RICO COMES TO THE JANUARY 6 INVESTIGATION — BUT NOT THE WAY YOU THINK

Longterm readers of this site know that bmaz always gets incensed when people discuss RICO, mostly because those discussions tend towards magical thinking that RICO can make complex legal questions magically result in jail time for bad guys.

That's why I put RICO in the title.

But RICO really has come up in a January 6 case: pertaining to DOJ's attempted seizure of the $90,000 John Sullivan made off selling his video of the insurrection. Much of that filing dismisses Sullivan's attempt to keep the money because he needs it for living expenses. If he genuinely needed it to pay his lawyer, he might have an argument, but DOJ says he's got other bank accounts with significant funds for that.

> Here, the defendant has submitted no declaration, financial affidavit, or banking statements. He has not provided any information about his assets outside his bank account ending in 7715, the only account from which funds were seized. He has not provided information about his short- or long-term liabilities. He has not detailed his sources of income, despite being, to the government's understanding, currently employed by his father. He has not described his ability to use other assets, liquid and non-liquid, to pay basic necessities, including the assistance of family members and friends. He has not provided information regarding what funds he has recently

> expended toward household expenses and what any additional funds are requested, nor detailed what the "household expenses" entail. Such specification is particularly essential where expenditures can dramatically vary, irrespective of necessity, based on a defendant's typical lifestyle. Cf. United States v. Egan, 2010 WL 3000000, at *2 (S.D.N.Y. July 29, 2010) ("The Court does not take lightly a request to release funds allegedly stolen from former customers in order to finance luxuries" such as high-end vehicles or a multimillion-dollar home").
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> A more fulsome showing is particularly warranted in light of the defendant's Pretrial Services Report from the arresting jurisdiction, which was prepared from an interview conducted on January 15, 2021 and, according to D.C. Pretrial Services, submitted to this Court with the Rule 5 papers. That document reported significant funds in unspecified bank accounts of the defendant – funds that wholly predate, and lie entirely outside the scope of, the government's seizure warrants. The government's seizure warrants instead surgically targeted the defendant's $90,875 in proceeds from sales of his video footage from the U.S. Capitol – all of which was deposited into his bank account subsequent to January 15. The Pretrial Services Report further noted multiple vehicles owned by the defendant. And it provided a specific estimate of the defendant's monthly expenses to include rent, groceries, cell phone, auto insurance, and other incidentals – which, if extrapolated, should mean that the defendant retains substantial assets notwithstanding the government's seizure of the $62,813.76 on April 29, 2021.

> The government, moreover, is aware of at least one other bank account of the defendant with America First Credit Union in which he retained a positive balance as of March 19, 2021. Again, this account and the funds therein lie wholly outside the scope of the government's seizure warrants.

But there's a part of the filing that probably answers a question I asked: aside from the First Amendment concerns of seizing funds from making a video, I wondered why DOJ had invoked the obstruction charge against Sullivan to do so, rather than the civil disorder charge, as the basis for the seizure. There's more evidence that Sullivan was trying to maximize chaos than obstruct the counting of the vote, so it seemed like civil disorder was the more appropriate felony.

It seems that invoking obstruction gave DOJ a way to seize the funds, and even then it had to go through RICO magic.

Here's the language in question: I've highlighted the RICO reference in bright red letters for bmaz's benefit.

> Title 18, United States Code, Section 981(a)(1)(C) provides that "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of … any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of [Title 18 of the U.S. Code])" is "subject to forfeiture to the United States." The provision thus subjects "proceeds" traceable to violations of specified unlawful activities ("SUAs") to civil forfeiture. Meanwhile, criminal forfeiture is authorized when 18 U.S.C. § 981(a)(1)(C) is used in conjunction with 28 U.S.C. § 2461(c), which holds that "[i]f 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." In turn, 18 U.S.C. § 1956(c)(7) – which was cross-referenced in § 981(a)(1)(C) – incorporates as SUAs all predicate offenses under the Racketeer Influenced and Corrupt Organizations ("RICO") statute – that is, "any act or activity constituting an offense listed in section 1961(1) of this title [Title 18] except an act which is indictable under subchapter II of chapter 53 of title 31."
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> Finally, 18 U.S.C. § 1961(1) sets forth the RICO predicates and expressly includes, among those predicates, 18 U.S.C. § 1512. 3 Thus, "[b]y application of § 2461(c), *forfeiture of property is mandated for a violation of 18 U.S.C. § 1512*, since it is a racketeering activity identified in 18 U.S.C. § 1961(1), which is a specified unlawful activity under 18 U.S.C. § 1956(c)(7)(A)." United States v. Clark, 165 F. Supp. 3d 1215, 1218 (S.D. Fla. 2016) (emphasis added).

The forfeiture law, 18 USC §981, allows for forfeiture when a person profits off any of a bunch of crimes. Terrorism is in there, for example, but Sullivan is not charged with a crime of terrorism (they might get there with Sullivan if he were charged with breaking a window that surely cost more than $1,000 to fix, but they haven't charged him for that, even though his own video suggests he did break a window and all those windows are ridiculously expensive). Instead, DOJ is using 18 USC §1956, money laundering, to get to forfeiture. Sullivan is not alleged to have laundered money. But that law includes RICO's predicates among the unlawful activities for which one might launder money. And obstruction, 18 USC §1512, is a specific unlawful activity that may be part of

RICO.

That is, they found a crime that Sullivan allegedly committed — obstruction — nested three layers deep in other statutes.

DOJ admits that obstruction hasn't led to forfeiture all that often — but they've found nine cases, none in DC, where it has.

> 3 There is a limited number of forfeiture allegations paired with § 1512 as the SUA. Section 1512 prohibits (a) killing or assaulting someone with intent to prevent their participation in an official proceeding, (b) intimidating someone to influence their testimony in such a proceeding, (c) corrupting records or obstructing, impeding, or influencing such a proceeding, and (d) harassing or delaying someone's participation in such a proceeding — crimes that do not often generate profits. Nonetheless, the government has identified at least nine indictments where a § 1512 count was a basis for the forfeiture allegation. See United States v. Clark, 4:13-cr-10034 (S.D. Fla.); United States v. Eury, 1:20CR38-1 (M.D.N.C.); United States v. Ford and Prinster, 3:14-cr45 (D. Or.); United States v. Shabazz, 2:14-cr-20339 (E.D. Mich.); United States v. Cochran, 4:14-cr-22-01-HLM (N.D. Ga.); United States v. Adkins and Meredith, 1:13cr17-1 (N.D. W. Va.); United States v. Faulkner, 3:09-CR-249-D (N.D. Tex.); United States v. Hollnagel, 10 CR 195 (N.D. Ill.); United States v. Bonaventura, 4:02-cr-40026 (D. Mass.). Congress likewise included some of § 1512's surrounding obstruction-related statutes as SUAs, and forfeiture allegations have also referenced these sister statutes. E.g., United States v. Fisch, 2013 WL 5774876 (S.D. Tex. 2013) (§ 1503 as SUA); United States v. Lustyik, 2015 WL 1401674 (D.

> Utah 2015) (same).

Of course, those obstruction charges were probably garden variety obstruction (say, threatening trial witnesses for pay), not the already novel application of obstruction that other defendants are challenging.

bmaz may swoop in here and accuse DOJ of using RICO for magical thinking. At the very least, this all seems very precarious, as a matter of law.

I'm all in favor of preventing someone from profiting off insurrection. But this seems like a novel application of law on top of a novel application of law.

Sullivan has a hearing today before Judge Emmet Sullivan, so we may get a sense of whether the judge thinks this invocation of RICO is just magical thinking.