CASE NO. 17-5012

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

CORRY PURIFY,
Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable John E. Dowdell
United States District Judge
District Court Case No. 13-CR-0028-JED-29

ANSWER BRIEF OF THE UNITED STATES

Oral argument is not requested
There are no attachments to this brief

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Statement of Prior or Related Appeals

There are no prior or related appeals.

Statement of Jurisdiction

The district court had jurisdiction under 18 U.S.C. § 3231 because Corry Purify was charged with, and ultimately pleaded guilty to violating the laws of the United States in the Northern District of Oklahoma. (Vol. I at 28-256). Purify filed a timely notice of appeal from the final judgment of the district court, therefore, this Court has jurisdiction under 28 U.S.C. § 1291.

Issue Presented for Appeal

Did the district court err in finding that the government had satisfied the requirements of 21 U.S.C. § 853(p) when it ordered the forfeiture of Purify's property as a substitute asset?

Statement of the Case

Corry Purify was a mid-level distributor in a drug organization that obtained cocaine from the Sinoloa and Zetas cartels, processed the cocaine into cocaine base, and distributed the drugs in Oklahoma. (Vol. I at 30-36).

In 2014, an indictment charged Purify and more than 50 others with a drug conspiracy, in violation of 21 U.S.C. § 846 (Count 1), and maintaining places for the manufacture and distribution of cocaine base, in violation of 21 U.S.C. § 856 (Counts 31, 32). A forfeiture notice in the indictment stated that any defendants convicted of the conspiracy would be required to forfeit "a sum of money in an amount of at least $10 million, representing the proceeds of the drug conspiracy, for which the defendants are jointly and severally liable." (Vol. I at 174).

The drug conspiracy count alleged that Purify committed specific acts in furtherance of the conspiracy. For example, paragraph 144 of Count 1 alleged that in January or February 2014, a co-conspirator "delivered one kilogram of cocaine to PURIFY at 9124 E. 49th Street, Tulsa, OK." (Vol. I at 72). Similarly, paragraph 359 alleged that on March 6, 2014, two of the co-conspirators discussed how a third co-conspirator was "to get drug proceeds from PURIFY on the trip to Tulsa." (Vol. I at 116). In addition, paragraph 541 alleged that on April 9, 2014, "PURIFY agreed to distribute one kilogram of cocaine" and told another co-conspirator that he "could sell the kilogram quickly so that [the co-conspirator] can have the money to take 'south'." (Vol. I at 153).

Officers arrested Purify for the drug conspiracy on August 19, 2014, but he was released on bond. Ten days later, Purify was arrested again, and charged with a separate federal firearms offense. At the time of his second arrest, local police seized $2,688 from Purify's pockets. A later superseding indictment added the firearms charge as Count 239 in this case. (Vol. I at 254).

Eventually Purify entered into a Plea Agreement with the government, whereby he agreed to plead guilty to the drug conspiracy. (Doc. 1434, Plea Agreement at 8).[1] As part of the Plea Agreement, Purify agreed to the entry of a criminal forfeiture money judgment in the amount of $10 million representing proceeds of the drug conspiracy. (*Id.* at 5). The Plea Agreement specified that Purify would be jointly and severally liable for the forfeiture judgment. Purify also agreed to forfeiture of a number of specific items including three handguns,

[1] The Plea Agreement is not part of the record on appeal. The government filed a motion to supplement the record on appeal with the Plea Agreement; the motion is pending. Alternatively, the Court may take judicial notice of publicly filed judicial records concerning matters that bear directly upon the disposition of the case at hand. *United States v. Ahidley*, 486 F.3d 1184, 1192 fn. 5 (10th Cir. 2007); *United States v. Pursley*, 577 F.3d 1204, 1214 fn. 6 (10th Cir. 2009); *see* Fed. R. Evid. 201.

ammunition, and a small amount of currency that was seized from a residence when Purify was arrested on August 19, 2014. (*Id.* at 5-6). Purify further agreed to waive all constitutional and statutory challenges (including appeal) to any forfeiture carried out in accordance with the Plea Agreement on any grounds.

Purify pleaded guilty pursuant to his Plea Agreement, and on December 18, 2015, the district court entered the agreed Order of Forfeiture including the $10 million joint and several money judgment and the specific assets listed in Purify's forfeiture agreement. (*Id.* at 8). On January 13, 2016, Purify, who had five prior felony convictions with imprisonment, was sentenced to 120 months imprisonment.[2]

On January 22, 2016, in the dismissed separate firearms case, Purify sought the release of the $2,688 seized during his second arrest, claiming it was not included in his Plea Agreement or in the Order of Forfeiture in the drug conspiracy case. *United States v. Corry Donita*

[2] Doc 1594, Purify Sentencing Memorandum at 5; Doc 1643, Judgment in a Criminal Case at 2. The Court may take judicial notice of publicly filed judicial records concerning matters that bear directly upon the disposition of the case at hand. *Ahidley*, 486 F.3d at 1192 fn. 5 (10th Cir. 2007); *Pursley*, 577 F.3d at 1214 fn. 6 (10th Cir. 2009); *see* Fed. R. Evid. 201.

Purify, District Court (N.D. Okla.) No. 14-CR-00154-CVE, Doc. 38. (Vol. I at 264-69). The government informed the court that it was seeking to forfeit the $2,688 in partial satisfaction of the $10 million money judgment in the drug conspiracy case and the court denied Purify's motion. No. 14-CR-154-CVE, Docs. 40 and 41.[3]

The government filed a motion in this case to amend the Order of Forfeiture to include the $2,688 as a substitute asset, attaching a declaration that the forfeiture judgment remained unsatisfied and the property subject to forfeiture "cannot be located upon the exercise of due diligence." (Vol. I at 259-269).

The district court denied the government's motion because the declaration failed to set forth the steps taken to attempt to locate the property subject to forfeiture. (Vol. I at 276). On April 11, 2016, the government filed an amended Rule 32.2(e) motion, which contained an amended declaration detailing the steps that the government had taken

[3] The Court may take judicial notice of publicly filed judicial records concerning matters that bear directly upon the disposition of the case at hand. *Ahidley*, 486 F.3d 1184, 1192 fn. 5 (10th Cir. 2007); *Pursley*, 577 F.3d 1204, 1214 fn. 6 (10th Cir. 2009); *see* Fed. R. Evid. 201.

to locate any of Purify's property that was traceable to the offense. (Vol. I at 277-290).

Purify responded that although the government may have established that he did not presently possess the proceeds of the drug conspiracy, it had not established – as Section 853(p) requires – that those proceeds were unavailable due to "an act or omission of the defendant." (Vol. I at 291-295).

The government replied that § 853(p) did not require it to show that forfeitable property was unavailable due to Purify's act or omission in order to forfeit his substitute assets. Rather it argued, for purposes of § 853(p), Purify was liable for the acts or omissions of his co-conspirators rendering the forfeitable property unavailable. (Vol. I at 299-300).

The district court overruled Purify's objections and granted the government's amended Rule 32.2(e) motion. (Vol. I at 303-306). In doing so, the court explained that just as a criminal defendant is liable to forfeit the proceeds of a conspiracy whether or not he personally obtained those proceeds, he is liable to forfeit substitute assets whether or not he was personally responsible for causing those proceeds to

become unavailable. (Vol. I at 305). In both instances, under the *Pinkerton*[4] doctrine, a criminal defendant who voluntarily joins a conspiracy is liable for the acts of his co-conspirators. Thus, the district court held the government was not required to show that Purify had ever personally possessed the forfeitable proceeds to find that he was required to forfeit a substitute asset under § 853(p). (Vol. I at 305-306).

Defendant now appeals, asserting that the district court erred in allowing forfeiture of the $2,688 as a substitute asset.

Summary of the Argument

Upon conviction, a defendant forfeits the proceeds of a conspiracy, and the forfeiture order may include a money judgment for which the defendant is jointly and severally liable with co-conspirators. The government may satisfy the money judgment by forfeiting any property of the defendant as a substitute asset.

To forfeit substitute assets, the government need only show that due to an act or omission of the defendant, the directly forfeitable property "cannot be located upon the exercise of due diligence." *See* Rule

[4] *Pinkerton v. United States*, 328 U.S. 640 (1946).

32.2(e), F.R.CrimP., and 21 U.S.C. § 853(p). In this case, the district court found that the government had exercised due diligence but had not been able to locate any of the drug proceeds in Purify's possession. Purify argues that the government failed to establish that he ever personally possessed any of the drug proceeds, and thus failed to show that the unavailability of that money was due to his act or omission.

Purify's argument fails for two reasons: First, in his Plea Agreement, Purify admitted that he had personally sold between 5 and 8 kilograms of cocaine, and agreed he was jointly and severally liable for the $10 million forfeiture judgment. (Doc. 1434, Plea Agreement at 13).[5] Thus, it was reasonable for the government to infer, and for the district court to find, that Purify had had *at least* $2,688 in drug proceeds in his possession at one time, and that the failure to locate that money was due to his personal act or omission.

Second, under the doctrine of joint and several liability, a defendant is liable to forfeit the proceeds of a conspiracy regardless of the amount of money that the defendant personally obtained. Just as a defendant is vicariously liable for the acts of his co-conspirators with

[5] *See* fn. 1.

regard to the forfeiture of the proceeds of their crime, he is vicariously liable for their acts or omissions in causing those proceeds to become unavailable. If Purify did not personally obtain the drug proceeds and did not personally cause them to become unavailable, his co-conspirators surely did obtain the proceeds and surely did, through their acts or omissions, cause them to "go missing." Because Purify is liable for the conduct of his co-conspirators, the district court did not err in finding that the directly forfeitable property was unavailable due to an act or omission of Purify.

Argument

A. Record Reference

Purify filed a response to the government's motion to forfeit a substitute asset, arguing that the government had failed to show that the unavailability of proceeds of his drug conspiracy were the result of some act or omission on his part. (Vol. I at 292-294). Purify nowhere argued that the district court could not rely on the acts or omissions of his co-conspirators to find the proceeds unavailable under § 853(p), or that the affidavit supporting the government's motion failed to adequately allege those acts or omissions.

B. Standard of Review

This Court reviews a criminal forfeiture order under the same standard of review as any other sentencing matter: the district court's legal conclusions are reviewed de novo and its factual conclusions for clear error. *United States v. Gordon*, 710 F.3d 1124, 1165 (10th Cir. 2013). Here, the district court's legal conclusion that the government could seek forfeiture of substitute assets based on acts or omissions by Purify's co-conspirators is reviewed de novo, while the court's findings that those acts or omissions rendered proceeds of the offense unavailable is reviewed for clear error.

C. Overview of Criminal Forfeiture Procedure

1. After conviction of a criminal offense, the defendant is subject to a mandatory forfeiture judgment for the proceeds of that offense.

Upon conviction of a drug offense, the court must order the forfeiture of the amount of the proceeds of the offense as part of the defendant's sentence. *See* 28 U.S.C. § 2461(c) ("If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case . . . ."); 21 U.S.C. § 853(a)(1) (providing that a person

convicted of a drug offense "shall forfeit . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of the violation"); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (applying 21 U.S.C. § 853(a) and holding that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied. . . .").

If the proceeds of the defendant's offense have been dissipated or cannot be located, the forfeiture order may take the form of a personal money judgment. The imposition of a money judgment – like the forfeiture of the property directly traceable to the offense – is mandatory, even if the defendant has no assets at the time he is sentenced with which to satisfy the judgment. *United States v. McGinty*, 610 F.3d 1242, 246 (10th Cir. 2010) (holding that the district court erred in refusing to order the defendant to pay a money judgment equal to the proceeds of his offense); *See United States v. Grose*, 461 F. App'x 786, 806-07 (10th Cir 2012) (following *McGinty*; that defendant lost the proceeds of his wire fraud offense in a subsequent bad investment does not excuse him from liability for a money judgment any more than if he had spent the money on wine, women and song).

2. The defendant is jointly and severally liable for the money judgment even if he did not personally obtain the criminal proceeds.

Other circuits have overwhelmingly held that if a defendant is one of several defendants convicted of a conspiracy, he is jointly and severally liable for the forfeiture money judgment with all others convicted of the offense, regardless of how much, or how little, of the proceeds the defendant personally obtained. *See United States v. Ponzo,* ___ F.3d ___, 2017 WL 1291183 (1st Cir. Apr. 7, 2017) (holding the defendant jointly and severally liable for the forfeiture of $2.25 million in a drug conspiracy); *United States v. Honeycutt,* 816 F.3d 362 (6th Cir. 2016) (same), *cert. granted,* 2016 WL 4078900 (U.S. Dec. 9, 2016); *United States v. Nagin,* 810 F.3d 348 (5th Cir. 2016) ("As a general matter, co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy"); *United States v. Roberts,* 660 F.3d 149, 165 (2d Cir. 2011) (holding that joint and several liability for the amount of the money judgment in a drug case is mandatory); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (all co-conspirators are jointly and

severally liable for the amount of the forfeiture regardless of how much or how little they benefitted from the conspiracy).

The basis for joint and several liability is two-fold: First, under the *Pinkerton* doctrine, all members of a conspiracy are liable for the foreseeable acts of their conspirators, *see United States v. Beecroft,* 825 F.3d 991 (9th Cir. 2016) (applying *Pinkerton* and holding that all conspirators in a mortgage fraud scheme are jointly and severally liable for the loan proceeds obtained by the conspiracy). Second, the statute itself makes defendants liable for the proceeds that they obtained "directly *or indirectly." See United States v. Olguin,* 643 F.3d 384, 398-99 (5th Cir. 2011) (because a defendant is liable for proceeds obtained "indirectly," he is liable for proceeds obtained by co-conspirators even though he obtained little or none of the money himself). *But see United States v. Cano-Flores,* 796 F.3d 83 (D.C. Cir. 2015) (declining to follow all other circuits and holding that neither rationale for joint and several liability – *Pinkerton* liability and the language authorizing forfeiture of property obtained "indirectly" – justifies holding a defendant liable for more than the amount of money he obtained personally).

This Court has not expressly adopted the doctrine of joint and several liability, but district courts in this circuit have followed the majority rule and have held defendants jointly and severally liable for the forfeiture judgment amount in criminal cases. *See, e.g., United States v. Heller,* 2011 WL 5865914, *3 (N.D. Okla. Nov. 22, 2011) ("In a narcotics conspiracy, each member of the conspiracy is jointly and severally liable for the total amount of proceeds derived from the conspiracy;" citing *Roberts, Spano,* and other cases from other circuits).[6]

[6] As noted above, the Supreme Court has granted *certiorari* in *Honeycutt* to resolve the split in the circuits on the joint and several liability issue. On March 29, 2017, the Court heard oral arguments. Whether the outcome of that case would affect the outcome of this one depends, of course, on what the Supreme Court holds, and whether this court finds it necessary to rely on the doctrine of joint and several liability to affirm the judgment of the district court. Other circuits have disagreed as to whether it is necessary to withhold ruling on the joint and several liability issue while the Supreme Court's decision is pending. *Compare United States v. Lara,* ___ F. App'x ___, 2017 WL 527912 (6th Cir. Feb. 8, 2017) (holding appeal on joint and several liability in abeyance pending the Supreme Court's decision in *Honeycutt*) *with Ponzo,* ___ F.3d ___, 2017 WL 1291183 (1st Cir. Apr. 7, 2017) (declining to abstain from applying joint and several liability while the Supreme Court considers the issue in *Honeycutt*).

3. Substitute assets may be forfeited to satisfy a money judgment.

To satisfy a forfeiture money judgment, the government has several options. It could, for example, use the Federal Debt Collection Procedures Act, 28 U.S.C. § 3201, *et seq.,* and collect the judgment as it would the judgment in a civil case. *See United States v. Bradley,* 644 F.3d 1213, 1309-10 (11th Cir. 2011).

More commonly, however, the government seeks to collect a forfeiture judgment by moving to amend the forfeiture order to forfeit property of the defendant as a substitute asset. *See United States v. Candelaria-Silva,* 166 F.3d 19, 42 (1st Cir. 1999) (once the government has obtained a money judgment, it may forfeit other property of the defendant in partial satisfaction of that judgment); *United States v. Garza,* 407 F. App'x 322, 324-25 (10th Cir. 2011) (affirming the forfeiture of a substitute asset in partial satisfaction of a forfeiture money judgment in a drug case); *United States v. McCrea,* 2014 WL 123172 (W.D. Va. Jan. 13, 2014) (explaining that the term "money judgment" is simply shorthand for the proceeds of defendant's crime, and that therefore § 853(p), which authorizes the forfeiture of substitute assets in place of other "property," allows the forfeiture of any property

of the defendant to satisfy a money judgment). *See generally,* Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2016 Supplement), § 22-2(c), pp. 328-31 (collecting cases ordering the forfeiture of substitute assets to satisfy a forfeiture money judgment).

Any property of the defendant is forfeitable as a substitute asset. *See United States v. Smith,* 656 F.3d 821, 828 (8th Cir. 2011) (no constitutional requirement of a nexus between the defendant's offense and the property to be forfeited; any property of the defendant may be forfeited); *United States v. Fleet,* 498 F.3d 1225, 1231 (11th Cir. 2007) (Congress chose broad language providing that any property of the defendant may be forfeited as a substitute asset; it is not for the courts "to strike a balance between the competing interests" or to carve out exceptions to the statute); *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit "every last penny" he owns as substitute assets). Moreover, like the forfeiture of the property directly traceable to Purify's offense and the entry of a money judgment, the forfeiture of substitute assets is mandatory. *See United States v. Alamoudi,* 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary . . . [W]hen the Government cannot reach the property

initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property"); *Garza,* 407 F. App'x at 324 (same; following *Alamoudi*).

4. The procedure for amending a forfeiture order to include substitute assets is found in Rule 32.2(e) and in 21 U.S.C. § 853(p).

Rule 32.2(e), F.R.Crim.P., provides the mechanism for moving to amend the forfeiture order to include substitute assets. *United States v. Hall*, 434 F.3d 42, 60 (1st Cir. 2006). It provides that "on the Government's motion," the court may "at any time" amend a forfeiture order to include "substitute property that qualifies for forfeiture under an applicable statute." Rule 32.2(e)(1)(B). In the case of a forfeiture based on a drug violation, the reference to the "applicable statute" is to 21 U.S.C. § 853(p). Accordingly, to obtain an order amending a forfeiture order to include substitute assets, the government is required only to show that the requirements of Section 853(p) are satisfied. *See Gordon,* 710 F.3d at 1165-68.

D. The district court did not err in concluding the government had met § 853(p)'s requirements as interpreted by this Circuit's precedent.

1. Taylor's affidavit satisfied *Gordon*'s requirements for forfeiture of substitute assets.

Under Section 853(p), the government must establish two things: 1) that the property traceable to the offense – *i.e.,* the drug proceeds – "cannot be located upon the exercise of due diligence;" and 2) that the government's inability to locate the property is "a result of any act or omission of the defendant." 21 U.S.C. § 853(p)(1)(A).[7] As this Court held in *Gordon*, "The Government generally has little difficulty in making the necessary showing [under § 853(p)]." *Gordon,* 710 F.3d at 1166, quoting *Asset Forfeiture Law in the United States,* § 22-3 at p. 643.

In *Gordon*, the government sought the forfeiture of property of the defendant to satisfy, in part, an outstanding money judgment of $2.7 million for which Gordon was jointly and severally liable in connection

[7] Section 853(p)(1) actually sets forth five alternative ways in which the government may establish that the directly forfeitable property is unavailable. *See* § 853(p)(1)(A)-(E). These alternatives are disjunctive, however, and only the first one is relevant to this appeal. *See United States v. Surgent*, 2009 WL 2525137, *18 (E.D.N.Y. Aug 17, 2009) (unpublished) (noting that because the requirements in § 853(p) are disjunctive, the government need only show that one of them is satisfied).

with a fraud scheme. *Gordon* at 1165. A government investigator – the same William Robert Taylor whose declaration was the basis for the court's factual findings in this case – averred that he had conducted a full financial investigation of the defendant's business and personal bank accounts and that he had not been able to locate the proceeds of the fraud. This Court held that because the money could not be found in the defendant's bank accounts, "it was reasonable for Mr. Taylor to infer, and the district court to find, that the money was dissipated due to Mr. Gordon's conduct." (*Id.* at 1166). Moreover, the court noted that the defendant had offered "no reasonable basis to dispute or otherwise contradict the averments in Mr. Taylor's affidavit that the government exercised due diligence in seeking to locate the directly forfeitable funds at issue and that they were missing due to an act or omission of Mr. Gordon." (*Id.*at 1167).

Accordingly, the panel affirmed the forfeiture of the defendant's property as a substitute asset.[8] *See also Garza,* 407 F. App'x at 324-25

[8] The *Gordon* court also discussed the requirement in Section 853(p) that the substitute asset be "property of the defendant" and concluded that that issue would need to be addressed only if a third party filed a claim to the property pursuant to 21 U.S.C. § 853(n). *Gordon,* 710 F.3d at 1167-68. That is not an issue in the instant appeal.

(agent's affidavit stating he reviewed defendant's financial records and found that one parcel of real property was his only asset satisfied § 853(p)).

Other Courts have similarly found that the declaration of a government investigator, stating that he or she had been unable to locate the forfeitable property, satisfied the requirements of Section 853(p). *See Alamoudi,* 452 F.3d at 315) (Courts interpret § 853(p) liberally to prevent defendants from frustrating the forfeiture laws; it is sufficient if a law enforcement agent submits that she has searched for the missing assets and that despite the exercise of due diligence she has been unable to find them); *United States v. Candelaria-Silva,* 166 F.3d at 42 (the government satisfied the requirements of Section 853(p) by submitting a motion and affidavit reciting its efforts to trace defendant's drug proceeds); *United States v. Seher,* 562 F.3d 1344, 1373 (11th Cir. 2009) (same; following *Candelaria-Silva); United States v. Tardon,* 56 F. Supp.3d 1309 (S.D. Fla. 2014) (following *Seher*; agent's affidavit stating that directly forfeitable property could not be located was sufficient to satisfy § 853(p); *United States v. Hailey,* 887 F. Supp.2d 649 (D. Md. 2012) (analysis of defendant's bank accounts,

showing that he has spent the proceeds of his crime, satisfies § 853(p) and allows the government to recover substitute assets); *United States v. Stathakis*, 2008 WL 413782, *16 (E.D.N.Y. 2008) (unpublished) (government showed it satisfied due diligence requirement in § 853(p) having agent testify that he obtained defendant's bank records and found his accounts to be empty).[9]

In this case, the district court followed this Court's guidance in determining whether to forfeit Purify's property as a substitute asset. Relying on the admissions in Purify's Plea Agreement, the court found that the conspirators had obtained $10 million in proceeds and that Purify was jointly and severally liable for the forfeiture of that amount. Thus, as part of Purify's sentence, the court issued a forfeiture order in the form of a money judgment for $10 million.

[9] Alternatively, courts have found that the government satisfied the requirements of Section 853(p) in other ways. For example, in *United States v. Loren-Maltese*, 2003 WL 291910, *1 (N.D. Ill. 2003) (unpublished), the court held that the requirements that the forfeitable property could not be located upon the exercise of due diligence, and that the absence of the property was due to an act or omission of the defendant, were both satisfied by showing that the defendant refused to disclose what became of the forfeitable property during the presentence investigation.

The government then moved under Rule 32.2(e) to forfeit the $2,688 seized from Purify at the time of his second arrest as a substitute asset in partial satisfaction of the money judgment. Before forfeiting the substitute asset, the district court required the government to satisfy the requirements of Section 853(p) and found, based on the amended Taylor declaration, that the government had done so. Accordingly, the court correctly entered an order amending the original forfeiture order to include the $2,688 as a substitute asset.

2. The affidavit sufficiently established that either Purify's own acts or omissions, or those of his co-conspirators, led to the unavailability of the criminal proceeds.

Purify attempts to distinguish this controlling precedent by suggesting that because the government did not show that he had ever had the criminal proceeds in his possession, it could not show that the unavailability of those proceeds was due to his own "act or omission." Purify's argument fails for several reasons.

First, contrary to Purify's assertions, the government did establish that he had at least a portion of the criminal proceeds in his personal possession at various times during the conspiracy. In his Plea Agreement, Purify admitted not only that the conspiracy had realized

$10 million in proceeds from the sale of illegal drugs, but that he had "conspired with others to possess and sell at least 5 kilograms of cocaine," and that he had personally "sold smaller quantities of drugs that I obtained from co-conspirators." (Doc. 1434, Plea Agreement at 8). That admission was consistent with the allegations in the indictment that a co-conspirator "delivered one kilogram of cocaine to PURIFY at 9124 E. 49th Street, Tulsa, OK;" (Vol. I at 72, paragraph 114); that two of the co-conspirators made arrangements for a third co-conspirator "to get drug proceeds from PURIFY on the trip to Tulsa." (Vol. I at 116, paragraph 359), and that "PURIFY agreed to distribute one kilogram of cocaine" and told another co-conspirator that he "could sell the kilogram quickly so that [the co-conspirator] can have the money to take 'south'". (Vol. I at 153, paragraph 541). Moreover, as part of his forfeiture agreement in the Plea Agreement, Purify agreed that he is jointly and severally liable for the $10 million forfeiture judgment with co-conspirators. (Doc. 1434, Plea Agreement at 5).[10]

Given that Purify admitted being part of a $10 million drug conspiracy and having participated in distributing a portion of the

[10] *See* fn. 1.

drugs himself, it was reasonable for the government's investigator to infer, and for the district court to find, that Purify had had *at least* $2,688 in drug proceeds in his possession at one time, and that the government's failure to locate that money, despite the exercise of due diligence, was due to Purify's personal act or omission. For that reason alone, the district court was justified in finding that the requirements of Section 853(p) were satisfied.

However, Purify's attempt to distinguish *Gordon* and the other cases fails for a more fundamental reason.

As discussed above, under the majority rule, a defendant convicted of a drug conspiracy is jointly and severally liable to forfeit the proceeds of that conspiracy, regardless of the amount of money that the defendant personally obtained. Indeed, the defendant in this case expressly agreed in his Plea Agreement that he was jointly and severally liable for the forfeiture of the $10 million in drug proceeds realized by himself and his co-conspirators.

As universally acknowledged, the government may enforce a money judgment by forfeiting any property of the defendant as a substitute asset. As one commentator has observed, "There are legions

of cases illustrating this application of the substitute assets provision." *Asset Forfeiture Law in the United States* (2016 Supp.), § 22-2(c), p. 328. Moreover, when it comes to forfeiting substitute assets to satisfy a money judgment, the courts do not distinguish between forfeiture orders generally, and those based on joint and several liability. Indeed, many if not most of the cases cited above, including this Court's decision in *Gordon,* involved the forfeiture of a substitute asset to satisfy a forfeiture money judgment for which the defendant was jointly and severally liable.

None of these cases suggests that the substitute asset were forfeitable only if the government established that the defendant *was personally responsible* for rendering the criminal proceeds unavailable. Indeed, such a rule would make no sense: if the defendant were liable for the forfeiture of proceeds that he did not personally obtain, it would be inconsistent to require a showing that he once had the proceeds in his possession and caused them to be lost before the forfeiture order was enforceable. The rule that Purify advocates would, in other words, contradict the doctrine of joint and several liability by making an order premised on that doctrine unenforceable by the very means that

Congress enacted for the enforcement of such orders – the forfeiture of substitute assets.

Yet Purify points to the statutory text and argues that substitute assets are forfeitable only if the directly forfeitable property is unavailable due to an act or omission "of the defendant." The question is how the text of the statute can be reconciled with the routine enforcement of money judgments premised on joint and several liability by forfeiting substitute assets.

The Fourth Circuit recently addressed precisely that question in *United States v. Chittenden,* 848 F.3d 188 (4th Cir. 2017). In that case, upon conviction of conspiracy to commit bank fraud, the court ordered the forfeiture of $1.5 million in the form of a money judgment. The district court then ordered the defendant to forfeit property valued at $1.0 million as a substitute asset. 848 F.3d at 204.

On appeal, the defendant argued that she was not the person responsible for the dissipation of the proceeds of the conspiracy; rather, she said, it was her co-conspirators' acts of dissipating, commingling or transferring the conspiracy proceeds that rendered them unavailable,

and that such acts should not be attributable to her. 848 F.3d at 203-04. However, the panel did not agree.

"It is well-established," the Court said, "that a defendant is vicariously liable for the reasonably foreseeable conduct of his co-conspirators, both substantively and at sentencing." (*Id.* 848 F.3d at 204). Indeed, that vicarious liability underlies the rule that "a defendant is jointly and severally liable for the forfeiture of proceeds from a conspiracy." (*Id.*) It follows, the Court concluded, that a defendant is also vicariously liable for the acts or omissions of her co-defendants *in causing the proceeds of the conspiracy to be dissipated, commingled or transferred*, and thus to be unavailable for forfeiture. (*Id.*)

Taken together with the rule that the forfeiture of substitute assets is mandatory when the tainted property has been placed beyond the reach of the court, the panel concluded that a defendant's vicarious liability for the acts of her conspirators in dissipating the proceeds of a crime means that her substitute assets may be forfeited to satisfy a money judgment if she *or her co-conspirators,* through their acts or omissions, caused the directly forfeitable property to be unavailable for

forfeiture. (*Id.*) In short, if a defendant is liable for the conduct of her co-conspirators in *obtaining* the criminal proceeds in the first place, she is liable for their *dissipation* of those proceeds as well.

For the same reasons, the district court in this case correctly ordered the forfeiture of Purify's substitute asset. Even if Purify was not personally responsible for dissipating the $10 million in proceeds of the illegal drug sales – or even for dissipating any part of it – then surely his co-conspirators were responsible for doing so, and Purify is liable for their conduct for the same reason that he is liable for the forfeiture of the proceeds of the entire conspiracy: he is vicariously liable, under the *Pinkerton* doctrine, substantively and at sentencing, for the acts or omissions of his co-conspirators. If his co-conspirators caused the forfeitable proceeds to become unavailable, then Purify is liable for the consequences of those acts as surely as if he had caused the money to become unavailable himself.

Accordingly, the district court did not err in finding that the requirements of Section 853(p) were satisfied, and in ordering Purify to forfeit $2,688 as a substitute asset.

Conclusion

For all of these reasons, the forfeiture order should be affirmed.

Statement Regarding Oral Argument

The United States does not request oral argument.

Respectfully submitted,

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