No. 19-

IN THE

Supreme Court of the United States

MARITIME LIFE CARIBBEAN LTD.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title 28, section 516, of the United States Code, vests the authority to litigate on behalf of the United States in the Department of Justice, under the supervision of the Attorney General. In turn, section 543 vests the Attorney General with the power to appoint attorneys to assist United States attorneys in the conduct of the litigation.

The question presented is whether a district court's usurpation of the Attorney General's power to appoint a private attorney to represent the interests of the United States—over the United States' objection—is subject to harmless error review.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

A. Parties to the Proceeding

This action was initially brought by the United States against Raul Gutierrez, and others in a multi-defendant indictment. Mr. Gutierrez pled guilty to the crimes charged and the United States moved for a preliminary order of forfeiture. Thereafter, petitioner, Maritime Life Caribbean Ltd. ("Maritime"), filed a third-party ancillary petition pursuant to 21 U.S.C. § 853(n). Over the United States' objection, the District Court instructed a third-party, the Republic of Trinidad and Tobago ("Trinidad"), to represent the United States in the ancillary proceeding.

B. Corporate Disclosure Statement

Maritime does not have any parent corporations. No other publicly held company owns 10% or more of Maritime's stock. This disclosure is made pursuant to Rule 29.6.

C. Complete List of Directly Related Cases

United States v. Gutierrez, Case No. 05-20859, District Court for the Southern District of Florida

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The District Court's order granting a foreign sovereign's motion to intervene in the ancillary forfeiture proceeding is reproduced at App. F (ECF No. 473). The District Court announced its decision overruling the United States' objection to the intervention from the bench. The relevant pages of the transcript are reproduced at App. E (ECF No. 1286, 04/12/07 Tr. 305:19-24). From the bench, the District Court authorized the foreign sovereign to "carry the burden" for the United States, to "get the United States out of the picture." The relevant page of the transcript are reproduced at App. D (ECF No. 829, 01/23/12 Tr. 515:14–516:5). The District Court order recognizing that the foreign sovereign had no legal right, title or interest, but allowing the foreign sovereign to remain in the proceeding, "not in their own rights, but . . . to do the work on behalf of the United States," is available at App. C (ECF 976, 07/09/14 Tr. 708:14–22). The District Court order authorizing the foreign sovereign to relieve the United States of its "heavy burden of prosecuting the case by putting that burden on the real party in interest" is available at App. B (ECF No. 1242; ECF No. 1283, 12/08/16 Tr.).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 2019. App. A; *United States v. Maritime Life Caribbean Ltd.*, 913 F.3d 1027 (11th Cir. 2019). On April 10, 2019, the Court of Appeals entered an order denying Maritime's timely filed petition for panel rehearing and for rehearing *en banc*. App. H; *United States v. Maritime Life Caribbean Ltd.*, No. 17-10889, 2019 U.S. App. LEXIS 10702 (11th Cir. Apr. 10, 2019). Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

- 28 U.S.C. § 516(a) – "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

- 28 U.S.C § 543(a) – "The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires, including the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting Federal offenses committed in Indian country."

- 28 U.S.C § 544 – "Each United States attorney, assistant United States attorney, and attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties."

- 28 U.S.C. § 853(k) – "Bar on intervention. Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may— (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section . . ."

- 28 U.S.C. § 853(n) – "Third party interests . . . (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury. . ."

STATEMENT OF THE CASE

On November 3, 2006, Mr. Gutierrez pled guilty to criminal charges and agreed to forfeit his home, located at 12850 SW 57th Avenue, Miami, Florida, 33156 (the "Red Road Property"). The United States moved for a preliminary order of forfeiture, which the District Court granted. (ECF Nos. 417 & 418). Trinidad moved to intervene, citing Federal Rule of Civil Procedure 24(a). (ECF No. 463). In support of its motion, Trinidad relied exclusively on its status as a victim of fraud whose alleged entitlement to restitution was partially dependent on the sale of the Red Road Property. *Id.* At a status conference, the District Court questioned Trinidad's standing:

> I am not sure if [Trinidad has] standing, but we are not going to have three people arguing the same thing. You can form a committee on the Government/victim side and decide who will be speaking for that group. You should have interests in common. If there is an issue with that let me know.

App. G (ECF No. 726, 03/06/07 Tr. 284:21–285:2). In a summary order, the District Court granted Trinidad's motion to intervene. (ECF No. 473).

At the next hearing, counsel for the United States referred to the previous status conference and warned of a conflict arising from Trinidad's participation:

> There is a potential conflict here . . . in a forfeiture proceeding, it is extremely clear from all the case law and the statute, the victims don't really have a right to have standing in a forfeiture proceeding . . . And it's of concern to the United States because we do it all the time. And an exception can be made which can become precedential. At this point I'm extremely concerned about it.

App. E (ECF No. 1286, 04/12/07 Tr. 204:4–5, 305:16–306:11). The District Court responded: "I think you are going to see that you are going to get a lot of cooperation from the lawyers for [Trinidad] . . . So they probably are going to be carrying the laboring oar, I would think, from this point forward." *Id.* at 305:19-24.

Five days later, the United States moved to set aside forfeiture as to the Red Road Property, stating: "It was always the United States' intent, as stated in its motion for Preliminary Order and Judgment of Forfeiture, to move for an order vacating the Order of Forfeiture, as to the Red Road Property . . . in favor of the restitution, when determined." (ECF No. 512 at 312). Trinidad alone opposed the United States' motion to set aside the forfeiture. (ECF No. 515 at 319–31). The United States acceded to Trinidad's objection and withdrew its motion to vacate the order of forfeiture. (ECF No. 520). Had the motion to vacate been granted, and not withdrawn as Trinidad requested, the Red Road Property would not have been subject to forfeiture.

On April 29, 2010, Maritime timely filed its verified petition pursuant to 21 U.S.C. § 853(n), requesting a hearing, as provided for under that provision, to determine its legal right, title, or interest in the Red Road Property. (ECF No. 729). The ancillary proceeding hinged on the issue of who held legal right, title or interest in the Red Road Property before Mr. Gutierrez, for whom the Red Road Property was home, forfeited that property as part of his plea agreement with the United States.

Mr. Gutierrez entered his plea agreement in October of 2006 for activity in relation to a Trinidad-based airport construction project; by 2007, the United States initiated a criminal forfeiture proceeding to have the Red Road Property, among other things, forfeited. Maritime made an unrelated $2 million interest-bearing loan to Mr. Gutierrez that went unpaid. As collateral for that loan, Mr. Gutierrez pledged his home, the Red Road Property, to Maritime, by way of a collateral assignment

(the "Collateral Assignment"). Because the loan was not repaid, Maritime asserted its right to the Red Road Property through its verified section 853(n) petition. For its part, Trinidad had no legal right, title or interest in the Red Road Property and never filed a section 853(n) petition.

On January 23, 2012, the District Court ordered discovery to proceed and directed Trinidad to "carry the burden" for the United States. App. D (ECF No. 829, 01/23/12 Tr. 515:14–516:5). The District Court asked if Trinidad would "take on that responsibility" to "get the United States out of the picture." *Id.* (at 516:9–18). Over Maritime's objection, Trinidad agreed to do so. *Id.* (at 516:9–517:19).

Maritime later moved for summary judgment, contending, in part, that Trinidad lacked any cognizable interest of its own in the proceeding. (ECF No. 901). The District Court acknowledged that Trinidad "does not have a direct claim under 853 or under the forfeiture claim [sic]," App. C (ECF No. 976, 07/09/14 Tr. 708:21–22), but denied Maritime's motion and allowed Trinidad to remain in the action. (ECF No. 974). The District Court ruled: "I'm going to allow [Trinidad] to remain in the association not in their own rights, but . . . to do the work on behalf of the United States." App. C (ECF No. 976, 07/09/14 Tr. 708:14–22).

Over the next five years, Trinidad actively litigated on behalf of the United States against Maritime, preparing and submitting approximately 95% of all documents for the United States and leading fourteen depositions on behalf of the United States. Maritime objected to

Trinidad's participation throughout the proceeding. *See e.g.*, App. D (ECF No. 829, 01/23/12 Tr. 517:19); (ECF No. 893, 08/22/12 Tr. 526:3–527:5); (ECF No. 1004-1); (ECF No. 1234, 10/31/16 Tr.).

Trinidad proceeded to take the "laboring oar" and "work on behalf of the United States." App. C (ECF No. 976, 07/09/14 Tr. 8:14–9:1). Trinidad dominated every facet of the proceeding on behalf of the United States to oppose Maritime's claim and pursue its own interests—interests which proved not to be aligned with those of the United States. Following years of discovery that Trinidad conducted on behalf of the United States, and litigation strategy that Trinidad dictated, Trinidad moved for summary judgment. Trinidad did so on the bases that, *inter alia*, Mr. Gutierrez did not own the Red Road Property because it was titled in the name of Inversiones Rapidven (a Panamanian bearer share corporation), (ECF No. 1003 at 5–11), and that the failure to record the Collateral Assignment entitled the United States to judgment as a matter of law.

In its opposition to summary judgment, Maritime highlighted that Trinidad's argument—that Mr. Gutierrez did not own the Red Road Property—was inconsistent with the United States' theory of forfeiture. The United States forfeited the property through Mr. Gutierrez, not the title-holding entity, Inversiones Rapidven. (ECF No. 1014, at 3–6). Indeed, the order of forfeiture names Mr. Gutierrez, not Inversiones Rapidven, as the one forfeiting the Red Road Property in connection with Mr. Gutierrez's plea agreement. The District Court accepted Maritime's argument that ownership of real property through legal title alone is a rebuttable presumption that can be

overcome by determining who exercised "dominion and control," and denied summary judgment. (ECF No. 1014 at 6–9); (ECF No. 1157 at 9).

Rather than proceed to a merits trial, the District Court, *sua sponte*, and over Maritime's objection, bifurcated the trial into two phases: the first to address the collateral assignment's authenticity ("Phase One"), and the second to address the merits of Maritime's claim ("Phase Two"). (ECF No. 1221, 02/29/16 Tr.). The purpose of the bifurcation was to defer a trial on the legal issues raised at summary judgment. *Id.* (at 35:8–14).

Prior to the Phase One hearing, Maritime moved to preclude Trinidad's participation. (ECF Nos. 1227 & 1234, 10/31/16 Tr.). The United States responded: "The United States generally objects to participation by victims who lack any legally-traceable interest in property subject to forfeiture." (ECF No. 1235). The United States went on: "the Interveners are not parties to the ancillary proceedings and are not asserting petitions under 21 U.S.C. § 853(n) . . . . As such, they do not speak on behalf of the United States and cannot dictate the United States' litigation decisions." *Id.* Nonetheless, the United States took the position that there was no "prohibition against" Trinidad "assisting the [G]overnment in ensuring the success of its litigation." *Id.*

The District Court denied Maritime's motion, and permitted Trinidad to relieve the United States of its "heavy burden of prosecuting this case by putting that burden on the real party in interest." (ECF No. 1242 & ECF No. 1283, 12/08/16 Tr.). Just before the Phase One hearing, the United States changed its position and stated:

"it's the position of the Department of Justice, which is a representative of the United States, that the United States has got to be conducting this proceeding, Judge." App. B (ECF No. 1283, 12/08/16 Tr.). Trinidad did not elicit live testimony at the hearing, but the United States did submit evidence that Trinidad elicited during discovery, including five of the six deposition transcripts submitted on behalf of the United States. (ECF No. 1222). The District Court *sua sponte* cross-examined Maritime's witnesses, Mr. Gutierrez and Leslie Alfonso, with evidence adduced by Trinidad, and relied heavily on Trinidad's deposition testimony in rendering its ruling against Maritime. (ECF Nos. 1267 & 1270, 02/13/17 Tr.).

Following Phase One, the District Court ruled that Maritime failed to prove that the Collateral Assignment was authentic and thus did not permit the proceeding to reach a Phase Two merits hearing. (ECF Nos. 1267 & 1270, 02/13/17 Tr.). In effect, the District Court treated purported deficiencies in the Collateral Assignment as outcome-determinative procedural defects when these defects had previously been insufficient to defeat Maritime's claim on the merits at summary judgment. Maritime appealed.

On appeal, Maritime contended that the District Court's order allowing Trinidad to intervene, and instructing the United States to allow Trinidad to "carry the burden" for and then litigate "on behalf of," the United States, was improper. (Appellant Br., at 33–43). Further, relying on *Young v. United States ex rel. Vuitton et Fils S.A. et al.*, 481 U.S. 787 (1987), Maritime contended that the District Court's appointment of Trinidad's private counsel as interested prosecutor to litigate on behalf of

the United States amounted to fundamental error that precluded harmless error analysis. *Id.* at 43–45.

A panel of the Court of Appeals for the Eleventh Circuit issued a published opinion, holding that the District Court erred in allowing Trinidad, a party without standing, to litigate on behalf of the United States. The panel, however, rejected Maritime's contention that the appointment of Trinidad, a foreign sovereign represented by a private law firm, was fundamental error. App. A, *United States v. Maritime Life Caribbean Ltd.*, 913 F.3d 1027 (11th Cir. 2019). The panel reasoned that *Young* did not apply in a section 853(n) proceeding because such a proceeding is "civil in nature," whereas *Young* was a criminal contempt proceeding. *Id.* at 1036. Applying harmless error, the panel concluded that reversal was not warranted, because Trinidad's participation did not prejudice Maritime's substantial rights. *Id.*

Maritime petitioned for panel rehearing and rehearing *en banc*, contending that harmless error cannot apply to the admitted error by the District Court. On April 10, 2019, the panel and the Eleventh Circuit Court of Appeals denied Maritime's petition. App. H, *United States v. Maritime Life Caribbean Ltd.*, No. 17-10889, 2019 U.S. App. LEXIS 10702 (11th Cir. Apr. 10, 2019). This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant review, because the Eleventh Circuit decided an important federal question that has not been, but should be, settled by the Court. Specifically, the Eleventh Circuit held that the District Court's erroneous

appointment, over the United States' objection, of a private prosecutor who was not appointed by the Department of Justice and who did not swear to faithfully execute his duties, is subject to harmless error review. Where, as here, the private prosecutor was also retained counsel for a foreign sovereign, injury to the system, and not just the parties, is especially apparent. Such an error is never subject to harmless error review. Just as Article III courts have no power to act without jurisdiction, to levy taxes, or to wage war, the courts, absent express statutory authority, which did not exist here, have no power to appoint a private prosecutor—that power is vested in the Attorney General. Because the District Court did not have the authority to appoint a private attorney to litigate on behalf of the United States, particularly one whose client is expressly denied legal standing in the forfeiture proceeding, it follows that the District Court's order is not subject to harmless error analysis. The harmless error standard cannot convey to Article III courts authority they do not possess.

Certiorari should also be granted to maintain uniformity with the Court's decision in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). In *Young*, a plurality of the Court held that the District Court's constitutional appointment of an interested attorney is fundamental error. The Court should clarify, following upon *Young*, that the appointment of an interested attorney requires reversal without regard to the facts or circumstances of the particular case.

1. The District Court appointed a private prosecutor over the United States' objection. That ruling must be vacated on fundamental separation of powers principles.

The separation of powers principle inherent in the Constitution prohibits Article III courts from usurping the role of the Executive Branch. Under Article III, courts may not exercise "executive or administrative duties of a nonjudicial nature." *Buckley v. Valeo*, 424 U.S. 1, 123 (1976). "[O]ne purpose of the broad prohibition upon the courts' exercise of executive or administrative duties of a nonjudicial nature is to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988) (internal quotation and citation omitted). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The Attorney General had exclusive control over the conduct of the litigation in the ancillary proceeding below. The power to conduct litigation in which the United States is interested is vested solely in the Department of Justice, under the direction of the Attorney General. *See* 28 U.S.C. § 516. Section 516 provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

The present case clearly is one "in which the United States is interested." Pursuant to section 853, property subject to criminal forfeiture shall be forfeited "to the

United States." 28 U.S.C. § 853(a). Moreover, sub-section 853(n), which regulates interests of third-parties, provides that the United States "may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing." 21 U.S.C. § 853(n)(5). Thus, the United States has an interest in and is a party to ancillary proceedings brought pursuant to section 853(n).

In cases in which the United States is interested, the Attorney General has exclusive control over specified litigation "except as otherwise provided or authorized by law." 28 U.S.C. § 516. As a threshold point, the circumstances under which the law provides for an exception to this exclusive grant of power are limited, and do not apply in this case. For example, the Court has held that a federal court's inherent authority to punish disobedience and vindicate its authority is "an excepted provision or authorization within the meaning of §§ 516 and 547." *United States v. Providence Journal Co.*, 485 U.S. 693, 704 (1988) (citing *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). In *Young*, the District Court's inherent authority to appoint a special prosecutor in the context of a criminal contempt proceeding arose out of necessity. "If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that branch declined prosecution." *Young*, 481 U.S. at 801.

In contrast, here there is no such necessity, and therefore no exception or authorization, as it pertains to the prosecution of a criminal forfeiture proceeding. *See* 21 U.S.C. § 853. Not only is there no statutory exception,

the relevant statute expressly prohibits participation by third-parties. *See id.* § 853(k) ("Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section[.]").

Thus, the Executive's power to litigate on behalf of the United States in an ancillary proceeding brought pursuant to § 853(n) is exclusive. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *id.* at 694 ("Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States United States.") (citing 28 U.S.C. § 516); *The Confiscation Cases*, 74 U.S. 454, 457 (1868) ("Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or someone designated by him to attend to such business, in his absence, as may be appertain to the duties of his office.").

Only officers of the United States may litigate on behalf of the United States. *Buckley*, 424 U.S. at 140 (statutory provisions vesting in the Federal Election Commission "primary responsibility for conducting civil litigation in the courts of the Unites States for vindicating public rights" violate the Appointments Clause because only officers may perform such functions).

The District Court had no authority to appoint a private attorney to assist the United States, much less to

"carry the laboring oar" on behalf of the United States. Congress vested the authority to appoint a special prosecutor in the Attorney General alone. Article II, § 2, cl. 2 of the Constitution provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Although, "[o]n its face, the language of this 'excepting clause' admits of no limitation on interbranch appointments," *Morrison*, 487 U.S. at 673, "as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress." *Ex parte Siebold*, 100 U.S. 371, 398 (1879). Once Congress exercises its authority to vest the appointment of inferior officers, that decision (assuming constitutionally firm), must be respected. *See Chadha*, 462 U.S. at 955 ("Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."); *cf. Morrison*, 487 U.S. at 676–77 (upholding provisions of Ethics in United States Act that vested appointment authority over independent counsel in special division of judiciary).

Here, Congress vested the power to appoint attorneys to assist a United States Attorney solely in the Attorney General. *See* 28 U.S.C § 543(a) ("The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires[.]"). In formulating legislation for the appointment of special prosecutors, Congress could not more clearly have granted that authority to the Attorney General. In turn, the decision as to when special attorneys "[are] to be employed . . . [is] left solely to the discretion of the Attorney General, and is not subject to review." *United States v. Wrigley*, 520 F.2d 362 (8th Cir. 1975).

What is more, Congress conditioned the Attorney General's grant of power, requiring special attorneys to be deputized: "[e]ach . . . attorney appointed [to assist United States attorneys] under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties." 28 U.S.C. § 544. By using the word "shall," Congress expressed its intent that this condition is mandatory. *See id.* (mandating that appointed attorneys "*shall* take an oath to execute faithfully his duties") (emphasis added); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty.").

By appointing Trinidad's counsel to act as private prosecutor over the United States' objection, the District Court asserted judicial supremacy over the Executive Branch and usurped the Attorney General's exclusive control over the exercise of that power. Just as Congress cannot take such action, neither can the Judiciary. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."). The District Court had no power to appoint a private prosecutor, much less one that was not (and, as counsel for a foreign sovereign, could not have been) properly deputized according to law. In so doing, the court usurped the power of the Attorney General in violation of 28 U.S.C. § 543 and in contravention of the principles underlying the separation of powers doctrine.

2. A violation of the separation of powers cannot be harmless. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919,

958 (1983) (invalidating unconstitutional legislative veto provision by which Congress retained the power to reverse a decision that it expressly authorized the Attorney General to make); *Myers v. United States*, 272 U.S. 52 (1926) (invalidating unconstitutional statute that authorized Congressional participation in the removal of executive officers because it infringed the constitutional principle of separation of powers); *Bowsher*, 478 U.S. at 726 (invalidating unconstitutional statutory provision that authorized Congress to reserve to itself the authority to remove an executive officer).

Absent the power to act, a court lacks authority and its judicial rulings must be vacated. *Gomez v. United States*, 490 U.S. 858, 875 (1989) (reversing conviction where magistrate had no authority to conduct *voir dire* or jury selection); *United States v. Providence Journal Co.*, 485 U.S. 693, 698 (1988) (dismissing petition for writ of certiorari where special prosecutor, appointed by district court, had no authority to file petition over the objection of the Solicitor General); *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983) (because the District Court had no power to enhance the defendant's sentence, the "doctrine of harmless error does not apply"); *cf. Torres v. Oakland Scavenger Co.*, 48 U.S. 312, 317 n.3 (1988) (a "litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by the court.").

In *Providence Journal*, the Court granted certiorari to determine whether respondents, the Providence Journal Company, could properly be held in contempt for violating the District Court's subsequently invalidated restraining order. 485 U.S. at 698. The Court, however, did not have the opportunity to address that issue, because it concluded

that "jurisdiction [was] lacking," and dismissed the writ of certiorari. *Id.* at 801. The Court lacked jurisdiction because the petition had been filed by a special prosecutor whom the District Court appointed to prosecute the contempt proceeding on behalf of the United States over the objection of the Solicitor General—the official to whom the Attorney General had delegated authority to argue suits and appeals in the Supreme Court. *Id.* at 699.

The Court in *Providence Journal* concluded that section 518(a) prevented the special prosecutor from proceeding on behalf of the United States because the Solicitor General did not authorize the proceeding. *Id.* at 707–08. Section 518(a) provides: "Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Court . . . in which the United States is interested." 21 U.S.C. § 518(a). After concluding that the contempt proceeding was clearly one in which the United States was interested, the Court held: "Absent a proper representative of the United States as a petitioner in this criminal prosecution, jurisdiction is lacking and the writ of certiorari, heretofore granted, is now dismissed." *Id.* at 801. Notably, the Court dismissed the petition despite the fact that the Solicitor General took the side of the special prosecutor. *Id.* at 701. The Court reasoned: "the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the United States and therefore of all the people." *Id.* at 706. In this case, the United States had no voice. Instead, the District Court instructed a foreign sovereign to speak on behalf of the United States, over the United States' objection—despite the United States and Trinidad having different interests and, indeed, different theories of forfeiture.

Similarly, in *Gomez v. United States*, 490 U.S. 858, 875 (1989), a federal magistrate conducted *voir dire* and jury selection over the defendants' objections and without the power to do so under the Federal Magistrates Act, 28 U.S.C. § 636(b)(3). In a unanimous decision, the Court reversed, holding that the Federal Magistrates Act did not authorize magistrates to preside over the selection of a jury in a felony trial without the accused's consent, and that jury selection is not among the less important pretrial matters that a magistrate may hear and determine under the provisions of the Act. *Id.* at 870–72. Notably, the Court rejected the United States' argument that the error was harmless, because petitioners alleged no specific prejudice. The Court concluded, "harmless error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." *Id.* at 876.

The same holds true in this case. The District Court had no authority to appoint a private attorney, let alone one representing a foreign sovereign, to serve as private prosecutor. *See* 28 U.S.C. § 516(a). Moreover, the United States objected to the appointment, and subsequently informed the District Court that Trinidad's participation was improper and threatened a conflict of interest. App. E (ECF No. 1286, 04/12/07 Tr. 41:25–42:11). Despite the United States' opposition, the District Court persisted, and, extending its gavel into the exclusive domain of the Attorney General, instructed the United States to allow the foreign sovereign to "carry[] the laboring oar" on behalf of the United States. *Id.* (at 41:23–24).

Because the District Court did not have authority to appoint a private prosecutor to litigate on behalf of the United States, it follows that the District Court's order is

not subject to harmless error analysis—"[h]armless error cannot give the District Court authority that it does not possess." *Olson*, 716 F.2d at 853; *Providence Journal*, 485 U.S. at 801; *Gomez*, 490 U.S. at 875.

Further, because it would be impossible to conclude with any certainty that the United States would have withdrawn its motion to set aside the preliminary order of forfeiture had the District Court not overreached into the province of the Attorney General, the proper remedy is to reverse and remand with instructions to set aside the preliminary order of forfeiture as it relates to the Red Road Property. *See Young*, 481 U.S. at 815 (Scalia, J., concurring) ("[S]ince we cannot know whether petitioners would have been prosecuted had the matter been referred to a proper prosecuting authority, the convictions are likewise void.").

Application of harmless error is improper for the additional reason that the District Court appointed an interested attorney with an inherent conflict of interest to serve as the private prosecutor. In *Young*, a plurality of the Court "established a categorical rule against the appointment of an interested prosecutor," and "[g]iven the fundamental and pervasive effects of such an appointment," held that "the harmless-error analysis is inappropriate[.]" 481 U.S. at 814. The appointment of an interested attorney therefore requires reversal without regard to the facts or circumstances of the particular case. *Id.* at 809.

In *Young*, the district court appointed the respondent's attorney to investigate and prosecute the petitioners in a criminal contempt proceeding. *Id.* at 791. The Court

reversed, holding that the District Court erred by appointing as prosecutor's counsel an interested party from the underlying civil case. *Id.* at 802–09 (plurality opinion); 815 (Blackmun, J., concurring); 825–26 (Rehnquist, Ch. J., O'Connor, J., Powell, J., concurring in part and dissenting in part). The Court's plurality went on to hold that the District Court's error was fundamental and, thus, beyond the purview of harmless error analysis. *Id.* at 809–14. The plurality explained that the error was so fundamental and pervasive that it required reversal without regard to the facts or circumstances of that particular case. *Id.* at 810. The error was fundamental because "prosecution by someone with conflicting loyalties calls into question the objectivity of those charged with bringing a defendant to judgment[.]" *Id.* at 810–11.

The effects of the error were also pervasive, as it influenced the entire prosecution, making it "extremely difficult" to determine the effect of the appointment. *Id.* at 812. "A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record." *Id.* at 813 (emphasis in original). "Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." *Id.* at 812.

The same core policy considerations are present here. In accordance with *Young*, the error in this case was so fundamental and pervasive that it amounts to fundamental error immune from a harmless error analysis. As the attorney representing a purported victim seeking compensation based on a successful forfeiture, Trinidad's attorney had a conflict of interest that undermined the

integrity of the proceedings.[1] What is more, Trinidad's control of the litigation for more than seven years, "on behalf of" The United States, profoundly "shap[ed]" the record of this case.

3. That the third-party ancillary proceeding is "civil" in nature does not insulate the proceedings from the interested attorney's inherent conflict of interest. *See Young*, 481 U.S. at 805 ("Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety . . . that appointment illustrates the *potential* for private interest to influence the discharge of public duty.").

The effects of Trinidad's participation were also pervasive. Trinidad, acting on behalf of the United States, like the special prosecutor in *Young*, was "armed with expansive powers and wide-ranging discretion." *See id.* at 813. Trinidad's counsel carried the "laboring oar," deciding whom to depose on behalf of the United States, what evidence to bring forth to the district court, what arguments to make at summary judgment, whether and how the case should be settled, among a myriad of other discretionary decisions. Indeed, at ever material turn over the span of more than seven years, Trinidad's counsel dictated the litigation strategy for the United States in opposing Maritime's claim, all while Trinidad's interests diverged from those of the United States.

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1. Although often difficult to determine the effect of the appointment, *id.* at 812, the effects in this case were apparent: Trinidad alone opposed the United States' motion to vacate the preliminary order of forfeiture. (ECF Nos. 512 & 515). Further, at summary judgment, Trinidad took a position that was inconsistent with and undermined the United States' theory of forfeiture. (ECF Nos. 1003 & 1004).

Pursuant to *Young*, it would be fundamental error to permit an attorney with a pecuniary interest in property subject to a criminal forfeiture from representing the United States during the criminal forfeiture. *See id.* at 814. It is therefore incongruous with *Young* to hold that an interested attorney may defend the United States' interests in a third-party ancillary proceeding to a criminal forfeiture. The outcome is the same. The interested attorney profits from the successful defense of the third-party's claims just as she would profit from the direct forfeiture of the criminal defendant's property.

CONCLUSION

For the foregoing reasons, Maritime respectfully requests that the Court grant its Petition for Writ of Certiorari and, upon review, vacate the judgment of the District Court, reverse the United States Court of Appeals for the Eleventh Circuit's decision, and remand with instructions to set aside the preliminary order of forfeiture as it relates to the Red Road Property.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 16, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10889

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARITIME LIFE CARIBBEAN LIMITED,

Interested Party-Appellant,

RAUL J. GUTIERREZ,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida.
D.C. Docket No. 1:05-cr-20859-PCH-1

January 16, 2019, Decided

Before WILLIAM PRYOR and MARTIN, Circuit Judges, and WOOD,* District Judge.

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* The Honorable Lisa Godbey Wood, United States District Judge for the Southern District of Georgia, sitting by designation.

Appendix A

WILLIAM PRYOR, Circuit Judge:

This appeal involves two questions about an ancillary third-party forfeiture proceeding in which Maritime Life Caribbean asserted that it was given a security interest in the forfeited property: whether the district court erred in requiring Maritime Life to prove the authenticity of the collateral assignment that allegedly granted it a security interest in the forfeited property by a preponderance of the evidence, and whether the district court erred in permitting the Republic of Trinidad and Tobago to intervene in the forfeiture proceeding even though it had no legal interest in the property. We conclude that, although both rulings were in error, neither error warrants reversal. We affirm.

I. BACKGROUND

Raul Gutierrez pleaded guilty in 2006 to a variety of wire- and bank-fraud charges arising from a bid-rigging scheme involving the construction of an airport in Trinidad and Tobago. After sentencing, the district court entered a preliminary order of forfeiture against him in the amount of $22,556,100, representing the proceeds of his criminal activity. The forfeiture included Gutierrez's interest in a piece of real property located at 12850 Red Road in Coral Cables, Florida, the title for which was held by Inversiones Rapidven, S.A. Although the plea agreement exhaustively listed Gutierrez's assets and liabilities, it did not mention any encumbrance on the Red Road property.

Appendix A

The Republic of Trinidad and Tobago moved to intervene in the forfeiture proceeding under Federal Rule of Criminal Procedure 32.2. Trinidad asserted that it was a victim of the bid-rigging conspiracy and that it had an interest in any forfeiture proceeds that might result from the sale of the Red Road property, but it did not assert any legal interest in the property itself. The district court expressed skepticism about the propriety of permitting Trinidad to intervene and acknowledged that it was "not sure if [Trinidad has] standing" under the statute governing criminal forfeitures, 21 U.S.C. § 853. Despite these misgivings, the district court granted Trinidad's motion to intervene. It directed Trinidad and the government to "form a committee on the government[/]victim side and decide who will be speaking for that group."

At a later status conference, the government expressed concern over a "potential conflict" between the parties' interests and argued that victims like Trinidad do not "have standing in a forfeiture proceeding." The district court disregarded this concern on the ground that the government was "going to get a lot of cooperation from the lawyers for [Trinidad]" and Trinidad probably would end up "carrying the laboring oar . . . from this point forward." In the district court's view, Trinidad's intervention was permissible because it was the party who was "going to benefit if the government wins on the forfeiture."

In 2010, the district court instructed the government to issue a Notice of Criminal Forfeiture addressed to Steve Ferguson, the former chief executive officer of Maritime

Life. Ferguson and Gutierrez were longtime business associates and friends, and both were implicated in the criminal charges underlying the forfeiture proceeding. Maritime responded to the notice by filing a third-party claim asserting an interest in the Red Road property under the criminal-forfeiture statute, 21 U.S.C. § 853(n), and Rule 32.2(c). To support its claim, Maritime produced an alleged collateral assignment that purported to memorialize a transaction in which Gutierrez granted a security interest in the Red Road property to Maritime as collateral for a $2 million loan to Keystone Property Developers, Ltd., Gutierrez's construction company. The alleged assignment is dated July 24, 2001 and was signed by Gutierrez in his capacity as president of Calmaquip Engineering Corporation, but it was never recorded.

The government and Trinidad opposed Maritime's claim. The parties then engaged in protracted discovery in which Trinidad played a significant role, leading 14 depositions on behalf of the government. Maritime objected to Trinidad's participation in the litigation, but the district court denied its motion. The district court acknowledged that Trinidad "does not have a direct claim under [section] 853 or under the forfeiture claim" but permitted Trinidad to proceed, "not in [its] own rights, but . . . to do the work on behalf of the government."

After discovery, Trinidad and the government jointly moved for summary judgment, but the district court denied that motion. Instead, it *sua sponte* decided to hold a bifurcated trial with an initial phase focused solely on the question whether "to admit the collateral assignment

as being genuine and authentic" under Federal Rule of Evidence 901. The second phase was to address the merits of Maritime's interest in the Red Road property. The district court explained that the question of authenticity was "a nice clean issue" that, if resolved against Maritime, would obviate the need to resolve the complicated dispute about the legal effect of an unrecorded assignment of a security interest in real property for which Gutierrez, the party who allegedly conveyed the assignment, did not hold title. Maritime objected on the ground that the authenticity issue should be consolidated with the merits issues, but it later conceded that an adverse ruling on authenticity would make the "other issues . . . go away."

At the hearing for the first phase of trial, Maritime presented three witnesses: Lesley Alfonso, the Maritime director who allegedly discovered the collateral assignment; Frank Norwitch, a certified document examiner who reviewed the collateral assignment; and Raul Gutierrez, who allegedly signed the assignment. The government presented no live witnesses. Alfonso testified that in early 2010, Andrew Ferguson, Maritime's chief executive officer and the son of Steve Ferguson, asked her to search for any documents related to the Red Road property. She asserted that she discovered the assignment in the files of a deceased Maritime executive who had managed the loan transaction with Gutierrez. Alfonso also testified that she returned to the storage room to ensure that there were no other documents responsive to the description she was given. Cross-examination by the government and questioning by the district court made clear that this testimony conflicted with Alfonso's earlier

deposition testimony, in which she agreed that she did not have "occasion to go back into the storage room and look at the folder or anything else that was around that document."

Norwitch testified as an expert after the government stipulated to his qualifications. He testified that he examined the watermark and the ink used in both the typed and handwritten portions of the collateral assignment and concluded that there was "no evidence that this document was anything other than what it is purported to be." But Norwitch explained that the ink used in the document has been in commercial use for decades and that he could not determine "when [the] document was signed." And Gutierrez testified that he executed the collateral assignment on July 24, 2001, after Maritime requested additional collateral. He admitted that he failed to list the assignment in his presentence investigation report and testified that he never thought to record the multi-million-dollar transaction. Gutierrez also acknowledged that he had been convicted of crimes of fraud and that he had falsified his community-service hours after being released from prison.

After the hearing for the first phase of trial, the district court ruled that Maritime had failed to carry its burden of proving the authenticity of the collateral assignment "by the greater weight of the evidence." The court determined that circumstantial evidence and unexplained defects present on the face of the document undermined the inference that the assignment was authentic. It also determined that the expert testimony was inconclusive, that Alfonso and Gutierrez were not

credible, and that virtually no evidence corroborated the authenticity of the assignment. Having ruled that the collateral assignment was inauthentic, the district court concluded that it was unnecessary to proceed to the second phase of trial and denied Maritime's claim.

II. STANDARD OF REVIEW

"We review a district court's legal conclusions regarding third-party claims to criminally forfeited property *de novo* and its factual findings for clear error." *United States v. Marion*, 562 F.3d 1330, 1335 (11th Cir. 2009).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that although the district court applied the wrong standard when it assessed the authenticity of the alleged collateral assignment, the error was harmless. Second, we explain that the district court erred by permitting Trinidad to intervene, but this error too does not warrant reversal.

A. The District Court Committed Harmless Error in Ruling that the Collateral Assignment Was Inauthentic.

The district court ruled that the "burden of proof" was "on Maritime to prove by the greater weight of the evidence that the collateral assignment" is "an authentic document," but this ruling was in error. Even so, Maritime has suffered no prejudice.

A two-step process governs the determination of whether a document is authentic. The district court must first make a preliminary assessment of authenticity under Rule 901, which "requires a proponent to present 'sufficient evidence to make out a prima facie case that the proffered evidence is what it purports to be.'" *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012) (quoting *United States v. Belfast*, 611 F.3d 783, 819 (11th Cir. 2010)). If the proponent satisfies this "prima facie burden," the inquiry proceeds to a second step, in which "the evidence may be admitted, and the ultimate question of authenticity is then decided by the [factfinder]." *Id.; see also In re Int'l Mgmt. Assocs., LLC*, 781 F.3d 1262, 1267 (11th Cir. 2015) ("Once [a] prima facie showing of authenticity [is] made, the ultimate question of the authenticity of the documents [is] left to the factfinder.").

The first phase of the bifurcated trial framework adopted by the district court was intended to address only the preliminary question of authenticity. Under the two-step process contemplated by Rule 901, Maritime bore the burden of establishing a prima facie case of authenticity at the first stage. Only at the second step would "the trier of fact . . . appraise whether the proffered evidence is in fact what it purports to be." *United States v. Caldwell*, 776 F.2d 989, 1002 (11th Cir. 1985).

By requiring Maritime to prove authenticity by "the greater weight of the evidence," the district court compressed the two steps of the inquiry under Rule 901 into one and conflated the issue of authenticity with the issue of entitlement to the proceeds of the sale of the Red

Road property, but this technical error need not warrant reversal. Federal Rule of Civil Procedure 61 permits reversal based on a trial error "only where the error has caused substantial prejudice to the affected party (or, stated somewhat differently, affected the party's substantial rights or resulted in substantial injustice)." *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004) (internal quotation marks omitted). The error by the district court prejudiced Maritime only if there is a "reasonable likelihood that the outcome would have been different" if the district court had ruled that Maritime satisfied its burden to prove a prima facie case of authenticity before proceeding to determine whether Maritime had an interest in the Red Road property. *United States v. Jeri*, 869 F.3d 1247, 1262 (11th Cir. 2017).

Maritime suffered no prejudice. If the district court had followed the process contemplated by Rule 901, it would have answered the ultimate question of authenticity in the same way; the outcome of the trial would not have differed.

The first phase of the trial featured all of the evidence relevant to the question of authenticity. Maritime was on notice that the district court would apply a preponderance standard in determining whether the assignment was authentic and had every incentive to produce all relevant evidence. The second phase would have been a bench trial, *see* 21 U.S.C. § 853(n)(2), so the district court inevitably would have reached the same answer to the "ultimate question of authenticity" when it acted as the finder of fact. *Lebowitz*, 676 F.3d at 1009.

The district court was entitled to find that the assignment was not authentic under the preponderance standard applicable at the second step of the inquiry under Rule 901, and Maritime's claim was bound to fail if the assignment was inauthentic. Maritime never asserted any other potential source of an interest in the Red Road property, and its trial counsel even conceded that it "only has a claim if it has an assignment." In other words, Maritime's claim stood or fell with the authenticity of the collateral assignment.

The collateral assignment was suspect on its face. It was neither witnessed nor notarized, even though Raul Gutierrez admitted that his secretary was a notary. The document does not so much as mention the legal titleholder of the Red Road property, Inversiones Rapidven, and contains no legal description of the property. The document was printed on Calmaquip letterhead, even though Lesley Alfonso, a Maritime director, testified that it was the practice of Maritime to prepare its own loan documents. The assignment was purportedly created to secure a limited guarantee agreement in which Maritime lent $2 million to Keystone Construction. The assignment states that the limited guaranty agreement was attached to it, but Alfonso testified that nothing was attached to the assignment when she allegedly found it. Maritime's own expert concluded that there was no evidence suggesting that anything had ever been attached to the assignment. And the assignment was never recorded—an astonishing oversight in a multi-million-dollar transaction.

Circumstantial evidence also supported the finding that the assignment was inauthentic. The limited guaranty agreement makes no mention of the collateral assignment. And as the district court explained, there was "not a single document" that "referenced the collateral assignment . . . before or after" the assignment was allegedly executed, other than a letter that Gutierrez purportedly sent to Richard Lacle, his associate at Inversiones Rapidven. This letter lacked any indicia of authenticity, such as a letterhead, physical or email address, or method of transmission. And Lacle denied ever receiving the letter and suggested that it was fabricated. And finally, Gutierrez listed the Red Road property as an unencumbered asset in his presentence investigation report and failed to list the collateral assignment as a debt.

Based on this evidence, the district court was entitled to infer that there was a *post hoc* plot between Gutierrez and Maritime to spare the Red Road property from forfeiture through a fabricated assignment of an interest to Maritime. As we have explained, "[a] district court has discretion to determine authenticity, and that determination should not be disturbed on appeal absent a showing that there is no competent evidence in the record to support it." *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000). Even if we were to assume that Gutierrez's signature on the assignment is genuine, it is entirely possible that he signed shortly before he went to prison in an effort to shield his property from forfeiture. Ample evidence established the existence of a close relationship between Gutierrez and the officers of Maritime. We reject Maritime's assertion that Gutierrez

could not possibly have anticipated that the government would seek forfeiture of his property. We expect that a person who knows he is under investigation in a case of complex financial fraud could have foreseen the impending forfeiture.

Ample evidence supports the finding by the district court on the ultimate question of authenticity. And that finding controlled whether Maritime had an interest in the Red Road property. So no prejudicial error occurred.

B. Trinidad's Intervention Does Not Merit Reversal.

Maritime also argues, and we agree, that the district court erred in permitting Trinidad, a foreign sovereign, to intervene in the ancillary proceeding to litigate on behalf of the United States. To represent the United States, an attorney must be either a United States Attorney, an assistant United States Attorney, or a special attorney. *See* 28 U.S.C. § 541(a) (creating procedures for appointing a United States Attorney for each judicial district); *id.* § 542(a) (creating procedures for appointing assistant United States Attorneys); *id.* § 543(a) (creating procedures for appointing special attorneys to assist United States Attorneys). And every attorney representing the United States must take an oath of office. *See id.* § 544 (requiring United States Attorneys, assistant United States Attorneys, and specially appointed attorneys to take an oath to faithfully execute their duties). Trinidad was not specially appointed to litigate on behalf of the United States and took no oath of office.

Nor did Trinidad have standing to intervene to defend its own interests. Congress has created one—and only one—means for interested third-parties to participate in a criminal-forfeiture proceeding: asserting a "legal right, title, or interest" sufficient for standing in an ancillary proceeding, 21 U.S.C. § 853(n). Section 853(k) of the statute governing criminal forfeitures provides that "[e]xcept as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section" may "intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section." *Id.* § 853(k). As we have explained, "[a]n ancillary proceeding constitutes the sole means by which a third-party claimant can establish entitlement to return of forfeited property." *United States v. Davenport*, 668 F.3d 1316, 1320 (11th Cir. 2012). Trinidad made no attempt to intervene under section 853(n) and did not assert any "legal right, title, or interest" in the Red Road property, 21 U.S.C. § 853(n).

Although there was no legal basis for Trinidad's intervention, this error too does not warrant reversal. Maritime makes two arguments about prejudice, but neither is persuasive.

First, Maritime argues that Trinidad's participation was prejudicial because the district court relied on deposition testimony elicited by Trinidad in finding a material inconsistency in the testimony of Alfonso. But the bare fact that the district court relied in part on evidence generated by Trinidad to discredit Alfonso's testimony does not prove prejudicial error. As the district

court stated, its ruling against Maritime did not depend on its rejection of Alfonso's testimony. The district court concluded that "even if" Alfonso "were credible," it was "just as likely" that the collateral assignment "could have been placed there by anybody, and then she was sent . . . on her merry way to find that document." The district court was entitled to credit this alternative explanation of the discovery of the collateral assignment in the light of the numerous deficiencies in the document itself and the surrounding circumstantial evidence that it was not genuine.

The district court also had another, independent ground for discounting Alfonso's testimony: that she was not "an unbiased witness." Alfonso is a former employee and current director of Maritime. She had an obvious incentive to tailor her testimony to support Maritime's interests. And regardless of whether we would have regarded this incentive as sufficient to discredit Alfonso's testimony in the exercise of our independent judgment, the credibility determination by the district court is binding on us. As we have explained, "[t]he credibility of a witness is in the province of the factfinder," and we "will not ordinarily review the factfinder's determination of credibility." *United States v. Copeland*, 20 F.3d 412, 413 (11th Cir. 1994).

Second, Maritime argues, based on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987), that permitting a third party to litigate on behalf of the United States in an ancillary forfeiture proceeding is structural error, but

this argument is a nonstarter. In *Young*, a plurality of the Supreme Court concluded that the "appointment of an interested prosecutor" in a criminal contempt proceeding is a structural error. *Id.* at 810. This rule does not apply to an ancillary proceeding conducted under section 853(n) because such a proceeding is civil in nature. *See, e.g.*, *United States v. Douglas*, 55 F.3d 584, 586 (11th Cir. 1995) ("Congress therefore viewed a [section] 853(n) hearing as a species of an 'action at law or equity'—a substitute for separate *civil* litigation against the government."); *United States v. Gilbert*, 244 F.3d 888, 907 (11th Cir. 2001), *superseded by rule on other grounds as recognized in United States v. Marion*, 562 F.3d 1330 (11th Cir. 2009) (expanding *Douglas* to other kinds of forfeitures). Indeed, if there were a constitutional prohibition on interested private parties representing the United States in civil actions, the validity of statutes such as the False Claims Act, 31 U.S.C. § 3730, would be doubtful.

Trinidad's intervention did not affect Maritime's "substantial rights." Fed. R. Civ. P. 61. Although the district court erred in permitting a foreign sovereign with no interest of its own to litigate on behalf of the United States, this error does not require reversal of the dismissal of Maritime's claim.

IV. CONCLUSION

We **AFFIRM** the judgment in favor of the United States.

APPENDIX B — EXCERPTS OF HEARING TRANSCRIPT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI, DATED DECEMBER 8, 2016

[1]IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI

CASE NO. 05-CR-20859-PCH-2

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAUL J. GUTIERREZ,

Defendant.

December 8, 2016

TELEPHONIC STATUS CONFERENCE

BEFORE THE HONORABLE **PAUL C. HUCK**,
UNITED STATES DISTRICT COURT JUDGE

***

[6]**THE COURT:**

***

I'm going to deny the motion to preclude Mr. Grossman or any of the representatives from his firm or who was acting on behalf of his firm when they were participating in the depositions for the reasons basically set forth in the government and Trinidad's response.

***

[7]And as I said on prior occasions, I look at who are really the parties in interest here. It's really between Maritime and Trinidad and Tobago, slash, the banks.

I think I'm trying to do the right thing by relieving the government of its -- of a heavy burden of prosecuting this case by putting that burden on the real party in interest.

And maybe that was one of those things where no good deed goes unpunished, but I'm going to stick with my prior position, and Mr. Grossman and his colleagues could actively participate, including participating in the depositions.

***

[8]**MR. GROSSMAN:**

***

I understand the government has taken -- in their papers they say they're going to do all of the questioning. In our papers we actually requested the Court continue to permit us -- in fact, at this limited trial to ask questions, to point to documents.

THE COURT: Well, the government doesn't seem to want you to do that. I'm not going to preclude that, Mr. Gregorie. As far as I'm concerned, Mr. Grossman can fully participate, but if it's your determination that you don't want him to participate, then I'm going to abide by that.

MR. GREGORIE: I understand, Your Honor, it's the position of the Department of Justice, which is a [9]representative of the United States, that the United States has got to be conducting this proceeding, Judge.

****

APPENDIX C — EXCERPTS OF HEARING TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DATED JULY 9, 2014

[1]IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 05-CR-20859-PCH

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAUL J. GUTIERREZ, *et al.*,

Defendants.

Miami, Florida
July 9, 2014

STATUS HEARING BEFORE
THE HONORABLE PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

***

[5]THE COURT: All right. Let's talk about some of the issues [6]that have been raised both in the report and recommendation as well as the objections and the

response. Maritime makes much to do about Trinidad's lack of standing in this case. I think you need to clarify that.

My recollection is that Trinidad did not file a Section 853(n) claim because it's not seeking anything pursuant to that particular statutory provision, but rather Trinidad is involved in this litigation essentially to act as a surrogate for the United States Government because, first, the Government has a claim under the forfeiture laws to the Red Road property. And second, Trinidad has a claim for restitution as a victim.

And then, if the Government prevails on the forfeiture of the Red Road property, then, I'm assuming it still intends to provide restitution from the proceeds to Trinidad. As I say, Trinidad, I don't think has ever represented a claim under 21 United States Code 853(n).

My recollection, also, is that the reason I allowed Trinidad to intervene in this case because, in my view, it was only fair and proper that Trinidad would do the heavy lifting for the Government in this case because if that side wins, Trinidad will hopefully benefit.

***

[7]MR. ROPOLLO: And that is ours also, Judge.

But as we will find out, contrary to law, there is a long precedent of cases that do not allow to specifically state that restitution victims cannot have a role in the forfeiture like this.

THE COURT: Well, it is not having a legal role.

Basically, and let me go back and repeat, I'm not suggesting that Trinidad is here as the party kind of protecting its rights and asserting its direct rights, but rather as a surrogate for the Government. Basically, doing the Government's work for the Government, but the Government is the party that has the claim for restitution and is objecting to or fighting you on your claim under Section 853(n).

So I don't think those other cases are particularly pertinent. It's just a matter of who is doing the work and who is going to be taking the depositions and writing the memoranda. And it seems to me the Government used its resources in a case like this and that was my thinking on it.

MR. ROPOLLO: Well, and if I may briefly, Your Honor, that poses many of the problems we've been experiencing in the past four years. The Government itself is the body that looks to this. They have the responsibility of showing why they have the right to forfeiture and so far they haven't done that.

We've got Trinidad speaking for the U.S. Government and it is not the U.S. Government really ever explaining their part of the [8]case. The Government has represented to you objecting of having RTT intervene.

***

Appendix C

[8]THE COURT: Okay. I understand your argument and I hope you understand my position the same way.

I'm going to allow the Trinidad entity to remain in the association not in their own rights, but as I said before, to do the work on behalf of the Government. It's the Government seeking forfeiture and, then, I guess contesting your 853(n) claim.

And so again, rather than have the Government use its resources I'm going to allow the Government to rely on the work done by the lawyers that were Trinidad. In case anybody is unclear about it, the Trinidad entity does not have a direct claim under 853 or under the forfeiture claim.

Its only right is as a victim to restitution in the event that the Government prevails on the Government's forfeiture claim. So hopefully I put that to rest for you. Whether right or wrong [9]that's my ruling.

****

APPENDIX D — EXCERPTS OF HEARING TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DATED JANUARY 23, 2012

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 05-20859-CR-PCH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAUL GUTIERREZ, *et al.*,

Defendant.

Miami, Florida
January 23, 2012

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

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[37]THE COURT: Here's what we're going to do. The Government really shouldn't be in this, shouldn't be given the burden, in my humble opinion. So here's what I think

we should do. The Government has the documents, it's going to have to produce those together with the answers to interrogatories and produce the agent. Okay? And work that out among all the parties.

Once that's done, it seems to me the real parties in interest are -- parties in interest on the Government's side are the banks and the Republic. It seems to me from that point forward, those parties, because they're the ones who are going to either win or lose, either get or not get the money, they [38]should carry the burden of the discovery, taking the depositions, etcetera, etcetera, unless Mr. Gregorie, you tell me the Government has a real interest in being involved in that, and it seems to me that the laboring oar belongs in the hands of the banks and the Trinidad Republic.

MR. GREGORIE: We do not have an interest in that, Your Honor. We would prefer to defer to the bank's counsel for that, Judge.

THE COURT: Okay. Mr. Moorefield, Mr. Grossman, you want to take on that responsibility?

MR. MOOREFIELD: We'll be happy to, Your Honor, yes, sir. We'll work with RTT and prepare that discovery in any format Your Honor would like, informal, formal, whatever you direct us to do, Judge.

MR. GROSSMAN: Yes, Your Honor.

THE COURT: Okay. So after we get the Government out of the picture, the three of you can work out your schedule.

How's that?

MR. ROPPOLO: Your Honor, one point on the that. The Government is the entity that is trying to forfeit this house. It's not RTT, it's not the bank group. And the bank group and RTT, what they are, they're alleged victims here who are asking the Government if the Government wins, if the Government can forfeit this, then please give us the money as restitution victims. But it's the Government, the US Government who is the [39]one who is actually in charge here. They're the ones who are trying to take this house.

THE COURT: So what's your point?

MR. ROPPOLO: Well, to have, for example, RTT lead the charge of this, you're having a sovereign government –

THE COURT: So your point is you don't want them – you don't want the banks, you don't want the Republic of Trinidad and Tobago to be involved in the discovery.

MR. ROPPOLO: Your Honor, that's correct. I don't think --

THE COURT: Well, I'm going to let them be involved because the Government has put enough time and effort into this case, and the battle is between contending people

who want that asset. The Government doesn't want that asset. I guess it could have taken it in the nature of a fine, but no, they felt the victims should be entitled to it. So the victims and Maritime, you're going to have to fight it out. Seems the fair thing to do and relieve the Government of the financial and other burdens associated with this battle.

Yes, sir.

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APPENDIX E — EXCERPTS OF HEARING TRANSCRIPT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION, DATED APRIL 12, 2007

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 05-20859-CRIMINAL-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAUL J. GUTIERREZ, *et al.*,

Defendants.

Miami, Florida
April 12, 2007

HEARING - RED ROAD PROPERTY
BEFORE THE HONORABLE PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

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[39]THE COURT: Okay. Now, is there anything else we [40]need to take care of?

MS. REYNOLDS: Yes, Your Honor.

THE COURT: Okay.

MS. REYNOLDS: It's an issue I raised at the last hearing. There is a potential conflict here. The Court at the sentencing ordered that this property be used exclusively for restitution. Restitution and forfeiture are an opposite. Forfeiture, it goes to the forfeiture fund. Restitution, it goes to the victims.

And I had attempted to, after the restitution hearing and the judgment, I have attempted on behalf of the United States to get out of the forfeiture and get the forfeiture out of this case so it can be dealt with in restitution.

Your Honor had indicated at that time that you would prefer to go forward with the forfeiture at this juncture with all of the judicial -- with all of our offices investment and time and discovery, I don't think it is wise for us to proceed with the forfeiture because it has been specifically ordered restitution. And after all of this, you are going to end up entering an order of forfeiture again, which is conflicting.

So whatever it's worth, I would like to inform the Court of that potential conflict.

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[41]THE COURT: I tell you what, why don't you go talk to Mr. Gregory and then you come up with a proposal,

talk to the other parties, and we'll see where we are. Now, I can see where the government wants to limit its exposure and time and effort in this case, but I think you are going to see that you are going to get a lot of cooperation from the lawyers for the Republic and for the banks. So they probably are going to be carrying the laboring oar, I would think, from this point forward.

MS. REYNOLDS: That's true, Your Honor. And [42]actually, they have been extremely helpful. But as Mr. Klock had pointed out in his brief and we have been very silent on this, in a forfeiture proceeding, it is extremely clear from all the case law and the statute, the victims really don't have a right to have standing in a forfeiture proceeding. They have been allowed to intervene. But playing this out, Your Honor, this is not the case that will come before you. And it's of concern to the United States because we do it all the time. And an exception can be made which can become precedential. At this point, I'm extremely concerned about it.

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THE COURT:

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With regard to whether you want to get the [43]assistance of the -- or continue to have the victims intervene, well, if you don't want to do that, then the victims can ask to intervene and I'll probably let them intervene in this case because I know ultimately they are

the ones who are going to benefit if the government wins on the forfeiture.

Even if they lose on the forfeiture, they may ultimately win, because if the property is not forfeited, it still doesn't mean that Ms. Guitierrez is going to get the property. It may well be that the creditors get the property. I don't know. We will have to wait for another day.

****

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF FLORIDA, DATED MARCH 8, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-CR-20859-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAUL GUITERREZ,

Defendant.

ORDER GRANTING BANK VICTIMS AND THE REPUBLIC OF TRINIDAD AND TOBAGO MOTIONS TO INTERVENE

THIS CAUSE came before the Court upon the Bank Victims' Motion to Intervene and Joinder in Republic of Trinidad and Tobago's Motion to Intervene filed March 1, 2007 (D.E. 470) and The Republic of Trinidad and Tobago's Motion to Intervene filed February 27, 2007 (D. E. 262). Upon review of the record and a hearing being held regarding this matter, it is hereby

ORDERED AND ADJUDGED that the Bank Victims' Motion to Intervene and Joinder in Republic of

Appendix F

Trinidad and Tobago's Motion to Intervene filed March 1, 2007 (D. E. 470) and The Republic of Trinidad and Tobago's Motion to Intervene filed February 27, 2007 (D.E. 262) is GRANTED.

DONE AND ORDERED in Chambers, Miami, Florida, this 7th day of March, 2007.

/s/
PAUL C. HUCK
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
All counsel of record

APPENDIX G — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED MARCH 6, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-20859-CR-HUCK

UNITED STATES OF AMERICA

vs.

RAUL J. GUTIERREZ,

Defendant.

HEARING HELD MARCH 6th, 2007
BEFORE THE HONORABLE PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

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THE COURT. *** Let's deal with the motion to intervene first. I am going to grant the motion to intervene. I am not sure if they have standing, but we are not going to have three people arguing the same thing. You can form a committee on the Government slash victim side and decide who will be speaking for that group. You should have interests that are in common. If there is an issue with that let me know.

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APPENDIX H — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 10, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17-10889-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARITIME LIFE CARIBBEAN LIMITED,

Interested Party-Appellant,

RAUL J. GUTIERREZ,

Defendant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING *EN BANC*

BEFORE: WILLIAM PRYOR and MARTIN, Circuit Judges, and WOOD,* District Judge.

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* The Honorable Lisa Godbey Wood, United States District Judge for the Southern District of Georgia, sitting by designation.

Appendix H

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE