

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term, 2010
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9 (Argued: October 21, 2009 Decided: March 11, 2010)

10
11 Docket Nos. 07-4483-cr (L); 07-4539-cr
12 (Con); 07-5067-cr (Con); 07-5068-cr (XAP)
13

14
15 UNITED STATES OF AMERICA,
16

17 *Appellee-Cross-Appellant,*
18

19 -v.-
20

21 ALI AWAD, ABDI EMIL MOGE, ABDULAHY HUSSEIN,
22

23 *Defendants-Appellants-Cross-Appellees,*
24

25 BASHI MUSE, OSMAN OSMAN, ABDINUR AHMED
26 DAHIR, ALI DUALEH, OMER ALI ABDIRIZAH,
27 MOHAMED AHMED, SAEED BAJUUN, SOFIA ROBLES,
28 ISSE ALI SALAD, HASSAN SADIQ MOHAMED, LIBAN
29 HASHI, BASHIR AHMED, MOHAMED ALI, AHMED
30 ISMAIL, AHMED SHERIF HASHIM, MAXAMED
31 ABSHAR, ABSIR AHMED, LIBAN ABDULLE,
32 ISMACIIL GEELE, MOHAMED ABDILLAHI MOHAMED,
33 ISMAIL ALI MOHAMED, MOHAMED SHIREH, DEKO
34 OHERSI, ABDUL HERSI, WELI MOHAMED ABDI,
35 WARFA ABDI DIRIE, HASSAN YUSUF, MAHAMUD
36 AFDHUB, WARSAME GULED, ISSE ABDIWAAB,
37 YOUNAS HAJI, MOHAMED MOHAMED, ABDIAZIS
38 SALEH MOHAMED, OMAR OSMAN MOHAMED,
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40 *Defendants,*

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2 MOHAMED JAMA, AHMED M. EGAL, DAHIR
3 ABDULLE SHIRE, MUHIDIN MOHAMED,
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5 *Defendants-Appellants.*
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9 Before: WALKER, CALABRESI, and WESLEY, *Circuit Judges.*
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11 Appellants Ali Awad and Abdi Emil Moge appeal from an
12 Opinion and Order of the District Court for the Southern
13 District of New York (Cote, J.), entered on October 24,
14 2007, ordering criminal forfeitures against them pursuant to
15 21 U.S.C. § 853. We hold, consistent with the other courts
16 of appeal that have considered this issue, that the
17 imposition of the forfeiture orders was proper. We
18 therefore affirm.
19

20 AFFIRMED.
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24 MICHAEL HUESTON, New York, New York, *for*
25 *Defendant-Appellant-Cross-Appellee Awad.*
26

27 ROBERT J. BOYLE, New York, New York, *for*
28 *Defendant-Appellant-Cross-Appellee Moge.*
29

30 DANIEL L. STEIN, ANJAN SAHNI and JESSE M. FURMAN,
31 Assistant United States Attorneys, United
32 States Attorneys Office for the Southern
33 District of New York, *for Preet Bharara,*
34 United States Attorney, Southern District of
35 New York, *for Appellee-Cross-Appellant United*
36 *States of America.*
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39 PER CURIAM:

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41 Appellants Ali Awad and Abdi Emil Moge were tried

1 before a jury as alleged participants in a criminal
2 conspiracy to distribute and possess with intent to
3 distribute a controlled substance, namely mixtures and
4 substances containing a detectable amount of cathinone, a
5 Schedule I controlled substance, in a form commonly known as
6 khat. Appellant Awad was convicted of conspiracy to
7 distribute and possess with intent to distribute cathinone,
8 in violation of 21 U.S.C. § 846, and conspiracy to import
9 cathinone, in violation of 21 U.S.C. § 963. Appellant Moge
10 was convicted of conspiracy to distribute and possess with
11 intent to distribute cathinone, in violation of 21 U.S.C. §
12 846, conspiracy to import cathinone, in violation of 21
13 U.S.C. § 963, and conspiracy to commit money laundering in
14 violation of 18 U.S.C. § 1956(h).¹ The district court also
15 entered forfeiture orders against appellants Awad and Moge

¹ In this opinion, we resolve only the propriety of the forfeiture orders entered by the district court pursuant to 21 U.S.C. § 853(a). On appeal, appellants raise a host of other challenges to their convictions and sentences. The government cross-appeals with respect to the sentences imposed on appellants Moge, Awad and Hussein. Except for our resolution of the propriety of the forfeiture orders, we resolve all of the challenges to appellants' convictions and sentences in a separate summary order filed today. That summary order pertains to docket number 07-4483-cr (L) and all associated cases.

1 under 21 U.S.C. § 853(a).² We hold that the district court
2 properly imposed forfeiture money judgments as part of
3 appellants' sentences and that the propriety of an order
4 imposed pursuant to 21 U.S.C. § 853(a) does not depend on a
5 defendant's assets at the time of sentencing.

6 **BACKGROUND**

7 In the fall of 2005, law enforcement officers, led by
8 the Drug Enforcement Administration (the "DEA"), began an
9 investigation into a network of people involved in the
10 importation and distribution of khat plants in the United
11 States. The investigation resulted in dozens of seizures of
12 khat plants. Khat leaves are chewed for their stimulant
13 effect, but khat itself is not a controlled substance.
14 Rather, cathinone, a constituent of the khat plant, is a
15 Schedule I controlled substance.³ *United States v. Abdulle,*

² Although he did not brief the issue before this Court, pursuant to Federal Rule of Appellate Procedure 28(I), appellant Moge has joined the arguments of his co-appellants that apply to him. The district court entered a forfeiture order against Moge. Therefore, to the extent that he appeals that order, this opinion also applies to him.

³ As the district court acknowledged, when the khat plant is cut, the cathinone begins to degrade. See *United States v. Awad*, No. 06-CR-600 (DLC), 2007 WL 1988382, at *1-2 (S.D.N.Y. July 3, 2007); see also *United States v. Hassan,*

1 564 F.3d 119, 125 (2d Cir. 2009). Cathinone is a central
2 nervous system stimulant, and Schedule I criminalizes its
3 possession in "any quantity." 21 C.F.R. § 1308.11(f)(3).

4 Prior to sentencing, the district court conducted an
5 evidentiary hearing pursuant to *United States v. Fatico*, 579
6 F.2d 707 (2d Cir. 1978), to determine, among other things,
7 the amount of khat attributable to each defendant for
8 purposes of calculating his offense level under the United
9 States Sentencing Guidelines. *United States v. Awad*, No.
10 06-CR-600 (DLC), 2007 WL 3120907, at *1 (S.D.N.Y. Oct. 24,
11 2007). At this time, the government submitted a proposed
12 forfeiture order against appellant Awad in the amount of
13 \$10,000,000 and a proposed order against appellant Moge in
14 the amount of \$9,458,000. The government calculated the
15 proposed forfeiture orders "by multiplying the drug
16 quantities it had argued were attributable to each defendant

578 F.3d 108, 114 (2d Cir. 2008). In another case involving
cathinone, expert testimony was offered to explain that
"cathinone is present in khat for forty-eight hours after
harvesting, at which point the chemical weakens and
eventually dissipates entirely." *United States v. Abdulle*,
564 F.3d 119, 124 (2d Cir. 2009). In this case, forensic
chemists testified that all but one of the seized shipments
of khat tested positive for cathinone.

1 by the street value of khat." *Id.* At the October 5, 2007
2 sentencing hearing, the district court imposed a forfeiture
3 order in the amount of \$10,000,000 as to Awad and \$4,646,000
4 as to Moge. *Id.* at *2.

5 Awad and Moge challenged the imposition of the
6 forfeiture orders before the district court. *Id.* As
7 characterized by the district court, appellants argued that
8 a defendant "in a drug case [is] not subject to forfeiture
9 in the form of a money judgment, where the defendant does
10 not . . . have assets to satisfy the money judgment" at the
11 time of sentencing. *Id.* at *1. The district court rejected
12 this contention and held that "forfeiture orders can be
13 entered under 21 U.S.C. § 853 in drug cases regardless of
14 the defendant's assets at the time of sentencing." *Id.* The
15 court also rejected Awad's challenge to the amount of the
16 forfeiture order, determining that it was "supported by the
17 preponderance of the evidence."⁴ *Id.*

⁴ Focusing solely on the propriety of the imposition of the forfeiture order, appellant Awad does not appear to challenge the amount of the order before this Court. In a footnote to his brief, appellant Moge does contend that the district court erred in its determination of the amount of khat attributable to him and that, therefore, the order should be vacated. We find that the district court

1 commission of various drug . . . crimes." *Casey*, 444 F.3d
2 at 1073 (quoting *Libretti v. United States*, 516 U.S. 29, 39
3 (1995)); see also *Hall*, 434 F.3d at 59.

4 As the district court reasoned, when "a defendant lacks
5 the assets to satisfy the forfeiture order at the time of
6 sentencing, the money judgment . . . is effectively an *in*
7 *personam* judgment in the amount of the forfeiture order."
8 2007 WL 3120907, at *2; accord *Vampire Nation*, 451 F.3d at
9 202. This is so because "[m]andatory forfeiture is
10 concerned not with how much an individual has but with how
11 much he received in connection with the commission of the
12 crime." *Casey*, 444 F.3d at 1077. A contrary interpretation
13 could have the undesirable effect of creating an incentive
14 for an individual involved in a criminal enterprise to
15 "rid[] himself of his ill-gotten gains to avoid the
16 forfeiture sanction." *Hall*, 434 at 59.

17 Notwithstanding appellants' arguments to the contrary,
18 this Court's decision in *United States v. Robilotto*, 828
19 F.2d 940 (2d Cir. 1987), supports our view. In *Robilotto*,
20 in the context of interpreting the RICO forfeiture
21 provision, 18 U.S.C. § 1963, we concluded that the statute

1 "imposes forfeiture directly on an individual as part of a
2 criminal prosecution rather than in a separate proceeding *in*
3 *rem.*" 828 F.2d at 948 (internal quotation marks omitted).
4 In other words, the forfeiture constitutes "a sanction
5 against the individual defendant rather than a judgment
6 against the property itself." *Id.* Consequently, criminal
7 forfeiture need not be traced to identifiable assets in a
8 defendant's possession. *Id.* at 949. The same is true in
9 this context.⁵ In fact, this Court has previously noted
10 that the statutory provision governing forfeitures under
11 RICO and criminal forfeiture orders imposed pursuant to §
12 853 "are so similar in legislative history and plain
13 language as to warrant similar interpretation." *DSI Assoc.*
14 *LLC v. United States*, 496 F.3d 175, 183 n.11 (2d Cir. 2007)
15 (quoting *United States v. Ribadeneira*, 105 F.3d 833, 835 n.2
16 (2d Cir. 1997)).

17 The statute at issue in this case instructs that we
18 interpret its terms "liberally." 21 U.S.C. § 853(o). As

⁵ We are aware of the thorough discussion and contrary interpretation advanced in *United States v. Surgent*, No. 04-CR-364 (JG) (SMG), 2009 WL 2525137 (E.D.N.Y. Aug. 17, 2009), upon which appellant Awad relies heavily. In the end, however, we find it unpersuasive.

1 the district court and other courts of appeal that have
2 addressed this issue have reasoned, section 853 "does not
3 contain any language limiting the amount of money available
4 in a forfeiture order to the value of the assets a defendant
5 possesses at the time the order is issued." *Vampire Nation*,
6 451 F.3d at 201; accord *Baker*, 227 F.3d at 970. Thus, our
7 interpretation of the criminal forfeiture provision
8 "ensur[es] that all eligible criminal defendants receive the
9 mandatory forfeiture sanction Congress intended" and ensures
10 that there is a mechanism by which the government may
11 "disgorge their ill-gotten gains, even those already spent."
12 *Casey*, 444 F.3d at 1074.

13 CONCLUSION

14 We have reviewed all of appellants' arguments and find
15 them to be without merit. Accordingly, for the foregoing
16 reasons, the district court's opinion and order of October
17 24, 2007, holding that a defendant who is convicted of a
18 violation under the Controlled Substances Act, 21 U.S.C. §
19 801 *et seq.*, punishable by a term of imprisonment of more
20 than a year, is subject to the forfeiture provision of 21
21 U.S.C. § 853, irrespective of his assets at the time of
22 sentencing, is hereby AFFIRMED.