No. 20-7198

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IN THE SUPREME COURT OF THE UNITED STATES

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BENJAMIN EDWARD HENRY BRADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Sixth Amendment entitles a defendant to have the jury find the facts essential to criminal forfeiture beyond a reasonable doubt.

2. Whether a district court imposing a criminal forfeiture under the procedures set forth in 21 U.S.C. 853 may enter a forfeiture money judgment establishing the amount of the defendant's forfeiture liability.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Bradley, No. 15-cr-37 (Aug. 20, 2019)

United States v. Bradley, No. 15-cr-37 (Jun. 23, 2017)

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

United States v. Bradley, No. 19-5985 (Aug. 10, 2020)

United States v. Bradley, No. 17-5725 (Aug. 1, 2018)

United States Supreme Court:

Bradley v. United States, No. 18-7282 (Feb. 19, 2019)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-18) is reported at 969 F.3d 585. The two memorandum opinions and the order of the district court (Pet. App. 47-98) are not published in the Federal Supplement, but one memorandum opinion is available at 2019 WL 3934684. A prior opinion of the court of appeals (Pet. App. 1-8) is reported at 897 F.3d 779. A prior memorandum opinion of the district court (Pet. App. 33-46) is not published in the Federal Supplement but is available at 2017 WL 2691535.

## JURISDICTION

The judgment of the court of appeals was entered on August 10, 2020. A petition for rehearing was denied on November 10, 2020 (Pet. App. 20). The petition for a writ of certiorari was filed on February 11, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Tennessee, petitioner was convicted of conspiring to possess with intent to distribute and conspiring to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and 846, and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Judgment 1. The district court sentenced him to 204 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court also entered a forfeiture money judgment in the amount of $1 million, for which petitioner was jointly and severally liable with his co-conspirators. D. Ct. Doc. 1005, at 1 (June 22, 2017). The court of appeals affirmed the sentence but vacated the forfeiture judgment and remanded the case for further consideration in light of Honeycutt v. United States, 137 S. Ct. 1626 (2017). Pet. App. 1-8. Petitioner filed a petition for a writ of certiorari challenging his sentence, which this Court denied. 139 S. Ct. 1221 (2019).

On remand, the district court entered a forfeiture money judgment in the amount of $1 million against petitioner. Pet. App. 94-98. The court of appeals affirmed. Id. at 10-18.

1. Between 2009 and 2015, petitioner ran a drug trafficking conspiracy that obtained opiate pills in Detroit, Michigan, and transported those pills to central Tennessee, where members of the conspiracy distributed them. Pet. App. 10-11. Petitioner supervised the conspiracy's drug-collection efforts in Detroit. Id. at 11. One method of obtaining pills involved driving patients to the doctor to obtain prescriptions, assisting them in getting the prescriptions filled, paying them for the prescriptions, and then storing the pills at various locations, including a house owned by petitioner. Id. at 2, 11. Petitioner recruited a co-conspirator, Pamela O'Neal, to live in that stash house and accept deliveries of pills. Id. at 2. Between July 2014 and March 2015, O'Neal received daily deliveries of 300 pills, typically oxycodone. Ibid.

Petitioner and his co-conspirators then shipped or transported pills to another co-conspirator, Donald Buchanan, in Nashville, Tennessee, who sold them to redistributors. Pet. App. 2, 11. Buchanan deposited payments for the pills into bank accounts owned or controlled by petitioner. Id. at 11. From 2012 through mid-2014, those deposits totaled $800,000; thereafter, Buchanan paid petitioner or his couriers directly in cash. See

id. at 4, 11. Petitioner was ultimately responsible for distributing over 186,000 oxycodone and oxymorphone pills. See Presentence Investigation Report ¶ 16.

2. a. A federal grand jury in the Middle District of Tennessee returned an indictment charging petitioner with conspiring to possess with intent to distribute and conspiring to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and 846, and conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Indictment 2-4. The indictment also contained forfeiture allegations under 21 U.S.C. 853(a)(1), (a)(2), and (p), and 18 U.S.C 982(a)(1). Indictment 5-8.

Section 853(a)(1) provides for the criminal forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a] violation" of certain federal drug statutes, including 21 U.S.C. 846. 21 U.S.C. 853(a)(1). Section 982(a)(1) provides for the criminal forfeiture of "any property, real or personal, involved in" a money-laundering offense, including a violation of 18 U.S.C. 1956, and "any property traceable to such property." 18 U.S.C 982(a)(1). Forfeitures under both Section 853(a) and Section 982(a)(1) are governed by the procedures in Section 853. See 18 U.S.C. 982(b)(1). Section 853(p) provides for the forfeiture of "any other property of the defendant" if, "as a result of any act or omission of the defendant," the directly forfeitable

property "cannot be located upon the exercise of due diligence," "has been commingled with other property which cannot be divided without difficulty," or meets other statutory criteria of unavailability. 21 U.S.C. 853(p)(1)-(2).

In this case, the indictment invoked Section 853(a) and Section 982(a)(1) and sought forfeiture of "any property constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of" the charged drug-distribution conspiracy, and "any property, real or personal, involved in" or "traceable to" the charged money-laundering conspiracy. Indictment 5, 7. The indictment also sought "a money judgment * * * representing the amount of gross drug proceeds obtained as a result of" the drug-distribution conspiracy, and "the property involved in" or "traceable to" the money-laundering conspiracy. Ibid. And the indictment provided that if the property constituting or derived from the proceeds of petitioner's offenses could not be located, the government would seek forfeiture of substitute property under 21 U.S.C. 853(p). Indictment 5-8.

b. Petitioner pleaded guilty to the drug-distribution-conspiracy and money-laundering-conspiracy counts. Pet. App. 11. The district court sentenced petitioner to 204 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

The district court also entered a forfeiture money judgment in the amount of $1 million; the court's order provided that the forfeiture judgment was entered "jointly and severally" as to petitioner and "any other co-conspirator." D. Ct. Doc. 1005, at 1. The court further ordered petitioner to forfeit currency that the police seized and real property that was derived from, traceable to, or involved in petitioner's offenses of conviction. See id. at 2-3. The court provided that the value of the seized currency and real property was to be applied toward the fulfillment of the $1 million money judgment. Id. at 3.

c. The court of appeals affirmed petitioner's sentence but vacated the district court's forfeiture order and remanded for further proceedings. Pet. App. 1-8. After petitioner filed his notice of appeal, this Court issued its decision in Honeycutt, which held that Section 853 does not permit the imposition of joint and several liability on a member of a conspiracy for proceeds of the conspiracy that the member himself did not acquire. 137 S. Ct. at 1630. The court of appeals found that, in light of Honeycutt, the district court had committed plain error in entering the forfeiture order because the court had impermissibly tallied "the proceeds attributable to all members of the conspiracy" rather than "the proceeds attributable just to [petitioner]." Pet. App. 3-4. The court of appeals instructed the district court to "conduct fresh factfinding and figure out an amount proportionate

with the property [petitioner] actually acquired through the conspiracy." Id. at 4 (citation and internal quotation marks omitted). The court declined to consider petitioner's contention that the Sixth Amendment prohibits a judge, as opposed to a jury, from finding facts that trigger criminal forfeiture, noting subsidiary questions that "[t]he parties may wish to address * * * on remand." Id. at 5.

d. Petitioner filed a petition for a writ of certiorari challenging his sentence, which this Court denied. 139 S. Ct. 1221.

3. On remand, the district court denied petitioner's motion to dismiss the government's forfeiture allegations. Pet. App. 78-93. The court rejected petitioner's assertion that judicial factfinding in the context of criminal forfeiture violates the Sixth Amendment, concluding that it was bound by this Court's holding in Libretti v. United States, 516 U.S. 29 (1995), "that criminal forfeiture does not implicate the Sixth Amendment right to a jury." Pet. App. 85; see id. at 83-88. The district court also rejected petitioner's argument that Section 853 does not authorize the entry of a forfeiture money judgment, finding that such a result was compelled by circuit precedent that was undisturbed by this Court's decision in Honeycutt. Id. at 89-93.

Following an evidentiary hearing, the district court found that "the government ha[d] established by a preponderance of the

evidence that [petitioner] personally obtained * * * at least $1,000,000 from his participation in the opioid distribution and money laundering conspiracies to which he pleaded guilty." Pet. App. 66; see id. at 74-77. The court accordingly entered a forfeiture money judgment in the amount of $1 million against petitioner and ordered petitioner to forfeit specific currency that the police seized and specific real property that was derived from, traceable to, or involved in petitioner's offenses of conviction. See id. at 94-98. The order provided that the value of the seized currency and real property was to be applied toward the fulfillment of the $1 million money judgment. Id. at 96.

4. The court of appeals affirmed. Pet. App. 10-18.

a. The court of appeals rejected petitioner's assertion that the Sixth Amendment prohibits a judge from finding the facts underlying a criminal-forfeiture order. Pet. App. 15-17. The court explained that although "[t]he Sixth Amendment requires juries to find the facts, other than the fact of a prior conviction, that lead to an increase in the statutory maximum or minimum sentence," it "does not constrain judicial factfinding about aspects of the sentence that lack a determinate statutory maximum or minimum." Id. at 15. The court found that "[c]riminal forfeiture is one such indeterminate piece of a sentence" because "[it] requires a defendant to forfeit the property he used in or received from his crime." Id. at 15-16. The court also concluded

that this Court's decisions in Apprendi v. New Jersey, 530 U.S. 446 (2000), and Southern Union Co. v. United States, 567 U.S. 343 (2012), did not abrogate the Court's earlier decision in Libretti, Pet. App. 16-17, noting that "Southern Union reiterated[] [that] no Apprendi violation exists where no statutory maximum exists," id. at 17.

b. Relying on circuit precedent, the court of appeals rejected petitioner's argument that Section 853 does not authorize forfeiture money judgments. Pet. App. 12 (citing United States v. Hampton, 732 F.3d 687 (6th Cir. 2013), cert. denied, 571 U.S. 1145 (2014)). The court also found that Honeycutt did not require a different conclusion, noting that Honeycutt acknowledged that "[Section] 853 'adopted an in personam aspect to criminal forfeiture'" and that Honeycutt itself had "addressed the permissible scope of a money judgment under [Section] 853." Ibid. (quoting Honeycutt, 137 S. Ct. at 1635 (brackets omitted)). The court reasoned that "[i]t's hard to maintain that the Court always prohibited what it refined [in Honeycutt], absentmindedly cutting off the branch it sat on." Ibid.

ARGUMENT

Petitioner renews his contentions (Pet. 6-14) that the Sixth Amendment guarantees a right to jury factfinding on criminal forfeiture and that 21 U.S.C. 853 does not permit the entry of a forfeiture money judgment. The court of appeals correctly rejected

both contentions, and its resolution of petitioner's claims does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 6-11) that the court of appeals erred in concluding that a defendant does not have a Sixth Amendment right to have a jury determine the facts on which criminal forfeiture relies and that, in any event, this Court should grant certiorari in this case and overrule Libretti v. United States, 516 U.S. 29 (1995). These arguments are meritless. This Court has repeatedly denied petitions for writs of certiorari raising similar arguments, and it should follow the same course here.[1]

a. The court of appeals correctly concluded that the Sixth Amendment right to a jury does not extend to factfinding underlying a criminal forfeiture order. In Libretti, this Court held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." 516 U.S. at 49. Contrary to petitioner's suggestion (Pet. 9), that conclusion was not dicta. The defendant in Libretti argued that the right to a

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[1] See, e.g., Afriyie v. United States, 140 S. Ct. 1228 (2020) (No. 19-7259); Stevenson v. United States, 137 S. Ct. 1212 (2017) (No. 16-900); Crews v. United States, 137 S. Ct. 409 (2016) (No. 16-6183); Miller v. United States, 137 S. Ct. 323 (2016) (No. 16-5841); Sigillito v. United States, 574 U.S. 1104 (2015) (No. 14-7586); Wilkes v. United States, 574 U.S. 1049 (2014) (No. 14-5591); Phillips v. United States, 569 U.S. 1031 (2013) (No. 12-8549); Dantone, Inc. v. United States, 549 U.S. 1071 (2006) (No. 06-71); Braun v. United States, 546 U.S. 1076 (2005) (No. 05-599).

jury determination on criminal forfeiture "has both a constitutional and statutory foundation." 516 U.S. at 48. The Court thus needed to determine that there was no Sixth Amendment basis for a jury requirement in order to conclude that any "right to a jury determination of forfeitability is merely statutory in origin." Id. at 49; see id. at 48-49; see also id. at 52 (Souter, J., concurring in part and concurring in the judgment) ("I would not reach the question of a Sixth Amendment right to trial by jury on the scope of forfeiture.").

b. Petitioner contends (Pet. 6-11) that this Court should overrule Libretti in light of subsequent cases construing the Sixth Amendment, but no sound basis exists for doing so. In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. In Southern Union Co. v. United States, 567 U.S. 343 (2012), the Court held "that the rule of Apprendi applies to the imposition of criminal fines." Id. at 360.

Libretti's determination that the Sixth Amendment does not require a jury to engage in factfinding in this context does not conflict with Apprendi or Southern Union. By its terms, the rule in Apprendi and Southern Union applies only to determinate

sentencing schemes in which a factual determination "increases the penalty for a crime beyond the prescribed statutory maximum." Apprendi, 530 U.S. at 490. But, unlike criminal sentences or the fine at issue in Southern Union, the amount of money or property that a defendant may be required to forfeit is not subject to any such statutory maximum. See 21 U.S.C. 853(a)(1) (requiring mandatory forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [the] violation"); 18 U.S.C. 982(a)(1) (requiring mandatory forfeiture of "any property, real or personal, involved in [the] offense, or any property traceable to such property"). "A judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum." United States v. Fruchter, 411 F.3d 377, 383 (2d Cir.), cert. denied, 546 U.S. 1076 (2005); see Pet. App. 16 ("Unlike a statutory minimum or maximum based on a certain fact -- say a fine for every day of a violation -- criminal forfeiture requires a defendant to forfeit the property he used in or received from his crime.").

This Court's decision in Alleyne v. United States, 570 U.S. 99 (2013), which applied Apprendi to mandatory minimum criminal penalties, is also consistent with Libretti. Alleyne held that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury." Id. at 103. But

Alleyne did not cite Libretti, much less overrule it. Just as forfeiture does not involve statutory maximum sentences, it also does not involve statutory minimum sentences. Instead, as noted above, forfeiture does not involve a determinate sentencing regime at all. "Criminal forfeiture is, simply put, a different animal from determinate sentencing." Fruchter, 411 F.3d at 383.

This Court has also recognized the compatibility of its Apprendi line of cases with the conclusion that the facts underlying a criminal forfeiture need not be proved to a jury beyond a reasonable doubt. After the Court in United States v. Booker, 543 U.S. 220 (2005), reached its constitutional holding on the federal sentencing guidelines, it considered which portions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 et seq.), it had to "sever and excise as inconsistent with the Court's constitutional requirement." 543 U.S. at 258. At the outset of that analysis, the Court explained that "[m]ost of the statute is perfectly valid." Ibid. It then listed examples of those "perfectly valid" provisions, including 18 U.S.C. 3554, governing criminal "forfeiture." Ibid.; see Fruchter, 411 F.3d at 382 ("Booker itself suggests that a district court's forfeiture determination * * * does not offend the Sixth Amendment.").

c. Every court of appeals that has considered the question has concluded that Apprendi and its progeny do not alter Libretti's

holding that the Sixth Amendment does not require jury findings on criminal forfeiture. See, e.g., United States v. Saccoccia, 564 F.3d 502, 507 (1st Cir.), cert. denied, 558 U.S. 891 (2009); Fruchter, 411 F.3d at 382-383 (2d Cir.); United States v. Leahy, 438 F.3d 328, 331-333 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006); United States v. Day, 700 F.3d 713, 732-733 (4th Cir. 2012), cert. denied, 569 U.S. 959 (2013); United States v. Simpson, 741 F.3d 539, 560 (5th Cir.), cert. denied, 572 U.S. 1127 (2014); United States v. Hall, 411 F.3d 651, 654-655 (6th Cir. 2005); United States v. Tedder, 403 F.3d 836, 841 (7th Cir.), cert. denied, 546 U.S. 1075 (2005); United States v. Sigillito, 759 F.3d 913, 935 (8th Cir. 2014), cert. denied, 574 U.S. 1104 (2015); United States v. Phillips, 704 F.3d 754, 769-771 (9th Cir. 2012), cert. denied, 569 U.S. 1031 (2013); United States v. Cabeza, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam). Accordingly, review is not warranted here.

2. The court of appeals correctly rejected petitioner's argument (Pet. 11-14) that a district court imposing criminal forfeiture under Section 853 may not enter a forfeiture money judgment that establishes the amount of the defendant's forfeiture liability -- and is instead limited to ordering forfeiture of specific assets known at the time of sentencing. Pet. App. 12. The court's resolution of this issue is consistent with decisions from other courts of appeals, and this Court has repeatedly denied

review of petitions for writs of certiorari presenting similar questions.[2] It should do so again here.

a. A district court imposing a criminal forfeiture under Section 853 may enter a forfeiture money judgment that establishes the amount of the defendant's forfeiture liability and is enforceable through subsequent forfeitures of specific property.

i. Before 1970, criminal forfeiture was essentially unknown in the United States. Instead, forfeiture proceedings were brought as civil actions against the property involved in crime, relying on the fiction that "the property itself is 'guilty' of the offense." Austin v. United States, 509 U.S. 602, 615 (1993); see id. at 613-617. Those in rem actions resulted in the forfeiture of the "guilty property" -- for example, a vessel used to smuggle goods or an illicit distillery -- but did not impose personal liability on the individuals who committed the offenses. United States v. Bajakajian, 524 U.S. 321, 332 (1998); see Austin, 509 U.S. at 615-616.

In 1970, Congress for the first time authorized criminal forfeiture by making forfeiture a penalty for certain violations of the drug laws and the Racketeer Influenced and Corrupt

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[2] See, e.g., Holden v. United States, 139 S. Ct. 1645 (2019) (No. 18-8672); Lo v. United States, 138 S. Ct. 354 (2017) (No. 16-8327); Crews v. United States, 137 S. Ct. 409 (2016) (No. 16-6183); Hampton v. United States, 571 U.S. 1145 (2014) (No. 13-7406); Newman v. United States, 566 U.S. 915 (2012) (No. 11-9001); Smith v. United States, 565 U.S. 1218 (2012) (No. 11-8046); Olguin v. United States, 565 U.S. 958 (2011) (No. 11-6294).

Organizations Act, 18 U.S.C. 1961 et seq. See Bajakajian, 524 U.S. at 332 n.7. Unlike a civil forfeiture, those criminal forfeitures were "an aspect of punishment imposed following conviction of a substantive criminal offense." Libretti, 516 U.S. at 39. And whereas civil forfeitures are in rem proceedings directed at specific property, criminal forfeitures are in personam and impose personal liability on the convicted defendant. Bajakajian, 524 U.S. at 332.

Since 1970, Congress has substantially expanded the scope of criminal forfeiture. Many statutes now require the criminal forfeiture of the "proceeds" of various offenses. See, e.g., 18 U.S.C. 982(a)(2), 1963(a)(3); 21 U.S.C. 853(a)(1); see also 18 U.S.C. 981(a)(1) (authorizing civil forfeiture of the proceeds of additional offenses); 28 U.S.C. 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture is authorized). Those statutes "serve important governmental interests such as 'separating a criminal from his ill-gotten gains,' 'returning property, in full, to those wrongfully deprived or defrauded of it,' and 'lessening the economic power' of criminal enterprises." Honeycutt, 137 S. Ct. at 1631 (brackets and citation omitted). Criminal forfeiture provisions are generally enforced using the procedures set forth in 21 U.S.C. 853 and in Federal Rule of Criminal Procedure 32.2. See 18 U.S.C. 982(b)(1); 28 U.S.C. 2461(c).

Section 853 includes procedures designed to preserve and recover criminal proceeds and other specific tainted property subject to forfeiture. See 21 U.S.C. 853(c) and (e). In practice, however, criminals have often dissipated or concealed the proceeds of their offenses by the time they are caught. Congress addressed that problem by enacting a substitute-assets provision, 21 U.S.C. 853(p). Section 853(p) states that if, as a result of any act or omission of the defendant, the tainted property subject to forfeiture "cannot be located upon the exercise of due diligence," "has been commingled with other property which cannot be divided without difficulty," or meets other statutory criteria of unavailability, then "the court shall order the forfeiture of any other property of the defendant, up to the value of" the unavailable tainted property. 21 U.S.C. 853(p)(1) and (2). As this Court recently explained, "Section 853(p)(1) demonstrates that Congress contemplated situations where the tainted property itself would fall outside the Government's reach" and "authorized the Government to confiscate [other] assets * * * from the defendant who initially acquired the property and who bears responsibility for its dissipation." Honeycutt, 137 S. Ct. at 1634.

ii. In many cases, criminal defendants are sentenced before the government has identified specific assets to be forfeited. That may be because the defendant has dissipated the proceeds of

the offense and has no other assets, because the defendant has successfully concealed his assets, or because the government has not yet been able determine which specific assets are subject to forfeiture either directly (because they are tainted) or as substitute assets under Section 853(p).

Because criminal forfeiture is a mandatory sanction that operates in personam rather than in rem, courts of appeals have uniformly held that a defendant cannot escape forfeiture liability merely because sufficient forfeitable property is not available or has not yet been identified at the time of sentencing. Every court of appeals with criminal jurisdiction has held that the government may obtain a "money judgment" reflecting the amount of the defendant's forfeiture liability, and that it may do so "even where the amount of the judgment exceeds the defendant's available assets at the time of conviction." United States v. Vampire Nation, 451 F.3d 189, 202-203 (3d Cir.), cert. denied, 549 U.S. 970 (2006); see, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); United States v. Awad, 598 F.3d 76, 78-79 (2d Cir.), cert. denied, 562 U.S. 950, and 562 U.S. 1054 (2010); United States v. Blackman, 746 F.3d 137, 145 (4th Cir. 2014); United States v. Olguin, 643 F.3d 384, 397 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011); Hampton, 732 F.3d at 691-692 (6th Cir.); United States v. Baker, 227 F.3d 955, 970 (7th Cir. 2000), cert. denied, 531 U.S. 1151

(2001); United States v. Smith, 656 F.3d 821, 827 (8th Cir. 2011), cert. denied, 565 U.S. 1218 (2012); United States v. Casey, 444 F.3d 1071, 1073-1077 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); United States v. McGinty, 610 F.3d 1242, 1246-1247 (10th Cir. 2010); United States v. Padron, 527 F.3d 1156, 1162 (11th Cir. 2008); United States v. Day, 524 F.3d 1361, 1377-1378 (D.C. Cir.), cert. denied, 555 U.S. 887 (2008).

Federal Rule of Criminal Procedure 32.2 reflects the same understanding. In 2000, the Advisory Committee recommended, and this Court promulgated, amendments to the rule that recognize the government's ability to seek a "forfeiture money judgment" and that establish different procedures for such judgments than for the forfeiture of specific property. Fed. R. Crim. P. 32.2(a); see, e.g., Fed. R. Crim. P. 32.2(c)(1) (providing for ancillary proceedings to determine third-party rights in specific property, but stating that "no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment"). In recommending the amendment, the Advisory Committee observed that "[a] number of cases have approved use of money judgment forfeitures." Fed. R. Crim. P. 32.2(b)(1) advisory committee's note (2000). The Committee itself "t[ook] no position on the correctness of those rulings." Ibid. But Congress allowed the amendment to go into effect, and it later enacted a general provision authorizing courts to enter criminal forfeitures

"pursuant to the Federal Rules of Criminal Procedure," including Rule 32.2. 28 U.S.C. 2461(c); see USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, Tit. IV, § 410, 120 Stat. 246.

iii. The most common means of enforcing a forfeiture money judgment is the subsequent identification and forfeiture of specific property. Rule 32.2(e) provides that, "[o]n the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property" that is "subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered," or that is "substitute property that qualifies for forfeiture under an applicable statute." Fed. R. Crim. P. 32.2(e)(1). Accordingly, if the government discovers previously concealed assets constituting or derived from the proceeds of the offense, it may forfeit those assets in satisfaction of the money judgment. See, e.g., United States v. Saccoccia, 62 F. Supp. 2d 539, 540 (D.R.I. 1999) (ordering the forfeiture of 83 gold bars worth $2.1 million that were discovered "buried or otherwise secreted at the home of [the defendant's] mother" several years after sentencing). Alternatively, if the government can show that tainted property subject to forfeiture is unavailable "as a result of any act or omission of the defendant," then Section 853(p) authorizes the government to forfeit substitute property to

satisfy the money judgment. 21 U.S.C. 853(p)(1) and (2); see generally Stefan D. Cassella, Asset Forfeiture Law in the United States § 22-2(b) and (c), at 761-763 (2d ed. 2013).

While the enforcement of forfeiture money judgments was not directly at issue in Honeycutt, this Court reviewed "Congress' carefully constructed statutory scheme" and concluded that Section 853(p)'s substitute-assets provision is "the sole provision of [Section] 853 that permits the Government to confiscate property untainted by the crime." 137 S. Ct. at 1633-1634. In the wake of that description of Section 853, the government adopted the view that a forfeiture money judgment does not supply independent authority for seizing the defendant's untainted property through mechanisms applicable to general judgments in favor of the United States. See, e.g., Br. in Opp. at 16-18, Lo v. United States, 138 S. Ct. 354 (2017) (No. 16-8327). Instead, a forfeiture money judgment reflects the district court's determination of the defendant's forfeiture liability and serves as the basis for subsequent enforcement under the applicable forfeiture statutes.

Here, for example, the forfeiture money judgment memorializes the district court's finding that petitioner personally obtained $1 million in proceeds as a result of his drug-distribution and money-laundering schemes. See Pet. App. 94-95. The judgment also identifies specific currency and real property that is subject to forfeiture, the value of which is to be applied toward the

fulfillment of the $1 million money judgment. See id. at 95-96. If the government later identifies additional specific property that "constitut[es], or [is] derived from, any proceeds" that petitioner obtained from his drug-distribution offense, 21 U.S.C. 853(a)(1), or that was "involved in" or is "traceable to" property involved in his money-laundering offense, 18 U.S.C 982(a)(1), then it may invoke Rule 32.2(e)(1)(A) to forfeit that property in partial satisfaction of the money judgment. Alternatively, if the government can establish that petitioner transferred, commingled, or otherwise rendered proceeds unavailable under the applicable statutory criteria, it may seek to forfeit substitute property in accordance with Section 853(p) and Rule 32.2(e)(1)(B). But the government cannot enforce a forfeiture money judgment like the one entered here by seizing the defendant's property using mechanisms outside the applicable forfeiture statutes.[3]

b. Petitioner provides (Pet. 11-14) no sound reason to question the uniform conclusion of the courts of appeals that district courts imposing criminal forfeitures may enter forfeiture money judgments.

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[3] The government may accept voluntary payments in satisfaction of forfeiture money judgments because such payments do not involve any involuntary transfer of the defendant's property. In addition, forfeiture money judgments entered under the bulk-cash smuggling statute may be subject to a different analysis because that statute expressly provides for the entry of "a personal money judgment against the defendant for the amount that would be subject to forfeiture." 31 U.S.C. 5332(b)(4).

i. Petitioner principally contends (Pet. 13) that Section 853 does not authorize money judgments. That is not correct. Although Section 853 does not use the term "money judgment," it imposes a mandatory in personam forfeiture obligation. Several features of the statute also make clear that a defendant's liability is not limited to property that can be identified at the time of sentencing -- and thus that a defendant may not evade forfeiture liability by dissipating or concealing the proceeds of his offense.

Most obviously, Section 853(p) provides that, if the defendant's actions have rendered tainted property unavailable, the court "shall order the forfeiture of any other property of the defendant, up to the value of" the unavailable tainted property. 21 U.S.C. 853(p)(2). The substitute assets subject to forfeiture are not limited to assets that have been identified at the time of sentencing; instead, they encompass "any other property of the defendant." Ibid. By its plain terms, therefore, Section 853(p) requires the forfeiture of "property acquired by the defendant after the imposition of sentence." Smith, 656 F.3d at 827. Accordingly, as several courts of appeals have held, Section 853(p) contemplates the entry of an order that establishes the value of the proceeds that the defendant obtained -- that is, a forfeiture money judgment -- even if the government has not yet located assets

sufficient to satisfy that judgment. See, e.g., ibid.; Day, 524 F.3d at 1377-1378.

A nearby subsection reinforces that conclusion. Section 853(m) provides that, "to facilitate the identification and location of property declared forfeited," a court may order discovery "after the entry of an order declaring property forfeited to the United States." 21 U.S.C. 853(m) (emphasis added). Like Section 853(p), that provision anticipates circumstances in which a district court will issue an order fixing the amount of the defendant's forfeiture liability (i.e., a forfeiture money judgment) despite the government's inability to identify and locate forfeitable assets at the time of sentencing. It would make little sense to authorize the government to use post-sentencing discovery to locate forfeitable property if a defendant's forfeiture liability were limited to assets identified at the time of sentencing.

ii. To the extent that petitioner suggests (Pet. 13) that the imposition of a forfeiture money judgment impermissibly allows the government to seize "untainted property" without following the procedures set forth in Section 853(p), that suggestion is incorrect. As explained above, see pp. 20-22, supra, the government agrees that a forfeiture money judgment is limited by the provisions of the applicable forfeiture statutes, and that the government may thus enforce such a judgment only against specific

property that is subject to forfeiture under the relevant statutes. That limitation ensures that a court will not force a defendant to forfeit his property unless the government establishes either that it is tainted or that it satisfies the requirements for substitute property under Section 853(p).

iii. Petitioner asserts (Pet. 12) that the lower courts' practice of issuing forfeiture money judgments is "fundamentally incompatible" with this Court's decision in Honeycutt. That contention lacks merit because Honeycutt addressed the validity of a money judgment issued under Section 853 and explicitly noted that Section 853 "adopt[ed] an in personam aspect to criminal forfeiture[] and provid[ed] for substitute-asset forfeiture." 137 S. Ct. at 1635; see id. at 1631. As the court of appeals observed, "[i]t's hard to maintain that th[is] Court [in Honeycutt] always prohibited what it refined, absentmindedly cutting off the branch it sat on." Pet. App. 12; see United States v. Waked Hatum, 969 F.3d 1156, 1164 (11th Cir. 2020) (noting that "rather than abolishing in personam judgments against conspirators, the Honeycutt Court presumed the continued existence of in personam proceedings") (brackets, citation, and internal quotation marks omitted), petition for cert. pending, No. 20-1370 (filed Mar. 26, 2021); United States v. Nejad, 933 F.3d 1162, 1165 (9th Cir. 2019) ("[O]ur rationale for allowing district courts to impose personal

money judgments remains undisturbed by the reasoning of Honeycutt.").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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