

No. _____

In the Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

UNOPPOSED APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**APPLICATION TO THE HONORABLE
JUSTICE ELENA KAGAN
AS CIRCUIT JUSTICE**

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December 2, 2022

To the Honorable Elena Kagan, Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Pavel Lazarenko requests an extension of time within which to file his petition for a writ of certiorari, up to and including Friday, February 10, 2023 (60 days). Respondent, the United States of America, does not object to this application.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

Mr. Lazarenko seeks review of the September 12, 2022 decision and judgment of the United States Court of Appeals for the Ninth Circuit in *United States v. Lazarenko*, Nos. 21-10225 and 21-10250 (attached as Exhibits 1–2).

JURISDICTION

The Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit issued its opinion on September 12, 2022. Ex. 1. Absent an extension of time, Mr. Lazarenko’s petition for a writ of certiorari from this Court will be due on December 12, 2022.¹ *See* Sup. Ct. R. 13.1. In accordance with Rule 13.5, this application is being filed at least 10 days in advance of the December 12, 2022 deadline.

¹ Ninety days after September 12, 2022, falls on Sunday, December 11, 2022. Under this Court’s rules, when a deadline falls on a Sunday, the period extends to the next nonholiday weekday, which is Monday, December 12, 2022. *See* Sup. Ct. R. 30.1.

REASONS JUSTIFYING AN EXTENSION OF TIME

“For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.” Sup. Ct. R. 13.5. A 60-day extension of the December 12, 2022 deadline would expire on Friday, February 10, 2023. Good cause exists for the unopposed requested extension of time in this case for the following reasons:

1. This case presents the question of whether the federal government can seize funds unconnected to an underlying crime and apply those funds toward a criminal forfeiture judgment, when the government has already restrained more than sufficient “tainted” funds connected to the crime to satisfy the judgment.

2. Mr. Lazarenko was the Prime Minister of Ukraine from 1996 to 1997. After falling out of favor with the then-President of Ukraine and surviving an assassination attempt, Mr. Lazarenko fled to the United States.

3. When Mr. Lazarenko reached the United States, he was charged with and subsequently convicted of certain counts of money laundering. The district court imposed a criminal forfeiture money judgment of approximately \$23 million. The government has previously restrained bank accounts belonging to Mr. Lazarenko amounting to more than \$200 million, which the government maintained were connected to the money laundering convictions. These accounts are more than sufficient to cover the criminal forfeiture judgment.

4. Nevertheless, in April 2021, the government requested a forfeiture order for accounts of Mr. Lazarenko that had been restrained and which contained

approximately \$2 million. The government now argued that the funds in the accounts were not “tainted” but were subject to forfeiture in the criminal case. The district court granted the government a forfeiture order for these accounts.

5. Prior to the Ninth Circuit’s decision in this case, several Circuits had drawn a clear distinction between assets connected to an underlying crime (“tainted property”) and assets unconnected to the underlying crime (“substitute property”). Under 21 U.S.C. § 853(p)(1), the government could only seize substitute property if there was not enough tainted property to satisfy the entire criminal forfeiture order.

6. Yet in this case, the Ninth Circuit decided to take a new approach. Looking at the second section of 21 U.S.C. § 853(p), the Ninth Circuit interpreted language that “the court shall order the forfeiture of any other property of the defendant” to hold that substitute property can be used to satisfy a criminal forfeiture, even when tainted property is available. In so doing, the Ninth Circuit interpreted 21 U.S.C. § 853(p) in a way that no other Circuit had before and departed from the plain meaning of the statutory framework.

7. The consequences of the Ninth Circuit’s decision are significant. Under its interpretation of 21 U.S.C. § 853(p), the government can now seize any property of a citizen to satisfy a criminal judgment, regardless of whether assets directly traceable to the crimes are still available. Whether this new approach is consistent with the text of 21 U.S.C. § 853 is a question worthy of this Court’s attention.

8. Given the impact of the Ninth Circuit’s decision, Mr. Lazarenko carefully considered whether to seek this Court’s review. Having decided to file a

petition for certiorari, Mr. Lazarenko has engaged the appellate team from the undersigned firm.

9. The requested extension is needed for newly added counsel to properly familiarize themselves with the pleadings, decisions below, and relevant caselaw in order to complete the petition for a writ of certiorari.

10. Appellate counsel have several obligations that will make it difficult to accomplish these tasks by the current deadline of December 12, 2022, including in-person hearings in federal district court and in the United States Court of Appeals for the Fourth Circuit between now and then.

11. Counsel for Mr. Lazarenko have conferred with counsel for the government, who has advised that she does not object to this requested 60-day extension.

12. This is Mr. Lazarenko's first application for an extension of the deadline to file a petition for a writ of certiorari.

13. For these reasons, Mr. Lazarenko respectfully requests that the due date for his petition for a writ of certiorari be extended by sixty days, to February 10, 2022, or until such earlier time as this Court deems just.

Respectfully submitted,

/s/ Matthew Nis Leerberg

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v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I, Matthew Nis Leerberg, hereby certify that I am a member of the Bar of this Court. I further certify that a copy of Applicant's Unopposed Application for an Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was served this 2nd of December, 2022, via electronic mail and U.S. mail, postage prepaid, on the following:

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Counsel for Respondent

December 2, 2022

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

Exhibit 1

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 12 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAVEL IVANOVICH LAZARENKO, AKA
Pavlo Ivanovych Lazarenko,

Defendant-Appellant.

No. 21-10225
21-10250

D.C. No.
3:00-cr-00284-CRB-1

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted August 12, 2022
San Francisco, California

Before: RAWLINSON, BADE, and BRESS, Circuit Judges.

Defendant-Appellant Pavel Ivanovich Lazarenko appeals the district court’s preliminary order of criminal forfeiture and order correcting the preliminary order of criminal forfeiture. We have jurisdiction under 28 U.S.C. § 1291. We review the district court’s interpretation of federal forfeiture law de novo and its factual findings for clear error. *United States v. Hernandez-Escobar*, 911 F.3d 952, 955

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

(9th Cir. 2018). We affirm.

1. Lazarenko challenges the district court’s conclusion that he made property subject to forfeiture unavailable for one of the reasons listed under 21 U.S.C. § 853(p)(1). The district court did not err.

First, the district court did not violate the “merger of judgments” rule when it considered the underlying counts of conviction to determine whether the unavailable property was traceable to Lazarenko’s criminal activity and therefore subject to forfeiture. Section 853(p) requires the court to first consider whether tainted property has been dissipated. 21 U.S.C. § 853(p)(1); *United States v. Nejad*, 933 F.3d 1162, 1166 (9th Cir. 2019). The district court appropriately consulted the indictment and underlying convictions to verify that the unavailable property was forfeitable and thus subject to substitution. *See* 21 U.S.C. § 853(a), (p).

The district court also did not err in concluding that \$2,033,602.80 located in Lazarenko’s BancBoston Robertson Stephens account had been made unavailable under § 853(p)(1). The record supports the district court’s finding that Lazarenko commingled the illicit \$2.3 million deposit with other funds such that it could not “be divided without difficulty,” that part of the deposit could not “be located upon the exercise of due diligence,” and that part of the deposit had been transferred to third parties. 21 U.S.C. § 853(p)(1)(A)–(B), (E). Further, Lazarenko is incorrect

that the district court's order violated the "relation-back doctrine." All the acts and omissions that led to the unavailability of the funds took place after the unlawful deposit in September 1998, and thus *after* the government's interest in the property vested under § 853(c).

The district court also did not err in finding that Lazarenko diminished the value of his Novato, California mansion by \$760,900. The record reflects that Lazarenko's failure to maintain the premises while he still owned and controlled the property caused it to diminish in value by at least that amount.

2. Lazarenko argues that the district court improperly forfeited funds held in Guernsey and Liechtenstein bank accounts as substitute property under § 853(p)(2) even though the government has argued those funds are tainted in a separate civil forfeiture proceeding in the District of Columbia, contending that substitute property may not itself be tainted property. This argument is foreclosed by the text of § 853(p)(2), which states that once the government has established that the defendant made forfeitable property unavailable, "the court shall order the forfeiture of *any other property* of the defendant." 21 U.S.C. § 853(p)(2) (emphasis added). Thus, the district court was correct to conclude that "any other property" of the defendant may be substituted, whether it is tainted or not. *See Nejad*, 933 F.3d at 1165; *see also* 21 U.S.C. § 853(o) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").

Switching gears, Lazarenko argues that the funds in his Guernsey and Liechtenstein bank accounts cannot be used as substitute property because other assets more directly traceable to his crimes are still available. This argument fails for the same reason as the preceding argument: The text of § 853(p) provides that substitution is authorized once “*any* property” is made unavailable, at which point “*any* other property of the defendant” may be substituted “up to the value of any” unavailable property. *Id.* § 853(p)(1)–(2) (emphases added). Nothing in the text suggests the limitation Lazarenko seeks, and interpreting the statute as he suggests would hardly amount to “liberally constru[ing]” it. *Id.* § 853(o); *see also Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 906 (9th Cir. 2018) (“[T]he term ‘any’ [is] broad and all-encompassing.”).¹

3. Lazarenko also raises three equitable arguments against the preliminary order. None has merit.

Lazarenko’s judicial estoppel argument fails because there is no inconsistency in the government’s position. *See United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008). Section 853(p) allows “any other property of the defendant” to be forfeited as substitute property, so it does not matter whether the

¹ We also note that the record casts doubt on Lazarenko’s representation that the assets he would prefer the government to seize are in fact available. *See United States v. All Assets Held at Bank Julius*, 244 F. Supp. 3d 188, 194 (D.D.C. 2017); *United States v. All Assets Held at Bank Julius*, 959 F. Supp. 2d 81, 114 (D.D.C. 2013).

Guernsey and Liechtenstein funds are tainted or untainted.

Lazarenko is incorrect that the election of remedies doctrine bars the government from seeking to civilly forfeit the Guernsey and Liechtenstein funds in one proceeding and then to criminally forfeit them as substitute property in another. These remedies are not “repugnant and inconsistent with each other,” *Teutscher v. Woodson*, 835 F.3d 936, 956 (9th Cir. 2016), because the government may “pursue both civil forfeiture and criminal forfeiture at the same time” and “may pursue civil forfeiture even after a failed criminal prosecution,” *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1150, 1152 (9th Cir. 2011).

The district court did not abuse its discretion by declining to apply the first-to-file rule because the criminal proceedings commenced four years before the civil proceedings. *See Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239–41 (9th Cir. 2015).

4. Last, we reject Lazarenko’s argument that the district court did not have jurisdiction to enter the corrected order after he filed his first notice of appeal. “The filing of a notice of appeal . . . does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure Rule 35(a).” Fed. R. App. P. 4(b)(5).

AFFIRMED.

Exhibit 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 04 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PAVEL IVANOVICH LAZARENKO,
AKA Pavlo Ivanovych Lazarenko,

Defendant - Appellant.

No. 21-10225

D.C. No. 3:00-cr-00284-CRB-1
U.S. District Court for Northern
California, San Francisco

MANDATE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PAVEL IVANOVICH LAZARENKO,
AKA Pavlo Ivanovych Lazarenko,

Defendant - Appellant.

No. 21-10250

D.C. No. 3:00-cr-00284-CRB-1
U.S. District Court for Northern
California, San Francisco

The judgment of this Court, entered September 12, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Howard Hom
Deputy Clerk
Ninth Circuit Rule 27-7