it remains to be seen whether a majority of the Court would agree with this proposed rule.

c. Dissents

The dissenters filed two separate opinions. Kennedy (who joined the *Monsanto* and *Caplin & Drysdale* majority) filed an opinion in which Alito joined. Kagan filed a short, but important, dissenting opinion.

Justice Kennedy’s dissent argued that “[t]he principle the Court announced in *Caplin & Drysdale* and *Monsanto* controls the result.”²⁴ Specifically, Justice Kennedy reiterated the idea set forth in *Monsanto* that defendants subject to pretrial seizures

are “not barred” from hiring a lawyer who is “willing to represent [them] in the hopes that their fees would be paid at some future point.”²⁵ (He did not address the fact that such a contingency fee would likely violate the ethics rules of nearly every state.) He also claimed that the Court’s “holding rewards criminals who hurry to spend, conceal, or launder stolen property.”²⁶

Although Justice Kagan’s dissent is only five paragraphs, it provides hope that the *Monsanto* decision may one day be overturned. Justice Kagan’s dissent begins, “I find ... *Monsanto* ... a troubling decision.”²⁷ It continues:

It is one thing to hold ... that a convicted felon has no Sixth Amendment right to pay his

lawyer with funds adjudged forfeitable. ... But it is quite another thing to say that the government may, prior to trial, freeze assets that a defendant needs to hire an attorney, based on nothing more than “probable cause to believe that the property will ultimately be forfeitable.”²⁸ At that time “the presumption of innocence still applies,” and the government’s interest in the assets is wholly contingent on future judgments of conviction and forfeiture.²⁹

However, Justice Kagan explained, “the correctness of *Monsanto* is not at issue today[, because] Petitioner ... has not asked th[e] Court either to overrule or to modify that decision.”³⁰ Thus, “because *Luis* takes *Monsanto* as a given, the Court must do so as well.”³¹

ii. The Implications

The direct implications of *Luis* are limited because most circuits already prohibited pretrial restraint of untainted assets pursuant to 21 U.S.C. § 853(e), which is the statute used for nearly all pretrial restraining orders in anticipation of forfeiture. Thus, *Luis* only applies directly to the small subset of restraints pursuant to 18 U.S.C. § 1345. That statute only applies to healthcare and bank fraud cases, and its plain language requires the attorney general to commence a separate civil action to obtain a restraining order.

However, *Luis* is an important decision because it solidifies the unanimous circuit level position that defendants have a Sixth Amendment right to utilize untainted assets to pay reasonable attorney’s fees. It also indicates that at least six Justices are uncomfortable with a broad reading of *Monsanto* and provides some indication that a majority of current Justices may find the joint dissent from *Monsanto* and *Caplin & Drysdale* more persuasive than the majority opinions. This last implication gives some hope to practitioners thinking of challenging particularly egregious or burdensome pretrial restraints or seizures, even if those restraints are imposed on assets considered tainted, as such challenges may provide a vehicle for the Court to overturn or to further limit the holdings of *Monsanto* and/or *Caplin & Drysdale*.

Finally, case law continues to develop following the issuance of *Luis*. Issues being addressed include whether *Luis* requires release of untainted assets

between conviction and appeal, and whether the holding of *Luis* is retroactive to cases on collateral review.

With respect to the former issue, the courts of appeals that have addressed whether untainted assets are subject to release for paying appellate counsel have concluded that, after conviction, untainted assets may be seized or restrained, even if such restraints prevent the convicted defendant from hiring appellate counsel of choice. These holdings are based on the fact that the Supreme Court's holding of *Caplin & Drysdale* directly addressed this issue, and that the holding of *Luis* did not overturn *Caplin & Drysdale* but instead only limited *preconviction* seizures of untainted assets.³² Thus, practitioners should consider whether to include in their pretrial fees a provision of funds to cover potential appellate work, so that clients are not without retained appellate counsel in the event of a conviction at trial.

Regarding the retroactivity of *Luis* on collateral review, a number of district courts have determined that *Luis* is not retroactive, but the U.S. District Court for the District of New Mexico recently issued a certificate of appealability on this issue, noting that there is no circuit level precedent addressing the question.³³ And the Tenth Circuit heard oral argument on this issue on Jan. 22, 2019.³⁴

Appellant asserted, at oral argument, that his case rises or falls on whether *Luis* establishes a “watershed rule of criminal procedure” under *Teague*,³⁵ and the panel seemed to agree.³⁶ Since the issuance of *Teague*, the Supreme Court has refused to confer watershed status on a single procedural rule.³⁷ Indeed, the only procedural rule the Court has deemed sufficiently critical to meet the test for being a watershed rule is the right to counsel found in *Gideon v. Wainwright*.³⁸ Although the Supreme Court has equated the right to counsel with the right to counsel of choice,³⁹ given the stringent nature of the watershed rule test, this argument may be a longshot.

c. *Honeycutt* i. The Decision

In addition to Sixth Amendment issues, forfeitures involve taking property as punishment and thus implicate due process. Unfortunately, courts have often viewed forfeiture as a remedial tool and have, therefore, not required the government to adhere strictly to statutory authority when forfeiting assets.⁴⁰ A prime example of

courts' permissive approach to forfeitures was the fact that every circuit except the D.C. Circuit authorized joint and several forfeiture money judgments, despite a conspicuous absence of statutory authority for them. With the issuance of the Supreme Court's unanimous opinion in *Honeycutt v. United States*,⁴¹ which rejected this almost unanimous circuit position, there is some reason to believe that the permissive forfeiture era is coming to an end.

In *Honeycutt*, the Court unanimously held that the plain language of 21 U.S.C. § 853(a)(1) prohibits the imposition of joint and several forfeiture judgments.⁴² Specifically, § 853(a)(1) reads: “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation [is forfeitable.]” The Court focused on the word “obtained” and held that this statutory language “limits forfeiture to property the defendant ‘obtained.’” Thus, the Court held that forfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime, and further noted that the provision does not permit forfeiture of property from a co-conspirator who did not personally obtain any funds as a result of the offense.

Importantly, the Court rejected the government's argument that “Congress ... must be presumed to have legislated against the background principles of conspiracy liability” when it passed § 853.⁴³ The Court instead adopted a plain reading of the statutory language.⁴⁴ The Court then noted that “as is clear from its text and structure, § 853 maintains traditional in rem forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists.”⁴⁵ In support of this finding that § 853 focuses on tainted property, the Court referred to the plurality opinion in *Luis*, citing *Luis* for the proposition that “the Court has previously acknowledged that § 853(c) applies to tainted property only.”⁴⁶

ii. The Implications

From the Court's discussion, it is unclear whether its holding prohibiting joint and several liability in criminal forfeiture is limited to forfeitures based on statutory provisions that contain the word “obtained,” or whether the holding applies broadly to all criminal forfeiture statutes. The circuits are divided on this issue, with the Third, Fifth, and Eleventh Circuits applying *Honeycutt* broadly to statutes and subsections that do not

include the word “obtained,”⁴⁷ and the Sixth Circuit reading the holding as being applicable only to forfeiture provisions authorizing forfeiture of property “the defendant obtained.”⁴⁸ The Second Circuit is poised to hear the issue soon as well.⁴⁹

Courts have also grappled with § 2255 motions to correct sentences based on *Honeycutt*. However, thus far, district courts have rejected the argument that *Honeycutt* is retroactive to cases on collateral review based both on the *Teague* anti-retroactivity standards — finding that *Honeycutt* announced a “new rule” and that the rule is procedural as opposed to substantive⁵⁰ — and based on the requirement that a § 2255 motion relate to the length of a custodial sentence and not a financial aspect of the sentence.⁵¹

Another issue raised but left undecided by *Honeycutt* is whether forfeiture money judgments are authorized in the first place. The issue arose primarily based on the logic of the *Honeycutt* decision, in which the Court focused on the plain text of the forfeiture statutes and established that the statutory language itself provides the outer bounds of the government's forfeiture authority. Despite being referenced in Federal Rule of Criminal Procedure 32.2, the statutory text does not authorize money judgments. Justice Kagan recognized and expressed this fact during the *Honeycutt* oral argument when she labeled forfeiture money judgments “extra-statutory” mechanisms.⁵²

Although defendants' challenges to forfeiture money judgments in light of this logic and Justice Kagan's comment have, thus far, been unsuccessful, these challenges have led to an important concession by the Office of the Solicitor General. In a court-ordered response to a petition for certiorari on the issue, the Solicitor General's Office wrote, “in light of this Court's decision in *Honeycutt* ... the government no longer takes the position that it can enforce a forfeiture money judgment ... by seizing the defendant's property using mechanisms outside the applicable forfeiture statutes.”⁵³ “[T]he government now agrees ... that ... a forfeiture money judgment reflects the district court's determination of the defendant's forfeiture liability and serves as the basis for subsequent enforcement under the applicable forfeiture statutes[,]” but that the government can only collect substitute assets by making the showing required by § 853(p).⁵⁴

This is a major concession because, under this interpretation, a forfeiture money judgment does not immediately become a civil judgment collectable through writs of garnishment and execution. Instead, to collect on the forfeiture money judgment, the government must return to court to overcome a contested showing required by § 853(p) that tainted property of equivalent value to the amount of untainted assets the government seeks to collect was placed beyond reach of the government through an “act or omission of the defendant.”⁵⁵ In practice, this factual and procedural hurdle (if adhered to) should significantly reduce collection actions based on forfeiture money judgments.

Ultimately, *Honeycutt* may signal that the Court is carefully reviewing forfeiture actions to ensure strict adherence to the text of the forfeiture statutes. Defense lawyers should welcome such scrutiny and should continue to challenge money judgments and other extra-statutory forfeiture efforts, even those that are well-established in circuit precedent. After all, *Honeycutt* was a unanimous Supreme Court opinion that overturned nearly unanimous contrary circuit precedent.

d. *Chamberlain*

Honeycutt and *Luis* have also had a major positive impact in the Fourth Circuit, where, until 2017, the government could seize or restrain *untainted* assets pretrial pursuant to § 853(e).

Following the *Monsanto* and *Caplin & Drysdale* decisions, the Fourth Circuit was the first circuit to consider whether the government was authorized to restrain untainted (i.e., substitute or “innocent”) assets pretrial under 21 U.S.C. § 853(e) (which was then § 853(c)). In 1990, a panel of the Fourth Circuit, including Retired Justice Powell, considered this question. The panel held that § 853(e) authorizes pretrial restraint of substitute assets. In reaching this determination, the panel relied primarily on the following quotation from the majority’s opinion in *Monsanto*: “The government may ‘seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable.’”

Every other circuit to address the issue rejected the Fourth Circuit’s holding. However, until 2017, the Fourth Circuit refused to change its anomalous rule. The Fourth Circuit’s position changed when, after oral

argument in *United States v. Chamberlain*,⁵⁶ the Office of the Solicitor General took the position in its *Honeycutt* briefing that § 853(e)(1) does *not* authorize pretrial restraint of untainted assets. Once Chamberlain’s counsel (including the author) brought the government’s position in *Honeycutt* to the Fourth Circuit’s attention, the Fourth Circuit *sua sponte* granted rehearing en banc (before issuing a panel decision). At that point, the government conceded that the Fourth Circuit’s position was contrary to statute. The en banc court then unanimously overruled its prior precedent and held that “[t]he plain language of [§ 853(e)] provides no authority to restrain substitute assets prior to trial.”⁵⁷ In doing so, the court cited to the discussion in the *Luis* plurality opinion that noted that “Section 853(e) ‘explicitly authorizes restraining orders or injunctions against ‘property described in subsection (a) of this section’ (i.e., tainted assets).”⁵⁸

This ruling will not only expand access to counsel of choice in the Fourth Circuit; it will also protect defendants from overbroad seizures and restraints designed to put undue pressure on uncharged individuals to plead guilty prior to indictment and will thus protect the presumption of innocence. As such, *Chamberlain* is another example of the Court’s *Honeycutt* and *Luis* decisions helping to restore, to some degree, the balance of power between the federal government and people accused of offenses — a balance of power that had been tilted largely in the government’s favor by the *Monsanto* and *Caplin & Drysdale* decisions.

e. *Timbs*

The Supreme Court issued its decision in *Timbs v. Indiana* on Feb. 20, 2019.

Petitioner Timbs was charged by the State with dealing heroin and pleaded guilty.⁵⁹ At the time of his arrest, the police seized a Land Rover that Petitioner had purchased for \$42,000 with untainted funds (i.e., money he received from an insurance policy when his father died). After Petitioner’s conviction, the State instituted a civil forfeiture action to forfeit the Land Rover. Observing that Petitioner had purchased the vehicle for more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction, the trial court determined that the forfeiture would be grossly dispro-

portionate in violation of the Eighth Amendment’s Excessive Fines Clause. The court of appeals affirmed. But the Indiana Supreme Court reversed, holding that the Eighth Amendment’s Excessive Fines Clause did not apply to the States.

The question presented to the U.S. Supreme Court was whether “the Eighth Amendment’s Excessive Fines Clause [is] an ‘incorporated’ protection applicable to the States under the Fourteenth Amendment’s Due Process Clause?”⁶⁰

i. Decision and Opinions

The Court’s holding was straightforward and unanimous. The Eighth Amendment’s Excessive Fines Clause is applicable to the States. Only Justice Thomas declined to join the majority opinion, which held that the clause is incorporated by the Fourteenth Amendment’s Due Process Clause. Justice Thomas concurred in the judgment but submitted that the incorporating clause should be the Fourteenth Amendment’s Privileges or Immunities Clause. Justice Gorsuch joined the majority opinion but filed a separate concurring opinion in which he agreed with Justice Thomas that “the appropriate vehicle for incorporation may well be the ... Privileges or Immunities Clause ... [but concluded that] nothing in this case turns on that question. ...”⁶¹

ii. Implications

The direct impact of the Court’s holding that the Excessive Fines Clause applies to the States may be limited because “all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality,”⁶² and because the Court did not opine on the substantive issue of whether the forfeiture of the \$42,000 was indeed grossly disproportionate under the Excessive Fines Clause.

However, the Court’s discussion provides useful material for practitioners seeking to challenge forfeitures as excessive under the clause. For example, the Court noted that the clause was an outgrowth of, among other things, the Magna Carta, which the Court explained “required that economic sanctions ‘be proportioned to the wrong’ and ‘not be so large as to deprive [an offender] of his livelihood.’”⁶³ The Court also found that there is “good reason [for] the protection against excessive fines,” including that such “fines can be used ... to retaliate against or chill the speech of

political enemies” and that “fines may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence’ [because] ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’”⁶⁴ Finally, the Court reiterated that “it makes sense to scrutinize governmental action more closely when the State stands to benefit[.]”⁶⁵

Thus, in addition to providing another clear legal basis for challenging disproportionate forfeitures, the Court’s analysis may provide a basis for challenging forfeiture judgments, including forfeiture money judgments, that exceed a defendant’s current wealth, otherwise substantially deprive defendants of their livelihood, or are imposed irrespective of ability to pay.

This observation is particularly important in the context of forfeiture provisions, such as federal forfeitures, that are generally deemed mandatory and are typically imposed irrespective of a defendant’s ability to pay. This statutory scheme may well violate the Eighth Amendment’s Excessive Fines Clause when applied to individuals who lack an ability to pay. For, as Justice Thomas noted in concurrence, the Excessive Fines Clause was based in part on the experience in England

of the Star Chamber and other courts that “most notoriously departed from all Rules of Justice and Equity, in the Imposition of Fines ...’ without ‘any Regard to the Nature of the Offences, or the Ability of the Persons.’”⁶⁶

Therefore, practitioners should object on Eighth Amendment grounds to forfeitures (and pretrial seizures and restraining orders in advance of forfeitures) that approach or exceed a client’s present wealth, that otherwise substantially deprive clients of their ability to earn a living, or that are imposed without consideration of the individual’s ability to pay.⁶⁷

Similar arguments can be made to challenge restitution orders. For, under the Mandatory Victim Restitution Act (MVRA),⁶⁸ the amount of restitution imposed for offenses covered by the Act must be determined irrespective of the defendant’s ability to pay.⁶⁹ Although the terms of payment are supposed to be tied to the defendant’s ability to pay,⁷⁰ U.S. Attorney’s Offices have argued that the government’s authority to collect restitution is not limited by the payment terms set forth in restitution orders, and some courts have agreed.⁷¹ Based on the Court’s explanation of the meaning of the Excessive Fines Clause in *Timbs*, however, that position may violate not only the MVRA but also the Eighth Amendment.

In sum, although the limited holding of *Timbs* may not have a profound direct impact on the imposition of monetary penalties, the Court’s explanation of the meaning of the Excessive Fines Clause could be used to limit some of the most debilitating forfeiture and restitution orders (including pretrial seizures and restraints), which have historically been deemed mandatory and required to be imposed irrespective of a defendant’s individual financial circumstances.

III. Conclusion

Forfeiture is an extremely powerful tool. Despite being a criminal punishment, its enabling statutes state that its imposition is mandatory when appropriate.⁷² And courts agree that forfeiture is a separate penalty from restitution, meaning that, in virtually every financial case, the defendant may be ordered to pay what is, in essence, double restitution⁷³ — and will then also face a potential fine. Moreover, unlike restitution and fines, “money judgment” forfeitures are often

imposed irrespective of the defendant’s ability to pay.⁷⁴

As noted, *Timbs* may provide renewed grounds to challenge forfeitures, pretrial restraints and seizures, and other monetary penalties that do not consider the defendant’s ability to pay.

One additional argument practitioners should consider raising in opposition to the imposition of forfeiture in cases where the defendant lacks the ability to pay restitution is that the plain language of 18 U.S.C. § 3572(b) seems to prohibit forfeiture in such cases. Although the subsection is entitled “Fine Not to Impair Ability to Make Restitution,” the provision reads: “If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.” Because forfeiture is a “monetary penalty,”⁷⁵ the plain language of this statute should prohibit forfeiture if it would impair the defendant’s ability to pay restitution.

Ultimately, the forfeiture statutes provide prosecutors with “a nuclear weapon” to seize or restrain assets before conviction. *Luis*, *Honeycutt* and *Timbs* indicate that the Supreme Court may be taking a hard look at the act of forfeiture and at pretrial seizures and restraints in advance of forfeiture. The Supreme Court appears to recognize the deleterious effect such acts can have on the integrity and fairness of the criminal justice system. Defense lawyers should take note and should continue bringing constitutional and statutory challenges to actions that — although accepted by circuit precedent, or even Supreme Court authority — appear to violate the plain language of the forfeiture statutes or defendants’ fundamental rights, or which unduly empower the government at the expense of the presumption of innocence, the right to counsel, or the right of people accused of crime to utilize their own property as they see fit unless and until they are convicted.

Notes

1. https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/01/22_assets_forfeiture_fund_aff.pdf.

2. Terrence Reed & Joseph Gill, *RICO Forfeitures, Forfeitable Interests, and Procedural Due Process*, 62 N.C. L. REV. 57, 61 (1983), available at <http://scholarship.law>



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3. See *id.* at 62.

4. *Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017).

5. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 329 (1999) (quoting R. OUGH & W. FLENLEY, *THE MAREVA INJUNCTION AND ANTON PILLER ORDER: PRACTICE AND PRECEDENTS* xi (2d ed.1993)).

6. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (internal quotation marks and citations omitted).

7. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989).

8. *Ibid.* (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in result)).

9. *Id.* at 635.

10. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 635, 109 S. Ct. 2667 (1989) (Blackmun, J., dissenting).

11. *Kaley v. United States*, 571 U.S. 320 (2014).

12. The dissent, authored by Chief Justice Roberts and joined by Justices Breyer and Sotomayor, is worth studying because it may provide practitioners with arguments to distinguish direct challenges to the grand jury's probable cause finding — which are disallowed by the majority's holding in *Kaley* — and appropriate challenges related to pretrial seizure issues.

13. *Kaley*, 571 U.S. at 324, 331 n.9.

14. *Luis v. United States*, 136 S. Ct. 1083 (2016).

15. *Id.* at 1096.

16. See, e.g., *id.* at 1088.

17. *Id.* at 1093.

18. *Ibid.*

19. *Id.* at 1093-94.

20. *Id.* at 1094-95.

21. *Id.* at 1090-92.

22. *Id.* at 1101 (Thomas, J., concurring).

23. See *id.* at 1102-03 (Thomas, J., concurring) (“When the potential of a conviction is the only basis for interfering with a defendant’s assets before trial, the Constitution requires the government to respect the longstanding common law protection for a defendant’s untainted property.”).

24. *Id.* at 1103-12 (Kennedy, J., dissenting).

25. *Id.* at 1105 (Kennedy, J., dissenting).

26. *Id.* at 1103 (Kennedy, J., dissenting).

27. *Id.* at 1112 (Kagan, J., dissenting).

28. *Id.* (quoting *Monsanto*, 491 U.S. at 614).

29. *Id.* (quoting *Kaley*, 134 S. Ct. at 1196-97).

30. *Ibid.*

31. *Ibid.*

32. *United States v. Scully*, 882 F.3d 549, 553 (5th Cir. 2018); *United States v. Marshall*, 872 F.3d 213, 221-22 (4th Cir. 2017), *cert.*

denied, 138 S.Ct. 1274, 200 L.Ed.2d 426 (2018).

33. *United States v. Mark Hopkins*, No. 2:09-CR-00863 MCA, 2018 WL 1393780, at *2 (D.N.M. Mar. 19, 2018), *appeal pending*, Tenth Cir. Case No. 18-2046 (finding that *Luis* is not retroactive, but granting a certificate of appealability because the issue has not been addressed by the Tenth Circuit) (citing *Thaw v. United States*, 2016 WL 4623053 (N.D. Tex., Aug. 16, 2016) (unpublished); *Noel v. United States*, 2017 WL 548985 (W.D. N.C., Feb. 8, 2017) (unpublished); *Valencia-Trujillo v. United States*, 2017 WL 3336491 (M.D. Fla. Aug. 4, 2017) (unpublished); *Clark v. Harmon*, 2017 WL 2493271, at *2 (N.D. Tex. May 10, 2017) (unpublished); *Farkas v. Andrews*, 2017 WL 4518684 (E.D.N.C. Oct. 10, 2017) (unpublished); *Rand v. United States*, 2018 WL 1114376 (N.D. Tex. Jan. 8, 2018) (unpublished); *United States v. Watson*, 2017 WL 4698962 (S.D. Tex. Oct. 19, 2017) (unpublished)).

34. *United States v. Hopkins*, Case No. 18-2046 (10th Cir. Jan. 22, 2019), audio of oral argument available at <https://www.ca10.uscourts.gov/oralarguments/18/18-2046.MP3>.

35. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

36. *Hopkins*, 10th Cir. Case No. 18-2046, Oral argument at 15:11.

37. Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 WASH. L. REV. 463, 466 (2016), available at <https://www.law.uw.edu/wlr/print-edition/print-edition/vol-91/2/constitutional-retroactivity-in-criminal-procedure>.

38. *Ibid.*

39. *Gonzalez-Lopez*, 548 U.S. at 147-48 (“The right to select counsel of one’s choice ... has been regarded as the root meaning of the [Sixth Amendment’s] constitutional guarantee.”).

40. See, e.g., *In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990), *overruled by United States v. Chamberlain*, 868 F.3d 290 (4th Cir. 2017) (en banc) (“Congress intended that the [forfeiture] statute ‘shall be liberally construed to effectuate its remedial purposes.’ In the context of the case before us, the remedial purpose of the Act is to preserve the defendant’s assets for ultimate forfeiture if he is convicted. Liberal construction of § 1963 requires reading its several subsections together, rather than in isolation, to achieve the congressional purpose of pretrial restraint.”); *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (collecting cases and stating: “Although the criminal forfeiture statute does not explicitly refer to money judgments, our sister circuits have uniformly recognized that money judgments representing the unlawful proceeds are appropriate.”).

41. *Honeycutt*, 137 S. Ct. 1626 (2017).

42. *Id.* at 1632.

43. *Id.* at 1634 (quoting Brief for United States at 10).

44. *Ibid.* (“The plain text and structure of § 853 leave no doubt that Congress did not incorporate those background principles [of conspiratorial liability].”).

45. *Id.* at 1635.

46. *Id.* at 1633.

47. *United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017), *as amended* (Aug. 23, 2017) (applying the *Honeycutt* holding generally to the RICO forfeiture statute 18 U.S.C. § 1963 and the civil forfeiture statute 18 U.S.C. § 981(a)(1)(C)); *United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017), *cert. denied sub nom. Main v. United States*, 138 S. Ct. 1577, 200 L. Ed. 2d 765 (2018) (applying the *Honeycutt* bar to joint and several forfeiture liability to 18 U.S.C. § 982(a)(7), which reads, “The court, in imposing sentence on a person convicted of a federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.”); *United States v. Elbeblawy*, 899 F.3d 925, 942 (11th Cir. 2018) (applying *Honeycutt* to § 981(a)(7) despite lack of word “obtained” in that provision); *United States v. Carlyle*, 712 F. App’x 862, 864 (11th Cir. 2017) (applying the *Honeycutt* holding to 18 U.S.C. § 981(a)(1)(C) despite lack of word “obtained” in that provision).

48. *United States v. Sexton*, 894 F.3d 787, 799 (6th Cir. 2018), *reh’g denied* (July 16, 2018), *petition for cert. pending*.

49. *United States v. McIntosh*, No. 11-CR-500 (SHS), 2017 WL 3396429, at *6 (S.D.N.Y. Aug. 8, 2017), on appeal Second Circuit Case No. 17-2623, but stayed pending resolution of a cert. petition from other cases on a “crime of violence” issue.

50. E.g., *United States v. Ortiz*, No. CR 11-251-08, 2018 WL 3304522, at *8 (E.D. Pa. July 5, 2018), *reconsideration denied*, No. CR 11-251-08, 2018 WL 4006335 (E.D. Pa. Aug. 21, 2018); *United States v. Filice*, No. CR 13-8-DLB-CJS-11, 2018 WL 2326616, at *3 (E.D. Ky. May 22, 2018) (The new rule in *Honeycutt* is not substantive because it has not altered “the range of conduct or the class of persons that the law punishes.”) (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

51. See, e.g., *Bangiyev v. United States*, No. 1:14-CR-206, 2017 WL 3599640, at *4 (E.D. Va. Aug. 18, 2017), *appeal dismissed*, 710 F. App’x 116 (4th Cir. 2018), *and appeal dismissed*, 712 F. App’x 334 (4th Cir. 2018) (“To the extent that Petitioner seeks to reduce the amount he owes in forfeiture through this Motion, the government correctly points out that

the relief cannot be provided through § 2255.”) (citing *United States v. Knafel*, No. 5:12-CR-00015-1, 2013 WL 6404966, at *1 (W.D. Va. Dec. 6, 2013) (“Petitioner cannot attack the validity of the forfeiture order via § 2255 because the outcome would not have any impact on the length of his custody pursuant to the criminal judgment.”)); *United States v. Alquza*, No. 3:11CR373-FDW, 2017 WL 4451146, at *3 (W.D.N.C. Sept. 21, 2017), *aff’d*, 722 F. App’x 348 (4th Cir. 2018) (collecting cases).

52. *Honeycutt*, Tr. of Oral Argument at 46:13 (Justice Kagan: “And let’s put aside the extra-[]statutory money judgments, since I don’t understand really how that works, so let’s just focus on (p). All right?”). Transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-142_4gc5.pdf.

53. Resp. to Pet. for Cert., *Henry Lo. v. United States*, 9th Cir. Case No. 16-8327 (filed September 2017).

54. *Ibid.*

55. 21 U.S.C. § 853(p).

56. *United States v. Chamberlain*, 868 F.3d 290, 291 (4th Cir. 2017) (en banc).

57. *Id.* at 296 (citing *Luis*, 136 S. Ct. at 1091).

58. *Ibid.*

59. As stated by the Indiana Supreme Court, the relevant facts were as follows: “Defendant, Tyson Timbs, used life insurance proceeds after his father’s death to pay \$42,058.30 for a Land Rover in January 2013. Over the next four months, Timbs regularly drove the Land Rover between Marion and Richmond, Indiana, to buy and transport heroin. Timbs’s trafficking came to the attention of a confidential police informant, who told a member of the Joint Effort Against Narcotics team that he could buy heroin from Timbs. Police set up a controlled buy, and the informant and an undercover detective bought two grams of heroin from Timbs for \$225. Police made another controlled buy a couple of weeks later, acquiring another two grams of heroin for \$160. During the second buy, the detective set up a third controlled buy with Timbs. The day the third buy was to occur, police apprehended Timbs during a traffic stop. The Land Rover had 1,237 miles on its odometer when Timbs bought it in January, and more than 17,000 miles when police seized the vehicle in late May.” *State v. Timbs*, 84 N.E.3d 1179, 1181 (Ind. 2017).

60. *Timbs v. Indiana*, 586 U.S. ___, ___, No. 17-1091, 2019 WL 691578, at *2 (U.S. Feb. 20, 2019).

61. *Id.* at *6 (Gorsuch, J., concurring).

62. *Id.* at *4.

63. *Id.* at *3 (quoting *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989) and citing 4 W. BLACKSTONE, COMMENTARIES ON THE

LAW OF ENGLAND 372 (1769) (“[N]o man shall have a larger amerement imposed upon him, than his circumstances or personal estate will bear. ...”); *see also id.* at *8 (Thomas, J., concurring) (“Magna Carta required that ‘amerements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood[.]’” (quoting *United States v. Bajakajian*, 524 U.S. 321, 335 (1998)); *id.* at *9 (noting that “the text of the Eighth Amendment was “based directly on the Virginia Declaration of Rights, which adopted verbatim the language of the English Bill of Rights,” and explaining that “the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any ‘fine or amerement ought to be according to the degree of the fault and the estate of the defendant.” (internal quotation marks omitted) (emphasis added).

64. *Id.* at *4.

65. *Ibid.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (Scalia, J.)).

66. *Id.* at *8 (Thomas, J., concurring) (quoting 2 H. HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND: FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 698 (1827)) (emphasis added); *accord id.* at *9 (noting that “the text of the Eighth Amendment was “based directly on the Virginia Declaration of Rights, which adopted verbatim the language of the English Bill of Rights,” and explaining that “the clause in the Virginia Declaration of Rights embodied the traditional legal understanding that any ‘fine or amerement ought to be according to the degree of the fault and the estate of the defendant.” (internal quotation marks omitted) (emphasis added).

67. *Cf., e.g., United States v. McGinty*, 610 F.3d 1242, 1245-46 (10th Cir. 2010) (criminal forfeiture is mandatory) (citing cases); *see also United States v. Monsanto*, 491 U.S. 600, 612-13 (1989) (trial courts lack discretion to refuse to impose pretrial forfeiture restraints when the relevant statutory provisions are met).

68. 18 U.S.C. § 3663A.

69. *E.g., United States v. Dawkins*, 202 F.3d 711, 715-16 (4th Cir. 2000) (discussing § 3663A’s requirement that courts order restitution without regard to ability to pay).

70. *See, e.g., United States v. Paroline*, 134 S. Ct. 1710, 1742 (2014) (Sotomayor, J., dissenting) (“Courts of Appeals have uniformly found it an abuse of discretion to require defendants to make immediate lump sum payments for the full amount of a restitution award when they do not have the ability to do so.” (citing cases)); *United States v. Grant*, 715 F.3d 552, 558 (4th Cir. 2013) (“[T]he MVRA requires that the total amount of restitution must be determined without regard to the defendant’s financial

circumstances. However, the defendant’s financial circumstances are relevant to the determination of the rate at which the restitution must be paid. ... [I]n determining the manner of payment and the monthly payment schedule, the district court must consider the defendant’s financial resources and assets and her projected income and her obligations, including those of her dependents.”).

71. *See United States v. Wykoff*, 839 F.3d 581, 582 (7th Cir. 2016) (rejecting defendant’s argument that the court instituted payment plan should take precedent over the writ of garnishment, stating, “[A]t the start of incarceration ‘any existing assets should be seized promptly. If the restitution debt exceeds a felon’s wealth, then the Mandatory Victim Restitution Act of 1996, 18 U.S.C. §§ 3663A, 3664, demands that this wealth be handed over immediately.”

(quoting *United States v. Sawyer*, 521 F.3d 792, 795 (7th Cir. 2008)); *United States v. Behrens*, 656 F. App’x 789, 790 (8th Cir. 2016) (similar); *but see United States v. Martinez*, 812 F.3d 1200, 1207 (10th Cir. 2015) (“The government has statutory authority to enforce only the terms of a restitution order, not to take an enforcement action that would exceed a restitution order’s payment terms.”); *United States v. Bratton-Bey*, 564 F. App’x. 28 (4th Cir. 2014) (unpublished) (favorably citing *United States v. Roush*, 452 F. Supp. 2d 676, 682 (N.D. Tex. 2006), for the proposition that “the government [is barred] from garnishing the defendant’s bank account before any restitution was due on the ground that ‘there is presently nothing for the government to enforce’”); *United States v. Grant*, 715 F.3d 552, 559 (4th Cir. 2013) (explaining that defendant’s “obligat[ion] to pay restitution” is “tethered to” the restitution order); *United States v. Rush*, No. 5:14CR00023, 2016 WL 3951224, at *2 (W.D. Va. July 20, 2016) (discussing *Bratton-Bey* and *Grant* and explaining that “recently, the Fourth Circuit has twice vacated district court rulings allowing the government to access funds outside of the payment schedule set forth in the judgment”; *cf. Klein v. Comm’r of Internal Revenue*, No. 24595-15L, 2017 WL 4422361, at *9 (T.C. Oct. 3, 2017) (“The FDCPA allows the government to move the sentencing court to obtain writs of ... garnishment, ... without the need to obtain a civil judgment prior to enforcing a criminal restitution order. ... Our research has discovered no case where the government argued (let alone argued successfully) that FDCPA authorized it to collect more in restitution than what the sentencing court had originally ordered.”) (internal quotation marks and citations omitted).

72. *See, e.g., Monsanto*, 491 U.S. at 607

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(interpreting 21 U.S.C. § 853 and stating, “Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied.”); *McGinty*, 610 F.3d at 1245-46 (“[T]he plain language of 18 U.S.C. § 982(a)(2) indicates the mandatory nature and scope of criminal forfeiture.”).

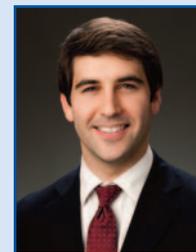
73. *United States v. Torres*, 703 F.3d 194, 204 (2d Cir. 2012) (holding that imposition of forfeiture and restitution was proper and noting that “[e]ight other circuits to have considered orders of forfeiture and restitution in the face of ‘double recovery,’ due process-type challenges have affirmed their concurrent imposition”).

74. *United States v. Vampire Nation*, 451 F.3d 189, 203 (3d Cir. 2006) (holding that a forfeiture money judgment may be imposed “even where the amount of the judgment exceeds the defendant’s available assets at the time of conviction,” and citing cases from the First, Fourth, Seventh, and Ninth Circuits reaching the same holding).

75. *Cf., e.g., Austin v. United States*, 509 U.S. 602, 618 (1993) (“[F]orfeiture serves ‘punitive and deterrent purposes,’ and ‘impos[es] an economic penalty.” (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974)); *United States v. Alphas*, 785 F.3d 775, 781 (1st Cir. 2015) (“[F]orfeiture is a penalty imposed on a criminal independent of any loss to the crime victim.” (quoting *United States v. Parsons*, 109 F.3d 1002, 1005 (4th Cir. 1997)); *United States v. Alt*, 83 F.3d 779, 783 (6th Cir. 1996) (“Civil forfeiture is a penalty tied to commission of a criminal offense and unrelated to a specific loss by the government.” (citing *Austin*, 509 U.S. at 621-22)). ■

About the Author

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