
IN THE
SUPREME COURT OF THE UNITED STATES

PRISCILLA DAYDEE VALDEZ

Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

***ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT***

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

JON M. SANDS
Federal Public Defender
District of Arizona

M. EDITH CUNNINGHAM
Assistant Federal Public Defender
407 W. Congress, Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7500
Facsimile: (520) 879-7600
Counsel of Record

Sent by Federal Express on August 28, 2019, for delivery on August 30, 2019.

**APPLICATION REQUESTING AN EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI**

The petitioner, Priscilla Daydee Valdez, by and through her court-appointed counsel, M. Edith Cunningham, Assistant Federal Public Defender, respectfully requests that the Honorable Justice Kagan grant an extension of time to file the petition for writ of certiorari pursuant to Supreme Court Rules 13.5 and 30. Petitioner asks the Court to extend the time for filing the petition for eleven (11) days, from September 12, 2019, to September 23, 2019.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 21, 2018. Appendix A. The Court of Appeals denied Petitioner's petition for rehearing and rehearing en banc on April 29, 2019. Appendix B. The Honorable Justice Kagan extended the time for filing the petition for certiorari from July 28, 2019, to September 12, 2019.

Appendix C.

The extension is requested because of undersigned counsel's conflicting professional obligations, including: the petition for certiorari filed August 2 in No. 19-5487 (Ninth Circuit No. 17-10546); urgent motions regarding supervised release conditions filed August 8, 20, and 28 in CR 2:16-0743-PHX-SPL (D. Ariz.); an urgent motion filed August 26 in Ninth Circuit No. 14-10080 related to an opinion filed in that case on August 19; and work on an opening brief which was due August 29 in Ninth Circuit No. 18-10289 (appeal from a trial conviction with multiple issues). (Counsel spent the majority of August working on the brief due August 29, but, because of unanticipated developments in other cases and the impending jurisdictional deadline for the certiorari petition in this case, the Ninth Circuit recently extended the due date of that brief until October.) Counsel also must consult regularly with trial attorneys in the office about

legal issues and supervise two law clerks, who are starting their externship on August 30.

Ms. Valdez's petition for certiorari involves a complex criminal forfeiture issue addressed in a published Ninth Circuit opinion. The additional time is needed to ensure that counsel has adequate time to complete the necessary research and to draft and revise the petition. Late last week, counsel learned that a petition for certiorari was recently filed in *Peithman v. United States*, No. 19-16. The question presented in the *Peithman* petition appears to be related to the question to be presented in Ms. Valdez's petition. Both cases involve 28 U.S.C. § 2461(c), a "bridging" statute that allows for imposition of criminal forfeiture when civil forfeiture is authorized by the statute of conviction. Additional time is therefore also needed to evaluate the potential relationship between the circuit split at issue in *Peithman* and Ms. Valdez's case.

Petitioner therefore respectfully asks the Honorable Justice Kagan to extend the time for filing the petition for eleven (11) days, from September 12, 2019, to September 23, 2019.

RESPECTFULLY SUBMITTED this 28th day of August 2019.

JON M. SANDS
Federal Public Defender
District of Arizona

s/M. Edith Cunningham
*M. Edith Cunningham
Assistant Federal Public Defender
407 W. Congress Street, Suite 501
Tucson, Arizona 85701
Telephone: (520) 879-7500
Facsimile: (520) 879-7600

**Counsel of Record*

APPENDIX

A

911 F.3d 960

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Priscilla Daydee VALDEZ, aka Priscilla
D. Valdez, Defendant-Appellant.

No. 17-10446

|
Argued and Submitted November
14, 2018 San Francisco, California

|
Filed December 21, 2018

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the District of Arizona, D.C. No. 4:16-cr-01667-RCC-DTF-2, [Raner C. Collins, J.](#), to attempted smuggling of ammunition from the United States into Mexico, and she was ordered to forfeit substitute property by paying a personal money judgment for half the value of the ammunition. Defendant appealed.

Holdings: The Court of Appeals, [Graber](#), Circuit Judge, held that:

the government properly sought criminal forfeiture of the ammunition defendant had attempted to smuggle;

the government was authorized to seek the forfeiture of substitute property; and

district court properly ordered defendant to forfeit substitute property.

Affirmed.

Attorneys and Law Firms

*[962 M. Edith Cunningham](#) (argued), Assistant Federal Public Defender; [Jon M. Sands](#), Federal Public Defender; Office of the Federal Public Defender, Tucson, Arizona; for Defendant-Appellant.

[Robert Lally Miskell](#) (argued), Chief, Appellate Section; Elizabeth A. Strange, First Assistant United States Attorney; United States Attorney's Office, Tucson, Arizona; for Plaintiff-Appellee.

Appeal from the United States District Court for the District of Arizona, [Raner C. Collins](#), District Judge, Presiding, D.C. No. 4:16-cr-01667-RCC-DTF-2

Before: [Susan P. Graber](#) and [Mark J. Bennett](#), Circuit Judges, and [Leslie E. Kobayashi](#),* District Judge.

* The Honorable Leslie E. Kobayashi, United States District Judge for the District of Hawaii, sitting by designation.

OPINION

[GRABER](#), Circuit Judge:

Defendant Priscilla Daydee Valdez pleaded guilty to attempted smuggling of ammunition from the United States into Mexico. The ammunition is subject to forfeiture under [18 U.S.C. § 924\(d\)](#) but, because Defendant had caused the ammunition to be transferred to a third party, the government instead sought forfeiture of substitute property under [21 U.S.C. § 853\(p\)](#) and [28 U.S.C. § 2461\(c\)](#). The district court agreed that the criminal laws authorize forfeiture of substitute property in these circumstances, and the court ordered Defendant and a co-defendant each to pay a personal money judgment for half the value of the ammunition. Defendant timely appeals. Reviewing de novo the interpretation of the federal forfeiture statutes, [United States v. 25445 via Dona Christa](#), [138 F.3d 403, 407 \(9th Cir. 1998\)](#), amended by [170 F.3d 1161 \(9th Cir. 1999\)](#), we conclude that the district court properly ordered forfeiture of substitute property. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Defendant pleaded guilty, without a plea agreement, to one count of knowingly attempting to export 10,000 rounds of ammunition, in violation of [18 U.S.C. § 554\(a\)](#). She stipulated to the following facts:

Prior to March 3, 2016, an acquaintance asked Priscilla Valdez if she was willing to purchase ammunition and drive it to Nogales, Arizona. Ms. Valdez did not agree to commit the offense, but gave this acquaintance's contact information to an individual she knew—Anhelika Ruiz.

*963 Shortly before March 3, 2016, Ms. Ruiz asked Ms. Valdez to help and accompany her regarding the ammunition purchase. Ms. Valdez agreed. Prior to the offense, Ms. Valdez picked up a quantity of cash from the acquaintance, for the ammunition purchase.

On or about March 3, 2016, Ms. Valdez and Ms. Ruiz met in Tucson. Ms. Valdez gave Ms. Ruiz the money she had been given. Ms. Ruiz rented a car, in her own name.

They then drove to a gun store in Phoenix, Arizona. Ms. Ruiz purchased 10,000 rounds of 7.62 x 39mm ammunition at the gun store, using the money that Ms. Valdez had provided her. The ammunition was loaded into the rented car. Ms. Ruiz and Ms. Valdez then drove south, to Nogales, Arizona.

They received instructions to drive the car, with ammunition inside, to a specific business in Nogales, Arizona. They were instructed to give the keys of the rented car to a person who worked at the front desk of the business.

Later, Ms. Valdez and Ms. Ruiz were informed when they could pick up the car. When they picked up the car, the ammunition had been unloaded by unknown individuals.

Ms. Valdez was aware that her acquaintance and the individuals that picked up the ammunition intended to try to move it from the U.S. to Mexico. Ms. Valdez, by assisting in the commission of the offense, knowingly attempted to export ammunition. Ms. Valdez does not have a license to export ammunition.

The district court accepted the factual stipulation and found Defendant guilty. The government was unsuccessful in its efforts to recover the ammunition.

The indictment included a forfeiture allegation, seeking forfeiture of the ammunition or, if the requirements of 21 U.S.C. § 853(p) were met, substitute property

in lieu of the ammunition. After the court accepted Defendant's guilty plea, the government submitted a receipt for the ammunition from the gun store, showing that the ammunition cost \$2,470. The government sought a money judgment against Defendant for half the cost of the ammunition. The district court rejected Defendant's objections and entered a final order of forfeiture against Defendant for \$1,235, in the form of a money judgment.¹ The court sentenced Defendant to five years of probation. Defendant timely appeals, challenging only the forfeiture order.

¹ The district court separately ordered co-defendant Ruiz to forfeit the same amount. Ruiz did not appeal.

DISCUSSION

This case involves the interaction of three disparate statutory provisions. Title 18 U.S.C. § 924(d)(1) authorizes the civil forfeiture of firearms and ammunition. Title 28 U.S.C. § 2461(c) permits the use of the criminal forfeiture procedures of 21 U.S.C. § 853 whenever civil forfeiture is available and a defendant is found guilty of a crime. Finally, 21 U.S.C. § 853(p) allows the forfeiture of substitute property in certain situations, among them the situation in which the defendant's own actions made the forfeitable property unavailable. Below, we conclude that (A) the government properly sought criminal forfeiture; (B) 28 U.S.C. § 2461(c) authorizes the forfeiture of substitute property; and (C) the district court properly ordered forfeiture of substitute property.

A. The government properly sought criminal forfeiture.
We begin with the civil forfeiture provision found in 18 U.S.C. § 924(d)(1): *964 “Any firearm or ammunition involved in or used in [certain specified crimes] or any violation of any other criminal law of the United States ... shall be subject to seizure and forfeiture....” Defendant does not contest that the ammunition was “involved in” her crime, nor does she contest that the ammunition itself would have been subject to civil forfeiture.

But the government did not bring a civil forfeiture action. Instead, invoking 28 U.S.C. § 2461(c), the government sought criminal forfeiture of the ammunition or, in the alternative, forfeiture of substitute property. Section 2461(c) “permits the government to seek *criminal* forfeiture whenever civil forfeiture is available and the

defendant is found guilty of the offense.” *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011) (some emphasis omitted). That statute provides:

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 to [sic] 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.

28 U.S.C. § 2461(c).

Section 2461(c) authorizes criminal forfeiture here because Defendant pleaded guilty to a federal crime and civil forfeiture was available. In the words of the statute, Defendant was “charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized,” and Defendant was “convicted of the offense giving rise to the forfeiture.” *Id.* We reject Defendant’s contention that § 2461(c) does not apply to civil forfeitures under § 924(d) because § 924(d) does not use the word “property.” Section 924(d) indisputably authorizes civil forfeiture of firearms and ammunition, which simply are specific types of property. Section 924(d) authorizes the civil forfeiture of property, and Defendant pleaded guilty. In these circumstances, § 2461(c) allows the government to invoke criminal forfeiture.

B. Section 2461(c) authorizes the forfeiture of substitute property.

“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.” 28 U.S.C. § 2461(c). We therefore examine, in some detail, the provisions of 21 U.S.C. § 853.

By its terms—both substantive and procedural—§ 853 authorizes the forfeiture of specified categories of property for persons convicted of certain federal drug crimes. Subsection 853(a) describes the categories of “[p]roperty subject to criminal forfeiture”; § 853(b) defines the term “property”; and the remaining subsections generally describe applicable procedures for the forfeiture of the property described in subsection (a). *See, e.g., id.* § 853(c) (“Third party transfers”); § 853(e) (“Protective orders”); § 853(m) (“Depositions”).

*965 Relevant here, § 853(p) provides a procedure for the forfeiture of substitute property in certain circumstances:

Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall

order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1) (C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

21 U.S.C. § 853(p). When a defendant is convicted of one of the drug crimes listed in § 853(a), the operation of § 853 is straightforward: Subsection 853(a) authorizes the forfeiture of specified property; or, if the forfeitable property is unavailable or diminished in value due to the defendant's actions, then § 853(p) authorizes the forfeiture of substitute property. See generally *Honeycutt v. United States*, — U.S. —, 137 S.Ct. 1626, 1633–35, 198 L.Ed.2d 73 (2017) (describing the operation of § 853 in drug cases).

We conclude that § 853(p) is one of the “procedures” incorporated by reference in § 2461(c). Section 853(p) describes a process for ordering the forfeiture of substitute property whenever the property is unavailable or diminished in value due to the defendant's own acts or omissions. Indeed, all courts to have described § 853(p)—including the Supreme Court and this court—have referred to it as a “procedure.” See *Honeycutt*, 137 S.Ct. at 1634 (“Congress provided just one way for the Government to recoup substitute property when the tainted property itself is unavailable—the *procedures* outlined in § 853(p).” (emphasis added)); *United States v. Lo*, 839 F.3d 777, 790 (9th Cir. 2016) (“Section 2461[c] also references 21 U.S.C. § 853, and states that the procedures in that statute ‘apply to all stages of a criminal forfeiture proceeding’ except for an exception that is inapplicable here. Section 853(p) provides a *procedure* for the forfeiture of substitute property....” (emphasis added)). Other circuits have held squarely that § 853(p) is a “procedure” for purposes of § 2461(c). See *United States v. Gregoire*, 638 F.3d 962, 971 (8th Cir. 2011) (“With an exception not relevant here, the procedures set forth in 21 U.S.C. § 853 ‘apply to all stages of a criminal forfeiture proceeding.’ 28 U.S.C. § 2461(c). Therefore, forfeiture of ‘substitute property’ is authorized in the circumstances described in 21 U.S.C. § 853(p).”); *United States v. Alamoudi*, 452 F.3d

310, 313–14 (4th Cir. 2006) (“[Section] 2461(c) instructs the court to follow the procedures set forth in [21 U.S.C. § 853]. Pursuant to § 853(p), a court ‘shall order the forfeiture of any other property of the defendant’ if it finds *966 that [the requirements of § 853(p)(1) are met].” (emphases omitted)); see also *United States v. Parrett*, 530 F.3d 422, 429–31, 429 n.4 (6th Cir. 2008) (similarly appearing to apply § 853(p) through operation of § 2461(c)).

We acknowledge that § 2461(c) authorizes the court to order forfeiture of “the property.” But by incorporating *all* of the procedures of § 853 except § 853(d), Congress intended to permit forfeiture of substitute property under § 853(p) whenever the defendant's own acts or omissions caused “the property” to be unavailable or diminished in value. That is, when the defendant's own actions thwart the ability of the court meaningfully to order forfeiture of “the property,” § 853(p) authorizes the forfeiture of substitute property. Had Congress intended to restrict § 2461(c)'s scope to forfeiture of “the property” only, and to preclude forfeiture of substitute property, it could have excepted § 853(p) in addition to § 853(d). See *United States v. Johnson*, 529 U.S. 53, 58, 120 S.Ct. 1114, 146 L.Ed.2d 39 (2000) (“When Congress provides exceptions in a statute ... [t]he proper inference ... is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.”); *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (“The doctrine of *expressio unius est exclusio alterius* as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.” (internal quotation marks omitted)).

Similarly, it is irrelevant to our analysis that a different forfeiture statute, 18 U.S.C. § 982(b)(1), provides that, for certain crimes, the criminal forfeiture “shall be governed by the *provisions* of” 21 U.S.C. § 853, rather than by the *procedures* of § 853. (Emphasis added.) Whatever distinction might exist between “provisions” of § 853 and “procedures” of § 853 in these two disparate statutes, that distinction is immaterial here because § 853(p) is a procedure within § 853. We join our sister circuits in holding that 28 U.S.C. § 2461(c) incorporates the substitute property provision in 21 U.S.C. § 853(p).

C. The district court properly ordered forfeiture of substitute property.

Section 853(p) authorizes forfeiture of substitute property when, “as a result of any act or omission of the defendant,” *id.* § 853(p)(1), the forfeitable property “has been transferred ... to ... a third party,” *id.* § 853(p)(1)(B). Here, Defendant received money from her acquaintance, gave it to Ruiz for the purpose of purchasing ammunition, and accompanied Ruiz on her journey. Defendant and Ruiz then left the ammunition in the car and provided the car keys to a third party, knowing that someone would remove the ammunition from the car and attempt to transport it into Mexico. Those acts and omissions clearly caused the ammunition to be transferred to a third party. *Id.* Accordingly, the district court properly ordered Defendant to forfeit substitute property.

Defendant objects to that analysis on the ground that it omits a critical portion of the text of § 853(p)(1). In particular, Defendant quotes the following passage from § 853(p)(1):

Paragraph (2) of this subsection [which authorizes the forfeiture of substitute property] shall apply, *if any property described in subsection (a), as a result of any act or omission of the defendant ... (B) has been transferred or sold to, or deposited with, a third party[.]*

(Emphasis added.) Defendant asserts that the ammunition here does not meet the *967 definition of forfeitable property in § 853(a) and that, accordingly, the requirements of § 853(p)(1) are not met.

Defendant misunderstands how the three relevant statutes work together. Section 924(d) describes the forfeitable property, and § 2461(c) authorizes the use of the procedures of § 853 *with respect to the forfeitable property.*

In a case governed by § 2461(c), Congress intended courts to apply § 853(p) and the other procedures of § 853 to the forfeitable property as defined elsewhere. Subsection 853(a) is plainly a substantive, not procedural, provision of § 853, because it describes the forfeitable property for certain drug crimes. As a substantive provision, it is not incorporated by § 2461(c). Accordingly, in a case governed by § 2461(c), courts must read the references in § 853’s procedural provisions to “property described in subsection (a)” as referring to the forfeitable property as defined elsewhere. *See United States v. Bermudez*, 413 F.3d 304, 305–06 (2d Cir. 2005) (per curiam) (holding that § 853(p) applies with respect to forfeitable property as defined in § 982(a)(1) rather than § 853(a)).

We reject Defendant’s argument that our interpretation is inequitable. In the course of her crime, Defendant caused ammunition to be transferred to a third party. Congress has determined that, in this circumstance, the government may seek the forfeiture of substitute property. Defendant complains that, had she been arrested *before* she caused the ammunition to be transferred, the government would have recovered the ammunition and would have had no ability to seek forfeiture of substitute property. She contends that Congress could not have intended this unfair result, which treats intermediary smugglers differently depending on when they are arrested. We see no inequity in treating persons differently depending on whether they cause contraband to remain in the hands of criminals. For those who cause that additional harm, Congress permissibly has concluded that they must forfeit substitute property.

AFFIRMED.

All Citations

911 F.3d 960, 19 Cal. Daily Op. Serv. 5, 2018 Daily Journal D.A.R. 12,108

APPENDIX

B

FILED

UNITED STATES COURT OF APPEALS

APR 29 2019

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PRISCILLA DAYDEE VALDEZ, aka
Priscilla D Valdez,

Defendant-Appellant.

No. 17-10446

D.C. No.

4:16-cr-01667-RCC-DTF-2

District of Arizona,

Tucson

ORDER

Before: GRABER and BENNETT, Circuit Judges, and KOBAYASHI,* District Judge.

The panel has voted to deny Appellant's petition for panel rehearing. Judges Graber and Bennett have voted to deny Appellant's petition for rehearing en banc, and Judge Kobayashi has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc is DENIED.

* The Honorable Leslie E. Kobayashi, United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX

C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

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

JUL 08 2019

Scott S. Harris
FILED Clerk of the Court
DOCKETED 19-3011
DATE INITIAL

July 1, 2019

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Priscilla Daydee Valdez
v. United States
Application No. 19A13
(Your No. 17-10446)

Dear Clerk:

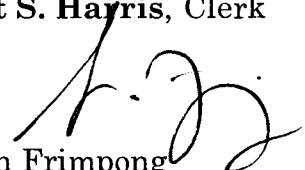
The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on July 1, 2019, extended the time to and including September 12, 2019.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by


Susan Frimpong
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Ms. Mary Edith Cunningham
Federal Public Defender's Office
407 W. Congress Street
Suite 501
Tucson, AZ 85701

Mr. Noel J. Francisco
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526