How Much Is Too Much? Forfeitures and the Eighth Amendment

By Daniel E. Wenner and Stanley A. Twardy, Jr., Day Pitney LLP

In March 1941, D.C. Comics published Issue 5 of the *Batman* comic book series. Anyone who has followed the Caped Crusader over time—from the comic books to the campy 1960s television series to the Super Friends cartoons of the 1970s—knows that "crime doesn't pay" is among the Dark Knight's favorite mantras. For defendants in federal white collar cases, the sentiment is apt.

Upon conviction, federal white collar defendants face the possibility that the court will order them to serve time in prison. It might also order them to pay a fine or restitution or to forfeit their ill-gotten gains to the government. Or, it might order all of these things. What is the difference among these financial penalties?

A fine is money paid to the court as punishment for the offense. For example, if the defendant is convicted of wire fraud in which he or she tricked the victims into giving him or her $100,000 under false pretenses, the sentencing court might impose a fine of $5,000 as a punishment for the crime.

Restitution is an order to repay the specific victims the amounts they lost as a result of the offense. So in the above example, the sentencing court might order the defendant to repay the victims $100,000 in restitution. Importantly, restitution is not punishment for the offense; rather, it is an effort to make the victims whole after a transgression. It is akin to a civil judgment for money owed to an aggrieved party.

Like a fine, forfeiture is punishment. It is a theory—codified in the U.S. Code—through which the government is entitled to take from the culprit the proceeds of the crime. The idea behind forfeiture is that the moment the crime is committed, the proceeds of that crime vest with the U.S. government. When the wrongdoer is convicted, the government can make him or her turn over the proceeds of his or her crime, which are by law the government's property. Forfeiture can be a harsh penalty, but it gives teeth to Batman's concept that crime doesn't pay.

These financial penalties are not mutually exclusive; a court can order the defendant to pay all three. So, taking the example above, the defendant might be ordered to pay a fine of $5,000, repay the victims the $100,000 they lost, *and* forfeit an additional $100,000. All told, the perpetrator of the $100,000 fraud in our example would owe $205,000 in fines, restitution, and forfeiture. In reality, while it is conceivable that a sentencing court could order all three financial penalties, it usually would not impose a fine, which is discretionary at sentencing, when there are large restitution or forfeiture obligations as well. On the other hand, because restitution goes back to the victims (and is mandatory in most cases), courts typically do not order a defendant to pay less than the full restitution amount.

What about forfeiture? It's a penalty and it's not discretionary, but do courts have any flexibility when ordering it?

Because forfeiture is a punishment, it's subject to the Excessive Fines Clause of the Eighth Amendment. That leaves some room for defendants to argue against exorbitant forfeiture amounts. The

defendants in *United States v. Beecroft*, 825 F.3d 991 (9th Cir. 2016), and *United States v. Viloski*, 814 F.3d 104 (2d Cir. 2016), did just that with moderate success. Taken together, these cases show that it is possible to limit steep forfeiture orders. Of course, doing so is still an uphill climb.

The Supreme Court Set the Baseline in *United States v. Bajakajian*

The facts of *United States v. Bajakajian*, 524 U.S. 321 (1998), are as follows: In June 1994, Hosep Bajakajian and his family were at Los Angeles International Airport about to board a flight to Italy. A dog trained to detect currency alerted to their bag, in which customs inspectors discovered approximately $230,000 in cash. Agents approached Bajakajian and explained they must report all cash over $10,000 in his possession; Bajakajian said he and his wife carried only $15,000. The agents searched their bags and discovered the full $357,144. Bajakajian was arrested and charged with attempting to leave the United States without fulfilling the requirement that he report that he was transporting more than $10,000 as required by 31 U.S.C. § 5316(a)(1)(A). Bajakajian was convicted of the underlying offense, and the government sought forfeiture of $357,144 as having been "any property . . . involved in [the] offense." (18 U.S.C. § 982(a)(1).)

After a bench trial on the forfeiture amount, the district court ordered Bajakajian to forfeit $15,000, even though the judge found the entire $357,144 forfeitable. The district court concluded that forfeiture of the entire sum would be "'extraordinarily harsh' and 'grossly disproportionate to the offense in question,'" rendering it a violation of the Eighth Amendment. (*Bajakajian*, 524 U.S. at 326.) The government appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed the trial court, holding that "forfeiture ordered by § 982(a)(1) was *per se* unconstitutional in cases of currency forfeiture." (*Id.* at 327.) The government sought a writ of certiorari, which the Supreme Court granted because the Ninth Circuit's holding had "invalidated a portion of an Act of Congress." (*Id.)*

The question before the Supreme Court was "whether forfeiture of the entire $357,144 that respondent failed to declare would violate the Excessive Fines Clause of the Eighth Amendment." (*Id.* at 324.)

The Supreme Court first held that criminal forfeiture based on a defendant's conviction for a particular offense constituted a "fine" within the meaning of the Eighth Amendment and, as a result, the Excessive Fines Clause applied. (*Id.* at 334.)

For our purposes, the more important aspect of the Supreme Court's opinion is how a lower court should determine whether the forfeiture is excessive. Turning to that question, the Supreme Court began: "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (*Id.*) It concluded "that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." (*Id.*)

In reaching this conclusion, the Supreme Court directed courts to "compare the amount of the forfeiture to the gravity of the defendant's offense" to determine if the forfeiture is unconstitutional. (*Id.* at 336–37.) In making that comparison, the Supreme Court looked to "the essence of [Bajakajian's] crime," whether his conduct "fit into the class of persons for whom the statute was principally designed," the "maximum sentence that could have been imposed," and "[t]he harm that [Bajakajian] caused." (*Id.* at 337–39.) By balancing those factors, the Supreme Court concluded that imposing forfeiture of the entire amount of Bajakajian's unreported currency would violate the Eighth Amendment. As a result, it affirmed the judgment of the Ninth Circuit, albeit without endorsing the Ninth Circuit's per se rule.

The Supreme Court's analysis provided a framework for how lower courts should determine whether the forfeiture component of a defendant's sentence violates the Eighth Amendment. Since that time, the lower courts have engaged in a straightforward application of *Bajakajian* in myriad circumstances in the face of defendants' perpetual efforts to limit the amount of money they have to forfeit upon conviction. Usually, the analysis is rather mundane as the courts routinely uphold forfeiture orders that track the defendant's profits. But sometimes, the lower courts find themselves grappling with the possibility of an exorbitant forfeiture order that appears on its face to violate the Eighth Amendment. One such case is *United States v. Beecroft*, where the Ninth Circuit vacated a forfeiture order because it seemed on its face to simply be too much.

Beecroft **and the $107 Million Forfeiture Order**

Melissa Beecroft participated in a massive residential mortgage-fraud scheme in the Las Vegas area between 2003 and 2008. The scheme was led by Steven Grimm and Eve Mazzarella. The conspirators would recruit and pay straw purchasers who would "buy homes at substantially inflated prices, sometimes with 100% mortgage financing." (*Beecroft*, 825 F.3d at 994.) When the loans were funded, Grimm and Mazzarella would have the title and escrow companies send excess funds to various shell companies they owned, which they would purportedly use for repairs and improvements. Of course, no such repairs or improvements were made. Instead, they simply kept the money. They also had the straw buyers transfer ownership to the shell companies. All told, "the scheme involved more than 400 straw-buyer transactions and 227 properties purchased for more than $100 million." (*Id.*) The majority of the loans went into default, and the lenders lost tens of millions of dollars.

Beecroft began working as an administrative assistant for one of Grimm's companies in September 2002. Through the course of her work with Grimm, she "participated extensively in Grimm's mortgage-fraud scheme, completing loans for Grimm, handling false information that was given to banks on behalf of straw buyers (including inflating income information and even completing some of the fraudulent loan applications herself), and directing to whom fraudulent third-party disbursements would be made." (*Id.*) One witness described her as Grimm's "right hand." (*Id.*) The government claimed she made in excess of $400,000 from the commissions and fees the scheme generated. (*Id.*)

Beecroft was convicted after a lengthy jury trial of one count of conspiracy to commit bank, mail, and wire fraud; two counts of mail fraud; and two counts of wire fraud. At sentencing, the district court imposed a below-guidelines term of imprisonment of three years and ordered her to pay $2,275,025 in restitution. As to forfeiture, she was ordered to forfeit $107 million for the conspiracy count and an additional $1,420,000 for the remaining four counts. Her lawyer did not object to the sentence, including the monetary penalties, and she appealed. On appeal, she argued (in relevant part) that the forfeiture order violated the Eighth Amendment's Excessive

Fines Clause. Because her counsel did not object, the Ninth Circuit reviewed the claim for plain error.

The Ninth Circuit recognized that the forfeiture order was subject for review under the Excessive Fines Clause. The court then listed the four *Bajakajian* factors to determine whether the forfeiture was "grossly disproportional to the gravity of" the offense. (*Id.* at 1000 (quoting *Bajakajian*, 524 U.S. at 334).) In the Ninth Circuit, those factors are: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." (*Id.* (quoting *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004)).)

The Ninth Circuit considered the offense to be quite severe in terms of the consequences on the victims and Las Vegas community. It also noted that the sentences proscribed for her conduct demonstrated its severity. Each count carried a statutory maximum penalty of 30 years in prison and a fine of up to $1 million. The guidelines range called for a range of imprisonment of 210–262 months and a fine of between $20,000 and $1 million. As for the substantive counts, for which Beecroft was ordered to forfeit $330,000; $305,000; $325,000; and $460,000, respectively, the court had "little trouble concluding that the amounts of forfeiture . . . are not excessive." (*Id.* at 1001.) After all, they were well below the maximum statutory and guidelines recommended fine amounts of $1 million.

The $107 million forfeiture order for the conspiracy count, however, was another matter. The appeals court observed that the conspiracy offense had the same potential penalties, meaning that for that count "Beecroft was ordered to forfeit a sum more than *100 times* greater than the maximum fine allowable and more than *5,000 times* greater than the lower-end of the Guidelines range" for the applicable fine. (*Id.*) Thus, the appeals court found "a tremendous disconnect between the forfeiture amount and Beecroft's legally available fine" and remarked that "such a disconnect stands out even among forfeiture orders which have previously been held grossly disproportional." (*Id.*) Relying on the disparity and the fact that "the propriety of the forfeiture amount was not even discussed at sentencing," the Ninth Circuit concluded that it had "no choice but to conclude that an order which so vastly outpaces the otherwise available penalties for Beecroft's criminal activity runs afoul of the Excessive Fines Clause." (*Id.* at 1002.) Therefore, the court vacated the forfeiture order and remanded to the district court to reconsider the amount in light of the Eighth Amendment's Excessive Fines Clause.

In *Beecroft*, the Ninth Circuit was taken by the sheer size of the forfeiture amount. As noted, it was 100 times higher than the maximum fine authorized for the same offense. Certainly, astronomically high forfeiture sums might generate a similar reaction from sentencing or reviewing courts. But what if the forfeiture amount is not quite so huge, but is just as daunting for the defendant in light of his or her financial circumstances? Does that matter? It might.

Considering the Impact on the Defendant's Livelihood

The Second Circuit took up this very question in *United States v. Viloski*. Benjamin Viloski was a lawyer and real estate broker. He had worked with Dick's Sporting Goods on a number of development projects. During the course of his work for Dick's between 1998 and 2005, he "participated in a kickback scheme" related to the construction of new stores. (*Viloski*, 814 F.3d at 107.) The kickbacks came in the form of "consulting" fees paid to Viloski, which he sometimes passed on to his codefendant and senior Dick's executive, Joseph Queri Jr.

In 2009, Viloski's misconduct caught up with him when he was indicted. After a three-week jury trial, he was convicted of several conspiracy and substantive mail fraud and money laundering counts, among others. In January 2012, the district court sentenced Viloski to a below-guidelines term of imprisonment of five years, ordered him to pay $75,000 in restitution to two developers, and ordered him to forfeit $1,273,285.50, which was the sum total of the kickbacks Viloski had received, laundered, and passed along to Queri.

Viloski appealed to the Second Circuit, which affirmed his conviction and sentence but vacated the forfeiture order and remanded for the district court to determine whether it violated the Excessive Fines Clause of the Eighth Amendment. The Second Circuit "specifically directed the District Court to evaluate the forfeiture in light of *Bajakajian*, 524 U.S. at 321." (*Id.* at 108.)

On remand, the district court set forth the Second Circuit's version of the *Bajakajian* factors for determining whether a forfeiture order violates the Excessive Fines Clause. According to the district court, those factors are: "(1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct." (*Id.* (quoting *United States v. Viloski*, 53 F. Supp. 3d 526, 530 (N.D.N.Y. 2014)).) Viloski argued to the district court that it should consider, in addition to those factors, his "poor health," "physical and civic disabilities," "inability to pay the forfeiture," and "lack of culpability and lack of profit from the scheme compared to co-defendant Queri." (*Id.* (quoting *Viloski*, 53 F. Supp. 3d at 532).) The district court was sympathetic to Viloski's plight, but "declared them irrelevant" because "[t]he Supreme Court [had] limited the inquiry to the four *Bajakajian* factors." (*Id.* (alterations in original) (quoting *Viloski*, 53 F. Supp. 3d at 532).) The district court, therefore, considered only the *Bajakajian* factors and determined that the forfeiture did not violate the Eighth Amendment. Viloski again appealed.

On appeal, the Second Circuit noted that in prior cases it had "implicitly cautioned against applying the *Bajakajian* factors too rigidly." (*Id.* at 110.) It explained that the Supreme Court did not consider the issues Viloski raised because Bajakajian had not raised them in his case. It also reasoned that "depriv[ing] a wrongdoer of his livelihood" was "one additional factor" that was "especially important." (Id. at 111 (quoting Bajakajian, 524 U.S. at 335).) The Second Circuit reasoned that "it seems unlikely that the Bajakajian Court meant to preclude courts from considering whether a forfeiture would deprive an offender of his livelihood." (Id.) It therefore held "that, when analyzing a forfeiture's proportionality under the Excessive Fines Clause, courts may consider—in addition to the four factors [it had] previously derived from Bajakajian—whether the forfeiture would deprive the defendant of his livelihood, i.e., his 'future ability to earn a living.'" (*Id.*)

The Second Circuit was quick to point out that this livelihood analysis "is a component of the proportionality analysis, not a separate inquiry." (*Id.* at 112.) As a result, "a forfeiture that deprives a defendant of his livelihood might nonetheless be constitutional, depending on his culpability or other circumstances." (*Id.*) The Second Circuit specifically cautioned "that courts may not consider as a discrete factor a defendant's personal circumstances, such as age, health, or present financial condition, when considering whether a criminal forfeiture would violate the Excessive Fines Clause." (*Id.*) But it noted that a person's health or financial condition might have bearing on his or her ability to earn a living, which means that his or her personal circumstances "might thus be *indirectly* relevant to a proportionality determination, to the extent that those circumstances, in conjunction with the challenged forfeiture, would deprive the defendant of his livelihood." (*Id.* at 113.)

The appeals court analyzed the *Bajakajian* factors in Viloski's case under its clarified framework. After doing so, it concluded that "because the four *Bajakajian* factors support the conclusion that the forfeiture is not grossly disproportional to the gravity of Viloski's offenses, and Viloski has failed to establish that the forfeiture would deprive him of his livelihood," Viloski's Eighth Amendment challenge failed. (*Id.* at 115.)

Hope for the (Virtually) Hopeless Situation

Defendants are often stuck without much to say when it comes to forfeiture. Other than contesting the numbers (usually a fool's errand except at the margins), white collar defendants will leave their sentencing hearings with a sizeable forfeiture order. But there is hope (however slight). *Viloski* reaffirms the Second Circuit's view that the inquiry into whether a forfeiture amount is "grossly disproportional to the gravity of" the offense calls for an analysis that is moored to the analysis in *Bajakajian*, but not a strict application of the circuit's distillation of *Bajakajian* into factors.

When endeavoring to expand the court's proportionality analysis beyond the strict *Bajakajian* factors, it is useful to articulate the differences between different courts' recitation of those factors. For example, the differences between the *Bajakajian* factors in the Second and Ninth Circuits are shown in this side-by-side comparison:

Factor	Second Circuit	Ninth Circuit
1	"the essence of the crime and its relation to other criminal activity"	"the nature and extent of the crime"
2	"whether the defendant fits into the class of persons for whom the statute was principally designed"	"whether the violation was related to other illegal activities"
3	"the maximum sentence and fine that could have been imposed"	"the other penalties that may be imposed for the violation"
4	"the nature of the harm caused by the defendant's conduct"	"the extent of the harm caused"

The third and fourth factors are basically the same, but the first two are different. Both circuits look at the "essence" or "nature" of the crime in the first factor. Both circuits also analyze whether the crime was related to other "criminal" or "illegal" activities. But that is part of the first factor in the Second Circuit, while it is the second (and separate) factor for the Ninth Circuit. The Second Circuit then asks "whether the defendant fits into the class of persons for whom the statute was principally designed." The Ninth Circuit makes no similar inquiry.

Why are the factors in one circuit different from the factors in another? Because the Supreme Court did not set forth a strict test; instead, it engaged in a proportionality analysis in the circumstances of one defendant's case. This scenario creates an opportunity for defendants to press for courts to broaden their consideration of what makes a forfeiture "grossly disproportional to the gravity of" the offense by demonstrating the shortcomings in any strictly factor-based *Bajakajian* analysis.

The Second Circuit's recognition in *Viloski* that the *Bajakajian* factors are to be flexibly applied—and incorporating a livelihood analysis into them—gives reason for optimism. By focusing on the proportionality analysis, the Second Circuit recognized the importance of the impact of forfeiture on the defendant. While it did not endorse a wholesale inquiry into the defendant's health and personal circumstances, it recognized the significance of the size of the forfeiture order on the

defendant's ability to earn a living. That consideration, which did not arise in *Bajakajian*, is crucial. Its recognition provides a bit more balance to the proportionality analysis because it adds something to the defendant's side of the ledger.

Forfeiture is a virtual slam dunk for the government. But *Viloski* gives defendants an avenue to pursue to try to limit the size of any forfeiture order. By homing in on the impact of a large forfeiture order on their ability to earn a living, coupled with its excess over the maximum statutory fine, defendants might avoid the imposition of an outsized forfeiture order.

Conclusion

Defense counsel in federal cases are accustomed to detailing for sentencing judges the history and characteristics of their clients to persuade the court to exercise leniency in sentencing. Such arguments are traditionally aimed at minimizing the prison time imposed under the sentencing guidelines. Often, white collar criminals also face hefty forfeiture judgments that might haunt them long after they have left federal custody and returned to society. Following the line of argument tepidly endorsed in *Viloski*, it would be prudent for defense counsel to focus those same history and characteristics arguments on the size of those forfeiture judgments. By wrapping their arguments in the cloak of gross disproportionality and focusing the sentencing court on the real-world impact of an exorbitant forfeiture judgment, defense counsel might minimize the ultimate penalties imposed on their clients. Such a result would serve the ends of justice without running afoul of the Eighth Amendment's prohibition on "excessive fines."

***

Daniel E. Wenner, a former assistant U.S. attorney in the Eastern District of New York, is a partner at Day Pitney LLP in Hartford, Connecticut. The focus of his practice is white-collar criminal defense and internal investigations. He can be reached at dwenner@daypitney.com.

Stanley A. Twardy, Jr., the former U.S. Attorney for the District of Connecticut, is the managing partner of Day Pitney LLP in Stamford, Connecticut. The focus of his practice is white-collar criminal defense and internal investigations. He can be reached at satwardy@daypitney.com.