No. 17-10446

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PRISCILLA DAYDEE VALDEZ,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona, No. 4:16-01667 (Rayes, J.)

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

JOSHUA M. KOPPEL
ANURADHA SIVARAM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

SHARON COHEN LEVIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(202) 230-8804

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous amicus briefs each year addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

One such issue is that of forfeiture liability. Forfeiture orders like the one under review here have the potential to impose draconian judgments out of proportion to an offender's culpability. Rehearing this case will provide the Court with an opportunity to interpret several forfeiture statutes in accordance with the scope Congress intended.

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus and its counsel contributed money that was intended to fund the preparing or submitting of the brief. Amicus files this brief with the consent of both parties under Ninth Circuit Rule 29-2(a).

INTRODUCTION

Congress provided for the civil forfeiture of firearms or ammunition that have been unlawfully exported. Congress also provided for the criminal forfeiture of the proceeds a defendant obtained from the offense and further provided that if those proceeds are unavailable the government may forfeit substitute property of the defendant. The forfeiture order in this case, however, does not target such tainted ammunition or any proceeds the defendant received from the offense. Rather, the forfeiture order imposes a money judgment as substitute property for the ammunition, even though the defendant did not own the ammunition involved in the offense.

This novel punishment has no basis in statute or in the long history of forfeiture jurisprudence. The order affirmed by the panel is a penalty that impermissibly combines elements of civil and criminal forfeiture while departing from the mechanisms and objectives of—as well as the important limitations on—both sets of remedies. Not only does the result contravene critical principles of forfeiture law, it also raises serious questions under the Eighth Amendment's prohibition of excessive fines.

As significantly, the panel's decision cannot be reconciled with the Supreme Court's recent decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which dramatically curtailed the scope of forfeiture liability under one of the very

statutes at issue here. Peculiarly, the panel hardly mentions *Honeycutt*, although it was decided well before oral argument. The clear conflict with Supreme Court authority and the improper interpretation of federal criminal statutes warrants rehearing the case en banc.

ARGUMENT

I. THE PANEL'S DECISION IS INCONSISTENT WITH BACKGROUND PRINCIPLES OF FORFEITURE, CONGRESSIONAL INTENT, SUPREME COURT PRECEDENT, AND CONSTITUTIONAL LIMITATIONS

A. Forfeiting Substitute Property From A Defendant Who Never Owned The Tainted Property Is Inconsistent With The Purposes And Mechanisms Of Both Civil And Criminal Forfeiture

Civil and criminal forfeiture laws serve distinct purposes and operate in different manners. The order here—which permits the government to forfeit substitute property from a defendant who never owned the tainted property—is inconsistent with the traditional usage of either type of forfeiture proceeding.

Civil forfeiture proceeds *in rem* against criminally tainted property. *Honeycutt*, 137 S. Ct. at 1634. The purpose of civil forfeiture is remedial, *United States v. Ursery*, 518 U.S. 267, 278 (1996)—to permit confiscation of illegal goods and the tools used to commit crimes. For example, the Supreme Court has explained that the civil forfeiture statute at issue here, 18 U.S.C. § 924(d), was intended to "[k]eep[] potentially dangerous weapons out of the hands of unlicensed dealers" by "removing from circulation firearms that have been used or intended

for use outside regulated channels of commerce." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984). Because the named defendant in a civil forfeiture proceeding is the tainted property, the government traditionally could not obtain substitute property if the tainted property could not be found or was otherwise unavailable for forfeiture. This is also consistent with civil forfeiture's remedial purpose: the forfeiture of a vehicle or of cash in lieu of missing contraband firearms, for example, would not serve to remove firearms from circulation.

Criminal forfeiture, in contrast, proceeds *in personam* against a criminal defendant, and is part of the punishment imposed for committing an offense. *See United States v. Bajakajian*, 524 U.S. 321, 332 (1998); *Ursery*, 518 U.S. at 278. Criminal forfeiture statutes are intended to "separat[e] a criminal from his ill-gotten gains." *Honeycutt*, 137 S. Ct. at 1631 (quotation marks omitted); *see also Kaley v. United States*, 571 U.S. 320, 323 (2014). As Congress has explained, these provisions are intended "[t]o enforce the age-old adage that 'crime does not pay'" and "deprive criminals of both the tools they use to commit crimes and the fruits—the 'proceeds'—of their crime." H.R. Rep. No. 105-358, pt. 1, at 35 (1997). Unlike civil forfeiture statutes, criminal forfeiture statutes sometimes permit the government to seek substitute property if the defendant owned the property involved in the crime but has disposed of it. This furthers the punitive

purpose of criminal forfeiture: if a drug dealer has already sold his drugs, forfeiture of the proceeds of that sale or other similarly valued property will operate to fully disgorge him of the profits of his crime.

Thus, civil forfeiture provides for the confiscation of tainted property, regardless of who owns it, but not that property's substitute. And criminal forfeiture provides for the forfeiture of tainted property or its substitute, but only if the tainted property was owned by the defendant. Neither type of proceeding reaches substitute property for tainted property that was never owned by the defendant—the type of forfeiture imposed here.

The Supreme Court recently recognized these limitations in construing 21 U.S.C. § 853—the criminal forfeiture statute applicable to certain drug offenses—in *Honeycutt*. In that case, the Court held that a defendant may not be held jointly and severally liable for the profits that his co-conspirator derived from a crime but that the defendant himself did not acquire. 137 S. Ct. at 1630. The Court explained that section 853(a) provides for the criminal forfeiture of only "proceeds *the person* [*i.e.*, the defendant] obtained" as a result of committing certain drug crimes or any of "*the person's* property" used to commit such crimes. *Honeycutt*, 137 S. Ct. at 1632-1633 (emphasis added) (quoting 21 U.S.C. § 853(a)) (quotation marks omitted). And where the tainted property is unavailable, section 853(p) permits the government to forfeit substitute property "only from the defendant who

initially acquired the property and who bears responsibility for its dissipation." *Honeycutt*, 137 S. Ct. at 1634. In other words, the government cannot forfeit substitute property from a person who never obtained the tainted property or its proceeds. Such a result would be inconsistent with both the *in rem*, remedial nature of civil forfeiture and the *in personam*, punitive nature of criminal forfeiture. It would contravene the limitations of both the civil and the criminal forfeiture statutes, thereby depriving defendants of critical protections embodied in each regime.

B. The Statutes At Issue Can And Should Be Construed Consistently With The Background Principles Of Civil And Criminal Forfeiture

The panel's affirmance of a forfeiture order at odds with fundamental principles of civil and criminal forfeiture might be permissible if it were required by statute. But here, the relevant statutes are most reasonably construed *consistently* with those baseline principles.

Section 853(a)—the criminal forfeiture provision applicable to certain drug offenses—permits forfeiture of property involved in the commission of a crime only if that property belongs or belonged to the defendant. *See supra* p.5; *Honeycutt*, 137 S. Ct. at 1632 ("Section 853(a)(1) limits forfeiture to property the defendant 'obtained … as the result of' the crime."); 21 U.S.C. § 853(a)(2) (limiting forfeiture to "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" the crime). And the substitute asset provision, section 853(p), is expressly limited to situations in which "the defendant once possessed tainted property as '*described in subsection (a)*,' and provides a means for the Government to recoup the value of the property if it has been dissipated or otherwise disposed of by 'any act or omission of the defendant.'" *Honeycutt*, 137 S. Ct. at 1634 (emphasis added). The scheme of section 853 is thus consistent with the policy behind *in personam* criminal forfeitures, which are meant to "ensure that crime does not pay," *Kaley*, 571 U.S. at 323, by "separating a criminal from *his* ill-gotten gains," *Honeycutt*, 137 S. Ct. at 1631 (emphasis added) (quotation marks omitted).

The civil forfeiture provision at issue here, section 924(d), in contrast, permits the forfeiture only of the particular "firearm or ammunition involved in or used in" committing certain offenses. 18 U.S.C. § 924(d)(1). It does not permit the government to collect a substitute for the tainted firearms or ammunition if they are unavailable. *See id.* § 924(d)(2)(C). This scheme is consistent with the remedial purpose of civil forfeitures—removing the contraband from public circulation—as explained above. *See supra* pp.3-4.

The final statute at issue in this case, 28 U.S.C. § 2461(c), bridges section 853 and section 924(d). As relevant here, section 2461(c) permits the government to seek forfeiture of firearms under section 924(d) in the course of a criminal

proceeding, pursuant to the procedures set out in section 853. Section 2461(c) thus broadens the scope of offenses for which the government can seek forfeiture in a criminal proceeding from drugs to firearms, but it does not affect the critical limitation—accomplished through section 853(p)'s reference to section 853(a), and section 853(a)'s reference to tainted property *owned by* the defendant—that the government can seek forfeiture of substitute property only when the defendant owned the tainted property. The legislative history of section 2461 confirms that Congress sought to expand procedural protections for defendants facing forfeiture—not substantively increase the penalties associated with the crimes. *See* H.R. Rep. No. 105-358, pt. 1, at 19 (stating that one purpose of the statute is to "expand procedural protections for property owners"); *id.* at 35-36 (explaining that the aim of section 2461 is to "encourage greater use of criminal forfeiture—with its heightened due process protection"). Thus, the combination of these three statutes permits the government to obtain forfeiture of either (a) the *particular* contraband used in the commission of an offense, regardless of who owns it (an *in rem* civil forfeiture), or (b) a substitute for the contraband owned by the defendant and used in the commission of an offense (an *in personam* criminal forfeiture).[2]

[2] For the purpose of this amicus brief, NACDL assumes, without taking a position on the issue, that section 853(p) is one of the procedural provisions referenced in section 2461(c), and that forfeiture of substitute property would have been permissible if Ms. Valdez had owned the ammunition at issue in her offense.

The panel decision permits the government to combine the substitute-property aspect of *in personam* criminal forfeiture and the without-regard-to-ownership aspect of *in rem* civil forfeiture in a manner that is divorced from the policies underlying either type of forfeiture, and the critical limitations embodied in both. The resulting forfeiture order here penalizes an offender who did not profit from, or use her tools to commit, the offense—a result that is inconsistent with the "important background principles … of forfeiture." *Honeycutt*, 137 S. Ct. at 1634.

To be sure, Congress can provide for a criminal penalty unrelated to any of a defendant's tainted property or proceeds from an offense; indeed, that is the nature of a standard fine imposed as part of a criminal sentence. But such penalties are not traditionally the subject of forfeiture proceedings. This Court has accordingly required that Congress speak clearly to the extent it intends to use a forfeiture proceeding to impose a non-forfeiture penalty. *United States v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1169 (9th Cir. 2008) ("[F]orfeiture statutes are strictly construed against the government.") (quotation marks omitted). Section 2461(c), which provides only for the "procedures" of section 853 to apply to forfeitures permitted by section 924(d), evinces no intent to make such a substantive departure from fundamental forfeiture principles.

Indeed, where Congress has permitted the forfeiture of substitute property owned by a person who did not own the tainted property, it has done so expressly and in narrow circumstances. 18 U.S.C. § 982(b)(2) permits a court, in limited circumstances, to order that a defendant convicted of certain money laundering offenses forfeit tainted property or substitute assets. In the case of a defendant who "acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense"—*i.e.*, a defendant who, like the defendant in this case, did not own the tainted property—the court may order forfeiture of substitute assets only if that 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." *Id.* Thus, in section 982(b)(2), Congress *expressly* provided for substitute property forfeiture for defendants who did not own the tainted property, but also critically *limited* that provision to the most culpable defendants. Congress knows very well how to untether substitute property forfeiture from a defendant's own property for crimes in which intermediaries may be involved. But in the case of Ms. Valdez's offense of conviction, it simply chose not to do so.

C. The Panel's Construction Of The Substitute Forfeiture Scheme Contravenes The Supreme Court's Analysis In *Honeycutt*

Not only does the panel's decision needlessly construe the relevant forfeiture statutes in a manner that marks a substantive departure from fundamental forfeiture

principles, but it also eviscerates the express limitations of section 853 as interpreted by the Supreme Court in *Honeycutt*. Given this irreconcilable conflict with the Supreme Court's clear interpretation of the very statutory provision at issue in this appeal, rehearing en banc is warranted. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

As explained above, in *Honeycutt*, a unanimous Court held that section 853 did not contemplate forfeiture liability for proceeds that a "defendant himself did not acquire." 137 S. Ct. at 1630, 1634; *see supra* pp.5-6. The Court reasoned that by providing for substitute asset forfeiture, Congress made it easier for the government to hold the defendant who acquired the tainted property responsible, but did not go so far as to "enact any significant expansion of the scope of property subject to forfeiture." 137 S. Ct. at 1635 (quotation marks omitted). The Supreme Court thus established that section 853 "authorize[s] the Government to confiscate assets only from the defendant who … acquired the property." *Id.* at 1634.

Permitting a forfeiture order for substitute assets where a defendant (like Ms. Valdez) *neither* received criminal proceeds *nor* acquired instrumentalities of the crime, significantly expands the scope of forfeiture liability beyond "the defendant who acquired the tainted property." *Honeycutt*, 137 S. Ct. at 1635. Nothing in section 2461(c) or section 924(d) suggests that the substitute asset forfeiture provision of section 853(p) may be construed more expansively when the

underlying offense is a firearms offense rather than the narcotics offense at issue in *Honeycutt* and referenced in section 853(a).

Moreover, the panel decision permits the government "to circumvent Congress' carefully constructed statutory scheme." *Honeycutt*, 137 S. Ct. at 1634. In addition to the criminal forfeiture provision of section 853, 21 U.S.C. § 881 provides for the civil forfeiture of, *inter alia*, contraband drugs, conveyances, real property, firearms used to facilitate narcotics offenses, and proceeds traceable to narcotics offenses. The panel's decision would allow the government, through the bridging provision of section 2461(c), to seek forfeiture under section 881 and to obtain the forfeiture of substitute property even from a defendant who never owned the tainted property—precisely what *Honeycutt* held that the government may not do under section 853 directly. Such an end-run around the limitations of section 853 and *Honeycutt* is impermissible, and mandates correction by an en banc court.

D. The Panel's Extension Of Section 853(p) To Permit The Forfeiture Of Substitute Assets Where The Defendant Never Owned The Tainted Property Is Likely To Violate The Eighth Amendment's Excessive Fines Clause In At Least Some Cases

The Eighth Amendment's Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Bajakajian*, 524 U.S. at 328. The Supreme Court has held that a forfeiture qualifies as a fine under that clause if it amounts to punishment for

wrongdoing, and is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Id.* at 334, 336-340.

Traditionally, civil *in rem* forfeitures of property used in the commission of a crime were not considered to implicate the Excessive Fines Clause because they were not considered "punishment against the individual for an offense." *Bajakajian*, 524 U.S. at 331; *but see Austin v. United States*, 509 U.S. 602 (1993). But criminal *in personam* forfeitures—including those of substitute assets where the tainted property is unavailable—are punitive, and thus implicate the Excessive Fines Clause. *Bajakajian*, 524 U.S. at 331-334.

Where, as here, a court orders a defendant to forfeit funds she does not yet have, in lieu of property or proceeds she never obtained, there is a grave concern whether the forfeiture categorically runs afoul of the Eighth Amendment's prohibition on excessive fines. Such an order effectively requires the defendant to do the impossible: to give back property she never owned in the first instance.

Even if such substitute asset forfeiture money judgments do not invariably violate the Excessive Fines Clause, however, they may be found to do so on a case-by-case basis. The panel's construction of the relevant statutes will frequently result in minimally culpable defendants receiving harsh forfeiture penalties, because a low-level offender may be subject to a forfeiture order tied to the value of the entire enterprise. This Court should rehear the case en banc to avoid

construing the provision in a manner that would raise such "constitutional problems." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).

II. NEITHER SECTION 924(d) NOR SECTION 853(p) PERMITS ENTRY OF A MONEY JUDGMENT AS "SUBSTITUTE PROPERTY" SUBJECT TO FORFEITURE

The district court compounded its error here by entering a money judgment against an impecunious defendant rather than ordering the forfeiture of specific property or assets. The court thus permitted the government to obtain a lien on the defendant's future assets instead of following the procedures of the forfeiture statute to forfeit specific property. The unlawful money judgment both highlights the dangers of permitting the government to obtain forfeiture of property from a defendant who never owned tainted property as described above, and independently heightens the need for the Court to rehear the case.

A. The Substitute Property Provision Does Not Permit The Government To Obtain A Money Judgment In Lieu Of Forfeiture Of Other Property

Even if section 853(p) permitted the government to forfeit substitute property in this case (and it does not, because Ms. Valdez never owned the tainted property), nothing permits the government to obtain a money judgment against Ms. Valdez for the value of the ammunition. Where tainted property owned by the defendant is unavailable for forfeiture, section 853(p)(2) permits the court only to "order the forfeiture of any other property of the defendant, up to the value of [the

tainted] property." 21 U.S.C. § 853(p)(2). The statute does not provide for entry of a money judgment up to the value of the tainted property, which would permit the government to obtain a lien on and seize future assets of the defendant as she acquires them.

No other relevant provision authorizes a money judgment in this case either. Section 924(d) authorizes only forfeitures of firearms or ammunition. *See* 18 U.S.C. § 924(d)(1); *id.* § 924(d)(2)(C). And the definition of "property" in section 853(b)—the word used in the substitute property provision in section 853(p)—includes only "real property" and "tangible and intangible personal property." 21 U.S.C. § 853(b).

Congress has the authority to prescribe the limits of penalties and forfeitures and elected not to include money judgments as an option in the statutes at issue here. *See, e.g.*, *Whalen v. United States*, 445 U.S. 684, 689 (1980) (federal courts "may constitutionally impose only such punishments as Congress has seen fit to authorize"); *see also Libretti v. United States*, 516 U.S. 29, 56 (1995) (Stevens, J., dissenting) ("a court 'transcend[s] its jurisdiction' when it orders the forfeiture of property beyond that authorized by statute") (quotation marks omitted). Because the relevant statutes do not authorize the entry of money judgments in lieu of the forfeiture of substitute property, the district court's substitute property forfeiture money judgment in this case is unlawful.

Congress has chosen to permit entry of a money judgment against impecunious defendants in other forfeiture statutes. In particular, the statute authorizing forfeiture of bulk cash smuggled into or out of the United States provides that if "the property subject to forfeiture … is unavailable, and the defendant has insufficient substitute property that may be forfeited …, the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture." 31 U.S.C. § 5332(b)(4). In contrast, Congress chose not to provide for money judgments in section 924(d) or section 853(p).[3]

B. The En Banc Court Should Revisit The Legality Of Awarding Money Judgments In Criminal Forfeiture Proceedings Because The Practice Cannot Be Reconciled With The Supreme Court's Interpretation Of Criminal Forfeiture Statutes

Although this Court has read section 853 to authorize forfeiture money judgments, this expansive interpretation is irreconcilable with the Supreme Court's recent approach to cabining the government's forfeiture authority. In *United States v. Casey*, 444 F.3d 1071 (9th Cir. 2006), this Court held that a court may impose a money judgment to obtain the forfeiture of substitute property to further the "broad

[3] To be sure, Federal Rule of Criminal Procedure 32.2 provides procedures for the court to enter an award of a forfeiture money judgment where authorized by law. But that rule cannot independently authorize such a judgment. *See* 28 U.S.C. § 2072(b) (the rules of procedures prescribed by the Supreme Court "shall not abridge, enlarge or modify any substantive right").

remedial purpose" of the forfeiture statute. *Id.* at 1074 (citing 21 U.S.C. § 853(o)); *see also United States v. Newman*, 659 F.3d 1235, 1242 (9th Cir. 2011). But *Casey* was decided before the Supreme Court's decision in *Honeycutt* and is undermined by the reasoning in that case. There, the Supreme Court expressly rejected the argument that section 853(o)'s directive that courts should "liberally construe[] [the section] to effectuate its remedial purposes" gives license to impose broad forfeiture liability. 137 S. Ct. at 1635 (quotation marks omitted).

The Supreme Court's recent jurisprudence signals that there are significant infirmities in the Ninth Circuit's forfeiture caselaw and irreconcilable differences between the circuit's interpretation of the statutory scheme and intervening Supreme Court authority. *See also* Matthew L. Allison, *To Curb or Not to Curb: Applying* Honeycutt *to the Judicial Overreach of Money Judgment Forfeitures*, 48 U. Balt. L. Rev. 271 (2019) (acknowledging that money judgment forfeitures are "not directly authorized or allowed by current statutes").[4] Accordingly, the en banc court should rehear this case to remedy this disconnect with governing law, and correct the Court's prior construction of the relevant statutes.

[4] The Supreme Court has not considered whether a court may impose a money judgment in lieu of substitute property forfeiture, but Justice Kagan has expressed skepticism about the practice. Oral Arg. Tr. 46:13-15, *Honeycutt v. United States*, No. 16-142 (U.S. Mar. 29, 2017), 2017 WL 1165184.

CONCLUSION

The Court should grant rehearing or rehearing en banc.

Respectfully submitted,

/s/ Sharon Cohen Levin

JOSHUA M. KOPPEL
ANURADHA SIVARAM
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

SHARON COHEN LEVIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(202) 230-8804

April 15, 2019

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Amicus Brief in support of Petition for Rehearing complies with the length limits permitted by Circuit Rule 29-2(c)(2). The brief is 4,017 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Sharon Cohen Levin
SHARON COHEN LEVIN

April 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Sharon Cohen Levin
SHARON COHEN LEVIN