NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN BRADLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under *Apprendi* and its progeny, a court violates the Sixth Amendment's jury-finding requirements by ordering forfeiture, over the defendant's objection, based only on judge-found facts.

2. Whether *in personam* money judgments—which seize even untainted assets—are an end-run around the criminal forfeiture statute and inconsistent with this Court's precedent in *Honeycutt*.

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PARTIES TO THE PROCEEDING

All parties are listed in the caption of the opinion of the United States Court of Appeals for the Sixth Circuit.

REFERENCE TO OPINIONS BELOW

The August 1, 2018 opinion of the Sixth Circuit Court of Appeals is published as *United States v. Bradley,* 897 F.3d 779 (6th Cir. 2018). App. 1–9. The August 10, 2020 Sixth Circuit Court of Appeals opinion in the second appeal following remand is published as *United States v. Bradley*, 969 F.3d 585 (6th Cir. 2020). App. 10–19. The November 11, 2020 Sixth Circuit denial of rehearing en banc is unpublished. App. 20. These opinions are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the August 10, 2020 judgment and opinion of the Sixth Circuit Court of Appeals. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .

21 U.S.C. § 853:

a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

1. any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

2. any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

3. in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

1. real property, including things growing on, affixed to, and found in land; and

tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

[. . .]

p) Forfeiture of substitute property

1. In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

A. cannot be located upon the exercise of due diligence;
B. has been transferred or sold to, or deposited with, a third party;
C. has been placed beyond the jurisdiction of the court;
D. has been substantially diminished in value; or
E. has been commingled with other property which cannot be divided without difficulty.

2. Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

3. Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

[. . . .]

STATEMENT OF THE CASE

In 2015, Petitioner Benjamin Bradley pleaded guilty to charges stemming from his involvement in a conspiracy to possess and distribute prescription opioids. App. 1–2. While he admitted guilt with respect to conspiracy and money laundering charges, App. 1, he reserved his right to contest the government's notice of forfeiture. App. 26–32.

The government moved to forfeit Bradley's real properties, including the home where his wife and children lived, other properties he had renovated and rented out, and two lots of currency. App. 34, 48–49. It also moved for—and received—a million-dollar money judgment under 21 U.S.C. § 853(p). App. 38–39, 46.

From the start, Bradley challenged the forfeitability of the property and argued that since forfeiture is a mandatory criminal penalty, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the government must prove to a jury beyond a reasonable doubt that the property it is seeking is forfeitable. App. 5. He also argued that the district court lacked the statutory authority to issue the million-dollar money judgment it eventually levied. App. 3.

But the district court ruled against Bradley, leaving the government free to prove forfeiture by only a preponderance of the evidence and enabling the court to base its finding on hearsay and other unreliable evidence.

Bradley appealed his sentence. In its unanimous opinion, the panel (Judges Sutton, Kethledge, and McKeague) observed that the question of

whether the Sixth Amendment prohibits imposing criminal forfeiture without a supporting admission or jury finding was a "an unanswered question in [the Sixth] [C]ircuit" and suggested the parties "address these questions on remand." App. 5. The court held that the money judgment, insofar as it imposed joint and several liability, violated *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), and it vacated the forfeiture order in its entirety. It remanded for reconsideration and renewed factfinding to correct the "[b]ack-of-the-envelope calculations" that went into the money judgment. App. 4.

On remand, the district court again rejected Bradley's arguments. App. 47. The court noted, with respect to Bradley's Sixth Amendment argument, that "regardless of. . . this court's personal feelings on the matter," until the Supreme Court says otherwise, the court's "hands [were] tied" by *Libretti v. United States*, 516 U.S. 29 (1995). App. 87–88. In that case, this Court stated that there is no "right to a jury verdict on forfeitability." *Libretti*, 516 U.S. at 49.

The district court conducted an evidentiary hearing with respect to Bradley's factual arguments, App. 51–22, but absent the Sixth Amendment's protections, the court once again considered hearsay in its factfinding. App. 71–72. Moreover, the court applied a presumption of forfeitability with respect to the real properties, placing the burden on Bradley to rebut that presumption. App. 75. Ultimately, the district court issued a forfeiture order

nearly identical to the first—the only change was the elimination of joint and several liability. App. 94–98.

Bradley again appealed and renewed his legal arguments that *Apprendi* applies to forfeiture proceedings and that courts lack statutory authority to issue *in personam* money judgments. App. 11–12, 15–16. The Sixth Circuit rejected both arguments even as it acknowledged the tension between *Apprendi* and *Libretti*. App. 16. The panel also concluded that, while *Honeycutt* said 21 U.S.C. § 853 did not expand the traditional scope of forfeiture, § 853 "*did* expand traditional forfeiture in some ways" by "'adopting an *in personam* aspect to criminal forfeiture" that would authorize the one-million-dollar debt. App. 12 (quoting *Honeycutt*, 137 S. Ct. at 1635).

The Sixth Circuit denied Bradley's timely pro se petition for rehearing en banc on November 10, 2020. App. 20. This petition for a writ of certiorari, filed within ninety days of that date, is thus timely.

REASONS FOR GRANTING THE WRIT

I. Federal circuit courts have acknowledged the tension between this Court's 1995 *Libretti* decision and the subsequent *Apprendi* doctrine, which guarantees a jury finding of any facts, like criminal forfeiture, that trigger an increased mandatory criminal penalty.

This case squarely presents a Sixth Amendment issue relating to criminal forfeiture left open in the wake of this Court's jurisprudence in *Apprendi, Booker*, *Alleyne,* and *Southern Union*: whether the Sixth Amendment's prohibition on judicial finding of facts that increase mandatory penalties extends to criminal forfeiture. *See* U.S. Const. amend. VI; *e.g.*,

Apprendi, 530 U.S. at 490. Every lower court that has addressed this issue has concluded it is bound by *Libretti*, and that the Sixth Amendment does not apply to forfeiture factfinding until this Court holds otherwise. *E.g.*, *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012); *United States v. Simpson*, 741 F.3d 539, 559–60 (5th Cir. 2014); *United States v. Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014); *United States v. Fruchter*, 411 F.3d 377, 380–82 (2d Cir. 2005); *United States v. Leahy*, 438 F.3d 328, 331–32 (3rd Cir. 2006).

Many of those courts recognized that *Apprendi* and its progeny have undermined *Libretti* but nonetheless view *Libretti* as controlling. *E.g.*, App. 16 ("In situations like this, where an advocate insists a new Supreme Court decision undermines a previous decision, the earlier decision stands until the Court says otherwise."); *Fruchter*, 411 F.3d at 380 ("Because *Libretti* has direct application in this case, we are bound by its holding even if it might appear 'to rest on reasons rejected in some other line of decisions.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))); *Phillips*, 704 F.3d at 769; *Sigillito*, 759 F.3d at 935 (stating "we are compelled to apply *Libretti*" and quoting *Rodriguez de Quijas* for that proposition); *Leahy*, 438 F.3d at 33 ("Even assuming [*Libretti* has been undercut by subsequent precedents], we nonetheless note that as a Court of Appeals, we are not free to ignore . . . *Libretti* . . . .").

Libretti, decided over twenty-five years ago, did not and could not anticipate the sea change brought on by *Apprendi* and its progeny. The result

is a consistent and entrenched conflict with this Court's Sixth Amendment jurisprudence. Cases like *Apprendi, Booker*, *Alleyne,* and *Southern Union* reach a consistent, unqualified result: that the Sixth Amendment entitles criminal defendants to have a jury—not a judge—find beyond a reasonable doubt contested facts triggering a criminal penalty. *Apprendi*, 530 U.S. at 490; *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (applying *Apprendi* to sentencing guidelines); *Southern Union*, 567 U.S. at 350 (applying *Apprendi* to criminal fines); *Alleyne*, 570 U.S. at 117 (applying *Apprendi* to mandatory minimum sentences).

The Sixth Circuit decision, like the decisions of every federal circuit to have addressed the issue, rests on an interpretation of *Libretti* that is unsustainable in light of this Court's more recent Sixth Amendment precedents. At issue here is a defendant's right, stretching back to the common law, to have a jury find the facts determining forfeiture. *Libretti*'s Sixth Amendment pronouncement simply cannot coexist with the modern *Apprendi* doctrine or historical forfeiture practice.

Indeed, the government and this Court anticipated that *Southern Union*'s reach would extend to criminal forfeiture. At oral argument in *Southern Union*, the Deputy Solicitor General stated that while "extending" *Apprendi* to forfeiture "would involve overruling the Court's decision in *Libretti v. United States*," under a "strict application of *Apprendi*, . . . it's difficult to see

why" *Apprendi* should not apply to forfeiture. Transcript of Oral Argument at 36–37, *S. Union Co. v. United States*, 567 U.S. 343 (2012) (No. 11-94).

Libretti's statement that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection," 516 U.S. at 49, was dicta. The lower courts were not required to follow it in light of the intervening developments in Sixth Amendment doctrine that eroded *Libretti*. *See Libretti*, 516 U.S. at 52–53 (Souter, J., concurring in part and concurring in the judgment).

But even if *Libretti's* statement was a holding, it contradicts historical forfeiture practice and this Court should overrule it. As this Court explained in *Southern Union*, "[T]here is authority suggesting that English juries were required to find facts that determined the authorized pecuniary punishment." *S. Union Co. v. United States*, 567 U.S. 343, 354 (2012) (citing 1 T. Starkie, A Treatise on Criminal Pleading 187–88 (1814)).

Apprendi and later cases acknowledged and reinstated the historical role of the jury and have washed away *Libretti*'s doctrinal foundation, to the extent it ever was sound. *Apprendi* and its progeny have held firm to one basic principle: any fact that automatically "aggravates the punishment" for an offense must be either found by a jury or admitted in a guilty plea. *Alleyne*, 570 U.S. at 108.

Forfeiture is such a fact: the sentencing "range" for forfeiture is precisely zero until the underlying facts triggering forfeiture are found. Absent the

finding of those facts, the minimum forfeiture is zero, and the maximum forfeiture is zero. But once those facts are found, the court *must* forfeit the property—since forfeiture is mandatory. Thus, forfeiture is akin to a mandatory minimum sentence triggered by some fact, or a sentencing range that is automatically increased if the defendant, for example, brandished a firearm. *Alleyne*, 570 U.S. at 117.

The lower courts' misapplication of *Libretti* has a tremendous impact on criminal defendants, rendering this an important question of federal law. Forfeiture is an increasingly used tool of criminal punishment. While courts once invoked criminal forfeiture less frequently than civil forfeiture, Congress began to regularly authorize it in statutes beginning in the 1970s. *See* Charles Doyle, Cong. Rsch. Serv., 97-139, Crime and Forfeiture 13 (2015); Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 Cardozo L. Rev. 1, 23–24 (2013). Now, forfeiture is "a mandatory penalty for most major federal crimes." Finneran & Luther, *supra*, at 24.

Without Sixth Amendment protections, the jury plays no role in forfeiture factfinding, and the defendant is not entitled to confront witnesses testifying in forfeiture hearings—enabling judges to consider untestable hearsay. As exemplified by this case, the government then need only prove forfeitability by a preponderance of the evidence, App. 75, and the government may unjustly benefit from statutory presumptions of forfeitability. Forfeiture

places defendants evaluating plea deals with forfeiture allegations in a difficult position: a defendant who is offered a tolerable prison sentence but severe forfeiture allegations that could render his wife and young children homeless, as in Bradley's case, will likely be dissuaded from taking the plea.

The result is a Sixth Amendment doctrine that incoherently exempts forfeiture from its ambit, while other forms of punishment factfinding are subject to Sixth Amendment protection. That, in turn, prevents juries from performing the role envisioned—and historically performed—at the Founding.

This case is an excellent vehicle that squarely presents a forfeiture claim that was raised, preserved, and thoroughly litigated below. After remand, there was a full evidentiary hearing, and the trial and appellate courts considered Bradley's arguments. App. 11, 51–52.

Moreover, the lower courts' divergence from the *Apprendi* line of cases is entrenched and persistent; the status quo will remain until and unless this Court intervenes.

II. In the wake of its *Honeycutt* decision, this Court should address the lower courts' divergence from historical forfeiture practice and statutory text in imposing money judgments.

This case squarely presents an important statutory issue related to this Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), in which this Court held that 21 U.S.C. § 853 does not authorize joint and several liability among co-conspirators as part of criminal forfeiture. This Court in *Honeycutt* did not have to answer whether the statute authorizes money

judgments, that is, *in personam* criminal forfeiture that runs against the defendant rather than against a specific asset. This Court should address that question now.

Prior to *Honeycutt*, the federal circuits had coalesced around a single mistaken answer to the question of whether § 853 authorizes money judgments. They have reasoned that, although § 853 "do[es] not expressly authorize personal money judgments as a form of forfeiture, nothing suggests that money judgments are forbidden." *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013). As such, courts have incorrectly assumed § 853 permits or even requires the issuance of money judgments.[1]

The lower courts' interpretation cannot stand in light of this Court's more recent decision in *Honeycutt*. Certiorari is appropriate because the imposition of money judgments under § 853 is fundamentally incompatible with *Honeycutt*'s interpretation of historical forfeiture practice and the plain text and structure of § 853. This entrenched misapplication of the lower courts' authority justifies the exercise of this Court's jurisdiction.

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[1] *See e.g.*, *United States v. Hall*, 434 F.3d 42, 59–60 (1st Cir. 2006); *United States v. Awad*, 598 F.3d 76, 78–79 (2d Cir. 2010) (per curiam); *United States v. Vampire Nation*, 451 F.3d 189, 202–03 (3d Cir. 2006); *United States v. Blackman*, 764 F.3d 137, 145 (4th Cir. 2014); *United States v. Olguin*, 643 F.3d 384, 397–98 (5th Cir. 2011); *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000); *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011); *United States v. Casey*, 444 F.3d 1071, 1073–77 (9th Cir. 2006); *United States v. McGinty*, 610 F.3d 1242, 1245–49 (10th Cir. 2010); *United States v. Padron*, 527 F.3d 1156, 1161–62 (11th Cir. 2008); *United States v. Day*, 524 F.3d 1361, 1377–78 (D.C. Cir. 2008).

In *Honeycutt*, this Court held that § 853 did not abrogate historical forfeiture practice except where Congress clearly expressed its intent to do so. *Honeycutt*, 137 S. Ct. at 1634. Traditionally, forfeiture proceeded against the tainted property only. *Id.* But a money judgment is the seizure of *untainted* property. As this Court noted, "Congress provided just one way for the Government to recoup substitute property when the tainted property itself is unavailable—the procedures outlined in § 853(p)." *Id.*

But the plain text of § 853(p) does not support the imposition of money judgments, either. The court can impose forfeiture of substitute "property of the defendant" under § 853(p), and then only if the government can prove one of the conditions in § 853(p)(1) is satisfied (*e.g.* the property was commingled with other property rendering divisibility difficult). *See Honeycutt*, 137 S. Ct. at 1635 ("§ 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists.").

Congress knows how to authorize money judgments. It has specifically authorized a "personal money judgment" as an alternative penalty for cases involving "bulk cash smuggling." 31 U.S.C. § 5332(b)(4). The fact that § 853(p) includes no similar language indicates that Congress did not intend for it to be read as a personal money judgment provision. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

disparate inclusion or exclusion." (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

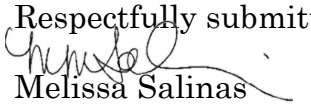
This case illustrates the harm caused by this entrenched misapplication of § 853. A money judgment is a mandatory imposition of *in personam* liability that usurps the court's discretionary authority. Indeed, the district court here believed it was required to issue a money judgment. App. 66–67; *see also, e.g.*, *United States v. Casey*, 444 F.3d 1071, 1077 (9th Cir. 2006) (overturning a district court's refusal to impose a money judgment on the grounds that "the government is entitled to a money judgment in criminal forfeiture cases, even when a defendant has no assets"). This mistaken interpretation of § 853 turns defendants into government debtors. The petitioner owes one million dollars to the government from the forfeiture proceeding, much of which he will still owe long after he has served his time in prison.

Finally, as in Issue I above, this issue was squarely presented to the district court and court of appeals, with thorough briefing and reasoned decisions. Moreover, the issue is entrenched; every circuit to have addressed the issue has wrongly assumed courts have authority to issue money judgments.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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