

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: May 11, 2010 Decided: July 7, 2010)

Docket No. 09-2784-cr

-----x

UNITED STATES OF AMERICA,

Appellant,

- v. -

JOSEPH A. CASTELLO,

Defendant-Appellee,

MICHAEL VARRONE, RAMON CALVO, ROLF ANDERSEN,
DANA SCHWARTZ CASTELLO,

Defendants.

-----x

Before: JACOBS, Chief Judge, WINTER and
 McLAUGHLIN, Circuit Judges.

Defendant-Appellee Joseph Castello was convicted in the United States District Court for the Eastern District of New York (Wexler, J.), after a jury trial, of failing to file thousands of Currency Transaction Reports in the course of running his check-cashing business, in violation of 31

1 U.S.C. § 5313(a). Forfeiture was mandatory, and the
2 district court fixed the amount at \$12,012,924.31, plus his
3 equity in certain real property. On appeal, this Court
4 affirmed the conviction but vacated the forfeiture order and
5 remanded to the district court for further fact-finding as
6 to whether the forfeiture was unconstitutionally excessive
7 under United States v. Bajakajian, 524 U.S. 321 (1998).

8 On remand, the district court vacated the forfeiture
9 order in the judgment and fixed the amount of forfeiture at
10 zero. On this appeal, the United States does not contest
11 (or concede) the unconstitutionality of the original amount,
12 but argues that *some* amount of forfeiture is mandated.

13 We now vacate the revised order and remand for the
14 district court to reinstate the initial forfeiture order.
15

16 DIANE LEONARDO BECKMANN (David
17 C. James, Laura D. Mantell, on
18 the brief), Assistant United
19 States Attorney's Office for the
20 Eastern District of New York,
21 for Benton J. Campbell, United
22 States Attorney for the Eastern
23 District of New York, Brooklyn,
24 New York, for Appellant.

26 MURRAY E. SINGER, Law Office of
27 Murray E. Singer, Great Neck,
28 New York, for Appellee.
29

1 DENNIS JACOBS, Chief Judge:
2

3 Defendant-Appellee Joseph Castello was convicted in the
4 United States District Court for the Eastern District of New
5 York (Wexler, J.), after a jury trial, of failing to file
6 thousands of Currency Transaction Reports ("CTRs") in the
7 course of running his check-cashing business, in violation
8 of 31 U.S.C. § 5313(a). Forfeiture was mandatory, and the
9 district court fixed the amount at \$12,012,924.31, plus his
10 equity in his house (the "First Order"). On appeal, this
11 Court affirmed the conviction but vacated the First Order
12 and remanded to the district court for further fact-finding
13 as to whether the forfeiture was unconstitutionally
14 excessive.

15 On remand, the district court's "Second Order" fixed
16 the forfeiture amount at zero. This appeal by the United
17 States does not contest (or concede) the unconstitutionality
18 of the original amount; instead, the government argues that
19 *some* amount of forfeiture is mandated.

20 We now vacate the Second Order and remand for the
21 district court to reinstate the First Order.
22
23

1 **I**

2 Castello's check-cashing business cashed more than \$600
3 million in checks over the period of the indictment: January
4 1, 1995 to November 30, 2004. In violation of 31 U.S.C.
5 § 5313(a) and 31 C.F.R. § 103.22(b), Castello failed to file
6 CTRs for thousands of these checks exceeding \$10,000.
7 Checks in amounts exceeding \$10,000 constituted about \$200
8 million of the total.

9 On March 9, 2006, a federal grand jury returned a
10 superseding indictment charging Castello with conspiracy to
11 launder money (18 U.S.C. § 1956(h)); failure to file CTRs
12 (31 U.S.C. § 5313(a)); unlawfully structuring financial
13 transactions (31 U.S.C. § 5324); conspiracy to impair,
14 impede, obstruct, and defeat the Internal Revenue Service
15 (18 U.S.C. § 371); tax evasion (26 U.S.C. § 7201); and
16 obstruction of justice (18 U.S.C. § 1512). Following a jury
17 trial, Castello was acquitted of all charges except failure
18 to file CTRs.

19 Forfeiture is mandatory for failure to file CTRs. 31
20 U.S.C. § 5317(c)(1)(A). The government sought forfeiture
21 of: \$9,341,051.81 (which represented four percent of the
22 value of the checks exceeding \$10,000 for which no CTRs were

1 filed)¹; \$2,671,872.50 (representing funds connected with a
2 Citibank account held in Castello's wife's name); and
3 Castello's equity in the family home in Greenwich,
4 Connecticut. Castello opposed the government's proposed
5 forfeiture on the grounds that the funds sought were not
6 involved in the offense and therefore were not subject to
7 forfeiture, and that in any event the amount of forfeiture
8 was grossly disproportional to the crime in violation of the
9 Excessive Fines Clause of the Eighth Amendment, as that
10 clause had been interpreted in United States v. Bajakajian,
11 524 U.S. 321 (1998).

12 By Memorandum and Order of September 17, 2007, the
13 district court concluded that the government's proposal
14 "represents a proper amount subject to forfeiture" because
15 it was "properly representative of the fees earned by
16 Castello for cashing checks in excess of \$10,000 for which
17 no CTRs were filed," and because the specific "assets
18 identified are properly traceable to the crime." United
19 States v. Castello, No. 04-336, 2007 WL 2778686, at *2
20 (E.D.N.Y. Sept. 17, 2007). Separately, the court considered

¹ Castello regularly charged a commission of between .75% and 5%.

1 the constitutionality of the forfeiture under Bajakajian and
2 held that it was "fair, reasonable, and well-supported by
3 the evidence of record. Accordingly, the forfeiture sought
4 does not violate the Eighth Amendment." Id. at *3.

5 The First Order, entered September 25, 2007, imposed
6 forfeiture as sought by the government: \$12,012,924.31, plus
7 the equity in the house. Castello was also sentenced to the
8 statutory maximum of five years' imprisonment, three years'
9 supervised release, a \$250,000 fine, and a \$100 special
10 assessment.

11 Castello appealed his conviction and his sentence. The
12 conviction was affirmed by summary order. See United States
13 v. Castello, 308 F. App'x 523 (2d Cir. 2009) (summary
14 order). The forfeiture order was vacated in a separate
15 opinion. See United States v. Varrone, 554 F.3d 327 (2d
16 Cir. 2009).² Varrone rejected Castello's argument that the
17 forfeiture violated § 5317(c)(1)(A), Varrone, 554 F.3d at
18 330-31; it is therefore law of the case that the entire
19 amount deemed forfeitable in the First Order is properly
20 forfeitable under the statute. At the same time, Varrone

² Varrone also vacated the judgment's order of
restitution, 554 F.3d at 335, but that issue is not before
us on this appeal.

1 vacated the First Order and remanded, holding that the
2 findings were insufficient to test constitutionality:

3 [W]e lack an adequate factual record to determine
4 whether the forfeiture ordered by the district
5 court constitutes an excessive fine, and we
6 therefore vacate the district court's order of
7 forfeiture in the judgment and in its separate
8 forfeiture order and remand to the district court
9 to make factual findings regarding the four
10 factors set forth in United States v. Bajakajian.

11
12 Varrone, 554 F.3d at 328-29.

13 On remand, the district court conducted a Bajakajian
14 analysis, held that the First Order "cannot be upheld,"
15 United States v. Castello, No. 04-336, 2009 WL 1505271, at
16 *2 (E.D.N.Y. May 21, 2009), and issued the Second Order,
17 which imposed no forfeiture at all.

18 The United States now appeals the Second Order. The
19 government does not concede (or contest) that the original
20 forfeiture amount was unconstitutionally excessive.
21 Instead, it argues that forfeiture in some (unspecified)
22 amount is mandatory.

23
24 **II**

25 We review the district court's legal conclusions de
26 novo and its factual findings for clear error. Bajakajian,
27 524 U.S. at 337 n.10; United States v. Capoccia, 503 F.3d

1 103, 109 (2d Cir. 2007).

2 "The court in imposing sentence for any violation of
3 section 5313"--the statute Castello violated--"*shall* order
4 the defendant to forfeit *all* property, real or personal,
5 involved in the offense and *any* property traceable thereto."
6 31 U.S.C. § 5317(c)(1)(A) (emphases added). In fixing the
7 amount of forfeiture, the statute thus affords no leeway:
8 *All* property involved in the failure to file CTRs is
9 forfeited as well as *all* property traceable to that offense.
10 See Varrone, 554 F.3d at 330-31; United States v. Elfgeeh,
11 515 F.3d 100, 138-39 (2d Cir. 2008).

12 At the same time, this broad forfeiture provision is
13 limited by the Excessive Fines Clause of the Eighth
14 Amendment. See Bajakajian, 524 U.S. at 327-28. "The
15 touchstone of the constitutional inquiry under the Excessive
16 Fines Clause is the principle of proportionality: The amount
17 of the forfeiture must bear some relationship to the gravity
18 of the offense that it is designed to punish." Id. at 334.
19 The rule is that "a punitive forfeiture violates the
20 Excessive Fines Clause if it is grossly disproportional to
21 the gravity of a defendant's offense." Id. The burden
22 rests on the defendant to show the unconstitutionality of

1 the forfeiture. United States v. Jose, 499 F.3d 105, 108
2 (1st Cir. 2007); United States v. Ahmad, 213 F.3d 805, 816
3 (4th Cir. 2000).

4 Putting § 5317(c)(1)(A) and Bajakajian together: The
5 proper amount of forfeiture following a § 5313(a) conviction
6 is the total forfeitable amount required by the statute,
7 discounted by whatever amount is necessary to render the
8 total amount not “grossly disproportional” to the offense of
9 conviction. Four factors, distilled from Bajakajian, guide
10 our analysis:

11 [1] the essence of the crime of the defendant and
12 its relation to other criminal activity, [2]
13 whether the defendant fit[s] into the class of
14 persons for whom the statute was principally
15 designed, [3] the maximum sentence and fine that
16 could have been imposed, and [4] the nature of the
17 harm caused by the defendant’s conduct.

18
19 Varrone, 554 F.3d at 331 (applying Bajakajian) (internal
20 quotation marks and brackets omitted). To see how these
21 factors work, it is useful to consider the Supreme Court’s
22 approach in Bajakajian.

23 Customs inspectors, using dogs trained to smell
24 currency, stopped Bajakajian as he awaited a plane to Italy
25 and advised him that under federal law anyone transporting
26 more than \$10,000 in currency outside the United States must

1 file a report with the federal government. Bajakajian, 524
2 U.S. at 324. Bajakajian claimed that he had only \$8000 and
3 his wife, \$7000; but their bags contained over \$350,000 in
4 cash. Id. at 324-25. Bajakajian was convicted of willfully
5 failing to report, in violation of 31 U.S.C. § 5316,
6 5322(a). Bajakajian, 524 U.S. at 325. Acting pursuant to a
7 forfeiture statute nearly identical to § 5317(c)(1)(A),³ the
8 district court determined that forfeiture of the whole
9 \$350,000, as mandated by statute, would be “grossly
10 disproportionate to the offense in question,” and
11 accordingly limited the forfeiture to \$15,000. Bajakajian,
12 524 U.S. at 326 (internal quotation marks omitted).

13 The Supreme Court affirmed, id. at 344, and its
14 analysis tracked the four factors listed above. First, “the
15 essence of [the defendant’s] crime” was a reporting
16 violation wholly “unrelated to any other illegal activities.
17 The money was the proceeds of legal activity and was to be
18 used to repay a lawful debt.” Id. at 337-38. Second, the
19 defendant “d[id] not fit into the class of persons for whom

³ The forfeiture statute at issue in Bajakajian was 18 U.S.C. § 982(a)(1), which provides for forfeiture of “any property, real or personal, involved in such offense, or any property traceable to such property.”

1 the statute was principally designed: He [wa]s not a money
2 launderer, a drug trafficker, or a tax evader." Id. at 338.
3 Third, "under the Sentencing Guidelines, the maximum
4 sentence that could have been imposed . . . was six months,
5 while the maximum fine was \$5,000. Such penalties confirm a
6 minimal level of culpability." Id. at 338-39 (citations
7 omitted). And fourth, "[t]he harm that [the defendant]
8 caused was also minimal" and only the government was
9 affected (and "in a relatively minor way"): There was no
10 fraud on the government, and the public fisc suffered no
11 loss. Id. at 339. For these reasons, the Court held that
12 full forfeiture was unconstitutionally excessive.⁴

⁴ The only issue before the Court in Bajakajian was whether full forfeiture violated the Excessive Fines Clause. Bajakajian, 524 U.S. at 339 n.11. The Court's affirmance of the \$15,000 forfeiture "reflect[ed] no judgment that a forfeiture of even \$15,001 would have suffered from a gross disproportion, nor d[id] it affir[m] the reduced \$15,000 forfeiture on de novo review. . . . Nor, indeed, d[id] it] address in any respect the validity of the forfeiture ordered by the District Court. . . . [The defendant] did not cross-appeal the \$15,000 forfeiture ordered by the District Court. The Court of Appeals thus declined to address the \$15,000 forfeiture, and that question [wa]s not properly presented [to the Supreme Court] either." Id. A natural reading of Bajakajian suggests that a forfeiture of some amount greater than zero but less than the full amount required by statute is permissible, but the above-quoted language at least provides a caution before assuming what would otherwise seem obviously to be true. Cf. United States v. U.S. Currency in the Amount of \$119,984.00, More

1 **III**

2 Applying Bajakajian here, it is clear that the Second
3 Order, imposing no forfeiture, must be vacated. The full
4 measure of forfeiture calculated in the First Order could be
5 limited, if at all, only by the Excessive Fines Clause.
6 Thus a forfeiture of zero would be proper only if a
7 forfeiture of even \$1 would be grossly disproportional to
8 the offense of conviction, which is clearly not the case
9 here. As the ensuing sections explain, application of the
10 four Bajakajian factors establishes that the forfeiture
11 imposed in the First Order was not grossly disproportional
12 to the crime for which Castello was convicted. Accordingly,
13 we vacate the Second Order and remand for the district court
14 to reinstate the First Order.

15
16 **A**

17 The first Bajakajian factor requires consideration of
18 "the essence of the crime of the defendant and its relation
19 to other criminal activity." Varrone, 554 F.3d at 331
20 (internal quotation marks and brackets omitted). Castello

or Less, 304 F.3d 165, 175 n.7 (2d Cir. 2002) (stating, in dicta, that "Bajakajian does not appear to bar forfeiture of some amount less than the entire sum").

1 knowingly and willfully failed to file the CTRs, Castello,
2 308 F. App'x at 524 ("Castello argues that the evidence
3 produced at trial was insufficient to prove the requisite
4 mental state, i.e., that he *knowingly* and *willfully* failed
5 to file CTRs for checks made out in amounts over \$10,000.
6 We disagree."), but--like Bajakajian--he was convicted of no
7 other crime. The Supreme Court determined that these facts
8 weigh against the constitutionality of full forfeiture.

9 In other ways, however, Castello's crime is far more
10 serious than Bajakajian's. Castello failed to file the
11 required CTRs "thousands" of times, and his doing so enabled
12 his customers to commit various acts of fraud, whereas
13 Bajakajian committed a single offense, once, for a purpose
14 that was not nefarious. See Bajakajian, 524 U.S. at 326
15 (noting the district court's finding of fact that the
16 defendant failed to report "because of fear stemming from
17 cultural differences: [Defendant], who had grown up as a
18 member of the Armenian minority in Syria, had a distrust for
19 the Government" (internal quotation marks omitted)).

20 This first factor therefore weighs in favor of full

1 forfeiture.⁵

2
3 **B**

4 The second Bajakajian factor considers “whether the
5 defendant fit[s] into the class of persons for whom the
6 statute was principally designed.” Varrone, 554 F.3d at 327
7 (brackets omitted). The CTR statute is a reporting statute
8 intended to facilitate the government’s efforts to uncover
9 and prosecute crime and fraud. “By forcing financial
10 institutions to [file CTRs], Congress hoped to maximize the
11 information available to federal regulatory and criminal
12 investigators. The overall goal of the statute was to

⁵ This first factor also considers how the offense of conviction may bear upon other criminal activity engaged in by the defendant. Accord United States v. Cheeseman, 600 F.3d 270, 284 (3d Cir. 2010); United States v. Browne, 505 F.3d 1229, 1282 (11th Cir. 2007). This inquiry seems sufficiently broad to include within it acquitted conduct. See Bajakajian, 524 U.S. at 338 (referring to “any other illegal activities”); Varrone, 554 F.3d at 331 (referring to “other criminal activity”). Cf. United States v. Vaughn, 430 F.3d 518, 527 (2d Cir. 2005) (explaining that a sentencing court has the authority, with some limits not relevant here, to “find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct”).

Our analysis does not consider these issues, however, because the First Order was constitutional regardless of whether the government proved other criminal activity by a preponderance of the evidence.

1 interdict the laundering of illegally obtained and untaxed
2 monies in legitimate financial institutions." United States
3 v. St. Michael's Credit Union, 880 F.2d 579, 582 (1st Cir.
4 1989); see also Cal. Bankers Ass'n v. Shultz, 416 U.S. 21,
5 27 (1974) ("The absence of such records . . . was thought to
6 seriously impair the ability of the Federal Government to
7 enforce the myriad criminal, tax, and regulatory provisions
8 of laws which Congress had enacted."). Moreover, the CTR
9 statute expressly applies to a "cashier of . . . checks," 31
10 U.S.C. § 5312(a)(2)(K), so Castello falls squarely within
11 the class of persons whose conduct the statute is intended
12 to regulate.

13 The district court recognized that "Castello [clearly]
14 fits within the class of persons for whom this reporting
15 statute was designed," but afforded this factor only
16 "neutral" weight because Castello was not convicted of the
17 offenses that the statute aims to expose.⁶ Castello, 2009

⁶ The district court observed: "To the extent that the statute seeks to punish third parties involved in different criminal activities, outside the scope [of] the original check cashing, the court holds that there is insufficient evidence to hold that this factor weighs in favor of Constitutionality. While the government charged Castello with the crimes of money laundering, tax evasion, and obstruction of justice, the jury did not convict Castello of these crimes." Castello, 2009 WL 1505271 at *2.

1 WL 1505271 at *2. We disagree. The inquiry in this case is
2 whether Castello was the kind of person to whom the statute
3 is directed--as he clearly is.

4 Castello draws an analogy to Bajakajian, which
5 concluded that the defendant did "not fit into the class of
6 persons for whom the statute [31 U.S.C. § 5316] was
7 principally designed: He is not a money launderer, a drug
8 trafficker, or a tax evader." Bajakajian, 524 U.S. at 338.
9 True, Castello is not a money launderer, a drug trafficker,
10 or a tax evader; but his acts facilitated such conduct in
11 just the way the statute was designed to frustrate, while
12 Bajakajian, who was carrying his own earned money to use for
13 lawful purposes, was none of those things, and did not
14 facilitate such offenses.

15 Factor number two therefore weighs in favor of full
16 forfeiture.

17

18

C

19 Third, Bajakajian considers "the maximum sentence and
20 fine that could have been imposed." Varrone, 554 F.3d at
21 331. Statutory penalties reflect severity in a general way,
22 but the applicable Guidelines are more indicative. In

1 Bajakajian, the maximum statutory sentence was five years'
2 imprisonment and a \$250,000 fine, which (as the Supreme
3 Court observed) "suggests that [Congress] did not view the
4 reporting offense as a trivial one." 524 U.S. at 339 n.14.
5 But since the Guideline penalty applicable to Bajakajian was
6 only six months' imprisonment and a \$5000 fine, id. at 338,
7 the level of culpability was found to be "minimal," id. at
8 339. Because "the maximum [Guideline] fine and Guideline
9 sentence to which [the defendant] was subject were but a
10 fraction of the penalties authorized [by statute]," the
11 disparity "undercuts any argument based solely on the
12 statute, because [the Guideline sentence] show[s] that [the
13 defendant's] culpability relative to other potential
14 violators of the reporting provision--tax evaders, drug
15 kingpins, or money launderers, for example--is small
16 indeed." Id. at 339 n.14.

17 Here, the statutory maximum penalties are five years'
18 imprisonment and a \$250,000 fine, 31 U.S.C. § 5322(a); and
19 that is the sentence that Castello received. As Varrone
20 observed, the statutory maximum fine was a small fraction of
21 the \$12 million, so that the First Order raised a
22 constitutional issue. 554 F.3d at 332. But the relevant

1 metric is the top of the Guidelines for the fine and for
2 imprisonment; in this case, while the maximum Guidelines
3 fine may not exceed the statutory maximum, the Guidelines
4 range of imprisonment was far greater.⁷ See Tr. of
5 Sentencing Proceedings at 13 (September 25, 2007)
6 (Castello's lawyer explaining that the "guideline range from
7 the presentence report is obviously way beyond the five-year
8 maximum that the Court can impose for this conviction and it
9 is way beyond that five-year maximum because of the amount
10 of money involved."); see also id. (noting that the five-
11 year statutory maximum was "well below the guidelines
12 range").

13 For these reasons, the third factor weighs in favor of
14 full forfeiture.

⁷ Varrone considered only the statutory fine in arriving at its conclusion that this factor weighs against the constitutionality of full forfeiture. This observation was premised both on the Eleventh Circuit's decision in United States v. 817 Northeast 29th Drive, Wilton Manors, Florida, 175 F.3d 1304, 1309 n.9 (11th Cir. 1999), and on an ambiguity in Bajakajian itself, which refers to the "maximum fine" without clearly differentiating the statutory maximum from the Guidelines maximum. We consider this wrinkle for the first time in this opinion.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

D

Finally, Bajakajian invites an analysis of “the nature of the harm caused by [Castello’s] conduct.” Varrone, 554 F.3d at 331. As the district court said, the CTR statute “exists so that the government can track the flow of cash transactions [and] these large amounts of cash are not funneled into criminal activities. . . .” Castello, 2009 WL 1505271 at *3. The court added, however, that “[t]he fact that Castello was not convicted of involvement in [any other] crimes makes this factor weigh against a finding that the forfeiture was Constitutionally proportionate to the crime of which Castello was convicted.” Id. We disagree.

Bajakajian was convicted of a *single* failure to report, which “affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and [the defendant] caused no loss to the public fisc.” Bajakajian, 524 U.S. at 339. The same cannot be said here.

Castello cashed thousands of checks in excess of \$10,000, totaling over \$200 million, without filing the required CTRs, and he did so knowingly and willfully. Castello, 308 F. App’x at 523. Castello’s refusal to file

1 CTRs helped his customers evade taxes, cash fictitious
2 checks, and commit securities fraud. The victims included
3 private parties as well as the federal government. Cf.
4 Ahmad, 213 F.3d at 816-17 (noting that the defendant
5 committed multiple reporting violations that harmed both the
6 federal government and private parties). As Castello
7 emphasizes, he was acquitted of tax fraud and the related
8 crimes with which he was charged; but his failure to file
9 the CTRs allowed others to commit crimes that, had he filed
10 the CTRs, the government could have prevented or prosecuted.

11 Accordingly, this final factor weighs in favor of full
12 forfeiture.

13

14

CONCLUSION

15 The Second Order, imposing no forfeiture, is vacated.
16 We remand for the district court to reinstate the First
17 Order requiring forfeiture of \$12,012,924.31 and the
18 defendant's equity interest in his home in Greenwich,
19 Connecticut.