No. 19-6062

IN THE
SUPREME COURT OF THE UNITED STATES

PRISCILLA DAYDEE VALDEZ
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

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

REPLY TO UNITED STATES OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
District of Arizona

*M. EDITH CUNNINGHAM
Assistant Federal Public Defender
407 W. Congress, Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7500
Facsimile: (520) 879-7600
edie_cunningham@fd.org

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER

INTRODUCTION

Ms. Valdez seeks review of the Ninth Circuit's ruling requiring her to forfeit her own money as a substitute for unlawfully exported ammunition that never belonged to her. The Ninth Circuit's interpretation of the interplay between 18 U.S.C. § 924(d), 28 U.S.C. § 2461, and 21 U.S.C. § 853(p) is at odds with rules of statutory construction, the relevant legislative history, the overarching statutory scheme, and the background principles of forfeiture.

The government claims that the Ninth Circuit's interpretation is correct without addressing any of those points. It also inaccurately characterizes the Third and Fourth Circuits' analysis of the interplay between 28 U.S.C. § 2461 and 21 U.S.C. § 853(p) in an apparent effort to obscure the circuit split created by the Ninth Circuit's ruling. That ruling—applicable to about 20% of the nation's population—unfairly exacts financial hardship on economically disadvantaged defendants struggling to get back on their feet.

This Court should grant the writ to ensure a fair and uniform application of the bridging statute, 28 U.S.C. § 2461. Although this case involves a criminal forfeiture under 18 U.S.C. § 924(d) and 28 U.S.C. § 2461, the Ninth Circuit's erroneous ruling applies to *all* criminal forfeitures imposed via this bridging statute, which broadly applies to all civil forfeiture statutes, including the widely applicable 18 U.S.C. § 981.

ARGUMENT

I. Rules of statutory construction support interpretation of the statutory scheme to preclude forfeiture of substitute property in lieu of ammunition that was not the defendant's property.

A. The Ninth Circuit's contrary interpretation conflicts with the statutory text.

The Ninth Circuit's interpretation contravenes rules of textual interpretation and the requirement to construe forfeiture statutes strictly against the government. Petition for Writ of Certiorari (Pet.) 14-19. Like the Ninth Circuit, the government simply ignores key points made by Ms. Valdez.

First, the government ignores the plain language of 18 U.S.C. § 924(d)(2)(C), which limits forfeitures to "*only* those firearms or quantities of ammunition" involved in a violation under that section. *Id.* (emphasis added). If the statutory scheme is strictly construed, 21 U.S.C. § 853(p) should not even apply via the bridging statute, 28 U.S.C. § 2461, because of this strict limiting language in 18 U.S.C. § 924(d). Pet. 14-15. Section 853(p) also should not apply via the bridging statute because it is not a "procedure" but rather requires the court to make the substantive determination whether the defendant is responsible for the government's inability to seize property subject to criminal forfeiture. Pet. 18 n.8. (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

But, if 21 U.S.C. § 853(p) is a "procedure" incorporated by 28 U.S.C. § 2461, then the limitations of § 853(a)—explicitly incorporated by the language of § 853(p)—are integral to that procedure. Under § 853(p)(1)'s plain language, substitute-asset forfeiture comes into play only "if any property described in

subsection (a)" is unavailable to the government as a result of the defendant's act or omission. § 853(p)(1). The property described in § 853(a) is limited to any of the *defendant's property* used to commit the offense or any *proceeds the defendant obtained* as a result. Section 853(p)(2)'s plain language confirms that § 853(a)'s limitations must apply by directing the forfeiture of "any *other* property *of the defendant*" if the defendant renders unavailable the property subject to forfeiture. § 853(p)(2) (emphasis added). If the limitations of § 853(a) did not apply to § 853(p), then the word "other" in § 853(p)(2) would be rendered superfluous, violating a basic tenet of statutory construction. Pet. 15-17. And, if there is any ambiguity in the statutory scheme, it must be resolved in defendants' favor under the rule of lenity. Pet. 14, 17-18.

The government, however, does not even address these fundamental principles of statutory construction. Brief in Opposition (B.I.O.) 8-10. The only case it relies upon, *United States v. Bermudez*, 413 F.3d 304 (2d Cir. 2005), did not involve application of § 853(p) via 28 U.S.C, § 2461(c) but addressed substitute-asset forfeiture under a separate criminal forfeiture statute, 18 U.S.C. § 982. In § 982(b)(2), Congress explicitly authorized substitute-asset forfeiture under the "provisions" (*not* the "procedures") of § 853(p) for certain money-laundering defendants who handled but did not retain the tainted property, but only if the defendant conducted three or more transactions involving $100,000 or more in a twelve-month period. Thus, "only intermediaries . . . who are financially capable of laundering large amounts of property are required to forfeit substitute assets

[under § 982(b)(2)], and [Congress "plainly [] contemplated"] the possibility of an oppressively high forfeiture to profit ratio." *Bermudez*, 413 F.3d at 307 (quoting *United States v. Hendrickson*, 22 F.3d 170, 175 (7th Cir. 1994)).

In contrast, nothing in the text or legislative history of 28 U.S.C. § 2461 reflects intention to subject mere intermediaries, particularly those like Ms. Valdez who had no assets to begin with, to such draconian substitute-asset forfeiture. Pet. 12-13.

B. Confiscating substitute assets when the property subject to forfeiture was not the defendant's property is inconsistent with the relevant legislative history, the background principles of forfeiture, and the overarching statutory scheme.

The government refers to Ms. Valdez's discussion of the background principles of forfeiture but does not refute her argument that the Ninth's Circuit's ruling conflicts with those principles. B.I.O. 10. Civil forfeiture laws reach only tainted property—contraband and the instrumentalities of crime—and Congress enacted criminal forfeiture laws to deprive criminals of not only the tools they use to commit crime but also the proceeds of their crimes. Pet. 8-11. The forfeiture order at issue here serves none of these purposes.

Given these rationales for forfeiture, it is inappropriate to force an intermediary defendant to forfeit substitute assets in place of items purchased with money provided by a criminal mastermind and then delivered to that mastermind. Accordingly, Congress designed the nation's seminal criminal forfeiture statutes—21 U.S.C. § 853 (drug-trafficking) and 18 U.S.C. § 1963 (racketeering)—to allow substitute-asset forfeiture only when the defendant has transferred or concealed *her*

own property, either something she owned that she used to commit the offense or any property she obtained as proceeds from her involvement. Pet. 11-12 (citing S. Rep. No. 98-225 at 194, 196 (1983)). Congress made a very limited exception in 18 U.S.C. § 982(b)(2) for those defendants who have the financial wherewithal to launder hundreds of thousands of dollars' worth of property for significant financial gain. *See Bermudez*, 413 F.3d at 307.

But most intermediaries who become criminally involved are on the low end of the economic totem pole. They commit crime because they are in desperate need of money, and they agree to do things such as transport drugs or ammunition for a fee that is a small fraction of the commodity's market value. It would be counterproductive for Congress to seek substitute-asset forfeiture from such intermediaries—essentially requiring them to forfeit their own assets to pay for the criminal scheme of the mastermind who induced them to participate—even if they did not profit from that scheme or use their own property in assisting the mastermind to effectuate it. If a defendant had little or no financial resources to begin with, allowing the government to confiscate the defendant's meager assets or future income as a substitute for the value of the unseized contraband, without providing any discretion to the district court to determine whether this extremely punitive measure is appropriate under case-specific circumstances, only perpetuates the defendant's financial instability, which is often what led to the defendant's criminal behavior in the first place. Such a harsh sanction—disconnected from the traditional mechanisms of both civil and criminal forfeiture—only serves to make it

more difficult for economically disadvantaged defendants to reintegrate into society.

Nothing indicates that Congress intended for the bridging statute, 28 U.S.C. § 2461, to operate in such a harsh manner, something the government also fails to address. Instead, there is every indication that, if substitute-asset forfeiture is to be applied under 21 U.S.C. § 853(p) and the bridging statute, Congress intended that it be imposed subject to the limitations of § 853(a). The relevant Congressional report explains that 28 U.S.C. § 2461(c) was designed to streamline forfeiture proceedings and to provide *greater* protections for defendants in those proceedings. Pet. 12-14 (citing H.R. Rep. No. 105-358(I) at 35 (1997)). That same report confirmed Congress' view that the purpose of criminal forfeiture laws is to deprive defendants of the tools they use to commit crime and the proceeds of their crimes. *Id.*

And accepting the Ninth Circuit's contrary interpretation leads to an obvious absurdity that Congress could not have intended. Letting the *Valdez* opinion stand would allow the government to indirectly force drug-trafficking defendants to criminally forfeit substitute assets via 21 U.S.C. § 881 and 28 U.S.C. § 2461 even when it cannot obtain such assets directly under 21 U.S.C. § 853, the criminal forfeiture statute Congress enacted specifically for drug-trafficking offenses. Pet. at 28-29. The government offers no explanation as to why the government should be able to "circumvent Congress' carefully constructed statutory scheme," *Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017), in this manner.

C. The Ninth Circuit's interpretation raises constitutional concerns.

The government correctly notes that Ms. Valdez did not raise an Eighth

Amendment claim below. B.I.O. 10. Nor does she raise one before this Court. Her petition simply alerts the Court to grave constitutional concerns stemming from the Ninth Circuit's interpretation, concerns which must be avoided under rules of statutory construction if "fairly possible." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)). Ms. Valdez also alerted the Ninth Circuit to its obligation to consider constitutional concerns. Reply Brief of Appellant, *United States v. Valdez*, 9th Cir. No. 17-10446, 2018 WL 3109527, at 5 (2018); *United States v. Valdez*, 911 F.3d 960, 967 (9th Cir. 2018) (Pet. App. A5).

The government does not dispute that, under the Ninth Circuit's interpretation, Eighth Amendment concerns could arise in other cases. It also does not dispute that this interpretation raises serious due process and equal protection concerns, including by mandating a harsh forfeiture penalty for intermediary-defendants whose smuggling crimes are detected after-the-fact but requiring no forfeiture penalty at all for equally or more culpable intermediary-defendants who are caught at the border with the ammunition in hand. Pet. 21-25.

II. Contrary to the government's claim, the Ninth Circuit's interpretation contravenes this Court's reasoning in *Honeycutt* and conflicts with other circuits.

The government claims that the Ninth Circuit's holding is not inconsistent with *Honeycutt*, 137 S. Ct. 1626, because, there, this Court addressed a forfeiture order under 21 U.S.C. 853(a)(1) and considered the propriety of imposing joint and several liability under that statute. B.I.O 11-12. But Ms. Valdez acknowledges that *Honeycutt's* holding addresses whether § 853(a)(1) authorizes joint and several

liability. Pet. 25. She then explains how the Ninth Circuit's interpretation here conflicts with *Honeycutt*'s reasoning, which relied on, inter alia, the background principles of forfeiture, the text of 21 U.S.C. § 853(p), and the circumscribed role of intermediaries in criminal offenses. Pet. 25-27. The government does not address these points. B.I.O. 11-12.

Importantly, this Court emphasized that § 853(p) "begins from the premise that the defendant once possessed tainted property *as 'described in subsection (a),'* and provides a means for the Government to recoup the value of the property if it has been dissipated or otherwise disposed of by 'any act or omission of the defendant.'" *Honeycutt*, 137 S. Ct. at 1634 (emphasis added) (quoting § 853(p)(1)). The Court also noted that "Congress' carefully constructed statutory scheme [] permits forfeiture of substitute property only when the requirements of §§ 853(p) *and* (a) are satisfied." *Id.* (emphasis added). These points support Ms. Valdez's argument that § 853(a)'s limitations are integral to § 853(p)'s provision for substitute-asset forfeiture.

Moreover, contrary to the government's contention (B.I.O. 12-14), the Ninth Circuit's interpretation *does* conflict with the Third and Fourth Circuits' interpretation of the interplay between 28 U.S.C. § 2461(c) and the limitations of 21 U.S.C. § 853(a).

The government correctly notes that neither *United States v. Vampire Nation*, 451 F.3d 189, 201-02 (3d Cir. 2006) nor *United States v. Alamoudi*, 452 F.3d 310, 313-14 (4th Cir. 2006) involved a forfeiture under 18 U.S.C. § 924(d). But, as

the government concedes, both involved a civil forfeiture under 18 U.S.C. § 981(a)(1)(C) that was transformed into a criminal forfeiture via 28 U.S.C. § 2461(c). Thus, as here, these cases required the court to consider whether 21 U.S.C. § 853(p) is subject to the limitations of § 853(a) when applied via 28 U.S.C. § 2461.

In *Alamoudi*, 452 F.3d at 311-16, substitute-asset forfeiture was appropriate because the defendant had concealed money he obtained as proceeds. In rejecting the defendant's Sixth Amendment claim that he was entitled to a jury determination on the forfeiture of substitute assets, the court explained that, under 21 U.S.C. § 853(a), criminal forfeiture may include all proceeds obtained by the defendant. *Id.* at 314. It emphasized that substitute-asset forfeiture under § 853(p) does not allow for an increase in the forfeiture's dollar amount and therefore does not increase the punishment. *Id.* at 315. Implicit in that holding is the requirement that substitute-asset forfeiture under § 853(p) is limited to situations in which a defendant transfers or conceals *his own* property (consistent with § 853(a)). Otherwise, confiscation of substitute assets *would* increase the dollar amount of the forfeiture imposed on the defendant, because confiscating someone else's property traceable to the offense exacts *no* punishment on a defendant. Pet. 28.

In *Vampire Nation*, 451 F.3d at 202, although the criminal forfeiture was imposed under 18 U.S.C. § 981 and 28 U.S.C. § 2461, the court specified that the criminal forfeiture was "limited by the provisions of 21 U.S.C. § 853(a)" and that the court may order forfeiture of substitute property "[i]n the event that property

traceable to the crime is not available." In *United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017), the court—citing and relying upon this statement in *Vampire Nation*—held that the limiting language of 21 U.S.C. § 853(a) applies when criminal forfeiture of substitute assets is imposed via 18 U.S.C. § 981, 28 U.S.C. § 2461, and 21 U.S.C. § 853(p). (Although the *Gjeli* court did not cite 28 U.S.C. § 2461, that statute provides the only mechanism by which 21 U.S.C. § 853(p) could apply to a civil forfeiture authorized by 18 U.S.C. § 981.) Thus, the Third Circuit has already explicitly disagreed with the Ninth Circuit's resolution of this issue.

Therefore, while all circuits to have addressed the issue have held that 28 U.S.C. § 2461(c) incorporates the substitute-property provisions of 21 U.S.C. § 853(p), the Ninth Circuit diverged from the Third and Fourth Circuits in holding that, when § 853(p) is so incorporated, the limitations set forth in § 853(a) need not be applied as well. No other circuit has addressed that issue.

III. This case is an ideal vehicle to resolve the questions presented.

The government does not dispute that Ms. Valdez was a mere intermediary with no ownership interest in the ammunition. The straightforward facts here present an ideal opportunity to focus on the purely legal issues presented.

Because of the Ninth Circuit's sheer size, the impact of its erroneous holding is widespread. Pet. 30-31. Although the $1,235 forfeiture order imposed on Ms. Valdez is not a huge sum, it impacts her greatly given her limited means and personal circumstances. And it has now become commonplace in the District of Arizona to order forfeiture of a defendant's substitute assets in lieu of unlawfully

exported firearms and ammunition under 28 U.S.C. § 2461 and 21 U.S.C. § 853(p) with no determination that the missing contraband qualifies as the defendant's property under 21 U.S.C. § 853(a). Some of these orders involve significant sums of money. *See*, *e.g.*, *United States v. Valles*, 4:16-cr-01059-JAS-BPV (D. Ariz.), Document 178 (6/25/18 Notice of Amended Order of Forfeiture, $61,476 forfeiture order); *United States v. Soto*, 915 F.3d 675, 677 (9th Cir. 2019) ($7,123 forfeiture order); *United States v. Cereceres*, 771 F. App'x 803 (9th Cir. 2019) ($3,939 forfeiture order). It will be very difficult for impoverished defendants to recover from this financial hit as they try to rebuild their lives.

Contrary to the government's claim (B.I.O. 14), the issues in Ms. Valdez's petition are closely related to the circuit split on the permissibility of joint and several liability under 18 U.S.C. § 981(a)(1)(C), because civil forfeiture under this statute can be imposed as a criminal forfeiture via 28 U.S.C. § 2461, which the courts of appeal have agreed brings 21 U.S.C. § 853(p) into play if the government seeks substitute assets. If § 853(p) is subject to the limitations of § 853(a), then joint and several liability is not allowed under *Honeycutt*.

The government correctly notes that this Court recently denied the certiorari petition in *Peithman v. United States*, which questioned whether joint and several liability can be imposed under 18 U.S.C. § 981(a)(1)(C), because the government conceded that *Honeycutt*'s reasoning applies to that statute. 140 S. Ct. 340 (2019) (No. 19-16). The government has not, however, conceded that the limitations of 21 U.S.C. § 853(a) must be applied as well if the substitute-asset provision of 21 U.S.C.

§ 853(p) is applied to a forfeiture imposed under any statute via 28 U.S.C. § 2461. Therefore, it is now even more critical for the Court to grant Ms. Valdez's writ in order to provide necessary guidance to federal courts on how to properly impose criminal forfeiture orders via 28 U.S.C. § 2461 when the statute of conviction authorizes civil forfeiture of property.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted this 28th day of February, 2020.

JON M. SANDS
Federal Public Defender
District of Arizona

s/M. Edith Cunningham
*M. Edith Cunningham
Assistant Federal Public Defender
407 W. Congress Street, Suite 501
Tucson, Arizona 85701
Telephone: (520) 879-7500
Facsimile: (520) 879-7600
edie_cunningham@fd.org
**Counsel of Record*