UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 15-161-08 (EGS)**
	:	
v.	:	
	:	
CARLOS COOPER,	:	
	:	
Defendant.	:	
	:	

GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING THE GOVERNMENT'S MOTION FOR A FINAL ORDER OF FORFEITURE

1. The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits to the Court this Motion for the Court to reconsider its Order and Memorandum Opinion (Mem. Op.) (ECF Nos. 271 and 272) denying the Government's motion for a Final Order of Forfeiture (ECF No. 235). In light of the numerous pleadings filed in this case regarding this issue, it is appropriate to frame the issue for the Court by going back to basics and building from there.

2. The government is not requesting that the Court enter an order forfeiting any specific property. The government is requesting the Court to determine the forfeiture money judgment - - that is, the cash value of how much "tainted" property the defendant obtained as part of his criminal conduct. The government is emphatically not seeking to seize any assets or otherwise enforce the forfeiture money judgment at this point.

3. The government respectfully disagrees with the Court's apparent interpretation of Honeycutt v. United States, 137 S. Ct. 1626 (2017). As discussed in more detail below, the Court appears to be holding that Honeycutt, in effect, requires that unless the government

establishes that it is entitled to substitute assets, it cannot obtain a forfeiture money judgment for any funds the defendant does not possess. Honeycutt did not address this issue. Honeycutt focused on whether, in effect, a forfeiture money judgment can encompass joint and several liability in determining a forfeiture money judgment. The Honeycutt court found that it did not, that only funds a defendant obtains - - directly or indirectly - - are subject to forfeiture. The Honeycutt court did not address whether the funds had to be retained or how forfeiture money judgments are enforced.

Relevant Facts

4. What is not at dispute is that Mr. Cooper received $46,432 from Mr. Jackson in connection with Mr. Cooper acquiring heroin and then supplying the heroin to Mr. Jackson. As shown below, the defendant has consented to this Court entering a forfeiture money judgment but is arguing that the amount of the forfeiture money judgment should be reduced by the amount of money Mr. Cooper paid to his own supplier.

5. The government has not been able to identify the person(s) who supplied Mr. Cooper with the heroin that he distributed to Mr. Jackson.[1]

Procedural History

6. Defendant Cooper pled guilty to one count of Conspiracy to Distribute and Possess with Intent to Distribute 100 Grams or More of Heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(i), and 846. As part of the plea agreement (ECF #175), the defendant agreed to:

> "A. The forfeiture of (1) any property constituting, or derived from,

1 If necessary, the government will submit an affidavit in support of this fact.

> any proceeds obtained, directly or indirectly, as the result of this offense; and (2) any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of this offense; and
> B. Entry of a forfeiture money judgment equal to the value of any property constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of this offense."

The defendant also agreed to forfeit his interest in any asset or property that was subject to forfeiture as a substitute asset for property otherwise subject to forfeiture.

7. Additionally, as part of the plea agreement, the defendant agreed to the Court entering a Consent Preliminary Order of Forfeiture (CPOF), which the defendant and his counsel signed and which this Court subsequently issued (ECF No. 177). The CPOF contains the following provisions:

> ***WHEREAS***, in his plea agreement, the defendant agreed to the forfeiture of the above property and the entry of a forfeiture money judgment at sentencing;"
> . . . .
>
> ***WHEREAS***, pursuant to Rule 32.2(b)(2) of the Federal Rules of Criminal Procedure, this Court determines, based on the evidence set forth during defendant's plea hearing, that entry of a forfeiture money judgment against defendant and in favor of the United States for an amount to be determined at sentencing which is equal to the value of any property constituting or derived from any proceeds defendant obtained, directly or indirectly, as a result of the offense to which defendant has pled guilty, is appropriate insofar as this property is subject to forfeiture pursuant to Title 21, United States Code, Section 853;
> . . .
>
> ***NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED***:
> . . .
> 2. A forfeiture money judgment for a sum of money that is equal to the value of any property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of the offense to which the defendant has pled guilty shall be determined at sentencing.

The Court signed and issued the CPOF on March 8, 2017.

8. Accordingly, the government and defendant have agreed that this Court has the authority to enter a forfeiture money judgment at sentencing, and this Court has accepted and adopted this agreement.

The Legal Basis for a Forfeiture Money Judgment

9. As noted in our earlier pleading, a court may order forfeiture of an amount of money; the forfeiture is not limited to the amount of money still in the defendant's possession at the time he is sentenced, or by the availability of substitute assets. See United States v. Newman, 659 F.3d 1235, 1243 (9th Cir. 2011) (forcing defendants to disgorge their ill-gotten gains, "even those already spent," insures that defendants do not benefit from their crime; 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) (citations omitted); United States v. Vampire Nation, 451 F.3d 189, 202-03 (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 § 853 directing courts to liberally construe its provisions to effectuate their remedial purposes); 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); United

States v. Croce, 209 Fed. Appx. 208, 213 (3d Cir. 2006) (following Vampire Nation; forfeiture order is not limited to the property in the defendant's possession at the time of sentencing; "a contrary position would permit defendants who unlawfully obtain proceeds to dissipate those proceeds and avoid liability for their ill-gotten gains"); United States v. Hall, 434 F.3d 42, 59 (1st Cir. 2006) (citations omitted) (holding that the trial court may order the defendant to forfeit a sum of money equal to the drug proceeds that he earned but did not retain, reflecting the criminal nature of forfeiture as "a sanction against the individual defendant rather than a judgment against the property itself."); United States v. Blackman, 746 F.3d 137, 143 (4th Cir. 2014) (forfeiture is mandatory even if the defendant lacks the present ability to satisfy the judgment; "To conclude otherwise would enable wrongdoers to avoid forfeiture merely by spending their illegitimate gains prior to sentencing"; following Vampire Nation, Casey, and Newman).

10. The D.C. Circuit, reversing a District Court ruling denying a forfeiture money judgment, held that "money judgments are appropriate in the criminal context." United States v. Day, 524 F.3d 1361, 1378 (D.C. Cir. 2008). That court stated "[b]oth the Third Circuit and the Ninth Circuit recently have held that money judgments are appropriate where the Government is entitled to criminal forfeiture, *even where the amount of the money judgment exceeds the defendant's current assets.* See Vampire Nation, 451 F.3d at 201–03; Casey, 444 F.3d at 1077. In each case, the court noted the liberal construction required by § 853(*o*) (see Vampire Nation, 451 F.3d at 202 n. 12; Casey, 444 F.3d at 1073), and rejected the contrary view because it 'would permit defendants who unlawfully obtain proceeds to dissipate those proceeds and avoid liability for their ill-gotten gains.'" Id. (emphasis added).

11. Accordingly, the D.C. Circuit in Day specifically authorized the entry of a

forfeiture money judgment for the entire amount of funds subject to forfeiture, even if the defendant is not in possession of those funds.

12. In summary, a forfeiture money judgment represents the total amount of "tainted" funds a defendant obtained and/or possessed - - "property flowing from (§ 853(a)(1)), or used in (§ 853(a)(2)) the crime itself." Honeycutt, 137 S. Ct. at 1632.

The Practice in This District

13. In its opinion, this Court implies that the government must comply with the requirements of 21 U.S.C. § 853(p) before it can seek a forfeiture money judgment: "If the government wants to confiscate untainted money, it must comply with section 853(p) of the statute, which governs the forfeiture of substitute assets. The government has provided no evidence that is it seeking forfeiture of substitute assets." Mem. Op., ECF No. 72 at 10, n. 8. The government is not seeking substitute assets - - as noted above, it is seeking a forfeiture money judgment.

14. It has been the practice in this District that as part of a plea agreement, the court enters a consent forfeiture order containing a forfeiture money judgment.[2] Additionally, where applicable, the consent order of forfeiture includes a provision stating that any assets that have been forfeited either before entry of the plea or as part of the plea agreement be credited against the forfeiture money judgment. As noted above, the defendant has specifically agreed to this

2 In cases where the parties as part of a plea agreement can agree to a sum certain for the forfeiture money judgment, the Preliminary Consent Order of Forfeiture contains the forfeiture money judgment. In cases like this case where the parties cannot agree to the amount, the parties agree to have the Court determine the amount of the forfeiture money judgment at sentencing.

process and the Court has accepted it by entry of the CPOF. The government understands that it must comply with the provision of 21 U.S.C. § 853(p) before seeking the forfeiture of actual substitute assets. Consistent with both parties' pleadings to date, the government is only seeking the entry of a forfeiture money judgment. This is the most efficient process, because in some cases the government is not able to identify substitute assets until after sentencing.[3] Thus, when the government comes back to seek the forfeiture of substitute assets, the court and the parties only have to address the § 853(p) factors and not determine the amount of a forfeiture money judgment. This has been the practice of this District and is consistent with the practice in several other districts, but not all. See, e.g., United States v. Newman, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (when seeking only a money judgment, the Government does not have to show that the requirements for forfeiting substitute assets in § 853(p) or Rule 32.2(e) are satisfied); United States v. Lo, 839 F.3d 777, 792 (9th Cir. 2016) (following Newman; § 853(p) does not apply to the entry of a money judgment); United States v. Misla-Aldarondo, 478 F.3d 52, 74 (1st Cir. 2007) (Where the government sought a forfeiture money judgment pursuant to Fed. R. Crim. P. 32.2,"[i]f the government has proven that there was at one point an amount of cash that was directly traceable to the offense, and that thus would be forfeitable under 18 U.S.C. § 982(a), that is sufficient for a court to issue a money judgment, for which the defendant will be fully liable whether or not he still has the original corpus of tainted funds—indeed, whether or not he has any funds at all."); United States v. Carey, 268 F.Supp.3d 29, 33 (D.D.C. 2017) (same; following Newman and noting that in order to obtain a forfeiture money judgment the government only needs to comply with the requirements of Fed. R. Crim. P. 32.2); United States

3 In some cases, the government is never able to identify substitute assets.

v. St. Pierre, 809 F. Supp. 2d 538, 541 n.1 (E.D. La. 2011) (where the Government is seeking a judgment for the proceeds of the criminal activity, and not substitute assets for assets that cannot be located, the Government is not required to show that it first exercised due diligence in terms of § 853(p));. but see, e.g., United States v. Abdelsalam, 311 Fed. Appx. 832, 847 (6th Cir. 2009) (because the only way the Government can, in the future, enforce the money judgment is by forfeiting substitute assets, it must show that § 853(p) is satisfied before the money judgment is entered); United States v. Nagin, 810 F.3d 348, 353 n.5 (5th Cir. 2016) ("There is no consensus among the circuits over whether the government must make a showing that satisfies the requirements of 21 U.S.C. § 853(p)(1)'s substitute-asset provisions as a precondition to imposing a personal money judgment under 28 U.S.C. § 2461(c)," contrasting Newman and Abdelsalam); United States v. Sigillito, 899 F. Supp.2d 850, 864-66 (E.D. Mo. 2012) (assuming without deciding that § 853(p) applies to money judgments and rejecting challenge on the merits).

Honeycutt Does not Affect the Imposition of a Forfeiture Money Judgment

Although the defendant has not raised this issue, it is worth addressing as the Court appears to imply that Honeycutt somehow ruled on the continued viability of forfeiture money judgments. However, it is clear that the Supreme Court's ruling in Honeycutt does not affect the determination or validity of a forfeiture money judgment. The Honeycutt Court specifically noted that "[b]y providing an *in personam* aspect to criminal forfeiture, and providing for substitute-asset forfeiture, Congress made it easier for the government to hold the defendant who acquired the tainted property responsible. Congress did not, however, enact any 'significant expansion of the scope of property subject to forfeiture.'" Honeycutt, 137 S. Ct. at 1635.

In United States v. Elbeblawy, 899 F.3d 925 (11th Cir. 2018), the 11th Circuit, relying on Honeycutt, vacated a forfeiture money judgment because it relied on joint and several liability. That court, however, rejected the defendant's argument that Honeycutt eliminated all forfeiture money judgments, holding:

> We have squarely held that "criminal forfeiture acts *in personam* as a punishment against the party who committed the criminal act[ ]." United States v. Fleet, 498 F.3d 1225, 1231 (11th Cir. 2007). The "proceeds of crime constitute a defendant's interest in property" and "can be forfeited in an *in personam* proceeding in a criminal case." In re Rothstein, Rosenfeldt, Adler, P.A., 717 F.3d 1205, 1211 (11th Cir. 2013) (citation and internal quotation marks omitted). In an attempt to circumvent this precedent, Elbeblawy argues that "Honeycutt's focus on individual receipt of forfeitable assets ... shows that money judgments derived from conspiratorial criminal responsibility are not authorized." But Honeycutt held only that a district court may not hold members of a conspiracy jointly and severally liable for property that a conspirator derived from the crime. 137 S. Ct. at 1630. And far from *sub silentio* abolishing *in personam* judgments against conspirators, the Court presumed the continued existence of *in personam* proceedings when it stated that the statute at issue there "adopt[ed] an *in personam* aspect to criminal forfeiture." *Id.* at 1635.

Id. at 940-41.

In United States v. Holden, 732 Fed. Appx. 619 (9th Cir. 2018), a post-Honeycutt case, the 9th Circuit affirmed a forfeiture money judgment in the amount of $1.4 million. The court held:

> The district court did not violate 18 U.S.C. § 981 by ordering forfeiture in the form of a personal money judgment. United States v. Newman, 659 F.3d 1235, 1242-43 (9th Cir. 2011). We are not persuaded that our decision in Newman is "clearly irreconcilable" with any recent Supreme Court decisions, Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), so we are bound by its conclusion that, "at least where the proceeds of the criminal activity are money, the government may seek a money judgment as a form of criminal forfeiture" under 18 U.S.C. § 981. Newman, 659 F.3d at 1242.

Id. at 620.

Likewise, in United States v. Gorski, 880 F.3d 27, 40-41 (1st Cir. 2018), the court stated:

> Gorski seizes on [the] reasoning [in Honeycutt] to contend that money judgments in forfeiture orders now must be considered invalid because the forfeiture statutes do not expressly authorize money judgments. However, by Gorski's own account, our existing precedent is to the contrary. See United States v. Hall, 434 F.3d 42, 59-60 (1st Cir. 2006). And, Honeycutt does not permit us to reach a different result as a three-judge panel, given that—as Gorski himself acknowledges—Honeycutt "did not rule on the issue" that he has presented to us. See United States v. Monteiro, 871 F.3d 99, 108 (1st Cir. 2017) (citing United States v. Mouscardy, 722 F.3d 68, 77 (1st Cir. 2013))."

In United States v. Ford, 296 F. Supp.3d 1251, 1257-59 (D. Or. 2017), the court stated: "Honeycutt did not overrule the universally recognized rule among the federal courts of appeals permitting *in personam* money judgments against criminal defendants."

The $46,432.00 Jackson gave Cooper are Proceeds and therefore Tainted Property

The Court cites the following portion of Honeycutt in support of its ruling: "'Section 853(a) limit[s] forfeiture to tainted property acquired by the defendant.'" Mem. Op. at 12, quoting Honeycutt, 137 S.Ct. at 1633.

The funds that Jackson gave to Cooper - - the "buy money" - - was "tainted" property. That money was the proceeds of Cooper's narcotics distribution because "but-for" his agreement to sell the narcotics to Jackson, Cooper would not have obtained or acquired the funds. In United States v. DeFries, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997), the D.C. Circuit, citing the 7th Circuit, determined that the following property, which included proceeds, was subject to forfeiture for a violation of RICO, 18 U.S.C. § 1962; property which the defendant obtained where the "'defendant's racketeering activities were a cause in fact of the acquisition or maintenance of' the property sought" for forfeiture. DeFries, 129 F.3d at 1313, quoting

United States v. Horak, 833 F.2d 1235, 1243 (7th Cir.1987). The D.C. Circuit held that "because the but-for test usefully articulates the requirement of a nexus between the targeted property and the racketeering activity, we adopt it." Id.

The logic of DeFries applies here. But-for Cooper's narcotics activity, Jackson would not have given him the funds. Accordingly, the funds Cooper obtained from Jackson were proceeds and thus tainted funds. To find otherwise would allow defendants to avoid any forfeiture simply by having a seller insist on being paid before handing over the drugs.

This fact - - that Cooper personally obtained proceeds of the narcotics activity - - is the key distinguishing factor between Cooper's situation and the situation of the student in Honeycutt. In the example of the student, he never acquires, obtains, etc., any funds from the narcotics conspiracy other than the $3,600 paid to him by the farmer - - meaning the only "tainted" property he obtained was the money paid to him. Honeycutt, 137 S. Ct. at 1631-32 ("Suppose a farmer masterminds a scheme to grow, harvest, and distribute marijuana on local college campuses. The mastermind recruits a college student to deliver packages and pays the student $300 each month from the distribution proceeds for his services. In one year, the mastermind earns $3 million. The student, meanwhile, earns $3,600. If joint and several liability applied, the student would face a forfeiture judgment for the entire amount of the conspiracy's proceeds: $3 million. The student would be bound by that judgment even though he never personally acquired any proceeds beyond the $3,600.")[4]

4 The government respectfully disagrees with the Court's assertion that "[h]owever the essential point of the Supreme Court made in the example is that making the student liable for the entire $3 million would require the student to pay all but $3,600 of the forfeiture from untainted funds," citing Honeycutt, 137 S. Ct. at 1635. Mem. Op. at 12. As shown from the quoted language from Honeycutt at 137 S. Ct. at 1631-32, the reason the Honeycutt Court

The Substitute Assets Provision

As noted above, the government does not believe that it must comply with the substitute asset provisions of 21 U.S.C. § 853(p) in order to obtain the forfeiture money judgment. That position notwithstanding, the government can easily meet that burden. Section 853(p)(1) states that the government may seek the forfeiture of assets in several situations, one of which is when the property subject to forfeiture "(B) has been transferred or sold to, or deposited with, a third party". By defendant's own admission, a portion of the proceeds he obtained - - the issue before this Court - - were "transferred" to his supplier. Accordingly, the government has complied with the substitute assets provision of 21 U.S.C. § 853.

Conclusion

Wherefore, the United States respectfully re-states its request that, the Court enter the previously filed proposed Final Order of Forfeiture and enter a forfeiture money judgment of

disallowed such joint-and-several liability was because the student never obtained the funds - - and consistent with the plain meaning of the narcotics forfeiture statute, the student could only be ordered to forfeit the proceeds he obtained.

$46,432.00 reflecting the gross proceeds defendant Cooper personally obtained in connection with his drug sales to Jackson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of this pleading to be served upon defense counsel via email and the Electronic Case Filing (ECF) system, this 28th day of January, 2019.

_____/s/_____
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