No. 24-7227

IN THE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Lonnie L. Kocontes — PETITIONER
(Your Name)

vs.

People of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

California Court Of Appeal, 4th District, Division 3
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lonnie L. Kocontes CDCR# BN8076
(Your Name)

480 Alta Rd
(Address)

San Diego, CA 92179
(City, State, Zip Code)

None (Incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

Q1: Does the Due Process Clause, independent of the Double Jeopardy Clause, require a state to apply issue and/or claim preclusion to a federal judgment in a state criminal prosecution?

Q2: If yes, is the state free to apply its law of preclusion to a federal civil asset forfeiture judgment in the criminal defendent's favor, when the asset forfeiture case alleged the same conduct for which the state was prosecuting?

Q3: If federal law of issue/claim preclusion must be applied by the state under such circumstances, do the civil privity standards announced by this Court in Taylor v. Sturgell apply to the federal judgment? (See 553 US 880 (2008).)

Q4: Under the applicable federal, common-law rules of issue/claim preclusion to the asset forfeiture judgment, was there privity between California and the United States such that the judgment barred the award of restitution awarded by the state?

Kocontes v. California

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LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

None that are pending, but Case No. 23-5143 in this Court was related.

Opinion Below/Appendices

Appendix A: The unpublished opinion of the California Court Of Appeal, 4th District, Division 3 in case no. GO-60333

Appendix B: The denial of review of Appendix A by the California Supreme Court, case no. S287657

Appendix C: Summary Judgment in U.S. v. $1,026,781.61, USDC Central District of California case no. SACV 09-04381

Appendix D: Docket excerpts from Appendix C

Appendix E: Appellant's Opening Brief, People v. Kocontes, California Court Of Appeal, 4th Dist., Div. 3 #GO-60333 (Appdx. A)

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC § 1257(a)

Petitioner seeks review of the 9/19/24 order of the California Court Of Appeal in case # GO-60333, for which a petition for review was denied on 12/18/2024 by the Calif. Supreme Court in case # S287657.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

United States Consitution, Amendment XIV

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition concerns a criminal restitution order entered against Petitioner in a murder prosecution captioned People v. Kocontes, Orange County California Superior Court Case No. 13ZF-0163, California Court of Appeal, 4th District, Division 3 No. GO-60333, review denied, California Supreme Court No. S287657 (December 18, 2004). The circumstances surrounding the murder conviction are summarized in the denied Petition For A Writ Of Certiorari, Case No. S23-5143

In May 2006, Petitioner's then ex-wife, Micki Kanesaki, went overboard on a cruise ship off the coast of Italy. Her body was discovered 36 to 48 hours later in the Mediterranian Sea. An Italian pathologist determined that Ms. Kanesaki was strangled, although a defense expert disagreed, indicating that the cause of death was blunt force trauma to the head. It was estimated that the distance she fell was 65 to 80 feet. There were no witnesses, no forensice evidence connecting Petitioner to Ms. Kanesaki's death, and no video.

Following an FBI investigation conducted jointly with the Orange County, California Sheriff's Department, the FBI seizedover $1 million of Petitioner's money from a bank account and eventually filed a lis pendens against his home, essentially freezing over 90% of his total assets. This action followed the refusal of both the criminal U.S. prosecutor and the Italian prosecutor to bring criminal charges against Petitioner.

The civil asset forfeiture suit proved to be a disaster for the government. After extensive discovery battles and motion practice, summary judgment against the government was entered on November 12, 2012. (See USDC Central Dist. Cal. Case No. SACV 09-04381, Doc. 220, Appendix C.) In its judgment, which has never been vacated or modified, the District Court made the following finding:

> While suspicion naturally would focus on the domestic partner in a case such as this, suspicion is not enough to survive summary judgment. When all is said and done, the government has presented nothing more than allegations and speculation to support its claim that Kocontes murdered Kanesaki, which is insufficient to create a genuine issue of material fact.

(See Appendix C at 28.)

Following the government's loss, it appealed and brought a motion for indicative ruling after it convinced the Orange County California District Attorney to criminally prosecute Petitioner. Although the US District Court granted the motion for indicative ruling, the court expressly stated that it was not altering the grant of summary judgment. (See Appendix D at 3, Doc. 299, 4/16/2013.) The civil asset forfeiture case and appeal have been stayed ever since, so the summary judgment in Petitioner's favor remains unaffected.

The investigation into Ms. Kanesaki's death was conducted jointly between the FBI and the Orange County Sheriff's Department from the very beginning. OCSD participated in both interviews of Petitioner--who cooperated fully, even voluntarily providing a DNA sample. And when the Deputy OCDA, Susan Price, interviewed a witness in February 2013, she told her, "We're not working with the FBI **anymore.**" (See Appendix E at 13-14.) When the first homocide case against Petitioner was dismissed for lack of jurisdiction, the first person Deputy Price called when she stepped into the hallway was not her supervisor, but the AUSA assigned to the failed civil asset forfeiture case, Frank Kortum.

The FBI's joint investigation produced benefits to the California criminal prosecution that California could not have obtained on its own. For example, using the Patriot Act, the FBI obtained thousands of pages of financial records without subpoena, and used databases unavailable to state law enforcement to locate them. Similarly, the FBI recruited Petitioner's own investigator, Billy J. Price, who began working for them as a double agent in hopes of obtaining a reward if the forfeiture case was ultimately successful (while he simultaneously took Petitioner's money to investigate Ms. Kanesaki's death). Price segued into assisting the state prosecutor when she put him in a wired courthouse room with witness Amy Nguyen who had already told

a federal grand jury that she knew nothing about Petitioner's cruise. But in January 2009, while acting as an FBI informant and Petitioner's investigator, Price (Bill) recorded Nguyen claiming that Petitioner planned to have "Bill Price's people" to go on the cruise and "throw Micki off the boat" while Bill Price and his girlfriend would be Petitioner's "alibi." According to Amy Nguyen (whom Petitioner had divorced years earlier) Bill Price talked to her before recording her, making similar false allegations about Petitioner that Bill Price made when he browbeat her at the courthouse in 2013, e.g., that Petitioner had wrongfully divorced her, took her home, was a pedophile, etc.

Moreover, two separate FBI agents testified at Petitioner's state trial (Kenneth Stokes and Rick Simpson), including Stokes' claim that Petitioner "mumbled" what sounded like an admission. Simpson was allowed to claim that Petitioner's case languished because he could not get any information from the Italian authorities; in fact, he had interviews of cruise ship staff (who saw Petitioner and Kanesaki hours after she was purportedly strangled and thrown overboard), autopsy results, and reports from international FBI agents (more documents the state would not have had absent the close working relationship with the FBI). But due to defense counsel's incompetence, none of this information was ever told to the jury--defense counsel never impeached a single witness with prior testimony or statements.

The theory of both the asset forfeiture case and the state criminal prosecution was that Petitioner murdered Kanesaki for financial gain. In fact, Kanesaki's sole source of income for the last 10+ years of her life was disability insurance payments of $2800 monthly. Although Ms. Kanesaki's niece claimed she became a millionaire from stock trades, the tax returns from the early 2000's until her death consistently showed capital losses. Also, Petitioner traced nearly all of the couple's jointly-held assets to his separate property post-divorce. (See Appendix E at 4-12.)

Although Petitioner's trial public defender failed to raise the effect of the forfeiture judgment, her replacement at the restitution hearing preserved the issue. The superior court ignored it entirely, making no ruling (an implied denial). The California Court Of Appeal denied by applying a single case from a different court of appeal that applied state law. (See Appendix A at 7-10.)

REASONS FOR GRANTING THE PETITION

Question 1: Does the Due Process Clause, independant of the Double Jeopardy Clause, require a state to apply issue and/or claim preclusion to a federal judgment in a state criminal prosecution?

There is disagreement amongst the circuit courts of appeals on this issue. The potential to "constitutionalize" claim or issue preclusion as a due process requirement first arose in a Judge Friendly opinion, U.S. ex rel DiGiangiemo v. Regan (2d Cir 1975) 528 F2d 1262, 1265-1267. As is typical, the issue arose following a successful motion to suppress, in state court. Although Judge Friendly ultimately decided that his procedural default required denial of his habeas petition, Judge Friendly stated that had DiGiangiemo successfully moved to suppress evidence in the first instance, "due process would forbid relitigation of the issue [of admissibility] determined adversely to it [the prosecution]." Id. at 1266.

On the other hand, the First and Eleventh Circuits have declined to apply due process to preclusion issues, holding that the elements of due process were not met in the cases before them in that issue preclusion was not satisfied. E.g., U.S. v. Bonilla Romero (1st Cir1987) 836 F2d 37, 43; U.S. v. Perchitti (11th Cir 1992) 955 F2d 674, 676. The Fifth Circuit, however, has been more direct in its disagreement with Judge Friendly. E.g., 814 F2d 200, 203-04 ("We decline to find the collateral estoppel doctrine cognizable as a constitutional claim apart from those claims that are recognized under the double jeopardy clause"). The Third Circuit similarly rejects Judge Friendly's view of a due process requirement to apply preclusive effect to prior judgments that suppressed evidence. U.S. ex rel Hubbard v. Hatrak (3d Cir 1978) 588 F2d 414, 418 ("These well-known cases hold that . . . the interest of a judicial system is a sufficient reason for applying the doctrine of collateral estoppel . . . . They do not, however, suggest that non-party collateral estoppel is constitutionally required").

This Court initially expressed "grave doubts whether collateral estoppel can be regarding as a constitutional requirement" in Hoag v. New Jersey (1958) 356 U.S. 464, 471. But after the 5th Amendment was

incorporated via the 14th Amendment, this Court applied principles of issue preclusion to a criminal case involving Missouri in Ashe v. Swenson (1970) 397 U.S. 436 under the Double Jeopardy Clause. Thus, there is no principled reason not to apply issue and/or claim preclusion to a judgment issue pretrial such as the one in this case.

Judge Friendly identified four factors underpinning his due process analysis of issue preclusion in DiGiangiemo, all of which apply to the facts of this case. First, the fear of convicting the innocent is the most important policy concern. In this case, the District Court made a factual finding that the government's evidence was insufficient as a matter of law to even get to trial in the forfeiture case. While the state may argue that new evidence justifies the conviction, surely there was the same evidence--or the ability to get it--available to the United States previously. If Petitioner had lost the forfeiture case, surely the state would have sought to admit that fact or even argue that, given certain issues should be deemed established against him because he had an opportunity to litigate them. But parties--especially the United States with all of its resources--are not allowed multiple bites at the apple:

> Every litigant would like multiple chances to win; that [double standard] is what the United States is seeking, while it contends that for Egan and Egan Marine any one loss would be dispositive. And, by bringing the civil case first, the United States should receive the benefit of civil discovery, which is more extensive than that allowed in criminal prosecutions by Fed R. Crim Pro. 16--discovery that it could put to use in the criminal case as well as the civil one. We understand why the United States seeks these advantages but do not think it is entitled to them, without the detriment of being bound by the cicil judgment if it loses. If it fails to show some fact in the civil suit by a preponderance of the evidence, it is precluded from trying to show the same thing beyond a reasonable doubt.

U.S. v. Egan Marine Corp. (7th Cir 2016) 843 F3d 674, 678.

The state's other excuse for not applying issue preclusion to Petitioner's summary judgment will likely be that some evidence, such as the recording of Amy Nguyen contradicting her federal grand jury testimony. But merely because the state believes that the first

case was "unfair" because all of the government's evidence was not considered, that will not allow the state to escape issue preclusion that would otherwise apply:

> [E]ven if the first proceeding must afford a 'fair and full opportunity to litigate, the government has not provided any authority to show that a denial of a motion to continue or exclusion of evidence deprives a decision of its collateral effect. On the contrary, in Harris v. Washington, 404 U.S. 55 (1971) the state of Washington argued that the trial court improperly excluded probative evidence in a prosecution for murder so that the state did not have a chance to fully litigate its charges against Harris. The Supreme Court said that collateral estoppel barred a second prosecution, even if the trial court did err in the first case.

U.S. v. Abatti (SD Cal 1978) 463 F Supp 596, 601-02.

Judge Friendly's second factor is "the legitimate reliance a defendant may place on a prior adjudicationwhether or not it was correctly decided; this policy seems to be at the core of U.S. v. Oppenheimer (1916) 242 U.S. 85." Here, Petitioner expended over $300,000 litigating the asset forfeiture case (which the U.S. was ordered to, but has not, paid), only to run out of funds to defend the subsequent criminal case based on the same alleged conduct. That left him with an incompetent public defender who had serious health problems resulting in her retirement a few months after losing Petitioner's case. Petitioner should have been entitled to rely on the summary judgment in the forfeiture case, or at the very least the appellate process to follow after his victory.

Judge Friendly's third factor--"the desire to avoid the waste of effort by all concerned--defendant, prosecution, witness, judge, and jury--involved in relitigating the matter once determined"--was not met in DiGiangiemo because the habeas petitioner raised the issue for the first time in a collateral attack. 528 F2d at 1269. But in this case, Petitioner's claim was raised at the trial court level in the restitution hearing in the first instance.

Judge Friendly's fourth consideration is "the danger of prosecutorial harassment." One would be hard-pressed to find another case like this one as far as prosecutorial harassment is concerned. Having been unable to get Petitioner criminally charged by either the criminal AUSA or the Italians, the civil AUSA brought meritless forfeiture cases against virtually every asset Petitioner owned. When that failed, he con-

vinced his co-investigative colleagues in state government to file criminally, who were promptly bounced out of court for lack of jurisdiction. The state prosecutor appealed that ruling solely to avoid issue preclusion, brought an indictment (the first case was a complaint) that would get the case before a former prosecutor as judge, then after avoiding issue preclusion it dismissed its appeal--but not until Petitioner had expended tens of thousands of dollars opposing the appeal.

Accordingly, Petitioner requests that this Court hold that the Due Process Clause, independent of the Double Jeopardy Clause, requires a state to apply issue and/or claim preclusion to a prior judgment when embarking on a criminal prosecution.

Question 2: If Due Process does required applying issue or claim preclusion independently from double jeopardy, is a state free to apply its own preclusion law to a federal judgment?

This question appears to have been answered in Semtek Int'l, Inc. v. Lockheed Martin Corp (2001) 531 U.S. 497, 506-07:

> Neither the Full Faith & Credit Clause, US Const. Art. IV, §1 nor the full faith and credit statute, 28 USC §1738 addresses the question [of the claim-preclusive effect of a federal judgment] . . . . yet we have long held that States cannot give these judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.

Although California has given lip service to this fact, the Court of Appeal in this case applied a California case interpreting California law to hold that, the only way in which issue preclusion could apply to the federal forfeiture judgment in Petitioner's favor was if the state prosecutor had actively participated in the forfeiture case--an event almost certain to never occur before a criminal prosecution. (See Appendix A at 8, discussing People v. Meredith (1992) 11 Cal App 4th 1548.) The California Supreme Court acknowledged that the federal common law of preclusion should be applied to federal judgments in California state courts in Levy v. Cohen (1977) 19 Cal 3d 165, 172 ("The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition"); (citing Stoll v. Gottlieb (1938) 305 U.S. 165, 170-71).

Nevertheless, in this case the California Court of Appeal applied a California case interpreting California's law of issue preclusion to the federal forfeiture judgment, and the California Supreme Court refused to review and correct that decision.

Question 3: If the federal law of issue/claim preclusion must be applied by the state under such circumstances [to a federal judgment], do the civil privity standards announced by this Court in Taylor v. Sturgell apply to the federal judgment (553 U.S. 880 (2008)?

The federal law of privity uses multiple tests in varying language to describe the concept of privity. This Court announced six ways in which privity may be established in the civil context in Taylor v. Sturgell (2008) 553 U.S. 880, 893-895:

> First, '[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement' [citation omitted]; . . . .
>
> Second, nonparty preclusion may be justified based on a variety of pre-existing 'substantive relationships' between the person to be bound and a party to the judgment; . . . .
>
> Third, we have confirmed that, 'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who was a party' to the suit; . . . .
>
> Fourth, a nonparty is bound by a judgment if she 'assumed control' over the litigation in which that judgment was rendered. . . . .
>
> Fifth, a party bound by a judgment may not avoid its preclusive effect by relitigating through a proxy; . . . .
>
> Sixth, in certain circumstances a special statutory scheme may 'expressly foreclose successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process.

Although the Taylor Court rejected the notion of "virtual representation as overly broad and vague, it reiterated that the third category above may be satisfied when the trial court took care to ensure that the absent parties' interests were protected, or that the parties to that litigation understood their suit to be on behalf of absent parties. Id. at 896-97. As noted, these concerns for nonparties are rooted in due process concerns for the absent parties, not to ensure that state and federal governments get multiple chances to establish the same facts.

The federal courts applying issue or claim preclusion to the judgments of separate sovereigns in criminal cases take a variety of inconsistent approaches. At one extreme in the anti-privity view, the only time that a pretrial judgment, such as the grant of a suppression motion, will have issue preclusive effect is if the prosecutor who brought the unsuccessful first case, resulting in the grant of a suppression motion, simultaneously functioned as a specially-appointed federal prosecutor in the second case. U.S. v. Perchitti (11th Cir. 1992) 955 F2d 674, 676 ("In suuport of her assertion of privity, Reynolds points to the fact that Dirks prosecuted the state action [in which evidence was suppressed] and then was appointed as a Special Assistant United States Attorney for the prosecution of the federal case. Had Dirks worn both hats simultaneously, this might have been a closer question"). In the Perchitti court's view, the fact that separate sovereigns are involved is dispositive of all issues related to double jeopardy principles. Id. at 676, n. 4. In this case, the California Court of Appeal slightly modified the Perchitti approach, holding that privity would have existed only if the state prosecutor had actively participated in the prior federal forfeiture case. (See Appendix A at p, para. 2.) The Court Of Appeal also relied on the separate sovereign doctrine. (Id. at 9, para. 1.)

One problem with the separate sovereign/active participation approach is that it almost never exists. On the one hand, this view emphasizes that the state and federal governments are separate sovereigns who may act independently. But then, courts such as the Perchitti court and the California Court Of Appeal,require a level of joint participation that belies their separateness. A state prosecutor will almost never take an active role in a federal prosecution or forfeiture case that precedesa state criminal prosecution, and under PerAlso, when federal and state prosecutors/law enforcement work together from the inception of a case as they did here, opportunities to manipulate the rules arise. For example, when one jurisdiction allows only limited discovery but a civil case with broad discovery like an asset forfeiture

action, is available, prosecutors will bring the civil case first to get the benefit of more expansive discovery. And in this case, the FBI recruited Petitioner's own investigator, Bill Price, to spy on the defense activities. But when Petitioner complained about such conduct in the state criminal prosecution, the response was that the state was not responsible for the FBI's actions. Another way in which collusive governments may cheat is when one learns of exculpatory information, but by not passing it onto the other, a Brady violation can be avoided.

Although it represents a minority position, issue preclusion has been applied even when an original order suppressing evidence was essentially overturned in a differenct case. U.S. v. Arterbury (10th Cir 2020) 961 F3d 1095. The defendant was charged with child pornography but the district court dismissed without prejudice after suppressing evidence. The government charged another person based on the same warrant found defective in Arterbury's case, and got the trial court reversed when it again suppressed evidence. Armed with the appellate ruling, the government reindicted Arterbury. Arterbury lost his issue preclusion motion, but the 10th Circuit held that to be error. The court relied in part on this Court's observation that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." Ashe v. Swen(1970) 397 U.S. 336, 444; 961 F3d at 1102-03. The court also relied on Judge Friendly's rationale in DiGiangiemo that "[t]he difference in the stage of the proceeding at which the judge rules shouldn't affect whether the issue can be revisited in the second proceeding." 528 F2d at 1265-66; 961 F3d at 1103.

A common definition of privity in the civil context includes when a party is "so identified with a party to former litigation that he presents precisely the same right in respect to the subject matter involved." Stratosphere Lit., LLC v. Grand Casinos, Inc. (9th Cir 2002) 298 F3d 1137, 1142 n.3. This definition of privity was used to apply privity to a federal prosecutor who sought to relitigate a successful suppression motion in state court in U.S. v. $106,647 (D. Md 2014) 2014 US Dist LEXIS 118544 *5-8.

Some courts have recognized that a close working relationship between federal and state law enforcement can create privity in the context of multiple prosecutions, notwithstanding that they are separate sovereigns. The court recognized this potential in Londono-Rivera v. Virginia (ED Va 2001) 155 F Supp2d 551. In that case, a joint DEA task force with Metropolitan police on board arrested the defendant as a result of a joint investigation. Charges in federal court were dismissed after a suppression motion was granted. The federal prosecutor then asked the state prosecutor to pursue state charges. The defendant then sought a federal injunction to bar the state prosecution after the same evidence was allowed therein. The court ultimately denied the injunction on procedural grounds, but noted that the closeness of the working relationship could satisfy the test for privity when "'a party is so identical in interest with another that he represents the same legal right.'" Id. at 565 [citation omitted]. Observing that the Fourth Circuit generally would not find privity based merely on federal-state cooperation, but the court stressed that none of the prior cases involved prosecutions in which it appeared that both the federal and state law enforcement had the same purpose in mind, i.e., enforcement of state drug laws. Id. at 566-567. In this case, both the asset forfeiture case and the restitution order affirmed by the Court Of Appeal share the same purpose--to recover assets for the Kanesaki estate. See also U.S. v. Evans (ED La 1987) 655 F Supp 243 (Adopting Judge Friendly's due process analysis based on the identical evidence and interest of the state and federal governments after evidence was suppressed in the state prosecution).

This commonality of interest as a sufficient basis on which to find privity pervades the civil law. See e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan'g Agency (9th Cir 2003) 322 F3d 1064, 1081 ("Even when the parties are not identical, privity may exist when a party is 'so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved"); Perez v. Espinoza (CD Cal 2020) 2020 US Dist LEXIS 80295 *8 ("Privity is a flexible concept determined to exist when the parties share a sufficient commonality of interest");

Many civil cases describe the commonality of interest as the identical subject matter. E.g., Harris v. Ocwen Loan Serv'g, LLC (6th Cir 2017) 2017 US App LEXIS 23818 *7 ("The concept of privity relates to the subject matter of the litigation . . . not to the relationship between the parties themselves"); Media Group v. Tuppatsch (D Conn 2003) 298 F Supp2d 235, 241 n.7 ("[t]he concept of privity relates to the subject matter of the litigation, not to the relationship between the parties themselves"); Donley v. Hudson's Salvage, LLC (ED La 2011) 2011 US Dist LEXIS 136908 *36 ("Privity is the connection or relationship between two parties, each having a legally recognized interest in the same subject matter").

Given that a commonality of interest or identical subject matter is typically sufficient to find privity in the civil context, what justification can require more in a criminal setting? As Judge Friendly explained when he rejected the notion that the government should have a second chance to present evidence in the second case:

> We think not. While it was unnecessary to determine in U.S. v. Oppenheimer, supra, whether application of collateral estoppel on behalf of a criminal defendant was consitutionally required, overly sensitive ears are not needed to detect due process overtones in Mr. Justice Holmes' statement:
>
> > It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.
>
> 247 U.S. at 87.

> Question 4: Under the applicable federal, common-law rules of issue/claim preclusion to the federal asset forfeiture judgment, was there privity between California and the United States such that the judgment barred the award of restitution by the state?

This Court recognized in Taylor v. Sturgell that the categories it announced for a finding of privity in a civil context "is meant only to provide a framework . . . not to establish a definitive taxonomy." 553 U.S. at 893 n.6. Thus, in the criminal context a different framework is needed that provides sufficient safeguards for personal freedom. Although routine cooperation that occurs after a separate sovereign has brought an unsuccessful case should be allowed, a different result should obtain when the two sovereigns work hand-in-

hand from the onset and manipulate the system to get benefits that would not be available if they were acting independently, such as the broader discovery available in a civil case when it precedes a criminal prosecution. Here, California and the FBI engaged in a joint investigation from the beginning, and the state criminal prosecution was undisputedly based primarily on evidence (witness interviews) obtained by the FBI and testimony of two FBI agents. The FBI even recruited Petitioner's own private investigator to act as a double agent and inform them of defense activities. Critically, Petitioner's investigator, Bill Price, supplied the FBI with a recording of Amy Nguyen, the Petitioner's ex-wife, contradicting her federal grant jury testimony and implying that Petitioner premeditated Ms. Kanesaki's murder. When Petitioner sought an evidentiary hearing on the issue of excluding Price's and Nguyen's testimony due to the invasion of the defense camp, the California superior court refused to conduct one, explaining that, in its view California could not be held responsible for the FBI's conduct. Using the Patriot Act, the FBI obtained thousands of pages of Petitioner's financial records, which the state prosecutor would not have gotten on her own. And it was no coincidence that the state prosecution was lauched shortly after the federal summary judgment and the AUSA's realization that his appellate chances were not good.

Not only did the federal and state prosecutors share a common interest in recovering money for the Kanesaki estate, they also had a common interest in combatting crime. E.g., U.S. v. McElroy (SD NY 1990) 1990 US Dist LEXIS 11924 *2 ("[B]oth sovereignties have a common interest in . . . combatting crime"). Although it was not used to impeach Ms. Kanesaki's brother, Toshitaka Kanesaki, at trial, his diary showed an entry in 2013 documenting communication from AUSA Kortum's office stating that he would receive whatever proceeds were forfeited for the benefit of the Kanesaki estate.

As for the adequacy of the federal government's representation of the parties' shared interests, one need only examine the docket of the forfeiture case to understand the aggressive manner in which the AUSA litigated the case, filing scores of ex parte motions to the point where the court ordered him to stop filing such motions. The United

States engaged in extensive discovery, hired expert witnesses and conducted a multi-national investigation. California received the direct benefit of this work by the federal government.

Conclusion

Petitioner requests that this Court issue the writ of certiorári, appoint counsel to represent him, and establish a briefing schedule to determine the merits.

Dated: March 12, 2025

Respectfully submitted,

Lonnie Kocontes

Lonnie Kocontes
Petitioner
In Propria Persona