No. 19-6922

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES EDWARD BATES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether criminal defendants who acted in concert to obtain money may each be required to forfeit the amount of that revenue that has not been forfeited by the others.

2. Whether the forfeiture ordered in this case violated the Excessive Fines Clause of the Eighth Amendment.

3. Whether the district court abused its discretion by denying petitioner's motion to sever his trial from that of one of his co-defendants.

4. Whether the district court abused its discretion in determining that petitioner qualified for a six-level enhancement under Sentencing Guidelines § 2B1.1(b)(2)(C) (2016) because his offense caused "substantial financial hardship" to 25 or more victims.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tenn.):

United States v. Bates, No. 15-cr-20192 (Oct. 20, 2017)

Ryder v. Bates, No. 15-cv-2526 (Mar. 5, 2019)

Orlowski v. Bates, No. 11-cv-1396 (Aug. 14, 2019)

United States Court of Appeals (6th Cir.):

United States v. Bates, No. 17-6263 (July 31, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-43) is not published in the Federal Reporter but is reprinted at 784 Fed. Appx. 312.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2019. The petition for a writ of certiorari was filed on October 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349; three counts of wire fraud, in violation of 18 U.S.C. 1343; and 13 counts of mail fraud, in violation of 18 U.S.C. 1341. Judgment 1-2. He was sentenced to 151 months of imprisonment, to be followed by three years of supervised release, and found jointly and severally liable for forfeiture of $19,571,532.09. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-43.

1. Larry Bates, a self-described "apocalyptic economist," founded First American Monetary Consultants, a company that sold gold and silver coins. Pet. App. 1. Petitioner, Larry Bates's son, served as the company's second-in-command and supervised the company's staff. Id. at 3. Other members of the Bates family -- including petitioner's brother Bob and sister-in-law Kinsey -- also worked at the company. Ibid.

Larry Bates would appear on Christian television shows and speak at conferences, where he would warn his audience that they faced an imminent "end time scenario" that would destroy the value of their stocks and currency. Pet. App. 2. Larry Bates would urge members of the audience to invest in the gold and silver coins sold by First American, claiming that those coins would retain their value in the event of economic collapse. Ibid. Customers

would typically contact First American after hearing Larry Bates speak. Id. at 4. First American's sales staff would instruct customers to send payment immediately, and would promise customers that they could expect to receive their coins within 25-45 business days. Ibid.

Despite those representations, many customers failed to receive the coins for which they had paid. See Pet. App. 12; Gov't C.A. Br. 13. All told, between 2008 and 2013, First American received approximately $27 million more from customers than it actually spent on precious metals -- a differential that could not be explained by commissions and profits. Pet. App. 19. When customers contacted First American to complain, First American would provide false excuses for the delays -- claiming, for example, that the delays were attributable to the U.S. Mint, that the coins the company received from its suppliers had been of inferior quality and thus had to be returned, or that the coins were already on their way. Pet. App. 13; Gov't C.A. Br. 14.

Customers with unfulfilled orders eventually brought a class-action lawsuit against petitioner and other members of the Bates family, but First American nonetheless continued to sell coins to new customers while existing orders remained unfulfilled. Pet. App. 5; Gov't C.A. Br. 22-24. In the meantime, petitioner and other members of the Bates family used First American's funds to profit and to pay personal expenses; for example, Larry Bates spent the company's money to fund personal investments, Bob and Kinsey

Bates spent the company's money on personal vacations, and petitioner drew a significant salary from the company and received commissions from the company on unfulfilled orders. Gov't C.A. Br. 20-21.

2. In 2016, a federal grand jury in the United States District Court for the Western District of Tennessee returned a 46-count superseding indictment charging petitioner, Larry Bates, Bob Bates, and Kinsey Bates with mail fraud, wire fraud, and conspiracy to commit mail and wire fraud. First Superseding Indictment (Indictment) 1-57. Petitioner was charged with one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349; three counts of wire fraud, in violation of 18 U.S.C. 1343; and 13 counts of mail fraud, in violation of 18 U.S.C. 1341. Ibid.; see Pet. App. 5. The indictment also provided notice of the government's intent to seek forfeiture of any property constituting or derived from proceeds resulting from the charged offenses, pursuant to 18 U.S.C. 981(a)(1)(C) and 28 U.S.C. 2461(c). Indictment 58-60.

Before and during trial, petitioner, Bob Bates, and Kinsey Bates filed multiple motions to sever their trial from that of Larry Bates. See Pet. App. 6; Gov't C.A. Br. 45. The district court denied the motions, finding that "none of the * * * classic reasons for severance are present at all" and that the defendants' trials were "properly joined." Pet. App. 6. Following a jury trial, the defendants were convicted on all counts. Id. at 5.

3. In calculating petitioner's advisory sentencing range, the Probation Office applied a six-level sentence enhancement under Sentencing Guidelines § 2B1.1(b)(2)(C) (2016) on the ground that petitioner's offense conduct "resulted in substantial financial hardship to 25 or more victims." Presentence Investigation Report ¶ 41. The district court rejected petitioner's objection to the application of that enhancement, finding that the "trial testimony," "victim impact statements" filed by the government, and "other evidence in the record" were "reliable and sufficiently specific" to establish that petitioner's offense conduct caused substantial hardship to at least 32 identified victims. Am. Order Regarding Sentencing Guidelines Objections 15; see id. at 1-21. The court sentenced petitioner to 151 months of imprisonment. Sent. Tr. 63.

The district court granted the government's motion for forfeiture pursuant to 18 U.S.C. 981(a)(1)(C) and 28 U.S.C. 2461(c) and to hold each defendant jointly and severally liable for the proceeds received by First American for unfulfilled orders during the time that each defendant was a participant in the conspiracy. Forfeiture Order 11; see Forfeiture Mot. 2-3. Under the court's order, petitioner was jointly and severally liable to forfeit $19,571,532.09. Ibid.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1-43.

As relevant here, the court of appeals determined that the district court did not abuse its discretion in denying petitioner's motions to sever his trial from Larry Bates's. Pet. App. 21-24. The court of appeals rejected petitioner's contention that "Larry Bates' conduct and trial testimony were * * * so prejudicial as to warrant severance," observing that petitioner "fail[ed] to specify what Larry Bates did that caused [him] prejudice" and "fail[ed] to explain precisely how [Larry Bates's] testimony prejudiced" his defense. Id. at 21. The court also rejected petitioner's contention that severance was necessary because of "the admission of prejudicial evidence that would arguably not have been admissible against [petitioner] in a separate trial," explaining that "'the jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately'" and that "[a]ny potential prejudice" was in any event "minimal." Id. at 21-22 (brackets and citation omitted). And the court rejected the contention that petitioner's and Larry Bates's defenses were "so antagonistic to one another as to require severance." Id. at 23.

The court of appeals also determined that the district court did not abuse its discretion in finding that petitioner qualified for a six-level sentencing enhancement under Guidelines Section 2B1.1(b)(2)(C) because his offense conduct caused "substantial financial hardship" to 32 victims. Pet. App. 33; id. at 33-36. The court explained that "[e]ach of the identified victims provided

sufficient information" -- including "detailed explanations of how the fraud negatively affected the victims' finances, such as by cutting into their savings, requiring them to postpone retirement to mitigate their financial losses, or preventing them from adequately providing for their family members" -- "for the district court to determine that he or she suffered substantial financial harm under [the Guidelines provision]." Id. at 33-34.

The court of appeals further determined that the district court properly found petitioner jointly and severally liable for the court-ordered forfeiture pursuant to 18 U.S.C. 981(a)(1)(C) and 28 U.S.C. 2461(c). Pet. App. 40-42. The court acknowledged that, in Honeycutt v. United States, 137 S. Ct. 1626 (2017), this Court had held that joint and several liability was unavailable under a separate forfeiture statute, 18 U.S.C. 853(a)(1). The court observed, however, that in United States v. Sexton, 894 F.3d 787 (6th Cir.), cert. denied, 139 S. Ct. 415 (2018), it had held that Honeycutt's reasoning did not apply to Section 981(a)(1)(C). Pet. App. 41. "In light of Sexton," the court concluded that petitioner was properly "held to be joint[ly] and severally liable for forfeiture." Id. at 42.

Finally, the court of appeals rejected petitioner's "summar[y] alleg[ation] that the forfeiture amount violated the Eighth Amendment." Pet. App. 42. The court determined that the amount of the forfeiture was consistent with the Eighth Amendment because it was not "grossly disproportionate to the * * * charged

offense" under the standard set forth by this Court in United States v. Bajakajian, 524 U.S. 321, 334 (1998). Pet. App. 42-43.

ARGUMENT

Petitioner contends (Pet. 6-8) that the district court erred in imposing joint and several liability for a court-ordered forfeiture under Section 981. The imposition of joint and several liability under Section 981 on defendants who acted in concert to obtain the proceeds of criminal activity is correct and does not conflict with any decision of this Court or another court of appeals. The government agrees with petitioner that the court of appeals erred in distinguishing 18 U.S.C. 981 from 21 U.S.C. 853 for purposes of joint and several liability; the Third Circuit has rejected that distinction in published precedent. This case, however, would be an unsuitable vehicle for addressing that issue, because the circumstances support joint-and-several liability on alternative grounds. This Court has denied petitions for writs of certiorari in other cases presenting similar claims. See Peithman v. United States, 140 S. Ct. 340 (2019) (No. 19-16); Sexton v. United States, 139 S. Ct. 415 (2018) (No. 18-5391). The Court should follow the same course here.

Petitioner also contends (Pet. 7-24) that the forfeiture order violates the Excessive Fines Clause of the Eighth Amendment, that the district court abused its discretion in denying his motions for severance of his trial, and that the court abused its discretion in finding that he qualified for a six-level sentencing

enhancement under Sentencing Guidelines Section 2B1.1(b)(2)(C). The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review of petitioner's factbound contentions is not warranted.

1. Petitioner's contention (Pet. 6-7) that the district court erred by imposing joint and several forfeiture liability does not warrant this Court's review.

a. Where two defendants act in concert to obtain the proceeds of a crime, the government may seek forfeiture under Section 981 from each defendant for the full amount of those proceeds that has not been forfeited by others. Section 981 provides, as relevant here, for the forfeiture of "[a]ny property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of [certain statutory provisions]." 18 U.S.C. 981(a)(1)(D). Where multiple defendants jointly own a criminal enterprise, and work in concert to operate that enterprise, each of those defendants has "obtained, directly or indirectly," the full amount of the enterprise's proceeds. Ibid. The defendants' later decision to split up those proceeds among themselves does not negate the fact that each of the defendants initially "obtained," and is responsible for, the full amount of those proceeds.

An order requiring each defendant, jointly and severally, to pay the full amount of those proceeds is consistent with this

Court's decision in Honeycutt v. United States, 137 S. Ct. 1626 (2017). In Honeycutt, this Court explained that a separate forfeiture statute, 21 U.S.C. 853, "limits forfeiture to property the defendant 'obtained . . . as the result of' the crime." Id. at 1632 (quoting 21 U.S.C. 853(a)(1)). The Court concluded that a person cannot be said to have "obtained" property merely because that property was "obtained by his co-conspirator." Id. at 1631; see id. at 1632-1633. The Court illustrated its reasoning using a hypothetical example in which a farmer "masterminds a scheme to grow, harvest, and distribute marijuana on local college campuses," but "recruits a college student to deliver packages" of marijuana on campus. Id. at 1631. In the Court's example, the farmer's proceeds total "$3 million," but the student's earnings total only "$3,600." Ibid. The Court explained that, in that situation, the student has "obtained" only "[t]he $3,600 he received for his part in the marijuana distribution scheme." Id. at 1632. The Court concluded that the student has not obtained -- and thus may not be held jointly and severally liable for -- the remaining "$2,996,400," a sum that "ha[s] no connection whatsoever to the student's participation in the crime." Ibid.

As the government argued in the court of appeals, nothing in Honeycutt precludes holding a defendant jointly and severally liable under the circumstances of this case. See Gov't C.A. Br. 86-87. In contrast to the college student in the example discussed in Honeycutt, petitioner was the "second-in-command" in the

fraudulent scheme, participated in all relevant aspects of it, and had access to the proceeds that it generated. Pet. App. 3; see ibid. (noting that petitioner had access to First American's "executive suite" and "knew the combinations" to its safe); id. at 4 (noting that petitioner "worked as an officer and news director for the company" and served "as a co-host" on a radio show that promoted the company's products); id. at 14 (noting that the company's sales staff acted "[a]t the direction of" petitioner); Gov't C.A. Br. 86-87 (noting that petitioner received proceeds of the conspiracy). To adjust the example in Honeycutt to make it more parallel to this case, suppose that a marijuana farmer and his son together mastermind a scheme under which both of them operate a marijuana business, both work together to plant, grow, and sell the marijuana, and both earn a total of $3 million through their joint efforts. In that situation, it would be entirely consistent with Honeycutt to hold the farmer and his son jointly and severally liable for the full $3 million. The defendants have "obtained" that full sum through their concerted efforts, and the full sum has a "connection * * * to [each defendant's] participation in the crime." 137 S. Ct. at 1632.

b. Instead of affirming the forfeiture order on the basis described above, the court of appeals simply noted that, under its previous decision in United States v. Sexton, 894 F.3d 787 (6th Cir.), cert. denied, 139 S. Ct. 415 (2018), Honeycutt concerned only forfeitures under 21 U.S.C. 853(a)(1) and was "inapplicable"

to forfeitures under 18 U.S.C. 981(a)(1)(C). Pet. App. 41. The government agrees with petitioner that the court erred in distinguishing 18 U.S.C. 981 from 21 U.S.C. 853 for purposes of joint and several liability. The government has acknowledged in this Court and in various lower courts that Honeycutt's reasoning concerning joint and several liability also extends to forfeiture orders under Section 981(a)(1)(C). See, e.g., Br. in Opp. at 9, Peithman, supra (No. 19-16); Br. in Opp. at 10-11, Sexton, supra (No. 18-5391); Gov't C.A. Br. at 17-18 & n.4, United States v. Villegas, No. 17-10300 (9th Cir. May 14, 2018); Gov't C.A. Br. at 43-44, United States v. Haro, No. 17-40539 (5th Cir. Feb. 23, 2018). The government also expressed that position in the court of appeals in this case, although it acknowledged that the position was foreclosed by the court's previous decision in Sexton. See Gov't C.A. Br. 86.

The courts of appeals have reached conflicting decisions on that issue. The Third Circuit has concluded that Honeycutt does apply to Section 981(a)(1)(C). See United States v. Gjeli, 867 F.3d 418, 427-428 & n.16 (3d Cir. 2017), cert. denied, 138 S. Ct. 697, and 138 S. Ct. 700 (2018); see also United States v. Carlyle, 712 Fed. Appx. 862, 864 (11th Cir. 2017) (per curiam). The court below and the Eighth Circuit have disagreed. Pet. App. 41-42; United States v. Peithman, 917 F.3d 635, 652 (8th Cir.), cert. denied, 140 S. Ct. 340 (2019).

That circuit disagreement does not provide a sound basis for further review in this case. This case would be an unsuitable vehicle for resolving the disagreement. As explained above, the case also involves defendants whose culpability in operating the fraudulent scheme would in itself support joint-and-several liability for the proceeds of their crimes. In addition, the question presented is of diminishing importance because the government has agreed that Honeycutt's reasoning applies to Section 981(a)(1)(C), and has repeatedly expressed that view in the lower courts. Although some cases, like this one, in which Honeycutt was decided during the district court (or appellate) proceedings may remain in the system, it is far from clear that a substantial number of further cases implicating the issue is likely to arise. And at least a portion of those cases may, like this one, involve other bases on which a joint-and-several forfeiture order could be supported.

2. A writ of certiorari also is not warranted to review petitioner's contention (Pet. 7-8) that the forfeiture ordered in this case violates the Excessive Fines Clause of the Eighth Amendment.

In United States v. Bajakajian, 524 U.S. 321 (1998), this Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id. at 334. In applying that test, the Court considered factors such as the relationship between the

offense leading to the forfeiture and other illegal activities, the nature and extent of the criminal activity, the amount of the forfeiture and its relationship to other authorized penalties for the offense, and the harm caused by the offense. See id. at 337-340.

The court of appeals in this case correctly determined that, assuming that the forfeiture here is subject to the Excessive Fines Clause, the amount of the forfeiture was "not grossly disproportionate" under the factors set out in Bajakajian. Pet. App. 43. The court observed that the amount of the forfeiture "was calculated based on the losses suffered by First American customers from their unfulfilled orders and accordingly represents the harm that the defendants committed"; that petitioner participated "in a years-long conspiracy involving mail and wire fraud"; and that "the conspiracy inflicted a significant amount of financial and emotional harm on hundreds of customers." Id. at 42-43.

Petitioner does not contend that the court of appeals' factbound determination, in an unpublished decision, conflicts with any decision of this Court or of any other court of appeals. Petitioner also does not contend that the court of appeals applied the wrong legal standard in reviewing the proportionality of the forfeiture. Petitioner contests the court's application of that standard to the forfeiture here, but "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of

erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

3. A writ of certiorari likewise is not warranted to review the court of appeals' factbound determination that the district court did not abuse its discretion by denying petitioner's motions to sever his trial from Larry Bates's.

Federal Rule of Criminal Procedure 14(a) provides that, if "the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." This Court has explained, however, that, in light of the "preference in the federal system for joint trials of defendants who are indicted together," "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, 537-539 (1993). The Court has further explained that "Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts." Id. at 541.

The court of appeals correctly determined that the district court did not abuse its discretion in denying petitioner's motions for severance. Petitioner contends (Pet. 19) that his defense was "severely prejudiced" by Larry Bates's conduct and testimony at trial. The court of appeals observed, however, that petitioner "fail[ed] to specify what Larry Bates did that caused [him] prejudice" and "fail[ed] to explain precisely how the testimony prejudiced" his defense. Pet. App. 21. Petitioner further contends (Pet. 22) that "[t]he jury was unable to discern adequately between Larry Bates and the rest of the codefendants, instead [of] lumping all of the defendants together," but, as the court of appeals observed, "'the jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately,'" Pet. App. 22 (brackets and citation omitted).

Petitioner does not contend that the court of appeals' rejection of his factbound severance claim conflicts with any decision of this Court or of any other court of appeals. Petitioner also does not contend that the court of appeals applied the wrong legal standard in reviewing the district court's denial of his motions for severance. Petitioner instead argues (Pet. 22) that the decision below is inconsistent with "[t]he record" and "the facts at trial." Again, however, this Court ordinarily does not grant certiorari to review such factbound contentions. See Sup. Ct. R. 10; Johnston, 268 U.S. at 227.

4. Finally, a writ of certiorari is not warranted to review the court of appeals' decision that the district court did not abuse its discretion in determining that petitioner qualified for a six-level sentencing enhancement under Sentencing Guidelines § 2B1.1(b)(2)(C) because his offense conduct caused "substantial financial hardship" to 25 or more victims.

The court of appeals correctly rejected petitioner's contention that the district court abused its discretion in applying Sentencing Guidelines § 2B1.1(b)(2)(C) (2016). Section 2B1.1(b)(2)(C) authorizes a six-level sentencing enhancement where the defendant's offense conduct "resulted in substantial financial hardship to 25 or more victims." As the court of appeals observed, "[e]ach of [32] identified victims [in this case] provided sufficient information" -- including "detailed explanations of how the fraud negatively affected the victims' finances, such as by cutting into their savings, requiring them to postpone retirement to mitigate their financial losses, or preventing them from adequately providing for their family members" -- "for the district court to determine that he or she suffered substantial financial harm under [the Guidelines provision]." Pet. App. 33-34.

Petitioner argues (Pet. 16) that the decision below conflicts with United States v. Minhas, 850 F.3d 873 (7th Cir. 2017). In Minhas, the Seventh Circuit stated that the "same dollar harm to one victim may result in a substantial financial hardship, while for another it may be only a minor hiccup." Id. at 877. The

Seventh Circuit accordingly concluded that a district court ordinarily should gauge substantial financial hardship under Section 2B1.1(b)(2)(C) "relative to each victim," and should not simply "divide a total loss amount by the number of victims without any information about the amount each individual victim suffered or the victim's financial circumstances." Id. at 877-878. In this case, however, the court of appeals observed that the district court "exceeded the Minhas standard because it identified thirty-two victims of substantial financial harm only after reviewing each individual's trial testimony, sentencing testimony, or victim impact statement, without relying on generalizations about the victims as a group." Pet. App. 35. The decision below thus does not conflict with Minhas.

In any event, this Court typically declines to review contentions that district courts misinterpreted or misapplied the Guidelines. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). The Court instead typically leaves questions regarding the meaning of the Guidelines to the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Ibid. Further review of petitioner's objection to the application of Section 2B1.1(b)(2)(C) to the circumstances of his case is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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