

No. 17-1203

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**

REPLY BRIEF

STEVEN L. KESSLER
Counsel of Record
LAW OFFICES OF STEVEN L. KESSLER
100 Park Avenue, 34th Floor
New York, N.Y. 10017-5516
(212) 661-1500
stevenkessler@msn.com

Counsel for Petitioner

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REPLY BRIEF

If the government has its way, an innocent property owner would enjoy greater rights and protections when her property is the subject of an *in rem* civil forfeiture action than if it were sought to be forfeited as part of someone else’s criminal prosecution. Yet, the abuses of *civil* forfeiture – which precipitated the passage of CAFRA in 2000 – continue to be regarded as a threat to the nation’s constitutional democracy, even in this Court. *See Leonard v. Texas*, 580 U.S. ___, 137 S. Ct. 847, 848-49 (2017) (Thomas, J.) (statement respecting the denial of certiorari) (questioning whether “modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation’s history,” discussing how this “system” has “led to egregious and well-chronicled abuses” and stating that “[o]ne unaware of the history of forfeiture laws and 200 years of this Court’s precedent regarding such laws might well assume that such a scheme is lawless – a violation of due process’”) (citing *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring)).

What purports to make criminal forfeiture less subject to abuse than civil forfeiture is the requirement of a conviction. But a conviction of the *defendant* does little to protect a third-party property owner, particularly when the conviction is based on a plea. See Pet.9-12.



ARGUMENT

1. There is a direct split in the circuits on an issue of national scope and importance: The government asserts that there is nothing wrong with barring an innocent third-party property owner from challenging the basis for the forfeiture of her property in a criminal proceeding. That could not happen in a civil forfeiture action. Yet, in criminal proceedings today, it is the law in six circuits. Pet.12-17. Those courts, like the government here, have “brushed aside . . . due process concerns.” *United States v. Galemmo*, 661 Fed. Appx. 294, 303-04 (6th Cir. 2016) (Moore, J., concurring).

The decisions from the circuits that support Ms. Singh all point to “the due process concerns associated with stripping third parties of property rights based on proceedings in which they had no prior opportunity to participate.” *United States v. Emor*, 785 F.3d 671, 678 (D.C. Cir.), *reh’g en banc denied* (Sept. 1, 2015); see Pet.14-15, 22-24.¹ Indeed, allowing a property owner to

¹ The government argues that Ms. Singh waived her due process rights or lacks standing to raise them. Both contentions fail (19-20) (Note: Numbers in parentheses refer to pages in the government’s opposition to the Petition). Ms. Singh’s due process contentions can be found in the Third Circuit Record on Appeal at A177, A191, A193, A194, A195, A283, A287 and A317, as well as in her Third Circuit Brief at 28 and in her Petition for Rehearing *en banc* at 4, 5 and 7. That is far more than a “glancing” reference to a key issue in this case.

As for standing, the government acknowledges that a “legitimate claim of entitlement” from “an independent source such as state law” is sufficient (20). Ms. Singh’s undisputed “legal interest” under 21 U.S.C. § 853(n)(2) amply satisfies this standard.

challenge the basis for the forfeiture of her property would seem self-evident.

Remarkably, the government not only denies that Ms. Singh has the right to challenge the forfeiture of her property, but even denies that a split in the circuits exists. Yet, the Sixth Circuit recognized the split on this point. *Galemmo*, *supra*. Even the District Court below acknowledged it. A16-17, A32. Pet.12-17. The 6-3 split on an issue of such general application, even without more, provides an urgent basis for this Court’s review.

2. This case exposes the lack of judicial oversight of consent forfeitures in criminal cases: The significance of whether district courts are properly supervising consent forfeitures to ensure the forfeiture of only tainted property has already been acknowledged by this Court. *See Libretti v. United States*, 516 U.S. 29, 43 (1995).

In fact, it was Ms. Singh’s reliance on *Libretti* that convinced the District Court that the preliminary order of forfeiture of her property was defective. A32-33.² The court’s unauthorized solution to fixing that defect was unique, but the problem it attempted to address – unsupported and unreviewed consent forfeitures and

² The government’s claim that there is no circuit court decision that remanded a consent forfeiture for further factual findings pursuant to *Libretti* (19) is refuted by two cases cited by the government in its Third Circuit Brief. *See United States v. Newman*, 659 F.3d 1235 (9th Cir. 2011); *United States v. Pollard*, 103 F. Supp. 1221 (D. Nev. 2015) (on remand).

the property owner's ability to challenge them – is national in scope.

As is reflected by this case, since *Libretti* was decided, the government has come to rely on its ability to forfeit property in criminal proceedings pursuant to plea agreements without having to (1) prove that the property is tainted during the criminal phase or (2) justify the forfeiture to a third-party owner in the ancillary proceeding phase. Even here, it claims that there was nothing wrong with the preliminary order forfeiting Ms. Singh's property without any proof of taint, based solely on the defendant's bare admission of nexus (18-19). Thus, the Petition challenges the government's attempt to preserve judicially unreviewable consent forfeitures in criminal forfeiture proceedings.

3. Ms. Singh's home was forfeited without any proof of nexus in violation of section 853 and Rule 32.2: The government further denies the reality that, as the District Court found, Ms. Singh's property was included in a preliminary order of forfeiture without any proof of nexus, in violation of 21 U.S.C. § 853(c), (n) and Fed. R. Crim. P. 32.2(b). A32-34. The government's failure to acknowledge this key point denudes its legal contentions of any validity.

The District Court's initial determination that the government had not proven the requisite nexus to Ms. Singh's home was based on Ms. Singh's showing that the submissions in the criminal case failed to connect her property to any unlawful activity. As Ms. Singh demonstrated, because the earliest unlawful acts alleged in the charging documents post-dated the

purchase of the condominium by more than a year, the sole proof of taint was the defendant's unsupported admission that Ms. Singh's property had the "requisite nexus" to his criminal acts. Thus, the District Court correctly held that the defendant's "plea admission that the unlawful conspiracy began in 2006 . . . does not, without more, satisfy the Court that the Condominium Unit indeed traces to the Defendant's criminality." A32.

Further, because the consent forfeiture was based on a money judgment, no funds were traced to the defendant's crimes. See Fed. R. Crim. P. 32.2(b)(1)(A) (no tracing required for issuance of money judgment, only a determination of "the amount of money that the defendant will be ordered to pay"). Thus, no facts connected the defendant's crime to Ms. Singh's home.

The government never challenged, appealed from or disputed the correctness of the District Court's finding that the preliminary order of forfeiture had been issued without any proof that Ms. Singh's property was tainted.

That should have ended the discussion regarding Ms. Singh's home. But it did not. Rather than challenge the District Court's finding, the government made an *ex parte* submission in an attempt to remedy their previous error and prove nexus. This unauthorized procedure, resulting in the District Court's nexus determination, took place nearly two years *after* the conclusion of the criminal case against the defendant and long after Ms. Singh had commenced an ancillary proceeding asserting her interest in the property.

The government's avoidance of this fact is part and parcel of its attempt to obscure the time frames of the events below. As just one example, it writes that "Petitioner contends that the district court erred by prohibiting her from challenging in a third-party ancillary proceeding the court's *earlier* determination in its preliminary order of forfeiture that a sufficient nexus existed. . . ." (11). Yet, there was no "earlier" nexus determination.

The government's arguments rely on a misrepresentation of the record. Under section 853 and Rule 32.2, the timing and sequence of events are critical to determining the lawfulness of the criminal forfeiture of third-party property. The forfeiture of Ms. Singh's property was unlawful because it was not preceded by a determination of nexus and is properly subject to challenge on that basis by its legal owner.

4. The invalid forfeiture of Ms. Singh's property did not trigger the relation-back provision: The government claims that Ms. Singh's property was lawfully forfeited because, under the relation-back doctrine, the defendant's criminal conspiracy was alleged to have commenced before the purchase of the condominium so, at the time of the purchase, the defendant had no right to the funds used to pay for the property (14).

This assertion is also incorrect. As the District Court found, there was no proof or determination, prior to the issuance of the preliminary order of forfeiture, that "[Ms. Singh's home] indeed traces to the

Defendant’s criminality.” A32. Therefore, the relation-back provision was never triggered before Ms. Singh filed her ancillary claim.

In a criminal forfeiture case, only the issuance of a preliminary order based on a determination that the property is tainted triggers the relation-back provision, setting in motion the procedures for assertion of third-party rights. Both section 853 and Rule 32.2 require the government to show that property is tainted *before* including it in a preliminary order of forfeiture and triggering third-party proceedings. *See* 21 U.S.C. § 853(n)(2) (“Any person, other than the defendant, asserting a legal interest in *property which has been ordered forfeited* . . . may . . . petition the court for a hearing. . . .”) (emphasis added); Fed. R. Crim. P. 32.2(b)(1)(A) (“the court [before issuing a preliminary order of forfeiture] must determine whether the government has established the requisite nexus between the property and the offense”).

As this Court affirmed just last year, the relation-back provision applies only to tainted property. *Honeycutt v. United States*, 581 U.S. ___, 137 S. Ct. 1626, 1633 (2017) (“Consistent with its text, the Court has previously acknowledged that [the relation-back provision in] § 853(c) applies to tainted property only”) (citing *Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083, 1091 (2016) (“The distinction that we have discussed is thus an important one, not a technicality. It is the difference between what is yours and what is mine”)).

Here, because there was no determination that Ms. Singh's property was tainted prior to the issuance of the preliminary order of forfeiture, the relation-back provision was never triggered.

5. The District Court's unauthorized nexus procedure does not justify the forfeiture of Ms. Singh's property: The government appears to agree with the Third Circuit that, as far as Ms. Singh is concerned, it makes no difference whether the forfeitability of her property is demonstrated during the forfeiture phase of the case or years later during the ancillary phase. Indeed, the government goes beyond the Third Circuit and asserts that there is "no statute or precedent establishing that a district court may not amend a preliminary order of forfeiture prior to entry of a final order of forfeiture" (27).

This statement contravenes Rule 32.2, which expressly limits amendments to a preliminary order of forfeiture to a period "within seven days after oral announcement of the sentence" and only to matters "necessary to correct 'arithmetical, technical, or other clear error.'" Fed. R. Crim. P. 32.2(b)(2)(B), 2009 Advisory Committee Note (quoting Fed. R. Crim. P. 32.2(b)(2)(B)).³

The government also seeks to impose a double standard that is inconsistent with its own position. It contends that forfeitability cannot be "relitigated"

³ A forfeiture order also may be amended after an ancillary proceeding, but then only to reflect third-party rights, not to fix a defective forfeiture during the criminal phase. Fed. R. Crim. P. 32.2(c)(2).

during the ancillary phase (18). Yet, that is precisely what the District Court permitted the government to do. While the government now claims that the Third Circuit did not pass on the legality of the District Court's nexus procedure (27), the circuit in fact endorsed its validity by relying on the findings made in that procedure to justify the unlawful forfeiture of Ms. Singh's property.

The government repeats that error here by citing solely to the evidence adduced in the unauthorized nexus procedure to support its assertion that the forfeiture of Ms. Singh's property was supported by proof (2, 3, 7, 14, 16) (citing Third Circuit Supplemental Appendix containing only material submitted *ex parte* by the government during the ancillary phase).

Although acknowledging that the District Court's nexus procedure was conducted *ex parte* (7), and over Ms. Singh's objection, the government alleges that she "did not challenge those factual findings [of nexus] in the district court or in the court of appeals" (26). The contention that Ms. Singh waived the right to make arguments during a procedure from which she was expressly barred borders on the frivolous.⁴

And yet, Ms. Singh certainly asserted below that the government's proof was insufficient to satisfy its nexus burden. Singh 3d Cir. Reply Br. at 12 & n.2. The

⁴ The government's comment that Ms. Singh received a redacted copy of the government's *ex parte* submission to the District Court (7, 25) does not change the fact that she was barred from contesting it.

government's showing was, as it concedes here, based on a broad claim that the defendant's business was "rotten and malignant," not on tracing specific funds to criminal acts (26). Yet, as this Court has noted, the lower courts "have experience separating tainted assets from untainted assets," *Luis*, 136 S. Ct. at 1095, and there was nothing stopping the government from attempting to make an actual nexus showing below. Nothing, that is, except the absence of evidence.

Indeed, despite being granted leave to effectively present a new criminal case in an *ex parte* proceeding years after the conclusion of the prosecution of the defendant, the government could not trace the funds used to purchase the condominium to the defendant's criminal acts. This is not surprising, given Ms. Singh's earlier showing that the charging documents on which the defendant's plea was based failed to allege even one overt act that took place prior to the purchase of the property.

6. The Third Circuit's opinion conflicts with decisions from other circuits: The government asserts that the Third Circuit's decision "does not conflict with any decision of this Court or another court of appeals" and that as a result, "[f]urther review is not warranted" (11). The government is wrong.

In fact, the Third Circuit is alone in barring a third-party with a "legal interest" in property from challenging its forfeitability. *See* 21 U.S.C. § 853(n)(2).

While the Court has not yet addressed this issue, at least two circuit courts have held that a third-party

who “establishes a legal interest” in property “may bring her challenges to the legality of the forfeiture in the § 853(n) proceeding,” including the factual basis for it. *See Brown v. United States*, 692 F.3d 550, 552 (6th Cir. 2012) (citing *United States v. Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011) (explaining that defendants “may present *all legal arguments* that might bar the government’s forfeiture in [a section 853(n)] proceeding[.]”) (emphasis added by the Sixth Circuit in *Brown*)), *cert. denied*, 586 U.S. 1133 (2013). And, of course, the Fourth and D.C. Circuits would reach the same result. *See United States v. Emor, supra*, at 678; *United States v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1987).

The government avoids the fact that Ms. Singh satisfies the legal interest standard of section 853(n)(2). She is the legal, equitable and beneficial owner of her home, as the District Court found (A25), and it is undisputed that she received the property in a legitimate, arms-length transaction under state law and she is not a straw owner or nominee. Thus, under the foregoing precedent, she “may bring her challenges to the legality of the forfeiture” of her home. *Brown, supra*.⁵

7. The final order of forfeiture of Ms. Singh’s property violates Rule 32.2: The government argues that the express prohibition of Rule 32.2 that no

⁵ In every decision relied upon by the government in an effort to bar Ms. Singh’s Petition, the third-party failed to demonstrate a legal interest in the property under state law and therefore lacked standing under 21 U.S.C. § 853(n)(2). The District Court here acknowledged Ms. Singh’s legal interest in the property. A25.

property shall be forfeited unless the court makes a determination of the defendant's interest in the property does not apply where a third-party files a petition (15 fn.2). But because Ms. Singh's petition was dismissed at the pleading stage, the issue of the defendant's interest in the property was never litigated during the ancillary proceeding. Thus, the Rule expressly required the District Court to make a finding regarding the defendant's interest in Ms. Singh's home prior to issuing a final order of forfeiture with respect to that property. *See* Fed. R. Crim. P. 32.2(b) 2000 Advisory Committee Note (the Rule "postpones the determination of the extent of the defendant's interest until the ancillary proceeding. . . . 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*") (emphasis added).

This requirement reflects the jurisdictional limitation of criminal forfeiture. Because it is *in personam* against the defendant, only the defendant's interest in property can be forfeited, as even the cases relied upon by the government attest. *See, e.g., United States v. Kennedy*, 201 F.3d 1324, 1329 (11th Cir. 2000) (16). The violation of this rule supports Ms. Singh's Petition and this Court's review of the ability of property owners to challenge the forfeitability of their property.



CONCLUSION

For all the reasons set forth above and in Ms. Singh's Petition, the Court should grant the Petition.

Respectfully submitted,

STEVEN L. KESSLER

Counsel of Record

ERIC M. WAGNER

LAW OFFICES OF STEVEN L. KESSLER

100 Park Avenue, 34th Floor

New York, N.Y. 10017-5516

(212) 661-1500

stevenkessler@msn.com

Counsel for Petitioner