No. 16-8327

IN THE SUPREME COURT OF THE UNITED STATES

HENRY LO, 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

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QUESTION PRESENTED

Whether a district court imposing a criminal forfeiture under the procedures set forth in 21 U.S.C. 853 may enter a forfeiture money judgment establishing the amount of the defendant's forfeiture liability.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 839 F.3d 777.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2016. A petition for rehearing was denied on December 12, 2016 (Pet. App. 47). The petition for a writ of certiorari was filed on March 10, 2017. 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 Northern District of California, petitioner was convicted on two counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. The district court also entered a forfeiture money judgment in the amount of $2,232,894.39. The court of appeals dismissed petitioner's appeal as barred by an enforceable waiver of appellate rights. Pet. App. 1-35.

1. Beginning in 2007, petitioner worked for Absolutely New, Inc. (ANI), a consumer goods company in San Francisco. During and after his employment, petitioner defrauded ANI of more than two million dollars by directing checks and electronic transfers from ANI's bank accounts into his personal accounts and concealing the nature of the transfers. In addition, petitioner executed a scheme to defraud his ex-girlfriend by persuading her to pay $125,000 on the pretense that the money would be used to satisfy her tax liability. Pet. App. 4-6; Gov't C.A. Br. 3-4.

2. A grand jury indicted petitioner on 24 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of fraudulent use of an unauthorized access device, in violation of 18 U.S.C. 1029(a)(2); and four counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 54-57. The indictment also contained

a forfeiture allegation under 18 U.S.C 981(a)(1)(C) and 28 U.S.C. 2461(c). Section 981(a)(1)(C) provides for the civil forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation" of certain criminal statutes, including the mail and wire fraud statutes. 18 U.S.C. 981(a)(1)(C); see Pet. App. 25 n.6. Section 2461(c), in turn, specifies that if the government included a notice of forfeiture in the indictment, a court imposing a sentence for an offense for which civil forfeiture is authorized "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 [18 U.S.C.] 3554." Section 2461(c) further provides that, subject to an exception not relevant here, those criminal forfeitures are governed by the procedures set forth in 21 U.S.C. 853.

In this case, the indictment invoked Section 981(a)(1)(C) and Section 2461(c) and sought forfeiture of "all property constituting, and derived from, proceeds [petitioner] obtained directly and indirectly, as the result of" the charged offenses. Pet. App. 58. The indictment stated that the property subject to forfeiture "include[ed]," but was "not limited to," a parcel of real property and the funds in six financial accounts. Ibid. The indictment further stated that if the property constituting or derived from the proceeds of petitioner's offenses was unavailable, the government would seek forfeiture of substitute

property under 21 U.S.C. 853(p). Pet. App. 58-59. Section 853(p) allows the forfeiture of "any other property of the defendant" if, as a result of any act or omission of the defendant, the directly forfeitable property "cannot be located upon the exercise of due diligence," "has been commingled with other property which cannot be divided without difficulty," or meets other statutory criteria of unavailability.

Petitioner entered a plea agreement in which he agreed to plead guilty to two counts of wire fraud and one count of mail fraud. Pet. App. 7. As part of the agreement, petitioner admitted to defrauding ANI and his ex-girlfriend of at least $2.3 million. Ibid. Petitioner also agreed to waive the right to appeal his convictions and any aspect of his sentence, including any orders relating to forfeiture or restitution. Id. at 7-8.

3. Before sentencing, the Probation Office determined that petitioner had defrauded his victims of more than $2.3 million. Presentence Investigation Report (PSR) ¶ 52. It also noted that petitioner had recently transferred a residence worth $3.3 million to his wife despite a court order instructing him not to transfer any interest in that property. PSR ¶ 81 & n. A. The Probation Office recommended that petitioner be sentenced to pay approximately $2.3 million in restitution, and further recommended that he be ordered to forfeit the same amount as the proceeds of his offenses. PSR Sent. Recommendation 3-4.

The government's position on forfeiture was the same as the Probation Office's. Pet. App. 125-127, 131-135. The government explained that petitioner "was dissipating assets" and that it had decided to seek forfeiture because having a "forfeiture money judgment" reflecting the full amount of the proceeds petitioner obtained as a result of his fraudulent schemes, as well as a "restitution judgment," would "give[] the government more flexibility in obtaining assets that [it] can use to make the victims whole." Id. at 158-159; see id. at 126-127.[1] In addition to the evidence that petitioner had transferred his residence in violation of a court order, the government provided documents showing that petitioner had moved funds out of the financial accounts listed in the indictment, such that those accounts had zero or negative balances. Id. at 270.

Petitioner objected to the requested forfeiture, arguing that the indictment failed to provide sufficient notice that the government would seek a forfeiture money judgment rather than the forfeiture of specific property, and further arguing that the amount of the forfeiture should not include all of the proceeds of his fraudulent schemes, but rather should be limited to the

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[1] See Asset Forfeiture and Money Laundering Section, U.S. Dep't of Justice, Asset Forfeiture Policy Manual 165-167 (2016), https://www.justice.gov/criminal-afmls/file/839521/download (describing procedures through which forfeited assets may be used to satisfy a defendant's restitution obligations).

proceeds linked to the specific uses of the mail and wires at issue in the three counts to which he had pleaded guilty. Pet. App. 106-108. The district court overruled those objections. Id. at 190-191. The court then sentenced petitioner to 70 months of imprisonment and ordered him to pay $2,232,894.39 in restitution. Id. at 9, 42, 46. It also imposed the government's requested forfeiture money judgment by providing that petitioner "shall forfeit [his] interest in the following property to the United States: $2,232,894.39." Id. at 46.

4. The court of appeals dismissed petitioner's appeal as barred by his appeal wavier. Pet. App. 1-35. The court held that petitioner knowingly and voluntarily entered the plea agreement, including the appeal waiver. Id. at 16-17. The court noted that, under circuit precedent, "a waiver of the right to appeal does not bar a defendant from challenging an illegal sentence," which the court had defined as a sentence that is "not authorized by the judgment of conviction or [is] in excess of the permissible statutory penalty for the crime." Id. at 13-14 (brackets and citations omitted). As relevant here, however, the court rejected petitioner's "four arguments as to why the forfeiture order constitutes an illegal sentence" under that standard. Id. at 23; see id. at 23-34.

First, the court of appeals rejected petitioner's contention that the government "did not provide sufficient notice that it was

seeking a forfeiture money judgment." Pet. App. 23; see id. at 23-27. The court held that the forfeiture notice in the indictment satisfied 28 U.S.C. 2641(c) and Federal Rule of Criminal Procedure 32.2, which specifies that the government "need not identify the property subject to forfeiture or specify the amount of a money judgment" in the indictment. Pet. App. 26-27 (quoting Fed. R. Crim. P. 32.2(a)). The court also noted that the indictment expressly stated that the forfeiture sought "was 'not limited to' the property listed in the indictment." Id. at 27.

Second, the court of appeals rejected petitioner's contention that the government was required to follow the procedures for forfeiting substitute property set forth in 21 U.S.C. 853(p) and Rule 32.2(e). Pet. App. 27-28. For example, Section 853(p) requires the government to establish that the directly forfeitable property has been rendered unavailable by an "act or omission of the defendant," 21 U.S.C. 853(p), and Rule 32.2(e)(2) establishes procedures for adjudicating the rights of third parties who claim an interest in the substitute property to be forfeited. The court explained that those procedures apply when the government seeks to forfeit specific substitute property, such as a piece of real property or the funds held in a designated account. Pet. App. 27. Here, in contrast, "the government sought a money judgment, not forfeiture of specific property," and the court therefore held

that the government "was not required to follow the procedures applicable to its seeking substitute property." Id. at 28.

Third, the court of appeals rejected petitioner's contention that the forfeiture money judgment exceeded the amount attributable to the specific counts to which he pleaded guilty. Pet. App. 28-33. The court explained that petitioner pleaded guilty to mail and wire fraud, which require that the charged use of the mail or wires "be completed in furtherance of a scheme to defraud." Id. at 30. The court therefore held that petitioner was liable to forfeit the proceeds of the "fraudulent scheme as a whole," not just the "amounts traceable to [petitioner's] three specific uses of the wires or mail" charged in the counts to which he pleaded guilty. Id. at 30-31.

Fourth, the court of appeals rejected petitioner's contention that the amount of his forfeiture liability should have been determined by a jury rather than by the district court. Pet. App. 33-34. The court explained that petitioner's argument was foreclosed by Libretti v. United States, 516 U.S. 29 (1995), which held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." Id. at 49; see Pet. App. 33-34.

ARGUMENT

Petitioner contends that the district court exceeded its statutory authority by "impos[ing] a forfeiture money judgment."

Pet. 11; see Pet. 11-22. To the extent that petitioner is arguing that a court imposing a criminal forfeiture under the procedures in 21 U.S.C. 853 may not enter a forfeiture money judgment establishing the total amount of the defendant's forfeiture liability -- and instead is limited to ordering forfeiture of specific assets that can be located at the time of sentencing -- the courts of appeals have uniformly and correctly rejected that argument, and this Court has repeatedly denied review of the question.[2] The same result is warranted here, particularly because petitioner did not properly raise that question before either the district court or the court of appeals. To the extent that petitioner is instead arguing that a forfeiture money judgment may not be enforced by seizing the defendant's untainted assets using mechanisms outside the forfeiture statutes, the government agrees -- and, in any event, the decisions below did not address that issue. Any potential dispute about the mechanisms available to enforce forfeiture money judgments should await a case in which the government has actually sought to enforce such a judgment in a manner the defendant contends is impermissible. The petition for a writ of certiorari should be denied.

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[2] See, e.g., Crews v. United States, 137 S. Ct. 409 (2016) (No. 16-6183); Hampton v. United States, 134 S. Ct. 947 (2014) (No. 13-7406); Newman v. United States, 566 U.S. 915 (2012) (No. 11-9001); Smith v. United States, 565 U.S. 1218 (2012) (No. 11-8046); Olguin v. United States, 565 U.S. 958 (2011) (No. 11-6294).

1. A district court imposing a criminal forfeiture under Section 853 may enter a forfeiture money judgment that establishes the amount of the defendant's forfeiture liability and that is enforceable through subsequent forfeitures of specific property.

a. Before 1970, criminal forfeiture was essentially unknown in the United States. Instead, forfeiture proceedings were brought as civil actions against the property involved in crime, relying 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, a vessel used to smuggle goods or an illicit distillery -- but did not impose personal liability on the individuals who committed the offenses. United States v. Bajakajian, 524 U.S. 321, 332 (1998); see Austin, 509 U.S. at 615-616.

In 1970, Congress for the first time authorized criminal forfeiture by making forfeiture a penalty for certain violations of the drug laws and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq. See Bajakajian, 524 U.S. at 332 n.7. Unlike a civil forfeiture, those criminal forfeitures were "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 are in rem proceedings directed at specific property, criminal forfeitures

are <u>in personam</u> and impose personal liability on the convicted defendant. <u>Bajakajian</u>, 524 U.S. at 332.

Since 1970, Congress has substantially expanded the scope of criminal forfeiture. Many statutes now require the criminal forfeiture of the "proceeds" of various offenses. See, <u>e.g.</u>, 18 U.S.C. 982(a), 1963(a)(3); 21 U.S.C. 853(a)(1); see also 18 U.S.C. 981(a)(1) (authorizing civil forfeiture of the proceeds of additional offenses); 28 U.S.C. 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture is authorized). Those statutes "serve important governmental interests such as 'separating a criminal from his ill-gotten gains,' 'returning property, in full, to those wrongfully deprived or defrauded of it,' and 'lessening the economic power' of criminal enterprises." <u>Honeycutt</u> v. <u>United States</u>, 137 S. Ct. 1626, 1631 (2017) (brackets and citation omitted). Criminal forfeiture provisions are generally enforced using the procedures set forth in 21 U.S.C. 853 and in Federal Rule of Criminal Procedure 32.2. See 18 U.S.C. 982(b)(1); 28 U.S.C. 2461(c).

Section 853 includes procedures designed to preserve and recover criminal proceeds and other specific tainted property subject to forfeiture. See 21 U.S.C. 853(c) and (e). In practice, however, criminals have often dissipated or concealed the proceeds of their offenses by the time they are caught. Congress addressed

that problem by enacting a substitute-assets provision, Section 853(p). Section 853(p) states that if, as a result of any act or omission of the defendant, the tainted property subject to forfeiture "cannot be located upon the exercise of due diligence," "has been commingled with other property which cannot be divided without difficulty," or meets other statutory criteria of unavailability, then "the court shall order the forfeiture of any other property of the defendant, up to the value of" the unavailable tainted property. 21 U.S.C. 853(p)(1) and (2). As this Court recently explained, "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 dissipation." Honeycutt, 137 S. Ct. at 1634.

b. In many cases, criminal defendants are sentenced before the government has identified specific assets to be forfeited. That may be because the defendant has dissipated the proceeds of the offense and has no other assets, because the defendant has successfully concealed his assets, or because the government has not yet been able determine which specific assets are subject to forfeiture either directly (because they are tainted) or as substitute assets under Section 853(p).

Because criminal forfeiture is a mandatory sanction that operates in personam rather than in rem, courts of appeals have uniformly held that a defendant cannot escape forfeiture liability merely because sufficient forfeitable property is not available or has not yet been identified at the time of sentencing. Every court of appeals with criminal jurisdiction has held that the government may obtain a "money judgment" reflecting the amount of the defendant's forfeiture liability, and that it may do so "even where the amount of the judgment exceeds the defendant's available assets at the time of conviction." United States v. Vampire Nation, 451 F.3d 189, 202-203 (3d Cir.), cert. denied, 549 U.S. 970 (2006); see, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); United States v. Awad, 598 F.3d 76, 78-79 (2d Cir.), cert. denied, 562 U.S. 950, and 562 U.S. 1054 (2010); United States v. Blackman, 746 F.3d 137, 145 (4th Cir. 2014); United States v. Olguin, 643 F.3d 384, 397 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011); United States v. Hampton, 732 F.3d 687, 691-692 (6th Cir. 2013), cert. denied, 134 S. Ct. 947 (2014); United States v. Baker, 227 F.3d 955, 970 (7th Cir. 2000), cert. denied, 531 U.S. 1151 (2001); United States v. Smith, 656 F.3d 821, 827 (8th Cir. 2011), cert. denied, 565 U.S. 1218 (2012); United States v. Casey, 444 F.3d 1071, 1073-1077 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); United States v. McGinty, 610 F.3d 1242, 1246-1247 (10th Cir.

2010); United States v. Padron, 527 F.3d 1156, 1162 (11th Cir. 2008); United States v. Day, 524 F.3d 1361, 1377-1378 (D.C. Cir.), cert. denied, 555 U.S. 887 (2008).[3]

Rule 32.2 reflects the same understanding. In 2000, the Advisory Committee recommended, and this Court promulgated, amendments to the rule that recognize the government's ability to seek a "forfeiture money judgment" and that establish different procedures for such judgments than for the forfeiture of specific property. Fed. R. Crim. P. 32.2(a)(1); see, e.g., Fed. R. Crim. P. 32.2(c)(1) (providing for ancillary proceedings to determine third-party rights in specific property, but stating that "no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment"). In recommending the amendment, the Advisory Committee observed that "[a] number of cases have approved the use of money judgment forfeitures." Fed. R. Crim. P. 32.2(b)(1) advisory committee's note at 143 (2000). The Committee itself "t[ook] no position on the correctness of those rulings." Ibid. But Congress allowed the amendment to go into effect, and later enacted a general provision authorizing courts to enter criminal forfeitures "pursuant to the Federal Rules of Criminal

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[3] Petitioner cites (Pet. 17-18) a district court decision concluding that the forfeiture statutes do not authorize money judgments. See United States v. Surgent, No. 04-cr-364, 2009 WL 2525137 (E.D.N.Y. Aug. 17, 2009). The Second Circuit has rejected that court's analysis as "unpersuasive." Awad, 598 F.3d at 79 n.5; see United States v. Kalish, 626 F.3d 165, 168 (2010).

Procedure," including Rule 32.2. 28 U.S.C. 2461(c); see USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, Tit. IV, § 410, 120 Stat. 246.

c. The most common means of enforcing a forfeiture money judgment is the subsequent identification and forfeiture of specific property. Rule 32.2(e) provides that, "[o]n the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property" that is "subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered," or that is "substitute property that qualifies for forfeiture under an applicable statute." Fed. R. Crim. P. 32.2(e)(1). Accordingly, if the government discovers previously concealed assets constituting or derived from the proceeds of the offense, it may forfeit those assets in satisfaction of the money judgment. See, e.g., United States v. Saccoccia, 62 F. Supp. 2d 539, 540 (D.R.I. 1999) (ordering the forfeiture of 83 gold bars worth $2.1 million that were discovered "buried or otherwise secreted at the home of [the defendant's] mother" several years after sentencing). Alternatively, if the government can show that tainted property subject to forfeiture is unavailable "as a result of any act or omission of the defendant," then Section 853(p) authorizes the government to forfeit substitute property to satisfy the money judgment. 21 U.S.C. 853(p)(1) and (2); see

generally Stefan D. Cassella, Asset Forfeiture Law in the United States § 22-2(b) and (c), at 761-763 (2d ed. 2013).

Although the courts of appeals have unanimously held that the government may obtain forfeiture money judgments, few courts have squarely addressed the means by which such a judgment may be enforced. One exception is the Third Circuit, which has instructed that "the scope of [an] in personam judgment in forfeiture is more limited than a general judgment in personam" because it is "limited by the provisions of" the applicable forfeiture statutes. Vampire Nation, 451 F.3d at 202. In other words, the Third Circuit has held that a forfeiture money judgment may be enforced only through the forfeiture of specific property under the relevant forfeiture statutes. Ibid. In contrast, some other courts of appeals have suggested that the government may enforce a forfeiture money judgment "in the same way that a successful plaintiff collects a money judgment from a civil defendant." United States v. Hall, 434 F.3d 42, 59 (1st Cir. 2006); see, e.g., Casey, 444 F.3d at 1075 (equating forfeiture money judgments with general civil judgments); but see United States v. Misla-Aldarondo, 478 F.3d 52, 75 (1st Cir.) (characterizing the discussion in Hall as dicta and expressly reserving the question), cert. denied, 552 U.S. 856 (2007).

Although the government has relied primarily on the forfeiture of specific property to enforce forfeiture money

judgments, it has previously argued that such judgments may also be enforced through the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. 3001 et seq., and the other mechanisms available for the enforcement of general judgments in favor of the United States. See, e.g., United States v. Coyne, No. 93-cr-253, 2010 WL 56049, at *4 (D.N.J. Jan. 4, 2010) (granting a motion for garnishment under the FDCPA). The government has now reconsidered that issue in light of this Court's decision in Honeycutt. Although the enforcement of forfeiture money judgments was not directly at issue in that case, the Court reviewed "Congress' carefully constructed statutory scheme" and concluded that Section 853(p)'s substitute-assets provision is "the sole provision of [Section] 853 that permits the Government to confiscate property untainted by the crime." 137 S. Ct. at 1633-1634.

In light of that description of Section 853, the government now agrees with the view adopted by the Third Circuit in Vampire Nation. Under that view, a forfeiture money judgment does not supply independent authority for seizing the defendant's untainted property through the FDCPA or the other mechanisms applicable to general judgments in favor of the United States. Instead, a forfeiture money judgment reflects the district court's determination of the defendant's forfeiture liability and serves as the basis for subsequent enforcement under the applicable forfeiture statutes. See Vampire Nation, 451 F.3d at 202. Here,

for example, the forfeiture money judgment memorializes the district court's finding that petitioner obtained $2,232,894.39 in proceeds as a result of his fraudulent schemes. Pet. App. 46; see id. at 190-191. If the government later identifies specific property that "constitutes or is derived from proceeds traceable to" petitioner's offenses, 18 U.S.C. 981(a)(1)(C), it may invoke Rule 32.2(e)(1)(A) to forfeit that property in satisfaction of the money judgment. Alternatively, if the government can establish that petitioner transferred, commingled, or otherwise rendered the proceeds unavailable under the applicable statutory criteria, it may seek to forfeit substitute property in accordance with Section 853(p) and Rule 32.2(e)(1)(B). But the government no longer takes the position that it can enforce a forfeiture money judgment like the one entered here by seizing the defendant's property using mechanisms outside the applicable forfeiture statutes.[4]

2. Petitioner provides no sound reason to question the courts of appeals' uniform conclusion that district courts imposing criminal forfeitures may enter forfeiture money judgments.

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[4] The government may continue to accept voluntary payments in satisfaction of forfeiture money judgments because such payments do not involve any involuntary transfer of the defendant's property. In addition, forfeiture money judgments entered under the bulk-cash smuggling statute may be subject to a different analysis because that statute expressly provides for the entry of "a personal money judgment against the defendant for the amount that would be subject to forfeiture." 31 U.S.C. 5332(b)(4).

a. Petitioner principally contends (Pet. 11-17) that Section 853 and other forfeiture statutes do not authorize money judgments. That is not correct. Although the criminal forfeiture statutes at issue here do not use the term "money judgment," they impose a mandatory in personam forfeiture obligation. Several features of those statutes make clear that a defendant's liability is not limited to property that can be identified at the time of sentencing -- and thus that a defendant may not evade forfeiture liability by dissipating or concealing the proceeds of his offense.

Most obviously Section 853(p) provides that, if the defendant's actions have rendered the tainted property subject to forfeiture unavailable, the court "shall order the forfeiture of any other property of the defendant, up to the value of" the unavailable tainted property. 21 U.S.C. 853(p)(2). The substitute assets subject to forfeiture are not limited to assets that have been identified at the time of sentencing; instead, they encompass "any other property of the defendant." Ibid. By its plain terms, therefore, Section 853(p) requires the forfeiture of "property acquired by the defendant after the imposition of sentence." Smith, 656 F.3d at 827. Accordingly, as several courts of appeals have held, Section 853(p) contemplates the entry of an order that establishes the value of the proceeds that the defendant obtained -- that is, a forfeiture money judgment -- even if the government

has not yet located assets sufficient to satisfy that judgment. See, e.g., ibid.; Day, 524 F.3d at 1377-1378.

Section 853(m) reinforces that conclusion. It provides that, "to facilitate the identification and location of property declared forfeited," a court may order discovery "after the entry of an order declaring property forfeited to the United States." 21 U.S.C. 853(m) (emphasis added). Like Section 853(p), that provision anticipates circumstances in which a district court will issue an order fixing the amount of the defendant's forfeiture liability (i.e., a forfeiture money judgment) despite the government's inability to identify and locate forfeitable assets at the time of sentencing. It would make little sense to authorize the government to use post-sentencing discovery to locate forfeitable property if a defendant's forfeiture liability were limited to assets identified at the time of sentencing.

b. Petitioner also contends that the imposition of a forfeiture money judgment impermissibly allows the government to seize "future untainted assets of the defendant" without following the procedures set forth in Section 853(p). Pet. 21; see Pet. 20-22. But as explained above, see pp. 16-18, supra, the government now agrees with the Third Circuit's conclusion in Vampire Nation that a forfeiture money judgment is "limited by" the provisions of the applicable forfeiture statutes, and that the government may thus enforce such a judgment only by forfeiting

specific property that is subject to forfeiture under the relevant statutes. 451 F.3d at 202. That limitation ensures that a court will not forfeit a defendant's property unless the government establishes either that it is tainted or that it satisfies the requirements for forfeiting substitute property under Section 853(p).

3. Petitioner does not argue that the court of appeals' decision conflicts with any decision of another court of appeals or otherwise satisfies this Court's traditional certiorari standards. See Sup. Ct. R. 10. And even if the question presented warranted this Court's review, this case would not be an appropriate vehicle in which to consider it because petitioner did not properly raise that question in the lower courts.

In the district court and his opening brief in the court of appeals, petitioner objected to forfeiture on a variety of substantive and procedural grounds. See Pet. App. 106-107, 233-246. He did not, however, advance that claim that he now presses in this Court -- that forfeiture money judgments are categorically impermissible. Instead, petitioner raised that argument for the first time in his reply brief in the court of appeals. See id. at 311-314. That was too late to preserve the issue, because the court of appeals "do[es] not consider issues raised for the first time in reply briefs." Vasquez v. Rackauckas, 734 F.3d 1025, 1054 (9th Cir. 2013). Accordingly, neither the district court nor the

court of appeals addressed petitioner's contention that forfeiture money judgments are categorically impermissible.

This Court's "traditional rule * * * precludes a grant of certiorari" where, as here, "the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Petitioner identifies no sound reason to depart from that rule here. And petitioner's failure to raise the issue in the district court means that this case would be a poor vehicle for the additional reason that his claim would be reviewable only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 732-733 (1993). Petitioner would not be entitled to relief under that standard. Among other things, a district court order that is consistent with the uniform view of the courts of appeals does not constitute "clear or obvious" error. Puckett v. United States, 556 U.S. 129, 135 (2009).

4. Finally, petitioner contends (Pet. 22-24) that his petition should be held pending Honeycutt. But that request is moot now that the Court has issued its decision in Honeycutt, and nothing in the Court's decision undermines the court of appeals' decision in this case.

Honeycutt held that proceeds 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. 137 S. Ct. at 1635. That holding is not relevant here, because petitioner was neither charged with conspiracy nor held jointly and severally liable for proceeds obtained by others -- to the contrary, he admitted in his plea agreement that he obtained more than $2.3 million in proceeds himself. Pet. App. 3-5. Honeycutt did not address the propriety of forfeiture money judgments or otherwise undermine any aspect of the court of appeals' reasoning in this case.

As explained above, the Court's opinion in Honeycutt has prompted the government to reconsider the means by which it may enforce a forfeiture money judgment. See pp. 16-18, supra. But the question whether the government may obtain a forfeiture money judgment is distinct from "[t]he question of how the government can enforce that judgment." Misla-Aldarondo, 478 F.3d at 74. The government has revised its position on the latter question based on Honeycutt, but only the former question is even arguably presented here. The court of appeals affirmed the district court's entry of a forfeiture money judgment, but neither court addressed the means by which that judgment may be enforced. That question will arise only in subsequent proceedings, when the government takes action to enforce the judgment. Cf. id. at 75 (upholding a

forfeiture money judgment without deciding whether the government may enforce it through mechanisms outside the forfeiture statutes). And because neither Honeycutt nor the government's revised position on the scope of its authority to enforce a forfeiture money judgment is relevant to the question presented in the petition for a writ of certiorari (or the distinct questions actually raised and decided below), there is no need to remand this case to allow the court of appeals to consider those intervening developments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2017