No. 19-8464

IN THE

SUPREME COURT OF THE UNITED STATES

JAMAL MITCHELL — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Does an order has to be first challenged on direct appeal before the order can be later challenged in an ancillary proceeding based on an intervening change in law?

II. Can Rule 41(g) of the Federal Rules of Criminal Procedure or Rule 60(b) of the Federal Rules of Civil Procedure be invoked to challenge aspects of a forfeiture order?

III. Did the Court's decision in Honeycutt pose a jurisdictional contraint on the government's authority and a court's competence to seek and order forfeiture of property that has no connection to a crime?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Mitchell, No. 02-cr-25, United States District Court for the Eastern District of Virginia. Judgment entered on August 6, 2019.

United States v. Mitchell, No. 19-7198, United States Court of Appeals for the Fourth Circuit. Judgment entered on January 30, 2020.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was January 30, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 13, 2020, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions Involved in Question 2

1. Rule 41(g) of the Federal Rules of Criminal Procedure provides in relevant part that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g).

2. Rule 60(b)(5) of the Federal Rules of Civil Procedure provides for relief from a judgment or order "if it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5).

3. Rule 60(b)(4) of the Federal Rules of Civil Procedure provides relief from an order or judgment when "the judgment is void." Fed. R. Civ. P. 60(b)(4).

4. Rule 60(b)(6) of the Federal Rules of Civil Procedure offers an avenue of relief for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6).

Provisions Involved in Question 3

1. Section 853(a)(1) of Title 21 provides in relevant part that any person convicted of a crime shall forfeit to the United any property or proceeds obtained "as the result of such violation." 21 U.S.C. § 853(a)(1).

STATEMENT OF THE CASE

On January 2, 2019, Petitioner filed in the District Court for the Eastern District of Virginia a motion titled "Motion to Amend Forfeiture Order and the Request for Return of Real Property." The motion was brought pursuant to Rule 60(b)(4)-(6) of the Federal Rules of Civil Procedure and Rule 41(g) of the Federal Rules of Criminal Procedure. The basis for the motion was an intervening change in circuit law.

On August 6, 2019, the district court denied the motion. (Appx. C.) The court found that neither Rule 41(g) nor Rule 60(b) is an appropiate vehicle to challenge a forfeiture order. (See Appx. C at 2.) Furthermore, the district court concluded the proper avenue to challenge a forfeiture order is on direct appeal. (See Appx. C at 3.) Petitioner appealed the the district court's order.

On appeal, the Fourth Circuit stated it found no reversible error in the district court's order and concluded it was affirming for reasons specified by the district court. (See Appx. A.)

The Petitioner petitioned for rehearing and asked the full court of appeals to hear the case en banc. That petition was denied on April 13, 2020. (See Appx. D.)

REASONS FOR GRANTING THE PETITION

Question I

This petition presents the question whether an order must be challenged on direct appeal or not, when there has been an intervening change in controlling law that renders the order open to collateral attack. An decisive answer to this question will have widespread implications on cases where defendants and litigants alike will be able to benefit from rulings in circuit courts that have abrogated previous case law. While it is settled that relief is available to criminal defendants via a motion pursuant to 28 U.S.C. § 2255 by reason of an intervening change in law, see Davis v. United States, 417 U.S. 333 (1974), it is unclear whether a litigant or third party in an ancillary proceeding, who may have had a claim denied because of precedent in effect at the time the issue was adjudiacted, can benefit from the new law that overruled old law.

In Petitioner's case, he relied on the change in law effected by the decision in United States v. Chittenden, 896 F.3d 633 (4th Cir. 2018). The Fourth Circuit in Chittenden established new law by abrogating previous case law. The decision in Chittenden was prompted by this Court's opinion in Honeycutt v. United States, 137 S. Ct. 1626 (2017). Although Petitioner did not rely on Honeycutt directly, see Appendix B, he cited its holding to demonstrate how the decision in Chittenden was brought about.

All told, the Court should grant the petition on Question I

to establish the proper framework for all parties to benefit from an intervening change in law.

Question II

The next question presented concerns the appropriate vehicle to challenge a forfeiture order, and to request the return of seized property that is beyond the reach of a forfeiture statute.

In regard to Rule 41(g) of the Federal Rules of Criminal Procedure, it has been decided that the Rule acts as a mechanism to petition a court for the return of property unlawfully held. See, e.g., United States v. Garcia, 65 F.3d 17 (4th Cir. 1995); Bertin v. United States, 478 F.3d 489 (2nd Cir. 2007); United States v. Chambers, 192 F.3d 374 (3rd Cir. 1998).However, the burden that is placed on movants who invoke Rule 41(g) is so heavy that the Rule is rendered inapplicable.

For instance, in Petitioner's case the district court found that Rule 41(g) does not apply, in spite of the motion plainly stating that its aim was to seek return of unforfeitable property.

A decision by this Court on the appropiateness of Rule 41(g) to seek the return of property that do not fall within the scope of a criminal forfeiture statute is necessary to clarify the confusion among the courts regarding the Rule's proper utility.

Subsequently, it has been held by this Court that Rule 60(b)(5) permits a party to obtain relief from a judgment

or order if the decrees are no longer equitable. See Horne v. Flores, 557 U.S. 433, 447 (2009). "The Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if there has been a significant change in law." id. The decision in Horne re-established the means and manner in which Rule 60(b)(5) may be invoked.

By contrast, Rule 60(b)(4) authorizes the court to relieve a party from a final judgment if the judgment is void. See United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010). "A void judgment is one so affected by a fundamental infirmity may be raised even after the judgment becomes final." Espinosa, supra. The sanction by this Court of the nature of Rule 60(b)(4) presupposes the existance of the Rule as it is stated in its text.

The catch-all provision of Rule 60(b)(6) reads that a party may seek relief from a judgment for "any reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). In Buck v. Davis, 137 S. Ct. 759 (2017), this Court held that Rule 60(b)(6) permits a court to reopen a judgment for any other reason that justifies relief.

Taken together, a party must satisfy one of the enumerated grounds for relief under Rule 60(b). What is less transparant is whether Rule 60(b) applies to forfeiture proceedings. The courts that ruled on Petitioner's claims say it does not, see Appendix C at 2, while other courts say it do. See, e.g., United States v. Rodriguez-Aguirre, 414 F.3d 1177, 1182 (10th Cir. 2005); United States v. Puig, 419 F.3d 700, 702 (8th Cir.

2005). The divide among the courts on the application of Rule 60(b) to forfeiture proceedings necessitates an authoritative decision by this Court regarding Question II of this petition.

Question III

In Honeycutt v. United States, 137 S.Ct. 1626 (2017), this Court found that forfeiture pursuant to 21 U.S.C. § 853(a)(1) is limited to property the defendant acquired as the result of a crime. "The provisions, by their terms, limit forfeiture under § 853 to tainted property, that is, property flowing from § 853 (a)(1)." id. at 1632. Can it be inferred from the Court's reading and interpretation of § 853(a)(1) that it contains a jurisdictional element?

Section 853(a)(1) provides in revelant part that any person convicted of a violation under Title 21 of the U.S.C. shall forfeit any property derived from any proceeds the person obtained "as the result of such violation." 21 U.S.C. § 853(a)(1). As the Honeycutt court made known, the operative phrase of the statute is "as the result" of a crime. Honeycutt at 1635.

It has been said that jurisdiction refers to "the court's statutory or constitutional power to adjudicate the case." United States v. Cotton, 535 U.S. 625, 630 (2002). Moreover, this Court has established a rule in determining whether a threshold limitation on a statute is jurisdictional. See Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). It is only when Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." id.

Indeed, Congress has stated a limitation on § 853(a)(1)'s

reach by embedding the phrase "obtained as the result of" a crime into the statute. Personal or real property that do not fall within the text of § 853(a)(1) should be beyond the government's authority to confiscate and above a court's jurisdiction to order the forfeiture of the property, especially since courts do not have free-standing jurisdiction. See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

An answer to Question III of this petition will have important implications on cases where untainted property is mired in the tortuous process of criminal forfeiture. With the exception of a few rare cases, after a criminal forfeiture order has been handed, owners of untainted property are invariably denied the opportunity to have their property returned. By ruling that § 853(a)(1) contains a jurisdictional element, this Court will provide a sense expediency for courts to decide without delay whether there is statutory authority under § 853(a)(1) to order forfeiture of property.

In Petitioner's case, he invoked Rule 60(b)(4) to the claim that the district court did not have statutory authority to issue the forfeiture order that encompassed his real property, because the properties were not obtained as a result of a crime. While he did not rely directly on the decision in Honeycutt, he based his motion on the Fourth Circuit's intervening change in law announced in United States v. Chittenden, 896 F.3d 633 (4th Cir. 2018), which applied the principles established in Honeycutt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jamal O Mitchell

Date: May 6, 2020