

1
2 UNITED STATES COURT OF APPEALS

3 FOR THE SECOND CIRCUIT

4 August Term 2012

5 (Argued: March 7, 2013 Decided: June 19, 2013)

6 Docket No. 12-3574-cv

7 -----x
8 UNITED STATES OF AMERICA,

9 Plaintiff-Appellee,

10 -- v. --

11 DANIEL BONVENTRE, BARBARA BONVENTRE,

12 Claimants-Appellants,

13 \$304,041.01 ON DEPOSIT AT CITIBANK, ET AL.,

14 Defendants.
15 -----x

16 B e f o r e : WALKER, SACK, and LYNCH, Circuit Judges.

17 Daniel R. Bonventre appeals from the July 5, 2012 order of the
18 District Court for the Southern District of New York (Jones, Judge)
19 denying his motion for a Monsanto hearing in his civil action (to
20 prevent forfeiture of monies allegedly needed to fund his defense
21 in a companion criminal case). We clarify the threshold requirement
22 for motions for Monsanto hearings in criminal in personam actions
23 or Monsanto-like hearings in civil in rem actions and AFFIRM the
24 district court's judgment.

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14 JOHN M. WALKER, JR., Circuit Judge:

15 In United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) (en
16 banc), we held that the Fifth and Sixth Amendments entitle a
17 criminal defendant seeking to use restrained funds to hire counsel
18 of choice to an adversarial, pre-trial hearing at which the court
19 evaluates whether there is probable cause to believe (1) that the
20 defendant committed the crimes that provide the basis for the
21 forfeiture; and (2) that the contested funds are properly
22 forfeitable.

23 Defendant-Appellant Daniel R. Bonventre seeks a similar
24 hearing in a civil action to recover restrained monies to fund his
25 counsel of choice in a parallel criminal case. This appeal raises
26 questions of whether a defendant seeking a Monsanto or Monsanto-
27 like hearing must first make a threshold showing that such a
28 hearing is warranted, and if so, what the standard for such a
29 showing should be. We hold that a defendant seeking a Monsanto or
30 Monsanto-like hearing must demonstrate, beyond the bare recitation

1 of the claim, that he or she has insufficient alternative assets to
2 fund counsel of choice.

3 Ordinarily, “[t]he district court’s denial of an evidentiary
4 hearing is subject to an abuse of discretion standard of review.”
5 Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247,
6 253 (2d Cir. 2000). Bonventre’s appeal, however, raises a question
7 of law concerning the threshold requirement for motions for
8 Monsanto and Monsanto-like hearings, so we review the district
9 court’s judgment de novo. Because the district court gave Bonventre
10 ample opportunity to demonstrate that he had insufficient
11 unrestrained assets to fund his defense with counsel of choice in
12 his parallel criminal case—which he failed to do—we affirm its
13 denial of his motion.

14 **BACKGROUND**

15 Bonventre appeals from a July 5, 2012 order of the District
16 Court for the Southern District of New York (Jones, Judge) denying
17 his motion for a Monsanto hearing. United States v. All Funds on
18 Deposit in Account Nos. 94660869, 9948199297, 80007487, 9115606297,
19 9116151903, and 9931127481, et al., No. 10 Cv. 4858 (BSJ) (JCF),
20 2012 WL 2900487 (S.D.N.Y. Jul. 5, 2012). Although this is an appeal
21 from a civil action, Bonventre’s parallel criminal case undergirds
22 his arguments. We therefore describe the relevant facts and history
23 of both actions.

24

1 **The Criminal Action**

2 In the S2 Indictment in United States v. Bonventre, 10 Cr. 228
3 (LTS), returned on November 17, 2010,¹ Bonventre was charged with
4 various securities and tax crimes related to the massive Madoff
5 fraud. The S2 Indictment contained broad forfeiture allegations and
6 specifically identified as forfeitable real and personal property
7 in which Bonventre had ownership interests. It did not, however,
8 specifically identify the brokerage accounts or transferred monies
9 subject to forfeiture.

10 In January 2011, Bonventre moved to dismiss the Indictment,
11 arguing that the government's forfeiture efforts (1) violated his
12 Fifth and Sixth Amendment rights because all forfeitable property
13 must be specifically identified in the indictment, information,
14 and/or restraining order; (2) were retaliatory; and (3) were
15 untimely because forfeitable property must be restrained upon the
16 filing of the indictment. The district court denied the motion on
17 the grounds that the government's actions were proper and that
18 Bonventre had no right to fund his defense with stolen money.
19 Bonventre took an interlocutory appeal, which we dismissed for lack
20 of jurisdiction on July 28, 2011. Bonventre's criminal trial is
21 scheduled for October 2013.

22

¹ The S2 Indictment is no longer the current indictment in Bonventre's criminal case. However, it was the operative charging instrument at the time of the district court's decision.

1 **The Civil Action**

2 On January 21, 2011, pursuant to the civil forfeiture statute,
3 the government executed ex parte seizure warrants for Bonventre's
4 assets allegedly traceable to the Madoff fraud. On February 2, the
5 government filed a Second Amended Complaint seeking civil
6 forfeiture of assets owned by Bonventre, his wife, and his son.²

7 On February 16, Bonventre moved to dismiss the Second Amended
8 Complaint, arguing that the government's civil forfeiture efforts
9 (1) violated his Fifth and Sixth Amendment rights; and (2) were
10 untimely. The district court denied the motion on September 14 on
11 the basis that the constitutional claims were collaterally estopped
12 by the district court's opinion in the criminal case and that the
13 timeliness arguments were meritless. Bonventre took an
14 interlocutory appeal, which we dismissed for lack of jurisdiction
15 on March 6, 2012.

16 On September 22, 2011, Bonventre moved for a Monsanto hearing.
17 In support of this motion, he filed two affidavits, both of which
18 stated that he would be unable to fund counsel of choice for his
19 criminal defense if denied access to the restrained funds.

20 On July 5, 2012, the district court denied Bonventre's
21 Monsanto motion. Relying on other circuits' caselaw, it imposed a
22 two-part threshold showing and found that Bonventre failed to meet

² Earlier versions of the Complaint sought forfeiture of a codefendant's assets.

1 either requirement. On August 31, 2012, Bonventre filed a notice of
2 appeal.³

3 DISCUSSION

4 On appeal, Bonventre argues that he is entitled to a Monsanto
5 hearing in his civil case and that he should not be required to
6 first make a threshold showing that the government has improperly
7 restrained assets required to fund his defense.⁴

8 We reiterate that, “[w]hatever the full extent of the Sixth
9 Amendment’s protection of one’s right to retain counsel of his
10 choosing, that protection does not go beyond the individual’s right
11 to spend his own money to obtain . . . counsel.” Caplin & Drysdale,
12 Chartered v. United States, 491 U.S. 617, 626 (1989) (quotation
13 marks omitted) (emphasis added). Accordingly, “neither the Fifth
14 nor the Sixth Amendment to the Constitution requires Congress to
15 permit a defendant to use assets adjudged to be forfeitable to pay
16 that defendant’s legal fees.” United States v. Monsanto, 491 U.S.

³ As civil defendants, Bonventre’s wife and son did not and could not join his original Monsanto motion. As parties with ownership interests in the contested properties, however, they have joined this appeal. Because we affirm the district court’s judgment, we need not determine whether they are proper parties on appeal.

⁴ Bonventre also reprises arguments from his earlier appeals that the government’s forfeiture efforts were unconstitutional and untimely. However, these constitutional and statutory issues are not independently appealable, nor are they “inextricably intertwined” with the central issue now on appeal, which is whether the district court’s imposition of a threshold showing for Bonventre’s Monsanto motion was permissible. Biediger v. Quinipiac Univ., 691 F.3d 85, 96 (2d Cir. 2012). Accordingly, we need not address these extraneous arguments here. Id.

1 600, 614 (1989). “[N]o constitutional violation occurs when, after
2 probable cause [that assets are forfeitable] is adequately
3 established, the Government obtains an order barring a defendant
4 from . . . dissipating his assets prior to trial.” Id. at 616.

5 In Monsanto, we concluded that the Fifth and Sixth Amendments
6 entitle a presumably innocent criminal defendant to an adversarial,
7 pre-trial hearing to address two questions: (1) whether there is
8 probable cause to believe that the defendant committed the crimes
9 providing a basis for forfeiture; and (2) whether there is probable
10 cause to believe that the properties are properly forfeitable. 924
11 F.2d at 1203. District courts in this circuit have found that a
12 defendant may also have the right to a Monsanto-like hearing in the
13 civil context when, as here, the civil forfeiture action may affect
14 the defendant’s right to counsel in a parallel criminal case. See
15 CFTC v. Walsh, Nos. 09 CV 1749 (GBD), 09 CV 1750 (GBD), 09 CR 722
16 (MGC), 2010 WL 882875, at *2-3 (S.D.N.Y. Mar. 9, 2010); SEC v.
17 Coates, No. 94 Civ. 5361 (KMW), 1994 WL 455558, at *3 (S.D.N.Y.
18 Aug. 23, 1994). However, neither the Supreme Court nor this Court
19 has resolved the question of what, if any, threshold showing a
20 defendant must make before a motion for a Monsanto or Monsanto-like
21 hearing is granted, as our sister circuits have required in United
22 States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998), and United
23 States v. Farmer, 274 F.3d 800, 804-05 (4th Cir. 2001). See also
24 United States v. Yusuf, 199 F. App’x 127, 132 and n.4 (3d Cir.

1 2006) (approving the Jones framework); United States v. Jamieson,
2 427 F.3d 394, 406 n.3 (6th Cir. 2005) (describing the spectrum of
3 approaches taken by different circuits).

4 In Jones, 160 F.3d 641, the government moved ex parte under
5 the criminal forfeiture statute to freeze some of the defendants'
6 assets pending trial. Challenging this restraint, the defendants
7 moved for a pre-trial hearing. The Tenth Circuit determined that
8 "due process requires a district court to conduct a post-restraint,
9 pre-trial adversarial hearing before continuing to freeze assets
10 that a defendant allegedly needs for legal and living expenses . .
11 . if certain conditions are present." Id. at 643. First, "a
12 defendant must demonstrate to the court's satisfaction that she has
13 no assets, other than those restrained, with which to retain
14 private counsel and provide for herself and her family." Id. at
15 647. Second, "[a] defendant must also make a prima facie showing of
16 a bona fide reason to believe the grand jury erred in determining
17 that the restrained assets constitute or are derived, directly or
18 indirectly, from gross proceeds traceable to the commission of the
19 . . . offense."⁵ Id. (quotation marks and alterations omitted).

20 In Farmer, 274 F.3d 800, the defendant's money was seized by
21 warrant pursuant to civil forfeiture statutes, although no civil

⁵ Unlike this Court, see Monsanto, 924 F.2d at 1196-97, the Tenth Circuit does not require "that the government reestablish probable cause to believe that defendants are guilty of the underlying . . . offense," Jones, 160 F.3d at 648.

1 forfeiture action was ever commenced. After a subsequent
2 indictment, the defendant filed a motion for an immediate hearing
3 to determine if some of the seized monies should be released. On
4 appeal from the denial of this motion, the Fourth Circuit found
5 that "due process require[d] a hearing for [the defendant] to
6 challenge probable cause," id. at 805, given that (1) there was a
7 threshold showing of the defendant's need for the restrained assets
8 to pay his attorneys, id. at 804; and (2) his attorney filed an
9 affidavit stating that the government's agents had conceded the
10 legitimate character of some of the seized assets, id. at 805.

11 While we agree with our sister circuits that a defendant
12 seeking a Monsanto or Monsanto-like hearing must first make a
13 threshold showing, we disagree as to the requirement. The
14 importance of the right at issue—to fund one's criminal defense
15 with counsel of choice—counsels in favor of a minimal barrier to
16 contest the restraint of needed monies. Accordingly, we hold that
17 all a defendant need do to trigger a Monsanto or Monsanto-like
18 hearing is to demonstrate, beyond the bare recitation of the claim,
19 that he or she does not have sufficient alternative assets to fund
20 counsel of choice. This requires more than a mere recitation; the
21 defendant must make a sufficient evidentiary showing that there are
22 no sufficient alternative, unrestrained assets to fund counsel of
23 choice. We do not believe that the defendant must make a formal
24 prima facie showing that the funds were illegitimately restrained,

1 see Jones, 160 F.3d at 647, beyond providing a basis for bringing a
2 motion for a Monsanto or Monsanto-like hearing in the moving
3 papers. At the subsequent hearing, the government will bear the
4 relatively modest burden of demonstrating probable cause to believe
5 the assets are properly forfeitable.

6 The requirement of a financial showing is grounded in the
7 reasoning of our decision in Monsanto, 924 F.2d 1186, which we
8 reaffirm today. As we held there, a hearing at which the
9 government's rationale for forfeiture is tested is required because
10 such an erroneous restraint on a criminal defendant's assets can
11 limit, or even eliminate, the defendant's constitutional right to
12 use his or her own funds to retain counsel of choice. That right,
13 however, is not implicated unless the restraint actually affects
14 the defendant's right to choose counsel and present a defense.
15 Thus, if a defendant has sufficient unrestrained assets with which
16 to fund his or her defense, the concerns that animated our holding
17 in Monsanto are not present.

18 Bonventre argues that any threshold requirement
19 unconstitutionally shifts the burden of proof to the defendant and
20 thereby increases the likelihood of a wrongful criminal conviction
21 because he will be unable to hire his counsel of choice. If the
22 basis for a defendant's motion is not frivolous, this low threshold
23 requirement will not operate to bar him from using restrained
24 assets to fund his defense. See Farmer, 274 F.3d at 805 (observing

1 that "threshold showings 'protect the government and its resources
2 from frivolous challenges' to forfeitures" (quoting Jones, 160 F.3d
3 at 647)).

4 The government's burden at the subsequent hearing remains the
5 same: it must demonstrate probable cause to believe that the funds
6 are forfeitable under the appropriate statute. Because of
7 differences between civil and criminal forfeiture laws, the focus
8 of the probable cause inquiry will vary. A civil forfeiture action
9 is an action in rem, and therefore is based solely on the origin of
10 the property, "not . . . upon the culpability of the owner." United
11 States v. \$743,578.82 in U.S. Currency, 286 F.3d 641, 657 (3d Cir.
12 2002). In contrast, criminal forfeiture actions are in personam
13 sanctions and thus depend on the defendant's guilt. See Monsanto,
14 924 F.2d at 1197.

15 Although the threshold requirement for the defendant
16 requesting a hearing and the government's burden at the subsequent
17 hearing are identical in the criminal or civil context, the
18 probable cause inquiry changes. At a Monsanto hearing in a criminal
19 case, the government must demonstrate that probable cause exists to
20 believe both that the criminal defendant committed the charged
21 offenses and that the restrained assets are properly forfeitable.
22 Monsanto, 924 F.2d at 1203. Meanwhile, in a Monsanto-like hearing
23 in a civil in rem action, the government must demonstrate only that

1 probable cause exists to believe that the restrained assets are
2 properly forfeitable under the civil forfeiture statute.

3 Because the probable cause requirement is different in a civil
4 action, Bonventre claims that the government's civil suit is merely
5 a strategic end-run around Monsanto's heightened protections for a
6 presumably innocent criminal defendant. However, "there is a strong
7 governmental interest in obtaining full recovery of all forfeitable
8 assets, an interest that overrides any Sixth Amendment interest in
9 permitting criminals to use assets adjudged forfeitable." Caplin &
10 Drysdale, 491 U.S. at 631 (emphasis added). Therefore, Bonventre's
11 assessment—that the government's "use of a civil *in rem* action . .
12 . [would change] the *Monsanto* inquiry . . . to whether the subject
13 assets were traceable to those crimes, whether or not there was
14 probable cause he participated [in those crimes]," Bonventre Br.
15 28—is accurate. The different criteria in civil and criminal
16 forfeiture actions, however, do not raise constitutional concerns,
17 provided that the government demonstrates that there is probable
18 cause that the assets are properly forfeitable.⁶

⁶ We need not address and therefore express no opinion on the question of whether, in a *Monsanto*-like hearing in a civil in rem action, the government's burden might entail some showing of culpability on the part of the defendant in order to negate any innocent owner defense the defendant may advance. See 18 U.S.C. § 983(d); cf. United States v. Michelle's Lounge, 39 F.3d 684, 700 (7th Cir. 1994) ("At a hearing, the defendant could rebut the government's showing of probable cause—for example, by proof of innocent ownership").

1 We now turn to the question of whether Bonventre has met the
2 threshold requirement. As evidence of his inability to hire his
3 counsel of choice without the restrained funds, Bonventre filed two
4 supporting affidavits. The first, a two-page declaration, noted
5 that he was unemployed and that his assets consisted of (1) a
6 monthly social security check for \$1,835; (2) pre-inheritance gifts
7 from his mother totaling \$225,000; (3) pre-inheritance gifts from
8 his father of two bonds bought in 1992 for \$30,000; (4) a house
9 owned jointly with his stepson; and (5) household items, including
10 a piano and a painting. The second, a barely three-page
11 declaration, reported that (1) his monthly social security check
12 had been reduced to \$1,710; (2) he continued to own the bonds,
13 piano, and painting; and (3) the jointly owned house had been sold,
14 netting him \$100,000 in proceeds, which he had since spent.
15 Bonventre stated that his monthly expenses (mortgage, taxes,
16 utilities, and maintenance fees) for two pieces of forfeitable real
17 property identified in the Indictment and Second Amended Complaint
18 totaled approximately \$14,700 per month and that his expenses for
19 those properties totaled approximately \$175,000 in the preceding
20 year. He also noted that his remaining expenses totaled
21 approximately \$22,000 annually and that the aggregate balance of
22 other accounts which the government had stated were not the subject
23 of seizure warrants (but not necessarily the aggregate value of all
24 of his unrestrained accounts) was \$121,000. Bonventre's attorney

1 estimated that the cost of the criminal defense would likely reach
2 \$2.5 to \$3 million, and the government acknowledged that the amount
3 in the restrained accounts was \$3.9 million.

4 The district court found that Bonventre failed to satisfy the
5 first threshold requirement because he provided insufficient
6 information for a court to evaluate the extent of his unrestrained
7 funds. We agree. Bonventre did not disclose his net worth, provide
8 a comprehensive list of his assets, or explain how he has been
9 paying his significant living expenses. While the affidavits
10 describe the aggregate balances of bank accounts enumerated in the
11 government's submissions, they do not clarify whether Bonventre has
12 access to other accounts and, if so, their value. Accordingly, the
13 district court's determination was appropriate.⁷

14 **CONCLUSION**

15 The district court's denial of Bonventre's motion for a
16 Monsanto hearing is AFFIRMED.

⁷ The district court alternatively refused to hold a hearing on the ground that Bonventre failed to make a prima facie showing that the restrained assets were not forfeitable. As we have held above, a defendant need not make such a formal showing to trigger a Monsanto-like hearing.