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Too Much of a Good Thing?

State Civil Asset Forfeiture in Timbs v. Indiana

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Asset forfeiture is an important weapon in the fight against human trafficking—a highly profitable crime that fattens the bank accounts of traffickers and supports the machinery that keeps their operations in business.[2] The recent United States Supreme Court opinion in *Timbs v. Indiana*, 139 S.Ct. 682 (2019), considered the question whether an asset forfeiture imposed by a state court is an unconstitutionally "excessive fine" under the Eighth Amendment. The Court's decision, concluding that the Excessive Fines Clause of the Eighth Amendment does apply to forfeitures imposed by the states,[3] may cause concern among prosecutors who pursue civil forfeiture in their trafficking cases. However, analysis of the decision, in view of prior decisions on forfeiture, including forfeiture in the context of trafficking-type offenses, reveals that the *Timbs* decision is likely to have little or no impact on most forfeitures sought in connection with human trafficking.

Facts of the Case and State Court Decisions

Tyson Timbs was convicted of distribution of heroin after undercover officers, acting on information from a confidential informant, purchased a few grams of the drug from the defendant during two controlled buys. Timbs entered guilty pleas to one of the drug counts and one count of conspiracy to commit felony theft; he was sentenced to six years' imprisonment, with one year to be served in "community corrections" and the other five suspended to a term of five years' probation, as well as various fees and penalties.[4]

About four months before his arrest, Timbs had purchased a Land Rover with money he had received from his late father's life insurance policy. He used that vehicle to travel between locations to transport the heroin he sold. When he purchased the Land Rover for over $42,000, it had about 1,200 miles on the odometer; by the time he was arrested only four months later, the vehicle had over 17,000 miles on it. While the criminal case was pending, the State moved to forfeit the Land Rover on the theory that it had been used in the course of the crime of distribution of drugs. After Timbs entered his guilty plea, the forfeiture case went to trial. The trial court denied the forfeiture, finding that the maximum fine for Timbs's crime was only $10,000 and that forfeiture of the Land Rover worth four times that sum would be an unconstitutionally "excessive fine" under the Eighth Amendment—one that was "grossly disproportionate" to the gravity of the offense. The Indiana Court of Appeals affirmed the trial court's decision.[5] On appeal to the Indiana Supreme Court, the trial court's decision was reversed because, the Court held, the Eighth Amendment's Excessive Fines Clause did not apply to the states under the Fourteenth Amendment.[6] Timbs appealed, and the U.S. Supreme Court granted *certiorari*.[7]

U.S. Supreme Court Decision

The Supreme Court's opinion, authored by Justice Ginsburg, was joined by eight of the Justices; Justice Gorsuch filed a separate concurring opinion and Justice Thomas, though not joining the majority opinion, filed an opinion concurring in the result. The Court's opinion is summarized succinctly in a few lines:

> The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." McDonald v. Chicago, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.[8]

The Court began by tracing the origins of the Excessive Fines Clause to the Magna Carta and then to the subsequent English Bill of Rights, which was intended to curb the abusive practice of raising revenue and harassing political enemies by imposing enormous fines and indefinitely imprisoning those unable to pay. After the nation's founding, this concern was reflected not only in the United States Bill of Rights, but also in the vast majority of state constitutions; by the time the Fourteenth Amendment was ratified, the Court observed, over 90 percent of the state constitutions contained a cognate provision against excessive fines. Further, present-day state constitutions all contain provisions either proscribing excessive fines or requiring that punishments be proportionate to the offense. The Court therefore concluded that the Eighth Amendment's protections—including those against excessive fines—were "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[9]

The Court declined to consider whether to revisit its earlier holding in *Austin* v. *United States,* 509 U.S. 602 (1993), which held that the Excessive Fines Clause applied to civil forfeitures that are, at least in part, punitive in nature. Although Indiana urged the Court to do so, as well as arguing that the application of the Clause to civil *in rem* forfeitures was not "deeply rooted" and, therefore, should not be applicable to the states through the Fourteenth Amendment, the argument below had been limited to whether the Eighth Amendment was incorporated by the Fourteenth Amendment. The Court held that when a federal constitutional right is incorporated by the Fourteenth Amendment, such incorporation includes *all* applications of that right.[10]

The Court vacated the decision of the Indiana Supreme Court.[11] Since the trial court and the Indiana Court of Appeals had already determined that the forfeiture was an "excessive fine" under the Eighth Amendment, presumably that determination will simply be reinstated.

The concurring opinion of Justice Kavanaugh agreed that the Court had correctly followed precedent in concluding that the Excessive Fines Clause was applicable to the states through the Fourteenth Amendment's Due Process Clause, but he expressed his doubt as to whether the correct basis for such application was the Due Process Clause, rather than the Privileges and Immunities Clause of the Fourteenth Amendment.[12] In his concurring opinion, Justice Thomas expressed his firm belief that the Due Process Clause applies only to rights to a specific form of "process;" he would have arrived at the same conclusion as the majority, but through application of the Privileges and Immunities Clause.[13]

Analysis

In its previous consideration of asset forfeiture in *Austin*, *supra*, the Supreme Court had held that the Excessive Fines Clause applied to civil forfeitures if they were in any way "penal" in nature (*i.e.*, not solely remedial, as would be the case of a forfeiture that merely compensated for losses). *Austin* involved the civil *in rem* forfeiture of the defendant's mobile home and autobody shop, after an undercover buy of drugs had been arranged at the shop and the defendant retrieved the drugs from his mobile home. Execution of a search warrant for the shop and the mobile home later recovered a small amount of cocaine and marijuana, as well as about $4,000 cash and a gun.[14] In response to the Government's argument that such forfeitures did not constitute "fines" because they are civil in nature, the Court held that to the extent such forfeitures are intended to have any punitive or deterrent value they must be considered "penal" and, thus, "fines" within the meaning of the Eight Amendment.[15] In *Austin*, the Court did not reach the issue whether the forfeiture in question was excessive, remanding the case for determination as to that issue.[16]

A few years after the *Austin* decision, the Supreme Court had occasion to consider what would make a forfeiture "excessive" under the Eighth Amendment. In *United States* v. *Bajakajian*, 524 U.S. 321 (1998), the Court held that a forfeiture is excessive if it is "grossly disproportionate to the gravity of a defendant's offense."[17] There, the Court determined to be excessive the forfeiture of the entire sum (over $350,000) of cash the defendant was charged with unlawfully failing to declare when traveling out of the country. The Court observed that the offense was *strictly* a failure to report—the actual possession of the cash was not, itself, a crime and the failure to report was unrelated to other criminal activity; the defendant was not a money launderer, drug trafficker, or tax evader. Moreover, the Court noted, "[The sum forfeited] is larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government."[18] The Court affirmed the decision of the courts below to require that defendant forfeit only $15,000—an amount that the trial court found to be reasonable under the circumstances.[19]

From these precedents, two principles are therefore clear: any forfeiture with some punitive or deterrent purpose will be considered a "fine" governed by the Eighth Amendment and, therefore, must not be "grossly disproportionate to the gravity of the offense." So far, the Supreme Court has considered the excessiveness of forfeitures only in the context of drug distribution offenses and failure to declare currency—it has not considered forfeiture in the context of human trafficking. However, at least one court has addressed the issue in an analogous context.

In *United States* v. *George*, 779 F.3d 113 (2d Cir. 2015), the defendant was convicted of "harboring an illegal alien," in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). An Indian immigrant, V.M., had left her authorized employment and gone to work for the defendant in her home, for a promised salary of $1,000 per month. The change in employment caused V.M. to become undocumented and the defendant never asked for documentation as a condition of employment. V.M. worked as a domestic employee in the defendant's home for six years, from 5:30 am to 11 or 11:30 pm, seven days a week, with no time off for vacation or sick leave. Instead of paying her the promised monthly salary, the defendant paid her a total of approximately $25-26,000, some of which was sent directly to India to support V.M.'s sons. Throughout the period of employment, the defendant never withheld or paid federal taxes with respect to V.M.'s wages. One of V.M.'s sons became suspicious and contacted a human trafficking hotline. Federal agents removed V.M. from the home, while the defendant obstructed the officers and delayed V.M.'s attempt to leave. Following that

incident, the son recorded several calls with the defendant, during which she acknowledged knowing about V.M.'s undocumented status and claimed that if the issue were reported to police, V.M. would be sent to prison for ten years. The defendant also admitted telling V.M. to lie about her status as an employee and to tell authorities she was simply a family friend. At trial, the defendant was convicted of the "harboring" count, but acquitted of the charge that she had done so for private financial gain. As part of the sentence, the defendant was ordered to forfeit her equity interest in her residence.[20]

Although the forfeiture in *George* was clearly punitive—imposed as part of the sentence—the Second Circuit's opinion affirming the District Court's order of forfeiture considered the issue whether the forfeiture was "excessive" under the Eighth Amendment. The court first set forth the four-part standard it had previously derived from the Court's opinion in *Bajakajian*, for determining the proportionality of forfeiture:

> (1) the essence of the crime of the defendant 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. [*United States v. Castello*, 611 F.3d 116, 120 (2d Cir. 2010).][21]

The court then proceeded to analyze the conduct at issue under the applicable standard:

> First, the essence of George's crime was no one-time failure to report otherwise legal activity as in Bajakajian. Rather, she harbored an illegal alien in her home for more than five years in order to secure the alien's unauthorized labor. In doing so, she not only thwarted federal immigration law, but also evaded federal minimum wage and tax laws. In these circumstances, the forfeiture of the home that facilitated George's criminal harboring is not constitutionally disproportional. See generally von Hofe v. United States, 492 F.3d 175, 188 (2d Cir.2007) (upholding civil forfeiture of husband's interest in family home, where his drug activity therein was "neither a spur of the moment decision nor a momentary lapse of judgment," such "that his own actions eviscerated any sanctity he might claim in his home").
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> Second, George falls squarely within the class of persons targeted by 8 U.S.C. § 1324, namely, persons who knowingly and actively seek to prevent government detection of an illegal alien for their own benefit. In short, she is not akin to the Bajakajian defendant, whose currency reporting failure did not take place in the context of money laundering, drug trafficking, or tax evasion, the targeted concerns of that crime of conviction. See United States v. Bajakajian, 524 U.S. at 338, 118 S.Ct. 2028.
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> Third, while the equity loss to George from the challenged forfeiture of her home exceeds the $20,000 top of George's applicable Guidelines fine range, see U.S.S.G. § 5E1.2(c)(3), it is well below the maximum statutory fine of $250,000 specified by Congress, see 8 U.S.C. § 1324(a)(1)(B)(ii); 18 U.S.C. § 3571(b)(3); see, e.g., United States v. Bajakajian, 524 U.S. at 338–39 & n. 14, 118 S.Ct. 2028 (citing low maximum penalties under then-mandatory Guidelines as indicative of defendant's "minimal level of culpability," while also noting that statutory maximum penalties are "relevant" to assessing "offense's gravity"). This factor points to no disproportionality in the challenged forfeiture order.

> Fourth, as for the harm caused by George, we have already observed that her crime was no mere failure to report otherwise legal activity as in Bajakajian, but a deliberate and sustained thwarting of federal immigration law, which allowed her to exploit alien labor while ignoring federal wage and tax laws. Such criminal conduct harmed not only the government, but also the exploited alien, as well as those citizens and lawful residents whose ability to secure work consistent with the protections of federal law was necessarily hampered by the sort of harboring evident here. In sum, this is not a case in which the harshness of the forfeiture so exceeds the gravity of the offense of conviction as to indicate gross disproportionality violative of the Constitution.[22]

The Second Circuit's analysis in *George* would clearly suggest that few, if any, forfeitures of the proceeds derived from, or assets used to support and operate, human trafficking schemes would be considered "grossly disproportionate to the gravity" of the crime. *George* involved the crime of "harboring"—a lesser crime not necessarily involving the force, fraud, or coercion that is typically an element of human trafficking. Trafficking is not a purely financial crime—it is devastating to its victims. The physical, emotional, and economic harm to victims of trafficking elevates the gravity of the offense far beyond that of economic or drug-related crimes, regardless of the statutory fines that could be imposed.

It may be, however, that application of trafficking statutes to actors not directly involved in the *operations* of a trafficking scheme (*e.g.*, publishers or websites that knowingly carry ads soliciting buyers, or the buyers themselves) would provide less support for forfeiture of significant assets, to the extent the roles of such actors are more peripheral and (arguably) not in the "the class of persons for whom the statute was principally designed." *Castello*, 611 F.3d at 120. The "nature of the harm caused by the defendant's conduct" might also (arguably) be less for such actors. *Id*. Prosecutors should take particular care in justifying forfeiture of significant assets from such defendants, especially where the value of the forfeited asset exceeds any statutorily-authorized fine. Such forfeitures may be wholly justified and appropriate in particular cases, but a sound foundation should be laid to support them.

Conclusion

Asset forfeiture forces traffickers to disgorge the ill-gotten gains of their criminal activity and cripples the infrastructure that supports it. Prosecutors can confidently continue to seek forfeiture of assets as part of the disposition of crimes involving both sex trafficking and labor trafficking. In petitioning for forfeiture, whether at sentencing or in separate civil proceedings, prosecutors should carefully set forth an analysis similar to that undertaken in *George* and ask the court to make specific findings as to the forfeiture's proportionality in light of all the relevant factors. Creating a good record at the trial court level increases the likelihood that the forfeiture will withstand challenge on appeal.

Endnotes

1. Teresa Garvey is an Attorney Advisor at AEquitas.
2. See Charlene Whitman, Hitting Them Where It Hurts: Strategies for Seizing Assets in Human Trafficking Cases, 20 Strategies in Brief (AEquitas, 2013).
3. The Court remanded the case for the state courts to consider whether the forfeiture was excessive under the applicable standards.
4. State v. Timbs, 62 N.E.3d 472, 473-74 (Ind. App. 2016) (*Timbs I*), rev'd, 84 N.E.3d 1179, vacated, 139 S.Ct. 682 (2019).
5. State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017) (*Timbs II*), vacated, 139 S.Ct. 682 (2019).
6. Id. at 1182-85.
7. Timbs v. Indiana, 138 S.Ct. 2650 (2018).
8. Timbs v. Indiana, 139 S.Ct. at 686-87 (*Timbs III*).
9. Id. at 687-89.
10. Id. at 689-91.
11. Id. at 691.
12. Id. at 691 (Kavanaugh, J., concurring).
13. Id. at 691 (Thomas, J., concurring in the judgment).
14. *Austin*, 509 U.S. at 604-05.
15. Id. at 618-22.
16. Id. at 622.
17. *Bajakajian*, 524 U.S. at 334, 337.
18. Id. at 337-40.
19. Id. at 326; 344.
20. *George*, 779 F.3d at 115-116.
21. Id. at 122.
22. Id. at 123-24.

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