

No. 19-6062

IN THE SUPREME COURT OF THE UNITED STATES

PRISCILLA DAYDEE VALDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 28 U.S.C. 2461(c) and 21 U.S.C. 853(p) authorized the district court to order the criminal forfeiture of substitute assets in the place of ammunition that petitioner transferred to a third party, where the ammunition was subject to forfeiture under 18 U.S.C. 924(d).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

United States v. Valdez, No. 16-cr-1667 (Oct. 13, 2017)

United States Court of Appeals (9th Cir.):

United States v. Valdez, No. 17-10446 (Dec. 21, 2018)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-6062

PRISCILLA DAYDEE VALDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 911 F.3d 960.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2018. A petition for rehearing was denied on April 29, 2019 (Pet. App. B1). On July 1, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 12, 2019. On August 31, 2019, Justice Kagan further extended the time to and including September 23, 2019, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Arizona, petitioner was convicted of attempting to smuggle goods from the United States, in violation of 18 U.S.C. 554(a). Pet. App. A1; Judgment 1. The district court sentenced her to five years of probation and ordered her to forfeit \$1235. Pet. App. A2; Judgment 1. The court of appeals affirmed. Pet. App. A1-A5.

1. In March 2016, petitioner and a co-defendant agreed to help one of petitioner's acquaintances obtain ammunition in the United States and smuggle it into Mexico. Pet. App. A2. Around March 3, the acquaintance gave petitioner cash with which to buy the ammunition. Ibid. On March 3, petitioner met the co-defendant in Tucson, Arizona; gave the co-defendant the money; and drove with the co-defendant to a gun store in Phoenix. Ibid. At the store, the co-defendant bought 10,000 rounds of ammunition for \$2470. Ibid.; C.A. E.R. 7; Presentence Investigation Report (PSR) ¶ 4.

Petitioner and the co-defendant then transported the ammunition by car to a parking lot in Nogales, Arizona, near the United States-Mexico border. Pet. App. A2; PSR ¶¶ 5-6. In accordance with instructions from petitioner's acquaintance, petitioner and the co-defendant left the car in the parking lot;

gave the keys to a person at the lot; waited several hours until petitioner received a phone call informing her that the car was "ready"; and returned to retrieve the car, which no longer contained the ammunition. PSR ¶ 5; see Pet. App. A2. Petitioner would later admit that she knew that her acquaintance and the individuals who picked up the ammunition intended to move it from the United States to Mexico. Pet. App. A2.

2. A grand jury in the District of Arizona indicted petitioner and her co-defendant for attempting to smuggle goods from the United States, in violation of 18 U.S.C. 554(a). Pet. App. A2; Indictment 1-2. In the indictment, the government sought criminal forfeiture of "any firearms and ammunition involved in the commission of the offense," or, if the ammunition were unavailable, of substitute property. Indictment 2.

Petitioner pleaded guilty without a plea agreement, but objected to the government's proposed order of forfeiture. Pet. App. A1-A2; D. Ct. Doc. 59, at 3-11 (July 14, 2017). The district court, however, determined that Section 924(d) made the ammunition subject to civil forfeiture; that Section 2461(c) in turn made that property subject to criminal forfeiture as well; and that Section 853(p), as incorporated by Section 2461(c), permitted the forfeiture of substitute property.

Before 1970, the government obtained forfeiture of property involved in crimes by bringing separate in rem civil actions against the property, on the fiction that "the property itself is

'guilty' of the offense." Austin v. United States, 509 U.S. 602, 615 (1993); see id. at 613-617. Those in rem actions resulted in the forfeiture of the "guilty property" -- for example, the vessel used to smuggle goods -- but did not impose personal liability on the individuals who committed the offenses. United States v. Bajakajian, 524 U.S. 321, 332 (1998); see id. at 331-332; see also Austin, 509 U.S. at 615-616.

Since 1970, however, Congress has authorized criminal forfeitures as penalties for violations of certain federal criminal laws. See Bajakajian, 524 U.S. at 332 n.7. Unlike civil forfeitures, criminal forfeitures are "an aspect of punishment imposed following conviction of a substantive criminal offense." Libretti v. United States, 516 U.S. 29, 39 (1995). And whereas civil forfeitures involve in rem proceedings against specific property, criminal forfeitures involve in personam proceedings and impose personal liability on the convicted defendant. Bajakajian, 524 U.S. at 331-332.

The forfeiture provisions on which the government relied in this case are codified in 18 U.S.C. 924 (2012), 21 U.S.C. 853, and 28 U.S.C. 2461. Section 924 provides for the civil forfeiture of any ammunition intended to be used in a federal offense, where the requisite intent is established by clear and convincing evidence. 18 U.S.C. 924(d)(1) and (3)(F). Section 853 authorizes the criminal forfeiture of certain property involved in drug crimes. 21 U.S.C. 853(a). It also authorizes the forfeiture of "any other

property of the defendant" if, as a result of any act or omission of the defendant, "any property described in [Section 853(a)] * * * cannot be located upon the exercise of due diligence," "has been transferred or sold to * * * a third party," "has been placed beyond the jurisdiction of the court," or meets other statutory criteria of unavailability. 21 U.S.C. 853(p). Finally, Section 2461 provides that, "[i]f a person is charged in a criminal case with a violation of an Act of Congress for which the civil * * * forfeiture of property is authorized," the government may obtain "the forfeiture of the property as part of the sentence in the criminal case." 28 U.S.C. 2461(c). Section 2461 further provides that "[t]he procedures in [21 U.S.C. 853] apply to all stages of a criminal forfeiture proceeding, except that [21 U.S.C. 853(d)] applies only in cases in which the defendant is convicted of a violation of [the Controlled Substances Act, 21 U.S.C. 801 et seq.]." 28 U.S.C. 2461(c).

The district court found that the forfeiture of substitute property was "appropriate" in this case because petitioner and her co-defendant "purchased the property (ammunition)" and "delivered it to the designated place," where "presumably it was picked up by the people with whom they were working." D. Ct. Doc. 84, at 1 (Sept. 1, 2017). Accordingly, the court issued a final order of forfeiture that required petitioner and her co-defendant to forfeit "\$2,470 * * * , which represents the value of the ammunition [they] disposed." D. Ct. Doc. 99, at 1 (Oct. 12, 2017).

The court sentenced petitioner to five years of probation and entered a personal money judgment ordering her to forfeit "half of the forfeiture amount, \$1,235.00." Judgment 1; Pet. App. A2. The court separately ordered the co-defendant to forfeit the same amount, and the co-defendant did not appeal. Pet. App. A2 n.1.

3. The court of appeals affirmed. Pet. App. A1-A5.

The court of appeals explained that 18 U.S.C. 924(d) authorized civil forfeiture of the ammunition involved in petitioner's crime and that 28 U.S.C. 2461(c) accordingly permitted the government to seek criminal forfeiture of the ammunition once petitioner pleaded guilty. Pet. App. A2-A3. The court then "join[ed its] sister circuits" in determining that Section 2461(c) incorporates the substitute-property procedures set forth in 21 U.S.C. 853(p). Pet. App. A4; see id. at A3-A4. The court explained that "Section 853(p) authorizes forfeiture of substitute property when, 'as a result of any act or omission of the defendant,' the forfeitable property 'has been transferred . . . to . . . a third party.'" Id. at A5 (citations omitted). Observing that petitioner and her co-defendant had undertaken acts that "clearly caused the ammunition to be transferred to a third party," the court found that the district court had properly ordered petitioner to forfeit substitute property under Section 853(p). Ibid.

The court of appeals rejected petitioner's contention that Section 853(p) authorizes forfeiture of substitute property only

when the forfeitable property meets the definition of forfeitable property set forth in 21 U.S.C. 853(a). Pet. App. A5. The court observed that, under the statutory scheme as applied to petitioner's case, "Section 924(d) describes the forfeitable property, and § 2461(c) authorizes the use of the procedures of § 853 with respect to the forfeitable property." Ibid. "In a case governed by § 2461(c)," the court explained, "Congress intended courts to apply § 853(p) and the other procedures of § 853 to the forfeitable property as defined elsewhere." Ibid. The court observed that "Section 853(a) is plainly a substantive, not procedural, provision," and thus "is not incorporated by § 2461(c)." Ibid. The court thus concluded that, "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." Ibid.

ARGUMENT

Petitioner does not appear to dispute that the ammunition she and her co-defendant attempted to smuggle across the border was subject to forfeiture under 18 U.S.C. 924(d). Petitioner contends (Pet. 8-33), however, that the district court lacked the authority to order her to forfeit \$1235 in substitute assets in lieu of half the ammunition. The court of appeals correctly affirmed the forfeiture order in this case, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that 18 U.S.C. 924(d), 21 U.S.C. 853(p), and 28 U.S.C. 2461(c) authorized the district court to require petitioner to forfeit substitute property in lieu of the ammunition that petitioner and her co-defendant transferred to a third party.

Under Section 924(d), the ammunition that petitioner and her co-defendant attempted to smuggle was subject to civil forfeiture, because it was used in an "offense * * * which involves the exportation of firearms or ammunition." 18 U.S.C. 924(d)(3)(F); see 18 U.S.C. 924(d)(1). Under Section 2461(c), that ammunition was also subject to criminal forfeiture, because petitioner was convicted of "a violation of an Act of Congress for which the civil * * * forfeiture of property is authorized." 28 U.S.C. 2461(c). And under Section 2461(c), "[t]he procedures in [21 U.S.C. 853]" governed the "criminal forfeiture proceeding." 28 U.S.C. 2461(c). One of the procedures in Section 853, in turn, is the provision in 21 U.S.C. 853(p) that provides for the forfeiture of substitute property if the forfeitable property meets statutory criteria of unavailability. See Honeycutt v. United States, 137 S. Ct. 1626, 1634 (2017) (explaining that "procedures outlined in § 853(p)" are the "one way for Government to recoup substitute property when the tainted property itself is unavailable") (emphasis added). As the court of appeals correctly recognized, those statutory provisions together authorized that the district court to order the forfeiture

of substitute property in lieu of the ammunition as part of petitioner's criminal sentence. Pet. App. A3-A5.

2. Petitioner's contrary arguments lack merit. First, Petitioner errs in contending (Pet. 14-19) that the court of appeals misinterpreted the statutory text. Petitioner suggests that, because Section 853(p) authorizes forfeiture of substitute property where "any property described in [Section 853(a)]" is unavailable, Pet. 15 (citation omitted), forfeiture of substitute property is unavailable unless the forfeitable property would fit within Section 853(a)'s description of property forfeitable for certain drug crimes. But Section 853(p) is applicable in this case through 28 U.S.C. 2461(c), which applies only "[t]he procedures in [21 U.S.C. 853]" to criminal forfeiture proceedings for property whose forfeiture is authorized by other statutes. 28 U.S.C. 2461(c) (emphasis added). And the court of appeals observed that Section 853(a) "is plainly a substantive, not procedural, provision of § 853, because it describes the forfeitable property for certain drug crimes." Pet. App. A5 (emphasis added). By incorporating only the procedures of Section 853, and not its definition of forfeitable property, "Congress intended courts to apply § 853(p) and the other procedures of § 853 to the forfeitable property as defined elsewhere." Ibid.; see also United States v. Bermudez, 413 F.3d 304, 306 (2d Cir. 2005) (per curiam) (determining that 21 U.S.C. 853(p) authorizes the forfeiture of substitute property in place of forfeitable property described in

18 U.S.C. 982(a)(1), rather than 21 U.S.C. 853(a)). Here, that is Section 924(d), not Section 853(a).

Second, petitioner errs in asserting (Pet. 8-14) that the forfeiture order here is inconsistent with "the purpose and mechanisms of both civil and criminal forfeiture." Pet. 8 (emphasis omitted). Petitioner does not explain why the criminal forfeiture in her case should have accorded with civil-forfeiture principles when, as petitioner recognizes, "[c]ivil and criminal forfeiture laws serve distinct purposes." Ibid. (citation omitted). And the forfeiture in this case comports with the general principle that criminal forfeitures are in personam and impose personal liability on the convicted defendant. See United States v. Bajakajian, 524 U.S. 321, 332 (1998).

Third, contrary to petitioner's contention (Pet. 23-25), the forfeiture in this case raises no "Eighth Amendment concerns." As an initial matter, petitioner did not make an Eighth Amendment claim in the lower courts, and this Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). In any event, this Court has explained that a forfeiture would violate the Excessive Fines Clause only if it is "grossly disproportional to the gravity of the defendant's offense." Bajakajian, 524 U.S. at 337. A forfeiture of \$1235 is not "grossly disproportional" to

the gravity of petitioner's offense, and petitioner does not appear to argue otherwise.

Finally, contrary to petitioner's suggestion (Pet. 25-27), the decision below is consistent with this Court's decision in Honeycutt v. United States, supra. Honeycutt addressed a forfeiture order under 21 U.S.C. 853(a)(1), which "mandates forfeiture of 'any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of' certain drug crimes." 137 S. Ct. at 1630 (quoting 21 U.S.C. 853(a)(1)). The Court held that forfeitures under Section 853(a)(1) are "limited to property the defendant himself actually acquired as the result of the crime" and rejected the lower courts' conclusion that a defendant convicted of a conspiracy offense may be held jointly and severally liable for the proceeds foreseeably obtained by his co-conspirators. Id. at 1635. Honeycutt did not address the question presented here -- whether and when a district court may order forfeiture of substitute property in lieu of firearms or ammunition subject to forfeiture under 18 U.S.C. 924(d).

Petitioner contends (Pet. 25-27) that the decision below is inconsistent with Honeycutt's observation that Section 853(p) "begins from the premise that the defendant once possessed tainted property as 'described in subsection (a)'" and "permits forfeiture of substitute property only when the requirements of §§ 853(p) and (a) are satisfied." 137 S. Ct. at 1634. But Honeycutt involved

a forfeiture order under 21 U.S.C. 853(a)(1), and the Court's analysis accordingly focused on the scope of forfeiture liability under that provision. See 137 S. Ct. at 1632-1633. The Court neither considered whether, nor held, that when 21 U.S.C. 2461(c) applies Section 853(p)'s substitute-property procedures to forfeitures under 18 U.S.C. 924(d), Section 2461(c) also incorporates the substantive limitations on forfeiture set forth in Section 853(a). To the contrary, Honeycutt recognized that "Section 853(p)(1) demonstrates that Congress contemplated situations where the tainted property itself would fall outside the Government's reach" and "authorized the Government to confiscate [other] assets * * * from the defendant who initially acquired the property and who bears responsibility for its disposition." 137 S. Ct. at 1634. That understanding of Section 853(p) is consistent with the court of appeals' decision in petitioner's case.

3. The decision below also does not conflict with any decision of another court of appeals. Indeed, the court below expressly "join[ed] [its] sister circuits in holding that 28 U.S.C. § 2461(c) incorporates the substitute property provisions in 21 U.S.C. § 853(p)." Pet. App. A4.

Contrary to petitioner's contention (Pet. 27-28), the decision below does not conflict with United States v. Alamoudi, 452 F.3d 310 (4th Cir. 2006). That case involved forfeiture under 18 U.S.C. 981(a)(1)(C) (2006), which provides for forfeiture for

certain offenses (such as bank fraud) rather than under 18 U.S.C. 924(d), which is at issue in this case. The Fourth Circuit explained that 18 U.S.C. 981(a)(1)(C) (2006) and 28 U.S.C. 2461(c) together required the defendant in that case to criminally forfeit “[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to’ violations of certain laws.” 452 F.3d at 313 (quoting 18 U.S.C. 981(a)(1)(C) (2006)) (brackets in original). The Fourth Circuit then explained that Section 853(p), as incorporated by Section 2461(c), “mandate[d] forfeiture of substitute assets ‘when the tainted property has been placed beyond the reach of a forfeiture.’” Id. at 314 (citation omitted). That analysis is consistent with the decision below, and the Fourth Circuit did not suggest, much less hold, that a district court may require the forfeiture of substitute property only in the place of the property identified in Section 853(a). To the contrary, the court explained that Section 853(p) “simply requires the court to allow the Government to seize substitute property when the defendant has placed the assets initially sought -- and to which the Government is legally entitled -- beyond the court’s reach.” Id. at 315.

Petitioner also errs in asserting (Pet. 27-28) a conflict between the decision below and United States v. Vampire Nation, 451 F.3d 189 (3d Cir.), cert. denied, 549 U.S. 970 (2006). Like Alamoudi, Vampire Nation involved a forfeiture under 18 U.S.C. 981(a)(1)(C) (2000) and did not discuss forfeitures under 18 U.S.C.

924(d). See 451 F.3d at 199-201. In the course of describing the interaction of 18 U.S.C. 981(a)(1)(C) (2000), 21 U.S.C. 853 (2000 & Supp. III 2003), and 28 U.S.C. 2461(c) (2000), the Third Circuit stated that the forfeiture judgment there was "limited by the provisions of 21 U.S.C. § 853(a)" to the property described in Sections 853(a)(1) and (2). Vampire Nation, 451 F.3d at 202. The court did not elaborate on or explain that statement; the statement was unnecessary to the court's judgment; and the court did not suggest that such a limitation would apply in a case involving a forfeiture under Section 924(d). Vampire Nation thus does not indicate that a future Third Circuit panel would necessarily disagree with the Ninth Circuit's resolution of petitioner's case.

Finally, the question in petitioner's case is not "closely related to" (Pet. 31) the question presented in the recent petition for a writ of certiorari in Peithman v. United States, 140 S. Ct. 340 (2019) (No. 19-16), which the Court denied earlier this Term. In Peithman, petitioners asked the Court to grant review to decide whether Honeycutt's reasoning rejecting joint and several liability also extends to forfeiture orders under 18 U.S.C. 981(a)(1)(C). See Pet. at i, Peithman, supra (No. 19-16). In response, the government acknowledged that the courts of appeals have disagreed on that issue, U.S. Br. in Opp. at 9-10, Peithman, supra (No. 19-16), but observed that the question "is of diminishing importance because the government has agreed that Honeycutt's reasoning applies to Section 981(a)(1)(C)," id. at 10-

11. Petitioner's case does not implicate questions relating to the circuit disagreement discussed in the Peithman petition because petitioner's forfeiture order was not under Section 981(a)(1)(C) and did not impose joint and several liability. See Gov't C.A. Br. 21.

The decision below appears to be the only one in which a court of appeals has squarely addressed the novel argument that petitioner raises. Its rejection of that argument does not suggest that the issue arises with any frequency or that this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

FEBRUARY 2020