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Cash-Carrying Defendant Argues Seizure of Money Just Isn't Fair

By Thom Mrozek

Daily Journal Staff Writer

Hosep Krikor Bajakajian was boarding a plane with \$357,144 in cash, when a money-sniffing dog discovered the currency that was carefully hidden in his luggage. When the Syrian-American refused to admit that he was carrying the cash, officials confiscated every cent.

Now, Bajakajian is fighting to have the money returned, contending that the use of criminal forfeiture laws to take all of his money is a violation of his constitutional rights.

Stressing that Bajakajian's only crime was failing to report his possession of the cash, defense attorneys James E. Blatt and Michael G. Raab believe that seizure of all the money is a violation of the Excessive Fines Clause of the Eighth Amendment. .

Last year, a federal judge agreed and ordered Bajakajian to turn over only \$15,000 and to pay a \$5,000 fine.

"This wasn't drug money; this wasn't gambling money; this wasn't stolen money; this wasn't money that was being laundered for any reason - that's been proven," U.S. District Judge John G. Davies said last year when he departed from federal sentencing guidelines that call for a defendant in this type of case to lose all their property.

"There is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh and would violate the Eighth Amendment" Davies continued.

Notwithstanding Davies' ruling, the government still has all of the money. When Bajakajian asked the U.S. Customs Service to return the confiscated cash, he learned that prosecutors had appealed Davies' decision.

The matter came before the 9th U.S. Circuit Court of Appeal on Tuesday when attorneys appeared before a three judge panel in Pasadena to argue *United States v. Bajakajian*, 95-50094.

Responding to Bajakajian's contention that it just isn't fair to take all of his money, two judges appeared sympathetic to the claims of the gas station owner, who borrowed about half of the \$357,144 to pay a loan from a relative in Syria.

Assistant U.S. Attorney Ronald L. Cheng concluded that it was completely appropriate to order Bajakajian to forfeit all of the money for the simple reason that this was the amount the defendant was trying to transport out of the country. This argument prompted Senior judge Warren J. Ferguson and Judge Thomas G. Nelson to blurt out in unison: "But, That's not illegal [to take money abroad]." On the other side, Blatt was peppered with questions from Chief Judge J. Clifford Wallace, who queried the Encino defense specialist on topics ranging from the standard of review to the lies Bajakajian told customs officials when the money was found.

When Blatt asserted that Judge Davies considered all of the factors leading to the crime of failing to report the currency - including the fact that Bajakajian's cultural background led him to distrust the government - Wallace said nationality or place of birth is not a factor in sentencing. And when Blatt said forfeiture should not be used to destroy his client Wallace shot back "What's that have to do with the law."

The legal arguments at Tuesday's hearing focused on two cases dealing with the reasonableness of forfeiture in criminal cases.

Bajakajian's case is unique because he is not a drug dealer nor the mastermind of a fraud trying to launder ill-gotten profit - the typical defendants charged under federal forfeiture statutes. In fact, Davies determined that the money is lawful and was intended for a lawful purpose, so taking the cash out of the country would not violate any laws. Bajakajian was charged only with failing to provide the information to the government.

While Blatt appealed to the judges' sensibilities, he cited a recent 9th Circuit ruling that set a two-prong standard for analysis of whether a fine or forfeiture violates the Eighth Amendment

In *United States v. Real Property Located in El Dorado Country*, 59 F.3d 974 (1995), the court held that the property must be an "instrumentality of the crime - or there must be sufficient connection between the property in question and a defendant's conduct. Second, the court said that the value of the property must be 'proportional' to the culpability of the owner."

Blatt said there is no nexus between the money and the crime, arguing that failing to report is not related to the money that Bajakajian legally possessed and could legally take out of the country. Furthermore, the defendant's crime was the result of an "honest mistake because he was frightened," Blatt said.

Addressing the issue of proportionality, Blatt pointed to a government brief which concludes that if the forfeiture is deemed grossly disproportionate to the defendant's offense, then he should be ordered to give up at least \$170,000 because he encouraged a friend to lie to investigators about the source of this portion of the money.

"Isn't that just as arbitrary as what they say the district court did," he asked. Responding to Blatt, Cheng said Bajakajian's business generates a cash flow of \$10,000 per month, so forfeiture of the entire amount is "not that harsh of an imposition."

The biggest obstacle Bajakajian will have to overcome is contained in *One Lot Emerald Cut Stones and One Ring v United States*, 409 U.S. 232 (1972), a U.S. Supreme Court case that upheld the forfeiture of \$50,000 worth of gems by a defendant who failed to report that they were coming into the country and failing to pay about \$335 in fees.

The high court ruled that the forfeiture was a "reasonable form of liquidated damages" and helps reimburse the government for the cost of investigating the crime.

Cheng argued that Bajakajian's cash - just like the illegally imported emeralds - was at the heart of the crime. "It was the money itself which constituted the offense," he said.

Blatt argued with Cheng's contention that One Lot Emerald is the controlling case.

"He's not here to cheat the government per se, out of money," Blatt said in response to Judge Wallace, who asked the attorney to distinguish Bajakajian from the person who failed to report the gemstones.

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Attorney's First Argument Was Supreme Effort Sole Practitioner in Encino Used Tutor, Went Into Training 'I Was Still Intimidated'

By **David F. Pike**

Daily Journal Staff writer

WASHINGTON - Last May, when Encino sole practitioner James E. Blatt was told the U.S. Supreme Court had agreed to review a case he had been handling for three years, he was "very nervous."

"I gave serious consideration to giving the case to a Supreme Court specialist," said Blatt a criminal-defense attorney who never had argued before the high court. "Laurence Tribe, [of Harvard Law School] contacted me and expressed interest in handling the case."

"But I knew the case better than anyone, and I had a responsibility and dedication to my client" said Blatt, 49. "And it was a great honor, and I doubted the opportunity would ever come again ... I didn't realize how much work and pressure were involved."

Preparing for Battle

Blatt did appreciate that the task was daunting, and so he launched into " a training program like a military operation" that covered everything recommended by veteran high-court practitioners and more.

James E. Blatt - "I was still intimidated [despite thorough preparation], but I realized you can communicate with [U.S. Supreme Court Justices] if you have the right approach."

In his favor, he certainly was familiar with *United States v. Bajakajian, 96-1487*, which he argued Nov. 4. He had represented Hollywood service station owner Hosep Krikor Bajakajian from the beginning of the case in 1994.

Bajakajian was arrested at Los Angeles International Airport as he and his wife and daughters prepared to board a flight to his native Syria. Money-sniffing dogs alerted police to \$357,000 hidden in the family's suitcases. Bajakajian said the money had been earned or borrowed and was being taken to Syria to repay relatives who had helped him start his business. But he had violated federal law by failing to report the export of currency in excess of \$10,000, as required by 31 U.S.C. Sections 5613(a)(1)(A) and 5311(a); he also was indicted on one count of criminal forfeiture of undeclared funds under 18 U.S.C. Section 982 (a) (1). Both laws were passed by Congress mainly to attack money laundering by drug dealers and other criminals.

Going to Trial

In October 1994, Bajakajian pleaded guilty to the failure-to-report count and agreed to a bench trial on the forfeiture count. U.S. District Judge John G. Davies of Los Angeles sentenced Bajakajian to three years' probation and a \$5,000 fine on the reporting count. He also found that all \$357,000 was subject to forfeiture, but ordered Bajakajian to turn over only \$15,000.

The money was not stolen, or the proceeds of drugs or gambling, Davies said, and forfeiture of more than \$15,000 would be "grossly disproportionate" to the defendant's culpability, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause.

The 9th U.S. Circuit Court of Appeals, in an opinion by Judge Warren J. Ferguson, affirmed but added a twist. The panel held the forfeiture also was unconstitutional under the Eighth Amendment because the money was not the "instrumentality" of the crime. "The crime is the withholding of information ... not the possession or transportation of money," it said. The court upheld the \$15,000 forfeiture only because Bajakajian had not cross-appealed on that issue.

Blatt had argued the appeal, but "I didn't realize the 9th Circuit would enlarge Judge Davies' ruling by such an extent," he said. "But I was confident that when the Supreme Court evaluated the district courts [proportionality] ruling, it would rule in our favor."

After the U.S. solicitor general's office filed the expected court petition, Blatt, with the help of an associate, Michael G. Raab, wrote a response. After review was granted last May 27, Blatt also had to submit a merits brief.

Getting ready for the argument however, required a special commitment.

"I did a number of things to prepare," he said. "I had a team of lawyers help me and hired a 'tutor,' Michael Heilden, a Los Angeles lawyer. We devoted an entire month to reviewing all the [relevant] cases and the arguments in past cases.

"I spent about three hours a day, there's a limit to how much time you can devote to studying a case," Blatt said.

Then he endured two moot courts conducted by the Public Citizen Litigation Group's Supreme Court Assistance Project here, which contacted him after the justices granted review. The project is headed by Alan B. Morrison, a veteran high-court litigator who has argued several landmark cases, and it regularly offers brief-writing and moot-court help to sole practitioners and small-firm lawyers around the country.

"Three weeks prior to the argument, I flew to D.C." for the first moot court, Blatt said. "It was very tough. I learned a great deal from them on preparation and strategy; it showed how much I had to catch up on."

Back in Encino, "I basically stopped making appointments my last two weeks," Blatt said. "I took the time off and worked six hours a day on the argument."

Then Blatt flew back to D.C. for another moot court on the eve of his argument. "I lost" he said with a laugh. "But they were able to focus me in the right direction, on certain things I should concede to get to the heart of the matter," that the seizing of "legal money being used for lawful purpose" was excessive.

"I learned how to respond to the justices' questions, how to think and discuss things in a much different way than in a trial court," Blatt said. "It was very helpful."

That same day, Blatt also watched arguments before the justices. "I learned from a solicitor general who was arguing [against allowing polygraph evidence in military courts] about using humor and being low-key to reach the justices," he said. "I evaluated his style and technique and saw he had a common-sense, practical approach."

On the day of argument with about 200 hours of preparation under his belt, Blatt was "very confident," he recalled. "I had prepared so much. But at first I was a little bit nervous, although after Chief Justice [William H.] Rehnquist asked me the first question, all my nervousness left me."

"I was still intimidated," he added, "but I realized you can communicate with them if you have the right approach."

Blatt also was helped by a pamphlet sent by the Supreme Court clerk's office to all counsel about to argue a case, he said. "It tells you you can do an excellent job even if this is your first argument and indicates that some of the best arguments have been made by first-time attorneys."

He also was soothed by a pre-argument pep talk regularly given to counsel by clerk William K. Suter. "He gave us confidence, told us to relax; it was very reassuring and relaxing."

Blatt admitted he had a "big advantage" in arguing second, after Assistant U.S. Solicitor General Irving L. Gornstein.

"I could see from the justices' questions that they wanted to know about the heart of it, what kind of standard there is for a government fine, and that they were not satisfied with no standard at all," Blatt said. "The 'instrumentality' factor was not important so I shied away from that"

When his turn came, Blatt stressed repeatedly that Bajakajian's money was "lawfully obtained, with taxes paid on it and that it was being used for a legitimate purpose."

He answered questions on the instrumentality issue but kept coming back to the fact that the money had no connection to criminal activity. And he insisted that "the district court applied the correct standard of grossly disproportionate," conceding that the fine and the \$15,000 forfeiture were probably correct because of "the government expense in this matter."

Justice Antonio Scalia was Blatt's toughest questioner. He asked, incredulously, whether judges would have to look to the particular circumstances and then apply the Excessive Fines Clause "on a case-by case basis, each individual case?"

"Justice Scalia, I believe that," Blatt replied earnestly.

Scalia also stressed several times that the court had long upheld customs laws that allow the seizure of undeclared items. "Do you know of a single case [in over 200 years] in which the forfeiture of undutied goods has been declared to be an excessive fine, by any court?" he asked.

"There has not been one single case, your honor, in reference to that," Blatt replied.

"That's what you're saying the Constitution has been requiring all these 200 years," Scalia shot back.

"That is correct your honor," Blatt said calmly. Following decisions in which the court has said the Eighth Amendment does apply to excessive fines, "there is now a review in reference to excessiveness concerning the Eighth Amendment and excessiveness implies an evaluation."

As the argument drew to a close, several justices struggled to determine a constitutional standard for deciding what amount would be disproportionate. When Justice Ruth Bader Ginsburg proposed a "shocks the conscience" standard, Blatt replied: "I like that ...

perhaps there is something that shocks the conscience when lawful money for a lawful purpose is taken entirely, without any concept of culpability..."

Two weeks after the battle, Blatt still sounded confident about his case. "I had a sympathetic defendant and excellent facts," he said. Asked whether handling the high-court argument ended up costing him money, Blatt replied, "When one goes to the Supreme Court monetary interests are secondary."

"It was the highlight of my career, the experience of a lifetime," Blatt said. "I can't imagine anything better."

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High Court Weighs Definition of 'Excessive Fine' in Customs Case; Judiciary: Dispute over \$357,144 seized by U.S. agents tests limit on punishment. Justices appear to be closely divided.

By: DAVID G. SAVAGE

TIMES STAFF WRITER WASHINGTON

It sounds like a startling proposition: a \$357,000 fine for failing to fill out a government report.

Nonetheless, a Justice Department lawyer defended the notion before the Supreme Court on Tuesday.

In 1994, U.S. customs officers found the cash, \$357,144 in all, hidden in the suitcases of a Hollywood service station owner and his wife as they were boarding an international flight leaving Los Angeles International Airport. Although it is legal to take cash out of the United States, federal law requires travelers to declare amounts over \$10,000.

The government's seizure of the suitcase full of otherwise legal currency is a "permissible punishment for a serious criminal offense" of failing to file the required report declaring the cash, Assistant Solicitor Gen. Irving Gornstein told the high court. The fine, though large, does not violate the Constitution's limit on "excessive fines," he added.

Government lawyers maintain that the forfeiture laws permit them to seize an unlimited amount of unreported money, regardless of whether the owner is otherwise innocent of any wrongdoing.

"It seems a little odd" to say that unlimited amounts can be seized for even trivial offenses, said Justice Sandra Day O'Connor. "Suppose we don't share your enthusiasm for this approach?" she asked.

The Constitution suggests that the punishment should fit the crime, she suggested.

"If unlimited forfeitures are permitted, why cannot the government demand the total forfeiture of a taxpayer's unreported income?" asked Justice David H. Souter. "Under current law, a taxpayer would pay a fine and a penalty for failing to disclose income. The money in dispute is not subject to forfeiture," he noted.

"Under your theory, we would be opening the door to a total forfeiture of unreported income," Souter said.

Sitting in the court was Hosesep K. Bajakajian, the Hollywood service station owner whose cash was seized three years ago and kept by the government. During a hearing before a federal judge in Los Angeles, Bajakajian provided proof that the cash had been earned or borrowed from friends.

He testified that he was taking it to Syria to repay relatives who helped him get started in business.

His attorney, James E. Blatt of Encino, agreed that Bajakajian was properly fined \$5,000 for failing to file a report at the airport. He did not even object to a \$15,000 forfeiture ordered by the judge.

But forfeiture of the entire amount is "grossly disproportionate" to his offense, Blatt argued.

"This money was lawfully obtained and it was being used for a lawful purpose," he said. "If this was laundered money or he was trying to avoid taxes, the forfeiture would make sense."

Four years ago, in something of a departure, the high court ruled for the first time that forfeitures could be limited by the 8th Amendment's ban on "cruel and unusual punishment [and] excessive fines."

Since then, however, the justices have not defined what is "excessive." That is the question raised directly in the case (United States vs. Bajakajian, 96-1487) being argued Tuesday.

The justices appeared closely divided.

Chief Justice William H. Rehnquist and Justice Antonio Scalia agreed with the government lawyer that unlimited forfeitures were permitted. Under the long tradition of customs law, a dealer who ships a valuable diamond across the border without paying duties loses the diamond, Scalia said. It may sound unfair but that is the law, he asserted.

But O'Connor and Souter, joined by Justice Stephen G. Breyer, seemed determined to set a limit.

Breyer expressed amazement that the government was arguing for forfeitures "without limit. No matter how valuable the property, it can be forfeited regardless of how trivial the offense. So, you can forfeit the Taj Mahal if a teaspoon of marijuana is sold there," he said.

The justices will meet privately to vote on the case and begin work on opinions. A ruling can be expected in several months. On June 22, 1998, the court issued its ruling.