CASE NO. 17-5113

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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May 24, 2018

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Statement of Prior or Related Appeals

In *United States v. Purify*, 702 F. App'x. 680 (10th Cir. July 18, 2017) (*unpublished*), this Court reversed the district court's forfeiture order and remanded for further proceedings in light of *Honeycutt v. United States*, 137 S.Ct. 1626 (2017).

Statement of Jurisdiction

The district court had jurisdiction under 18 U.S.C. § 3231 because Corry Purify was charged with cocaine conspiracy. (Vol. I at 247-392). On January 13, 2016, after Purify pleaded guilty to the drug conspiracy, the district court sentenced him to 120 months of imprisonment. (*Id.* at 503). This Court reversed the forfeiture order and remanded for proceedings under *Honeycutt*. After the district court granted the renewed motion for substitute asset forfeiture, Purify filed a timely notice of appeal from the final order of forfeiture of substitute asset on November 7, 2017. (*Id.* at 623). This Court has appellate 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 on remand it ordered the forfeiture of Purify's property as a substitute asset?

Statement of the Case

Purify appeals from the district court's order granting the government's motion to amend the order of forfeiture in the criminal case to forfeit $2,688 as a substitute asset, pursuant to 21 U.S.C. § 853(p) and Rule 32.2(e) of the Federal Rules of Criminal Procedure. (*Id.* at 614).

Purify was a member of a drug trafficking organization that operated in the Northern District of Oklahoma from 2011 to 2014. Among other things, the organization obtained illegal drugs, including cocaine, from foreign sources, including the Sinoloa and Zetas Cartels, processed the cocaine into cocaine base, and distributed the drugs in Oklahoma. (*Id.* at 249-255). A grand jury returned a Sixth Superseding

Indictment, charging Purify and more than 50 other individuals in a drug conspiracy in violation of 21 U.S.C. § 846 (Count 1) *(Id.* at 247, 249-392). The indictment contained a forfeiture notice stating, *inter alia,* that any defendants convicted of the conspiracy would be required to forfeit "a sum of money in an amount of at least $10,000,000 representing the proceeds of the drug conspiracy, for which the defendants are jointly and severally liable." (*Id.* at 393-400). The indictment also charged Purify in Counts 31, 32 and 240 of the Indictment with maintaining physical locations for the purpose of manufacturing and distributing cocaine base, in violation of 21 U.S.C. § 856 (commonly known as the "crack house" statute), and in Count 239 with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

The drug conspiracy count alleged various specific acts that Purify committed in furtherance of the conspiracy. 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." (*Id.* at 291). Similarly, Paragraph 359 alleged that on March 6, 2014,

two of the co-conspirators arranged for a third co-conspirator "to get drug proceeds from PURIFY on the trip to Tulsa." (*Id.* at 335). And 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.'" (*Id.* at 372).

Purify entered into a Plea Agreement whereby he agreed to plead guilty to Count 1 of the Indictment (*Id.* at 478). Among other things, Purify expressly confessed 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." (*Id.* at 485). Moreover, as part of the Plea Agreement, Purify agreed to the entry of a criminal forfeiture money judgment in the amount of $10 million for which he would be jointly and severally liable, as well as to the forfeiture of a number of specific items including three handguns, ammunition, and a small amount of currency that was seized at the time of his arrest. (*Id.* at 482-484). The district court entered the Order

of Forfeiture including the $10 million money judgment and the specific assets. (*Id.* 499)

When Purify was originally arrested on the drug conspiracy charges, he was released on bond, but he was arrested again on August 19, 2014 and charged in a separate criminal case, *United States v. Corry Purify,* No. 14-CR-0154-CVE, with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). At the time of his second arrest, local police seized $2,688 from Purify's person.

When the felon-in-possession indictment was dismissed (because the same offense was charged in Count 239 of the Sixth Superseding Indictment), Purify sought the release of the $2,688 on the ground that it was not included in his Plea Agreement or in the Order of Forfeiture in the drug conspiracy case. Motion to Return Property filed January 22, 2016 in No. 14-CR-0154-CVE. (*Id.* at 513). On February 3, 2016, the district judge in the felon-in-possession case denied Purify's motion, based on the government's representation that it was seeking to forfeit the $2,688 in partial satisfaction of the $10 million money judgment in the drug conspiracy case. (*Id.* at 524).

The government filed its initial motion to amend the Order of Forfeiture in the conspiracy case to include the $2,688 as a substitute asset on January 28, 2016. (*Id.* at 508). The motion, filed pursuant to Rule 32.2(e), recited that the $2,688 was property of Purify that was found on his person at the time of his arrest in the related case. The motion also included the Declaration of William Robert Taylor, a Litigation Financial Analyst assigned to the U.S. Attorney's Office, who declared that the forfeiture judgment remained unsatisfied and that he had been unable to locate, through the exercise of due diligence, any property of Purify that was traceable to the $10 million in drug proceeds that was subject to forfeiture. (*Id.* at 511). On April 16, 2016, the government supplemented the record when it filed an Amended Rule 32.2(e) Motion and an Amended Taylor Declaration detailing the steps that Mr. Taylor took to locate any property of Purify that was traceable to the offense. (*Id.* at 526, 536).

Purify objected to the Amended Motion on the ground that the government could not establish that Purify was personally responsible for the unavailability of the directly-forfeitable property, as

21 U.S.C. § 853(p) requires. The court held, however, that just as a defendant is jointly liable with his conspirators for the forfeiture of the total proceeds of their offense, he is jointly liable for the acts and omissions of the same co-conspirators that caused those proceeds to become unavailable. *United States v. Purify,* 2017 WL 1231069, *1 (N.D. Okla. Jan. 17, 2017) (reversed and remanded by *United States v. Purify*, 702 F. App'x 580 (10th Cir. July 18, 2017), following *United States v. Chittenden,* 848 F.3d 188 (4th Cir. 2017). (*Id.* at 555).

Purify appealed the forfeiture, and his appeal was pending when the Supreme Court held in *Honeycutt v. United States,* 137 S. Ct. 1626 (2017), that defendants *are not* jointly and severally liable for the forfeiture of the proceeds of their offense. After supplementary briefing, this Court held that *Honeycutt* undermined the district court's rationale for forfeiting the substitute asset and remanded the case to the district court to determine whether Purify was *personally* liable for the unavailability of the directly-forfeitable property. *United States v. Purify,* 702 F.App'x 680 (10th Cir. 2017) (*unpublished*) (*Purify* I) (holding that *Chittenden* was overruled by *Honeycutt*). (*Id.* at 561).

On remand, the government filed a renewed Rule 32.2(e) motion to amend the forfeiture order supported by a Second Amended Taylor Declaration. (*Id.* at 574, 580). The new Taylor Declaration had two parts: First, it recited evidence obtained from "investigative files, FBI reports and Rule 11 interviews of co-conspirators and cooperating defendants" establishing that Purify had obtained at least $195,000 in proceeds from the sale of cocaine by dividing at least 5 kilograms of cocaine that he received on consignment into smaller units and selling it for $39,000 per kilogram. (*Id.* at 581-82).

Second, the Declaration once again detailed the steps that Mr. Taylor took to establish that Purify currently has no assets other than the $2,688 the government was seeking to forfeit. (*Id.* at 582-84).

Purify objected to the renewed motion to amend the forfeiture order on two grounds. He devoted most of his brief to a procedural argument – an argument that the district court rejected, and that Purify has not appealed – that the district court lacked the authority under Rules 35, 32.2(b) and 32.2(e) to amend the order of forfeiture. (*Id.* at 591-95). Second, on the merits, he objected that "There is no evidence

that Mr. Purify ever had the cash the government seeks," and that accordingly, the government could not establish that it was entitled to substitute assets. (*Id.* at 595-98).

At no time did Purify object that the Taylor Declaration contained hearsay, nor did he offer any reason to believe that the hearsay in the Declaration was unreliable. To the contrary, other than to object that the evidence was insufficient, Purify did not address the evidence in the Taylor Declaration at all.

The district court accepted the evidence in the Taylor Declaration and based on that evidence, as well as the admissions in Purify's Plea Agreement, found that Purify had obtained at least $195,000 in proceeds from the sale of cocaine. (*Id.* at 620). Some of those assets, the court said, "were undoubtedly paid by Defendant to his co-conspirators" for drugs he had obtained on consignment. The court concluded, however, "Regardless of exactly how the proceeds were dissipated . . . the proceeds obtained by Defendant . . . are now unavailable due to the acts or omissions of Defendant . . . himself." (*Id.* at 621).

Accordingly, on October 25, 2017, the court held that the requirements of Section 853(p) were satisfied and once again granted the government's motion to amend the forfeiture order to include the substitute asset. (*Id.* at 622).

Purify now appeals that ruling.

Summary of the Argument

Under the Supreme Court's decision in *Honeycutt*, as applied by this Court in Purify's first appeal (*Purify I*), the government must establish two things when it moves to amend a forfeiture order to include a substitute asset: that Purify once possessed proceeds from his crime that were equal or greater in value to the substitute asset to be forfeited, and that the proceeds that Purify once possessed are unavailable due to some act or omission for which Purify is personally responsible.

In this case, the government satisfied the first requirement by showing, based on the unrefuted evidence set forth in the Second Amended Taylor Declaration and Purify's own admissions, that Purify

obtained at least $195,000 in criminal proceeds by dividing 5 kilograms of cocaine into smaller units and selling it for $39,000 per kilogram.

The district court was correct in finding that the government satisfied the second requirement for two reasons: 1) as this Court held in *Gordon,* if a defendant who once had a given sum of criminal proceeds in his possession no longer has any assets, it is reasonable to assume that the defendant is the person responsible for the dissipation of those assets; and 2) in a case where a defendant receives illegal drugs on consignment in five separate increments, it is reasonable to assume that he sold each increment and used the proceeds to pay his supplier before he received the next consignment. Using the proceeds of the sale of each consignment to pay the supplier constitutes a dissipation of the forfeitable proceeds for which Purify is personally responsible.

Purify's sole objection is that the starting point for the district court's analysis was erroneous because it was based on unreliable hearsay. Purify did not object to the hearsay in the Taylor Declaration before the district court, but makes his objection for the first time on appeal.

The district court committed no error, let alone clear error, in basing the forfeiture determination on uncontroverted hearsay. Among other things, the evidence in the Taylor Declaration regarding Purify's possession and sale of 5 kilograms of cocaine was corroborated by Purify's own admission in his Plea Agreement that he conspired to distribute at least 5 kilograms of cocaine and personally sold a smaller amount, and Purify failed to offer any evidence rebutting the allegations in the Taylor Declaration even though he had a full opportunity to do so.

Moreover, any error in the district court's consideration of the hearsay in the Taylor Declaration did not affect Purify's substantial rights.

Purify's attempt to make his objection to the forfeiture order in this criminal case appear to be part of a general reconsideration of the *civil* asset forfeiture laws is misplaced, as the civil forfeiture laws have nothing whatsoever to do with this case.

Accordingly, the judgment of the district court should be affirmed.

Argument

I. The district court did not commit clear error in concluding that Purify personally obtained at least $195,000 in criminal proceeds and he rendered his proceeds unavailable to satisfy the money judgment.

A. Record Reference

Purify filed a response to the government's Amended Rule 32.2(e) motion to forfeit a substitute asset, arguing the government failed to show that he received any proceeds of his drug conspiracy. (*Id.* at 597).

B. Standard of Review

A criminal forfeiture order is subject to the same standard of review as any other sentencing matter: legal conclusions of the district court are reviewed *de novo,* and its factual findings are reviewed for clear error. *United States v. Gordon,* 710 F.3d 1124, 1165 (10th Cir. 2013). Because the defendant did not raise any hearsay objection to the government's evidence in the district court, the court's reliance on hearsay in making its factual determination is reviewed for plain error affecting the defendant's substantial rights. *United States v. Lott,* 310 F.3d 1231, 1248 (10th Cir. 2002).

C. *The law after Honeycutt.*

In *Honeycutt v. United States,* 137 S. Ct. 1626 (2017), the Supreme Court held that a defendant is required to forfeit only those assets that he personally obtained in the course of his offense and may not be held jointly or severally liable to forfeit proceeds obtained only by his conspirators. In Purify's first appeal (*Purify I*), this Court applied *Honeycutt* to the government's motion to forfeit a substitute asset in place of the proceeds that Purify obtained. It held that to do so the government must establish two things: that Purify personally obtained proceeds from his crime that were equal or greater in value to the substitute asset to be forfeited, and that the proceeds that Purify obtained are unavailable due to some act or omission for which Purify personally responsible. For the following reasons, the district court did not clearly err in finding that the government satisfied both of those requirements.

D. *The government established that Purify personally obtained criminal proceeds in excess of the value of the substitute asset.*

The government satisfied the first substitute asset requirement by showing that Purify obtained at least 5 kilograms of cocaine to sell on

consignment, divided it into smaller units, and sold it for $39,000 per kilogram, thus realizing at least $195,000 in proceeds. The evidence supporting that finding included Purify's own admissions and the unrefuted evidence set forth in the Second Amended Taylor Declaration.

In his Plea Agreement, Purify acknowledged that he "conspired with others to possess and sell at least 5 kilograms of cocaine," and that he personally "sold smaller quantities of drugs that [he] obtained from co-conspirators." (*Id.* at 485). For their part, the co-conspirators and cooperating defendants said that Purify obtained at least 8 kilograms of cocaine from other members of the conspiracy to sell on consignment, that the cocaine was "fronted" to Purify 1 kilogram at a time, and that Purify divided each kilogram into 15 units of approximately 63 grams each and sold each unit for $2,600. Thus, according to the co-conspirators and cooperating defendants, Purify obtained $39,000 for each kilogram of cocaine that he received on consignment (15 x $2,600 = $39,000). Second Amended Taylor Declaration at 2-3. (*Id.* at 581-82).

If Purify sold at least 8 kilograms in the manner described by his co-conspirators, he realized at least $312,000 in criminal proceeds from his sales. Alternatively, if Purify sold at least 5 kilograms in this manner, as the admission in his Plea Agreement suggests, he realized at least $195,000 in criminal proceeds from his sales.

The district court applied the more conservative number and found that the government had satisfied the first substitute asset requirement by establishing that Purify personally obtained at least $195,000 in criminal proceeds, which amount was far in excess of the value of the substitute asset – $2,688 – that the government was seeking to forfeit.

Courts universally recognize that the calculation of the quantities of drugs sold in illegal street operations and the amount of money realized from such sales is not an exact science, and that mathematical exactitude is not required. Indeed, as long as the court sets forth a reasonable basis for its calculation and uses the more conservative estimates, its calculation of the amount that a defendant is required to forfeit as the proceeds of his offense will withstand challenge on appeal.

See 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 the defendant is required to forfeit). Here, the court used the more conservative estimate of the quantity of drugs sold and had a reasonable basis for its calculation of the money realized from those sales. Indeed, if the court had discounted the estimates of the quantities of drugs that Purify sold or the prices for which he sold them by a factor of 50, it still would have found ample evidence to support the forfeiture of $2,688 as a substitute asset. Thus, a sufficient factual basis supported the district court's conclusion that the first substitute asset requirement was satisfied: the evidence established Purify realized at least $2,688 from his role in the conspiracy.

E. *The court properly concluded that Purify was personally responsible for unavailability of the criminal proceeds.*

To satisfy the second substitute asset requirement, the government must show that the criminal proceeds that Purify personally obtained became unavailable due to an act or omission for

which Purify was personally responsible. *Purify I,* 702 F.App'x at 682; 21 U.S.C. § 853(p). The district court was correct in finding that the government satisfied the second requirement for two reasons.

First, as this Court held in *United States v. Gordon*, 710 F.3d 1124 (10th Cir. 2013), if the government establishes that the defendant obtained tainted assets at one time but no longer has any assets in his possession, it is reasonable to assume that defendant is the one responsible for the assets becoming unavailable. *Gordon,* 710 F.3d at 1166 (collecting cases and citing S.D. Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013), § 22-3). Accordingly, once the government establishes that the defendant had criminal proceeds in his possession, proof that it was unable to locate any of the defendant's assets despite the exercise of due diligence will be sufficient to satisfy the requirements of Section 853(p). *Id. Accord. United States v. Alamoudi,* 452 F.3d 310, 315 (4th Cir. 2006) (courts interpret section 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. Garza,* 407 F.App'x 322, 324-25 (10th Cir. 2011) (*unpublished*) (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)).

Second, according to the co-conspirators and cooperating defendants, Purify received illegal drugs on consignment in at least five separate increments. No supplier of illegal drugs would give another drug dealer a second or third supply of drugs to sell on consignment unless he was paid for the drugs supplied previously. Accordingly, as the district court held, it is reasonable to assume that Purify used the proceeds he obtained from selling each consignment of drugs to pay his supplier before he received the next consignment. Using the proceeds of the sale of each consignment to pay the supplier constituted a dissipation of the forfeitable proceeds of the offense for which the defendant was personally responsible.

Accordingly, the district court did not err in finding that there was a factual basis for amending the order of forfeiture to include $2,688 in substitute assets.

II. The district court did not commit plain error in accepting the hearsay in the Taylor Declaration.

A. Record Reference

Purify filed a response to the government's Amended Rule 32.2(e) motion, arguing that the government did not establish that Purify was responsible for the unavailability of his drug proceeds. (*Id.* at 598). Purify admits that nowhere in district court did he object to the hearsay in the Taylor Declaration.

B. Standard of Review

A criminal forfeiture order is subject to the same standard of review as any other sentencing matter: legal conclusions of the district court are reviewed *de novo,* and its factual findings are reviewed for clear error. *United States v. Gordon,* 710 F.3d 1124, 1165 (10th Cir. 2013). Because the defendant did not raise any hearsay objection to the government's evidence in the district court, the court's reliance on hearsay in making its factual determination is reviewed for plain error affecting the defendant's substantial rights. *United States v. Lott,* 310 F.3d 1231, 1248 (10th Cir. 2002).

C. The government's Rule 32.2(e) analysis is undisputed.

Purify does not object to any of this analysis. He does not disagree with the government's formulation of the two-part test that the government must satisfy to forfeit a substitute asset after *Honeycutt*; he does not dispute that the district court was entitled to determine the amount of money Purify is required to forfeit by making a reasonable and conservative estimate based on the quantity of drugs sold and the price at which he sold them; and he does not dispute the district court's logic in concluding that Purify is personally responsible for the unavailability of whatever tainted money was once in his possession. He makes only one argument – that the district court's starting point – that Purify sold at least 5 kilograms of cocaine that he received on consignment – was based on unreliable hearsay. For the following reasons, Purify's objection to the evidence in the Taylor Declaration is unavailing.

D. *Defendant waived any objection to hearsay.*

Purify was clearly on notice that the Taylor Declaration contained hearsay and that the government was relying on it to establish the amount of money that Purify received from the sale of cocaine. Indeed, Mr. Taylor expressly stated that all of the salient facts in his Declaration – the quantity of cocaine that Purify received on consignment; the manner in which he received, divided and sold it; and the amount of money that he received in return – came from statements made by co-conspirators and cooperating defendants and from other sources in the investigative files and not from Mr. Taylor's personal knowledge. Thus, Purify was well aware of the sources of the information in the Taylor Declaration and of the importance of making a timely objection to it if he had grounds on which to do so.

But Purify made no such objection. As he candidly admits, he did not object to the hearsay in the Taylor Declaration in the district court but makes his objection for the first time on appeal. (Aplt. Br. at 8.)

It is well-established that hearsay objections are waived if not timely raised. When such an objection is raised for the first time on

appeal, the judgment will be reversed only if the district court's reliance on hearsay was a plain error that affected the defendant's substantial rights. *United States v. Lott,* 310 F.3d 1231, 1248 (10th Cir. 2002). Here, the district court's consideration of the hearsay in the Taylor Declaration constituted no error at all – because hearsay is admissible in the forfeiture phase of a criminal trial – and concerns about the accuracy of the details in the Declaration in no way affected Purify's substantial rights.

Moreover, in his opposition to the government's motion to amend the forfeiture order in the district court, Purify chose to focus the court's attention not on the hearsay objections that he raises now, but instead on the procedural issues that he chose to raise below, and has abandoned on appeal. Regarding the Taylor Declaration, Purify said only that the evidence was insufficient to meet the government's burden on the merits. That was a strategic choice, the consequences of which Purify cannot escape by objecting to the court's reliance on hearsay for the first time on appeal.

E. *Hearsay is admissible in the forfeiture phase of a criminal case.*

The district court's reliance on the hearsay in the Taylor Declaration was not error, let alone plain error, because hearsay is admissible in determining what property is subject to forfeiture in a criminal case.

Determining what property is subject to forfeiture is part of the sentencing phase of a criminal case, *United States v. Wittig*, 575 F.3d 1085, 1096-97 (10th Cir. 2009), and it is well-established that hearsay is admissible in sentencing proceedings. Thus, the courts have universally held that the government may offer, and the court may rely upon, hearsay in making the factual findings necessary to entering a judgment of forfeiture. *United States v. Ali,* 619 F.3d 713, 720 (7th Cir. 2010); *United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007); *United States v. Creighton*, 52 F.App'x 31, 35-36 (9th Cir. 2002) (*unpublished*). *See, e.g., United States v. Bradley,* 2017 WL 2691535, *6 (M.D. Tenn. June 22, 2017) (allowing the government to establish the forfeitability of real property with an agent's affidavit containing

hearsay from a person who dealt directly with the defendant drug dealer).

In fact, as the Second Circuit observed in *Capoccia,* Rule 32.2(b)(1)(B) implicitly endorses the use of hearsay in forfeiture proceedings by authorizing courts to base the forfeiture determination on any "evidence or information submitted by the parties and accepted by the court as reliable." The "information" that may be considered in addition to the "evidence" offered by the government would logically include hearsay. 503 F.3d at 109.

Thus, even if Purify had objected to the Taylor Declaration solely on the ground that it contained hearsay, his objection would have been futile, and it is no less futile when raised for the first time on appeal.

F. *The hearsay in the Taylor Declaration was reliable and corroborated.*

The hearsay that is admissible in a forfeiture proceeding must be "accepted by the court as reliable." Rule 32.2(b)(1)(B). Conceivably, a court's reliance on hearsay that was blatantly unreliable in making a forfeiture determination could constitute plain error, but nothing in the

record suggests that the hearsay in the Taylor Declaration fell below that low bar.

Mr. Taylor identified the sources of the information in his declaration as co-conspirators and cooperating defendants. The declarants, in other words, were not random individuals with no basis of knowledge to support the assertions made, but persons who acted in coordination with Purify, who participated in the same illegal transactions in which he participated, and who were in a position to know from personal observation precisely what role Purify played in the drug conspiracy. Indeed, there was no one in a better position to know how many kilograms of cocaine Purify sold on consignment, in what increments the drugs were consigned to him and in what increments he sold them, and what amount of money he received in return, than his co-conspirators. The district court certainly had the discretion to consider that evidence and to assign it considerable weight.

Moreover, the hearsay statements in the Taylor Declaration did not portray Purify differently than other evidence in the record or with the government's allegations, or Purify's own admissions, regarding

Purify's role in the offense. The statements ascribed to the co-conspirators and cooperating defendants in the Taylor Declaration are entirely consistent with the government's description of Purify's role in the offense as set forth in the Indictment.

Count 1 of the Indictment, the drug conspiracy count, alleged in Paragraph 144 that in January or February 2014, a co-conspirator "delivered one kilogram of cocaine to PURIFY at 9124 E. 49th Street, Tulsa, OK." (Id. at 291). Similarly, Paragraph 359 alleged that on March 6, 2014, two of the co-conspirators arranged for a third co-conspirator "to get drug proceeds from PURIFY on the trip to Tulsa." (*Id.* at 335). And 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'". (*Id.* at 372). All of these allegations dovetail precisely with the portions of the Taylor Declaration setting forth Purify's role in the offense: that the cocaine the other conspirators gave to Purify was distributed to him one

kilogram at a time; that he was to sell it on consignment; and that he was to reimburse his suppliers from the proceeds of his sales.

The Taylor Declaration merely adds details – details relating to quantities, prices and timing – that show the manner in which Purify played his role. If anything, such details enhance the reliability of the hearsay statements; they do not undermine them.

Most important, the Taylor Declaration is corroborated by Purify's own statements in his Plea Agreement. Purify admitted that he conspired to distribute at least 5 kilograms of cocaine and that he personally "sold smaller quantities of drugs that [he] obtained from co-conspirators." Purify's own admissions corroborate the hearsay statements in the Taylor Declaration.

Purify offered no rebuttal to the Taylor Declaration whatsoever. The evidence on which the district court based its decision was reliable, corroborated, and unrefuted. *See United States v. Ali,* 619 F.3d at 721-22 (accepting hearsay as reliable evidence in a forfeiture proceeding after defendant was given the opportunity to present rebuttal evidence but did not do so).

G. *Any error in considering the hearsay did not affect Purify's substantial rights.*

Under the plain error rule, Purify's belated objection to the district court's consideration of the hearsay in the Taylor Declaration could result in the reversal of the order of forfeiture only if it affected Purify's substantial rights. Purify, however, cannot show that there was any such effect.

It is undisputed that Purify obtained at least *some* money from the sale of cocaine: he admitted as much in his Plea Agreement. The only question is whether the amount that he obtained was greater than the $2,688 that the court ordered forfeited as a substitute asset.

Based on the statements of the co-conspirators and cooperating defendants, the district court found that Purify obtained at least $195,000. Purify now belatedly claims that figure is unreliable because the hearsay statements of the co-conspirators and cooperating defendants are unreliable. This evidence remains unrefuted.
Thus, there is no reason to find that any error by the district court in considering the hearsay in the Taylor Declaration affected Purify's substantial rights.

H. Any error did not seriously affect the fairness, integrity or public reputation of the judicial proceedings.

Even if the Court were to address the fourth prong of the plain error test, any error in the court's reliance on the hearsay was not "so grave that the failure to correct it on appeal would threaten the integrity of judicial proceedings or result in a miscarriage of justice." *United States v. Turietta*, 696 F.3d 972, 977 (10th Cir. 2012). Purify cannot meet the "demanding" fourth prong, by establishing both that the error is particularly egregious, and that the failure to correct it would result in a miscarriage of justice. Any error does not affect the fairness, integrity, or public reputation of judicial proceedings and does not require reversal or remand.

III. This case has nothing to do with civil asset forfeiture.

In the concluding pages of his Opening Brief, Purify attempts to cloak his challenge to the criminal forfeiture order in this case in the mantel of reform. Citing media reports of alleged abuses of the civil asset forfeiture laws, he suggests that all forfeiture orders should be viewed with suspicion, and that this Court's failure to reverse the

forfeiture order in this case "would seriously affect the fairness, integrity, and public reputation of judicial proceeding." App. Br. at 19.

But this case has nothing to do with civil forfeiture. This is a criminal case in which Purity and more than 40 co-defendants were convicted of multiple counts of distributing huge quantities of crack cocaine in Tulsa and other communities, were sentenced to long terms in federal prison, and were ordered to disgorge the proceeds of their criminal acts. As the Supreme Court observed in *Kaley v. United States,* 134 S. Ct. 1090, 1094 (2014), "Forfeitures help to ensure that crime does not pay: they at once punish the wrongdoing, deter future illegality, and 'lessen the economic power' of criminal enterprises." (quoting *Caplin & Drysdale, Chartered v. United* States, 491 U.S. 617, 630 (1989)). The Supreme Court further observed in *Kaley v. United States,* 134 S. Ct. 1090, 1094 (2014), "The government also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities such as police training." To paraphrase the First Circuit's concluding sentence in a recent criminal forfeiture opinion, the forfeiture in this case "fits

hand-in-glove with this pithy observation." *United States v. George*, 886 F.3d 31, 42 (1st Cir. 2018).

Conclusion

For all of these reasons, the judgment of the district court should be affirmed.

Statement Regarding Oral Argument

The United States does not request oral argument.

Respectfully submitted,
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I certify that on May 24, 2018, I electronically transmitted the foregoing to the Clerk of the Court using the ECF System for filing, which will send notification of that filing to the following ECF registrant:

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