MONEY JUDGMENTS AFTER *HONEYCUTT*

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I. Money Judgments

Criminal forfeiture is part of the defendant's sentence

--- its purpose is punishment, and it is imposed *in personam*

- *Libretti v. United States*, 516 U.S. 29, 39 (1995) ("criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense");
- *United States v. Louthian,* 756 F.3d 295, 307 n.12 (4th Cir. 2014) (criminal and civil forfeiture are "distinct law enforcement tools:" the former is an *in personam* action that requires a conviction, and the latter is an *in rem* action against the property itself);
- *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the *in rem* judgment in a civil forfeiture case);
- *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates *in personam* against a defendant; it is part of his punishment following conviction);

Because it is an *in personam* punishment, the forfeiture order is not limited to specific assets that are directly traceable to the offense

— Instead, it can take the form of a personal money judgment

- *United States v. Roberts*, 696 F. Supp. 2d 263, 270 (E.D.N.Y. 2010) (forfeiture order may take the form of a money judgment because the forfeiture order is an *in*

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personam judgment), aff'd in part, vacated in part by 660 F.3d 149 (2d Cir. 2011) (affirming all aspects of the district court's decision except the forfeiture order, which was vacated and remanded for further fact-finding as to whether to calculate the forfeiture amount using retail or wholesale multiplier);

But a money judgment must be limited to the property involved in or derived from the offense for which the defendant was convicted

- *United States v. Juluke*, 426 F.3d 323, 328-29 (5th Cir. 2005) (the Government must prove that the property subject to forfeiture was the proceeds of the drug activity that formed the basis for the defendant's conviction, not of the defendant's drug trafficking generally);

- *United States v. Garcia-Guizar*, 160 F.3d 511, 524-25 (9th Cir. 1998) (where defendant is charged with selling $5,000 worth of drugs but $43,000 is seized from his locker, only the amount traceable to the offenses for which defendant is convicted can be forfeited in the criminal case; same for conspiracy count if it is limited to commission of the substantive offense);

— as I said earlier, you can forfeit all of the proceeds of a scheme or conspiracy only if the defendant is convicted of the scheme or conspiracy

- *United States v. Hasson,* 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) (the court in a money laundering case may not impose a forfeiture order based on a money laundering offense with which defendant was not charged or for which he was acquitted, but if he is convicted of a conspiracy, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he has been acquitted);

- *United States v. Lo,* 839 F.3d 777 (9th Cir. 2016)(following *Venturella* and *Hasson;* forfeiture in a mail or wire fraud case is not limited to the executions of the scheme on which defendant was convicted, but includes the proceeds of the entire scheme, "including additional executions of the scheme that were not specifically charged or on which the defendant was acquitted"; distinguishing *Garcia-Guizar*);

- *United States v. Venturella*, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case "is not limited to the amount of the particular mailing but extends to the entire scheme;" defendant's guilty plea to one substantive count involving $477 rendered her liable for money judgment of $114,000);

— But if you convict the defendant of an offense, and establish the value of the proceeds he obtained (or the value of the property involved, if it is money laundering offense)

— You can get a money judgment for that amount of money even if the defendant no longer has the money in his possession

- *United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (forcing defendants to disgorge their ill-gotten gains, "even those already spent," ensures that defendants do not benefit from their crimes; when the Government seeks a money judgment, the district court's only role, under Rule 32.2(b), is to determine the amount of money that the defendant will be ordered to pay); *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) (same);

- *United States v. Hampton,* 732 F.3d 687, 691-92 (6th Cir. 2013) (following all other circuits and holding that forfeiture being a mandatory part of the defendant's sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment);

- *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced; such a construction of the statute is consistent with the mandatory nature of criminal forfeiture and the provision in section 853 directing courts to liberally construe its provisions to effectuate their remedial purposes);

The point is that while the defendant's forfeiture liability is limited to the property derived from or involved in the crime for which he was convicted, his obligation to forfeit that money continues even if he has spent it on wine, women and song

— Otherwise, defendant's would have an incentive to dissipate their criminal proceeds as quickly as possible

- *United States v. Peithman,* 2017 WL 1682778 (D. Neb. May 1, 2017) ("The term 'money judgment' is a short-hand way of describing the defendant's continuing obligation to forfeit the money derived from or used to commit his criminal offense whether he has retained the actual dollars in his possession or not," quoting *Asset Forfeiture Law in the United States* (2d ed. 2013), § 19-4(c));

Examples:

Courts have imposed money judgments in all types of criminal cases – fraud, drugs, money laundering, etc.

Money laundering cases:

- *United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) ("Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property 'involved in' the offense, including the money or other property being laundered (the corpus) and any property used to facilitate the laundering offense"; in a conspiracy case, the corpus is the funds the defendant conspired to launder, including commingled clean money);

— Fraud and other economic crimes:

- *United States v. Kalish*, 626 F.3d 165, 168-69 (2d Cir. 2010) (defendant required to pay a money judgment equal to the proceeds of his advance fee scheme to defraud investors; that the forfeiture was based on a civil forfeiture statute made no difference; criminal forfeitures are in personam whether based on § 853 directly or through § 2461(c));

— Drug cases:

- *United States v. Casey*, 444 F.3d 1071, 1074-76 (9th Cir. 2006) (because forfeiture is mandatory, a defendant who has already spent the proceeds of his drug offense must pay a money judgment; otherwise he will have been allowed to enjoy the fruits of his crime, which would be inconsistent with the remedial purpose of the statute);

— RICO cases:

- *United States v. Corrado*, 227 F.3d 543, 558 (6th Cir. 2000) (*Corrado* I) (remanding case to the district court to enter money judgment for the amount derived from a RICO offense);

In most cases, the defendant will still have some assets that were involved in or derived from the crime, but not all of them

— In that case, the forfeiture order should be in the form of a money judgment for the full amount subject to forfeiture, with credit for the value of the specific assets recovered and forfeited

- *United States v. Hall*, 434 F.3d 42, 60 n.8 (1st Cir. 2006) (rejecting defendant's argument that district court could not enter a money judgment and order forfeiture of specific assets as part of the same order, order that included a money judgment for $511,321 and ordered the forfeiture of specific items of personal and real property in accordance with the jury's special verdict was proper);

- *United States v. Bradley,* 2017 WL 2691535 (M.D. Tenn. Jun. 22, 2017) (when forfeiture order contains both money judgment and specific assets, value of the assets is credited against the money judgment);

Imposition of the money judgment is mandatory

- *United States v. Blackman,* 746 F.3d 137, 143 (4th Cir. 2014) (§ 2461(c) makes criminal forfeiture mandatory in all cases; "The word 'shall' does not convey discretion . . The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.");

- *United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) ("When the Government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits"); *id.*

("[T]he district court has no discretion to reduce or eliminate mandatory criminal forfeiture");

- *United States v. Smith,* 749 F.3d 465, 488 (6th Cir. 2014) ("Criminal forfeiture judgments are mandatory for mail fraud convictions");

- *United States v. Carpenter*, 317 F.3d 618, 626 (6th Cir. 2003) (because criminal forfeiture is mandatory, the court must order the forfeiture of the property used to commit the offense in its entirety, even if the defendant used only part of it for that purpose; the only limitation is the Excessive Fines Clause of the Eighth Amendment); aff'd en banc, 360 F.3d 591 (6th Cir. 2004);

- *United States v. Corrado*, 227 F.3d 543, 552 (6th Cir. 2000) (*Corrado* I) (forfeiture is a mandatory aspect of the sentence; district court erred in refusing to order forfeiture of "sufficiently quantifiable" proceeds of a RICO offense); *United States v. Corrado*, 286 F.3d 934, 937 (6th Cir. 2002) (*Corrado* II) (same);

- *United States v. Hill*, 167 F.3d 1055, 1073-74 (6th Cir. 1999) (court may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items unless section 853(p) applies); *United States v. Hill*, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (same case, on appeal from modification of order of forfeiture to include substitute assets) (forfeiture of property involved in money laundering is mandatory);

II. Enforcement of the Money Judgment

The Government may enforce the money judgment the way it would enforce or attempt to collect any other debt owed to the United States:

- *United States v. Bradley*, 644 F.3d 1213, 1309-10 (11th Cir. 2011) (if a defendant does not satisfy a money judgment, the Government may depose him or anyone else, or conduct other discovery under the Fed. R. Civ. P., to learn what assets he has, and may use the FDCPA to seize the assets with a writ of attachment or garnishment);

- *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) ("a money judgment permits the Government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant");

— But the far more common way of enforcing a money judgment is to locate other assets of the defendant and forfeit them as "substitute assets"

- *United States v. Bermudez*, 413 F.3d 304, 306-07 (2d Cir. 2005) (affirming forfeiture of substitute assets in partial satisfaction of $14.2 million money judgment in a money laundering case);

- *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999) (once the Government has obtained a money judgment, it may forfeit defendant's real property in partial satisfaction of that judgment); *United States v. Baker*, 227 F.3d 955, 968 n.1 (7th Cir. 2000) (same);

- *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 to satisfy a money judgment);

- *United States v. Hill*, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (630 shares of stock could be forfeited as substitute assets to satisfy money judgment entered after property involved in money laundering scheme became unavailable);

The money judgment remains in effect until satisfied:

- *United States v. Navarrete*, 667 F.3d 886, 887-88 (7th Cir. 2012) (like a restitution order, a forfeiture order is an *in personam* judgment that remains in effect until satisfied; if defendant earns money after his release from prison, he may be able to pay both debts);

- *United States v. Fischer*, 394 Fed. Appx. 322, 332 (7th Cir. 2010) (following *Baker*; the 20-year limitation on judgments in the FDCPA, 28 U.S.C. § 3201, does not apply to criminal forfeiture money judgments which "remain in effect until satisfied"; the Government may enforce the judgment by forfeiting substitute assets at any time);

III. Calculating the Amount of the Money Judgment

You do not have to allege the amount of the money judgment that you'll be seeking in the indictment

— In fact, you don't have to say that you'll be seeking a money judgment at all

— It is enough to put the defendant on notice that the Government will be seeking the forfeiture of "all proceeds" of his offense, or "all property involved," as the case may be

- *United States v. Lo*, 839 F.3d 777 (9th Cir. 2016)(Rule 32.2(a) does not require Government to give defendant notice that it will be seeking forfeiture in the form of a money judgment);

- *United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (Rule 7(c)(2) does not require notice to defendant that he will be subject to a money judgment);

- *United States v. Plaskett*, 355 Fed. Appx. 639, 644 (3d Cir. 2009) (indictment need not specify that the Government will seek a money judgment; notice that the defendant will be required to forfeit the proceeds of his offense and that Government may seek substitute assets is sufficient);

- *United States v. Kalish*, 626 F.3d 165, 169 (2d Cir. 2010) (forfeiture notice that advised defendant he would have to forfeit an amount of money equal to the proceeds of his offense was sufficient; the indictment need not to use the words "money judgment"); *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011) (same, following *Kalish*);

If the indictment does specify the amount of the money judgment, the court is not necessarily limited to that amount when it issues its forfeiture order:

- *United States v. Segal*, 495 F.3d 826, 839-40 (7th Cir. 2007) (because the forfeiture notice used terms like "at least" and "including but not limited to" in describing the proceeds subject to forfeiture, the indictment did not limit the forfeiture to any specific figure or assets);

- *United States v. Ponzo,* 853 F.3d 558 (1st Cir. 2017) (in light of the "including but not limited to" language in the indictment and the precedents on this issue, it was not plain error for the district court to order forfeiture of more than the amount set forth in the indictment);

- *United States v. Warshak*, 2008 WL 2705044, *5 n.2 (S.D. Ohio 2008) (Government was "within its rights to increase the amount it seeks in forfeiture based on its discovery of new information"; money judgment entered for $459 million even though indictment alleged forfeiture of $100 million);

The time to calculate the amount of the money judgment is in the forfeiture phase of the trial when the evidence already in the record, supplemented by live testimony or an affidavit, may be used to establish the amount subject to forfeiture

- *United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) (computing the amount of a money judgment based on evidence already in the record supplemented by an agent's affidavit);

- *United States v. Roberts*, 696 F. Supp. 2d 263, 271 (E.D.N.Y. 2010) (court is not limited to evidence admitted in the guilt phase of the trial; defendant's proffer statements regarding the quantity of drugs sold was admissible to rebut his assertion that the Government's expert witness was overestimating that quantity in calculating the amount of the money judgment), aff'd in part, vacated in part by 660 F.3d 149, 153 (2d Cir. 2011) ;

— The only issue at this point is the amount of the money judgment; it is not an opportunity for the defendant to relitigate the case

- *United States v. Warshak*, 631 F.3d 266, 331 (6th Cir. 2010) (affirming district court's refusal to let defendant introduce evidence tending to show his conduct was not illegal; in the forfeiture phase the legality of the conduct is "no longer a live issue;" the only question is the nexus between the conduct and the offense);

The amount of the money judgment is determined by the court, not the jury, even if the defendant invokes Rule 32.2(b)(5) and asks for the jury to determine the forfeiture

— That rule only applies to the forfeiture of specific assets

- *United States v. Ponzo,* 853 F.3d 558 (1st Cir. 2017) (collecting cases and joining all other circuits in holding that there is no right to a jury determination of the amount of the money judgment under Rule 32.2(b)(5));

- *United States v. Warshak*, 631 F.3d 266, 330 (6th Cir. 2010) (noting without discussion that defendant invoked his right to have the jury retained to determine if there was a nexus between the offense and 33 specific assets, but the court held a separate hearing to determine the amount of the money judgment);

The calculation of the amount of the money judgment does not require mathematical precision

— The court is permitted to make a fair estimate based on the facts of the case

— For example, in a drug case, the court might estimate the defendant's gross proceeds from the quantity of drugs he sold, the time period in which he sold them, and the price in the market at the relevant time

- *United States v. Bogdanov*, ___ F.3d ___, 2017 WL 2961093 (7th Cir. Jul. 12, 2017) (to calculate the amount realized from the sale of stolen goods, the Government need not trace all items sold on eBay to stolen property, but may rely on circumstantial evidence and calculation by victim's investigator who applied "reasonable methodology");

- *United States v. Ayika,* 837 F.3d 460 (5th Cir. 2016) (affirming amount of money judgment in a health care fraud case based on accountant's review of representative sample of submitted claims);

- *United States v. Alexander*, 714 F.3d 1085,1092-93 (8th Cir. 2013) (district court may rely on the quantities and prices of the drugs sold, the frequency of sales, and the length of the conspiracy to calculate the amount of the money judgment);

- *United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) (in computing the amount of a money judgment, the court need not force the Government to prove the illegitimacy of each any every transaction if the evidence supports a reasonable inference that all of the transactions were illegitimate);

- *United States v. Roberts*, 660 F.3d 149, 166 (2d Cir. 2011) (because forfeiture is punitive, not restitutive, the calculation of the forfeiture money judgment need not be exact and is not improper if it exceeds what the defendant obtained to some extent); *id*. (in a drug case, the Government need not produce actual sales receipts but may rely on reasonable estimates of the quantity of drugs imported and their value; whether to use retail or wholesale value depends on whether the importer sold the drugs at retail himself or sold them at wholesale to others);

- *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009) (detailing how the court calculated what percentage of defendant's food stamp redemptions were fraudulent);

— As the Sixth Circuit held in *Corrado,* the district court cannot simply throw up its hands and say, "this is too complicated"

- *United States v. Corrado*, 227 F.3d 543, 555 (6th Cir. 2000) (*Corrado* I) (district court erred in refusing to impose a forfeiture judgment on the ground that the amount subject to forfeiture was not sufficiently quantifiable; the court is required to make a reasonable approximation, based on the evidence in the record, of the amount derived from the offense and enter a money judgment accordingly);

IV. Multiple Defendants / Joint and Several Liability

All of this is straightforward in a single-defendant case

— There may be some difficulty in calculating the value of the proceeds, but whatever proceeds were obtained, the defendant – if he acted alone – is the one who obtained them

— But what if the crime was committed by more than one person, acting in concert or as co-conspirators

Who is liable for what part of the proceeds of the offense?

For 45 years – from when the first criminal forfeiture statute was enacted in 1970 – the answer was that all defendants were jointly and severally liable

— Just as co-conspirators are liable for the acts of the other members of the conspiracy: *Pinkerton* liability

— The courts all held that each member of a conspiracy – or each person complicit in committing the same act – was liable for the consequences of that act – including the forfeiture of the proceeds

So if 9 people, acting together, stole $10 million in a fraud scheme, or sold $10 million in illegal drugs, they each were liable to forfeit the full amount, regardless of how much, or how little, of the money any of them personally obtained

- *United States v. Corrado*, 227 F.3d 543, 554-55 (6th Cir. 2000) (*Corrado* I) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); *United States v. Corrado*, 286 F.3d 934, 938 (6th Cir. 2002) (*Corrado* II) (same; because person who collected the proceeds was able do so because of his participation in a scheme, all members of the scheme are jointly and severally liable);

- *United States v. Honeycutt,* 816 F.3d 362 (6th Cir. 2016) (applying *Corrado:* if there is joint and several liability under RICO, there must be under § 853 as well; no need to consider the D.C. Circuit's reasoning in *Cano-Flores*), *cert. granted,* 2016 WL

4078900 (U.S. Dec. 9, 2016); *United States v. Wolford,* 656 Fed. Appx. 59 (6th Cir. 2016) (following *Honeycutt* and *Corrado*);

- *United States v. Stivers*, 2010 WL 2365307, *7 (E.D. Ky. June 11, 2010) (following *Corrado*, defendant who received little or nothing personally is jointly and severally liable for the amounts forfeitable for RICO and money laundering conspiracies);

The only exception to this rule applied to a very minor participant who obtained very little or none of the proceeds of the offense for himself

— In that case, the defendant could argue that applying the rule of joint and several liability to him would violate the Excessive Fines Clause of the Eighth Amendment because the forfeiture would be grossly disproportional to the gravity of the offense and his degree of culpability

- *United States v. Jalaram, Inc.*, 599 F.3d 347, 354-56 (4th Cir. 2010) (rejecting the Government's argument that the forfeiture of proceeds can never be disproportional and that an Eighth Amendment analysis is unnecessary; a forfeiture based on joint and several liability could be disproportional if the defendant's role in the offense were truly minor; but holding that given the seriousness of the offense and the defendant's central role over a period of six months, the forfeiture was not excessive);

- *United States v. Bonventre,* 646 Fed. Appx. 73 (2nd Cir. 2016) (implicitly acknowledging that forfeiture based on joint and several liability could be excessive if applied to a minor player, but holding that a person who provided technical support vital to the success of a fraud scheme is not such a minor player, even if he was not at the core of the scheme);

- *United States v. Van Brocklin*, 115 F.3d 587, 602 (8th Cir. 1997) (money judgment equal to entire amount realized as proceeds of bank fraud scheme is excessive as applied to a minor participant who, unlike her codefendants, reaped little benefit personally);

- *United States v. Maddux,* 2017 WL 187156, *5-6 (E.D. Ky. Jan. 17, 2017) (reducing the amount of the money judgment for each of the jointly and severally liable defendants to reflect their role in the offense, as reflected in the maximum fine applicable to each under the sentencing guidelines);

- *United States v. Stivers*, 2010 WL 2365307, *7-9 (E.D. Ky. June 11, 2010) (applying *Jalaram* but rejecting Eighth Amendment challenge because defendant played a major role in the offense, the offense (RICO/money laundering/extortion) was serious and caused great harm, and the maximum fine for RICO and money laundering is limited only by the amount involved in the offense; thus the fact that defendant obtained little money personally was irrelevant);

In 2015, a court for the first time, held that because the forfeiture statute speaks in terms of property "obtained, directly or indirectly, *by the defendant*," Congress had not made joint and several liability applicable to criminal forfeiture

- *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);

- *United States v. Lara,* ___ Fed. Appx. ___, 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*);

- *United States v. Solomon,* 2016 WL 6435138 (E.D. Ky. Oct. 31, 2016) (setting forth detailed analysis of joint and several liability and agreeing with *Cano-Flores,* but holding that district courts in the Sixth Circuit are bound by *Honeycutt*);

— The Supreme Court granted *cert.* to resolve the split in the circuits, using the Sixth Circuit's decision in *Honeycutt* as the vehicle for doing so.

Honeycutt

In *Honeycutt,* two brothers – one of whom ran an illegal drug operation out of his store, and the other who was his employee -- were convicted of a drug conspiracy.

— The Government sought forfeiture money judgments against each brother in the amount of $269,751, which represented the proceeds of the entire scheme.

— One brother, the store owner, pled guilty and agreed to forfeit $200,000,

— the other was convicted by a jury.

The Government argued that the second brother should be held jointly and severally liable for the entire amount, and thus requested a money judgment for the remaining balance of $69,751, even though the second brother had not personally obtained any of the proceeds of the scheme.

— The Sixth Circuit upheld the forfeiture order as consistent with the doctrine of joint and several liability, which had been applied in criminal forfeiture cases in all circuits but one.

In a unanimous decision by Justice Sotomayor, the Court reversed the Sixth Circuit, holding that the doctrine of joint and several liability is inconsistent with the plain language of the criminal forfeiture statute.

— Section 853(a) authorizes the forfeiture of any property obtained, directly or indirectly, by the defendant.

— Applying the dictionary definition of the term “obtained,” the Court held that the statute applies only to property that a defendant actually acquires; it does not make a defendant liable for the forfeiture of property obtained by someone else.

Accordingly, the Court reversed the judgment of the Court of Appeals and held that because “forfeiture pursuant to § 853(a)(1) is limited to property that the defendant himself actually acquired as the result of the crime,”

— and because the second brother did not personally benefit from the drug sales,

— the second brother was not required to forfeit anything.

- *Honeycutt v. United States,* ___ U.S. ___, 137 S. Ct. 1626 (2017) (application of the doctrine of joint and several liability is inconsistent with statutory language limiting criminal forfeiture to “proceeds the person obtained”; defendant cannot be liable for proceeds obtained by someone else);

The fallout

Where does this leave us?

The Supreme Court’s decision leaves all kinds of questions unanswered

— most immediately, what happens to all of the closed cases where there is a money judgment hanging over the head of a defendant, based on joint and several liability

— can the Government collect those judgments?

— Should it try?

— Is the defendant (now serving time in prison with time on his hands) entitled to move to vacate the forfeiture order?

I’m focusing right now, however, on the pending cases and the future cases that you will be bringing

— If a case is pending on appeal, and there is a forfeiture money judgment included as part of the sentence, will the case have to be remanded

— In future cases, will it be part of the Government’s obligation in the forfeiture phase of the trial to establish, by a preponderance of the evidence, not only the gross proceeds of the offense

— But how the defendants divided the money among themselves

— If the Government can only show the gross amount but cannot show how much each defendant personally realized, does that mean that there is no forfeiture order at all

— In a fraud case, does that mean that the victims get nothing from the forfeited funds because the Government could not show how much each defendant was required to pay?

— Does it mean that if there were two defendants, and one is wealthy and has lots of money, but the other got the proceeds of the crime and spent it all, the Government (and the victims) cannot use forfeiture to recover anything (except to get an empty money judgment)?

First, there is some doubt as to whether *Honeycutt* applies to all criminal forfeiture cases or only to those in which the forfeiture statute uses the phrase "property obtained"

— *Honeycutt*, remember, turned on the phrase "property obtained, directly or indirectly, by the defendant" – which is the language in the drug forfeiture statute, 21 U.S.C. § 853(a)(1), and many other statutes

— Other forfeiture statutes, however, are worded differently

— For example, two of the most frequently-used forfeiture statutes – 18 U.S.C. § 982(a)(1) (forfeiture of property involved in money laundering) and 18 U.S.C. § 981(a)(1)(C) / 28 U.S.C. § 2461(c) (forfeiture of proceeds of most fraud offenses) – are not limited to property "obtained" by the defendant but instead describe the property that is subject to forfeiture.

— In fact, the money laundering statute specifically provides that the Government may recover substitute assets from a person who laundered *but did not retain* at least $100,000 in criminal proceeds in a 12-month period

- 18 U.S.C. § 982(b)(2)

But let's assume for the moment that *Honeycutt* is going to apply to your case

— There are already a few cases that provide a clue as to where this is going

Remanding pending cases

In *United States v. Pickel,* the defendant was convicted of participating in a

conspiracy to distribute large quantities of marijuana.

— His role in the offense included growing marijuana at his home in California where 200 marijuana plants were found, and transporting marijuana from California to other parts of the country.

— As part of his sentence, Defendant was found jointly and severally liable to forfeit the $16.9 million in proceeds obtained by the conspiracy.

— In light of *Honeycutt,* however, the Tenth Circuit vacated the forfeiture judgment and remanded the case for the district court to determine the value of the proceeds that Defendant personally obtained.

- *United States v. Pickel,* ___ F.3d ___, 2017 WL 3028502 (10th Cir. Jul. 18, 2017) (for forfeiture judgments pending on appeal when *Honeycutt* was decided, remedy is remand to determine amount defendant personally obtained);

What if the defendant plead guilty and agreed to joint and several liability in his plea agreement?

In *United States v. Purify,* the Defendant pled guilty to a drug conspiracy and agreed that he was jointly and severally liable for the forfeiture of $10 million in proceeds.

— The district court entered a forfeiture money judgment in that amount and Defendant did not appeal.

— He did appeal, however, when the Government sought the forfeiture of $2000 in cash seized from Defendant as a substitute asset, arguing that the Government never showed that he personally obtained even that small amount from the offense

— The plea agreement contained the defendant's admission that he did sell some unspecified quantity of cocaine and marijuana himself, but the district court had never made a finding as to how much money, if any, the defendant realized from those sales

— So the court remanded the case to the district court for fact finding on that issue

- *United States v. Purify,* ___ Fed. Appx. ___, 2017 WL 3028534 (10th Cir. July 18, 2017) (remanding to determine if defendant obtained at least $2000 in proceeds personally);

What if the Government did establish the exact amount of money that a subset of the defendants in a large-scale scheme obtained

— Can it assume that they shared those proceeds *pro rata?*

In *United States v. Lobo,* the son of the President of Honduras, was convicted of conspiring with the Cachiros, a Honduran drug trafficking organization, to import hundreds of kilograms of cocaine into the United States.

— his role was to provide "security and logistical support" for the Cachiros in connection with two of the cocaine shipments.

— The Government initially sought a forfeiture money judgment against Defendant in the amount of $13.1 million, reflecting Defendant's joint and several liability for the gross proceeds of the conspiracy.

— Following *Honeycutt,* however, the court held that Defendant would be liable only for the amount that he personally obtained, and ordered rebriefing on the forfeiture issue.

In its revised forfeiture memorandum, the Government argued that Defendant personally received and thus should forfeit $326,667.

— The court held that the Government had established Defendant's liability for some of that amount, but not all of it.

— The court found that other members of the conspiracy paid Defendant a total of $267,667 for information regarding asset seizures and for personally escorting the cocaine shipments.

— With respect to another $60,000, however, the Government proved only that Defendant was one of five individuals who received, as a group, a total of $300,000 in kickbacks when the Government awarded contracts to businesses used to launder the Cachiros' drug proceeds.

— the Government reasoned that Defendant – as one of five people to receive the $300,000 – should be liable to forfeit one-fifth of that amount.

— But the court held that the Government's burden was to establish by a preponderance of the evidence the amount, if any, that Defendant actually received.

— Because it could not show how the $300,000 in kickbacks was divided among the five individuals, the Government could not hold Defendant liable for any of it.

— So the court entered a forfeiture order limited to $267,667.

- *United States v. Lobo*, 2017 WL 2838187, *6 (S.D.N.Y. June 30, 2017) (defendant, one of five individuals who received a $300,000 kickback as part of a money laundering scheme, is not liable for the forfeiture of any part of the money unless the Government can prove how the kickback was divided among the conspirators);

Notice the key point here:

— Because the Government could not show what part of the $300,000 the defendant received, he was not required to forfeit *any of it*

The last case presents an even more problematic set of facts:

In *United States v. Bogdanov,* the defendant and his wife and daughter engaged in a 10-year conspiracy to shoplift millions of dollars in consumer goods and sell them on eBay.

— The defendant pleaded guilty to a conspiracy to violate 18 U.S.C. § 2314 but disputed the Government's calculation of the amount of money he was required to forfeit.

— The Seventh Circuit focused on the question we discussed earlier: how do you calculate the value of the property subject to forfeiture, *i.e.,* the value of the stolen goods

— But the court left hanging the question raised by *Honeycutt*

The Government, the court said, had not shown how the proceeds of the crime were divided among the Defendant and his wife and daughter, as *Honeycutt* seems to require.

— The Defendant, however, did not raise this argument.

— Accordingly, the court held that "we must save for another day the possible application of this principle to an arrangement such as this one."

But how would such a case ever be resolved?

— Does it matter that only the father was prosecuted and convicted?

— If so, does that mean that he is liable only for the proceeds that he personally received, while the wife and daughter, who were not prosecuted, get to keep their share?

— More fundamentally, why should matter how members of a family divided up the criminal proceeds?

— the doctrine of joint and several liability, among its many virtues, made it unnecessary to decide, for example, how a husband and wife (or in this case, husband, wife and child) divided the criminal proceeds among themselves:

— very simply, they were jointly and severally liable for the full amount without regard to who received and spent what part of it on a new car for dad, jewelry for mom, or a family trip to Disneyworld.

— it would be bizarre indeed if the Government were unable to recover any of the money through forfeiture because – as occurred in *Lobo* – it could not show how the money was divided among the co-conspirators in this situation.

- *United States v. Bogdanov*, ___ F.3d ___, 2017 WL 2961093 (7th Cir. Jul. 12, 2017) (saving "for another day" the application of *Honeycutt* to proceeds received by family members who acted jointly in committing an offense);