

No. _____

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

—◆—
MELISA SINGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Nearly 97 percent of all federal convictions are the result of guilty pleas. When forfeiture is sought in those cases, the right of third party property owners to challenge the forfeitability of their property is dependent on the circuit in which the case is prosecuted.

There is a sharp divide among the circuits on this issue. Some courts recognize the due process and property rights of third party petitioners in this regard, while others, including the Third Circuit, do not.

The question presented is:

Whether a third party property owner is permitted to challenge the lawfulness of the forfeiture of his or her property in a criminal proceeding, particularly where the sole basis for the forfeiture is the defendant's plea and consent forfeiture agreement.

PARTIES TO THE PROCEEDING

All parties are listed in the caption. Although he is the criminal defendant in the original proceeding, David Nicoll is not a party here. His involvement terminated on October 23, 2013, when the District Court entered the preliminary order of forfeiture. Nicoll has had no involvement in these proceedings since that time.

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Melisa Singh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.



OPINIONS BELOW

The Opinion of the Third Circuit (App. 1) is reported at 2017 WL 43100005 (3d Cir. Sept. 28, 2017). The Opinion and Order of the District Court of New Jersey dismissing Ms. Singh's Petition (App. 24) is reported at 2015 WL 13628130 (D.N.J. Apr. 29, 2015). The District Court's orders denying Ms. Singh's motion to reconsider the dismissal (App. 12) and ruling that the government had established nexus (App. 19), both filed July 9, 2015, are reported at 2015 WL 4251134 and 2015 WL 4251088, respectively. The District Court's order denying Ms. Singh's letter motion for reconsideration of the final order of forfeiture (App. 7) is reported at 2017 WL 4769032 (D.N.J. Feb. 21, 2017).



JURISDICTION

Petitioner seeks review of the decision of the Third Circuit, entered September 28, 2017. A timely petition for rehearing was denied on November 28, 2017 (App. 39). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).



**CONSTITUTIONAL PROVISION,
STATUTES AND RULES INVOLVED**

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty or property without due process of law. . . .

21 U.S.C. § 853(a) provides in pertinent part that, in a criminal proceeding, property that is the “proceeds” of, or was “used . . . to commit,” specified crimes “shall” be forfeited.

Rule 32.2 of the Federal Rules of Criminal Procedure provides in pertinent part that, before a preliminary order of forfeiture is issued, “the court must determine whether the government has established the requisite nexus between the property and the offense.” Fed. R. Crim. P. 32.2(b)(1)(A).

21 U.S.C. § 853(c) provides in pertinent part that the government’s interest in forfeitable property “vests . . . upon the commission of the act giving rise to forfeiture. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture. . . .”

Under 21 U.S.C. § 853(k), third parties “claiming an interest in property” may not “intervene in a trial or appeal . . . of a criminal case,” but must wait until their property is included in a preliminary order of forfeiture, and then may only litigate their claim in a subsequent “ancillary proceeding.” 21 U.S.C. § 853(n); Fed. R. Crim. P. 32.2(c)(4).

Rule 32.2 directs the district court to “enter the [preliminary] order without regard to any third party’s interest in the property,” which is “deferred until . . . [the] ancillary proceeding. . . .” “If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant . . . had an interest in the property. . . .” Fed. R. Crim. P. 32.2(b)(2)(A); (c)(2).

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STATEMENT OF THE CASE

This matter brings before the Court, potentially for the first time, the protection of property rights of innocent third parties in criminal forfeiture proceedings, particularly where, as here, the sole basis for the forfeiture is the defendant’s plea and consent forfeiture agreement.

1. *Factual background:* In 2007, Melisa Singh became romantically involved with David Nicoll, the wealthy owner of a chain of New Jersey blood-testing laboratories. While the relationship was casual on her side, Nicoll wanted more. Disregarding the popular adage that ‘Money Can’t Buy Me Love,’ Nicoll attempted to do just that, aiming to overwhelm her with a series of increasingly lavish gifts.

Nicoll’s efforts to sweep Ms. Singh off her feet reached their peak on January 31, 2008, when he funded her purchase of a one-bedroom condominium in Manhattan for approximately \$700,000.

Ms. Singh took sole title to and possession of the property, which has remained her domicile ever since. As the District Court found, Ms. Singh paid all “maintenance, taxes, fees, and other costs for the unit, and she has been in exclusive possession of it. [Nicoll] has never owned nor resided in the unit.” App. 25.

For Nicoll, the transaction failed to have the hoped-for beneficial impact on his relationship with Ms. Singh. But the property has remained Ms. Singh’s home to this day.

More than six years later, Ms. Singh received a notice that her home was the subject of a preliminary order of forfeiture and that she had a brief window in which to assert her rights in the property or it would be permanently forfeited to the government.

2. *The government’s case against Ms. Singh’s home:* Ms. Singh timely filed a Petition asserting her interest in the property. The government moved to dismiss the Petition for failure to state a claim. Ms. Singh opposed the motion, arguing that nothing in the record of the criminal case established that her condominium or the funds used to purchase it were tainted.

The criminal case against the defendant had been resolved by a plea agreement and consent forfeiture without any proceedings. The sole support for the forfeiture of Ms. Singh’s condominium was the defendant’s plea, which set forth no factual evidence regarding the condominium, only a long list of property attached to the plea as a schedule, including Ms.

Singh's home, that the defendant "admitted" had the requisite nexus to his criminal activity.

Further, no money – including the funds used to purchase the condominium – was found to be tainted or subject to forfeiture. Instead, the defendant consented to a \$50 million money judgment. The consent forfeiture "as to specific property" provided that such property, when sold, would be applied to satisfy the money judgment.

The only evidentiary documents submitted in the criminal case were the criminal complaint and an information. Neither submission set forth any allegations, let alone proof, of a nexus between Ms. Singh's home and the defendant's crimes of conviction. Indeed, although the documents broadly alleged that the defendant's criminal scheme took place "[f]rom at least in or about January 2006, through in or about 2013," there were no allegations of any specific illegal acts prior to 2009. The earliest "overt acts" alleged to have been committed in furtherance of the defendant's conspiracy occurred in August 2009 – more than a year and a half *after* the purchase of Ms. Singh's condominium. And there was no allegation that tainted proceeds were used to fund that purchase.

The charging documents also suggested that the defendant's actions were *legal* before 2010. Buried in the back of a lengthy attachment to the complaint, the government conceded that "[u]ntil July 2010, lease agreements and service agreements between clinical laboratories and physicians that met the relevant

federal safe harbors of the Anti-Kickback Statute were also permitted under New Jersey state law under limited circumstances.”

Therefore, none of the submissions in the criminal case demonstrated that Ms. Singh’s property was tainted.

3. *The District Court rulings:* The District Court granted the government’s motion to dismiss Ms. Singh’s Petition. In the same ruling, however, the court agreed with Ms. Singh that the government had failed to demonstrate in the criminal proceeding that her home was tainted, as required by 21 U.S.C. §§ 853(a), (c) and Fed. R. Crim. P. 32.2(b)(1).

“[T]he Government’s nexus agreement with Defendant does not, without more, satisfy the Court that the Condominium Unit indeed traces to Defendant’s criminality.” App. 34. Because no showing of nexus had been made, the court agreed that, based on the record, it should “vacate the portion of the preliminary order that pertains to the condominium unit.” *Id.*

Instead of vacating the forfeiture, however, the court gave the government permission to submit evidence regarding nexus in an unprecedented, one-sided procedure, claiming that this Court’s decision in *Libretti v. United States*, 516 U.S. 29 (1995), authorized the procedure. App. 33. Citing to 21 U.S.C. § 853(k), the court barred Ms. Singh from participating in the procedure and from responding to the government’s submission.

Accepting the District Court's express invitation, the government submitted material that had never been referenced, let alone filed, in the criminal phase of the proceeding.

Then, in two decisions issued in tandem, the court denied Ms. Singh's motion for reconsideration of the dismissal and ruled that the government's unilateral submission had proven nexus, affirming the forfeiture of Ms. Singh's home. App. 12, 19.

Notably, however, in its nexus decision, the court did not find that the government had traced the proceeds of the defendant's criminal activity to the funds used to purchase Ms. Singh's home. To the contrary, the court found that "[n]ot every dollar from BLS [the defendant's business] came from the criminal scheme, and indeed BLS generated substantial funds through legitimate means. Yet the Government need not trace each dollar in BLS coffers to a criminal rather than a legitimate operation." App. 21-22.

Instead, the court held, because "the very nucleus" of BLS was "rotten and malignant" and its "entire operation was permeated by fraud," it was reasonable to conclude that every dollar ever earned by BLS stretching back to 2006 – three years before the government's first alleged overt criminal act – should be deemed tainted through the application of legal presumptions. App. 22-23 (citations omitted).

Significantly, the District Court's nexus ruling confirmed that there was no evidence of any specific criminal acts committed prior to 2009 or proof that

tainted funds were used to purchase the condominium in January 2008. However, that did not stop the court from finding a nexus and authorizing the forfeiture of Ms. Singh's home.

The court subsequently entered a final order of forfeiture without finding that the defendant had any right, title or interest in the property. Ms. Singh's motion for reconsideration on that basis was denied on procedural grounds. App. 7.

4. *The Third Circuit decision:* A Third Circuit panel affirmed, ruling that Ms. Singh was barred from challenging the lawfulness of the forfeiture of her property, which could only be raised by the criminal defendant, even though the defendant's right to challenge any forfeiture had terminated years earlier. "Whether the District Court followed the exact steps outlined in Rule 32.2(b) is of no import to her," the court held, referring to Ms. Singh, calling such "error" "irrelevant to Singh's claimed third-party interest."

Further, the court asserted that Ms. Singh was not harmed by the forfeiture of her home because the nexus requirement of Rule 32.2(b) and this Court's statement in *Libretti* that consent forfeitures must be supported by facts applied only to protect the criminal defendant, not innocent third party property owners. "[A]ny error [in the forfeiture] would implicate Nicoll's property rights, not Singh's." App. 4-5.

The Third Circuit also asserted that Ms. Singh was not harmed by the forfeiture of her property because the government ultimately adduced evidence of

nexus at the invented one-sided procedure. Although stating that it was not taking a position on the validity of the nexus procedure, the panel adopted within its factual recitation evidence that was only presented during that procedure. App. 5 n.1. The court overlooked, however, that the District Court's nexus determination did not find that the funds used to purchase Ms. Singh's home were traceable to the defendant's criminal activity.

Finally, the panel disregarded the failure of the District Court to determine whether the defendant had any interest in the property before entering a final order of forfeiture, as required by Rule 32.2(c)(2).

Ms. Singh's petition for rehearing was denied. App. 39. This Petition follows.



REASONS FOR GRANTING THE PETITION

The Court Should Grant Review of the Third Circuit's Decision Because it is Inconsistent with the Court's Precedents and Conflicts with the Decisions of Other Circuits on the Right of Third Party Property Owners to Challenge the Forfeitability of Their Property in Criminal Proceedings.

The rights of third parties to challenge the criminal forfeiture of their property is an issue of national scope and importance that has split the circuits and requires consistent application of the law to ensure that the court's jurisdiction and the property and due

process rights of innocent third parties are not violated, and that only tainted property belonging to the criminal defendant is forfeited.

Congress has provided special protection for third party property in criminal proceedings by barring the forfeiture of such property without a “special verdict” that the property is tainted. 21 U.S.C. § 853(c). However, two primary factors, operating together, have deprived third parties of the benefits of this provision.

First, in the nearly 97 percent of all federal convictions that are the result of guilty pleas, there is no jury verdict of guilt, let alone a special verdict of forfeiture for third party property. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (regarding percentage of guilty pleas, citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (visited Mar. 1, 2012)).

Instead, the forfeiture component of the defendant’s plea is resolved by a consent forfeiture agreement, which becomes the basis for the preliminary order of forfeiture. And, as a result of a void left after Rule 32.2 replaced Rule 31(e) in 2000, there is no requirement that the court make a finding that the defendant has an interest in the property before the ancillary proceeding is conducted.

Second, section 853(k) bars third parties from being heard prior to the entry of a preliminary order of forfeiture. Yet, neither the government nor the defendant has an interest in ensuring that property in a

consent forfeiture has a nexus to the criminal activity or actually belongs to the defendant. Thus, the role of protector of the third party property owner during sentencing and forfeiture is entrusted to the district court. But, despite the Court's admonition in *Libretti* that district courts must guard against factually bare consent forfeitures, the exponential increase in the use of criminal forfeiture after the enactment of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") has left third party rights unprotected during the sentencing and forfeiture phases of the criminal proceeding.

Thus, although there is no statute or rule preventing a district court in an ancillary proceeding from permitting a third party property owner to challenge the lawfulness of a preliminary forfeiture order based solely on a defendant's consent, many circuits have barred such challenges.

As a result, property owners like Ms. Singh, who have a legal and legitimately acquired property interest under state law, lose their property without an opportunity to be heard on whether it was forfeited in accord with statutory requirements.

Ironically, criminal forfeiture provides a less hospitable environment for third party property owners than civil forfeiture, where the government must first prove that the property is forfeitable in an adversary proceeding with the actual owner of the property on the other side before the burden ever shifts to the claimant. *See* 18 U.S.C. § 983(c)(1) ("the burden of proof

is on the Government to establish, by a preponderance of the evidence, that property is subject to forfeiture”).

Yet, in the belief that the requirement of a conviction made criminal forfeiture less subject to abuse than civil forfeiture, Congress crafted CAFRA to steer prosecutors to criminal forfeiture. *See, e.g.*, 28 U.S.C. § 2461(c); H.R. Rep. No. 106-192, at 8 (1999).

The problem is that, while the requirement of a conviction protects the defendant, it does little to protect third parties. Yet, “the Government’s penal interests are weakest when the punishment also burdens third parties.” *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 638 n.5 (1989) (Blackmun, J., dissenting).

These statutory, jurisdictional and constitutional violations all flow from the ills of unsupported and unreviewed consent forfeitures incorporated into plea agreements in criminal cases.

1. The Court Should Grant Certiorari to Resolve a Split Among the Circuits on the Right of Third Party Property Owners to Challenge the Forfeitability of Their Property in Criminal Proceedings.

There is a direct split among the circuits on whether third party owners may challenge the forfeitability of their property in an ancillary proceeding. The District Court below acknowledged this split in two of

its decisions. App. 16-17, 30-32. The Third Circuit, however, disregarded it.

Because of this split, had defendant Nicoll been prosecuted in the Fourth, Ninth or D.C. Circuits or in the District of Puerto Rico, the District Court would not have dismissed Ms. Singh’s Petition, and she would have been free to litigate the forfeitability of her property and her ownership interest in an ancillary proceeding.

A. *The split among the circuits*: In the Second, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, third party petitioners may not challenge the underlying forfeitability of their property. *DSI Assocs. LLC v. United States*, 496 F.3d 175, 184-85 (2d Cir. 2007) (“DSI cannot prevail . . . by reframing its argument as one challenging the underlying validity of the forfeiture order”); *United States v. Holy Land Found. for Relief & Dev.*, 722 F.3d 677, 689-90 (5th Cir. 2013); *United States v. Fabian*, 764 F.3d 636, 638 (6th Cir. 2014) (“third parties lack statutory standing to challenge a district court’s determination, in a preliminary order of forfeiture, . . . that certain property is subject to forfeiture”); *United States v. White*, 675 F.3d 1073, 1077-78 (8th Cir. 2012) (petitioner may not “relitigate the nexus between the criminal acts . . . and the forfeited proceeds”); *United States v. Andrews*, 530 F.3d 1232, 1236-37 (10th Cir. 2008) (“a third party has no right to challenge the preliminary order’s finding of forfeitability”); *United States v. Davenport*, 668 F.3d 1316, 1321 (11th Cir.) (petitioner “lacked standing to challenge the . . . determination of forfeitability”), *cert. denied*, 566 U.S. 1035 (2012).

In the Fourth Circuit, however, a third party petitioner may challenge the underlying forfeitability of contested property. *United States v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1987). The court found that “[s]erious due process questions would be raised . . . if third parties asserting an interest in forfeited assets were barred from challenging the validity of the forfeiture.” This was confirmed recently in *United States v. Bailey*, 926 F. Supp. 2d 739, 745 (W.D.N.C. 2013), which, as here, involved a consent forfeiture with no supporting proof and third party petitioners with an undisputed legal interest in the property.

Following suit, the Ninth Circuit permitted a petitioner to present all of its arguments and defenses to challenge the underlying forfeitability of contested property. *United States v. Lazarenko*, 476 F.3d 642, 650 (9th Cir. 2007). A more recent decision from the Ninth Circuit confirmed that, in an ancillary proceeding, a third party “may present *all legal arguments* that might bar . . . forfeiture.” *United States v. Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1143 (9th Cir. 2011) (emphasis added).

In addition, after the District Court below dismissed Ms. Singh’s Petition, the Court of Appeals for the District of Columbia joined the Fourth and Ninth Circuits and ruled that third parties may challenge determinations made during the criminal case in a subsequent ancillary proceeding. In *United States v. Emor*, 785 F.3d 671 (D.C. Cir.), *reh’g en banc denied* (Sept. 1, 2015), the court eloquently held that “the pleadings-only rule fortifies the due process concerns associated

with stripping third parties of property rights based on proceedings in which they had no prior opportunity to participate.” 785 F.3d at 678.

This creates a 6-3 circuit split on whether a third party property owner may challenge the forfeitability of his or her property.

Although the First Circuit does not appear to have definitively ruled on this issue, at least one court in that circuit applied the Fourth Circuit’s reasoning to permit a petitioner to challenge a property forfeiture. *United States v. One Rural Lot, et al.*, 726 F. Supp. 2d 61, 69 (D.P.R. 2010) (courts “should construe [§ 853(n)] so as to avoid unconstitutional deprivation of property rights without due process, because claimants are not parties to the criminal prosecution of the defendant”).

Finally, it should be noted that in the Eleventh Circuit, the same court that had previously barred a third party nexus challenge by a private citizen in *Davenport* reached a different conclusion where the petitioner was a trustee in bankruptcy. There, a consent forfeiture “established a *mere presumption* that the properties so listed constituted forfeitable proceeds or properties derived from such proceeds. . . .” *United States v. Rothstein, Rosenfeldt, Adler P.A.*, 717 F.3d 1205, 1215 (11th Cir. 2013) (emphasis added). Therefore, the Trustee was free to litigate the forfeitability of the property that had been included in the preliminary order of forfeiture.

B. *Acknowledging the split and its importance:* In a 2016 concurring opinion analyzing the case law on

third party challenges to forfeitability, a Sixth Circuit judge, while acknowledging the binding precedent of *Fabian* in that circuit, noted “a budding circuit split on this point.” *United States v. Galemmo*, 661 Fed. Appx. 294, 303 (6th Cir. 2016) (Moore, J., concurring). While the opinion’s analysis is excellent, it did not address all of the decisions taking sides on the issue. Thus, it understates the extent of the split, which is past the budding stage and is now in full bloom.

The opinion noted that most cases barring such challenges, such as *Holy Land Foundation* and *White*, failed to address due process. Others, like *Davenport* and *Andrews*, “brushed aside . . . due process concerns” in the “belief that any claimant who could succeed in challenging the preliminary order of forfeiture will also be able to succeed on one or both of the exceptions, making the inability to contest the preliminary order harmless.”

As the opinion noted, however, these decisions failed to recognize that “some claimants will fall through the cracks.” Thus, “[i]n an appropriate case,” the Sixth Circuit “should consider whether this result raises constitutional concerns.” *Galemmo*, 661 Fed. Appx. at 303-04 (Moore, J., concurring).

C. *The Third Circuit’s decision below*: Ironically, the Third Circuit has not directly ruled on this issue. In its decision below, the court even declined to acknowledge the split among the circuits, something the District Court did twice. Nevertheless, the court effectively took sides on the issue by asserting that “any

error” in the forfeiture “would implicate [the criminal defendant’s] property rights, not [those of the third party property owner]. . . .” App. 5. The panel, however, avoided citation to any case to support this assertion.

Thus, the Court should grant certiorari to resolve this sharp and clearly defined circuit split on whether third parties may challenge the lawfulness of the forfeiture of their property in criminal proceedings.

2. The Court Should Grant Certiorari Because the Third Circuit’s Decision is Inconsistent With the Court’s Decisions (1) Confirming that Criminal Forfeitures Must be Supported by Facts, (2) Holding that Third Parties Cannot be Bound by Rulings in Proceedings From Which They Were Excluded, and (3) Recognizing the Limits of Criminal Forfeiture Jurisdiction.

A. The Decision Below Contravenes the Court’s Decisions Confirming that Criminal Forfeitures Must be Supported by Facts.

Two principles underlie federal *in personam* jurisdictional power to forfeit property in a criminal proceeding: the property must have a nexus to the defendant’s criminal activity, and the defendant must have an interest in the property. 21 U.S.C. § 853(a)(1); Fed. R. Crim. P. 32.2(b)-(c).

If, following a conviction, tainted property cannot be located, the government may forfeit substitute assets. 21 U.S.C. § 853(p). Substitute assets do not have

a nexus to the defendant’s criminal activity, but they are limited, like tainted property, to “property of the defendant.” *Id.* § 853(p)(2).

As the Court recently observed:

By adopting an *in personam* aspect to criminal forfeiture, and providing for substitute-asset forfeiture, Congress made it easier for the Government to hold the defendant who acquired the tainted property responsible. Congress did not, however, enact any ‘significant expansion of the scope of property subject to forfeiture.’

Honeycutt v. United States, 581 U.S. ___, 137 S. Ct. 1626, 1635 (2017) (quoting S. Rep. No. 98-225, p. 192 (1983) (footnote omitted)).

Rule 32.2 sought to implement these jurisdictional principles. The nexus requirement is enforced by the provision that, “[i]f the government seeks forfeiture of specific property, the court *must* determine whether the government has established the requisite nexus between the property and the offense.” Fed. R. Crim. P. 32.2(b)(1) (emphasis added).

By requiring the court to make this nexus determination before issuing a preliminary order of forfeiture, the Rule sought to ensure that third party owners would not be compelled to litigate to protect their property until the court first determined that the property was tainted by the defendant’s criminal activity. 21 U.S.C. § 853(n); Fed. R. Crim. P. 32.2(b)(6)(A).

The requirement that the defendant have an interest in the property is enforced by the provision that, before issuing a final order of forfeiture, the court must determine “that the defendant . . . had an interest in the property. . . .” Fed. R. Crim. P. 32.2(c)(2).

This requirement is emphasized in the extensive notes to Rule 32.2: “The ancillary proceeding has become the forum for determining the extent of the defendant’s forfeitable interest in the property. This allows the court to conduct a proceeding in which all third party claimants can participate and which *ensures that the property forfeited actually belongs to the defendant.*” Fed. R. Crim. P. 32.2(b) 2000 Advisory Committee Note (emphasis added).

1. *The government has used consent forfeitures to bypass these protections:* In the context of a plea, however, there is no mechanism for determining whether the preliminary order of forfeiture was issued based on the requisite proof of nexus and whether the defendant has an interest in the property. Further, because third parties are barred from appearing in the criminal prosecution and because the defendant’s interest in the property is not even considered until the ancillary proceeding, the party who actually owns the property may not even be identified, let alone permitted to be heard, before the property is included in the preliminary order of forfeiture.

2. *The Court addressed these concerns in Libretti:* The Court in *Libretti* touched upon some of the concerns unique to consent forfeitures:

We recognized in *Caplin & Drysdale* that the broad forfeiture provisions carry the potential for Government abuse and ‘can be devastating when used unjustly.’ Nonetheless, we concluded that ‘[c]ases involving particular abuses can be dealt with individually by the lower courts, when (and if) such cases arise.’

We do not mean to suggest that a district court must simply accept a defendant’s agreement to forfeit property, particularly when that agreement is not accompanied by a stipulation of facts supporting forfeiture. . . . In this regard, we note that the Department of Justice recently issued a Revised Policy Regarding Forfeiture by Settlement and Plea Bargaining in Civil and Criminal Actions . . . to instruct that, among the procedures necessary to ensure a valid forfeiture agreement, ‘[t]he settlement to forfeit property must be in writing and defendant must concede facts supporting forfeiture.’

Libretti, 516 U.S. at 43 (quoting *Caplin & Drysdale*, 491 U.S. at 634-35).

Because of the facts of *Libretti*, however, the Court did not fully consider the potential impact of factually unsupported forfeitures on the property interests and due process rights of third parties.

First, these issues were raised by the defendant, not a third party who had no opportunity to be heard on the issue of nexus. Second, a trial on the merits preceded the defendant’s plea and consent forfeiture,

where “ample evidence” supporting forfeiture was presented. *Libretti*, 516 U.S. at 44-45.

Yet, despite these important differences, the Court in *Libretti* affirmed the critical importance of ensuring that *all* criminal forfeitures are supported by facts connecting the property to the criminal activity. The Court found that “the District Court did not rest its forfeiture order on nothing more than Libretti’s stipulation that certain assets were forfeitable. In fact, there is ample evidence that the District Court both understood the statutory requisites for criminal forfeiture and concluded they were satisfied on the facts of the case at the time sentence was imposed.” *Id.* at 44.

3. *The decisions below contravene Libretti*: Here, in direct contravention of the Court’s concerns in *Libretti*, Ms. Singh’s property was included in a preliminary order of forfeiture “on nothing more than [Nicoll’s] stipulation that certain assets were forfeitable,” and without any consideration of whether “the statutory requisites for criminal forfeiture . . . were satisfied on the facts of the case. . . .” *Id.* at 44.

The Third Circuit affirmed the unlawful forfeiture of Ms. Singh’s property, which contravenes the principles set forth by the Court in *Libretti*. Indeed, the Third Circuit went further, asserting that the Court’s conclusion in *Libretti* that criminal forfeiture must be supported by facts was merely “a procedural safeguard to protect the defendant” and that “[t]hird parties are

immaterial to the requisite nexus analysis.” App. at 4 (citing *Libretti*, 516 U.S. at 41).

Both the Third Circuit and District Court decisions below are therefore based in part on a direct misapplication of *Libretti*.

Thus, the Court should also grant certiorari to ensure that the statutory forfeiture requirements are applied equally to the property of innocent third parties as they are to that of criminal defendants.

B. The Rulings Below Contravene the Court’s Decisions Protecting the Due Process Rights of Non-Parties to Judicial Proceedings.

A consent forfeiture that deprives third parties of their property rights raises due process concerns that arise when a judicial determination affects the substantive rights of non-parties to the proceeding.

Decisions barring litigation of forfeitability during the ancillary phase prevent the third party from challenging rulings made in a proceeding which deprived them of an opportunity to be heard. This is problematic, as the Fourth, Ninth and D.C. Circuits have found. It is one thing to bar third parties from participating in a criminal proceeding. It is quite another to prevent those parties from challenging findings made during that proceeding that deprive them of substantive rights.

The courts' aversion to such a result is well founded. As this Court has held, "it is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971).

And on the specific issue of a third party being bound by a stipulation entered into by others, even where one of the stipulating parties was merely agreeing that it was the alter ego of the non-party, the Court has held that such an agreement "cannot foreclose [the non-party], which has never had its day in court on the question." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969).

The decisions barring third party challenges to forfeitability contravene these settled principles. And there is no compelling reason for such a violation of due process rights of innocent third parties. The purported bar on "relitigation of forfeitability" is mentioned only in the Advisory Committee Notes to Rule 32.2(b), not in any statute or rule, and cannot apply to consent forfeitures, because forfeitability was never litigated in the first place. In *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995), the Eleventh Circuit rejected the government's argument that "[t]he district court . . . must have found a 'factual basis' for the criminal forfeitures recited in the plea agreement when it accepted Douglas's guilty plea. . . . [I]n accepting the plea, the district court made no determination on

which the government was entitled to rely in its subsequent decision to seek a preliminary order of forfeiture.” The court held that the forfeiture of the property was frivolous and awarded attorneys’ fees to the third party property owner. *Id.* at 588.

C. The Decision Below Contravenes the Court’s Stated Principles of Criminal Forfeiture Jurisdiction.

Criminal forfeiture jurisdiction is limited to tainted property of the defendant. 21 U.S.C. § 853(a). The Court affirmed the central importance of this principle in *Honeycutt*, where it stated that the substitute assets provision of section 853(p)

demonstrates that 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. . . . [This] would allow the Government to circumvent Congress’ carefully constructed statutory scheme, which permits forfeiture of substitute property only when the requirements of §§ 853(p) and (a) are satisfied. There is no basis to read such an end run into the statute.

Honeycutt, 137 S. Ct. at 1634.

Further, the statute “is mandatory in its treatment of forfeiture of property in the defendant’s hands, but not in its treatment of property transferred to third

parties. . . . § 853(c) does not, like § 853(a), provide that all property defined as forfeitable under § 853 ‘must’ or ‘shall’ be forfeited: forfeitable property held by a third party presumptively ‘shall be ordered forfeited’ only if it is included in the special verdict, and its inclusion in the verdict is discretionary. . . .” *Caplin & Drysdale*, 491 U.S. at 637-38 & n.5 (Blackmun, J., dissenting).

Rule 32.2 recognizes the limits of *in personam* jurisdiction by requiring the district court, before issuing a final order of forfeiture, to “find[] that the defendant . . . had an interest in the property.” Fed. R. Crim. P. 32.2(c)(2).

The Advisory Committee explains that this change from prior Rule 31(e), which had required the government to demonstrate the defendant’s interest in the property *before* including it in a preliminary order of forfeiture, was implemented to “avoid duplication and a waste of judicial resources.” Fed. R. Crim. P. 32.2(b) 2000 Advisory Committee Note.

But it defies understanding how efficiency is promoted by compelling third parties to litigate ancillary claims to property in which the defendant has not been shown to have any interest. That risk is particularly grave when, as here, the sole basis for the forfeiture of the property is the defendant’s consent.

This elevation of efficiency above all else is not only misguided, but contravenes Congress’ statutory scheme. Pursuant to section 853(c), third party property may not be forfeited unless it is made “the subject of a special verdict of forfeiture” *before* the entry of a

preliminary order of forfeiture and *before* the ancillary proceeding phase. But if, as happened here, no one mentions during the criminal proceeding that the property sought to be forfeited is not owned by the defendant but by a third party, the district court – the sole protector of third party rights in the criminal proceeding – will be unable to determine whether a special verdict of forfeiture is required.

Even the Advisory Committee acknowledged that a criminal defendant “who has no interest in property has no incentive . . . to dispute the government’s forfeiture allegations.” Fed. R. Crim. P. 32.2(b) 2000 Advisory Committee Note.

As Justice Stevens recognized, a defendant’s motivation is in reality far stronger than a mere lack of “incentive” to acknowledge that he does not actually own property he has agreed to forfeit:

[I]t is not unthinkable that a wealthy defendant might bargain for a light sentence by voluntarily ‘forfeiting’ property to which the government had no statutory entitlement. This, of course, is not the law. No matter what a defendant may be willing to pay for a favorable sentence, the law defines the outer boundaries of a permissible forfeiture. A court is not free to exceed those boundaries solely because a defendant has agreed to permit it to do so.

Libretti, 516 U.S. at 55 (Stevens, J., dissenting).

The consent forfeiture of property is limited not only by the law, but by the boundaries of the court's jurisdiction over property in criminal forfeiture proceedings:

The proposition that the law alone defines the limits of a court's power to enter a judgment can be traced to this Court's early precedents. Precisely because extrastatutory punishments implicate the very power of a court to act, the district court must . . . satisfy itself that there is a factual basis for any judgment entered pursuant to a guilty plea that threatens to exceed statutory bounds. *Were a court to do otherwise, it would permit the parties to define the limits of its power.*

Libretti, 516 U.S. at 55-56 (Stevens, J., dissenting) (emphasis added) (citing *Ex parte Lange*, 18 Wall. 163, 178 (1874) (judgment imposing punishment in excess of statutory authorization is not merely voidable, but "void"); *Bigelow v. Forrest*, 9 Wall. 339, 351 (1870) (a court "transcend[s] its jurisdiction" when it orders a forfeiture of property beyond statutory authority)).

The Third Circuit below disregarded the unlawful final order of forfeiture of Ms. Singh's home without a finding that the defendant had any interest in the property, thereby permitting the criminal defendant and the government, rather than the law, "to define the limits of its power."

The unlawful result here exposes systemic problems with consent forfeitures. Plea agreements must set forth the nature and extent of the defendant's

interest in property and final orders of forfeiture must be based on express findings regarding the defendant's interest in the property. Otherwise, consent forfeitures will continue to violate the limits of the courts' jurisdiction.

In sum, the Court should grant certiorari because there is a direct split among the circuits on whether third parties may challenge the forfeitability of their property when its forfeiture is based solely on the plea and consent forfeiture of the defendant and because the decisions barring such challenges, including the Third Circuit's decision below, conflict with numerous precedents of this Court.

3. The Court Should Grant Certiorari Because the Third Circuit Sanctioned a Procedure that Misapplied a Decision of the Court and So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Court's Supervisory Power.

In affirming the District Court's unprecedented, invented and one-sided nexus procedure, the Third Circuit sanctioned a procedure that misapplied *Libretti* and so far departed from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory power.

A. *The courts below misapplied Libretti*: The District Court's nexus procedure directly misapplied *Libretti*. Although the court recognized *Libretti*'s

requirement that criminal forfeitures must be supported by a finding of nexus “at the time sentence was imposed,” it asserted that it was “difficult to see why [it] may not now” conduct its nexus assessment long after the forfeiture became “final as to the defendant.” App. 33. *See* Fed. R. Crim. P. 32.2(b)(4)(A).

In attempting to justify this extreme departure, the Third Circuit asserted that, right or wrong, the nexus procedure only affected the defendant, not the third party property owner. “Whether the District Court followed the exact steps outlined in Rule 32.2(b) is of no import to” Ms. Singh, the court held, calling such “error” “irrelevant to Singh’s claimed third-party interest.” App. 5, 4. This not only misreads *Libretti*, but contravenes Rule 32.2, which points out that proceedings after the issuance of a preliminary order of forfeiture have “no bearing on the defendant’s right to the property. . . .” *Id.* 2000 Advisory Committee Note (citation omitted).

B. *The nexus procedure below is an extreme departure from accepted and usual proceedings:* The nexus procedure conducted by the District Court and sanctioned by the Third Circuit is the first reported instance of such a judge-made remedy. It is an unwarranted and unlawful expansion of the government’s criminal forfeiture arsenal. In *Honeycutt*, this Court rejected a forfeiture remedy against a criminal defendant that was not expressly authorized by statute. *See* 137 S. Ct. at 1634.

The procedure below, however, not only invented an unlawful remedy beyond the scope of the criminal forfeiture laws, but it did so in the precise area where Congress has imposed special limitations and precautions: forfeiture of third party property in a criminal proceeding. Because the government's penal interests are weakest in this area, the statute specifically provides that, unlike tainted property of the criminal defendant, forfeiture of third party property is *not* mandatory and may only be forfeited by a special verdict. 21 U.S.C. § 853(c); *Caplin & Drysdale*, 491 U.S. at 637-38 & n.5 (Blackmun, J., dissenting). Thus, in seeking to justify the forfeiture of Ms. Singh's home, the lower courts not only unlawfully expanded the criminal forfeiture law, but directly contravened it.

This extreme departure from accepted procedures is evidenced by both the unlawful process used and its unprecedented result. This is the first reported case “in which a court awarded ownership to someone who never held title and did not live on the property, in preference to the titled owner who occupied the property.” *United States v. Nava*, 404 F.3d 1119, 1136 (9th Cir. 2005) (citing *United States v. Oregon*, 366 U.S. 643, 649 (1961) (the “devolution of property . . . is an area normally left to the states”); *United States v. Burnison*, 339 U.S. 87, 91-92 (1950) (the transfer of property is “part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment”)).

The unlawful nexus procedure employed below deprived Ms. Singh “of property rights based on proceedings in which [she] had no . . . opportunity to

participate” in favor of “someone who never held title and did not live on the property. . . .” *Emor*, 785 F.3d at 678; *Nava*, 404 F.3d at 1136.

Accordingly, the Court should also grant certiorari to exercise its supervisory power to invalidate the extreme departure below from the accepted and usual course of judicial proceedings and the misapplication of the Court’s rulings.

◆

CONCLUSION

For all these reasons, the Court should grant the Petition.

Respectfully submitted,

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