No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Criminal forfeiture statutes must be strictly construed in light of the "background principles" of forfeiture. *Honeycutt v. United States*, 137 S. Ct. 1626, 1634-35 & n.2 (2017).

A penalty provision for federal firearms and ammunition offenses, 18 U.S.C. § 924(d), authorizes civil forfeiture of "only those firearms or quantities of ammunition" involved in a firearm/ammunition exportation offense.

A bridging statute, 28 U.S.C. § 2461(c), provides that, if "civil . . . forfeiture of property is authorized" by a criminal statute and 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 defendant's sentence, applying "the procedures" of 21 U.S.C. § 853, with the exception of § 853(d).

Under 21 U.S.C. § 853(p), a subsection of a criminal forfeiture statute, the court shall order forfeiture of "any other property of the defendant" if "any property described in" § 853(a)—namely, "proceeds" the "person obtained" as a result of the violation or "any of the person's property" used to commit or facilitate the violation—is rendered unavailable by the defendant.

In a split with the Third and Fourth Circuits, the Ninth Circuit held that 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p) allow the forfeiture of substitute assets of a defendant even when the items subject to civil forfeiture under the authorizing statute are not encompassed by § 853(a).

The questions presented are:

(1) May a defendant be required to forfeit substitute property in lieu of the firearms and ammunition subject to forfeiture under 18 U.S.C. § 924(d)?

(2) If the substitute-asset provision of 21 U.S.C. § 853(p) is applied to a forfeiture imposed under any statute via 28 U.S.C. § 2461, must the limitations of 21 U.S.C. § 853(a)—which are explicitly incorporated by § 853(p)—be applied as well? In other words, if substitute-asset forfeiture is imposed via 28 U.S.C. § 2461(c), is it limited to situations in which a defendant transfers or conceals *her own* property?

PARTIES AND PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is not a corporation. There are no proceedings that are directly related to the case in this Court.

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INTRODUCTION

The district court ordered Ms. Valdez, who is indigent, to forfeit her own money as a substitute for unlawfully exported ammunition that never belonged to her, even though the authorizing statute, 18 U.S.C. § 924(d), explicitly limits forfeiture to "only those firearms or quantities of ammunition" involved in the offense. The Ninth Circuit affirmed in a published opinion even though 21 U.S.C. § 853(p)—the only substitute-asset forfeiture provision that could apply here via the bridging statute, 28 U.S.C § 2461(c)—specifies that substitute-asset forfeiture is limited to situations in which the defendant makes her *own* property unavailable for forfeiture.

Title 18 U.S.C. § 924(d) authorizes civil, *in rem*, forfeiture of firearms and ammunition involved in certain offenses. This limited authorization is consistent with the central objective of civil forfeiture: to remove tainted property from the public domain.

Title 21 U.S.C. § 853, on the other hand, is part of a criminal forfeiture statute that requires persons convicted of certain drug-trafficking offenses to forfeit any of their own property used to commit the offense or any proceeds personally obtained as a result of the offense. § 853(a)(1)-(2). This requirement and its limitations are consistent with the central objective of criminal forfeiture: to deter crime and to punish defendants by depriving them of both the tools they use to commit crimes and the fruits of their crimes. Section 853(p), which allows for criminal forfeiture of substitute property under certain circumstances, explicitly

incorporates the limitations of § 853(a) and reinforces this limitation by indicating that "any *other* property of the defendant" is subject to substitute-asset forfeiture. § 853(p) (emphasis added).

A bridging statute, 28 U.S.C. § 2461(c), allows for criminal forfeiture of "property" as part of a criminal sentence if a person is convicted of a crime for which the civil forfeiture of "property" is authorized, and it specifies that the "procedures" of 21 U.S.C. § 853 (except § 853(d)) apply to the criminal forfeiture proceedings.

If § 853(p) is applied via the bridging statute to allow for substitute-asset forfeiture, then the limitations set forth in § 853(a) must be applied as well under rules of statutory construction. Applying these limitations when criminal forfeiture is imposed via the bridging statute is also consistent with the relevant legislative history and with the background principles of forfeiture, which—as this Court emphasized in *Honeycutt v. United States*, 137 S. Ct. 1626, 1634-35 (2017)—should be considered when interpreting forfeiture statutes.

The Ninth Circuit, however, disregarded key statutory language and did not address either the background principles of forfeiture or the relevant legislative history. The penalty the Ninth Circuit affirmed combines the harshest aspects of civil and criminal forfeiture without incorporating the limitations typically inherent in each mechanism. The resulting rule—which applies to *all criminal offenses* for which the civil forfeiture of property is authorized and which, by virtue of the Ninth Circuit's size, governs roughly one-fifth of the nation's population—creates disharmony in the statutory scheme, mandates disparate punishment for similarly

culpable defendants, and raises serious constitutional concerns.

It also conflicts with this Court's reasoning in *Honeycutt* and creates a split with circuits that explicitly recognize that the limitations of 21 U.S.C. § 853(a) apply to criminal forfeiture imposed via 28 U.S.C. § 2461(c). *United States v. Alamoudi*, 452 F.3d 310, 313-14 (4th Cir. 2006); *United States v. Vampire Nation*, 451 F.3d 189, 201-02 (3d Cir. 2006). The questions presented here are also related to the circuit split regarding whether joint and several liability applies under 18 U.S.C. § 981, a civil forfeiture statute encompassed by the bridging statute. *See* Petition for a Writ of Certiorari, *Peithman v. United States*, Sup. Ct. No. 19-16. For all of these reasons, this Court should grant the writ.

OPINION BELOW

The Ninth Circuit's opinion is reported at *United States v. Valdez*, 911 F.3d 960 (9th Cir. 2018). App. A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 21, 2018. App. A. The Court of Appeals denied Ms. Valdez's petition for rehearing and rehearing en banc on April 29, 2019. App. B. The Honorable Justice Kagan extended the deadline for filing the petition for a writ of certiorari to September 23, 2019. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Title 18 U.S.C. § 924(d), provides, in relevant part:

> (d)(1) Any firearm or ammunition involved in or used in . . . any violation of any other criminal law of the United States . . . shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter . . . .
>
> (2) . . .
>
> (C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States . . . shall be subject to seizure, forfeiture, and disposition.
>
> (3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—
>
> . . .
>
> (F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

Title 28 U.S.C. § 2461(c) provides:

> (c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

Under 21 U.S.C. §§ 853(a) & (b), the following property is subject to forfeiture:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter [trafficking of controlled substances and related crimes] punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

21 U.S.C. § 853(p) provides for the forfeiture of substitute property under the following conditions:

(p) 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.

These statutes are provided in full in Appendix D.

STATEMENT OF THE CASE

The opening brief includes a detailed recitation of the facts, with record citations. *See* Opening Brief of Appellant, *United States v. Valdez*, Ninth Cir. No. 17-10446, 2018 WL 1165989, at *2-*5; *see also* DktEntry 8 in *United States v. Valdez*, Ninth Cir. No. 17-10446, at 2-5. The facts are also recounted in the Ninth Circuit's opinion. *Valdez*, 911 F.3d at 962-63**.**

An acquaintance of Ms. Valdez in Mexico asked if she was willing to purchase ammunition and drive it to Nogales, Arizona, which is located on the U.S./Mexico

border. She declined, but suggested that the acquaintance contact a person named Ms. Ruiz, who later agreed to purchase the ammunition.

After Ms. Ruiz so agreed, the acquaintance provided Ms. Valdez $3,000 to give to Ms. Ruiz to make the purchase. Ms. Valdez met Ms. Ruiz in Tucson and gave her all of the money, which Ms. Ruiz deposited in her bank account. Ms. Ruiz rented a car in her own name. At Ms. Ruiz's request, Ms. Valdez accompanied Ms. Ruiz to a store in Phoenix, where Ms. Ruiz purchased the ammunition. Ms. Valdez then rode with Ms. Ruiz to Nogales, Arizona.

As instructed by Ms. Valdez's acquaintance in Mexico, the young women gave the rental car keys to an employee at a designated business in Nogales. When they picked up the car later that day, it no longer contained the ammunition. Ms. Valdez's acquaintance paid Ms. Ruiz about $300 for her involvement, but Ms. Valdez declined his offer to pay for her assistance.

Law enforcement agents investigated after a report of a suspicious purchase at the gun store in Phoenix. Ms. Valdez and Ms. Ruiz were later charged with attempting to export ammunition in violation of 18 U.S.C. § 554(a). Ms. Valdez pleaded guilty to the indictment, which included notice of the government's intention to seek forfeiture of the ammunition involved in the offense pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).

Ms. Valdez objected to the government's preliminary order of forfeiture, which sought to make her jointly and severally liable with codefendant Ruiz for a monetary judgment reflecting the value of the ammunition because the ammunition

itself was unavailable. Ms. Valdez maintained that it was improper to order forfeiture of substitute property (i.e., United States currency via a monetary judgment) under 21 U.S.C. § 853(p) in place of the ammunition. The district court overruled her objection and, as part of the judgment, ordered Ms. Valdez to forfeit $1,235 of United States currency in the form of a personal monetary judgment, which was half of the total value of the ammunition involved. The district court entered the same forfeiture order as part of Ms. Ruiz's judgment. Both young women were placed on probation.

Ms. Valdez appealed the forfeiture order, and the Ninth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. Rules of statutory construction support interpretation of the statutory scheme to preclude forfeiture of substitute property from the defendant in lieu of ammunition involved in an offense if the ammunition was not the defendant's property.

A. Forfeiting substitute property from the defendant when the tainted property was not the defendant's property is inconsistent with the purpose and mechanisms of both civil and criminal forfeiture as well as the legislative history of the relevant statutes.

"Civil and criminal forfeiture laws serve distinct purposes" and therefore operate differently. Brief of Amicus Curiae the National Association of Criminal Defense Lawyers in Support of Appellant's Petition for Rehearing and Rehearing En Banc, DktEntry 46 in *United States v. Valdez*, Ninth Cir. No. 17-10446, at 3 ("NACDL Amicus Brief"). *See also id.* at 3-6. The forfeiture order affirmed by the Ninth Circuit in this case—requiring an indigent defendant to forfeit her own money as a substitute for ammunition that never belonged to her—conflicts with

the principles underlying both types of forfeiture.

Civil forfeiture "operates *in rem* against the property itself on the theory that the property itself is guilty of wrongdoing." *United States v. Nava*, 404 F.3d 1119, 1123 (9th Cir. 2005). *Accord Honeycutt*, 137 S. Ct. at 1634. It is "a remedial civil sanction" that allows the government to confiscate contraband and the instrumentalities of crime. *United States v. Ursery*, 518 U.S. 267, 278 (1996); *United States v. Bajakajian*, 524 U.S. 321, 333 (1998). For example, this Court held that 18 U.S.C. § 924(d), which contains the civil forfeiture provision at issue in this case, was enacted for the remedial purpose of "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers" as part of an effort to curtail "the widespread traffic in firearms" and, in particular, "their general availability to those whose possession thereof was contrary to the public interest." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984). Ownership of property is therefore irrelevant to the concept of civil forfeiture, and civil forfeiture statutes therefore typically are drafted without regard to who owns the forfeitable property. *See*, *e.g.*, 18 U.S.C. § 981(a)(1) ("The following property is subject to forfeiture to the United States"); 18 U.S.C. § 924(d) ("Any firearm or ammunition involved in or used in [certain offenses] . . . shall be subject to seizure and forfeiture").

"Criminal forfeiture provisions," in contrast, "operate *in personam* against the assets of the defendant and serve as part of the penalty for the defendant's conviction." *Nava*, 404 F.3d at 1124; *see also Bajakajian*, 524 U.S. at 332. Thus criminal forfeiture only permits the forfeiture of the defendant's interest in

property. *Nava*, 404 F.3d at 1124. "If criminal forfeiture reached beyond that portion of the property that was owned by a defendant, such a form of forfeiture would be *in rem*, against the property, rather than *in personam*, against the defendant." *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001), *superseded on other grounds as stated in United States v. Marion*, 562 F.3d 1330, 1340-41 (11th Cir. 2009); *see also* Fed. R. Crim. P. 32.2, advisory comm. notes (2000) ("criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited").

Criminal forfeiture was common in England at the time of the founding, but Congress "rejected" it throughout most of our nation's history until it was adopted "to combat organized crime and major drug trafficking." *Bajakajian*, 524 U.S. at 332 & n.7. These drug-trafficking and racketeering forfeiture statutes were enacted as part of the Comprehensive Forfeiture Act of 1984 and the 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See* Pub. L. No. 98-473, Chapter III, §§ 302 & 303, 98 Stat. 1837 (1984).[1] *See* also 21 U.S.C. §§ 853(a) & (p) (drug-trafficking); 18 U.S.C. §§ 1963(a) & (m) (racketeering).[2] Congress has explained that criminal forfeiture laws "enforce the age-old adage that 'crime does not pay,'" by "depriv[ing] criminals of both the tools they use to commit crime and

[1] Some criminal forfeiture provisions were enacted as part of the Organized Crime Control Act of 1970, 18 U.S.C. § 1963 (Pub. L. 91-452, 84 Stat. 922 (1970)) and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a) (Pub. L. 91-513, § 408, 84 Stat. 1236 (1970)), but the provisions were expanded in the 1984 acts.

[2] The substitution of assets provisions were originally contained in subsection d of both the drug-trafficking and racketeering statutes. *See* Pub. L. No. 98-473, Chapter III, §§ 302 & 303, 98 Stat. 1837 (1984).

the fruits–the 'proceeds'–of their crime." H.R. REP. NO. 105-358(I), at 35 (1997).

Consistent with this goal, the seminal laws enacted by Congress as criminal forfeiture statutes—21 U.S.C. §§ 853(a) (drug-trafficking) and 18 U.S.C. §§ 1963(a) (racketeering)—allow forfeiture of only *the defendant's* property used in or involved in the offense or any proceeds *the defendant* obtained as a result of the offense. These criminal forfeiture statutes likewise allow forfeiture of substitute property from the defendant when the defendant has transferred or concealed *his own* property before the government is able to seize it. *See* 21 U.S.C. §§ 853(p); 18 U.S.C. §§ 1963(m). The legislative history makes clear that Congress intended to use substitute-asset forfeiture only in cases in which the defendant had concealed or transferred his own property or assets. *See* S. REP. NO. 98-225, at 194 (1983) ("Should a defendant succeed in transferring or concealing *his* forfeitable assets prior to conviction," changes were necessary to "allow forfeiture of other assets of the defendant to satisfy the forfeiture judgment") (emphasis added); at 196 (changes were necessary "both to preserve the availability of *a defendant's* assets for criminal forfeiture and, in those cases in which he does transfer, deplete, or conceal *his* property, to assure that he cannot as a result avoid the economic impact of forfeiture") (emphasis added).

The requirement in criminal forfeiture statutes that *the defendant forfeit* certain property to the United States also naturally requires that the defendant own any such property. *See* 18 U.S.C. § 982(a), 18 U.S.C. § 1963(a), 21 U.S.C. § 853(a). The very meaning of the term "'[p]roperty . . . signifies, in a strict sense,

one's exclusive right of ownership of a thing.' In their strict meanings, therefore, the right of ownership and property are synonymous, each term signifying a bundle or collection of rights." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019) (citation omitted). And "forfeit" means "to lose or lose the right to especially by some error, offense, or crime." MERRIAM-WEBSTER DICTIONARY (2019) (definition of verb form).[3] *See also Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "forfeiture" as "1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty"). If something does not belong to the defendant, then it is difficult to fathom how the defendant could "lose" it via forfeiture. If criminal forfeiture cannot be imposed on a defendant in the first place because the forfeitable property does not belong to the defendant, then substitute-asset forfeiture should not apply either.

Substitute-asset forfeiture, therefore, makes sense when a defendant makes *her own* property unavailable to avoid a forfeiture penalty. But requiring an intermediary like Ms. Valdez to forfeit her own property in lieu of contraband purchased at the behest of a criminal mastermind, with funds supplied by that mastermind, is inconsistent with the principles of both *in rem* and *in personam* forfeiture.

Years after the enactment of the drug-trafficking and racketeering criminal forfeiture statutes, Congress enacted the bridging statute at issue in this case, 28

[3] available at https://www.merriam-webster.com/dictionary/forfeit.

U.S.C. § 2461.[4] This bridging statute allows the imposition of criminal forfeiture—using "the procedures" of one of those seminal criminal forfeiture statutes, 21 U.S.C. § 853—if a defendant is convicted of an offense for which civil forfeiture of "property" is authorized. Neither the text of 28 U.S.C. § 2461(c) nor its legislative history includes any indication that Congress intended to treat defendants convicted of the many offenses encompassed by this bridging statute more harshly than defendants in organized crime and drug cases. To the contrary, the legislative history indicates that, in enacting 28 U.S.C. § 2461(c), Congress merely sought to streamline forfeiture proceedings, as well as to *enhance* due process protections for criminal defendants in those forfeiture proceedings. H.R. REP. NO. 105-358(I), at 35 (noting that previously government had to "file a parallel civil forfeiture case" and that criminal forfeiture provides "heightened due process protection"). This same Congressional report also noted, in discussing proposed amendments to other forfeiture statutes,[5] that criminal forfeiture laws are designed to "deprive" criminals of both the tools used to commit crimes and the proceeds of their crimes. *Id.*

But if property does not belong to the defendant in the first place, it is impossible to "deprive" her of it. Nothing in the legislative history indicates that, by enacting the bridging statute, Congress sought to expand substitute-asset forfeiture

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[4] *See* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 16, 114 Stat. 202 (2000); USA Patriot Improvement and Reauthorization Act, Pub. L. No. 109-177, § 410, 120 Stat. 192 (2006).

[5] This discussion addressed proposed amendments to the definition of proceeds in 18 U.S.C. §§ 981 & 982.

beyond circumstances included in 21 U.S.C. §§ 853(a) and (p)(1), which restrict such forfeiture to situations in which the defendant has transferred or concealed her *own* property. Yet that is precisely what the Ninth Circuit—which disregarded both the legislative history and the background principles of forfeiture—did in this case.

B. The Ninth Circuit's interpretation conflicts with the statutory text and the requirement to construe forfeiture statutes strictly against the government.

"[F]orfeiture statutes are strictly construed against the government." *United States v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1169 (9th Cir. 2008). *See also United States v. One 1936 Model Ford V-8 De Luxe Coach,* 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."). Because criminal forfeiture is a form of punishment for a criminal offense, any ambiguity in criminal forfeiture statutes must be resolved in favor of the defendant under the rule of lenity. *United States v. Cano-Flores*, 796 F.3d 83, 93-94 (D.C. Cir. 2015) (citing *United States v. Batchelder*, 442 U.S. 114, 121 (1979)). *See also United States v. Davis,* 139 S. Ct. 2319, 2333 (2019*)* ("the rule of lenity[] teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor"). This Court recently emphasized the importance of strictly construing criminal forfeiture statutes in *Honeycutt*. 137 S. Ct. at 1634-35 & n.2 (holding that strict construction of 21 U.S.C. § 853(a) precluded joint and several liability). The Ninth Circuit, however, did not even acknowledge these principles and liberally construed 28 U.S.C. § 2461(c) and 21 U.S.C. § 853 to allow the forfeiture of substitute property via § 853(p), even though the property subject

to criminal forfeiture under the statutory scheme was not Ms. Valdez's property. *Valdez*, 911 F.3d at 962-67.

If strictly construed, the bridging statute, 28 U.S.C. § 2461(c), does not even apply to civil forfeitures authorized by 18 U.S.C. § 924(d). The bridging statute applies only when a defendant commits a violation for which the civil forfeiture of "property" is authorized. Section 924(d), however, does not use the term "property." Rather, it explicitly limits forfeiture in this specific context to "*[o]nly* those firearms or quantities of ammunition" involved in the violation. § 924(d)(2)(C) (emphasis added). By enacting this forfeiture provision, Congress merely sought to keep weapons out of the hands of unauthorized persons. *One Assortment of 89 Firearms*, 465 U.S. at 363-64.

But if 21 U.S.C. § 853(p) is a "procedure" that applies via the bridging statute, the Ninth Circuit's interpretation contravenes the plain language of § 853(p). By its own terms, the substitute-asset forfeiture provisions of § 853(p) apply only "if any property described in subsection (a)" is unavailable to the government as a result of the defendant's act or omission. § 853(p)(1). Subsection (a), in turn, is limited to proceeds the convicted person obtained as a result of the violation or any of "the person's property" used to commit or facilitate the violation. § 853(a)(1)-(2).[6] It does not encompass property merely handled by an intermediary. *See Honeycutt*, 137 S. Ct. at 1633 (noting that, when criminal "mastermind" arranges for drug purchasers to pay an "intermediary," who in turn delivers the money to the

[6] If a person is convicted of engaging in a continuing criminal enterprise, the person similarly must forfeit her interest in that enterprise. § 853(a)(3).

mastermind, the money is the mastermind's property, even though the intermediary possesses it temporarily). Thus, forfeiture of substitute property under § 853(p) is available only if the defendant obtained proceeds from, or used her own property in, the offense. If § 853(p) is a procedure applicable under the bridging statute, 28 U.S.C. § 2461(c), then the definition of property in § 853(a)—explicitly incorporated by § 853(p)—is an integral part of that procedure.

The plain language of § 853(p)(2) reinforces this limitation. It provides that, if the forfeitable property is unavailable as a result of any act or omission of the defendant, "the court shall order the forfeiture of any *other* property *of the defendant*" up to the value of the property that the defendant rendered unavailable. § 853(p)(2) (emphasis added). This language makes clear that substitute-asset forfeiture is authorized only if the defendant causes the unavailability of her own property. If the district court were free to order forfeiture of substitute property from the defendant—even if the property originally subject to forfeiture did not belong to her—then Congress presumably would have used the phrase "any property of the defendant."

The Ninth Circuit, however, disregarded the word "other." If, as the Ninth Circuit held, it does not matter whether the property made unavailable was the defendant's property, *Valdez*, 911 F.3d at 966-67, then the word "other" "would add nothing" to § 853(p)(2). *Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that government's interpretation of 18 U.S.C. § 3501 was untenable because it rendered subsection (c) meaningless). The Ninth Circuit's holding therefore

contravenes the principle that a statute must be construed to give "effect . . . to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Id.* (citations and alterations omitted).

Although 21 U.S.C. § 853(a), which § 853(p) incorporates by reference, also provides that "any person convicted of a violation of" drug-trafficking offenses shall forfeit the property thereafter described in subsection (a), this reference to drug statutes does not change the conclusion that § 853(a)'s limitations must be incorporated into § 853(p)'s substitute-asset forfeiture provision if § 853(p) is applied via the bridging statute. At most, the drug-statute references in § 853(a) create an ambiguity in the statutory scheme, which must be resolved in favor of defendants under the rule of lenity.

And there is an obvious explanation for any awkwardness in incorporating § 853(a) if the substitute-asset forfeiture provision of § 853(p) is applied via the bridging statute. Title 21 U.S.C. § 853 was enacted in 1984 as a criminal forfeiture statute for drug-trafficking offenses. Pub. L. No. 98-473, § 303, 98 Stat. 1837 (1984).[7] The bridging statute, 28 U.S.C. § 2461(c), was not enacted until 2000, with a minor amendment in 2006. Pub. L. No. 106-185, § 16, 114 Stat. 202 (2000); Pub. L. No. 109-177, § 410, 120 Stat. 192 (2006). Thus, Congress grafted the criminal-forfeiture requirements of § 853 onto civil forfeiture statutes via the bridging statute years after it crafted the language of § 853(p) and § 853(a). As explained above, *supra* at p. 13, however, there is no indication that Congress intended

[7] The substitution of assets provision was originally contained in subsection d. *See id.*

criminal forfeiture imposed via the bridging statute to be broader in scope than criminal forfeiture imposed under 21 U.S.C. § 853. Congress merely intended to apply the criminal-forfeiture principles of § 853 to other statutes authorizing civil or criminal forfeiture.

The Ninth Circuit cited several cases that described 21 U.S.C. § 853(p) as a procedure incorporated by 28 U.S.C. § 2461(c). *See Valdez*, 911 F.3d at 964-66 (citing *United States v. Lo*, 839 F.3d 777, 790 (9th Cir. 2016); *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011); *United States v. Gregoire*, 638 F.3d 962, 971 (8th Cir. 2011); *Alamoudi*, 452 F.3d at 313-14; *United States v. Parrett*, 530 F.3d 422, 429 n.4 (6th Cir. 2008)). But none of these cases sanctioned substitute-asset forfeiture via the bridging statute and § 853(p) when the property originally subject to criminal forfeiture was not the defendant's property.[8]

The Ninth Circuit's reliance on *United States v. Bermudez*, 413 F.3d 304 (2d Cir. 2005), is also unavailing. That case did not address the application of 21 U.S.C. § 853's substitute-asset provisions via 28 U.S.C. § 2461(c). Instead, it addressed substitute-asset forfeiture for certain money-laundering offenses under 18 U.S.C. §

[8] If the statutory scheme is strictly construed, 21 U.S.C. § 853(p) should not apply via the bridging statute, because it is not a "procedure." *See* 28 U.S.C. § 2461(c) ("The procedures in . . .(21 U.S.C. § 853) apply to all stages of a criminal forfeiture proceeding, except [] subsection (d)"). Procedures are rules that regulate the manner of determining a defendant's criminal liability; in contrast, substantive provisions govern the range of conduct or the class of persons covered by a statute. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Section 853(p) is a *substantive* provision of the statute, as it requires the court to determine whether the defendant is responsible for the government's inability to seize property subject to criminal forfeiture pursuant to 21 U.S.C. § 853(a), i.e., a determination regarding the conduct and persons covered by the statute. And when Congress intended to incorporate § 853(p) into another statute to allow forfeiture of substitute assets, it used the term "provision," not "procedure." *See* 18 U.S.C. § 982(b)(2). Ms. Valdez acknowledges that, in *Honeycutt*, 137 S. Ct. at 1634, this Court referred to "the procedures outlined in § 853(p)," but the Court did not consider this issue or the distinction between substantive and procedural statutory provisions. Nor did any of the above cases.

982(a) & (b). *Id.* at 305. Under § 982(a)(1), a person convicted of a money-laundering offense must forfeit any "property, real or personal, involved in such offense, or any property traceable to such property." Under § 982(b)(1), "the forfeiture of property under this section . . . .[is] governed by the provisions" of 21 U.S.C. § 853. Section 982(b)(2) specifies:

> The substitution of assets provisions of subsection [853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

Therefore, in § 982(b)2), the statute at issue in *Bermudez*, Congress explicitly provided for substitute-asset forfeiture for certain money-laundering defendants who did not own the tainted property, but it limited that harsh and counterintuitive sanction to narrowly defined, egregious circumstances. In contrast, nothing in the text or history of 28 U.S.C. § 2461(c) reflects a Congressional intent to subject intermediaries to substitute-asset forfeiture provisions.

The Ninth Circuit's expansive interpretation of § 853(p)'s application via the bridging statute is thus inconsistent with strict construction of the statutory text.

C. The Ninth Circuit's interpretation contravenes the judicial obligation to interpret the statutory scheme harmoniously, and it is inconsistent with congressional intent to promote uniformity in the scheme.

The Ninth Circuit's interpretation of the statutory scheme is inconsistent with the "rudimentary principle[ ] of construction" that "statutes dealing with

similar subjects should be interpreted harmoniously." *Jonah R. v. Carmona*, 446 F.3d 1000, 1007 (9th Cir. 2006) (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J, concurring)). Contrary to this principle, the Ninth Circuit's interpretation results in arbitrary, disparate parameters for criminal forfeiture depending on the crime committed. When Congress actually drafted stand-alone criminal-forfeiture statutes—which it did for drug-trafficking and racketeering offenses—it explicitly did *not* impose substitute-asset forfeiture unless the property made unavailable by the defendant was the defendant's own property. *See* 21 U.S.C. §§ 853(a) & (p) (drug-trafficking); 18 U.S.C. §§ 1963(a) & (m) (racketeering). As previously explained, the legislative history of these statutes makes clear that Congress sought to address situations in which the defendant transferred or concealed *his own* assets prior to conviction. *See* p. 11, *supra.*

The legislative history of the drug-trafficking and racketeering statutes also emphasized the serious threat posed by those activities. S. REP. NO. 98-225, at 191. There is no apparent reason why Congress would not have wanted to apply the limitations on criminal forfeiture in drug and racketeering cases to ammunition-exportation cases, or to other cases in which criminal forfeiture is applied via the bridging statute, 28 U.S.C. § 2461(c). As explained above, nothing in text of 28 U.S.C. § 2461(c) or its legislative history indicates that Congress intended harsher treatment of defendants convicted of the many offenses encompassed by this bridging statute. Instead, the legislative history reveals Congress's intention to both streamline forfeiture proceedings and *enhance* due process protections for

defendants impacted by forfeiture laws. *See* p. 13*, supra*. And nothing suggests that Congress contemplated application of substitute-asset forfeiture under the bridging statute to circumstances not covered by 21 U.S.C. §§ 853(a) and (p)(1), an application that is contrary to the basic principles of criminal forfeiture. In applying substitute-asset forfeiture in this way, the Ninth Circuit created disharmony in the statutory scheme, a problem that it neither acknowledged or addressed.

For example, if a drug-crime intermediary uses a cartel-owned vehicle to transport drugs across the border, but investigators become aware of the crime and arrest the intermediary after he has returned the car to Mexico, the district court is not authorized under § 853(p) and § 853(a) to order the intermediary to forfeit substitute assets in lieu of the car, because the car is not the intermediary's property. There is no indication that Congress wanted the bridging statute to create disparities between defendants who act as intermediaries in drug-trafficking crimes and those who act as intermediaries in other cases allowing for forfeiture of "property" involved in an offense. To the contrary, the legislative history reveals an intent to provide uniformity across the wide-ranging statutes authorizing forfeiture of property.

The Ninth Circuit's interpretation also creates discord with aspects of the statutory scheme designed to ensure that equally culpable defendants receive commensurate punishment. Criminal forfeiture is "punishment for past criminal conduct." *Alexander v. United States*, 509 U.S. 544, 553 (1993). Punishment should "fit the crime." *United States v. Vasquez*, 654 F.3d 880, 886 (9th Cir. 2011). *See also*

Molina-Martinez v. United States, 136 S. Ct. 1338, 1342 (2016) (discussing the importance of uniformity and proportionality in sentencing). A defendant has no control over whether she will be caught at the border while attempting to export ammunition, or will rather be apprehended after the exportation has occurred. That depends on factors such as whether a loaded vehicle is selected for a random search at the border, or whether law enforcement receives a tip about a suspicious purchase in enough time to intercept the contraband before it is moved across the border. A defendant should not receive a harsher sentence based on such happenstance.

Consistent with this principle, Ms. Valdez's statute of conviction, 18 U.S.C. § 554, like many federal criminal statutes, punishes attempted exportation coextensively with completed crimes. *See also*, *e.g.*, 18 U.S.C. § 2113 (bank robbery), 18 U.S.C. § 2241 (aggravated sexual abuse), 18 U.S.C. § 2421 (transportation for the purpose of prostitution). The Guidelines likewise typically punish an attempted crime coextensively with a completed crime if the defendant would have completed the crime "but for apprehension or interruption by some similar event beyond the defendant's control." U.S.S.G. § 2X1.1(b)(1); *see also* § 2K2.1(6)(A) (applying same four-level enhancement if person possessed ammunition "while leaving or attempting to leave the United States"). Defendants who engage in similar or more egregious criminal activity by acting as intermediaries and unsuccessfully attempting to cross the border with firearms or ammunition at the behest of criminal masterminds in Mexico (and thereby attempting to deposit the contraband

with a third party and place it beyond the court's jurisdiction, *see* 21 U.S.C. § 853(p)(1)), do not face the harsh monetary sanction of substitute-asset forfeiture, because the contraband is seized at the time of arrest. Such defendants are not punished by this seizure, because criminal masterminds furnished the money used to purchase the items. Defendants like Ms. Valdez who are apprehended after the contraband is exported into Mexico should not receive the additional punishment exacted by substitute-asset forfeiture.

The Ninth Circuit rejected Ms. Valdez's argument that its "interpretation [of the statutory scheme] is inequitable" but provided no reasoned explanation. *Valdez*, 911 F.3d at 967. It merely said that it saw "no inequity" in imposing additional punishment on those who caused the additional harm of allowing contraband to leave the jurisdiction. *Id.* Under the Ninth Circuit's interpretation, a district court cannot impose a criminal-forfeiture penalty on a cartel intermediary who is caught at the border attempting to export $100,000 worth of semiautomatic weapons, but it *must* impose a forfeiture penalty on an indigent defendant like Ms. Valdez, caught after the fact, who played a role in a much smaller scale ammunition-exportation crime. Congress surely could not have intended this inequitable result, and the statutory language does not require it.

D. The Ninth Circuit's interpretation raises constitutional concerns.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States,* 523 U.S. 224, 237 (1998) (citations omitted). As

explained above, the plain language of the statute is, at a minimum, susceptible to the interpretation that substitute-asset forfeiture under 21 U.S.C. § 853(p) via the bridging statute is subject to the limitations of 21 U.S.C. § 853(a). That is, substitute-asset forfeiture is only permitted if the defendant causes *her own* property to be made unavailable. The Ninth Circuit's contrary interpretation creates serious doubts about the constitutionality of the bridging statute, 28 U.S.C. § 2461(c).

The disparate, arbitrary treatment of defendants required by the Ninth Circuit's interpretation of the statutory scheme, discussed above, raises serious due process and equal protections concerns. *See Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (Due Process Clause forbids fundamentally unfair or arbitrary government action); *Jonah R.*, 446 F.3d at 1008 (denial of presentence credit where others guilty of equally serious crimes receive credit triggers equal protection concerns) (citations omitted).

The Ninth Circuit's interpretation also raises serious Eighth Amendment concerns. Here, Ms. Valdez was ordered to forfeit only $1,235 in substitute assets. Although this penalty may be paid in installments during her probation term, it is still a great deal of money given her indigent status. But the Ninth Circuit's interpretation opens the door to much more draconian forfeiture judgments on indigent intermediaries who likewise had no assets to begin with. For example, an intermediary may export contraband that is worth hundreds of thousands, or even millions, of dollars. *See Cano-Flores*, 796 F.3d at 94 (declining, pre-*Honeycutt*, to

impose joint and several liability under § 853(a) and noting that a forfeiture equal to cartel's $15 billion proceeds imposed on a trivial courier poses serious Eighth Amendment concerns).

II. The Ninth Circuit's application of substitute-asset forfeiture via 28 U.S.C. § 2461 contravenes this Court's reasoning in *Honeycutt* and conflicts with other circuits.

In *Honeycutt,* in which the statute at issue was 21 U.S.C. § 853, this Court stressed the importance of "engag[ing] with" the "important background principles . . . of forfeiture" when interpreting a forfeiture statute. 137 S. Ct. at 1634. The Court explained that, in drafting this criminal forfeiture statute, Congress altered the traditional distinction between *in rem* actions against tainted property and *in personam* actions against a criminal defendant "by effectively merging the *in rem* forfeiture proceeding with the *in personam* criminal proceeding and by expanding forfeiture to include not just the 'thing' but 'property . . . derived from . . . any proceeds' of the crime." *Id.* at 1635 (quoting § 853(a)(1)). But Congress did so consistently with the background principles of forfeiture. *Id.* As this Court emphasized, these principles are expressed in 21 U.S.C. §§ 853(a) & (p). *Id*. at 1633-35.

In *Honeycutt*, the Court's focus was different: the Court considered whether a defendant could be jointly and severally liable under 21 U.S.C. § 853(a)(1) for proceeds he did not obtain himself but that were acquired by other co-conspirators as a result of a drug-trafficking violation. The Court therefore focused on the word "obtained" in § 853(a)(1) and reasoned that a person cannot "obtain" property that

was ultimately "acquired by someone else," and therefore joint and several liability does not apply. *Id.* at 1632-33.

But the Court noted that its interpretation of § 853(a)(1) was also supported by § 853(a)(2), which "mandates forfeiture of property used to facilitate the crime but limits forfeiture to 'the person's property,'" and by § 853(a)(3), which "requires forfeiture of property related to continuing criminal enterprises, but . . . requires the defendant to forfeit only 'his interest in' the enterprise." *Id.* at 1633. The Court also emphasized that § 853(p) provides the only mechanism for "recoup[ing] substitute property when the tainted property itself is unavailable" and stressed that this provision, by its own terms, "begins from the premise that the defendant once possessed tainted property as *'described in subsection (a).*'" *Id.* at 1634 (emphasis added). The Court observed that "Congress' carefully constructed statutory scheme . . . permits forfeiture of substitute property only when the requirements of §§ 853(p) *and* (a) are satisfied." *Id.* (emphasis added).

Thus, the background principles of forfeiture identified by this Court in *Honeycutt* are inconsistent with the forfeiture of substitute assets under § 853(p) unless the property concealed or transferred by the defendant meets the requirements of § 853(a), i.e., it was *the defendant's property*, either because he used his own property in some way to commit the offense or because he personally obtained proceeds as a result of the offense. As explained above, this limitation is consistent with congressional intent as reflected in the legislative history of the seminal criminal forfeiture statutes.

In *Honeycutt*, the Court also made clear that these limitations typically preclude imposing criminal forfeiture liability on an intermediary who merely handles another's tainted property but does not retain it. *Id.* at 1631-33. The Court used the hypothetical example of a "mastermind" who devises a scheme to grow marijuana and distribute it on college campuses and recruits a college student to make deliveries for $300 per month. *Id*. at 1631. The Court first noted that the student is not jointly and severally liable for the $3 million earned by the mastermind over the course of the year, but only for the $3,600 the student himself earned for making deliveries. *Id*. at 1631-32. The Court further explained that the student is not liable for the entire $3 million even if the mastermind arranged for the drug purchasers to pay the student, who, in turn, passed on the money to the mastermind. *Id.* at 1633. The Court reasoned that the money—apart from $3,600 earned by the student—was the mastermind's property because it was "ultimately 'obtain[ed]'" by the mastermind, even though the student possessed it temporarily. *Id.* (citing § 853(a)(1)).

The Ninth Circuit's interpretation of the statutory scheme in this case therefore conflicts with this Court's reasoning in *Honeycutt*. It is also at odds with the reasoning of the Third and Fourth Circuits, which have explicitly recognized that criminal, *in personam* forfeiture imposed via 28 U.S.C. § 2461(c) is subject to the limitations of 21 U.S.C. § 853(a). *Vampire Nation*, 451 F.3d at 201-02; *Alamoudi*, 452 F.3d at 311-14.

The Fourth Circuit's discussion of criminal forfeiture in *Alamoudi*, 452 F.3d

310, is instructive. Mr. Alamoudi obtained proceeds from prohibited financial transactions, which were criminally forfeitable under 18 U.S.C. § 981 via 28 U.S.C. § 2461(c) and § 853(p). *Alamoudi*, 452 F.3d at 311-14. Substitute-asset forfeiture was appropriate because he admitted that he obtained money as proceeds of his crimes and concealed it; he was not a mere intermediary. *Id.* at 316. In reaching this conclusion, the *Alamoudi* court cited § 853(a) and applied its criminal-forfeiture principles in this non-drug case. *Id.* at 314. The *Alamoudi* Court also emphasized that substitute-asset forfeiture under § 853(p) merely "provides a tool that the court can use to enforce a criminal forfeiture; it neither leads to nor allows for an increase in the dollar amount of the forfeiture, and therefore, does not increase the punishment imposed." *Id.* at 315.

As explained above at pp. 22-23, if a defendant is forced to forfeit substitute assets in lieu of something that never belonged to her in the first place, then her punishment is increased, because seizure of "the thing" itself exacts no penalty on her. Such forfeiture of her substitute assets is wholly inconsistent with the concept of *in personam* forfeiture.

In addition, the Ninth Circuit's interpretation allows the government "to circumvent Congress' carefully constructed statutory scheme," *Honeycutt*, 137 S. Ct. at 1634, even in drug-trafficking cases in which 21 U.S.C. § 853 is directly applicable. Another section of the same chapter, 21 U.S.C. § 881(a), authorizes civil forfeiture of some of the same things that are subject to criminal forfeiture under § 853(a), including proceeds and vehicles and real property used in the offense, but

without regard to who owns the property or obtains the proceeds. As a civil forfeiture statute, 21 U.S.C. § 881(a) simply ordains that these things are "subject to forfeiture to the United States." It does not authorize seizure of substitute property if a defendant has transferred or concealed property subject to forfeiture.

But if the Ninth Circuit's opinion stands, then anything subject to forfeiture under 21 U.S.C. § 881 could be criminally forfeited via the bridging statute, 28 U.S.C. § 2461, and the government could obtain substitute assets from the defendant under 21 U.S.C. § 853(p) even if the property subject to forfeiture does not meet the requirements of § 853(a). The government could therefore force drug-trafficking defendants to criminally forfeit assets indirectly via 21 U.S.C. § 881 and 28 U.S.C. § 2461 when it is unable to obtain those assets directly under 21 U.S.C. § 853, the criminal forfeiture statute Congress specifically crafted for drug-trafficking offenses. "Such an end-run around the limitations of section 853 and *Honeycutt* is impermissible, and mandates correction by" this Court. NACDL Amicus Brief at 12. It defies logic to think that Congress could have intended the bridging statute to upend the criminal forfeiture scheme of 21 U.S.C. § 853 in this way. The text of the bridging statute does not require this absurd result, and its legislative history reflects no such congressional intent.

III. This case is a good vehicle to resolve the questions presented.

A. The facts are undisputed.

The facts in this case are undisputed. Criminal masterminds in Mexico supplied the money that Ms. Valdez's codefendant, Ms. Ruiz, used to purchase the

ammunition, which the young women delivered to a designated person for exportation into Mexico. It is thus clear that Ms. Valdez was a mere intermediary with no ownership interest in the ammunition.

B. The Ninth Circuit's decision will be broadly applied.

Although the Ninth Circuit's opinion in this case addressed the forfeiture of guns and ammunition authorized by 18 U.S.C. § 924(d) via the bridging statute, 28 U.S.C. § 2461, its implications are much broader. The Ninth Circuit's holding precludes application of 21 U.S.C. § 853(a)'s limitations whenever the government seeks forfeiture of substitute property under § 853(p) via the bridging statute. Thus, its holding applies to any civil forfeiture applied criminally via the bridging statute, including forfeitures authorized by 18 U.S.C. § 981(c) and 21 U.S.C. § 881, which apply to many offenses and many types of property.

"Forfeiture abuse is a rampant nationwide problem, even among federal prosecutors." Brief for the Cato Institute as *Amicus Curiae*, *Peithman* v. *United States*, Sup. Ct. No. 19-16, at 5. *See also id.* at 5-8. "[I]n recent decades," it has "become widespread and highly profitable," which "has led to egregious and well-chronicled abuses." *Id.* at 5 (citing *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting denial of certiorari)).

The Ninth Circuit's opinion opens the door to such widespread abuse. The Ninth Circuit is by far the largest circuit in the country—whether measured by caseload, by population, or by geographic area. *See Hearing on Oversight of the Structure of the Federal Courts Before the S. Subcomm. on Oversight, Agency Action,*

Federal Rights and Federal Courts of S. Comm. on the Judiciary, 6-8 (July 31, 2018) (written testimony of Ninth Cir. Judge Diarmuid F. O'Scannlain).[9] Its "caseload exceeds those of the First, Third, Seventh, Tenth, and D.C. Circuits, combined." *Id.* at 7. Its jurisdiction covers "more than sixty-five million people—almost exactly one-fifth of the entire population of the United States." *Id.* Its population is "larger than [that of] the First, Second, Third, and D.C. Circuits, combined." *Id.* at 8 (emphasis in original). Therefore, if the Ninth Circuit's far-reaching interpretation of the forfeiture scheme is incorrect, as Ms. Valdez contends, it is important for this Court to correct the error as soon as possible.

C. The issues in this case are related to the circuit split regarding whether joint and several liability is permissible under 18 U.S.C. § 981.

Additionally, the questions presented in this case are closely related to the circuit split on the permissibility of joint and several liability under 18 U.S.C. § 981(a)(1)(C), which is the subject of a pending petition for certiorari. *See* Petition for a Writ of Certiorari, *Peithman v. United States*, Sup. Ct. No. 19-16. Under 18 U.S.C. § 981(a)(1)(C), a civil forfeiture statute that applies to many crimes including mail and wire fraud, "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of [certain offenses]" is "subject to forfeiture to the United States." § 981(a)(1).

The Third Circuit held that *Honeycutt's* reasoning applies to § 981(a)(1)(C)

[9] available at https://www.judiciary.senate.gov/imo/media/doc/07-31-18%20O'Scannlain%20Testimony.pdf.

because "a review of the text and structure of [the statute] reveals that [it is] substantially the same as the one under consideration in *Honeycutt*." *United States v. Gjeli*, 867 F.3d 418, 427 (3d Cir. 2017). The *Gjeli* court noted that the limitations of 21 U.S.C. § 853(a) were also directly applicable to the case because the government sought substitute property under 21 U.S.C. § 853(p) (presumably via 28 U.S.C. § 2461),[10] which incorporates § 853(a). *Id.* n.16.

The Sixth and Eighth Circuits disagreed with the Third Circuit. *United States v. Sexton*, 894 F.3d 787, 798-99 (6th Cir. 2018); *United States v. Peithman*, 917 F.3d 635, 652 (8th Cir. 2019). The Sixth Circuit relied exclusively on the absence of the phrase "the person obtained" in 18 U.S.C. § 981(a)(1)(C) and its presence in 21 U.S.C. § 853(a)(1). *Sexton*, 894 F.3d at 799. The Eighth Circuit similarly found that "a material distinction is the lack of a reference to a 'person' in § 981." *Peithman*, 917 F.3d at 652. Both circuits overlooked that it would make no sense for a civil forfeiture statute like § 981 to use the word "person" because civil forfeiture is focused on seizure of the "thing" itself without regard to the defendant's culpability.

Moreover, in both *Sexton*, 894 F.3d at 798, and *Peithman*, 917 F.3d at 650, the forfeitures under § 981 were applied via the bridging statute, 28 U.S.C. § 2461. Neither of these courts considered that the bridging statute potentially brought into play 21 U.S.C. § 853(p), which explicitly incorporates § 853(a). In short, the Sixth and Eighth circuits did not consider the background principles of civil and criminal

[10] The *Gjeli* Court did not cite 28 U.S.C. § 2461, but that bridging statute is the only mechanism by which 21 U.S.C. § 853(p) could apply to property subject to forfeiture under a civil forfeiture statute.

forfeiture and the implications of the civil forfeiture's conversion into a criminal forfeiture via the bridging statute. These considerations, however, are critical to the resolution of the circuit split regarding whether joint and several liability is permissible under 18 U.S.C. § 981(a)(1)(C), just as they are critical to the resolution of the questions presented in this petition.

Consideration of each issue will deepen the Court's understanding of the other issue. Both issues should be resolved in light of the background principles of civil and criminal forfeiture. Even if the Court does not grant the petition for certiorari in *Peithman*, resolution of the questions presented in Ms. Valdez's petition would provide critical guidance to federal courts grappling with how to impose criminal forfeiture orders on defendants via 28 U.S.C. § 2461 when the statute of conviction authorizes civil forfeiture of property.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari.

Respectfully submitted this 23rd day of September 2019.

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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

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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

APR 29 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

August 31, 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 a further extension of time in the above-entitled case has been presented to Justice Kagan, who on August 31, 2019, extended the time to and including September 23, 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

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

APPENDIX D

term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term ''drug trafficking crime'' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term ''crime of violence'' means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term ''brandish'' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor un-

less the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term ''serious drug offense'' means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term ''violent felony'' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term ''conviction'' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part

wrongful seizure'' in item 2465 and added items 2466 and 2467.

§ 2461. Mode of recovery

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to to[1] 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.

(June 25, 1948, ch. 646, 62 Stat. 974; Pub. L. 106–185, § 16, Apr. 25, 2000, 114 Stat. 221; Pub. L. 109–177, title IV, § 410, Mar. 9, 2006, 120 Stat. 246.)

HISTORICAL AND REVISION NOTES

Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. Numerous sections in the United States Code prescribe civil fines, penalties, and pecuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof. See, for example, section 567 of title 12, U.S.C., 1940 ed., Banks and Banking, section 64 of title 14, U.S.C., 1940 ed., Coast Guard, and section 180 of title 25, U.S.C., 1940 ed., Indians. Compare section 1 (21) of title 49, U.S.C., 1940 ed., Transportation.

A civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action. *United States ex rel. Marcus v. Hess* et al., 1943, 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 433, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163; *Hepner v. United States*, 1909, 29 S.Ct. 474, 213 U.S. 103, 53 L.Ed. 720, and cases cited therein.

Forfeiture of bail bonds in criminal cases are enforceable by procedure set out in Rule 46 of the Federal Rules of Criminal Procedure.

If the statute contemplates a criminal fine, it can only be recovered in a criminal proceeding under the Federal Rules of Criminal Procedure, after a conviction. The collection of civil fines and penalties, however, may not be had under the Federal Rules of Criminal Procedure, Rule 54(b)(5), but enforcement of a criminal fine imposed in a criminal case may be had by execution on the judgment rendered in such case, as in civil actions. (See section 569 of title 18, U.S.C., 1940 ed., Crimes and Criminal Procedure, incorporated in section 3565 of H.R. 1600, 80th Congress, for revision of the Criminal Code. See also Rule 69 of Federal Rules of Civil Procedure and Advisory Committee Note thereunder, as to execution in civil actions.)

Subsection (b) was drafted to cover the subject of forfeiture of property generally. Sections in the United States Code specifically providing a mode of enforcement of forfeiture of property for their violation and other procedural matters will, of course, govern and subsection (b) will not affect them. It will only cover cases where no mode of recovery is prescribed.

Words ''Unless otherwise provided by enactment of Congress'' were inserted at the beginning of subsection (b) to exclude from its application instances where a libel in admiralty is not required. For example, under sections 1607, 1609, and 1610 of title 19, U.S.C., 1940 ed., Customs Duties, the collector of customs may, by summary procedure, sell at public auction, without previous declaration of forfeiture or libel proceedings, any vessel, etc., under $1,000 in value in cases where no claim for the same is filed or bond given as required by customs laws.

Rule 81 of the Federal Rules of Civil Procedure makes such rules applicable to the appeals in cases of seizures on land. (See also *443 Cans of Frozen Egg Product v. United States*, 1912, 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174, and *Eureka Productions v. Mulligan*, C.C.A. 1940, 108 F.2d 760.) The proceeding, which resembles a suit in admiralty in that it is begun by a libel, is, strictly speaking, an ''action at law'' (The Sarah, 1823, 8 Wheat. 391, 21 U.S. 391, 5 L.Ed. 644; Morris's Cotton, 1869, 8 Wall. 507, 75 U.S. 507, 19 L.Ed. 481; Confiscation cases, 1873, 20 Wall. 92, 87 U.S. 92, 22 L.Ed. 320; *Eureka Productions v. Mulligan*, supra), even though the statute may direct that the proceedings conform to admiralty as near as may be. *In re Graham*, 1870, 10 Wall. 541, 19 L.Ed. 981, and *443 Cans of Frozen Egg Product v. United States*, supra.

Subsection (b) is in conformity with Rule 21 of the Supreme Court Admiralty Rules, which recognizes that a libel may be filed upon seizure for any breach of any enactment of Congress, whether on land or on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States. Such rule also permits an information to be filed, but is rarely, if ever, used at present. Consequently, ''information'' has been omitted from the text and only ''libel'' is incorporated.

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsec. (c), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

The Controlled Substances Act, referred to in subsec. (c), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§ 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

AMENDMENTS

2006—Subsec. (c). Pub. L. 109–177 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.''

2000—Subsec. (c). Pub. L. 106–185 added subsec. (c).

[1] So in original.

EFFECTIVE DATE

Section effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as a note under section 801 of this title.

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub. L. 91–513, title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)

EFFECTIVE DATE

Section effective on first day of seventh calendar month that begins after Oct. 26, 1970, see section 704 of Pub. L. 91–513, set out as a note under section 801 of this title.

§ 852. Application of treaties and other international agreements

Nothing in the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances, or other treaties or international agreements shall be construed to limit the provision of treatment, education, or rehabilitation as alternatives to conviction or criminal penalty for offenses involving any drug or other substance subject to control under any such treaty or agreement.

(Pub. L. 91–513, title II, § 412, as added Pub. L. 95–633, title I, § 107(a), Nov. 10, 1978, 92 Stat. 3773.)

EFFECTIVE DATE

Section effective on date the Convention on Psychotropic Substances enters into force in the United States [July 15, 1980], see section 112 of Pub. L. 95–633, set out as a note under section 801a of this title.

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II punishable by im-

prisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT.—

(A) IN GENERAL.—Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY.—Failure to comply with an order under this subsection, or an

order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

***(l)* Jurisdiction to enter orders**

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have

alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(*o*) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) 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.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18.

(Pub. L. 91–513, title II, §413, as added and amended Pub. L. 98–473, title II, §§303, 2301(d)–(f), Oct. 12, 1984, 98 Stat. 2044, 2192, 2193; Pub. L. 99–570, title I, §§1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207–13, 3207–54; Pub. L. 104–237, title II, §207, Oct. 3, 1996, 110 Stat. 3104; Pub. L. 106–310, div. B, title XXXVI, §3613(a), Oct. 17, 2000, 114 Stat. 1229; Pub. L. 107–56, title III, §319(d), Oct.