

No. \_\_\_\_\_

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**In the**  
**Supreme Court of the United States**

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VAXIMA, INC. AND GENPHAR, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether a criminal forfeiture judgment against Petitioners Vaxima, Inc. and GenPhar, Inc. (collectively “Petitioners”) under 28 U.S.C. § 2461(c), is permitted under this Court’s decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) (“*Honeycutt*”).
2. Whether a criminal conviction can be supported by an indictment alleging that Petitioners’ conduct amounted to breach of contract.

## **PARTIES TO THE PROCEEDINGS**

### **Petitioners**

- Vaxima, Inc.
- GenPhar, Inc.

### **Respondent**

- United States of America

## **RULE 29.6 STATEMENT**

Petitioner Vaxima, Inc. does not have a parent corporation, no publicly held corporation owns 10% or more of its stock, and no shares are held by a publicly traded company.

Petitioner GenPhar, Inc. does not have a parent corporation, no publicly held corporation owns 10% or more of its stock, and no shares are held by a publicly traded company.

## LIST OF PROCEEDINGS

### **Direct Proceedings**

United States Court of Appeals for the Fourth Circuit  
Nos. 17-4277, 17-4278

United States of America, *Plaintiff -Appellee*, v.  
Vaxima, Inc., *Defendant-Appellant*.

United States of America, *Plaintiff -Appellee*, v.  
GenPhar, Inc., *Defendant-Appellant*.

Date of Final Opinion: February 28, 2022

Date of Rehearing Denial: March 28, 2022

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United States District Court of South Carolina  
No. 2:11-cr-00511-DCN

United States of America, v. Jian-Yun Dong, a/k/a  
John Dong, GenPhar, Inc., Vaxima Inc.

Date of Order: April 27, 2017

## **Related Proceeding**

United States Court of Appeals for the Fourth Circuit  
Nos. 17-4268, 18-4852, 19-4359, 19-4511

United States of America, *Plaintiff-Appellee*, v. Jian-Yun Dong, a/k/a John Dong, *Defendant-Appellant*.<sup>1</sup>

Date of Final Opinion: February 28, 2022

Date of Rehearing Denial: March 28, 2022

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<sup>1</sup> The underlying District Court consolidated the case involving three defendants, into one case, as *United States of America v. Vaxima, Inc.*, No. 2:11-cr-00511-BHH-2, *United States of America v. GenPhar, Inc.*, No. 2:11-cr-00511-BHH-3 and *United States of America v. Dong*, No. 2:11-cf-00511-BHH-1.

The Court of Appeals consolidated the appeals of Vaxima and GenPhar appeals, as *United States of America v. Vaxima, Inc.*, No. 17-4277 and *United States of America v. GenPhar, Inc.*, No. 17-4278. However, the third defendant in the underlying District Court case, Jian-Yun (“John”) Dong, was heard as its own separate appeal in *United States v. Dong*, No. 17-4268. Mr. Dong is filing his own Petition for Writ of Certiorari concurrently with this petition for Vaxima and GenPhar.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is found in the Appendix that is filed with this Petition (hereinafter “App.”) at 3a-12a. The Order Denying Rehearing is not reported, and is found at App.123a-124a. The United States District Court for the District of South Carolina’s Order on Bench Trial and Forfeiture Order are found at App.78a-122a and App.25a-62a, respectively. The opinions were not designated for publication.



## JURISDICTION

The Fourth Circuit entered its Opinion on February 28, 2022. App.3a-12a. The Order Denying Rehearing was entered March 28, 2022. App. 123a-124a. It issued the Mandate on April 5, 2022. App.1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).



## STATUTORY PROVISIONS INVOLVED

### 18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under

this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

#### **18 U.S.C. § 641**

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word “value” means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

**18 U.S.C. § 1343**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

**18 U.S.C. § 981(a)(1)(C)**

Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting “specified unlawful activity” (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

**28 U.S.C. § 2461(c)**

- (a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.
- (b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.
- (c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.



## STATEMENT OF THE CASE

### **A. Proceedings in the District Court Below**

Petitioners were convicted by way of the Indictment, after a bench trial before United States District Judge David C. Norton. App.134a-169a; App.76a-122a. The convictions arose from charges of fraudulent retention of federal funds that were awarded pursuant to three Cooperative Research and Development Agreements that Petitioners held with federal agencies. *Ibid.* Petitioner Vaxima was found guilty of both conspiracy offenses charged in Count One of the Indictment, as well as wire fraud as alleged in Count Sixteen. *Ibid.* Petitioner GenPhar was found guilty of the conspiracy charge in Count One of the Indictment. *Ibid.*

Before sentencing, Petitioners' case was transferred to United States District Judge Bruce H. Hendricks, who entered the Forfeiture Order against each defendant, jointly and severally, and imposing a judgment in the amount of \$3,211,599.38 (the "Forfeiture Judgment"). App.25a-62a. The Forfeiture Order was entered pursuant to 18 U.S.C. § 981(a)(1)(C), as incorporated by 28 U.S.C. § 2461(c). *Ibid.*

### **B. Proceedings in the Court of Appeals Below**

Petitioners appealed the District Court's convictions pursuant to the Indictment and its Forfeiture Order. App.3a-22a. The Court of Appeals affirmed Petitioner's conviction pursuant to the Indictment. *Ibid.*

The Court of Appeals also affirmed the Forfeiture Order against Petitioners in full. *Ibid.*

Petitioners filed a Motion For Rehearing And Rehearing En Banc, which was denied by the Court of Appeals on March 28, 2022. App.123a-124a. On April 5, 2022, the Court of Appeals issued the Mandate. App.1a-2a. This Petition was timely filed thereafter.



## **REASONS FOR GRANTING THE PETITION**

### **I. THE FORFEITURE JUDGMENT AGAINST PETITIONERS WAS ORDERED BY THE DISTRICT COURT UNDER AN ERRONEOUS INTERPRETATION OF THIS COURT'S DECISION IN *HONEYCUTT*, WHICH EVERY OTHER CIRCUIT COURT HAS INTERPRETED DIFFERENTLY AS WELL**

Review on a writ of certiorari may be granted for compelling reasons, which include that: “[A] . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Rule<sup>1</sup> 10(c). Another grounds compelling review by writ of certiorari, is that: “[A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;” Rule 10(a). Both grounds support review by this Court here.

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<sup>1</sup> All references to “Rule” herein, are to the Rules of the Supreme Court of the United States.

In *Honeycutt, supra*, 137 S. Ct. at 1626 (2017) (“*Honeycutt*”), this Court unanimously held that 21 U.S.C. § 853(a)(1) does not permit forfeiture orders under joint and several liability principles.<sup>2</sup> Instead, this Court held in *Honeycutt* that forfeiture judgments may only issue upon evidence that specific defendants personally obtained the assets to be forfeited. *Id.*, at 1633. The *Honeycutt* decision went on to explain:

Congress contemplated situations where the tainted property itself would fall outside the Government’s reach. To remedy that situation, Congress did not authorize the Government to confiscate substitute property from other defendants or co-conspirators; it authorized the Government to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation.

*Id.* at 1634.

Here, the Court of Appeals erred by holding that the Forfeiture Judgment ordered upon Petitioners’ co-defendant John Dong, should be remanded to the District Court to make findings consistent with this Court’s decision in *Honeycutt*, while affirming the Forfeiture Judgment as to Petitioners in full. App.19a-21a. The Court Appeals should have held that the Forfeiture Order and Forfeiture Judgment be vacated in its entirety as to all the defendants, including Petitioners, consistent with the *Honeycutt* decision.

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<sup>2</sup> The District Court’s conviction and sentencing of Dong preceded the Supreme Court’s decision in *Honeycutt*.

The record in the proceedings below was undisputed, that insufficient evidence was presented to support forfeiture of any of the Petitioners' assets or proceeds under the *Honeycutt* standard. Specifically, the Court of Appeals' Opinion holds that: "it is [] evident from the record established at both trials that GenPhar itself obtained the entirety of the proceeds constituting the forfeiture money judgment." (emphasis added). App.21a.

Yet in the Court of Appeals' *per curiam* opinion in the related appeal of Petitioners' co-defendant, Jian-Yun Dong ("Dong"), the Court of Appeals held: "[B]oth parties conceded during oral argument that the extent of Dr. Dong's ownership interest in GenPhar is unclear on the current record." (emphasis added), and that there was a: "lack of relevant factual findings" in the trial leading to issuance of the Forfeiture Judgments. App.133a.

The Court of Appeals' opinions in Petitioners' appeal on the one hand, and co-defendant Dong's appeal on the other, are therefore mutually exclusive. Namely, Petitioners necessarily cannot have "itself" obtained "the entirety" of the subject proceeds (App.21a), while at the same time it be "unclear" from the record what Petitioners' co-defendant Dong's ownership interest in GenPhar was (App.133a).

In addition, the Circuit Courts are entirely fractured regarding the scope and extent of *Honeycutt*'s reach when it comes to forfeiture orders. Does *Honeycutt* bar forfeiture orders pursuant to 18 U.S.C. § 981(a) (1)(C), under joint and several liability principles, as held by the Third and Ninth Circuits? *See United States v. Thompson*, 990 F.3d 680, 689-91 (9th Cir.) cert. denied, 142 S. Ct. 61 (2021); *United States v. Gjeli*, 867

F.3d 418, 427-28 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 700 (2018).

Or should the Circuit Courts decline to extend *Honeycutt* for purposes of imposing forfeiture orders pursuant to 18 U.S.C. § 981(a)(1)(C), as held by the Sixth and Eighth Circuits? *See United States v. Peithman*, 917 F.3d 635, 652 (8th Cir.), *cert. denied*, 140 S. Ct. 340 (2019); *United States v. Sexton*, 894 F.3d 787, 798-99 (6th Cir.), *cert. denied*, 139 S. Ct. 415 (2018).

Or should the Circuit Courts disregard entirely *Honeycutt*'s bar on forfeiture judgments imposed under joint and several liability principles, in favor of combing the record on a case-by-case basis to determine whether the defendant exhibited sufficient dominion and control over the proceeds at issue in order to justify forfeiture of those assets, as the First, Second and Eleventh Circuits have held? *See, e.g., Saccoccia v. United States*, 955 F.3d 171, 175 (1st Cir. 2020); *United States v. Jergensen*, 797 F. App'x 4, 8 (2d Cir. 2019); *United States v. Peters*, 732 F.3d 93, 103-04 (2d Cir. 2014); *United States v. Bane*, 948 F.3d 1290, 1297-98 (11th Cir. 2020).

In sum, this Court should grant review in order to settle an important question of federal law regarding statutory forfeiture orders, and whether the District Court's Forfeiture Order conflicted with relevant decisions of the Circuit Courts and this Court.

## **II. PETITIONERS' CRIMINAL CONVICTIONS WERE NOT SUPPORTED BY AN INDICTMENT ALLEGING THAT PETITIONERS' CONDUCT AMOUNTED TO BREACH OF CONTRACT.**

Another ground for granting review on writ of certiorari, is that a United States court of appeals entered a decision: "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a). This Petition should be granted upon such grounds, to review the Court of Appeals' affirmance of the District Court's conviction upon the Indictment, that alleged nothing other than conduct amounting to a breach of contract.

The Court of Appeals affirmed the District Court's conviction of Petitioner Vaxima for both conspiracy offenses charged in Count One of the Indictment, and wire fraud as alleged in Count Sixteen. App.134a-169a; App.76a-122a. The Court of Appeals also affirmed the District Court's conviction of Petitioner GenPhar for conspiracy in Count One of the Indictment. *Ibid.*

However, using government contract funds for purposes "inconsistent with terms and conditions of the grant" or "for unallowable expenditures, . . ." (App.134a-169a), amounts to a civil breach of contract action at most. Petitioners' conduct as alleged in the government's Indictment, even assumed entirely true, simply cannot support the charges for which they were convicted.

An indictment is legally insufficient if the facts alleged, even when taken as true, would not constitute a federal crime. *United States v. Thomas*, 367 F.3d

194, 197 (4th Cir. 2004); *see* Federal Rules of Criminal Procedure, Rule 7(c)(1). A defective indictment divests the criminal court of subject matter jurisdiction to hear the case as a matter of law. *United States v. Moloney*, 287 F. 3d 236, 239-240 (2nd Cir. 2002); *Class v. United States*, 138 S. Ct. 798 (2018) (Justice Alito, Kennedy and Thomas dissenting).

Petitioners’ Indictment was inherently defective, because it failed to even charge Petitioners with the predicate elements of any of the statutory crimes they were convicted of. App.134a-169a. Rather, the text of Petitioners’ Indictment alleges that Petitioners’ conduct amounted to using federal grant money for “purposes inconsistent with the terms and conditions of the grant.” App.140a-144a.

In sum, Petitioners’ conduct, even cast in the darkest possible light, amounted to breach of contract claims at best. As such the District Court’s holding affirming Petitioners’ convictions upon the Indictment, should not have been affirmed as a matter of law.



## CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 24, 2022