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“Brian Degen, Won't You Please Come Home”: Can the Government Seize Millions of Dollars in Property Because Its Owner Will Not Return to the United States for Trial?

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Case at a Glance

In this case, the Supreme Court is asked to determine if an American with dual citizenship and residing in Switzerland can be denied the opportunity to defend against the Government's seizure of over \$5 million of his property located in the United States because he will not return to this country to stand trial for trafficking in marijuana.

"Brian Degen, Won't You Please Come Home": Can the Government Seize Millions of Dollars in Property Because Its Owner Will Not Return to the United States for Trial?

by Jay E. Grenig

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Under certain circumstances, a fugitive from justice is not permitted to invoke the jurisdiction and resources of American courts to determine his or her rights. The doctrine, known as the fugitive disentitlement doctrine, is based on principles of fairness and, in essence, says that a person cannot have it both ways; one cannot flee justice in one proceeding and ask for justice in another. This case asks the Supreme Court to decide if the doctrine applies to a complicated set of facts which includes the fact that the person deemed a fugitive has been charged in the United States but not convicted; the fact that the individual has refused to submit to trial in the United States; and the fact that the individual faces trial in his country of residence on charges similar to those pending in the United States.

ISSUE

Can a court invoke the fugitive disentitlement doctrine to take possession of millions of dollars worth of property from a nonresident citizen who has refused to return to the United States to confront a criminal indictment, who has not been convicted in a United States court, and who currently faces criminal

charges in his country of residence similar to the charges filed against him in this country?

FACTS

The Government claims that for more than 20 years Brian Degen was one of the leaders of a major marijuana trafficking operation. After authorities arrested one of Degen's alleged co-conspirators and began an investigation into Degen's activities but before a grand jury indicted him, Degen left the United States and resettled in Switzerland. In 1989, a Nevada federal grand jury indicted Degen on various charges arising from his role in the marijuana trafficking operation.

Because Degen's father was born in Switzerland and Degen was born in California, Degen is a Swiss citizen as well as a citizen of the United States. However, the extradition treaty between Switzerland and the United States does not require either country to surrender its own citizens to the other for purposes of facing criminal charges. In the years since his indictment, Degen has not returned to the United States.

*BRIAN J. DEGEN V.
UNITED STATES
DOCKET NO. 95-173*

ARGUMENT DATE:
APRIL 22, 1996
FROM: THE NINTH CIRCUIT

On the same day that Degen was indicted, the Government filed a civil forfeiture complaint seeking possession of and title to various properties owned by Degen. (Forfeiture occurs when a person loses his or her rights in property as a result of criminal or quasi-criminal wrongdoing.)

The Government alleged that most, if not all, of Degen's property should be forfeited because it can be traced to or was used to facilitate the drug trafficking offenses charged in the criminal indictment. The property, located in California, Nevada, and Hawaii, has a value of more than \$5 million.

Degen answered the forfeiture complaint through counsel. He did not, however, appear to answer the criminal charges against him or make a good faith effort to submit to the court's jurisdiction in the criminal case.

The Government sought to dismiss Degen's claims in the forfeiture proceeding on the ground that he was and remains a fugitive from justice in the related criminal prosecution. Although Degen claimed that the property in question was acquired with legitimate funds and supplied documentation to that effect, the federal district court held that the fugitive disentitlement doctrine barred him from defending his property against forfeiture. 755 F. Supp. 308 (D. Nev. 1990).

Degen appealed to the Ninth Circuit which affirmed, holding that the Degen's claims to the property were properly dismissed under the fugitive disentitlement doctrine. The court observed that Degen knew that he was under indictment in the United States and persisted in his refusal to appear in the criminal case while, at the same time, attempting to use the judicial sys-

tem to defend against the forfeiture of his property. These facts were sufficient to invoke the fugitive disentitlement doctrine to preclude Degen from taking advantage of the judicial system to defend his property while flouting that very system in the criminal case against him. The Ninth Circuit was unmoved that the fact that Degen had been arrested by Swiss authorities, at the apparent behest of the United States, and faced trial there on drug trafficking charges. 47 F.3d 1511 (9th Cir. 1995).

The Supreme Court now reviews the Ninth Circuit's application of the fugitive disentitlement doctrine, having granted Degen's petition for a writ of certiorari. 116 S.Ct. 762 (1996).

CASE ANALYSIS

As noted above, the fugitive disentitlement doctrine provides that a fugitive from justice under certain circumstances loses the right to call upon the resources of the courts. In *Molinaro v. New Jersey*, 396 U.S. 365 (1970), the Supreme Court explained that an individual should not be able to take advantage of the resources of a court to determine his or her claims, simultaneously flouting the court's authority to decide a criminal case.

The fugitive disentitlement doctrine is an equitable doctrine of procedure developed by federal courts in their capacity to supervise and manage the proceedings before them. It was articulated over a century ago by the Supreme Court in *Smith v. United States*, 94 U.S. 97 (1876), when it was used to dismiss the appeal of a convicted criminal who became a fugitive while the appeal of the conviction was pending. The Court considered it unfair that the fugitive-appellant could accept the benefits from a favorable adjudication of the appeal while avoiding the consequences of an adverse decision. The

Supreme Court also has held that a fugitive's escape amounts to a waiver of his right to appeal; that the fugitive disentitlement doctrine serves an important deterrent function; and that the doctrine promotes the efficient and dignified operation of the judicial system.

The application of the fugitive disentitlement doctrine by the courts is discretionary. In other words, courts are not required to apply the doctrine, but, in cases in which it could be applied, courts are free to consider whether or not the doctrine is appropriate under the circumstances presented. *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993) (the sanction of disentitlement should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct).

The Court also has declined to apply the doctrine in the case of a defendant whose conviction has been reversed or otherwise set aside, and it is the prosecution, not the defendant, that seeks review of that decision. *United States v. Sharpe*, 470 U.S. 675, 682 n. 2 (1985). Degen relies on *Sharpe*, contending that the Court's decision in that case strongly suggests that the disentitlement doctrine applies *only* when the fugitive is the one affirmatively seeking judicial action.

Several federal courts of appeals have extended the doctrine beyond a fugitive's appeal of a criminal conviction, applying the doctrine to preclude a convicted fugitive from participating in civil proceedings not involving forfeiture but still related to the underlying criminal charges. For example, in *Conforte v. Commissioner of Internal Revenue*, 692 F.2d 587 (9th Cir. 1982), a taxpayer who fled after being convicted of crimi-

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nal charges for tax evasion was held not entitled to appeal the Tax Court's determination of tax deficiency and penalties. In *Doyle v. United States Department of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), the court held that a fugitive who failed to appear for sentencing was not entitled to obtain his files from Government investigators through use of the Freedom of Information Act. And, in *Broadway v. City of Montgomery*, 530 F.2d 657 (5th Cir. 1976), the Fifth Circuit declined to decide an appeal from an adverse ruling in a civil rights case that arose out of an illegal wiretap and brought by a fugitive who had pled guilty to a charge of cocaine possession brought as a result of the same illegal wiretap.

Four federal courts of appeals have gone further still and have extended the doctrine to civil forfeiture proceedings involving the property of both convicted and not-yet convicted fugitives. Those cases hold that a claimant who is a fugitive in a related criminal proceeding should not be allowed to defend against forfeiture of his or her property because the fugitive has disregarded the authority of the court and, thus, has waived the right to be heard. See *United States v. Eng*, 951 F.2d 461 (2d Cir. 1991); *United States v. \$129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985); *United States v. Timbers Preserve*, 999 F.2d 452 (10th Cir. 1993); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane*, 868 F.2d 1214 (11th Cir. 1989).

The Sixth and Seventh Circuits, on the other hand, have declined to apply the fugitive disentitlement doctrine to civil forfeiture proceedings involving the property of convicted fugitives or fugitives under indictment but not yet convicted. See *United States v. \$83,320 in United States Currency*, 682 F.2d

573 (6th Cir. 1982); *United States v. Michelle's Lounge*, 39 F.3d 684 (7th Cir. 1994); *United States v. \$40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994).

This case takes application of the fugitive disentitlement doctrine further yet, applying it in a civil case seeking forfeiture of millions of dollars in property in the absence of a criminal conviction and in light of a pending foreign prosecution that parallels the Government's attempted prosecution in this country. Focusing on these unique facts, Degen urges that the doctrine should be limited to persons who have become fugitives following a criminal conviction. He contends that a person should not be considered a fugitive simply because he or she declines to travel to the United States to stand trial in a criminal case.

Declaring that the use of the fugitive disentitlement doctrine in civil forfeiture actions is inconsistent with the Supreme Court's decisions applying the doctrine, Degen also asserts that a property owner's status as an not-yet convicted fugitive in a separate criminal proceeding does not offend the dignity of judicial proceedings.

The United States disagrees, arguing that it is the defendant's status as a fugitive, whether convicted or not, that triggers the doctrine. The Government argues that the doctrine is based primarily on the equitable principal that a litigant should not be entitled to invoke the protective processes of the judiciary while simultaneously undermining its authority by avoiding justice in a criminal case.

Supreme Court decisions upholding the use of the fugitive disentitlement doctrine in cases involving appeals from criminal convictions have not been fought on constitu-

tional grounds because a convicted criminal has no constitutional right to an appeal. *Ortega-Rodriguez*, 113 S. Ct. at 1210 (1993) (Rehnquist, C.J., dissenting). On the other hand, the seizure of assets pursuant to civil forfeiture has been held to constitute a deprivation of property, invoking the quintessential procedural due process rights of notice and an opportunity to be heard. *Michelle's Lounge*, 39 F.3d at 700-701.

Degen argues that the fugitive disentitlement doctrine should not be applied in a civil forfeiture action because doing so would deprive him of property without due process of law. Degen says he is entitled to a pre-deprivation hearing in order to defend against the action seeking to permanently divest him of his property.

Even if mistaken on his main arguments, Degen contends that the Supreme Court should return the case for further proceedings to determine if the Government came to the courts hearing this case with "unclean hands." Degen maintains that the United States attorney misled both the district court and the Ninth Circuit concerning the Government's role in securing Degen's arrest, detention, and pending prosecution by the Swiss government.

Contending that Degen should not prevail on this argument, the Government maintains that the factual and legal issues raised in this regard were not explored in the lower courts solely because Degen declined to press the matter.

SIGNIFICANCE

The Supreme Court's prior fugitive disentitlement cases have all involved proceedings in which appellants, i.e., persons seeking redress from a higher court, had become fugitives by escaping from

custody or jumping bail after being convicted of criminal charges. In addition, in each case, the fugitive was seeking reversal of a criminal conviction. In other words, none of the Court's cases has involved someone who refused to travel from his or her country of residence to the United States for trial.

This case gives the Supreme Court the occasion to determine whether or not the fugitive disentitlement doctrine should be expanded substantially in the manner recognized by several federal circuit courts of appeals. The Court has the opportunity to determine whether the doctrine applies to proceedings that do not involve a fugitive seeking reversal of a conviction; whether it should apply to a criminal defendant who has not been convicted; whether the doctrine applies to someone who has neither escaped from custody nor jumped bail, but has refused to return to the United States from a foreign residence where the person just happens to be a citizen; and whether it applies to proceedings separate from the proceedings from which the person has become a fugitive.

If the Court holds for the Government, the decision will make it easier for law enforcement officials to seize property owned by *suspected* criminals, particularly those who reside in foreign countries. If the Court rules for Degen, the Government will find it more difficult to seize property owned by foreign residents, while criminal defendants might be given a reason to flee before trial. The Government, however, could act to freeze property and other assets pending the outcome of a criminal case, an action that would counter the consequences of a decision favorable to Degen.

ATTORNEYS OF THE PARTIES

For Brian J. Degen (Lawrence S. Robbins; Mayer, Brown & Platt; (202) 463-2000).

For the United States (Drew S. Days, III, Solicitor General; Department of Justice; (202) 514-2217).

AMICUS BRIEFS

In support of Brian J. Degen
Public Citizen (Counsel of Record: Alan B. Morrison; Public Citizen Litigation Group; (202) 588-1000);

Gaith R. Pharaon (Counsel of Record: Richard F. Lawler; Whitman Breed Abbott & Morgan; (212) 351-3000).