

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-10486

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SONG JA CHA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

UNITED STATES' MOTION TO DISMISS APPEAL

The United States respectfully moves this Court, pursuant to Circuit Rule 27-9.2, to dismiss the above-captioned appeal. Defendant Song Ja Cha recently passed away while this direct appeal was pending. Ex. 1. In these circumstances, Circuit precedent dictates that this Court remand the case to the district court with instructions to vacate the judgment and dismiss the indictment. Precedent also dictates that the fees and restitution payments already paid by defendant need not be returned.¹

¹ The United States files this motion in lieu of its Appellee Brief.

BACKGROUND

On July 23, 2008, a federal grand jury returned a superseding indictment charging defendant with 20 sex trafficking-related offenses. E.R. 80-98. At trial, the government called 17 witnesses who testified that defendant lured poor young women from the Island of Chuuk to Guam with a promise of legitimate employment, only to force them into prostitution. On February 17, 2011,² a jury found defendant guilty on all counts. E.R. 736-740.

After trial, defendant and the United States stipulated to a restitution agreement for ten of defendant's victims that totaled \$200,000. Ex. 2. As part of that settlement agreement, defendant agreed "to waive any right to appeal or collaterally attack th[e restitution] agreement, and any award of restitution, as outlined" in the agreement. Ex. 2 ¶ 6. In addition, she agreed "that if the [sic] her conviction is overturned, on any grounds, th[e restitution] agreement is still binding, and that the defendant will not be entitled to reclaim the restitution amounts." Ex. 2 ¶ 7.

The district court sentenced defendant to life imprisonment with five years of supervised release. E.R. 75-76. The court also required defendant to pay a

² The trial was delayed by litigation over the reasonableness under the Fourth Amendment of the Guam police force's seizure of defendant's place of business. This Court ultimately concluded that the seizure was unreasonable in duration and suppressed the evidence obtained during the search of the business. See *United States v. Cha*, 597 F.3d 995, 1006 (9th Cir. 2010).

\$2000 assessment, a \$10,000 fine, and the \$200,000 in restitution. E.R. 78.

Defendant paid these amounts upon entry of judgment by the district court. See E.R. 79.

Defendant timely appealed on September 25, 2012. E.R. 845. Defendant filed her opening brief on appeal on February 2, 2016.³ Defendant passed away on May 9, 2016, while her direct appeal was still pending. Ex. 1.

DISCUSSION

In the Ninth Circuit, “[d]eath pending appeal of a criminal conviction abates not only the appeal but all proceedings in the prosecution from its inception.” *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983) (citing *Durham v. United States*, 401 U.S. 481, 483 (1971) (per curiam)); see also *United States v. Rich*, 603 F.3d 722, 724 (9th Cir. 2010) (quoting *Oberlin*, 718 F.2d at 895). “In such a case, the appeal is dismissed and the cause remanded to the district court with instructions to vacate the judgment and to dismiss the indictment.” *Oberlin*, 718 F.2d at 895.

This Circuit has also held that, when a criminal defendant dies while her appeal is pending, *unpaid* fees and restitution generally cannot be collected against a decedent’s estate. See *Rich*, 603 F.3d at 724, 729; *Oberlin*, 718 F.2d at 895.

However, funds “already paid need not be refunded because they are the equivalent

³ The appeal was delayed because defendant requested and received 12 briefing extensions.

of time-served.” *Rich*, 603 F.3d at 724 n.3 (citing *United States v. Zizzo*, 120 F.3d 1338, 1347 (7th Cir. 1997) (holding that funds already paid “are analogous to time served and are not refundable”); *United States v. Estate of Parsons*, 367 F.3d 409, 417-418 (5th Cir. 2004) (en banc) (“[T]he doctrine of abatement does not apply to fines, forfeitures, and restitution paid *prior* to a defendant’s death.” (citation omitted)); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997)). In short, “abatement does not entitle a defendant to monies paid before death as part of a fine or restitution order.” *Estate of Parsons*, 367 F.3d at 413.

Here, defendant’s death abates both the appeal and the district court proceedings below. See *Rich*, 603 F.3d at 724; *Oberlin*, 718 F.2d at 895. At the same time, defendant’s fees and restitution payments, all of which have already been paid, remain undisturbed. See *Rich*, 603 F.3d at 724 n.3; see also *Estate of Parsons*, 367 F.3d at 413. Indeed, aside from the case law holding that abatement does not reach funds paid prior to a defendant’s death, defendant here explicitly waived any right to collaterally attack the restitution agreement. Ex. 2 ¶ 6. Specifically, she agreed that the agreement would remain binding regardless the outcome of this appeal. Ex. 2 ¶ 7.

CONCLUSION

Pursuant to *Oberlin, Rich*, and the terms of defendant's restitution agreement, this Court should dismiss the instant appeal and remand the cause to the district court with instructions to vacate the judgment and dismiss the indictment, but to leave undisturbed the already-paid fees and restitution payments.

Defendant does not oppose an abatement of the appeal but opposes the requested instruction regarding the already-paid fees and restitution payments.

Respectfully submitted,

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Principal Deputy Assistant
Attorney General

s/ Robert A. Koch
THOMAS E. CHANDLER
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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I electronically filed the UNITED STATES' MOTION TO DISMISS APPEAL with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

Exhibit 1

GOVERNMENT OF GUAM
CERTIFICATE OF DEATH

STATE FILE NO. 160 16 000362

1. DECEDENT'S LEGAL NAME (INCLUDE AKA'S IF ANY) (FIRST, MIDDLE, LAST) SONG JA CHA				2. SEX FEMALE	3. SOCIAL SECURITY NUMBER [REDACTED] 9354
4a. AGE-LAST BIRTHDAY (YEARS) 74	4b. UNDER 1 YEAR Months: _____ Days: _____	4c. UNDER 1 DAY Hours: _____ Minutes: _____	5. DATE OF BIRTH (Mo/Day/Yr) [REDACTED] 1942		6. BIRTHPLACE (City and State or Foreign Country) KOREA
7a. RESIDENCE-STATE GUAM			7b. COUNTRY	7c. CITY OR TOWN MANGILAO	
7d. STREET AND NUMBER [REDACTED]		7e. APT. NO.	7f. ZIP CODE [REDACTED]	7g. INSIDE CITY LIMITS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
8. EVER IN US ARMED FORCES? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		9. MARITAL STATUS AT TIME OF DEATH <input type="checkbox"/> MARRIED <input type="checkbox"/> MARRIED, but separated <input checked="" type="checkbox"/> WIDOWED <input type="checkbox"/> DIVORCED <input type="checkbox"/> NEVER MARRIED <input type="checkbox"/> UNKNOWN		10. SURVIVING SPOUSE'S NAME (If wife, give name prior to first marriage)	
11. FATHER'S NAME (First, Middle, Last) CHOI SUNG NAM			12. MOTHER'S NAME PRIOR TO FIRST MARRIAGE (First, Middle, Last) PAE LI KIM		
13a. INFORMANT'S NAME DEPARTMENT OF CORRECTION		13b. RELATIONSHIP TO DECEDENT WARD OF TERRITORY		13c. MAILING ADDRESS (Street and Number, City, State, Zip Code) P.O. BOX 3236 HAGATNA, GUAM 96932	
14. PLACE OF DEATH (Check only one: see instructions)					
IF DEATH OCCURRED IN A HOSPITAL: <input checked="" type="checkbox"/> Inpatient <input type="checkbox"/> Emergency Room/Outpatient <input type="checkbox"/> Dead on Arrival			IF DEATH OCCURRED SOMEWHERE OTHER THAN A HOSPITAL: <input type="checkbox"/> Hospice facility <input type="checkbox"/> Nursing home/Long term care facility <input type="checkbox"/> Decedent's home <input type="checkbox"/> Other (Specify):		
15. FACILITY NAME (If not institution, give street & number) GUAM MEMORIAL HOSPITAL AUTHORITY			16. CITY OR TOWN, STATE, AND ZIP CODE OKA TAMUNING, 96913		17. COUNTRY OF DEATH GUAM
18. METHOD OF DISPOSITION: <input type="checkbox"/> Burial <input checked="" type="checkbox"/> Cremation <input type="checkbox"/> Donation <input type="checkbox"/> Entombment <input type="checkbox"/> Removal from State <input type="checkbox"/> Other (Specify):			19. PLACE OF DISPOSITION: (Name of cemetery, crematorium, other place) ADA'S CREMATORIUM		
20. LOCATION-CITY, TOWN, AND STATE SINAJANA, GUAM			21. NAME AND COMPLETE ADDRESS OF FUNERAL FACILITY ADA'S MORTUARY, INC SINAJANA, GUAM		
22. SIGNATURE OF FUNERAL SERVICE LICENSEE OR OTHER AGENT <i>Carmen D. Stegner</i>			23. LICENSE NUMBER (If license) 13-000098001-001		
ITEMS 24-28 MUST BE COMPLETED BY PERSON WHO PRONOUNCES OR CERTIFIES DEATH			24. DATE PRONOUNCED DEAD (Mo/Day/Yr) MAY 09, 2016		25. TIME PRONOUNCED DEAD 4:20 PM
26. SIGNATURE OF PERSON PRONOUNCING DEATH (Only when applicable)			27. LICENSE NUMBER		28. DATE SIGNED (Mo/Day/Yr)
29. ACTUAL OR PRESUMED DATE OF DEATH (Mo/Day/Yr) (Spell Month) MAY 09, 2016			30. ACTUAL OR PRESUMED TIME OF DEATH 4:20 PM		31. WAS MEDICAL EXAMINER OR CORONER CONTACTED? <input type="checkbox"/> YES <input type="checkbox"/> NO
32. PART I. Enter the chain of events—diseases, injuries, or complications—that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE. Enter only one cause on a line. Add additional lines if necessary.					Approximate Interval: Onset to death
IMMEDIATE CAUSE (Final disease or condition resulting in death) → SEPTIC SHOCK					HOURS _____ DAYS _____
Due to (or as a consequence of): b. GENERALIZED INFECTION					
Due to (or as a consequence of): c. _____					
Due to (or as a consequence of): d. _____					
PART II. Enter other significant conditions contributing to death but not resulting in the underlying cause given in PART I DISSEMINATING INTRAVASCULAR COAGULATION, HYPERTENSIVE & ARTERIOSCLEROTIC CARDIOVASCULAR DISEASE					33. WAS AN AUTOPSY PERFORMED? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
					34. WERE AUTOPSY FINDINGS AVAILABLE TO COMPLETE THE CAUSE OF DEATH? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
35. DID TOBACCO USE CONTRIBUTE TO DEATH? <input type="checkbox"/> Yes <input type="checkbox"/> Probably <input checked="" type="checkbox"/> No <input checked="" type="checkbox"/> Unknown		36. IF FEMALE: <input checked="" type="checkbox"/> Not pregnant within past year <input type="checkbox"/> Not pregnant, but pregnant 43 days to 1 year before death <input type="checkbox"/> Pregnant at time of death <input type="checkbox"/> Unknown if pregnant within past year <input type="checkbox"/> Not pregnant, but pregnant within 42 days of death			37. MANNER OF DEATH <input checked="" type="checkbox"/> Natural <input type="checkbox"/> Homicide <input type="checkbox"/> Accident <input type="checkbox"/> Pending Investigation <input type="checkbox"/> Suicide <input type="checkbox"/> Could not be determined
38. DATE OF INJURY (Mo/Day/Yr) (Spell Month)	39. TIME OF INJURY	40. PLACE OF INJURY (e.g., Decedent's home; construction site; restaurant; wooded area)			41. INJURY AT WORK? <input type="checkbox"/> Yes <input type="checkbox"/> No
42. LOCATION OF INJURY: State: _____ City or Town: _____		Street & Number: _____		Apartment No.: _____	Zip Code: _____
43. DESCRIBE HOW INJURY OCCURRED:				44. IF TRANSPORTATION INJURY, SPECIFY: <input type="checkbox"/> Driver/Operator <input type="checkbox"/> Pedestrian <input type="checkbox"/> Passenger <input type="checkbox"/> Other (Specify)	
45. CERTIFIER (Check only one): <input type="checkbox"/> Certifying physician-To the best of my knowledge, death occurred due to the cause(s) and manner stated. <input type="checkbox"/> Pronouncing & Certifying physician-To the best of my knowledge, death occurred at the time, date, and place, and due to the cause(s) and manner stated. <input checked="" type="checkbox"/> Medical Examiner/Coroner-On the basis of examination, and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated.					
Signature of certifier: _____					
46. NAME, ADDRESS, AND ZIP CODE OF PERSON COMPLETING CAUSE OF DEATH (Item 37) AURELIO A. ESPINOLA, M.D. #325 DUENAS DRIVE TAMUNING, GUAM 96913					
47. TITLE OF CERTIFIER CHIEF MEDICAL EXAMINER			48. LICENSE NUMBER M-1038		49. DATE CERTIFIED (Mo/Day/Yr) MAY 16, 2016
50. FOR REGISTRAR ONLY-DATE FILED (Mo/Day/Yr) MAY 17 2016			50a. REGISTRAR'S SIGNATURE <i>[Signature]</i> CAROLYN R. GARRIDO		
51. DECEDENT'S EDUCATION-Check the box that best describes the highest degree or level of school completed at the time of death. <input type="checkbox"/> 8 th grade or less <input type="checkbox"/> 9 th - 12 th grade; no diploma <input type="checkbox"/> High school graduate or GED completed <input type="checkbox"/> Some college credit, but no degree <input checked="" type="checkbox"/> Associate degree (e.g., AA, AS) <input type="checkbox"/> Bachelor's degree (e.g., BA, AB, BS) <input type="checkbox"/> Master's degree (e.g., MA, MS, MEng, MEd, MSW, MBA) <input type="checkbox"/> Doctorate (e.g., PhD, EdD) or Professional degree (e.g., MD, DDS, DVM, LLB, JD)		52. DECEDENT OF HISPANIC ORIGIN? Check the box that best describes whether the decedent is Spanish/Hispanic/Latino. Check the "No" box if decedent is not Spanish/Hispanic/Latino. <input checked="" type="checkbox"/> No, not Spanish/Hispanic/Latino <input type="checkbox"/> Yes, Mexican, Mexican American, Chicano <input type="checkbox"/> Yes, Puerto Rican <input type="checkbox"/> Yes, Cuban <input type="checkbox"/> Yes, other Spanish/Hispanic/Latino (Specify) _____		53. DECEDENT'S RACE (Check one or more races to indicate what the decedent considered himself or herself to be) <input type="checkbox"/> White <input type="checkbox"/> Black or African American <input type="checkbox"/> American Indian or Alaska Native (Name of the enrolled or principal tribe) _____ <input type="checkbox"/> Asian Indian <input type="checkbox"/> Chinese <input type="checkbox"/> Filipino <input type="checkbox"/> Japanese <input checked="" type="checkbox"/> Korean <input type="checkbox"/> Vietnamese <input type="checkbox"/> Other Asian (Specify) _____ <input type="checkbox"/> Native Hawaiian <input type="checkbox"/> Guamanian or Chamorro <input type="checkbox"/> Samoan <input type="checkbox"/> Other Pacific Islander (Specify) _____ <input type="checkbox"/> Other (Specify) _____	
54. DECEDENT'S USUAL OCCUPATION (Indicate type of work done during most of working life, DO NOT USE RETIRED). MANAGER / OWNER					
55. KIND OF BUSINESS/INDUSTRY KARAOKE LOUNGE & BAR					

Exhibit 2

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Attorneys for the United States of America

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM**

UNITED STATES OF AMERICA,)	CRIMINAL CASE NO. 08-00008
)	
Plaintiff,)	
)	
v.)	STIPULATED AGREEMENT ON
)	RESTITUTION
SONG JA CHA,)	
)	
Defendant.)	
_____)	

The United States, by and through undersigned attorneys, and Defendant Song Ja Cha, by and through her counsel, Joseph C. Razzano, stipulate to the following:

1. On February 17, a federal jury found Defendant Cha guilty of all 20 counts alleged in the indictment, including (a) conspiracy to commit sex trafficking, in violation of 18 U.S.C. § 371 (Count One); (b) sex trafficking, in violation of 18 U.S.C. § 1591 (Counts 2, 3, 5, 6, 7, 8, 9, 10); (c) attempted sex trafficking, in violation of 18 U.S.C. § 1594 (Count Four); (d) coercion and enticement to travel in interstate or foreign commerce for prostitution, in violation of 18 U.S.C. § 2422 (Counts Eleven through Nineteen); (e) transportation of a minor for prostitution, in violation of 18 U.S.C. § 2423 (Count Twenty).

2. Pursuant to 18 U.S.C. § 1593, Defendant Cha is obligated to pay mandatory restitution to victims of trafficking offenses named in the indictment, in the amount of \$194,017.76.

3. The parties agree that the defendant will pay \$200,000 in restitution to the victims named below. \$200,000 is to be paid from funds which are to be transferred to the Clerk of Court, United States District Court for the Territory of Guam, from the U.S. Department of Homeland Security, U.S. Customs and Border Protection - Fine, Penalty and Forfeiture Account No. 2008321000000301, pursuant to the Stipulated Settlement Agreement signed by the parties on August 8, 2012, and filed with the Court on September 6, 2012. (Document 324-1.)

4. The parties agree that the following victims should receive restitution in the following amounts:

Daileen Robert in the amount of \$5,208;
Simirina Samual in the amount of \$5,032.40;
Erneel Nemek in the amount of \$31,108;
Maktalena Chainen in the amount of \$13,131.48;
Lusy Paul in the amount of \$13,131.48;
Kina Choiter in the amount of \$37,847.84;
Arita Tipingeni in the amount of \$78,647.64;
Nana Tipingeni in the amount of \$3,358.92;
Sonina Suwain in the amount of \$6,552;

Arneen Tipingeni in the amount of \$5,982.24.

5. The defendant understands and agrees that restitution payments are to be made to the aforementioned individuals, in the aforementioned amounts, immediately upon the entry of judgment by the Court.

6. The defendant voluntarily, knowingly, and intelligently agrees to waive any right to appeal or collaterally attack this agreement, and any award of restitution, as outlined herein.

7. The defendant voluntarily, knowingly, and intelligently agrees, that if the her conviction is overturned, on any grounds, this agreement is still binding, and that the defendant will not be entitled to reclaim the restitution amounts.

8. The parties reserve the right to bring any and all facts which they believe are appropriate to the attention of the Court. The parties reserve the right to make all other sentencing recommendations, including the right to advocate for the length of incarceration, and the right to recommend or oppose imposition of fines.

9. Defendant understands that all final determinations regarding sentencing, including but not limited to the offense level at which she is sentenced, restitution amounts ordered, or fines imposed, will be made by the Court with the aid of the Probation Department.

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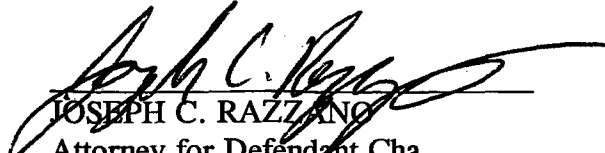
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Dated:

This 18th of September, 2012.


DEFENDANT SONG JA CHA


JOSEPH C. RAZZANO
Attorney for Defendant Cha

ALICIA A.G. LIMTIACO
United States Attorney
District of Guam and the N.M.I.


ROSETTA L. SAN NICOLAS

/

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/Jared Fishman
JARED FISHMAN

/s/Shan Patel
SHAN PATEL