New Considerations under the Eighth Amendment's Excessive Fines Clause When Determining Criminal Forfeiture

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NEW CONSIDERATIONS UNDER THE EIGHTH AMENDMENT’S EXCESSIVE FINES CLAUSE WHEN DETERMINING CRIMINAL FORFEITURE

The Second Circuit allows latitude in imposing criminal forfeiture by considering whether criminal forfeiture would deprive a convicted defendant of a future ability to earn a living. This decision raises questions whether it is proper for courts to ignore a defendant’s personal circumstances, such as age, health, and financial condition, when those conditions may affect a defendant’s future ability to earn a living.

I. INTRODUCTION

A fundamental goal of prosecutions is to ensure wrongdoers are held accountable for their actions. One avenue for holding defendants accountable is through incarceration. Another way is by ensuring that defendants who are found guilty are deprived of the fruits of their illegal acts. Essentially, forfeiture allows prosecutors to take defendants’ profits that are derived from their crimes.


2 See 18 U.S.C. § 3553(a) (listing factors regarding imposing sentences). The factors to be considered when imposing a sentence include: the conduct and totality of the circumstances surrounding the crime, the defendant’s prior propensity for wrongdoing, and the sentencing purpose, including necessity for punishment, public protection or deterring from future acts of similar nature. Id. The court shall also consider the “category of the offense” and relevant guidelines. Id. “The court should impose a sentence that is sufficient, but not greater than necessary.” Id; see also Mark Osler, Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home, 54 S.C. L. REV. 649, 654 (2003) (describing loss of traditional sentencing goals).

3 See U.S. CONST. amend. VI (setting forth accused’s rights in criminal prosecution); see also Kaley v. United States, 134 S. Ct. 1090, 1094 (2014) (“Criminal forfeitures are imposed upon conviction to confiscate assets used in or gained from certain serious crimes.”); United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006) (citing United States v. McHan, 345 F.3d 262, 271 (4th Cir. 2003) (holding criminal forfeiture statute is not discretionary); Cassella, supra note 1, at 3 (“Prosecutors are often told, ‘don’t just put the defendant in jail; take away the fruits of the crime.’”).

4 See Cassella, supra note 1, at 3 (describing goals of forfeiture); see also Sarah N. Welling & Jane Lyle Hord, Friction in Reconciling Criminal Forfeiture and Bankruptcy: The Criminal Forfeiture Part, 42 GOLDEN GATE U.L. REV. 551, 551 (2012) (contending “forfeiture is basically another part of the sentence rather than a separate charge in itself.”).
Criminal forfeiture statutes permit the government to confiscate property derived from, or used to, facilitate criminal activity. Such statutes serve several critical governmental interests including "separating a criminal from his ill-gotten gains," "returning property, in full, to those wrongfully deprived or defrauded of it," and "lessen[ing] the economic power" of criminal organizations.

The Supreme Court of the United States analyzed whether criminal forfeiture statutes violate the Eighth Amendment's Excessive Fines Clause. Forfeiture of a defendant's money is limited by the Excessive Fines Clause, which curtails unduly burdensome punishment. Punishment is the "intentional imposition of some deprivation or suffering on individuals against their wills." The Supreme Court held that forfeiture used as punishment violates the Excessive Fines Clause if the forfeiture is disproportional to the gravity of the defendant's criminal offense. The United States Court of Appeals for the Second Circuit recently took the Supreme Court's holding a step further by acknowledging an additional factor that is relevant when determining the constitutionality of forfeiture. The Second Circuit held that courts should also consider whether forfeiture would be depriving a convicted defendant of a future ability to earn a living.

Under federal law, the government can seize property by: (1) administrative forfeiture; (2) civil forfeiture; or (3) criminal forfeiture. Administrative forfeitures permit certain federal agencies to take an

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6 See id. (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629-30 (1989)) (enumerating purposes of criminal forfeiture statutes).
8 See id. at 334 (clarifying forfeiture constitutes punishment).
10 See Bajakajian, 524 U.S. at 324 (stating holding regarding forfeiture issue).
12 See id. (reviewing whether forfeiture would deprive defendant of his livelihood).
13 See Cassella, supra note 1, at 9-15 (explaining how government can seize property). Most federal forfeitures are uncontested administrative forfeitures. Id. Certain federal law enforcement agencies are authorized to seize property based on probable cause during an investigation. Id. On the other hand, civil forfeitures are not part of a criminal case, but are separate civil actions in rem against property and based on a preponderance of the evidence the property was derived from or used to commit a crime. Id. Unlike criminal forfeiture, civil forfeitures do not rely on guilty verdicts and may be filed even in the absence of a criminal case. Id.
individual's property without a judicial process.\textsuperscript{14} Merchandise that is barred from import, conveyance used to import, transport or store drugs, and a monetary instrument or other property under $500,000, may all be subject to administrative forfeiture.\textsuperscript{15} On the other hand, civil forfeitures are actions brought in judicial proceedings.\textsuperscript{16} Civil judicial forfeitures are referred to as \textit{in rem} action, meaning the action is brought against the property.\textsuperscript{17} However, criminal forfeitures are most relevant to the restrictions of the Excessive Fines Clause because criminal forfeitures are part of an action brought under a criminal prosecution.\textsuperscript{18} Criminal forfeiture is considered an \textit{in personam} action, which requires the government to indict the property used or derived from the crime, and also to indict a person for the crime.\textsuperscript{19} If a jury determines the property is forfeiture, the court will issue an order of

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  \item See id. (discussing civil judicial forfeitures).
  \item See Cassella, supra note 1, at 11 (explaining concept of \textit{in rem} forfeitures).
  \item See 28 U.S.C. § 2461(c) (proscribing modes of recovery for government in forfeiture action). The modes of recovery are prescribed as:

    If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

  \item See United States v. Jalaram, 599 F.3d 347, 352-53 (4th Cir. 2010) (meeting threshold requirement of Eighth Amendment); see also United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (limiting \textit{in personam} judgment in forfeiture is more limited than a general judgment \textit{in personam}). See U.S. DEP’T OF JUSTICE, TYPES OF FEDERAL FORFEITURE, (Feb. 1, 2017), https://www.justice.gov/afp/types-federal-forfeiture (discussing criminal forfeiture). The term \textit{in personam} means against the person. \textit{Id.} “Forfeitures pursuant to the Controlled Substance Act (CSA), Racketeer Influenced and Corrupt Organizations (RICO), as well as money laundering and obscenity statutes, there is an ancillary hearing for third parties to assert their interest in the property.” \textit{Id.} The court then issues a forfeiture order. \textit{Id.}
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Forfeiture. Forfeiture in a criminal case is considered a punishment. Forfeiture in criminal cases can also only occur if the defendant is convicted of certain enumerated offenses.

The applicability of criminal forfeiture is constrained by the Eighth Amendment of the United States Constitution. This provision is referred to as the Excessive Fines Clause and it explicitly prohibits excessive fines. The Excessive Fines Clause limits the government’s power to extract payments as punishment for a criminal offense, but it is up to courts to determine what is considered excessive. Although the Eighth Amendment may apply to civil proceedings, its application has frequently been used in criminal cases. Furthermore, when a person is convicted of certain

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20 See FED. R. CRIM. P. 32.2(b)(1)(A) (noting orders of forfeiture). Forfeiture should be determined in the following manner during the forfeiture phase of the trial:

As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

Id. See Cassella, supra note 1, at 14 (discussing forfeiture). Forfeiture is determined after the defendant is found guilty. Id. Once the defendant is found guilty, the court hears additional arguments and evidence at the sentencing phase, and if the government establishes the requisite nexus between the property and the crime, the defendant will be ordered by the court to forfeit the property derived from or used for the crime.


22 See United States v. Nava, 404 F.3d 1119, 1124 (9th Cir. 2005) (distinguishing defendant’s forfeiture interests from innocent party’s property); see also United States v. Ginsburg, 773 F.2d 798, 800 (7th Cir. 1985) (stating “government’s interest in the property does not attach until the time of the defendant’s conviction of the crime.”); United States v. King, 231 F. Supp. 3d 872, 889 (W.D. Okla. 2017) (highlighting foreseeability requirement regarding joint liability).


24 See U.S. CONST. amend. VIII. (defining Excessive Fines Clause); see also Bajakajian, 524 U.S. at 327-28 (providing further context to Excessive Fines Clause).

25 See Cassella, supra note 1, at 8 (explaining limits on government to impose excessive forfeiture).

statutory offenses, the court shall order the forfeiture of "any property, real or personal, involved in such offense, or any property traceable to such property."\(^{27}\) Such offenses include federal program fraud, mail fraud, and wire fraud.\(^{28}\)

II. HISTORY

Courts began interpreting the Eighth Amendment by analyzing issues dealing with cruel and unusual punishment, including the constitutionality of imposing the death penalty.\(^{29}\) Around the beginning of the twentieth century, courts formulated a view that the language of the Eighth Amendment not only protects citizens against cruel and unusual punishment, but also "against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."\(^{30}\)

When the Eighth Amendment was drafted, the word "fines" was defined as a payment to a sovereign as punishment for an offense, and punitive damages were frequently awarded.\(^{31}\) Courts have since interpreted the Excessive Fines Clause to suggest it does not apply to civil punitive damages, but applies to bail, fines, and other punishments.\(^{32}\) In effect, the

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\(^{28}\) See 18 U.S.C. § 982(3) (outlining applicable offenses).

\(^{29}\) See Commonwealth v. 1997 Chevrolet & Contents Seized From James Young, 160 A.3d 153, 163 (Pa. 2017) (acknowledging cruel and unusual punishment discussion). "While the 'cruel and unusual punishment' clause has generated a significant amount of litigation, the United States Supreme Court has interpreted the Excessive Fines Clause only on rare occasions, and, for many years, that Clause with respect to civil in rem forfeitures went unexplored." Id.; see also 1-4 William H. Erickson, B.J. George, Jr., & Timothy M. Tymkovich, UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE, ¶ 4.02 (Matthew Bender) (describing early cases involving Eighth Amendment).

\(^{30}\) See Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F. 2d 571, 579 (8th Cir. 1968)) (outlining purpose behind Eighth Amendment). "Amendment proscribes more than physically barbarous punishments . . . . The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .'" Id. (citations omitted); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (expanding view of Eighth Amendment); Erickson, supra note 29, at ¶ 4.02 (commenting on change in Court's views).

\(^{31}\) See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 265 (1989) (describing framers' intent of Eighth Amendment); see also Meghan J. Ryan, Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?, 87 WASH. U. L. REV. 567, 574 (2010) (explaining origin of Eighth Amendment). Scholars believe the Eighth Amendment was modeled from the 1776 Virginia Declaration of Rights, which states, "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.

\(^{32}\) See Browning-Ferris Indus., 492 U.S. at 262 (applying Eighth Amendment primarily to criminal prosecutions and punishments).
Excessive Fines Clause limits the government’s power to order defendants to make payments as punishment for their criminal offenses.33 The Excessive Fines Clause was not discussed much by the First Congress during the ratification of the Bill of Rights.34 However, the Excessive Fines Clause was taken precisely from the English Bill of Rights of 1689.35 The clause was incorporated into the English Bill of Rights to protect people from the power of the King’s judges during the reign of the Stuarts.36 The English constitutional tradition, including the Magna Carta, provided that a fine “should not deprive a wrongdoer of his livelihood.”37 However, the historical versions of the Excessive Fines Clause do not suggest how disproportional the fine must be to the offense to be in violation of the Constitution.38

It took courts some time to address whether civil forfeitures under 21 U.S.C. § 881 are considered punishment.39 To address that issue, the court needed to be mindful of the Double Jeopardy Clause of the Fifth Amendment, which prohibits individuals from being “subject for the same offence to be twice put in jeopardy of life or limb.”40 Ultimately, double jeopardy does not apply if a defendant is ordered to pay both restitution and criminal forfeiture.41

36 See Bajakajian, 524 U.S. at 335 (noting English Bill of Rights extends back to Magna Carta). In reviewing the Magna Carta, the Court quoted:

A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other’s villain than ours shall be likewise amerced, saving his wainage.

Id. at 335-36 (quoting Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)).
37 See id. (explaining relevance of Magna Carta provisions); see also Browning-Ferris Indus., 492 U.S. at 288 (proscribing Magna Carta’s requirement that payment not be large enough to deprive individual of livelihood).
38 See Bajakajian, 524 U.S. at 335 (discussing various versions of Excessive Fines Clause).
41 See United States v. McGinty, 610 F.3d 1242, 1247-48 (10th Cir. 2010) (explaining why criminal forfeiture and restitution are separate remedies).
Courts have allowed multiple punishments if the legislature authorizes it and the punishments have two separate attributes. The Supreme Court in *United States v. Ursery* held that the property is the subject of a traditional *in rem* forfeiture proceeding, whereas in a criminal prosecution the individual is proceeded against. The Double Jeopardy Clause only applies in criminal proceedings and where the forfeiture is intended as punishment. Whereas, to make the determination whether an *in rem* civil forfeiture is punishment, courts should first look to Congress' intent in enacting the forfeiture statute, and then to whether the proceedings are punitive in nature.

There are numerous statutes authorizing civil forfeiture in a variety of criminal contexts, but 21 U.S.C. § 881 is commonly considered the "centerpiece" of those statutes. Section 881 is the civil drug forfeiture statute that authorizes the government to combine conveyance, asset and real property forfeitures, and may give the government authority to seize all of an individual's property. Legislatures enacted such criminal forfeiture

Because restitution and forfeiture are distinct remedies, ordering both in the same or similar amounts does not generally amount to a double recovery...[P]aying restitution plus forfeiture at worst forces the offender to disgorge a total amount equal to twice the value of the proceeds of the crime. Given the many tangible and intangible costs of criminal activity, this is in no way disproportionate to the harm inflicted upon government and society by the offense.

*Id.* (internal citations omitted) (first citing United States v. Leahy, 464 F.3d 773, 793 n.8 (7th Cir. 2006); then quoting United States v. Emerson, 128 F.3d 557, 567 (7th Cir. 1997)).


44 See id. at 275 (explaining *in rem* forfeiture).

[This] forfeiture proceeding...is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted, and punished. *The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.*

*Id.* (citation omitted) (quoting Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931)).

45 See id. at 277 (explaining limitation on application of double jeopardy).

46 See id. at 288 (describing two steps to analyze civil forfeitures).

47 See id. (discussing civil forfeiture status and their application); see also Ronner, *supra* note 42, at 658 (categorizing 21 U.S.C. § 881 as centerpiece).

48 See Ronner, *supra* note 42, at 658 (explaining origin of 21 U.S.C. § 881). The statute was enacted under the Comprehensive Drug Abuse Prevention and Control Act of 1970 and authorized drug forfeiture or any property used in drug trafficking. *Id.* at 673. The statute was later amended
statutes to prevent prosecutorial overreach and to protect defendants' constitutional rights.\textsuperscript{49} Prosecutorial overreach includes targeting certain defendants or classes of defendants.\textsuperscript{50}

Since Eighth Amendment protections were traditionally focused around punishment, courts were interpreting the amendment to only apply to criminal proceedings.\textsuperscript{51} Furthermore, 21 U.S.C. § 881 was traditionally used as a forfeiture vehicle for civil proceedings.\textsuperscript{52} Around the 1970s, Congress began implementing statutes that authorized asset forfeiture for certain statutory offenses.\textsuperscript{53} The legislative goals of these statutes were to have measures to seize money or property that someone obtained in an illegal way and to deter future crimes.\textsuperscript{54}

Then in \textit{Austin v. United States},\textsuperscript{55} the Supreme Court addressed whether the Excessive Fines Clause applies to property forfeitures and the result became an important decision for future criminal forfeiture cases.\textsuperscript{56} The Supreme Court was not concerned whether forfeiture under a federal statute was criminal or civil, but was trying to understand at the time the Eighth Amendment was ratified, if forfeiture was understood in part as punishment and whether forfeiture should still apply as punishment in

to authorize the forfeiture of proceeds traceable to drug deals, including money and negotiable instruments. \textit{Id.} The Senate Report on the 1978 Amendment described the amended statute as "penal in nature." \textit{Id.} It was clear that the legislature intended the statute to act as a deterrent for drug crimes. \textit{Id.}


\textsuperscript{52} See \textit{id.} (considering forfeiture under federal forfeiture statute applies primarily to civil proceedings).

\textsuperscript{53} See Michele M. Jochner, \textit{The U.S. Supreme Court Expands Excessive Fines Clause Protection in Austin and Bajakajian}, 87 ILL. B.J. 78, 79 (1999) (explaining Congress' reach).

\textsuperscript{54} See \textit{id.} (discussing legislative goals).

\textsuperscript{55} 509 U.S. 602 (1993).

\textsuperscript{56} See \textit{id.} at 604 (figuring out reach of Excessive Fines Clause). Civil proceedings could have both punitive and remedial goals, so the question was not whether forfeiture is civil or criminal, but whether forfeiture is instituted as a form of punishment. \textit{Id.} at 610. Sanctions can have more than one purpose. \textit{Id.} The government argued forfeitures from drug offenses are remedial because: (1) they remove the instruments of the drug trade to protect the public from the detriment of drug dealing and (2) forfeited assets compensate the government for money spent on law enforcement activity and other societal problems. \textit{Id.} at 620. The Court disagreed, holding the forfeiture was punishment, in part because Congress also felt fines and imprisonment are not strong enough deterrents to stop the profits individuals can make in drug crimes. \textit{Id.} at 621.
present day.\textsuperscript{57} The Supreme Court in \textit{Austin} categorized forfeiture as punishment after examining legislative history.\textsuperscript{58} The Court reasoned that "civil sanction that cannot fairly be said \textit{solely} to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."\textsuperscript{59} The Court continued its reasoning that forfeiture is not solely remedial because of its historical use, statutory language, and Congress’ intent to deter and punish.\textsuperscript{60}

In dealing with the Eighth Amendment Excessive Fines Clause as it applies to \textit{in re}m civil forfeiture proceedings, \textit{Austin} shaped the outer limits of the application of the Excessive Fines Clause.\textsuperscript{61} In effect, the decision was the first major case to expand the reach of the Excessive Fines Clause and would begin a trend of similar future cases.\textsuperscript{62} However, the \textit{Austin} Court declined to establish a multi-factor test to determine when forfeiture is "excessive" under the Eighth Amendment.\textsuperscript{63}

The Supreme Court did not interpret the Excessive Fines Clause of the Eighth Amendment for two centuries.\textsuperscript{64} Then in \textit{United States v. Bajakajian},\textsuperscript{65} the Supreme Court expanded the reach of the Excessive Fines Clause and created precedent for individuals to challenge imposed fines.\textsuperscript{66} In \textit{Bajakajian}, the defendant violated federal law by attempting to travel outside of the United States without reporting the full amount of money with which he was traveling.\textsuperscript{67} Federal law prohibited transporting more than $10,000 out of the country without reporting the money to customs

\textsuperscript{57} See Erickson, \textit{supra} note 29, at \S 4.02 (describing importance of \textit{Austin}).
\textsuperscript{58} See \textit{Austin}, 509 U.S. at 619 (considering forfeiture as punishment).
\textsuperscript{60} See \textit{id.} at 621-22 (explaining why forfeiture is subject to Eighth Amendment limitations).
\textsuperscript{61} See \textit{id.} at 608-09 (expanding scope of Excessive Fines Clause).
\textsuperscript{62} See Jochner, \textit{supra} note 53, at 78 (pointing to impact of \textit{Austin} on future cases).
\textsuperscript{63} See \textit{Austin}, 509 U.S. at 622 (declining to establish test for determining whether forfeiture is constitutionally "excessive"); \textit{Yee v. City of Escondido}, 503 U.S. 519, 538 (1992) (allowing lower courts to address establishing test).
\textsuperscript{64} See Beth A. Colgan et al., \textit{Reviving the Excessive Fines Clause}, 102 CALIF. L. REV. 277, 297 (2014) (commenting on gap in time between ratification of Excessive Fines Clause and analysis).
\textsuperscript{66} See Jochner, \textit{supra} note 53, at 78 (discussing impact on Excessive Fines Clause).
\textsuperscript{67} See \textit{Bajakajian}, 524 U.S. at 324 (discussing facts of case). Bajakajian attempted to leave the country without reporting over $10,000. \textit{Id.} The government charged Bajakajian with failing to report, making a false material statement to the United States Customs Services, and a third count that sought forfeiture of the money. \textit{Id.} at 325. Bajakajian pled guilty to the failure to report charge, the false statement charge was dropped, and the forfeiture matter proceeded to trial. \textit{Id.}
officials.\textsuperscript{68} Despite the customs officials’ warning, Bajakajian stated he and his family were carrying less than the reportable amount.\textsuperscript{69}

The issue before the Court was whether forfeiture of the entire amount violated the Excessive Fines Clause.\textsuperscript{70} Although the district court held that the entire amount was subject to forfeiture because it was “involved in” the offense, the Court only ordered the defendant to forfeit a portion of the money.\textsuperscript{71} The Court reasoned the full forfeiture would be grossly disproportional to the offense and therefore would violate the Eighth Amendment.\textsuperscript{72}

In \textit{Bajakajian}, the United States Court of Appeals for the Ninth Circuit affirmed the district court’s holding that forfeiture must fulfill two conditions: (1) the forfeited property “must be an ‘instrumentality’ of the crime committed” and (2) the property’s value “must be proportional to the culpability of the owner.”\textsuperscript{73} For the first time, the Court developed a standard for determining whether a punitive forfeiture is constitutionally excessive.\textsuperscript{74} The Court held that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense that it is designed to punish.\textsuperscript{75}

The principle of proportionality is the key consideration to determine whether a criminal forfeiture is constitutional.\textsuperscript{76} Accordingly, the amount of the forfeiture must relate to the gravity of the offense that it is designed to punish.\textsuperscript{77} In \textit{Bajakajian}, the Court did not define gross


\textsuperscript{69} \textit{See} Charmin, \textit{supra} note 68, at 1598 (describing details of case). Before seizing the currency, officials searched the defendant’s wallets and carry-on bags. \textit{id.} at 1599. A federal grand jury indicted Bajakajian for failure to report the money, making a false material statement to the United States Customs Service, and forfeiture of the total amount involved in violating the reporting requirement. \textit{id.}

\textsuperscript{70} \textit{See} Bajakajian, 524 U.S. at 324 (analyzing amount of forfeiture under Excessive Fines Clause).

\textsuperscript{71} \textit{See id.} at 325-26 (explaining district court’s forfeiture holding).

\textsuperscript{72} \textit{See id.} at 326 (describing ruling of district court).

\textsuperscript{73} \textit{See} Bajakajian, 524 U.S. at 326 (reasoning for holding); \textit{see also} United States v. Ferro, 681 F.3d 1105, 1111 (9th Cir. 2012) (defining instrumentality as “actual means by which an offense was committed.”).

\textsuperscript{74} \textit{See Viloski}, 814 F.3d at 108-09 (discussing Supreme Court’s application of Excessive Fines Clause).

\textsuperscript{75} \textit{See Bajakajian}, 524 U.S. at 324 (requiring forfeiture weighed against gravity of defendant’s offense).

\textsuperscript{76} \textit{See id.} at 334 (finding full forfeiture of defendant’s currency would be grossly disproportional to offense) (citing Austin v. United States, 509 US. 602, 622-23 (1993)).

\textsuperscript{77} \textit{See Austin}, 509 U.S. at 622-23 (discussing high penalty for offense committed).
disproportionality, but rather through its reasoning, identified four factors that should be considered to determine whether forfeiture is grossly disproportional. The four factors are as follows:

(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.

The decision in Bajakajian has potential implications beyond cases involving forfeiture. In Justice Kennedy’s dissent, he stated that Bajakajian may be a “serious disruption of a vast range of statutory fines.” The four-factor test would ultimately lay the groundwork and form the majority of the Second Circuit’s analysis in Viloski which took its analysis further.

III. FACTS

The broad issue before the Viloski court was whether the criminal forfeiture violated the defendant’s rights under the Excessive Fines Clause of the Eighth Amendment. The jury convicted the defendant of participating in a kickback scheme involving the construction of sporting goods stores. The defendant was sentenced to five years in prison and a three-year term of supervised release. He was additionally ordered to pay

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78 See Bajakajian, 524 U.S. at 337-39 (applying principles of forfeiture laws to facts of case); see also Viloski, 814 F.3d at 110 (quoting United States v. George, 779 F.3d 113, 122 (2d Cir. 2015)) (outlining four-factor test).

79 See Viloski, 814 F.3d at 110 (quoting George, 779 F.3d at 122) (stating four factors).


81 See id. (expanding impact of decision); Bajakajian, 524 U.S. at 344 (Kennedy, J., dissenting) (commenting on decision precedent).

82 See Viloski, 814 F.3d at 115 (citing Bajakajian, 524 U.S. at 324) (applying four factors to conclude forfeiture not grossly disproportional).

83 See id. at 107 (outlining main question).

84 See id. (stating resolution of case). As a broker for Dick’s Sporting Goods, the defendant took payments for consulting fees from developers and landlords in exchange for work never executed. Id. He would then either a portion or all of these payments to a senior Dick’s Sporting Goods executive. Id.

85 See id. (describing Viloski’s court orders)

Viloski was charged in a twenty-count indictment related to these activities. After a three-week trial, a jury convicted him of one count of conspiracy to commit mail and
$75,000 to two victims and forfeit about $1.2 million that he acquired through money laundering. The defendant appealed his conviction, arguing the lower court erred by failing to consider personal circumstances like age, health, and financial situation when determining whether the $1.2 million forfeiture was unconstitutionally excessive.

The defendant based his opposition on three grounds. First, he argued that his sixty-month sentence was decided from an “incorrectly-calculated Guidelines range,” and inconsistent to the forty-one-month sentence imposed on a co-defendant. Second, he argued that the restitution was awarded to entities that suffered “no cognizable loss.” The defendant’s final argument was that there was not an adequate explanation for the “enormous” forfeiture which violated his constitutional rights under the Excessive Fines Clause. The court reviewed his claims for clear error and found that the sentencing judge is only required to make a reasonable estimate of the loss and held the sentence was substantially below the guidelines because “the loss amount was greater than the actual harm caused.” The court then reviewed the forfeiture order de novo and the factual findings for clear error. The court held that:

While property need not be personally or directly in the possession of the defendant, his assignees, or his co-conspirators in order to be subject to forfeiture, the property must have, at some point, been under the defendant’s control

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wire fraud, two substantive counts of mail fraud, one count of conspiracy to commit money laundering, three counts of aiding and abetting money laundering, one count of aiding and abetting transactions in criminally derived property, and one count of making false statements. He was acquitted on the remaining counts.

Id.; See generally United States v. Phillips, 704 F.3d 754, 762 n.7 (9th Cir. 2012) (discussing mail fraud). To be convicted of mail fraud, the prosecution must prove the defendant devised a scheme for obtaining money or property by false or fraudulent pretenses, representations, or promises for the purpose of executing such scheme. Id.

See Viloski, 814 F.3d at 107-08 (describing monetary portion of sentence). See generally United States v. Hunter, 618 F.3d 1062, 1064 (9th Cir. 2010) (describing difference between restitution and criminal forfeiture). “The purpose of restitution ... however, is not to punish the defendant, but to make the victim whole again by restoring to him or her the value of the losses suffered as a result of the defendant’s crime.” Id. (citing United States v. Crandall, 525 F.3d 907, 916 (9th Cir. 2008)).

See Viloski, 814 F.3d at 107 (explaining defendant’s appeal arguments).

See United States v. Viloski, 557 F. App’x 28, 35 (2d Cir. 2014) (explaining defendant’s arguments in opposition to his sentence).

See id. (providing defendant’s arguments against improper sentence).

See id. (describing lack of significant damage on rest of entities).

See id. (outlining defendant’s constitutionality argument).

See id. at 36 (explaining court’s rationale).

See Viloski, 557 F. App’x at 36 (stating court’s standard of review).
or the control of his coconspirators in order to be considered "acquired" by him.\footnote{See id. (quoting United States v. Contorinis, 692 F.3d 136, 147 (2d Cir. 2012)) (detailing requirements for property to be subject to forfeiture).}

The Second Circuit reviewed the case and relied on \textit{Bajakajian} to analyze the constitutionality of the criminal forfeiture.\footnote{See \textit{Viloski}, 814 F.3d at 108 (discussing reliance on \textit{Bajakajian}).} First, the court determined that the Excessive Fines Clause applied.\footnote{See \textit{id.} at 109 (discussing courts application of Excessive Fines Clause); see also United States v. An Antique Platter of Gold, 184 F.3d 131, 139 (2d Cir. 1999) ("[T]he fine was imposed at the culmination of a criminal proceeding that required a conviction of the underlying felony and could not have been imposed upon an innocent party.").} The Excessive Fines Clause applied because the forfeiture was a punitive damage that was linked to the offenses.\footnote{See \textit{Viloski}, 814 F.3d at 109 (explaining why Excessive Fines Clause applied).} The court subsequently evaluated whether the criminal forfeiture of Viloski's money was unconstitutionally excessive.\footnote{See \textit{id.} at 110 (pointing to court's next focus); see also United States v. King, 231 F. Supp. 3d 872, 899-90 (W.D. Okla. 2017) (applying Excessive Fines Clause and testing for disproportionality).} This inquiry required determining whether the \textit{Bajakajian} factors constituted a comprehensive list of factors required for the proportionality analysis because the courts that have applied \textit{Bajakajian} have "neither added to the four factors nor described them as comprehensive."\footnote{See \textit{Viloski}, 814 F.3d at 110 (recognizing principal issue was whether factors are exhaustive); see also United States v. George, 779 F.3d 113, 122-23 (2d Cir. 2015) (applying four factors to proportionality assessment of challenged criminal forfeiture); United States v. Robbins, No. 1:10-cr-268, 2015 U.S. Dist. LEXIS 59423, at *11 (W.D.N.Y. May 6, 2015) (utilizing \textit{Bajakajian} factors to determine forfeiture proportionality); United States v. 300 Blue Heron Farm Lane, 115 F. Supp. 2d 525, 528 (D. Md. 2000) (noting lower courts consider \textit{Bajakajian} factors in determining whether forfeiture is grossly disproportional to offense).} After answering this question affirmatively, the \textit{Viloski} court added a fifth factor to consider when determining the proportionality of forfeiture under the Excessive Fines Clause.\footnote{See \textit{Viloski}, 814 F.3d at 111 (concluding courts may also consider whether forfeiture would deprive defendant of his livelihood).} The fifth factor was whether the forfeiture would deprive the defendant of his livelihood and future ability to earn a living.\footnote{See \textit{id.} (stressing impact of likelihood factor in analysis). The consideration of the fifth factor is not a separate inquiry, but an inquiry that may be conducted within the proportionality analysis already mandated by the Supreme Court in \textit{Bajakajian}. \textit{Id.}}

The court carefully distinguished determining whether a forfeiture would deprive the defendant of his livelihood from considering how forfeiture would affect a defendant's personal circumstances, including age, health, and financial situation.\footnote{See \textit{id.} at 112 (distinguishing livelihood from "present personal circumstances").} Ultimately, the court determined that whether the forfeiture would deprive the defendant of his livelihood is a
relevant factor for the proportionality analysis.\textsuperscript{103} The court also acknowledged that the judiciary’s role is to evaluate the constitutionality of punishment, while the legislature’s role is to determine the appropriate punishment for criminal offenses.\textsuperscript{104} Finally, after recognizing that personal circumstances, like age, health, and financial situation might indirectly affect someone’s ability to earn a living, the court stressed that personal circumstances are not a separate and freestanding factor.\textsuperscript{105}

The Second Circuit applied the traditional \textit{Bajakajian} four-factor test to Viloski’s conviction.\textsuperscript{106} When applying the first factor, the court considered the nature of the defendant’s crime and its relation to other illicit conduct, and concluded that the defendant engaged in a multi-year conspiracy involving numerous financial offenses and fraudulent acts.\textsuperscript{107} The court distinguished the defendant’s involvement in a continuing conspiracy from a crime arising out of a single event or transaction, such as Bajakajian’s failure to report money.\textsuperscript{108} Viloski acted as a consultant for numerous real estate transactions, in which he accepted a consulting fee, a part of which was passed on to an employee of the sporting goods store, who was also indicted.\textsuperscript{109}

Next, the court determined that Viloski fell within the class of persons the statute was intended to punish.\textsuperscript{110} The court reasoned that Viloski was convicted of violating statutes that were created to punish “those who use facilities of interstate or foreign commerce to engage in fraudulent schemes and financial transactions” and subsequently attempted to conceal the ill-gotten gains.\textsuperscript{111} The court proceeded to scrutinize the maximum sentence and fine that could be imposed for Viloski’s offenses under the Sentencing Guidelines and concluded the harsh punishments permitted by the Guidelines suggest considerable culpability and therefore, indicate that the forfeiture was likely constitutional.\textsuperscript{112} The Sentencing Guidelines call for Viloski to serve 108 to 135 months in prison and pay a fine up to $500,000.\textsuperscript{113}

\begin{footnotesize}
\begin{enumerate}
\item See id. at 111 (adding fifth factor to proportionality test).
\item See id. at 112 (recognizing court’s role is not to decide whether punishment is appropriate for particular offense).
\item See Viloski, 814 F.3d at 113 (deeming personal circumstances to be “indirectly relevant to a proportionality determination”).
\item See id. (outlining \textit{Bajakajian} factors required for analysis).
\item See id. (describing defendant’s crime).
\item See id. (explaining defendant’s willful participation in ongoing scheme).
\item See Viloski, 557 F. App’x at 31 (describing fraudulent money transfers).
\item See Viloski, 814 F.3d at 114 (stating second step in proportionality determination).
\item See id. (explaining purpose of statutes at issue).
\item See id. (comparing statutory guidelines with Viloski’s crimes).
\item See id. (summarizing Sentencing Guidelines applicable to Viloski’s crimes). The statutory maximum fine for such offenses is $3,250,000, which is more than two-and-a-half times the\end{enumerate}
\end{footnotesize}
The court then considered the nature of the harm that Viloski's conduct caused. The court felt comfortable imposing severe penalties because Viloski's scheme to defraud caused "extensive harm" to the parties involved. Finally, the court addressed the newly developed fifth factor and considered whether the challenged forfeiture would deprive Viloski of his livelihood. The evidence Viloski presented concerning his personal circumstances was insufficient render the forfeiture disproportionate because he made no attempt to show the forfeiture would deprive him of his livelihood by preventing him from earning a living after released from prison. The Second Circuit concluded that the forfeiture imposed on Viloski was not grossly disproportionate to the gravity of the offenses that had been imposed.

IV. ANALYSIS

Punishing culpable offenders is an integral feature of the American criminal justice system. Seizing property from individuals convicted of specific crimes via criminal forfeiture is punishment. The government can seek criminal forfeiture as a prosecutorial function, but forfeiture is limited by the Eighth Amendment to the United States Constitution. Forfeiture does not apply in all types of cases and is not always an appropriate punishment. What is less clear, especially in light of the Second Circuit's ruling in Viloski, are the guidelines for determining when criminal forfeiture is constitutionally excessive. As a result of the Second Circuit's adoption of a different test, the question is whether the Supreme Court implemented forfeiture amount in question thus, suggesting Congress viewed these offenses as significant crimes. There is a strong presumption that the forfeiture is constitutional if it falls within the guideline range. See United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1309 (11th Cir. 1999).

See Viloski, 814 F.3d at 114 (stating fourth factor of proportionality test).

See id. (affirming district court's finding).

See id. at 114-15 (recognizing fifth factor for proportionality determination).

See id. (noting absence of evidence that Viloski would be deprived of livelihood). Viloski presented evidence regarding his age, health, and financial situation, but the court did not credit this evidence as probative of the fifth factor. Id. at 115.

See id. at 115 (rejecting Viloski's constitutional attack on forfeiture).

See Cassella, supra note 1, at 2 (explaining reasons for forfeiture of assets).

See Cassella, supra note 1, at 14 (noting criminal forfeiture is part of sentence).

See Cassella, supra note 1, at 8 (acknowledging forfeiture orders are constrained by Eighth Amendment).


See Viloski, 814 F.3d at 114 (establishing new criteria to consider for forfeiture).
the right test for analyzing the proportionality of forfeitures under the Excessive Fines Clause.\textsuperscript{124}

The test was not specific enough for other courts to use it effectively, leaving too much discretion to the circuit courts to adapt their own tests.\textsuperscript{125} An unpredictable test threatens to undermine the Eighth Amendment’s protection from government overreach.\textsuperscript{126} The \textit{Bajakajian} analysis is unhelpful because it leaves too much discretion to the courts and prevents attorneys from reliably predicting whether an ordered forfeiture will withstand constitutional attack.\textsuperscript{127}

The \textit{Viloski} court was comfortable beginning its analysis by reviewing the constitutionality of criminal forfeiture using the four-factor test established in \textit{Bajakajian}.\textsuperscript{128} However, the Second Circuit may be reaching too far by adding a fifth factor to the analysis.\textsuperscript{129} The Second Circuit’s analysis changes the consideration that a court must conduct when

\begin{itemize}
  \item \textsuperscript{124} See \textit{Bajakajian}, 524 U.S. at 344 (Kennedy, J., dissenting) (questioning majority’s opinion). The dissent points out the potential impact of this decision:

For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court’s test, its decision portends serious disruption of a vast range of statutory fines. The Court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and disrespectful of the separation of powers. The irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it. To make its rationale work, the Court appears to remove important classes of fines from any excessiveness inquiry at all. This, too, is unsound; and with all respect, I dissent.

\textit{Id.}; see also \textit{Viloski}, 814 F.3d at 110-11 (recognizing courts applying \textit{Bajakajian} neither added to factors nor described them as comprehensive); United States v. Lippert, 148 F.3d 974, 976 (8th Cir. 1998) (acknowledging Excessive Fines Clause analysis is more difficult after \textit{Bajakajian} decision). The \textit{Bajakafian} dissent argued that the majority “treats many fines as ‘remedial’ penalties even though they far exceed the harm suffered . . . .” See \textit{Lippert}, 148 F.3d at 978 (quoting \textit{Bajakajian}, 524 U.S. at 344-45) (Kennedy, J., dissenting)). The dissent criticized the majority for not considering a fine as a punishment even if the fine is much larger than the money the defendant owes for his crimes. \textit{Id.} The dissenters also criticized the majority’s stance that civil penalties under the Anti-Kickback statute could potentially not be subject to protection under the Excessive Fines Clause because those penalties are a remedy rather than a punishment. \textit{Id.}

\textsuperscript{125} See \textit{Viloski}, 814 F.3d at 110 (discussing prior application of \textit{Bajakajian} factors). The Second Circuit acknowledged the primary question on appeal was whether the \textit{Bajakajian} factors are comprehensive – a question of first impression. \textit{Id.}

\textsuperscript{126} See U.S. CONST. amend. VIII (prohibiting “excessive fines” and “cruel and unusual punishments”); see also \textit{Viloski}, 814 F.3d at 113 (acknowledging result will be “inherently imprecise”).

\textsuperscript{127} See \textit{Viloski}, 814 F.3d at 113 (applying \textit{Bajakajian} framework to ordered forfeiture).

\textsuperscript{128} See \textit{id.} (beginning with four “traditional” factors outlined in \textit{Bajakajian}).

\textsuperscript{129} See \textit{id.} at 111 (justifying consideration of one additional factor).
determining whether a punitive forfeiture violates the Excessive Fines Clause of the Eighth Amendment.\(^\text{130}\) Using a fifth factor that examines whether the forfeiture at issue would deprive a defendant of his livelihood, the court shifts the focus from the criminal act to the criminal wrongdoer.\(^\text{131}\) When the Supreme Court first examined the issue of criminal forfeiture, it focused on the characteristics of the offense, not the characteristics of the offender.\(^\text{132}\)

Other circuits have completely disregarded the relevance of a defendant’s future ability to earn a living when determining whether criminal forfeiture is appropriate.\(^\text{133}\) In an Eleventh Circuit case, a physician defendant who was convicted for unlawfully distributing controlled substances argued that the forfeiture of his medical license was an excessive fine in violation of the Eighth Amendment.\(^\text{134}\) The court disregarded the defendant’s claim that his license stripped him of everything in his life and refuted the defendant’s claim by stating that most people earn a living without a medical license.\(^\text{135}\) Furthermore, the court explicitly held that it does not consider the “personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.”\(^\text{136}\) Although the defendant in that case abused his medical license to perpetrate the crime, if the same facts are applied in the Second Circuit the case may have had a different result because the court can consider the defendant’s future ability to earn a living.\(^\text{137}\)

The *Viloski* court is not clear why a defendant’s personal circumstances, such as age, health, or financial situation should not be considered when making a proportionality determination.\(^\text{138}\) However, the court stated such circumstances could be considered when determining

\(^{130}\) See *id.* (adding additional factor to analysis). Viloski failed to introduce facts proving the challenged forfeiture would deprive him of his livelihood. *Id.* at 114 n.17.

\(^{131}\) See *Viloski*, 814 F.3d at 114 (analyzing impact of criminal forfeiture on defendant’s livelihood).

\(^{132}\) See generally *Bajakajian*, 524 U.S. at 324 (discussing details of offense involved).

\(^{133}\) See *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (holding personal impact of forfeiture irrelevant when determining Eighth Amendment violations).

\(^{134}\) See *id.* at 1287 (disregarding personal impact of medical license forfeiture).

\(^{135}\) See *id.* at 1292 n.11 (dismissing relevance of medical license for livelihood).

\(^{136}\) See *id.* (reiterating insignificance of personal impact when assessing constitutionality of forfeitures); see also *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (recognizing forfeiture of residence is analyzed as not determined as “excessive” as applied to individual).

\(^{137}\) See *Viloski*, 814 F.3d at 111-12 (balancing forfeiture with defendant’s future ability to earn living).

\(^{138}\) See *id.* at 114 (using Viloski’s failure to provide strong argument for why forfeiture would deprive him of livelihood).
whether forfeiture would deprive a defendant of his livelihood.\textsuperscript{139} It is contradictory to emphasize the irrelevancy of the personal factors in themselves, only to allow the court to ultimately consider the factors in conjunction with the fifth factor.\textsuperscript{140} This shift in analysis leaves too much open for interpretation when determining criminal forfeiture.\textsuperscript{141}

Regardless of whether or not a defendant is ordered criminal forfeiture, a defendant is already at severe risk of being deprived his livelihood from a criminal conviction and remedial payment.\textsuperscript{142} There are consequences of criminal convictions that are often hard to discern at the moment of conviction.\textsuperscript{143} The consequences of a conviction can severely impact an individual’s future social and economic status.\textsuperscript{144} These consequences are often imposed at the discretion of state and federal agencies independent of the court system.\textsuperscript{145} Such consequences consist of “temporary or permanent ineligibility for public benefits, public or government-assisted housing, and federal student aid; various employment-related restrictions; disqualification from military service; civic disqualifications such as felon disenfranchisement and ineligibility for jury service; and, for non-citizens, deportation.”\textsuperscript{146} Even when people fully rehabilitate, they may face countless barriers reintegrating into society.\textsuperscript{147} These barriers may be accompanied by stigmatization.\textsuperscript{148}

The Viloski court focused more on Viloski’s failure to present evidence to support his claim, rather than certain personal factors that would impact his ability to earn a future living.\textsuperscript{149} There may have been a different

\textsuperscript{139} See id. at 115 (citing factors “irrelevant in themselves”).

\textsuperscript{140} See id. (opining factors “irrelevant” but considering them in conjunction with challenged forfeiture).

\textsuperscript{141} See id. (leaving factors unclear for future courts analysis).


\textsuperscript{143} See Pinard, supra note 142, at 634-39 (discussing consequences of criminal convictions).

\textsuperscript{144} See Pinard, supra note 142, at 634-35 (emphasizing scope of consequences).

\textsuperscript{145} See Pinard, supra note 142, at 634-35 (explaining how consequences may attach “automatically upon the conviction by operation of law.”).

\textsuperscript{146} See Pinard, supra note 142, at 635-36 (discussing monetary and social impacts).


\textsuperscript{148} See id. at 990-91 (discussing reality of stigma attached).

\textsuperscript{149} See Viloski, 814 F.3d at 114 & n.17 (“Viloski has adduced no facts at all suggesting that the challenged forfeiture would deprive him of his livelihood . . . .”).
result if Viloski had a more compelling argument or was able to present more facts showing the forfeiture would deprive him of his livelihood.\textsuperscript{150} Therefore, the court should focus more on explaining how the analysis of personal factors could affect an excessive fines case.\textsuperscript{151}

Age is commonly a factor when determining the punishment for a defendant.\textsuperscript{152} Courts historically punish younger defendants or juveniles less severely so they can rehabilitate and create a future life.\textsuperscript{153} At sixty-five years old, Viloski could not argue rehabilitation or that he had his whole life ahead of him.\textsuperscript{154} The court may have looked at this situation differently had Viloski been younger.\textsuperscript{155} If a court is allowed to consider youthfulness as a mitigating factor, the court should also consider a defendant’s older age and a life without committing crime as a mitigating factor.\textsuperscript{156}

\textsuperscript{150} See id. at 114 (holding Viloski presented no evidence suggesting he would be deprived of his livelihood).

\textsuperscript{151} See id. at 115 (citing factors as "irrelevant in themselves.").

\textsuperscript{152} See Roper v. Simmons, 543 U.S. 551, 574 (2005) (analyzing differences between adults and juveniles). The Court found three reasons juveniles should be categorically less culpable than adults: (1) “lack of maturity and an underdeveloped sense of responsibility”; (2) “more vulnerable or susceptible to negative influences and outside pressures”; and (3) “character of a juvenile is not as well formed as that of an adult.” Id. at 569-70 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (citing Eddings v. Okla., 455 U.S. 104, 115-16 (1981)); See also Barry C. Feld, Symposium: “YOUTH MATTERS: MILLER V. ALABAMA AND THE FUTURE OF JUVENILE SENTENCING”: Guest Editor John F. Stinneford: The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time, 11 OHIO ST. J. CRIM. L. 107, 135 (2013) (discussing the relevance of age). “[T]he Supreme Court applied the Eighth Amendment to the entire category of juvenile offenders... and required states to consider youthfulness as a mitigating factor in sentencing.” Id. at 107. States are prohibited from executing juveniles. Id. Generally, there is a societal understanding that a person is no longer a child once he or she turns eighteen.

\textsuperscript{153} See Roper v. Simmons, 543 U.S. 551, 568 (2005) (acknowledging majority of states have rejected imposing death penalty on juveniles).

\textsuperscript{154} Brief of Petitioner-Appellant at 3, United States v. Viloski, 814 F.3d 104, No. 5:09-CR-00418-02 (2d Cir. 2016) (considering Viloski’s older age as less compelling factor).

\textsuperscript{155} See Feld, supra note 152, at 139 (explaining youthfulness as factor). The Model Penal Code sentencing provisions state when an offender commits a crime before the age of eighteen, “the offender’s age shall be a mitigating factor, to be assigned greater weight for offenders of younger ages.” Id. at 144-45 (quoting Model Penal Code § 6.11(a)). The Model Penal Code recommends younger offenders get priority for “rehabilitation and reintegration into the law-abiding community” and judges have the ability to commit juveniles to programs instead of giving prison sentences. Id. at 145 (quoting Model Penal Code § 6.11(b) and (d)).

\textsuperscript{156} See id. at 144-45 (explaining that youths have better chance to absolve their mistakes); IV. SENTENCING, 41 GEO. L.J. ANN. REV. CRIM. PROC. 721, 743 (2012) (examining Sentencing Guidelines and Sentencing Reform Act of 1984). Under the Sentencing Guidelines, career offenders are assigned the highest criminal history guideline. Id. at 749. An individual is labeled a career offender if the following are met:

1. the defendant was at least eighteen years old at the time of the instant offense;
2. the instant offense is a felony that is a crime of violence or a controlled substance offense;
The facts are undisputed that Viloski was in poor health.\textsuperscript{157} However, the courts view on health as a mitigating factor is unclear even though poor health can deprive a defendant from earning a living.\textsuperscript{158} Courts have used their discretion in considering poor health when making rulings.\textsuperscript{159} Maybe the reasoning is that if an individual pays a criminal forfeiture fine, he would not have the means to pay for medical expenses.\textsuperscript{160} Regardless, there seems to be a disconnect between health and future livelihood.\textsuperscript{161}

Additionally, the financial situation of a defendant ordered to pay a criminal forfeiture should be relevant in determining if the defendant would be deprived of his livelihood.\textsuperscript{162} In another Eleventh Circuit case, the court noted that the potential impact of forfeiture on a defendant’s finances is not a factor to be considered.\textsuperscript{163} A defendant who is ordered to forfeit money is directly financially impacted by that ordered payment.\textsuperscript{164} Although Viloski argued that he does not have the means to pay the money back, the court has measures for situations where a defendant does not have the money to pay back remedial damages, including seizing future assets.\textsuperscript{165}

\textit{Id.} and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

\textit{Id.}
\textsuperscript{157} See Viloski, 53 F. Supp. 3d at 532 (determining Viloski’s health and collection of Social Security benefits not considered). Viloski suffered from several ailments and had procedures including a double bypass surgery with post-surgery complications and a cancer diagnosis. \textit{Id.}

\textsuperscript{158} See \textit{id.} (noting Viloski’s poor health but not explaining relevance).

\textsuperscript{159} See \textit{Demonstrating inability to pay}, 48A NY Jur 2d Domestic Relations § 2818 (database updated Feb. 2017) (noting party’s poor health as factor to be considered on motion to punish for contempt). Another consideration in New York is the defaulting party’s use of money for other legitimate expenses, such as paying college tuition. \textit{Id.} However, the court should not consider inability to pay if the reason is something negative, such as habitual drinking, or if an individual is seeking to cheat the system by transferring property to a child. \textit{Id.} Also, the inability to pay will usually not be recognized as a defense if the individual’s loss of employment was willful. \textit{Id.}

\textsuperscript{160} See Viloski, 53 F. Supp. at 532 (“Moreover, as set forth in the financial status affidavit accompanying defendant’s memorandum, as a direct result of his conviction, incarceration, and costs of his defense, defendant contends he has no assets with which to pay any forfeiture, and there is little prospect that he will be able to pay any forfeiture amount in the future considering his age, poor health, and physical and civic disabilities.”).

\textsuperscript{161} See Viloski, 814 F.3d at 115 (listing personal factors including health).

\textsuperscript{162} See \textit{id.} (including financial situation as relevant personal factor).


\textsuperscript{164} See Brief of Petitioner-Appellant at 6, United States v. Viloski, 814 F.3d 104, No. 5:09-CR-00418-02 (2d Cir. 2016) (arguing person’s health and financial situation affect ability to earn living).

\textsuperscript{165} See Viloski, 814 F.3d at 108 (citing Viloski’s inability to pay forfeiture ordered by court); \textit{see also} United States v. Fogg, 666 F.3d 13, 18 (1st Cir. 2011) (basing forfeiture decision on defendant’s inability to pay). “[A] defendant’s inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional nor is it
The Viloski court continually cites the three personal factors as age, health, and financial circumstances as relevant factors for determining criminal forfeiture, but leaves open the possibility that other personal circumstances can be considered.\(^{166}\) For instance, the profession of the defendant is a personal factor that may impact the defendant’s livelihood and the ability to get a job in the future.\(^{167}\) Another factor can be whether the defendant has to provide for his family.\(^{168}\) Since many of the personal factors are intertwined with each other, such factors can be challenging to separate.\(^{169}\)

V. CONCLUSION

The Austin and Bajakajian cases heard by the Supreme Court of the United States are landmark decisions impacting the applicability of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The cases expanded the use of the Excessive Fines Clause, allowing defendants to challenge not only the proportionality of civil forfeitures, but also the constitutionality of criminal forfeitures. The decisions in these cases established the constitutionality of forfeitures and laid the groundwork for the Excessive Fines Clause analysis which the Viloski court applied in a criminal forfeiture action.

As determined in Viloski, when the Second Circuit is deciding whether an ordered criminal forfeiture is grossly disproportionate to a crime, a court must analyze whether the forfeited property is an “instrumentality” of the crime committed, and then if the property’s value is propositional to its owner’s culpability. The court must then analyze the criminal forfeiture using the Bajakajian four-factor test. The four factors are: (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 even the correct inquiry.” See Fogg, 666 F.3d at 20 (quoting United States v. Levesque, 546 F.3d 78, 85 (1st Cir. 2008)). A monetary judgment allows the government to collect on a forfeiture order in the “same way that a successful plaintiff collects a money judgment from a civil defendant[,] . . . even if a defendant does not have sufficient funds to cover the forfeiture at the time of conviction, the government may seize future assets to satisfy the order.” Id. at 20.

\(^{166}\) See Viloski, 814 F.3d at 115 (citing factors as relevant only when in conjunction with forfeiture).

\(^{167}\) See In re Disbarment of Viloski, 566 U.S. 1033, 1 (2012) (entering Viloski’s order for disbarment). Viloski was an attorney and had to forfeit his bar license. Id. Therefore, he could no longer could work in the profession he kept for most of his adult life. Id.

\(^{168}\) See Viloski, 814 F.3d at 110 (considering additional responsibility to provide for family). The main issue on appeal was a question of first impression which analyzed whether the factors are exhaustive. Id.

\(^{169}\) See id. (noting connectedness of factors).
principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the defendant’s harm.

As part of the proportionality analysis developed by the Bajakajian Court, the Viloski court held that the constitutionality of a criminal forfeiture may also be determined by analyzing the circumstances under an additional fifth factor. The fifth factor expanded the analysis by examining whether the forfeiture would deprive the defendant of his future ability to earn a living. However, the court was not allowed to consider as a discrete factor, whether a defendant’s personal circumstances, including age, health, and financial situation would be impacted by the criminal forfeiture. The ruling by the Second Circuit creates too much uncertainty by expanding the grossly disproportional analysis. The Second Circuit expanded the Bajakajian four-factor analysis, but did not provide guidance on how to apply the new factor.

Gregoire Ucuz