No. 18-

==========

IN THE SUPREME COURT OF THE UNITED STATES

LYNETTE GREGORY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

==========

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
ANNA M. DURBIN
Court-Appointed (CJA)
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Petitioner

June 2018

QUESTIONS PRESENTED

1. Is a question of the legality of a federal criminal sentence subject to waiver by plea agreement? In avoidance of this question, should an agreement generally waiving the right to appeal but exempting any challenge to a forfeiture "as set forth in" the Information and allowing claims that the sentence "exceeds the statutory maximum" be construed to allow an appeal questioning whether the criminal forfeiture imposed as part of the sentence was unauthorized by any statute?

2. Does a criminal forfeiture in a federal drug case in the form of a "money judgment" constitute an illegal sentence, because it is unauthorized by any statute?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (petitioner Gregory and respondent United States). There were related cases in the district court under different dockets, but no co-defendants or consolidated appellants.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LYNETTE GREGORY respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Third Circuit affirming her sentence of forfeiture in a criminal case.

OPINIONS BELOW

The Third Circuit's dispositive, non-precedential order (per Restrepo, J., with Bibas & Nygaard, JJ.), dated February 26, 2018, is attached as Appendix A. It is not published or otherwise available on electronic databases. The United States District Court for the Eastern District of Pennsylvania (Rufe, J.) wrote a memorandum opinion with accompanying Order, filed November 28, 2018, overruling the applicant's objection to the entry of a criminal forfeiture in the form of a "money judgment." That Memorandum and Order are not published in the Federal Supplement or otherwise available on electronic databases. A copy is attached as Appendix B.

JURISDICTION

On February 26, 2018, the United States Court of Appeals for the Third Circuit filed its order and judgment summarily affirming the petitioner's judgment of criminal forfeiture. Appx. A. No petition for rehearing was filed by any party. As a result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari was initially due on or before May 29, 2018, as the ninetieth day thereafter was Sunday, May 27, and Monday, May 28, was Memorial Day, a federal holiday. Upon timely application, Justice Alito on May 21, 2018, under No. 17A1290, granted a 30-day extension of time until June 28, 2018, for the filing of a certiorari petition. This

petition is being filed electronically and by postmark on or before that extended date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES and RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, "[N]or shall any person ... be deprived of life, liberty, or property without due process of law; ...."

Title 18, United States Code, provides, in pertinent part:

§ 3551. Authorized Sentences

(a) In general. – Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute ... shall be sentenced I accordance with the provision of this chapter ....

(b) Individuals. – An individual found guilty of an offense shall be sentenced in accordance with the provisions of section 3553, to —

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554 [criminal forfeiture], 3555 [Order of Notice to Victims], or 3556 [restitution] may be imposed in addition to the sentence required by this subsection.

* * * *

§ 3554. Order of Criminal Forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970 [*i.e.*, 21 U.S.C. § 853].

Title 21, United States Code, provides, in pertinent part:

§ 841 - Prohibited acts A

(a) Unlawful acts – Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to ... distribute ... a controlled substance; * * *

(b) Penalties – Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * * *

(1) * * * *

(C) In the case of a controlled substance in schedule ... II, ... such person shall be sentenced to a term of imprisonment of not more than 20 years ..., a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual ..., or both.

* * * *

§ 843. Prohibited Acts C

(a) Unlawful acts – It shall be unlawful for any person knowingly or intentionally —

* * *

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; * * * *

(d) Penalties—

(1) Except as provided in paragraph (2), any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine under Tile 18, or both; * * * *

§ 853 - Criminal forfeitures

(a) Property subject to criminal forfeiture.—Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property."—Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

* * * *

(p) **Forfeiture of substitute property**

(1) In general—Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property—In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

* * * *

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 32.2 Criminal Forfeiture

(a) **Notice to the Defendant**. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture

of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) **Entering a Preliminary Order of Forfeiture**.

(1) *Forfeiture Phase of the Trial.*

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

* * * *

(4) *Sentence and Judgment.*

(A) *When Final.* At sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) *Notice and Inclusion in the Judgment.* The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal.* The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) *Jury Determination.*

(A) *Retaining the Jury.* In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

* * * *

STATEMENT OF THE CASE

The petitioner, Lynette Gregory, represented by prior CJA counsel, pleaded guilty in the United States District Court for the Eastern District of Pennsylvania on April 22, 2015, pursuant to a plea agreement, to 35 counts of an Information. Filed October 25, 2013, along with a waiver of indictment, the Information charged violations of the Controlled Substances Act under 21 U.S.C. §§ 841(a)(1) & 843(a)(3) and 18 U.S.C. § 2(a). As stipulated in the Agreement and specified in the Information, the nature of the offense is her aiding and abetting, on 27 occasions, the distribution by others between 2010 and 2012 of a bit less than 147 grams of oxycodone *in toto*, and acquiring a controlled substance by fraud on eight occasions in 2011 and late 2010.

The charges against petitioner arose out of a conspiracy in which one Leon Little used the administrative assistant of a medical doctor to schedule appointments and forge prescriptions for oxycodone using the doctor's prescription pad. Little then recruited three drivers to recruit "pseudo-patients" and transport them to the doctor's

office to obtain prescriptions and then to pharmacies to obtain oxycodone. The oxycodone they obtained in this way was then turned over to Little, who paid them for their service and then sold the drugs for his own benefit. Petitioner Lynette Gregory was one of 60 pseudo-patients who picked up oxycodone prescriptions from the doctor's office and then obtained the oxycodone from various pharmacies. Ms. Gregory was charged with participating in 27 trips to at least three pharmacies, where she had 62 prescriptions filled, based on presenting 16 forged prescriptions. For her involvement in the conspiracy, petitioner was paid $250 per trip, for a total of $7750 in cash over a 21-month period (less than $370 per month). She did not dispute that these funds were paid to her out of the gross proceeds of Little's drug distribution business.

At the time of the offense, petitioner Gregory was disabled from back and knee injuries suffered in a bus accident, and a subsequent re-injury working at a catering company. As a result of these injuries she suffered continuing physical pain. She was living on Social Security disability benefits, supplemented with food stamps. The record of sentencing further revealed that she suffers from the effects of six years of being sexually abused by a maternal uncle from ages 6 to 12. She was diagnosed with bi-polar disorder and anxiety, and suicidal depression. Despite repeated rounds of in-patient treatment, she continued to suffer from alcoholism and drug addiction. Nevertheless, she obtained her GED in 1999. At the time of her arrest and sentencing, she retained no assets, direct or derivative, from her participation in the

conspiracy from 2010-2012. All of those funds had been spent on current living expenses, her children, and her drug and alcohol abuse.

The Information contains a Notice of Forfeiture under 21 U.S.C. § 853(a)(1), which identifies the property sought to be forfeited (cash proceeds of drug sales, or any property "derived from" such proceeds[1]) but does not mention any "forfeiture money judgment" as being sought. Under the plea agreement, Ms. Gregory agreed "not to contest forfeiture *as set forth in the notice of forfeiture* charging forfeiture under 21 U.S.C. § 853" (emphasis added). The agreement included her acknowledgment, in ¶4, of the "total maximum sentence" for the various counts, including that "any property constituting, or derived from, proceeds obtained directly or indirectly from the commission of the violations of Title 21, United States Code, Sections 841(a)(1) and 843 (a)(3) also may be ordered."

The plea agreement also contained a provision under which petitioner waived her right to appeal, with certain specified exceptions. One exception to the appellate waiver is for any sentence that is illegal in the sense of being unauthorized by statute,[2] and another is for any argument that might satisfy the Third Circuit's flexible "miscarriage of justice" standard. See *United States v. Khattak*, 273 F.3d 557,

---

[1] The Information also references "property used or intended to be used ... to commit the offense," see *id.*(a)(2), but that statutory provision has no application on the facts of this case, as applied to petitioner Gregory.

[2] Paragraph 12.b. of the Agreement stated, "If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal or petition for collateral relief but may raise only a claim, if otherwise permitted by law in such a proceeding: (1) that the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 4 above; ...."

562 (3d Cir. 2001), and its progeny. At the hearing for acceptance of the guilty plea, the district court reviewed the appellate waiver clause with Ms. Gregory, as required by Fed.R.Crim.P. 11(b)(1)(N), assuring her that "if I sentence you on any of those counts and the sentence goes above the statutory maximum for that count, you should be able to appeal that and you will be, because it's an illegal sentence and you should – it should be corrected – understood?" Tr. 4/22/15, at 30. The agreement's language specifically referencing forfeiture was not mentioned at the plea hearing.

Before the 35-count Information was filed, petitioner had been cooperating with the government, including testifying before the grand jury. Prior to sentencing, she was supervised on pre-trial release for over three years. This release included conditions of cooperating with mental health, and alcohol and drug abuse treatment. Over that period of time, petitioner successfully addressed her mental health and substance abuse and maintained sobriety. Petitioner Gregory is now 54 years old. She has two grown children, now on their own, and two minor children at home.

On November 13, 2017, the government moved the district court for entry of a "forfeiture money judgment" in the amount of $7750. Petitioner immediately responded in opposition, noting that a "money judgment" was neither mentioned in the Information's Notice of Forfeiture nor authorized by statute.

On November 14, 2017, Ms. Gregory was sentenced, as a downward departure, to concurrent terms of three years' probation with three months to be served on house arrest and 100 hours of community service over the course of her probation. No fine was imposed, based on a finding of inability to pay. She was also ordered to pay

$3500 in special assessments, as required by 18 U.S.C. § 3013(a)(2)(A) ($100 per felony count). At sentencing the court orally reserved the question of whether to enter the challenged personal money judgment of forfeiture, pending further briefing and argument. Judgment of sentence (not including the forfeiture) was then entered on November 15, 2017. In keeping with her agreement, petitioner did not appeal the principal judgment of conviction and sentence.

The final order of forfeiture, over defendant's objection to its legality, was filed on November 28, 2017, in the amount of $7750. The district court's order is supported by a memorandum opinion, which holds that the court is bound by existing Circuit precedent, even if that precedent is inconsistent in principle with this Court's later cases. Appx. B. Petitioner then filed, on December 12, 2017, a timely notice of appeal from the forfeiture judgment alone. *See* Fed.R.Crim.P. 32.2(b)(4)(C) (time to appeal); *Manrique v. United States*, 581 U.S. —, 137 S.Ct. 1266 (2017) (sanction that is entered separately from and subsequent to the principal sentencing judgment must be separately appealed to bring that sanction before the court of appeals for review).

In the U.S. Court of Appeals for the Third Circuit, the government filed a motion to enforce the appellate waiver clause of the plea agreement and on that basis for summary affirmance. Although petitioner's appeal was taken solely from the order of forfeiture, the government's boilerplate motion made no mention whatsoever of the forfeiture or the surrounding litigation in the district court. It also advanced no argument as to why petitioner's preserved challenge to the legality of that order would be within the scope of the appeal waiver provision of her plea agreement.

Petitioner responded with a detailed memorandum of law, explaining why her appeal was not barred by the terms of the agreement, construed in the light of Circuit precedent, and why she had at least a *prima facie* reasonable argument to present against the legality of the forfeiture that had been imposed in her case.

In an unexplained, one-sentence order filed February 26, 2018, a panel of the Third Circuit granted the government's motion and summarily affirmed the challenged criminal forfeiture judgment. Appx. A. This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. The order of the Court below should be summarily reversed, or full review on certiorari granted, as a plea agreement cannot insulate an illegal sentence, such as a criminal forfeiture, from appellate correction, and in any event petitioner's plea agreement should not be understood as waiving her right to appellate review of an unlawful forfeiture.

Plea agreement provisions waiving in most circumstances the right to appeal the sentence to be imposed have become ubiquitous in federal criminal cases. Petitioner's Third Circuit appeal was summarily affirmed in apparent reliance on such a provision, notwithstanding her arguments that the criminal forfeiture imposed on her was illegal. As the Court is well aware, over 95% of federal criminal cases are resolved with plea agreements, and many of those agreements include clauses

waiving the right to appeal. This Court should grant the petition to resolve the applicable standard and regularize this important process.

If a guilty plea is not voluntarily, knowingly and intelligently entered, then the plea may be withdrawn in the district court, Fed.R.Crim.P. 11(d), or invalidated on appeal or collateral attack, Rule 11(e), including any associated agreement and sentence. That is not this case.[3] To the extent that a claim of ineffective assistance of counsel may be cognizable on direct appeal, *cf. Massaro v. United States*, 538 U.S. 500 (2003), a waiver of the right to appeal will generally be held not to bar that issue. See *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (per curiam). Similarly, if the government breaches the agreement at sentencing, then the restrictions of that agreement cannot be enforced against the defendant. *E.g.*, *United States v. Gonzalez*, 16 F.3d 985, 989–90 (9th Cir. 1993). Once again, no such issue is presented here.

In this case, petitioner argued that the issue she sought to advance fell outside the terms of the appeal waiver, particularly if construed in the defendant's favor, because any unauthorized sanction necessarily exceeds the "statutory maximum." In most Circuits, in that situation, the appeal may proceed. See, *e.g.*, *United States v. Palmer*, 456 F.3d 484 (5th Cir. 2006) (waiver of right to appeal "sentence" did not bar appeal of conviction noting lack of factual basis for plea). And regardless of the literal

[3] A plea agreement including an appeal waiver does not deprive the court of appeals of jurisdiction under 28 U.S.C. § 1291, and the waiver is therefore subject both to construction by the appellate court and to waiver and forfeiture by the appellee. See, *e.g.*, *United States v. Gwinnett*, 483 F.3d 200, 202–03 (3d Cir. 2007); *United States v. Story*, 439 F.3d 226, 230–31 (5th Cir. 2006).

words of the agreement, she contended, a claim that the court had imposed a sanction that no federal statute authorizes should be cognizable on appeal as a matter either of policy or of due process. This Court should either grant this petition for certiorari and summarily vacate and remand on this question, or else grant the petition to address when the legality of a federal sentence is inherently cognizable on appeal without regard to any purported waiver.

In *United States v. Greenlaw*, 554 U.S. 237 (2008), this Court held that the government forfeits its opportunity to have an illegally lenient sentence corrected on appeal if it fails to file a timely notice of appeal, even if the defendant appeals the same judgment, notwithstanding the appellate court's authority under Fed.R.Crim.P. 52(b) to notice "plain error" *sua sponte*. In that situation, in other words, an unlawful sentence may be tolerated. But a criminal defendant, unlike the government, has a constitutional right not to be deprived of life, liberty or property without due process of law. U.S. Const., amend. V. This Court has never held that an illegal sentence that prejudices the defendant (that is, a criminal sanction that lacks a clear statutory foundation) can be let stand because of a procedural defect, such as a failure to object. While a court cannot be said to lack "jurisdiction" to enter an illegal sentence, *United States v. Cotton*, 535 U.S. 625, 629–31 (2002),[4] it certainly lacks any semblance of

[4] The life sentence imposed in *Cotton* was "illegal" in the sense that the degree of the offense that would allow that sentence was not supported by the facts alleged in the indictment. Those facts, however, were proven at trial and undisputed. For those reasons, and for lack of surprise, this Court held there was no miscarriage of justice and thus no plain error. 535 U.S. at 631–34.

lawful authority to do so. Hence, any such sentence inherently constitutes a miscarriage of justice.

The standards for allowing appeals to proceed notwithstanding waiver clauses in plea agreements vary somewhat by Circuit. But even the Circuits that employ the narrowest scope of exceptions allow appeals notwithstanding a waiver where the sentence imposed exceeds the legislatively-declared statutory maximum (as well as where the record reveals a denial of the right to counsel at sentencing, or if the sentence reflects a racial or similarly impermissible bias). See *United States v. Thornsbury*, 670 F.3d 532 (4th Cir. 2012), reaffirming *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Attar*, 38 F.3d 727, 72–33 (4th Cir. 1994); *United States v. Bownes*, 405 F.3d 634, 637 (7th Cir. 2005) (only due process limits enforcement)[5]; accord, *United States v. Watson*, 582 F.3d 974, 987 (9th Cir. 2009). See also *United States v. Freeman*, 640 F.3d 180, 194 (6th Cir. 2011) (suggesting that only sentences exceeding statutory maximum and violations of "contract law principles" can justify exceptions to appeal waiver); *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (seemingly not admitting of any such exceptions, referencing only principles of "contract law").[6]

---

[5] See also *United States v. Gibson*, 356 F.3d 761, 763 (7th Cir. 2004) (agreed sentence exceeded statutory maximum under cited statute; plea and sentence vacated and remanded despite waiver of right to appeal).

[6] The Eighth and Tenth Circuits say they apply a seemingly flexible "miscarriage of justice" standard for finding exceptions to appeal waivers, but their application of that rule is not open-ended. Instead, it is "extremely narrow," expressly equated with the standard of the circuits that allow only the narrowest exceptions. See *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (per curiam); *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (en banc).

Under the plea agreement in the present case, petitioner Gregory agreed "not to contest forfeiture *as set forth in the notice of forfeiture* charging forfeiture under 21 U.S.C. § 853." (emphasis added). That Notice of Forfeiture referenced § 853(a)(1) and not any such thing as a "money judgment." The plea agreement also contained a provision exempting from the waiver of petitioner's right to appeal any sentence that "exceeds the statutory maximum for that count as set forth in paragraph 4 above." Paragraph 4, in turn, had referenced criminal forfeiture of proceeds (and property derived from proceeds), but had made no mention of a "forfeiture money judgment." As explained by the district judge during the plea colloquy, "if I sentence you on any of those counts and the sentence goes above the statutory maximum for that count, you should be able to appeal that and you will be, because it's an illegal sentence and you should – it should be corrected – understood?" On this record, it is apparent that the court of appeals should not have prevented petitioner's appeal from the money judgment from proceeding.

But even if the foregoing fact-specific grounds are ignored, under any of the standards articulated in the Circuits, petitioner's appeal could not properly have been summarily rejected. The plea agreement in her case could not, consistent either with due process or with federal supervisory standards, have prevented an appeal seeking to argue that the judgment of forfeiture was unauthorized by statute. This Court should grant the petition for certiorari and either summarily vacate and remand for

_____(cont'd)

consideration of the merits, or else proceed to consider under what standard a defendant's appeal of an assertedly unlawful sentence must be allowed notwithstanding a written waiver of the right to appeal included in a plea agreement.

2. In disregard of this Court's precedent, the courts of appeals, including the court below, are routinely upholding lawless "money judgment" criminal forfeitures, despite lack of authorization in any statute.

Certiorari may and should also be granted to address the merits of petitioner's underlying appellate issue – the legality of the forfeiture imposed in her case. She challenged that imposition in the district court, where the issue was squarely joined, briefed, and addressed in a reasoned order and opinion. Appx. B. Petitioner then filed a timely notice of appeal seeking to challenge it. The court below had jurisdiction to address her contention. Under its own controlling precedent, however, that Court was (wrongly) bound to affirm on the merits, and may have taken the shortcut of granting the government's motion for summary affirmance on that basis alone, particularly given the weakness of the government's contention (as discussed under Point 1) that petitioner had waived the right to present that issue on appeal. Although the court of appeals gave no indication of its actual reasoning, *see* Appx. A, this Court is free to grant the present petition, express its disagreement with the enforcement of the appellate waiver, and then consider the merits as well. The latter issue is important, is squarely presented on the instant record, and has been thoroughly addressed in the Circuits. Upon consideration of the merits, it will be apparent that the judgment of the court below should be reversed.

Forfeiture is referred to in the governing statutes as a "sanction" for criminal conduct. *See* 18 U.S.C. §§ 3551(a), 3554. But however labeled by Congress, it is, as a matter of fundamental criminal and constitutional law, part of the sentence for the crime of which a defendant stands convicted. No sentence is lawful unless authorized by a statute, strictly construed. *Jones v. United States*, 526 U.S. 227, 233–34 (1999); *United States v. Evans*, 333 U.S. 483 (1948). This fundamental rule of legality is equally applicable to "sanctions" that stand in some sense apart from the core of the sentence. See *Paroline v. United States*, 572 U.S. —, 134 S.Ct. 1710 (2014) (strict construction of restitution statute); *Hughey v. United States*, 495 U.S. 411, 422 (1990) (same). To establish a criminal forfeiture, like any other sanction or sentence for the commission of a federal crime, in other words, the government must show that its claim comes squarely within a statutory provision calling for that penalty. See *United States v. Honeycutt*, 581 U.S. —, 137 S.Ct. 1626, 198 L.Ed.2d 73 (2017) ("joint and several" liability for criminal forfeiture is unlawful, for lack of express statutory authorization).

The governing Rule of Procedure properly and explicitly states that the court may order forfeiture only of "property" that "is subject to forfeiture under the applicable statute." Fed.R.Crim.P. 32.2(b)(1)(A). To the same effect, petitioner in her plea agreement stipulated that she would not challenge any forfeiture in keeping with (that is, "as set forth in") the Notice of Forfeiture that was part of the Information to which she pleaded guilty. That Notice seeks forfeiture only under 21 U.S.C. § 853(a)(1), and identifies the property sought to be forfeited (cash proceeds of drug

sales, or any property "derived from" such proceeds[7]) but does not mention any "forfeiture money judgment" as being sought.

Referencing the Third Circuit's pre-*Honeycutt* decision in *United States v. Vampire Nation (Banks)*, 451 F.3d 189, 202 (3d Cir. 2006) , the district court ruled that petitioner's admitted spending on daily essentials of the $250 payments she had received for acting as a "pseudo-patient" courier in the drug business meant that the money had "been transferred ... to ... a third party," within the meaning of 21 U.S.C. § 853(p), thus triggering a right to the forfeiture of substitute property under that provision. So far, so good. But § 853(p) itself must be strictly construed and enforced. *Honeycutt*, 137 S.Ct. at 1634. And that provision, like § 853(a) refers exclusively to forfeiture of "property" of the defendant, as defined in § 853(b). Subsection (b) encompasses all forms of real and personal property, tangible and intangible,[8] but says nothing about entry of a general judgment against the defendant.

Neither the statute referenced in the Notice nor any other statute applicable to this case – or to almost any other federal criminal case – authorizes a criminal forfeiture in the form of a "money judgment." Rather, under federal forfeiture statutes, only specific and identified items of property can be "forfeited." This is equally true of tainted property, property derived from the original tainted property (here, various packets of $250 in cash), or substitute assets. "Criminal forfeiture

---

[7] The Information also references "property used or intended to be used ... to commit the offense," see *id.*(a)(2), but that statutory provision has no application on the facts of this case.

[8] *See* Statutes Involved *ante*.

statutes empower the Government to confiscate property derived from or used to facilitate criminal activity." *Honeycutt*, 137 S.Ct. at 1631. Forfeiture is "limit[ed] to" specific categories of property described in the governing statute. *Id*. 1632. "These provisions, by their terms, limit forfeiture under § 853 to tainted property ...." *Id.* Certiorari should be granted to articulate, further establish and enforce this basic principle of legality which is presently lacking from the case law governing criminal forfeiture in the Circuits, as applied to so-called "money judgments."

That $7750 in cash may, at one time, while that cash was still in her possession, have been forfeitable from the petitioner under 21 U.S.C. § 853 (a)(1) , the provision covering proceeds and property derived from proceeds, does not mean that "the sum of" $7750 was forfeitable, as stated in the district court's order, and as affirmed by the court below. A "sum" of money is a mathematical measurement of value; it is not a description of any "property" which is subject to forfeiture under 21 U.S.C. § 853(a); see also *id.* § 853(b) ("property" defined to encompass both real and personal property, whether tangible or intangible; a "sum" of money, in the abstract, is neither), or under § 853(p). In other words, "the sum of $7750" is not the same thing (for example) as "$7750 in United States currency," which would be a form of tangible, personal "property," and forfeitable if seized from a defendant.

The district court, and presumably the court below, upheld the money judgment forfeiture in this case in reliance on the Third Circuit's two cases touching on the subject. See *United States v. Vampire Nation (Banks)*, 451 F.3d 189, 202 (3d Cir. 2006) (fraud and money laundering forfeiture under 18 U.S.C. § 982), relying on

United States v. Voigt, 89 F.3d 1050, 1084-88 (3d Cir. 1997).) While a careful reading of those cases might find them distinguishable, the lower courts did not view the local precedent that way, and in any event the other Circuits uniformly take the same position.[9] Yet not a single one of these cases advances a statutory-language rationale for its holding, as this Court's cases would require. To the contrary, the conventional approach is typified by the Fourth Circuit's opinion, which accurately states, "It is well settled that nothing in the applicable forfeiture statutes suggests that money judgments are forbidden." *United States v. Blackman*, 746 F.3d 137, 145 (4th Cir. 2014); accord, *United States v. Day*, 524 F.3d 1361, 1377 (D.C.Cir. 2008) ("Nothing in the relevant statutes suggests that money judgments are *forbidden*."). Needless to say, that is the opposite of the correct approach.

Under our Constitution, the government does not enjoy all powers that are not forbidden to it. To the contrary, the government can exercise no power against a person's liberty or property that is not expressly granted to it – particularly in a criminal case. The words of the applicable provisions "work to limit the operation of the statute." *Honeycutt*, 136 S.Ct. at 1632. Because the kind of forfeiture ordered in

---

[9] *E.g.*, *United States v. Olquin*, 643 F.3d 384, 395–98 (5th Cir. 2011) (collecting cases); see also *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013); *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012); *United States v. Gregoire*, 638 F.3d 962, 972 (8th Cir. 2011); *United States v. McGinty*, 610 F.3d 1242, 1245–49 (10th Cir. 2010); *United States v. Awad*, 598 F.3d 76 (2d Cir. 2010) (per curiam); *United States v. Casey*, 444 F.3d 1071, 1073–77 (9th Cir. 2006); *United States v. Hall*, 434 F.3d 42, 58–60 (1st Cir. 2006) (citing Second, Seventh and Eighth Circuits); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005).

this case is unauthorized by law, yet commonly imposed and routinely approved, this Court's intervention is required.

A criminal forfeiture is *in personam*, not *in rem*; that is, the criminal penalty statute does not demand forfeiture of some item of misused property regardless of who owns it, but rather demands forfeiture only of a particular defendant's tainted *interest* in the property. 21 U.S.C. § 853(n); Fed.R.Crim.P. 32.2(c) (providing for third party claims asserting an interest, other than the defendant's, in property ordered criminally forfeited); see *Honeycutt*, 137 S.Ct. at 1635. For this basic conceptual reason, the forfeiture statutes do not authorize the entry of "a general judgment *in personam*" against a criminal defendant for a sum of money, as if the government had won a lawsuit against the defendant. Rather, any criminal forfeiture judgment must be limited to "property constituting, or derived from any proceeds the person obtained, directly or indirectly," from committing the crime. 21 U.S.C. § 853(a)(1). The government may be able to take other property, if such exists, but nothing in the statute allows it to place a judgment lien against the defendant that places her in a state of perpetual financial impotence and prevents her from getting back on her feet.

In this case, after identifying $7750 as the total amount of money received by petitioner over the life of the conspiracy for her minor role as a "pseudo-patient," the district court failed to take the step required by the plain language of the statute and identify any "property" made forfeitable by law, or failing that, any substitute property of the impecunious petitioner that the government was entitled to take possession of, in satisfaction of its total potential forfeiture entitlement.

Although as already noted many courts have approved government demands for a "personal money judgment" at sentencing in lieu of a judgment ordering the forfeiture of the defendant's proven interest in specific tainted property, or failing that, some specific "substitute asset" of equal value that the defendant actually possesses, no court has persuasively justified this lawless practice. A careful consideration of the language, structure, history and purpose of the criminal forfeiture statutes demonstrates that such personal money judgments are not authorized. See *United States v. Surgent*, 2009 WL 2525137, *6–*7 (E.D.N.Y., Aug. 17, 2009) (Gleeson, J.).[10]

When Congress intends to authorize a "personal money judgment" in lieu of forfeiture of the defendant's interest in tainted (or substitute) property, it knows how to authorize that remedy. It has done so exactly once. *See* 31 U.S.C. § 5332(b)(4) ("personal money judgment" as alternative penalty where forfeiture not effective, in cases of bulk cash smuggling). Nothing in 21 U.S.C. § 853 authorizes that penalty.[11] Such differences in wording between statutes addressing similar concerns are given controlling weight over general statutory purpose when interpreting the statute lacking the specific provision, particularly in criminal cases. See *Lagos v. United*

[10] See also *United States v. Croce*, 334 F. Supp.2d 781 (E.D.Pa. 2004), *modified & adhered to on reconsideration*, 345 F. Supp.2d 492, *reconsideration denied*, 355 F.Supp.2d 774 (2005), *rev'd*, 209 Fed.Appx. 208 (3d Cir. 2006) (not precedential). The district court's opinions in *Croce* were the first to carefully analyze the issue.

[11] Fed.R.Crim.P. 32.2, which regulates criminal forfeiture proceedings, refers to "money judgments" in terms of notice, factfinding and the right to jury trial *See* Rule 32.2(a), (b)(1)(A), (b)(5) (by implication). As stated in the Advisory Committee Note (2000), "A number of cases have approved use of money judgment forfeitures. The Committee takes no position on the correctness of those rulings."

States, 584 U.S. —, 138 S.Ct. 1684, 1689–90 (May 29, 2018) (construing restitution statute); *Dean v. United States*, 581 U.S. —, 137 S.Ct. 1170, 1177 (2017) (construing mandatory consecutive sentencing law).

Discussing forfeiture, this Court has recognized that "it makes sense to scrutinize governmental action more closely when the State stands to benefit" financially. *United States v. Good Real Property*, 510 U.S. 43, 56 (1993), quoting *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring). And as this Court has also held, "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional [judicially inferred] remedies." *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 93–94 (1981).[12] "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* 97.[13] No reference to a "personal money judgment" appears in § 853 (or any other criminal forfeiture statute with the exception of 31 U.S.C. § 5332(b), as noted previously). The forfeiture ordered in this case against petitioner is thus not only unauthorized by statute, but also outside both the holdings and the rationale of all of this Court's most pertinent cases.

---

[12] See also *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 732 (1989); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981).

[13] Accord *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146–47 (1985); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 (1981) ("The comprehensive character of the procedures outlined ... precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress explicitly addressed.").

The court below (and other Circuits) have expressed a concern not to interpret the statutes in a way that "would permit defendants who unlawfully obtain proceeds to dissipate those proceeds and avoid liability for their ill-gotten gains." *Banks* (*Vampire Nation)*, 451 F.3d at 202. But the criminal sentencing laws already answer that concern in two different ways; no extra-statutory remedy like a "money judgment" is needed, even if such were permissible. First, the drug laws in this case authorize a fine of up to $1 million per count under 21 U.S.C. § 841(b)(1)(C) (and even more, under 18 U.S.C. § 3571(d), if there is that much "gross gain") plus $250,000 per count under § 843(a)(3) (referencing 18 U.S.C. § 3571(b)(3)). There is no need to distort the meaning of the word "forfeiture," obliterating the difference between a forfeiture and a fine, to deal with the possibility of a drug dealer's holding on to illicit gains. In any event, no such concern has any application to petitioner's case.

The second way in which the statute addresses the policy concerns expressed in case law is the substitute assets provision itself. The forfeiture statute itself provides that if property traceable to the crime is not available, the court may direct forfeiture, upon motion of the government, of "substitute property." *See* 21 U.S.C. § 853(p); *Honeycutt*, 137 S.Ct. at 1633–34. Before seeking substitute assets, however, the government must prove that one or more of the conditions of § 853(p)(1) exists.[14]

[14] Ordinarily, the government cannot invoke the "substitute assets" process until some primary asset is ordered forfeited, and attempts to seize it (or to trace the property derived from it, if the primary asset is gone) have failed. Here, the government persuaded the district court to skip that step based on petitioner's admission that she had spent the paltry sums she was paid for her role on daily living expenses. Unlike in criminal forfeiture generally, the jury has no role in the process of satisfying a forfeiture sanction from "substitute assets." 21 U.S.C. § 853(p)(2); Fed.R.Crim.P. 32.2(e)(3).

If a "money judgment" for a total "sum" were authorized, the substitute assets provision in subsection (p) would be rendered "futile," *Honeycutt*, 136 S.Ct. at 1633, that is, surplusage at best.[15] Like the extra-statutory "joint and several liability" theory unanimously rejected by this Court in *Honeycutt*, a "personal money judgment," even if entered only after the threshold prerequisites for § 853(p) liability have been established, "would allow the Government to circumvent Congress's carefully constructed statutory scheme, which permits forfeiture of substitute property only when the requirements of §§ 853(p) and (a) are satisfied," 136 S.Ct. at 1634, most notably the fundamental requirement of identifying one or more specific items of property possessed by the defendant. *See also* Fed.R.Crim.P. 32.2(e)(1)(B), (e)(2)A) (procedure to implementing § 853(p), referring to entry of order identifying "that property"). The "money judgment" theory negates the substitute assets part of the statute and is invalid for that reason as well.

To address the lawless but pervasive employment of "money judgments" in defiance of the detailed and specific criminal forfeiture laws, as occurred in this case, the petition should be granted.

[15] The notion of a "money judgment" forfeiture also renders pointless – and thus conflicts with – Congress's enactment of the presumption in 21 U.S.C. § 853(d) that property possessed by a drug dealer represents proceeds. See *Honeycutt*, 136 S.Ct. at 1633.

CONCLUSION

For the foregoing reasons, petitioner LYNETTE GREGORY prays that this Court grant her petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of forfeiture that was made part of her sentence.

Respectfully submitted,

s/Peter Goldberger
PETER GOLDBERGER
Counsel of Record
ANNA M. DURBIN
Court-Appointed (CJA)
Attorneys for Petitioner

June 28, 2018.