No. 16-142

In the Supreme Court of the United States

TERRY MICHAEL HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
JAMES I. PEARCE
Attorney

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

QUESTION PRESENTED

Whether 21 U.S.C. 853 renders the members of a drug conspiracy jointly and severally liable for the forfeiture of the reasonably foreseeable proceeds of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 816 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2016. A petition for rehearing was denied on May 31, 2016 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on July 29, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The relevant statutory provisions and rule are reprinted in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of conspiracy to possess iodine, knowing it would be used to manufacture meth-

amphetamine, in violation of 21 U.S.C. 846 and 841(c)(2); one count of conspiracy to possess chemicals, products, and materials which would be used to manufacture methamphetamine, in violation of 21 U.S.C. 846 and 843(a)(6); two counts of distribution of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c) and 18 U.S.C. 2; six counts of possession of materials which would be used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6) and 18 U.S.C. 2; and one count of possession of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c) and 18 U.S.C. 2. Petitioner was sentenced to 60 months of imprisonment. The district court denied the government's motion for a criminal forfeiture. The court of appeals affirmed petitioner's convictions but reversed the order denying forfeiture. Pet. App. 1a-34a.

A. Legal Background

Under 21 U.S.C. 853(a)(1), a person convicted of a felony drug offense must forfeit the proceeds of the crime—or, if the traceable proceeds are not available, an equivalent sum from other assets. This case concerns the application of that requirement to the members of a drug conspiracy.

1. 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; see also *Various Items of Pers. Prop.* v. *United States*, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned."). Those *in rem*

actions resulted in the forfeiture of specific "guilty property"—for example, a vessel used to smuggle goods or an illicit distillery—but did not impose personal liability on the individual who committed the offense. *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 (RICO), 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 *in personam* and impose personal liability on the convicted defendant. *Bajakajian*, 524 U.S. at 332.

In 1984, Congress expanded existing criminal forfeiture statutes by enacting Section 853 and a parallel forfeiture provision in RICO, 18 U.S.C. 1963. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, ch. III, 98 Stat. 2040. Congress sought to "enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep. No. 225, 98th Cong., 1st Sess. 191 (1983) (Senate Report). In particular, Congress "intended to eliminate the statutory limitations and ambiguities that ha[d] frustrated active pursuit of forfeiture by Federal law enforcement agencies." *Id.* at 192.

2. Section 853 provides that any person convicted of certain felony drug offenses "shall forfeit to the United States," among other things, "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. 853(a)(1). RICO's forfeiture provision contains materially identical language. 18 U.S.C. 1963(a)(3). The forfeiture of proceeds reflects another departure from traditional forfeiture law, which had until the late 1970s been limited to "contraband and the instrumentalities of crime." Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 25-4(a), at 900 (2d ed. 2013) (Cassella).

Section 853's predecessor provision had required the defendant to forfeit only the "profits" from the offense. 21 U.S.C. 848(a)(2)(A) (1982); see *United States* v. *McHan*, 101 F.3d 1027, 1041 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997). Section 853(a)(1) uses "the term 'proceeds' * * * in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." Senate Report 199; see *id.* at 211. The statute thus requires a defendant to forfeit "all gross receipts" from the offense, "not just [the] profits." *United States* v. *Olguin*, 643 F.3d 384, 399 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011).[1]

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[1] With a single exception, every court of appeals to consider the issue has adopted the gross-receipts interpretation of Section 853(a)(1) and 18 U.S.C. 1963(a)(3). See, *e.g.*, *United States* v. *Christensen*, 828 F.3d 763, 822-824 (9th Cir. 2015), cert. denied, No. 16-461 (Jan. 9, 2017); *United States* v. *Bucci*, 582 F.3d 108, 121-124 (1st Cir. 2009); *United States* v. *Keeling*, 235 F.3d 533, 537 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *McHan*, 101

Accordingly, if a drug dealer is convicted of selling a quantity of drugs for $100,000, he is liable to forfeit the entire $100,000—he cannot deduct the amount he paid for the drugs. See *United States* v. *Casey*, 444 F.3d 1071, 1076 & n.4 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); *McHan*, 101 F.3d at 1041-1042. The dealer also cannot escape forfeiture by using the proceeds to buy other property, such as a car or a house. Section 853(a)(1) reaches property "derived from" criminal proceeds, so any property that can be traced to the proceeds is likewise subject to forfeiture.

Forfeiture under Section 853 is not limited to property the defendant has in his possession when he is convicted. The statute provides that "[a]ll right, title, and interest" in criminal proceeds "vests in the United States upon the commission of the act giving rise to forfeiture." 21 U.S.C. 853(c). "Any such property that is subsequently transferred to a person other than the defendant" may be ordered forfeited unless the transferee shows that he is a bona fide purchaser who acquired the property without reason to believe it was subject to forfeiture. *Ibid.* The hypothetical $100,000 thus remains subject to forfeiture even if the dealer passes it on to his supplier, pays it to his couriers, or gives it to a friend. See, *e.g.*, *Casey*, 444 F.3d at 1073-1074; *United States* v. *Hurley*, 63 F.3d 1, 21-22 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).

3. In practice, of course, defendants have often dissipated the proceeds of their offenses by the time they are caught. And because "drug traffickers deal almost exclusively in cash and endeavor to keep the cash out of the banking system," it is often difficult if

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F.3d at 1041-1042; but see *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003).

not impossible to trace those proceeds to specific assets. Cassella § 25-5(c), at 927; see *United States* v. *Westbrook*, 119 F.3d 1176, 1192 (5th Cir. 1997), cert. denied, 522 U.S. 1119 (1998).

In 1986, Congress responded to that problem by "provid[ing] for the forfeiture of substitute assets where the proceeds of a specified crime are lost, beyond judicial reach, substantially diminished, or commingled." 132 Cong. Rec. 26,473 (1986); see Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, Tit. I, § 1153, 100 Stat. 3207-13. The substitute-assets provision 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 is otherwise unavailable. 21 U.S.C. 853(p); see 18 U.S.C. 1963(m).

Even if the defendant does not have substitute assets at the time of conviction, moreover, the government may obtain a money judgment for the amount of the proceeds. See Fed. R. Crim. P. 32.2(b) (providing for money judgments); see also *United States* v. *Hampton*, 732 F.3d 687, 691 (6th Cir. 2013) (collecting cases), cert. denied, 134 S. Ct. 947 (2014). Thus, if the $100,000 in drug proceeds cannot be located or traced and the defendant lacks substitute assets, the government is entitled to a $100,000 money judgment enforceable against assets he may acquire in the future. See Cassella § 19-4(c), at 691-693.

4. Section 853 applies only to drug offenses, but in the decades since its enactment Congress has authorized the forfeiture of proceeds as a penalty for many

other crimes. See, *e.g.*, 18 U.S.C. 982(a); see also 18 U.S.C. 981(a)(1) (civil proceeds forfeitures for various offenses); 28 U.S.C. 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture is authorized). Section 853's procedures generally govern forfeitures under those statutes as well. 18 U.S.C. 982(b)(1); 28 U.S.C. 2461(c).

B. The Present Controversy

1. Petitioner and his brother ran an outdoor-gear store in Chattanooga, Tennessee. Petitioner's brother owned the store; petitioner was the manager in charge of sales and inventory. The store carried a product called "Polar Pure," an iodine-based water purifier. In addition to being a water purifier, iodine is also used to make methamphetamine. In early 2008, after noticing a growing number of "edgy looking folks" buying Polar Pure, petitioner called the Chattanooga Police Department and was warned that "Polar Pure was being used to manufacture methamphetamine throughout the community." Pet. App. 2a; see 1/22/14 Trial Tr. (Tr.) 179; 1/23/14 Tr. 355.

Despite that warning, petitioner and his brother continued to sell increasing quantities of Polar Pure to methamphetamine cooks. They sold more than 2800 bottles in 2008 and more than 13,000 bottles in 2009. Polar Pure became the store's highest-grossing item, bringing in roughly $400,000 in revenues and $270,000 in profits between 2008 and 2010. Pet. App. 2a-3a, 51a; 1/22/14 Tr. 249-252.

Petitioner and his brother kept the store's supply of Polar Pure hidden behind the counter, so that customers had to ask for it. And although each bottle contained enough iodine to purify 500 gallons of water, the brothers sold up to 12 bottles at a time to custom-

ers who returned multiple times per week. Pet. App. 2a-3a; 1/21/14 Tr. 44, 48-50, 54-72.

Between 2008 and 2010, law enforcement officers repeatedly tried to convince petitioner and his brother to stop selling Polar Pure to methamphetamine cooks, but the brothers refused. Petitioner also lied about the quantity of Polar Pure he was selling, and he later told officers that he and his brother had adopted a "don't ask don't tell policy" for iodine sales. 1/22/14 Tr. 255-256; see *id.* at 147-149, 253; Pet. App. 3a.

In November 2010, law enforcement officers executed a warrant at the store and seized its inventory of Polar Pure. Illicit methamphetamine labs using iodine—which had previously been commonplace in the area—became "fairly non-existent" after the seizure. 1/23/14 Tr. 366; see 1/22/14 Tr. 232, 253-254.

2. Petitioner and his brother were indicted on conspiracy and substantive charges of possessing and distributing chemicals, knowing they would be used to make methamphetamine. Pet. App. 3a-4a. The indictment also sought a forfeiture money judgment holding the brothers jointly and severally liable for $270,000 in proceeds. Indictment 2-3; see Pet. App. 67a (second superseding indictment).[2]

Petitioner's brother pleaded guilty and agreed to a $200,000 forfeiture money judgment. Petitioner went to trial. The jury acquitted him on three counts but convicted him on the other 11, including substantive and conspiracy charges. Pet. App. 4a, 39a.

The district court sentenced petitioner to 60 months of imprisonment. The government sought a

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[2] Although Section 853(a)(1) authorizes the forfeiture of gross receipts, in this case the government sought to forfeit only the net profits from the Polar Pure sales. Pet. App. 67a.

forfeiture money judgment of approximately $70,000, the remaining amount of the conspiracy's proceeds. The court declined to order a forfeiture, stating that petitioner was a salaried employee and that the government had not proved that he personally retained any proceeds from the iodine sales. Pet. App. 4a, 39a.

3. The court of appeals affirmed petitioner's convictions but reversed the denial of a forfeiture. Pet. App. 24a-29a. The court joined several other circuits in applying traditional principles of conspiracy liability to hold that Section 853 "mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." *Id.* at 25a-26a. The court concluded that it was bound by *United States* v. *Corrado*, 227 F.3d 543 (6th Cir. 2000), which had interpreted RICO's "virtually identical" forfeiture provision to provide for joint-and-several liability. Pet. App. 27a.

Judge Moore concurred in the judgment. She likewise concluded that the panel was bound by *Corrado*, but wrote separately to express her agreement with the D.C. Circuit's decision in *United States* v. *Cano-Flores*, 796 F.3d 83 (2015), cert. denied, 136 S. Ct. 1688 (2016), which had departed from *Corrado* and the decisions of every other circuit to consider the issue by rejecting joint-and-several co-conspirator liability. Pet. App. 29a-34a.

SUMMARY OF ARGUMENT

A conspiracy is a partnership in crime in which the conspirators are legally responsible for each other's foreseeable actions in furtherance of their common plan. Under that bedrock principle of conspiracy liability, 21 U.S.C. 853 renders the members of a drug conspiracy jointly and severally liable to forfeit the proceeds foreseeably obtained by the conspiracy as a

whole, without regard to how they divided those proceeds among themselves.

A. Because a conspiracy is a partnership in crime, each of its members is "responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013). One consequence of that principle is the familiar *Pinkerton* rule, which provides that a person who joins a conspiracy is guilty of the reasonably foreseeable substantive offenses his co-conspirators commit in furtherance of the scheme. Similar principles of conspiracy liability run throughout the criminal law, governing the treatment of conspirators under the hearsay rule, the Confrontation Clause, and the venue provisions of Article III and the Sixth Amendment. The same principles also apply in criminal sentencing.

B. Those traditional principles of conspiracy liability dictate that, when the traceable proceeds of a conspiracy are unavailable, Section 853 renders conspirators jointly and severally liable for the amount of proceeds foreseeably obtained by the conspiracy. As the overwhelming majority of the courts of appeals have recognized, that result follows directly from the understanding that the members of a conspiracy are partners who act as each other's agents. Joint-and-several liability simply treats conspirators like the members of a lawful partnership, who are likewise jointly and severally liable for the partnership's debts.

Petitioner asserts that the text of Section 853(a)(1) precludes joint-and-several liability because it requires a person convicted of a drug offense to forfeit the proceeds "the person" obtained from the offense. But when one conspirator foreseeably obtains proceeds —say, by completing a drug sale—that act is attribut-

ed to his co-conspirators as a matter of law. And Section 853(a)(1) readily encompasses such co-conspirator liability by requiring the forfeiture of proceeds the defendant obtained "indirectly."

Petitioner objects that joint-and-several liability is a tort concept that is out of place in criminal sentencing, which typically calls for individual punishment. But joint-and-several liability naturally results where, as here, multiple criminal defendants share liability for a fixed sum. For example, it was "well-settled" that courts could "impose joint and several [restitution] liability" even before Congress expressly addressed the issue in 1996. *United States* v. *Hunter*, 52 F.3d 489, 494 (3d Cir. 1995); see 18 U.S.C. 3664(h). Joint-and-several liability is equally appropriate in the forfeiture context, where the fixed measure of liability is the defendants' gain rather than the victim's loss.

C. Most of petitioner's remaining arguments for a departure from traditional principles of conspiracy liability rest on a mistaken view of Section 853's purpose and structure. Unlike traditional civil *in rem* forfeiture statutes, Section 853 is not limited to the forfeiture of specific tainted property, such as the traceable proceeds of the offense. Instead, when those traceable proceeds are not available, Section 853 makes a defendant personally liable to forfeit an equivalent amount, either in the form of substitute property or through a money judgment. 21 U.S.C. 853(p); Fed. R. Crim. P. 32.2(a) and (b). And when two or more defendants conspired to obtain the proceeds, that personal liability is joint and several.

Petitioner contends that the application of traditional principles of conspiracy liability to Section 853(a)(1) would yield anomalous results under other

provisions of Section 853—for example, by authorizing the government to freeze all of the conspirators' untainted assets before trial. But those arguments are premised on a misunderstanding of the statute, which is why none of the anomalies petitioner posits have materialized during the decades that courts have applied the rule he seeks to overturn.

Departing from traditional principles of conspiracy liability would thwart the purpose of Section 853 by undermining the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014) (citation omitted). It would mean, for example, that the conspirators could avoid forfeiture by concealing the allocation of proceeds among themselves and dissipating those proceeds before being caught.

D. Finally, petitioner's reliance on the rule of lenity and the canon of constitutional avoidance is misplaced. The rule of lenity applies only when, at the end of the process of construing a statute, the Court is left with a grievous ambiguity. It has no role to play where, as here, longstanding background principles provide a clear answer. Nor does joint-and-several liability raise concerns under the Eighth Amendment. A defendant's liability is limited to the amount of proceeds that was reasonably foreseeable to him. As decades of experience confirm, a forfeiture in that amount will rarely, if ever, be grossly disproportional to the gravity of the defendant's offense. And petitioner's Sixth Amendment avoidance argument rests on his erroneous assumption that joint-and-several liability authorizes pretrial restraints of conspirators' untainted assets.

ARGUMENT

SECTION 853 RENDERS DRUG CONSPIRATORS JOINTLY AND SEVERALLY LIABLE TO FORFEIT THE REASONABLY FORESEEABLE PROCEEDS OF THEIR CONSPIRACY

A conspiracy is a partnership in crime in which each conspirator is legally responsible for his co-conspirators' reasonably foreseeable acts in furtherance of their common scheme. That principle animates numerous aspects of criminal law—including the *Pinkerton* rule holding a member of a conspiracy liable for substantive crimes committed by his co-conspirators. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946). The same principle dictates that 21 U.S.C. 853 renders the members of a drug conspiracy jointly and severally liable to forfeit the reasonably foreseeable proceeds of the conspiracy. For nearly three decades after Section 853's enactment, that rule uniformly prevailed in the courts of appeals.

Joint-and-several forfeiture liability makes sense. Just as the members of a lawful partnership are held jointly and severally liable for the partnership's debts, criminal conspirators have joint liability for the proceeds of their joint crimes. Joint-and-several liability is entirely consistent with Section 853's text and structure, and it is eminently workable in practice—as three decades of experience in the lower courts confirm. A departure from traditional principles of conspiracy liability, in contrast, would thwart Section 853's purpose by allowing conspirators to evade forfeiture by concealing the allocation of the proceeds among themselves.

A. Because A Conspiracy Is A Partnership In Crime, Conspirators Are Responsible For Each Other's Acts In Furtherance Of The Common Scheme

1. "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). To convict a defendant of a drug or RICO conspiracy, the government must prove "that two or more people agreed to commit a crime covered by the specific conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy)." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013).

Once a person joins a conspiracy, he "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith*, 133 S. Ct. at 719. So long as the "partners in the criminal plan" agree to pursue "the same criminal objective," "each is responsible for the acts of each other" even if they "divide up the work." *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997). That principle of responsibility for the acts of one's co-conspirators is rooted in the common law, which likewise recognized that "[o]ne who conspires with others to commit an unlawful act * * * is liable for the acts of each and all who participate with him in the execution of the unlawful purpose." Wm. L. Clark, Jr., *Handbook of Criminal Law* 162 (3d ed. 1915) (Clark).[3]

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[3] See 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law* § 629, at 385 (8th ed. 1892) ("When two or more persons unite to accomplish a criminal object, * * * each individual whose will contributes to the wrong-doing is in law responsible for the whole, the same as though performed by himself alone."); 3 Joseph

The principle that conspirators are legally responsible for each other's acts flows from the recognition that a conspiracy is a "partnership in crime." *Pinkerton*, 328 U.S. at 644, 646; see *United States* v. *Kissel*, 218 U.S. 601, 608 (1910) (Holmes, J.) ("A conspiracy is a partnership in criminal purposes."). The common law treated "every Partner" as "an agent of the Partnership" whose acts within the scope of the partnership bound his partners. Joseph Story, *Commentaries on the Law of Partnership* § 1, at 1 (5th ed. 1859). Modern partnership statutes reflect the same rule. See Uniform Partnership Act § 301(1) (1997). And just as each member of a lawful partnership is an agent whose acts bind his partners, "[e]ach conspirator is the agent of the other, and the acts done are therefore the acts of each and all." Clark 164; see *Pinkerton*, 328 U.S. at 646 ("[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward.").

2. One consequence of that traditional principle of conspiracy liability is the familiar *Pinkerton* rule, which provides that all conspirators may be convicted of a "substantive offense" committed by a member of the conspiracy so long as that offense was reasonably foreseeable and committed "in furtherance of the

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Chitty, *A Practical Treatise on the Criminal Law* 1143a (5th Am. ed. 1847) ("Where several persons are proved to have combined together for the same illegal purpose, any act done by any of the party, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party."); John Wilder May, *The Law of Crimes* § 89, at 99 (1881) ("[E]ach is responsible for all acts of his confederates, done in pursuance of the original purpose."); see also, *e.g.*, *Collins* v. *Commonwealth*, 3 Serg. & Rawle 220, 223 (Pa. 1817); *Commonwealth* v. *Warren*, 6 Mass. (6 Tyng.) 74 (1809).

conspiracy." *Pinkerton*, 328 U.S. at 647. That rule is based on the understanding that each conspirator's "acts in furtherance of the conspiracy are * * * attributable to the others." *Ibid.* Thus, even though the other conspirators did not *personally* perform the acts meeting the elements of the substantive offense, they are guilty because the acts of their co-conspirator and agent are attributed to them.

For example, a defendant may be convicted of possessing drugs he did not possess personally, so long as it was reasonably foreseeable that his co-conspirator would possess the drugs in furtherance of the conspiracy. See, *e.g.*, *United States* v. *Solis*, 299 F.3d 420, 446-447 (5th Cir.), cert. denied, 537 U.S. 1060, and 537 U.S. 1094 (2002); *United States* v. *Navarrete-Barron*, 192 F.3d 786, 792-793 (8th Cir. 1999). The same goes for possession of a firearm. See, *e.g.*, *United States* v. *Alvarez-Valenzuela*, 231 F.3d 1198, 1201-1202 (9th Cir. 2000). And a defendant may even be convicted of a murder committed by a co-conspirator if it was reasonably foreseeable and committed in furtherance of the conspiracy—that is, if it was within the scope of the illegal partnership he agreed to join. See, *e.g.*, *United States* v. *Rosalez*, 711 F.3d 1194, 1207 (10th Cir.), cert. denied, 134 S. Ct. 240, 134 S. Ct. 336 (2013), and 134 S. Ct. 1275 (2014); *United States* v. *Curtis*, 324 F.3d 501, 506 (7th Cir.), cert. denied, 540 U.S. 998 (2003).[4]

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[4] Because the *Pinkerton* rule simply supplies an evidentiary basis for holding a defendant liable for a substantive offense committed by his co-conspirator, "a conspiracy need not be charged in order for [the rule] to apply." *United States* v. *Lopez*, 271 F.3d 472, 480-481 (3d Cir. 2001), cert. denied, 535 U.S. 908, and

3. The *Pinkerton* rule may be the best known application of the principle that a conspiracy is a partnership in which the conspirators are responsible for each other's acts, but it is far from the only one. The same principle forms the basis for the common law exception to the hearsay rule, now codified in Federal Rule of Evidence 801(d)(2)(E), that makes an out-of-court statement by one conspirator in furtherance of the conspiracy admissible against his co-conspirators. The rationale for that exception is that "conspirators are partners in crime" and that, "[a]s such, the law deems them agents of one another." *Anderson* v. *United State*s, 417 U.S. 211, 218 n.6 (1974).

The same rationale applies to the forfeiture-by-wrongdoing doctrine, which provides that a defendant forfeits his rights under the Sixth Amendment's Confrontation Clause if he intentionally procures a witness's unavailability—for example, through bribery, intimidation, or murder—in order to prevent the witness from testifying. *Giles* v. *California*, 554 U.S. 353, 359-361 (2008); see Fed. R. Evid. 804(b)(6). Courts have held that a defendant likewise forfeits his confrontation rights if his co-conspirator procures a witness's unavailability for that purpose, reasoning that "traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis." *United States* v. *Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012), cert. denied, 133 S. Ct. 1278 (2013); see *id.* at 384-385 (collecting cases).

Courts have also relied on the principle that "a conspiracy is a partnership in crime" in which "an 'overt act of one partner may be the act of all'" in applying

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535 U.S. 962 (2002); see, *e.g.*, *United States* v. *Macey*, 8 F.3d 462, 468 (7th Cir. 1993).

the venue provisions of Article III and the Sixth Amendment. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254 (1940) (citation omitted); see *id.* at 253 (reasoning that acts "by any one of the [conspirators] in the [relevant district] bound all"); see also, *e.g.*, *United States* v. *Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995) ("[B]ecause proof of acts by one co-conspirator can be attributed to all members of the conspiracy, [one defendant's] contacts with the Eastern District of Virginia serve to establish venue for all the defendants.").

This Court has invoked the same principle in applying the statute of limitations to conspiracy offenses, reasoning that the fact that a conspiracy "may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Kissel*, 218 U.S. at 608; see *Brown* v. *Elliot*, 225 U.S. 392, 400-401 (1912) ("[E]very overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot.").

The principle that a conspiracy is a partnership in which the members act as each other's agents thus runs throughout the law's treatment of conspirators. And that principle also applies at sentencing. For example, courts consider the conduct of a defendant's co-conspirators when determining (or instructing juries to determine) the quantity of drugs that establishes the defendant's mandatory minimum sentence for a drug conspiracy. See, *e.g.*, *United States* v. *Foster*, 507 F.3d 233, 250-251 & n.10 (4th Cir. 2007), cert. denied, 552 U.S. 1274 (2008); *United States* v. *Jackson*, 335 F.3d 170, 180-181 (2d Cir. 2003); *United States* v. *Rodriguez*, 67 F.3d 1312, 1324 (7th Cir. 1995),

cert. denied, 517 U.S. 1174 (1996). And the Sentencing Guidelines attribute to a defendant the reasonably foreseeable acts of others done in furtherance of jointly undertaken criminal activity. Sentencing Guidelines § 1B1.3(a)(1)(B). That rule "closely correspond[s] to the classic statement of the common law requirements for substantive conspiracy liability," as modified by the Guidelines' focus on individual acts. *United States* v. *Spotted Elk*, 548 F.3d 641, 673 (8th Cir. 2008) (citing *Pinkerton* and Sentencing Guidelines § 1B1.3, comment. (n.1)), cert. denied, 556 U.S. 1145, 556 U.S. 1194, and 556 U.S. 1265 (2009).

B. Under Traditional Principles Of Conspiracy Liability, Section 853 Renders Conspirators Jointly And Severally Liable To Forfeit The Reasonably Foreseeable Proceeds Of Their Conspiracy

A straightforward application of traditional principles of conspiracy liability to Section 853 dictates that, when the traceable proceeds of the conspiracy are unavailable, a conspirator's liability to forfeit an equivalent sum is not limited to the amount of proceeds the government can prove he obtained personally. Instead, as courts have long recognized, each conspirator is jointly and severally liable for the amount of proceeds foreseeably obtained by the conspiracy as a whole—without regard to how the conspirators divided those proceeds among themselves.

1. Traditional principles of conspiracy liability govern the forfeiture of proceeds under Section 853

a. Section 853(a)(1) provides that "[a]ny person convicted of a violation" of specified drug laws "shall forfeit to the United States," among other things, "any property constituting, or derived from, any proceeds

the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. 853(a)(1). If the specific property constituting the proceeds cannot be located or traced to other property, the defendant must forfeit substitute assets or be subject to a money judgment equal to the value of the proceeds. See 21 U.S.C. 853(p); Fed. R. Crim. P. 32.2(b).

Section 853 does not expressly address the scope of a co-conspirator's liability for forfeiture, but background principles of conspiracy liability inform the application of the statute in this context. Cf. *Burrage* v. *United States*, 134 S. Ct. 881, 889 (2014) (relying on "traditional background principles 'against which Congress legislates'") (brackets and citation omitted). As in other conspiracy settings, courts have long applied "the familiar rule that a member of a conspiracy is responsible for the foreseeable acts of other members of the conspiracy taken in furtherance of the conspiracy." *United States* v. *Hurley*, 63 F.3d 1, 22 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). Under that rule, a defendant is liable for the amount of proceeds foreseeably obtained by the conspiracy as a whole, not just the proceeds he obtained personally. *Ibid.*; see Cassella § 19-5, at 700-703. Because each conspirator is "responsible for the acts of his co-conspirators in pursuit of their common plot," *Smith*, 133 S. Ct. at 719, each conspirator is liable for the proceeds foreseeably obtained by his co-conspirators.

That approach to forfeiture liability treats an unlawful conspiracy on a par with its lawful counterpart: a partnership. In a partnership, the general rule is that "[a]ll partners are liable jointly and severally for all obligations of the partnership," whether or not they incurred those liabilities through their own acts.

Uniform Partnership Act § 306(a); see, *e.g.*, *United States* v. *Galletti*, 541 U.S. 114, 116 (2004). Joint-and-several forfeiture liability treats criminal conspirators in the same way. "[M]uch like in a lawful partnership, 'the proceeds of a conspiracy are a debt owed by each of the conspirators,' regardless of the portion of those proceeds that each member received." *United States* v. *Beecroft*, 825 F.3d 991, 998 n.6 (9th Cir. 2016) (quoting *United States* v. *Spano*, 421 F.3d 599, 603 (7th Cir. 2005), cert. denied, 546 U.S. 1095, and 546 U.S. 1122 (2006)). That result is eminently sensible. Indeed, "[i]t would be absurd to treat [criminal conspirators] more leniently than the law treats a lawful partnership." *Spano*, 421 F.3d at 603.

b. Until 2015, courts applying Section 853 and the parallel provisions of 18 U.S.C. 1963 "ha[d] unanimously concluded that conspirators are jointly and severally liable for amounts received pursuant to their illicit agreement." *United States* v. *McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997). In all, that rule was adopted by nine circuits beginning shortly after those provisions were enacted in 1984. See, *e.g.*, *United States* v. *Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); *United States* v. *Benevento*, 836 F.2d 129, 130 (2d Cir. 1988); *United States* v. *Pitt*, 193 F.3d 751, 765-766 (3d Cir. 1999); *McHan*, 101 F.3d at 1043 (4th Cir.); *United States* v. *Edwards*, 303 F.3d 606, 643-644 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States* v. *Corrado*, 227 F.3d 543, 553 (6th Cir. 2000); *United States* v. *Masters*, 924 F.2d 1362, 1369-1370 (7th Cir.), cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991); *United States* v. *Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012); *United States* v.

Browne, 505 F.3d 1229, 1279-1280 (11th Cir. 2007), cert. denied, 554 U.S. 918 (2008); see also *United States* v. *Caporale*, 806 F.2d 1487, 1507-1508 (11th Cir. 1986) (applying joint-and-several liability to a predecessor provision), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987). Only the D.C. Circuit has rejected that rule, and it acknowledged that it was departing from the consensus view of other courts of appeals. *United States* v. *Cano-Flores*, 796 F.3d 83, 91 (2015), cert. denied, 136 S. Ct. 1688 (2016).[5]

The prevailing understanding of co-conspirator liability under Section 853 and 18 U.S.C. 1963 is correct. Indeed, it is reflected in the advisory committee notes to the relevant Federal Rule of Criminal Procedure, which recognize that "[c]riminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense." Fed. R. Crim. P. 32.2(c) advisory committee's note (2000 Amendments). And in the decades between the enactment of Section 853 and 18 U.S.C. 1963 and the D.C. Circuit's decision in *Cano-Flores*, Congress repeatedly revisited those provisions without disturbing the lower courts' then-uniform conclusion that joint-and-several

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[5] Most courts of appeals have held that forfeiture liability is limited to the amount of proceeds that was "reasonably foreseeable" to the defendant. See, *e.g.*, *Hurley*, 63 F.3d at 22; *United States* v. *Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012). The Eleventh Circuit, in contrast, has stated that in some circumstances a conspirator could be required to forfeit the proceeds of the conspiracy even if those proceeds were not reasonably foreseeable. See *Browne*, 505 F.3d at 1279-1280; but see *United States* v. *Seher*, 562 F.3d 1344, 1372 (11th Cir. 2009) (appearing to endorse a "reasonably foreseeable" limitation).

liability applies.[6] During the same period, Congress also provided for criminal forfeiture of the proceeds of other offenses under the procedures set forth in Section 853. See Combatting Terrorism Financing Act of 2005, Pub. L. No. 109-177, Tit. IV, § 410, 120 Stat. 246 (enacting 28 U.S.C. 2461(c)). Those provisions, too, have been interpreted to impose joint-and-several liability. See, *e.g.*, *Beecroft*, 825 F.3d at 998 n.6; *United States* v. *Mandell*, 752 F.3d 544, 554 (2d Cir. 2014), cert. denied, 135 S. Ct. 1402 (2015).

2. Section 853(a)(1)'s text readily encompasses traditional principles of conspiracy liability

Petitioner contends (Br. 10-13) that the text of Section 853(a)(1) resolves this case in his favor because it requires a person convicted of a specified drug offense to forfeit "any property constituting, or derived from, any proceeds *the person* obtained, directly or indirectly, as the result of such violation." 21 U.S.C. 853(a)(1) (emphasis added). On petitioner's view, that language limits forfeiture to proceeds that the defendant obtained *personally*. That is incorrect for two reasons.

First, petitioner's argument ignores the well-established principle that the foreseeable acts of each member of a conspiracy are attributed to the other conspirators as a matter of law. Under that principle, when one conspirator foreseeably obtains proceeds—say, by completing a drug sale—that act is attributed to his co-conspirators. Exactly the same logic under-

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[6] See, *e.g.*, Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, Tit. VII, § 743(a), 120 Stat. 272; International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, Tit. III, § 319(d), 115 Stat. 314; Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106-310, Tit. XXXVI, § 3613, 114 Stat. 1229-1230.

lies every application of the *Pinkerton* rule. For example, 21 U.S.C. 841(a)(1) makes it unlawful for "any person" to possess with intent to distribute a controlled substance. On petitioner's view (Br. 11), the "plain text" of that statute would limit liability to the "person" who physically possesses the drugs. But under *Pinkerton*, a member of a conspiracy is legally responsible for the foreseeable acts of his co-conspirators, and it is thus hornbook law that one conspirator may be convicted of possessing with intent to distribute drugs that were physically possessed only by his co-conspirator. See, *e.g.*, *Solis*, 299 F.3d at 446-447; *Navarrete-Barron*, 192 F.3d at 792-793. The same is true under Section 853(a)(1): Even if only one member of the conspiracy *personally* obtains the proceeds from a given sale, that act is attributed to his co-conspirators so long as it is reasonably foreseeable.

Second, the broad text of Section 853(a)(1) readily encompasses traditional principles of conspiracy liability by requiring forfeiture of proceeds the defendant obtained "directly *or indirectly*." 21 U.S.C. 853(a)(1) (emphasis added). The purpose of the phrase "or indirectly" is "to make clear that a person does not have to take personal, physical possession of the proceeds to 'obtain' them." Cassella § 25-4(f), at 920. For example, "a defendant 'obtains' fraud proceeds indirectly if he directs them to a corporation that he controls or that serves as his *alter ego*." *Id.* at 920-921. And just as a defendant obtains proceeds indirectly when they go to his lawful agent or alter ego, he also obtains proceeds indirectly when they go to the criminal enterprise of which he is a part, and in which all members are each other's agents. Section 853(a)(1) thus "is not limited to property that the defendant

acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him." *McHan*, 101 F.3d at 1043.

Petitioner concedes (Br. 12) that even if a defendant does not obtain proceeds personally, he obtains them "indirectly"—and thus is liable to forfeit them—if they go to "entities or people under the defendant's control." Petitioner would thus presumably concede that a defendant must forfeit proceeds obtained by a lawful partnership of which he is a member, or by his agent. The same rule applies when the proceeds are obtained by the defendant's criminal partnership or by his co-conspirators, who "the law deems" to be his "agents." *Anderson*, 417 U.S. at 218 n.6.

3. Petitioner identifies no sound reason to disregard traditional principles of conspiracy liability in the forfeiture context

a. Petitioner asserts (Br. 47-50) that courts of appeals have erred in applying traditional principles of conspiracy liability to forfeitures. Focusing exclusively on the *Pinkerton* rule governing liability for a co-conspirator's crimes, he asserts (Br. 49) that "*Pinkerton* was laser focused on substantive liability—*i.e.*, the conviction itself"—rather than on the consequences of a conviction, including forfeiture. See *Cano-Flores*, 796 F.3d at 94-95. That argument confuses *Pinkerton*'s specific result with its underlying rationale.

The *Pinkerton* rule is just one application of the principle that a person who joins a conspiracy "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith*, 133 S. Ct. at 719; see *Pinkerton*, 328 U.S. at 646-647. *Pinkerton* applied that principle to hold that the members of a conspiracy are liable for each other's substantive

offenses because their actions are attributed to each other. 328 U.S. at 647-648. But the same principle also operates in many other contexts—including at sentencing and in applying the hearsay rules, the Confrontation Clause, and the Constitution's venue provisions. See pp. 17-19, *supra*.

The principle that a conspiracy is a partnership in which the conspirators act as each other's agents applies equally to Section 853. Indeed, because the members of conspiracy "are substantively liable for the foreseeable criminal conduct of the other members" and are likewise sentenced based on "the foreseeable conduct of co-conspirators," "[i]t would be odd * * * to depart from this principle of attributed conduct when it comes to apply the forfeiture rules, which have aspects both of substantive liability and of penalty." *Hurley*, 63 F.3d at 22. And it would be particularly odd to conclude that a defendant can be held liable for first-degree murder under a *Pinkerton* theory, see, *e.g.*, *Rosalez*, 711 F.3d at 1207, and can be convicted for possession of drugs by his co-conspirators, yet cannot be held responsible in forfeiture for proceeds foreseeably obtained by his co-conspirators when they convert the same drugs to cash.

b. Petitioner also objects (Br. 51-53) that joint-and-several forfeiture liability is inconsistent with the *Pinkerton* rule because *Pinkerton* liability results in individual convictions and sentences rather than shared liability. Co-conspirators convicted of distributing five kilograms of cocaine are not, for example, jointly and severally liable to serve the ten-year prison term prescribed by 21 U.S.C. 841(b)(1)(A). But again, the underlying principle is the same: Each conspirator is legally responsible for the acts of his

confederates. That responsibility results in individual prison sentences and fines, which are based on the circumstances of each defendant. See 18 U.S.C. 3553, 3572. Criminal forfeiture is also "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995). But unlike a fine or prison sentence, it is based on a fixed benchmark: The government is entitled to recover the full amount of the proceeds of the conspiracy, but no more. The fact that multiple conspirators are responsible for the same proceeds thus yields the rule of joint-and-several liability: "The government can collect [the proceeds of a conspiracy] only once but, subject to that cap, it can collect from any [conspirator] so much of that amount as was foreseeable to that [conspirator]." *Hurley*, 63 F.3d at 23.

Similar principles apply to restitution, another aspect of criminal sentencing governed by a specific monetary benchmark—the victim's loss. Before 1996, district courts had discretion to order "that the defendant make restitution to any victim" of a criminal offense. 18 U.S.C. 3663(a)(1) (1994); see 18 U.S.C. 3664(a) (1994). It was "well-settled" that courts could "impose joint and several [restitution] liability on multiple defendants." *United States* v. *Hunter*, 52 F.3d 489, 494 (3d Cir. 1995); see *id.* at 494-495 (collecting cases). As in the forfeiture context, courts reached that conclusion by applying the "well-established" rule that every conspirator "is legally liable for all the actions of her co-conspirators in furtherance of th[e] crime." *United States* v. *Chaney*, 964 F.2d 437, 453 (5th Cir. 1992).[7]

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[7] Those pre-1996 decisions did not mandate joint-and-several liability because the applicable statutes made awards of restitution

In 1996, Congress made restitution mandatory for many offenses, 18 U.S.C. 3663A, but provided that a court may opt to "apportion liability among the defendants" rather than making "each defendant liable for payment of the full amount," 18 U.S.C. 3664(h). See Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, § 206, 110 Stat. 1234. That confirms that Congress knows how to *depart* from traditional principles of conspiracy liability when it wishes to do so, as it did in Section 3664(h) by allowing courts to apportion restitution liability rather than making it joint and several. But Congress has not departed from traditional principles of conspiracy liability for forfeitures under Section 853. And the availability of joint-and-several restitution liability both before and after the enactment of Section 3664(h) shows that there is nothing anomalous about holding criminal defendants jointly and severally liable for a fixed sum.[8]

c. Petitioner asserts (Br. 36-38) that joint-and-several liability is a tort-law concept that applies only to compensatory payments. See *Cano-Flores*, 796 F.3d at 95. Again, he is mistaken. Joint-and-several liabil-

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discretionary and allowed courts to consider factors including "the financial resources of the defendant" in deciding "whether to order restitution" and "the amount of such restitution." 18 U.S.C. 3664(a) (1994).

[8] Petitioner draws the wrong inference from Section 3664(h) because he assumes (Br. 39-40) that an explicit statutory provision was necessary to *authorize* courts to impose joint-and-several restitution liability. In fact, it was "well-settled" that courts had that authority before Section 3664(h) was enacted. *Hunter*, 52 F.3d at 494. Section 3664(h) was instead enacted to give courts discretion to *depart* from joint-and-several liability under the mandatory restitution scheme adopted in 1996.

ity simply describes a rule under which "each individual remains responsible for payment of the entire liability, so long as any part is unpaid." *United States* v. *Scop*, 940 F.2d 1004, 1010 (7th Cir. 1991); see *Black's Law Dictionary* 966 (10th ed. 2014). Such liability is not limited to compensating a tort victim's loss—it also applies, for example, to the debts of a partnership. See pp. 20-21, *supra*. And in another example of particular relevance to the forfeiture of criminal proceeds, the well-established practice of equity courts was to impose joint-and-several liability when ordering the disgorgement of illicit profits. See, *e.g.*, *Crites, Inc.* v. *Prudential Ins. Co.*, 322 U.S. 408, 414 (1944) (breach of receiver's duty to estate would warrant an order to "disgorge[]" profits, "including the profits of others who knowingly joined him in pursuing an illegal course of action"); *Jackson* v. *Smith*, 254 U.S. 586, 589 (1921) ("[O]thers who knowingly join a fiduciary in [an illegal] enterprise likewise become jointly and severally liable with him for such profits."); see also 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1081, at 231-232 (5th ed. 1941).

Petitioner is likewise wrong to assert (Br. 38) that joint-and-several liability is appropriate only where a defendant who is made to pay more than his proportionate share of the debt has a right "to obtain contribution from others in proportion to their fault." In fact, the traditional rule was that intentional wrongdoers held jointly and severally liable to pay damages or disgorge profits *did not* enjoy a right of contribution. See Restatement (Second) of Torts § 886A(3) (1979); Restatement (First) of Trusts § 258(2) (1935); see also Restatement (Third) of Torts: Apportion-

ment of Liability § 23, reporters' note to cmt. *l* (2000) (reflecting a different rule but acknowledging that "the law in most states" continues to deny a right of contribution to intentional tortfeasors). The absence of a right of contribution for conspirators required to forfeit criminal proceeds thus provides no sound reason to depart from the traditional principle that each member of a conspiracy is legally responsible for the acts of his confederates.[9]

C. Petitioner's Remaining Arguments For A Departure From Traditional Principles Of Conspiracy Liability Rest On A Misunderstanding Of Section 853's Purpose, Structure, And Practical Operation

Petitioner devotes the bulk of his brief (Br. 13-40) to a series of arguments intended to demonstrate that the application of traditional principles of conspiracy liability would be inconsistent with Section 853's purpose and structure, and would yield anomalous results. Those arguments rest largely on two related errors about Section 853's purpose and practical operation. Petitioner begins with the premise (*e.g.*, Br. 13) that Section 853 is limited to the forfeiture of "*tainted*

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[9] In arguing otherwise, petitioner relies (Br. 38) on this Court's decision in *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), which noted the absence of a federal right to contribution in holding that Congress did not make every possessor of an image of child pornography jointly and severally liable for the victim's "entire losses." *Id.* at 1725. But *Paroline* rejected such liability primarily because that case "d[id] not involve a set of wrongdoers acting in concert" and because joint-and-several liability would have made a single defendant liable for the combined consequences of the acts of "tens of thousands" of "independently acting offenders." *Ibid.* No such incongruity exists in applying the familiar rule that the confederates in a single conspiracy are responsible for each other's foreseeable acts in furtherance of their joint criminal enterprise.

assets," and he therefore assumes that holding conspirators jointly and severally liable for a forfeiture money judgment entails treating all assets that might be used to satisfy the judgment *as if* they were tainted. Section 853 does contain provisions intended to preserve and recover specific tainted property (here, the traceable proceeds of the offense). But if that tainted property is not available, Section 853 permits the forfeiture of substitute assets and the imposition of money judgments. Those remedies do not trigger the provisions directed at preserving or recovering tainted assets—which is why the anomalies petitioner posits have never come to pass during the decades that courts have applied traditional principles of conspiracy liability to Section 853.

1. Section 853 is not limited to the forfeiture of specific tainted property

Petitioner starts from the premise (Br. 13) "that what is subject to forfeiture [under Section 853(a)(1)] is *tainted* assets—the actual property constituting, or derived from, the proceeds of drug crimes." See, *e.g.*, Br. 6, 7, 16, 23, 24, 26, 28, 29, 37. Petitioner is correct that Section 853(a)(1) provides for the forfeiture of the traceable proceeds of the offense. But unlike civil *in rem* forfeiture provisions, Section 853 is not *limited* to the forfeiture of tainted property. Instead, if that property is not available, Section 853 makes a defendant personally liable to forfeit an equivalent amount.

a. Section 853(a)(1) defines the property subject to forfeiture as "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly," as a result of the offense. If, for example, a person sells a quantity of drugs for $100,000 in cash, the $100,000 in currency—or any asset traceable to

it—is subject to forfeiture. So long as that tainted property is available, the government must forfeit *that property*, and it cannot forfeit the defendant's untainted assets or obtain a money judgment. See *United States* v. *Zorrilla-Echevarría*, 723 F.3d 298, 298-300 (1st Cir. 2013).

In the usual case, however, the defendant has "already dissipated the proceeds of his offense" by the time he is caught, and those proceeds cannot be traced to other assets. Cassella § 25-6, at 935. That is particularly true because Section 853(a)(1) requires the forfeiture of "all gross receipts" from the offense, *United States* v. *Olguin*, 643 F.3d 384, 399 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011), and because it requires forfeiture of any proceeds the defendant "obtained" during the crime—even if he then passed them along to someone else, see *United States* v. *Casey*, 444 F.3d 1071, 1073 (9th Cir.), cert. denied, 549 U.S. 1010 (2006).

In the typical case in which the traceable proceeds are not available, Section 853(a)(1) authorizes the government to recover the *amount* of the proceeds through the forfeiture of specific substitute assets under Section 853(p). See, *e.g.*, *United States* v. *Chittenden*, No. 14-4768, 2017 WL 414122, at *11 (4th Cir. Jan. 31, 2017). Alternatively, the government may obtain a forfeiture money judgment. See *United States* v. *Hampton*, 732 F.3d 687, 691 (6th Cir. 2013), cert. denied, 134 S. Ct. 947 (2014).[10] Those remedies are

[10] Every court of appeals to consider the question has held that Section 853 authorizes a forfeiture money judgment, and such judgments are contemplated in Federal Rule of Criminal Procedure 32.2(a) and (b). See *Hampton*, 732 F.3d at 691 (describing the "unanimous and growing consensus among the circuits" that

available because, unlike civil *in rem* forfeiture, "criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself." *United States* v. *Hall*, 434 F.3d 42, 59 (1st Cir. 2006).

b. The same rules apply in a conspiracy case. If three defendants conspire to sell a quantity of drugs for $100,000, then the $100,000 in currency (or any asset traceable to it) is subject to forfeiture under Section 853(a)(1). If that tainted property is available, the government must forfeit that property. But if the specific tainted assets are no longer available, then the government may obtain the forfeiture of substitute property or a forfeiture money judgment of $100,000. And because the conspirators are legally responsible for each other's acts, they are jointly and severally liable for that amount—the government need not prove the amount of the dissipated proceeds each of them received.

Consistent with this understanding, the decisions imposing joint-and-several liability on the members of a conspiracy involve forfeiture money judgments or the forfeiture of substitute assets, not the forfeiture of

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Section 853 authorizes "a personal money judgment forfeiture"). Some courts locate the authority for money judgments in Section 853(p)'s provision for the forfeiture of substitute property. See, *e.g.*, *United States* v. *Smith*, 656 F.3d 821, 827 (8th Cir. 2011), cert. denied, 565 U.S. 1218 (2012). Others hold that Section 853(p) applies only when the government seeks to forfeit specific substitute assets, and not when it seeks a money judgment. See, *e.g.*, *United States* v. *Newman*, 659 F.3d 1235, 1242-1243 (9th Cir. 2011), cert. denied, 132 S. Ct. 1817 (2012); see also *United States* v. *Ginsburg*, 773 F.2d 798, 800-803 (7th Cir. 1985) (en banc) (holding that an earlier version of 18 U.S.C. 1963 authorized money judgments), cert. denied, 475 U.S. 1011 (1986).

specific tainted property. See, *e.g.*, *Elder*, 682 F.3d at 1072; *United States* v. *Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), cert. denied, 555 U.S. 1238 (2012); *Browne*, 505 F.3d at 1279-1280; *Spano*, 421 F.3d at 602-603; *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *Edwards*, 303 F.3d at 643-644; *Corrado*, 227 F.3d at 553; *Candelaria-Silva*, 166 F.3d at 44; *Pitt*, 193 F.3d at 765; *United States* v. *Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *McHan*, 101 F.3d at 1042-1043; *Hurley*, 63 F.3d at 22; *Masters*, 924 F.2d at 1369-1370; *Benevento*, 836 F.2d at 130 & n.1.

c. Petitioner thus errs in asserting (Br. 23-29) that joint-and-several liability should be rejected because it is inconsistent with the "200-year plus tradition of forfeiture law" that focused on specific tainted assets. Br. 23. As petitioner concedes (Br. 25), the traditional forfeitures to which he refers were civil *in rem* proceedings that, by definition, focused on specific tainted property and imposed no personal liability of any kind. Section 853(a)(1) was a sharp departure from that tradition. The very concept of *in personam* criminal forfeiture was "unknown in the federal system" until 1970. *Alexander* v. *United States*, 509 U.S. 544, 563 (1993) (Kennedy, J., dissenting). And the "idea of forfeiting the proceeds of crime" was also "entirely new" when Congress introduced it in modern forfeiture statutes. Cassella § 2-4, at 33. The fact that joint-and-several liability for *in personam* proceeds forfeitures is inconsistent with the tradition of *in rem* civil forfeitures is thus no surprise—and provides no reason to upset the lower courts' longstanding view that joint-and-several liability is appropriate.

2. Holding conspirators jointly and severally liable on forfeiture money judgments does not treat their untainted assets like tainted property

Petitioner contends (Br. 16-21) that the application of joint-and-several liability would render 21 U.S.C. 853(c) and (e) "nonsensical" because those provisions apply only to specific tainted assets and could not sensibly apply to the untainted assets that might be used to satisfy a forfeiture money judgment. Br. 17. But petitioner is wrong to assume that joint-and-several liability requires the application of those provisions to a defendant's untainted assets—which is why the courts that have applied joint-and-several liability for decades have not reached the "nonsensical" results petitioner posits.

Sections 853(c) and (e) are designed to preserve or recover the traceable proceeds of the offense. Section 853(c) provides that "[a]ll right, title, and interest in property described in subsection (a) vests in the United States" upon the commission of the offense. If, for example, a defendant sells a quantity of drugs for $100,000, the government's title vests in those specific bills, and in any assets derived from those bills. That rule allows the government to recover tainted assets following a conviction even if they are transferred to a third party. Section 853(e) allows the government to obtain "a restraining order or injunction * * * to preserve the availability of property described in subsection (a) for forfeiture." That provision allows the government to obtain an order barring the defendant from dissipating the proceeds of the offense before trial, to ensure that they will be available for forfeiture following a conviction. See *United States* v. *Monsanto*, 491 U.S. 600, 603-604, 612-614 (1989).

By their terms, Sections 853(c) and (e) are limited to property "described in" Section 853(a)—that is, to the traceable proceeds of the offense. See *Luis* v. *United States*, 136 S. Ct. 1083, 1091-1092 (2016) (opinion of Breyer, J.). Those provisions thus do not apply to substitute assets the government could recover under Section 853(p), which by definition reaches "*other* property of the defendant" if the property "described in subsection (a)" is not available. 21 U.S.C. 853(p) (emphasis added). And Sections 853(c) and (e) likewise do not apply to untainted assets that a defendant might use to satisfy a forfeiture money judgment. Such a judgment does not refer to specific assets at all—it simply reflects the amount of monetary punishment imposed in lieu of the forfeiture of specific assets. See Fed. R. Crim. P. 32.2 advisory committee's note (2000 Amendments) ("A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets.").

Petitioner thus errs in assuming (Br. 16-21) that holding conspirators jointly and severally liable to satisfy a money judgment or to forfeit substitute property vests title to their untainted assets in the government under Section 853(c) or renders those assets subject to pretrial restraint under Section 853(e).

3. Traditional principles of conspiracy liability do not require joint-and-several liability under Sections 853(a)(2) and (3)

Petitioner also contends (Br. 13-16) that conspirators should not be jointly and severally liable to forfeit the proceeds of the conspiracy under Section 853(a)(1) because "[a]bsurd results" would follow if joint-and-several liability were applied to Sections 853(a)(2) and (3). Br. 14. But traditional principles of conspiracy

liability do not require joint-and-several liability under those provisions, which serve different functions and contain different language.

Section 853(a)(2) requires a person convicted of a qualifying offense to forfeit "any of the person's property used, or intended to be used * * * to commit, or to facilitate the commission of, [the crime]." Section 853(a)(3) requires a person convicted of engaging in a "continuing criminal enterprise" in violation of 21 U.S.C. 848 to forfeit "any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise." Unlike Section 853(a)(1), those provisions are tied to *ownership* of specified property or interests—not to the *act* of obtaining proceeds. And while it is well-established that all members of a conspiracy are legally responsible for each other's acts, no comparable rule treats conspirators as owners of each other's property.

Consistent with that understanding, the courts of appeals that have applied joint-and-several liability to Section 853(a)(1) have not extended such liability to Sections 853(a)(2) and (3). Petitioner's assertion that joint-and-several liability would be anomalous if applied to those provisions thus provides no reason to reject its well-settled application to Section 853(a)(1).

4. The application of traditional principles of conspiracy liability furthers Section 853's purpose

Finally, petitioner contends (Br. 29-40) that the application of traditional principles of conspiracy liability frustrates Section 853's purpose. In fact, the opposite is true.

a. Congress enacted Section 853 to "punish wrongdoing, deter future illegality, and 'lessen the economic

power' of criminal enterprises." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014) (quoting *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 630 (1989)). Recognizing that a conviction of drug defendants or racketeers that leaves intact their "economic power bases" is of "only limited effectiveness," Congress designed forfeiture provisions to "strip these offenders * * * of their economic power." Senate Report 191. And Congress was particularly concerned that existing forfeiture provisions "fail[ed] adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 195.

A requirement that the government "determine the precise allocation" of proceeds among conspirators would recreate a version of the same problem, allowing the conspirators to "mask the allocation of the proceeds" and thereby "avoid forfeiting them altogether." *Caporale*, 806 F.2d at 1508. Denying forfeiture because "the government cannot prove exactly which defendant received how much of the pot" would "defeat[] the purpose of the [forfeiture] provision." *Ibid.* And that problem would often occur, because "it is unlikely that [a] criminal organization will have well-maintained and accurate files of proportional participation in the group." *United States* v. *Beneventto*, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987), aff'd, 836 F.2d 129 (1988). A departure from traditional principles of conspiracy liability would thus thwart the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Kaley*, 134 S. Ct. at 1094 (citation omitted).[11]

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[11] Petitioner contends (Br. 54-55) that Section 853(d) solves this problem because it creates a "rebuttable presumption" that a

In minimizing the government's interest in collecting forfeitures in full, petitioner overlooks the remedial aspects of forfeiture under Section 853, RICO, and the other provisions subject to criminal proceeds forfeitures. Although petitioner states (Br. 8) that forfeited funds "do not compensate victims," this Court has recognized that the government's interest in forfeiture "includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it." *Caplin & Drysdale*, 491 U.S. at 629. Forfeited property is used to "recompense victims" and to "improve conditions in crime-damaged communities." *Kaley*, 134 S. Ct. at 1094. "Realistically, a victim's hope of getting paid may rest on the government's superior ability to collect and liquidate a defendant's assets" through criminal forfeiture. *United States* v. *Blackman*, 746 F.3d 137, 143 (4th Cir. 2014). For example, between 2002 and 2015, the Department of Justice returned more than $4 billion in forfeited funds to crime victims.[12]

b. Petitioner hypothesizes (Br. 30-31) that holding co-conspirators liable for the reasonably foreseeable

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defendant's property is subject to forfeiture if the government can show that it was acquired during the offense (or shortly thereafter) and that "there was no likely source for such property" other than the offense. 21 U.S.C. 853(d). But that presumption offers no help when, as is often the case, the defendants have entirely dissipated or concealed the proceeds of the offense, or when a lack of accurate records makes it impossible to know when the defendants' assets were acquired.

[12] Dep't of Justice, *Justice Department Returned Over $4 Billion to Victims of Crime Through the Asset Forfeiture Program Between 2002 and 2015* (Apr. 22, 2015), https://www.justice.gov/opa/pr/justice-department-returned-over-4-billion-victims-crime-through-asset-forfeiture-program.

proceeds of the offense could allow a drug "kingpin" to retain the tainted profits of a conspiracy while low-level couriers are made to forfeit their untainted assets. But he identifies no case where such a result has occurred. In fact, joint-and-several liability becomes significant only when the traceable proceeds of the offense are not available. Moreover, the "kingpin" in petitioner's scenario would be more likely to have assets available to satisfy a forfeiture obligation—and would face greater forfeiture liability in the first place, because more of the conspiracy's proceeds would be foreseeable to him than to low-level couriers.

Indeed, basing forfeiture liability on the amount of proceeds that was reasonably foreseeable yields more sensible results than an alternative based on the amount the defendant obtained personally. The proceeds subject to forfeiture under Section 853(a)(1) include not just the profits a defendant ultimately keeps for himself, but also any money or other property he receives as result of the offense—even if he passes it along to someone else. See, *e.g.*, *Casey*, 444 F.3d at 1073. Petitioner's interpretation would thus give "conclusive weight" to whether a particular co-conspirator "physically handled the money." *Hurley*, 63 F.3d at 22. It would mean, for example, that petitioner's hypothetical low-level couriers would be subject to greater forfeitures than "higher level" conspirators who played larger roles in the offense, but handled less of the cash. *Ibid.* Rather than fixing the amount of forfeiture based on whether an individual conspirator happened to physically possess the proceeds at some point during the offense—a fact that may be "largely fortuitous"—the amount of proceeds

foreseeable to the particular defendant "represents the sounder measure of liability." *Ibid.*

D. Neither The Rule Of Lenity Nor The Canon Of Constitutional Avoidance Justifies A Departure From Traditional Principles Of Conspiracy Liability

Petitioner contends (Br. 41-47) that the rule of lenity and the need to avoid questions under the Eighth and Sixth Amendments justify a departure from traditional principles of conspiracy liability in Section 853(a)(1). He is mistaken.

1. The rule of lenity applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citations omitted), or an "equipoise of competing reasons [that] cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). This is not such a case, because the established principle that conspirators are legally responsible for each other's acts provides a clear answer. Such background legal principles are among "the ordinary canons of statutory construction" that may preclude resort to the rule of lenity. *Lockhart* v. *United States*, 136 S. Ct. 958, 968 (2016); see, *e.g.*, *Salinas*, 522 U.S. at 63-66 (declining to apply the rule of lenity after construing a statute based on "well-established principles" of conspiracy law); *United States* v. *Shabani*, 513 U.S. 10, 15-17 (1994) (similar).

In arguing otherwise, petitioner suggests (Br. 42) that the rule of lenity would permit co-conspirator liability only if Congress expressly provided for it. But Congress need not specifically provide for co-conspirator liability in each new federal criminal stat-

ute; instead, "the liability of coconspirators is a well-entrenched feature of federal criminal law" that Congress is presumed to incorporate absent some indication to the contrary. *United States* v. *Lake*, 472 F.3d 1247, 1266 (10th Cir. 2007).

2. Petitioner also errs in contending (Br. 43-45) that applying traditional principles of conspiracy liability to proceeds forfeitures under Section 853(a)(1) would raise constitutional concerns under the Eighth Amendment's prohibition on excessive fines.

"[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998). The application of traditional principles of conspiracy liability is consistent with that standard because proceeds obtained by other conspirators are attributable to the defendant "only to the extent that they were reasonably foreseeable to th[at] particular defendant." *Hurley*, 63 F.3d at 22. That is the standard that determines when a conspirator could be convicted and punished for his confederates' substantive crimes. See *Pinkerton*, 328 U.S. at 647-648. The attribution of the foreseeable proceeds of the conspiracy to an individual defendant will thus rarely, if ever, yield a forfeiture that is "grossly disproportional" to the gravity of his offense. To the contrary, "holding a defendant liable for an amount of money foreseeably [obtained] by himself and his own co-conspirators is quite rational based on a proportionality analysis." *Hurley*, 63 F.3d at 23.

In arguing otherwise, petitioner asserts (Br. 43) that the application of joint-and-several liability "will raise case after doubtful case" under the Eighth

Amendment. But joint-and-several liability has been the law in most of the country for decades, and petitioner musters only one example of a case raising Eighth Amendment concerns—the exceedingly unusual forfeiture order in *Cano-Flores*, which involved "one of the largest and most infamous drug cartels in Mexico." 796 F.3d at 85. In more typical cases, courts have routinely rejected Eighth Amendment challenges to forfeitures based on joint-and-several liability.[13]

In an unusual case in which "a defendant played a truly minor role in a conspiracy that [foreseeably] generated vast proceeds, joint and several liability for those proceeds *might* result in a forfeiture order grossly disproportional to the individual defendant's offense." *United States* v. *Jalaram, Inc.*, 599 F.3d 347, 355 (4th Cir. 2010) (emphasis added). In such cases, the Eighth Amendment's Excessive Fines Clause serves as a safeguard that prevents the imposition of excessive forfeitures. But the possibility of such cases does not warrant application of the canon of constitutional avoidance. That canon is "a means of giving effect to congressional intent, not of subverting it." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). Petitioner identifies no reason to think that Congress would have viewed the possibility of a handful of outlier cases raising Excessive Fines Clause issues as a suffi-

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[13] See *Candelaria-Silva*, 166 F.3d at 44; see also, *e.g.*, *United States* v. *Wolford*, 656 Fed. Appx. 59, 67 (6th Cir.), cert. denied, 137 S. Ct. 522 (2016); *United States* v. *Bonventre*, 646 Fed. Appx. 73, 92 (2d Cir. 2016), cert. denied, No. 16-6800 (Jan. 9, 2017); *United States* v. *Jiau*, 624 Fed. Appx. 771, 774 (2d Cir. 2015), cert. denied, 136 S. Ct. 2457 (2016); *United States* v. *Annabi*, 560 Fed. Appx. 69, 74 & n.7 (2d Cir. 2014); *United States* v. *Lyons*, 740 F.3d 702, 732-733 (1st Cir.), cert. denied, 134 S. Ct. 2743 (2014).

cient reason to depart from traditional principles of conspiracy liability—particularly in the context of a broad forfeiture provision that Congress directed "shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. 853(*o*); see *Monsanto*, 491 U.S. at 607 ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited.").

3. Finally, petitioner contends (Br. 45-47) that the application of traditional principles of conspiracy liability would violate the Sixth Amendment by mandating pretrial freezes of conspirators' untainted assets under Section 853(e), or by allowing the government to use the third-party-transfer provision in Section 853(c) to recover untainted funds paid to an attorney following a conviction. That argument rests on petitioner's mistaken assumption that joint-and-several liability subjects untainted property that a conspirator might use to satisfy a money judgment to Sections 853(c) and (e). Those provisions reach only tainted property—in this context, the traceable proceeds of the offense. See pp. 35-36, *supra*. The application of joint-and-several liability thus imposes no additional obstacle to a defendant's use of untainted funds to hire an attorney.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
JAMES I. PEARCE
Attorney

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APPENDIX

1. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

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

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

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

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

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

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

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

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

(c) Third party transfers

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

(d) Rebuttable presumption

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

(1) such property was acquired by such person during the period of the violation of this subchapter

or subchapter II of this chapter or within a reasonable time after such period; and

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

(e) Protective orders

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

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

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

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

(ii) the need to preserve the availability of the property through the entry of the requested order

outweighs the hardship on any party against whom the order is to be entered:

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

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

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

(4) ORDER TO REPATRIATE AND DEPOSIT.—

(A) IN GENERAL.—Pursuant to its authority to enter a pretrial restraining order under this section,

the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY.—Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

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

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United

States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

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

(i) Authority of the Attorney General

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

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

(2) compromise claims arising under this section;

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

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

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

(j) Applicability of civil forfeiture provisions

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

(k) Bar on intervention

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

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

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

(*l*) Jurisdiction to enter orders

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

(m) Depositions

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

tions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

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

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

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition

with a hearing on any other petition filed by a person other than the defendant under this subsection.

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

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

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

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

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

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

(*o*) Construction

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

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant,

up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

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

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

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

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

2. Federal Rule of Criminal Procedure 32.2 provides:

Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement,

and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Sentence and Judgment.

(A) When Final. At sentencing—or at any time before sentencing if the defendant consents —the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) Notice and Inclusion in the Judgment. The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) Time to Appeal. The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) Jury Determination.

(A) Retaining the Jury. In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) Special Verdict Forms. If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) Notice of the Forfeiture Order.

(A) Publishing and Sending Notice. If the court orders the forfeiture of specific property,

the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) Means of Publication, Exceptions to Publication Requirement. Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. If, as prescribed by statute, a third party files a petition asserting an interest

in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the

final order on the ground that the third party had an interest in the property.

(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property.

(1) In General. On 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:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. There is no right to a jury trial under Rule 32.2(e).