

No. 17-576

In the Supreme Court of the United States

OSAMA H. SALOUHA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In response to the Petition for Writ of Certiorari, the government can offer no persuasive justification why the government should be excused from complying with two fundamental rules of civil procedure in obtaining judgments without trial in civil forfeiture cases. The government does not dispute that it was relieved from supporting its motion to strike claims with evidence as required by Rule 56 of the Federal Rules of Civil Procedure, and then relieved from moving for a default judgment pursuant to Rule 55 in taking a final judgment of forfeiture. The government argues that the procedural rules should not apply but these arguments misconstrue the rules at issue and the record below.

The government also does not dispute that the application of these procedural issues is of broad significance to asset forfeiture cases in general and that there is material disagreement as to their application in the courts below. In particular, the government's insistence that it need not move for a default judgment applies not only to fugitive disentitlement cases but to the substantial number of cases where claims and answers are struck for technical non-compliance with the rules. The government's continuing insistence that it can forfeit millions of dollars based only upon the allegations in a verified civil complaint only reinforces the need for resolution by this Court.

This case illustrates well the danger in allowing the government to take property without allowing the claimants to defend and based only upon the allegations in a verified civil complaint. The

government cannot dispute that the complaint lacked allegations to trace each defendant asset to alleged unlawful conduct. This forfeiture leaves us without any confidence that the government did not simply take “innocent” property. This Court should hear this case and confirm that our procedural protections require more.

ARGUMENT

I. In Seeking A Final Judgment In Civil In Rem Forfeiture Without A Trial, The Government Must Comply With RULES 55 AND 56 Of The Federal Rules of Civil Procedure

A. There is A Circuit Split on the Application of the Rule 56 Summary Judgment Standard

Petitioners contend that in moving to strike the claims, the government was required to support its motion with evidentiary material as required by rule 56 of the Federal Rules of Civil Procedure. The Brief for the United States in Opposition (“Government’s Brief”) argues that the Sixth Circuit did not need to decide the question as to the application of Rule 56 because the government’s motion to strike claims was “undisputed.” This argument is wrong for at least three reasons.

First, as the government otherwise acknowledges, the district court treated the motion to strike claims as disputed; it accepted Petitioner’s brief in opposition to the first motion to strike claims as also responsive to the second motion to strike claims. (Order, Pet. App. 29). This opposition challenged the failure of the government to support its motion to strike with

admissible evidence, which deficiency continued in the second motion to strike. (Opposition, RE 90, Page ID # 705).

Second, the government's argument, like the Sixth Circuit's reasoning, is premised on a misunderstanding of summary judgment procedure. A party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Addickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "(I)f the moving party will bear the burden of persuasion at trial, that party *must* support its motion with *credible evidence* – using any of the materials specified in Rule 56(c) -- that would entitle it to a directed verdict if not controverted at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986)(emphasis added); *see also* Fed. R. Civ. P. 56 (c)(1)(A) (requirement of citing to evidentiary material in the record). "[T]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. *No defense to an insufficient showing is required.*" *Addickes*, 398 U.S. at 160 (emphasis added).

Accordingly, because the government failed to support its motion to strike claims with the type of evidence required, the government never discharged its initial burden and Petitioner had no requirement to respond. This is not a "unique" circumstance; it is discussed in *Addickes*. In holding that the motion to strike could be granted because Petitioners did not respond a second time to the government's additional unsworn attorney allegations, the Sixth Circuit

relieved the government of presenting admissible evidence as required by Rule 56 and impermissibly shifted the burden of proof to Petitioner to disprove the applicability of the fugitive disentitlement doctrine.¹

Third, it is illogical to say that the Sixth Circuit did not decide the issue as to whether Rule 56 applies. As is undisputed, Petitioners argued that Rule 56 required the government to proffer admissible evidence, not just unsworn attorney allegations. The Sixth Circuit further recognized that the government moved to strike the claims without submitting “any affidavits or exhibits.” (Opinion, Pet. App. 17-18). But the Sixth Circuit declined to hold the government to the evidentiary requirements of Rule 56 and relegated to a footnote the supporting view of the Second Circuit that summary judgment procedure should not apply in the context of a motion to strike claims pursuant to the fugitive disentitlement statute. (See Opinion, Pet. App. 17-18 *citing United States v. Technodyne*, 753 F.3d 368, 381-82 (2d Cir. 2014)). The Sixth Circuit’s published opinion only deepens the existing circuit split.

¹ Like the Sixth Circuit, the government emphasizes counsel’s inability to say where Mr. Salouha was located on morning of oral argument in the court of appeals. This is irrelevant. It was never disputed that Mr. Salouha was outside of the jurisdiction at the time the motion to strike was decided. The disputed issue was the fifth element of intent: whether Mr. Salouha was absent in order to avoid prosecution. And what is relevant is the intent (purpose for Mr. Salouha’s absence) at the time the district court granted the motion to strike -- not Mr. Salouha’s whereabouts and the reasons therefore almost two years later on the date of oral argument. What is relevant is the sufficiency of the record before the district court at the time the court decided the motion.

The government tries to downplay the split but does not rightly characterize the cases against it. In *United States v. \$6,976,934, Plus Interest Deposited into Royal Bank of Scotland Int’l, Held in the Name of Soulbury, Ltd.*, 554 F.3d 123, 133 (D.C. Cir. 2009), the D.C. Circuit’s holding implicitly approved of applying summary judgment procedures: “[u]nder the correct interpretation of the fugitive disentitlement statute, there is a genuine issue of material fact whether Scott is a person to whom the statute applies...” If the D.C. Circuit did not believe that the summary judgment procedure should apply, it would not have reversed the case on this basis. Furthermore, in *United States v. Salti*, 579 F.3d 656, 666 n.10 (6th Cir. 2009), the Sixth Circuit expressly approved of the approach in *Soulbury* of treating a motion to strike claims pursuant to the fugitive disentitlement statute as a motion for summary judgment. Moreover, the government does not acknowledge that in *Degen v. United States*, 517 U.S. 820 (1996), this Court reviewed the entry of summary judgment because a claimant was deemed a disentitled fugitive.

Like the decision below, the government appeals to a sense of “rough justice.” But under clearly established Rule 56 procedures, Mr. Salouha had no obligation to respond unless or until the government demonstrated that it could prove each element of the fugitive disentitlement statute with admissible evidence. The government bore the burden of proof. Like all litigants, the government should be held to the rules and its burdens, particularly in civil forfeiture where “the government has a direct pecuniary interest

in the outcome of the proceeding.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993).

This Court should resolve the issue of the application of Rule 56 summary judgment procedures to motions to strike claims in civil forfeiture cases.

B. With No Claims Pending In a Civil In Rem Forfeiture Case, the Government Must File a Motion For A Default Judgment and Demonstrate a Lawful Right to the Property

The government does not dispute that once the claims were struck it took the assets without ever moving for a default judgment and demonstrating a lawful right to the defendant property. Indeed, as the Sixth Circuit recognized, the district court “failed” to determine that there was a basis in the record for the forfeiture. (Opinion, Pet. App. 23). The government’s response to this complete failure of due process is to first argue that Petitioners do not even have the right to be heard.

This contention is itself a point of disagreement between the circuit courts which merits resolution by this Court. (See Petition, p. 18-19). The Sixth Circuit cited other decisions supporting silencing claimants once their claims are struck (*See* Pet. App. P. 21), but other circuit court decisions stand for allowing disentitled claimants to challenge the failure of process. *See e.g., United States v. Batato*, 833 F.3d 413, 427-28 (4th Cir. 2016)(allowing disentitled fugitive to challenge lack of due process on appeal); *Collaszos v. United States*, 368 F.3d 190 (2d Cir. 2004)(same). The notion that a “disentitled fugitive” can simply be

silenced from challenging the failure of process is contrary to a long line of precedents from this Court. (*See* Petition, p. 17-18). The Sixth Circuit quotes the “unseemly spectacle” of a fugitive defending property in a civil action, but it is still more “unseemly” for the courts to deny claimants the right to seek review of the denial of established process. Even if the fugitive disentitlement statute is constitutional on its face, a principled distinction should be drawn between allowing an alleged fugitive to seek review of the process afforded and defending the underlying merits of the civil forfeiture action. Otherwise, the legislature can simply disentitle categories of litigants and the disentitled cannot even challenge the denial of process.

Regardless, as the government acknowledges, the Sixth Circuit did address the issue raised as to the failure to move for a default judgment. The Sixth Circuit held that seeking a default judgment in a civil forfeiture action is “the general practice, and perhaps the best practice,” but that the failure to do so should not be “fatal” to the government in this case. (Opinion, Pet. App. at 22). The Sixth Circuit thus excuses the government from complying with the hard requirement of Federal Rule of Civil Procedure 55(b)(2): “...the party *must* apply to the Court for a default judgment.” (emphasis added)."

The government’s response is to deny that Rule 55 applies to civil forfeiture cases. The government contends that the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture (“Supplemental Rules”) control and do not require a motion for a default judgment. (Government’s Brief, p. 18). This argument is premised on a basic misunderstanding of

the interplay between the Supplemental Rules and the Federal Rules of Civil Procedure. As this Court has explained, the Supplemental Rules “are not comprehensive codes regulating every detail of practice.” *Miner v. Atlass*, 363 U.S. 641, 648 (1960). The Federal Rules of Civil Procedure “provide the basic procedures for forfeiture; the Supplemental Rules are simply an overlay—they are, as their title indicates, *supplemental*.” *United States v. \$8,221, 877.16 in United States Currency*, 330 F.3d 141, 156-57 (3d Cir. 2003)(emphasis in the original). The Federal Rules of Civil Procedure do apply unless there is an inconsistency with the Supplemental Rules. *Id.*; see also Supplemental Rules, Rule A (acknowledging same). Accordingly, because the Supplemental Rules do not address the procedure for obtaining a judgment once a claim is struck, the Federal Rules of Civil Procedure apply. The silence of the Supplemental Rules does not mean that the government is relieved from complying with any process.

The government also argues incorrectly that Rule 55 speaks of parties and not claimants and thus has no application in a civil forfeiture case. The case cited by the government in support actually stands for the opposite proposition. In *United States v. \$22,050.00 United States Currency*, 595 F.3d 318, 323-24 (6th Cir. 2010) the court held that Rule 55 should govern the motion of a claimant for relief from default judgment. As the court concluded: “the proper way to analyze this case is to focus on the general Rule 55(c) test for setting aside default in the case of a known claimant filing a technically compliant but untimely verified claim and answer, without regard to the Supplemental Rule G cases.” Furthermore, the First Circuit has rejected the

argument the government makes that Rule 55 should not be applied in civil forfeiture cases because it speaks of “parties” and not “claimants.” See *United States v. \$23,000 in United States Currency*, 356 F.3d 157, 163-64 (1st Cir. 2004).

Even the Sixth Circuit decision acknowledged that moving for a default judgment is “perhaps the best practice.” (Pet. App. At 22). This Court should use this case to confirm that it is the required practice. Moreover, as set forth in the Petition, this Court should further clarify what is required of the government in moving for a default judgment in a civil forfeiture case. (See Petition, 13-15, as to inconsistency of approach in lower courts). The government does not dispute that the lower courts are taking varied approaches as to the required showing for a default judgment in a civil forfeiture case. The government also does not dispute that this is an issue of broad application in civil forfeiture cases and does not just apply to cases where claims are struck pursuant to the fugitive disentitlement statute.

Petitioners submit that this Court should require the government in moving for a default judgment to demonstrate “the guilt” of each defendant asset. Cf. *Klapprott v. United States*, 335 U.S. 601 (1949). This case presents an excellent vehicle to decide this issue because the government never attempted to proffer a lawful basis for the forfeiture of each defendant asset. Saying that the assets have been used in money laundering does not talismanically justify the wholesale forfeiture of assets that have never been shown to be tainted with crime. The mere commingling

of tainted and untainted funds in an account, without more, does not subject the entire account to forfeiture. *See United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998); *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997).

II. The Forfeiture of Property Without Allowing a Claimant to Be Heard and Based Only Upon A Verified Civil Complaint Violates Due Process of Law

The government cannot defend the due process violation in this case. No decision of this Court supports taking property without the owner's right to be heard or the plaintiff demonstrating a lawful right to the property. Instead, the government argues that Petitioners failed to preserve the due process argument. This is not correct.

At the time of the filing of the motions to strike claims, Petitioners might have anticipated the loss of the right to defend property and based a due process argument upon it. But this facial challenge to the fugitive disentitlement statute has thus far been rejected in the federal court of appeals. *See e.g., Collaszos v. United States*, 368 F.3d 190 (2d Cir. 2004). What Petitioners could not have anticipated is that after striking the claims, the government would not comply with its obligation to move for a default judgment and demonstrate the "guilt" of the defendant property. This further deprivation of due process results in a far stronger "as applied" challenge to the forfeiture in this case. Petitioners made this challenge in the district court at the earliest opportunity: when it became clear that the government was not going to move for a default judgment and demonstrate a basis

for the forfeiture of each defendant asset.² There is no actual waiver of the argument.

Moreover, the Sixth Circuit held that the verified civil complaint alone is a sufficient basis to enter a final order of forfeiture. (Pet. App. 23-25). Unless Petitioners can simply be silenced, they are entitled to petition for review whether this holding comports with due process of law.³ On this issue, the government does not address *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), where this Court held a civil complaint that followed a criminal conviction to be an insufficient basis for even a temporary restraint of property. How then can a civil complaint (without a criminal conviction) support a final order of forfeiture? Petitioners respectfully submit this Court should clarify that a forfeiture without the opportunity to be heard or any more proof than the allegations in a civil complaint cannot stand.

² The Sixth Circuit characterized this as a “motion for reconsideration,” but in fact Petitioners sought reconsideration of only the striking of the claims.

³ As discussed, even accepting the allegations in the complaint as true, the complaint does not establish a basis for the forfeiture of each defendant asset. But the allegations in the complaint are not in fact undisputed. Petitioners specifically dispute the allegation that assets from Southside pharmacy were “commingled” with all of the defendant accounts. For example, one of the accounts seized was Mr. Salouha’s 401(k) account from a prior employer and did not contain any assets transferred from Southside pharmacy. (Declaration, RE 164-1, Page ID#: 1407.)

CONCLUSION

For the foregoing reasons and those more fully discussed in the Petition, this Court should grant a writ of certiorari and hear this case.

Respectfully submitted,

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