

Case No. 16-8327

IN THE SUPREME COURT OF THE UNITED STATES

HENRY LO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The Court should grant certiorari to resolve the question whether the Government may obtain a forfeiture money judgment against an impecunious defendant in the absence of statutory authority. The Government offers no statutory basis for the Ninth Circuit's – and other courts of appeals' – decisions holding that the Government is entitled to a forfeiture money judgment as part of a criminal judgment of conviction. Nor does it offer any sound basis to dispute the significance of the question presented in the petition. Because the question was briefed below and addressed by the Ninth Circuit Court of Appeals, this case is the right vehicle to resolve the issue.

I. The Question Presented is of National Importance and Can Only be Resolved by This Court

Criminal asset forfeiture has been the subject of several recent cases decided by this Court, including *Honeycutt v. United States*, 137 S.Ct. 1626, (2017) and *Luis v. United States*, 136 S.Ct. 1083 (2016), reflecting the Government's increasing use of criminal forfeiture as a form of punishment. But when requesting a forfeiture money judgment, the Government has been seeking, and courts have been exacting, a punishment that is not authorized by the pertinent forfeiture statutes. The Government, both below and in its opposition here, relies on appellate decisions that have created a punishment not authorized by Congress, but the Government fails to refute petitioner's claim that those decisions contravene fundamental principles of separation of powers and unconstitutionally allow the

judiciary to create criminal punishments. Whether courts may impose forfeiture money judgments as a criminal penalty in the absence of statutory authorization is a question that can only be resolved by this Court.

The Government asserts that “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,” but the only authority it cites in support are the court of appeals decisions challenged by Petitioner. Brief in Opposition (“Opp.”) at 10-13. Nowhere in the Government’s opposition does it address – much less refute – petitioner’s argument that there is no statutory authority for a forfeiture money judgment (a fact conceded by the government below, Pet.App. 287) and that the appellate decisions relied upon by the government are the sort of judicial legislating this Court has repeatedly condemned as a violation of the principles of separation of powers. Petition for Certiorari (“Pet. for Cert.”) at 13-14.

Rather than address the question presented head on, the Government veers off on a discussion of appellate courts’ struggles to determine how courts can enforce forfeiture money judgments. It then offers (for the first time) to limit its future enforcement of forfeiture money judgments to tainted assets, in an effort to satisfy this Court’s holding in *Honeycutt*, 137 S.Ct. at 1632-33, that forfeiture of property under the relevant statutes is limited to tainted property (unless the

Government satisfies the requirements of Section 853(p)). Opp. at 16-18. That rhetorical detour proves Petitioner's point: there is no enforcement mechanism for forfeiture money judgments because they are void *ab initio*. Because there is no statutory basis for a forfeiture money judgment as part of a criminal sentence, such judgments are inherently void and cannot be enforced. *See Ex Parte Lange*, 85 U.S. 163, 176-77) (criminal judgment imposing punishment in excess of statutory authorization is inherently void).

The Government's offer, Opp. at 17, to comply with the substitute asset provisions of Section 853(p) later, after it obtains an "extra-statutory" money judgment and seeks to enforce it, both evades the question at issue and ignores the requirements of the statute. Section 853(p) requires the Government to follow and satisfy the substitute asset provisions as a condition precedent for obtaining a lawful forfeiture of untainted property. As Petitioner repeatedly argued below, the Government failed to follow those substitute asset provisions before it obtained the forfeiture money judgment in this case. Pet.App. at 106-107. Rather than follow those procedures, the Government relied – both in the district court and in the Court of Appeals – on the circuit court decisions it relies on here, arguing that those decisions confer upon it the right to obtain a forfeiture money judgment independent of the statutory requirements, despite the conceded absence of statutory authorization.

Only this Court can correct the Government's and the appellate courts' imposition of a form of punishment that is not authorized by statute.

II. The Question Presented Was Briefed and Addressed Below

The question presented was briefed below and decided by the Ninth Circuit. In the district court, Petitioner objected to the forfeiture money judgment because the Government had not complied with the forfeiture laws, including the procedural requirements of Section 853 – it had not proven that specific property was the proceeds of the fraud or that such property was unavailable due to some action of the Petitioner. In response, the Government, relying on *United States v. Newman*, 659 F.3d 1235 (9th Cir. 2011), asserted that it need not forfeit, or prove the forfeitability of, specific property and could obtain a forfeiture money judgment because “forfeiture is not limited to specific assets directly traceable to the offense.” Therefore, it did not need to comply with the substitute asset provisions of Section 853(p) or Fed. R. Crim. P. 32.2. Pet.App. 126; *see also* Pet.App. 132-133. The district court agreed with the Government and entered the forfeiture money judgment.

In the Court of Appeals, the Government repeated its argument in opposition to Petitioner's brief on appeal, stating: “The district court's imposition of . . . forfeiture did not exceed statutory authorization.” Pet.App. 277. The Government again relied on *Newman* and the other appellate decisions which “have held that a

forfeiture money judgment may be entered against a defendant.” *Id.* at 287-290. While conceding that “the forfeiture statutes at issue, including [Section 853(p)], do not expressly authorize personal money judgments as a form of forfeiture,” the Government argued that “nothing suggests that money judgments are forbidden.” Pet.App. 287. The Government argued that under the circuit court decisions, it was not required to “first proceed against specific property constituting the proceeds of the offense, then against substitute property if the proceeds are unavailable.” Pet.App. 292. In response, Petitioner argued, as he does here, that forfeiture money judgments were not authorized by the applicable statutes. Pet.App. 310-314.

The Ninth Circuit agreed with the Government in its opinion below, holding that the Government was not required to follow the procedural requirements of Section 853 or Fed. R. Crim. P. 32.2 because those procedures only apply when the Government seeks forfeiture of specific property, not when it seeks a money judgment. Pet.App. 27; Opp. at 7. Finding that the forfeiture money judgement was not unlawful, the Court of Appeals held that Petitioner waived his appellate rights. Pet.App. 34-35.

Thus, not only was the issue raised by Petitioner below, it was addressed by the court below and is now properly before this Court. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (“even if this were a claim not raised

by petitioner below, we would ordinarily feel free to address it since it was addressed by the court below”).

III. Conclusion

The question presented in the petition is of significant national importance and was squarely addressed below. The petition for certiorari should be granted.



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