No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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JOHN AFRIYIE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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## QUESTION PRESENTED

In this insider trading case, the court of appeals affirmed a sweeping criminal forfeiture judgment encompassing all potential trades combined in a single count, even though the jury returned only a general verdict beyond a reasonable doubt and was expressly told it could convict on one trade alone. Should this Court address (i) the conflicts between the decision below and other courts of appeal holding that criminal forfeiture statutes require that forfeiture only be based on convicted conduct found by the jury and (ii) whether this Court should also extend the Sixth Amendment right to trial by jury, as expounded after *Apprendi v. New Jersey,* 530 U.S. 466 (2000), to criminal forfeiture cases, and if need be, overrule the Court's pre-*Apprendi* decision in *Libretti v. United States,* 516 U.S. 29, 48-49 (1995)?

## STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

The names of all parties to this petition appear in the caption of the case on the cover page. The parties have no parent or subsidiary companies and do not issue stock. The proceedings directly related to this case are as follows:

- *United States v. Afriyie,* No. 1:16-cr-00377-PAE-1, U.S. District Court for the Southern District of New York. Judgments entered July 28, 2017 and December 12, 2017.
- *United States v. Afriyie,* Nos. 17-2444, 17-4045, U.S. Court of Appeals for the Second Circuit. Judgments entered July 8, 2019 and October 11, 2019.

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## OPINIONS BELOW

The July 8, 2019 opinion and order of the court of appeals affirming the judgment of the district court, except to remand regarding restitution, may be found at *United States v. Afriyie,* 929 F.3d 63 (2d Cir. 2019), and is reproduced at Appendix A. The October 11, 2019 order denying the petition for rehearing or rehearing *en banc* is reproduced at Appendix C. *United States v. Afriyie,* 17-2444 (2d Cir. October 11, 2019). Excerpts of the July 26, 2017 sentencing addressing claims raised herein concerning sentencing loss and forfeiture are reproduced at Appendix B. *United States v. Afriyie,* 16-CR-377 (S.D.N.Y. July 26, 2017).

## JURISDICTION

The judgment of the court of appeals was entered on July 8, 2019. App. A. The order denying the petition for rehearing or rehearing *en banc* was entered on October 11, 2019. App. C. This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury….

2. At all relevant times, 18 U.S.C. § 981(a)(1)(C) defined "property … subject to forfeiture to the United States" to include

> (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of [laws including those charged in this case]

## STATEMENT OF THE CASE

In another case of overbroad application of criminal forfeiture laws,[1] this case concerns a sweeping forfeiture not authorized by the jury's verdict in derogation of statutory and constitutional commands. Petitioner went to trial on an insider trading indictment that indiscriminately grouped numerous trades made under divergent circumstances into singular counts – one for insider trading, one for wire fraud. The district court allowed the jury to convict on any one trade with no special verdict, but thereafter entered a sweeping criminal forfeiture judgment that applied to all trades without any determination that the jury convicted beyond a reasonable doubt as to all trades. The affirmance below conflicts with other circuit authority restricting criminal forfeiture to conduct found by the jury beyond a reasonable doubt and calls more broadly for this Court to examine whether to extend *Apprendi v. New Jersey,* 530 U.S. 466 (2000) to criminal forfeiture and overrule the Court's pre-*Apprendi* decision in *Libretti v. United States,* 516 U.S. 29, 48-49 (1995).

### A. District Court Proceedings

1. Petitioner John Afriyie went to trial on a two-count indictment charging insider trading in one count each of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff & 17 C.F.R. § 240.10b-5 and wire fraud in violation of 18

[1] *See also, e.g., Honeycutt v. United States,* 137 S.Ct. 1626, 1632-33 (2017)(precluding joint and several forfeiture liability for property co-conspirator derived from crime); *Luis v. United States,* 136 S.Ct. 1083 (2016)(pretrial restraint of legitimate assets needed to retain counsel violates Sixth Amendment right to counsel).

U.S.C. § 1343. The trial was bifurcated into merits and forfeiture segments, both before a jury. Defendant was sentenced principally to 45 months in prison, criminal forfeiture in an aggregate total of $2,780,720.02 and restitution totaling $663,028.92. Exh.A at 6.

Petitioner was a research analyst in the public equities unit at MSD Capital ("MSD"), a multi-strategy investment firm. In January 2016, private equity firm Apollo Global Management contacted the separate private capital unit at MSD about possibly financing a potential acquisition of ADT Corp, a publicly traded security and alarm company. MSD and Apollo dealt at arms-length from January 27th to about February 2nd. Apollo met once with MSD and provided research about the potential transaction pursuant to a confidentiality agreement. Within a week MSD declined to participate in the potential transaction. On February 16, Apollo publicly announced its planned acquisition of ADT. *See* Ex.A at 4-5.

The government alleged that petitioner traded on material non-public information in ADT options at various points: (1) after MSD distributed a "potential restriction" email on January 27th about Apollo's interest in a "U.S. listed alarm monitoring services company" although it did not identify ADT; (2) and in a two-week period after petitioner accessed on February 2nd Apollo's research on ADT on MSD's shared research drive following another restriction email this time identifying ADT. Afriyie's good faith defense emphasized that at various points in the time frame purchases were based on publicly available information and information made freely available on MSD's shared research drive. ExhA. at 4-5.

The options were sold for a total profit of $1,564,071.60. Petitioner lawfully reinvested substantially all the proceeds in other stock options that were also profitable. The account appreciated from $1.53 million to $2.7 million, generating $1.2 million in undisputedly lawful trading in a two-month period. *See* Exh.A at 5-6.

2. As pertinent here, the jury trial was bifurcated between a merits portion and a forfeiture portion, both before the same jury. The securities and wire fraud counts both indiscriminately grouped all of petitioner's trades into single counts without identifying them individually and even though the facts and good faith defense countenanced differing arguments of liability as to different transactions. *See* Exh.A at 16-17. At the merits trial, the government sought a unanimity instruction that allowed the jury to convict on any one trade if they were unanimous and allowing them to not consider any other trades. *See* Trial Transcript (hereafter "Tr.") at 630, 1002-03, 1006. Although the defense sought a special verdict form (Tr.706), the court deemed it unnecessary, and the jury returned general verdicts. As the district court observed:

> the government has chosen, at the guilt stage, to have me instruct the jury, which is legally correct, that they can return a guilty verdict based on a single transaction as to which all of the elements are met. *What [this] means is that it does not follow that after a verdict of guilt means that the jury has found that each of the options trades was an act of insider trading. They may have or they may not have.* (Tr. 895-96)(emphasis added).

Although criminal forfeiture trials are ordinarily tried on a preponderance standard, petitioner argued that the jury had to be charged according to a beyond a reasonable doubt standard as to which trades constituted insider trading because

the merits verdict failed to establish which trades were found by the jury beyond a reasonable doubt. The defense argued the impropriety of instructing the jury to evaluate forfeiture liability potentially in the first instance under the civil standard of proof without first finding that transaction beyond a reasonable doubt. *See* Tr.1026-1036. These objections were overruled and the jury was instructed to consider all trades under the civil standard, without regard to whether the transactions had been found beyond a reasonable doubt in the merits verdict. Tr.1149-50.

At sentencing, defendant argued that because of the general verdict by the merits jury and the court's instruction that it could convict on one trade alone, the jury's verdict had to be interpreted as finding only one trade beyond a reasonable doubt. Petitioner accordingly challenged both the sentencing loss used to determine the Guidelines range and the forfeiture. The district court rejected the former claim, concluding that it had discretion under the Guidelines to make its own determination and/or rely on the forfeiture jury's verdict on a preponderance of the evidence. Exh.A. at 17-18; Exh.B at Tr.11-13. The court also rejected this same argument as to the forfeiture, stating that although the jury was permitted to convict as to one trade at the merits trial (on a beyond a reasonable doubt standard), at the forfeiture trial (on a preponderance standard) the jury had to review all the trades and that this "necessarily reflects determination that each and every one of the transactions at issue…was insider trading and there was an ample, indeed an overwhelming, factual basis for those findings." Exh.B at Tr.44.

## B. Decision of the Court of Appeals

Other than to remand for reassessment of restitution,[2] the court of appeals affirmed. With respect to the sentencing and forfeiture issues, petitioner again argued that because the jury was instructed that it could convict on any one of the many trades included in the singular counts, and there was no special verdict, sentencing loss calculation and forfeiture could only be based on the least remunerative offense. *See United States v. Sturdivant*, 244 F.3d 71 (2d Cir. 2001). The court of appeals understood, however, that petitioner was arguing that this problem "afflicted the forfeiture determination albeit more profoundly." Exh.A at 19. This was based on petitioner's argument that, unlike discretionary guidelines determinations, forfeiture rulings must be based on the jury's verdict of guilt. The court, however, apparently discerned no difference between losses under the Guidelines and criminal forfeiture as to this issue and rejected both arguments on the basis of the judge's ability to determine sentencing loss without addressing the head on the distinct issue as to forfeiture. Exh.A at 16-18.

The court of appeals also upheld the forfeiture judgment against Afriyie's contention that untainted further appreciation of the insider trading proceeds was not forfeitable. The court rejected reliance on 18 U.S.C. § 981(a)(2)(B) which limits "proceeds" in insider trading cases to "the amount of money acquired through the illegal transactions" and does not include property obtained "indirectly" as in other

[2] The court of appeals remanded for reconsideration of restitution in light of *Lagos v. United States*, 138 S.Ct. 1684 (2018). Exh.A at 24-25.

forfeiture cases such as drug cases under subsection 981(a)(2)(A). *See United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012)("§ 981(s)(2)(B) supplies the definition of 'proceeds' in cases involving the purchase or sale of securities.") The court relied oncited subsection 981(a)(1)(C) providing for forfeiture of property "derived from proceeds traceable" to the offense and rejected the argument that this would render the proceeds definition in subsections 981(a)(2) meaningless. The court also rejected the argument that the rule of lenity should apply. Exh.A at 19-23.

## REASONS FOR GRANTING THE PETITION

### The Decision Conflicts With Other Courts of Appeal Limiting Criminal Forfeiture to Convicted Conduct and Implicates Whether the Sixth Amendment *Apprendi* Guarantee Should Extend to Criminal Forfeiture.

The decision below upholds a sweeping criminal forfeiture judgment based on all trades at issue at petitioner's trial even though the jury was explicitly told it could convict on one trade alone, and a special verdict was not taken requiring the jury to specify the trades on which it convicted. The decision conflicts with decisions of other lower courts that require the forfeiture to be based on definitively convicted conduct, and resolve doubts in interpreting the criminal trial verdict against forfeiture. In addition, this issue also implicates whether a defendant's Sixth Amendment right to a trial by jury, as explicated in the *Apprendi* line of cases, should extend to criminal forfeiture cases.

## A. The Decision Below Conflicts With Other Courts of Appeal Limiting Criminal Conduct to Explicitly Convicted Conduct.

The court of appeals' rejection of petitioner's argument that criminal forfeiture could not be premised on a verdict that failed to specify which trades the jury found to constitute insider trading beyond a reasonable doubt stands in contrast to the decisions of several courts of appeal, including a decision of then Judge Sotomayor in the Second Circuit. These cases, noting the statutory requirement of an underlying criminal violation to support forfeiture, have rejected forfeitures not clearly supported by the jury verdict, and resolved ambiguities in the verdict *against* forfeiture.

As the court below has recognized in a different case decided by Judge Sotomayor, as to non-guidelines punishment ranges a sentencing court cannot assume without a special verdict, that a jury deliberating a count with multiple bases of conviction, necessarily convicted on any more than one such basis:

> Where, as here, a defendant has already been convicted on a count charging two distinct offenses, and the jury's verdict is only demonstrably unanimous with respect to one of those offenses, … [t]he district court must give defendant the benefit of the verdict's ambiguity and sentence him assuming that he was convicted of the transaction involving the lower drug quantity….

*United States v. Sturdivant*, 244 F.3d 71, 80 (2d Cir. 2001). This is a widely-held principle. *See United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998) (defendant convicted of multi-prong drug conspiracy without special verdict must be sentenced within most lenient applicable statutory range); *United States v. Orozco–Prada,* 732 F.2d 1076, 1083–84 (2d Cir.1984); *United States v. Barnes*, 158 F.3d 662, 666-672

(2d Cir. 1998) (defendant convicted of multi-prong drug conspiracy without special verdict must be sentenced within most lenient applicable statutory range).[3] *See also Yates v. United States,* 354 U.S. 298, 312 (1957)("proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected").

In light of this accepted principle of interpretation of a jury verdict, it follows that the merits verdict in this case must be presumed to have been based on just one trade. Although the district court noted that the forfeiture trial verdict would have encompassed all trades, Exh.B at Tr.43-45, that verdict was based on the preponderance standard. The merits verdict, however, on the beyond a reasonable doubt standard cannot support a sweeping forfeiture order as to *all* trades. This case thus stands in conflict with lower court decisions requiring that the forfeiture be supported by the jury's verdict on the criminal merits beyond a reasonable doubt.

1. The conflict with other circuit decisions is clear. The Tenth Circuit in *United States v. Bader,* 678 F.3d 858, 894 (10th Cir.2012) held, "[t]here must be a nexus between the property forfeited and *an offense of conviction* that authorizes forfeiture."(emphasis original). The court noted that under 18 U.S.C. § 981(a)(1)(C) "'property is subject to forfeiture to the United States'" where it 'constitutes or is derived from proceeds traceable to a *violation* … .'" (emphasis added). There, the

[3] *Barnes* notes that this principle would not apply as to Guidelines determinations, an issue not presented here. *See id.* at 669 (discussing *Edwards v. United States,* 523 U.S. 511 (1998)).

court of appeals had determined to overturn several counts for HGH importation due to flaws in the jury instructions. Because those counts formed at least part of the basis for forfeiture, the case was remanded for the district court to revise the forfeiture to account for unauthorized amounts. Indeed, the court specifically noted that (as in this case) there was no special verdict that linked the forfeiture to specific violations. *Id.* at 895-96.

Similarly, the Ninth Circuit in *United States v. Garcia–Guizar,* 160 F.3d 511, 518 (9th Cir.1998) held that "only…proceeds of the conduct for which Garcia was actually convicted is properly subject to criminal forfeiture..." There the court found that the government failed to show that the moneys in question derived from activity for which defendant was definitively convicted as opposed to uncharged conduct. Again, the court cited the statutory requirement (in that case under 21 U.S.C. § 853(a)(1)) linking forfeiture to "such violation." *See also United States v. Hasson,* 333 F.3d 1264, 1279 n. 19 (11th Cir.2003) ("We do not mean to imply that a court could impose a forfeiture order based on a money laundering offense with which the defendant was not charged or for which he was acquitted.").

Indeed, the Second Circuit itself has recognized this principle in another decision authored by Judge, now Justice, Sotomayor under the same forfeiture statute at issue here. In *United States v. Capoccia*, 503 F.3d 103 (2d Cir. 2007), the court held that "[t]he violation on which the forfeiture is based must be the specific violations of which [defendant] was convicted, not some other, separate … violations." Again, the court held that under 18 U.S.C. § 981(a)(1)(C) "property is

subject to forfeiture to the United States" where it "constitutes or is derived from proceeds traceable to a *violation* … ." of enumerated statutes. In that case, certain moneys were obtained prior to the time frame of the charges of conviction and could not be included in the forfeiture order. As Judge Sotomayor explained, "[r]equiring the government to link assets to specific crimes of conviction is … consistent with the punitive purposes of criminal forfeiture." *Id.* at 116. The court also cited the legislative history under which the criminal forfeiture provisions applicable here were enacted, explaining the Congressional "design[] to prevent abuse of the civil forfeiture process in part by encouraging the government to seek forfeiture through criminal proceedings, where it would have to link targeted property to a specific criminal conviction." *Id.*

2. This case was decided under the same criminal forfeiture provision, 18 U.S.C. § 981(a)(1)(C), as *Bader* and *Capoccia*, and is on all fours with the statute in *Garcia–Guizar*. But contrary to those decisions, in this case, the court of appeals approved a sweeping criminal forfeiture as to all trades without the requisite support from a jury verdict. As detailed above, at the merits trial petitioner was convicted on two singular counts of securities and mail fraud incorporating multiple transactions at different times of the unfolding of the ADT matter, and the jury was told it could convict on one trade alone. Thus, the merits verdict afforded no basis for determining the scope of liability as determined by the jury beyond a reasonable doubt. And again, although there was a separate forfeiture trial, that trial was conducted on a preponderance of the evidence standard.

Had the decision below adhered to the principles cited by the other circuits and the Second Circuit's own decision in *Capoccia,* it would have at least addressed why the forfeiture should not be restricted to the least remunerative trade undertaken by petitioner. Unless, contrary to authority, sentencing courts are free to expand forfeiture beyond the dictates of the jury verdict, there was no basis to authorize forfeiture as to all trades.[4] Indeed, the fundamental error below was that both the district court and the court of appeals treated criminal forfeiture as something to be determined by a sentencing judge in its discretion as with Guideline determinations rather than something strictly confined by the authorization of the jury verdict.[5]

Alternatively, in the briefing below, the government claimed that "where…the defendant engaged in a continuing scheme, the amount derived from the entire scheme is forfeitable, and is not limited to the substantive counts of which the defendant was convicted." Govt.Brief on Appeal 54. But here the conviction was *not* for executing a continuing scheme. The indictment never charged a "continuing scheme" nor was the jury instructed to so find. Indeed, in *Capoccia* the Second Circuit emphasized that forfeiture is established, "[w]here the

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[4] Although criminal forfeiture is permitted according to a civil preponderance standard courts state that this is because it is deemed to constitute an additional penalty for the offense of conviction, not because it provides a separate basis for evaluating liability. *E,g,, Capoccia,* 503 F.3d at 115-16. *But see* Section B, *infra.*

[5] The Panel recognized the authority of the district court to make its own calculation of loss under the Guidelines. ExhA. at 18. But forfeiture is not a discretionary determination under advisory Guidelines.

*conviction itself* is for executing a scheme…" as opposed to an offense based on "individual instances of transferring stolen money." 503 F.3d at 117-18 (emphasis added). If "continuing scheme" is the answer, then under *Capoccia* petitioner had every right to insist that his jury, not the district judge, make the determination beyond a reasonable doubt.

This Court should speak to these issues and issue clarification to the lower courts. As it stands, the decision below sends the message that it is not the jury's verdict beyond a reasonable doubt that defines the scope of criminal forfeiture, but rather the sentencing judge's prerogative to made such determinations akin to sentencing guidelines findings. Even where such findings are aided by a *civil* forfeiture verdict, they still transgress the understanding that the criminal verdict beyond a reasonable doubt should govern the scope of criminal forfeiture.

### B. The Court Should Also Determine Whether to Recognize the Sixth Amendment *Apprendi* Right in Criminal Forfeiture Cases and Overrule *Libretti v. United States,* 516 U.S. 29 (1995).

In addition to the statutory requirement that criminal forfeiture be supported by the jury verdict, this case also implicates whether a defendant has an independent Sixth Amendment right to a jury determination beyond a reasonable doubt of criminal forfeiture of any fact mandating forfeiture under *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and its progeny.[6] This Court has not yet decided this

[6] Although not argued as such, as noted above, petitioner unsuccessfully demanded that the jury be required to determine which forfeiture trades constituted insider

issue which has received continued attention in the lower federal courts, particularly since this Court's decision in *Southern Union Co. v. United States,* 567 U.S. 343 (2012), applying *Apprendi* to criminal fines. This issue also well warrants this Court's attention for several reasons.

To begin with lower courts have declared themselves precluded from deciding the question by this Court's pre-*Apprendi* decision *Libretti v. United States,* 516 U.S. 29, 48-49 (1995), holding that there is no Sixth Amendment right to a jury trial as to criminal forfeiture because forfeiture constitutes a "sentencing" fact. The court below has taken this position that it is bound by *Libretti* in *United States v. Stevenson,* 834 F.3d 80, 85 (2d Cir. 2016) and *United States v. Fruchter,* 411 F.3d 377, 380 (2d Cir.2005)). Indeed, this has been a common refrain among lower courts deeming their hands tied. *See United States v. Sigilito*, 759 F.3d 913, 935 (8th Cir. 2014); *United States v. Wilkes*, 744 F.3d 1101, 1108 (9th Cir. 2014); *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012); *United States v. Miller*, 645 Fed.Appx. 211, 225 n.84 (3d Cir. 2016); *United States v. Bradley*, 2019 WL 1535368 *5 (M.D. Tenn. 2019).

But *Libretti's* sentencing fact vs. merits fact distinction has long been abandoned by this Court. The case, decided in 1995, concerns stipulated forfeiture in plea proceedings, and makes only passing reference concerning forfeiture that "a defendant does not enjoy a constitutional right to a jury determination as to the

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trading under the beyond a reasonable doubt standard before turning to tracing analysis. *See* Tr.1026-1036.

appropriate sentence to be imposed." 516 U.S. at 49. *Libretti's* casual assignment of forfeiture to the realm of "sentencing facts" that are beyond the reach of the Sixth Amendment has lost all validity in the post-*Apprendi* line of cases. *See, e.g., Ring v. Arizona,* 536 U.S. 584, 605 (2002)("the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury"). *See also id.* at 610 (Scalia, J. concurring)(the Sixth Amendment requirement to prove facts beyond a reasonable doubt to a jury does not depend on "whether the statute calls them elements of the offense, sentencing factors or Mary Jane.") This inconsistency was recognized early on and lower courts are all but asking this Court to speak to the issue. *See, e.g., United States v. Leahy,* 438 F.3d 328, 339 (3d Cir. 2006) (en banc) (McKee, Rendell, Ambro, Smith and Becker, JJ., concurring in part and dissenting in part) ("Although I find it difficult to reconcile *Libretti* with the Court' s subsequent decisions . . . any tension between *Libretti* and those cases must be resolved by the Supreme Court, as the majority explains.").

A Sixth Amendment right in criminal forfeiture cases is also strongly supported by this Court's decision in *Southern Union Co. v. United States,* 567 U.S. 343 (2012), which applies *Apprendi* to criminal fines:

> [R]equiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi's* animating principle: the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense....In stating *Apprendi's* rule, *we have never distinguished one form of punishment from another.*

132 S. Ct. at 2351 (emphasis added) (quotation omitted). Moreover, in

*Alleyne v. United States,* 570 U.S. 99 (2013), this Court extended *Apprendi* to any fact that increases a mandatory minimum. To be sure, lower courts that address the issue on the merits have contended that the *Apprendi* line of cases does not apply to criminal forfeiture because no "maximum" level of forfeiture is mandated by a jury finding as would occur with a statutory sentencing maximum. These cases distinguish *Southern Union* on the ground that, there, each daily violation of the statute in question represented a mandatory increase in the fine, but the jury had not been asked to determine the number of days of violations. *E.g., Stevenson,* 834 F.3d at 85.

But this Court should address the validity of this reasoning. Mandatory criminal forfeiture, unlike discretionary guideline or fine determinations, are literally determined by the scope of the jury's criminal verdict and should not be subject to judicial discretion. In that sense, the forfeiture is akin to the fines in *Southern Union* or a mandatory minimum as in *Alleyne.* Although deeming it bound by *Libretti* in the end, as one district court has noted:

> Taken together, these three cases *[Apprendi, Southern Union* and *Alleyne]* may support the proposition that facts supporting a criminal forfeiture order must be found by a jury. Since district courts have no discretion to reduce forfeiture, . . . the statute requires to be forfeited whatever amount the court finds to be forfeitable, making that amount arguably the substantial equivalent of a minimum mandatory punishment, and thus governed by the *Alleyne* rule.

*United States v. Carpenter,* 2014 WL 2178020 *3 (D. Mass. 2014).

Criminal forfeiture statutes do require an underlying criminal violation, and it matters to the determination of forfeiture what the scope of violations are. The significance of this issue is manifest and even more consequential than the related question involving fines resolved in *Southern Union.* While fines are generally discretionary and therefore often *not* imposed, forfeiture is usually mandatory and therefore more commonly imposed than fines. Moreover, because forfeiture judgments are not statutorily limited, enormous forfeitures can be and are imposed based only on facts found by a judge, by a preponderance of the evidence standard. The tension between *Libretti* and the more recent *Apprendi* line of authority is too pronounced to be tolerated. Whether this state of affairs should continue is deserving of the Court's attention.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 9, 2020

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