No. 17-12262-BB

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROSA ENEDIA PAZOS CINGARI and DOMENICO CINGARI,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-54, Hon. Charlene Edwards Honeywell

APPELLANT'S BRIEF OF DOMENICO CINGARI

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Aldridge | Pite, LLP – Trial counsel for Claimant Mortgage Electronic Registration Systems, Inc. and Wells Fargo Bank, N.A.;
2. Bentley, III, A. Lee – Former United States Attorney;
3. Burns, P.A. – Appellate counsel for Defendant-Appellant Domenico Cingari;
4. Burns, Thomas A. – Appellate counsel for Defendant-Appellant Domenico Cingari;
5. Ciccio, Matthew A. – Trial counsel for Claimants Mortgage Electronic Registration Systems, Inc. and Wells Fargo Bank, N.A.;
6. Cingari, Domenico – Defendant-Appellant;
7. Cingari, Rosa Enedia Pazos – Defendant-Appellant;
8. Crawford, Stephen M. – Trial counsel for Defendant-Appellant Rosa Enedia Pazos Cingari;
9. Gaugush, Simon A. – Assistant United States Attorney;
10. Harris, Stacie B. – Assistant United States Attorney;
11. Honeywell, Hon. Charlene Edwards – United States District Judge;
12. Hoppmann, Karin B. – Assistant United States Attorney, Appellate Division;

13. Jenkins, Hon. Elizabeth A. – United States Magistrate Judge;

14. Kovachevich, Hon. Elizabeth A. – United States District Judge;

15. Law Office of John L. Liguori – Trial counsel for Defendant-Appellant Domenico Cingari;

16. Law Office of Stephen M. Crawford – Trial counsel for Defendant-Appellant Rosa Enedia Pazos Cingari;

17. Liguori, John Lawrence – Trial counsel for Domenico Cingari;

18. Mortgage Electronic Registration Systems, Inc. – Claimant;

19. Muench, James A. – Assistant United States Attorney;

20. Muldrow, W. Stephen – Acting United States Attorney;

21. Porcelli, Hon. Anthony E. – United States Magistrate Judge;

22. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

23. Sansone, Hon. Amanda Arnold – United States Magistrate Judge;

24. Tedder, Joe G. – Claimant (Tax Collector of Polk County, Florida);

25. Victims (listed in Government's certificate of interested persons);

26. Wells Fargo Bank, N.A., claimant (ticker symbol: WFC);

27. Wilson, Hon. Thomas G. – United States Magistrate Judge.

No other publicly traded company or corporation has an interest in the outcome of this appeal.

January 19, 2018

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Domenico Cingari requests oral argument. This appeal from a 13-day jury trial involves a forfeiture award that is improper under the Supreme Court's recent decision in *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017). It also involves procedural error in the application of U.S.S.G. § 2B1.1 instead of § 2L2.1, which resulted in a guideline-range sentence far exceeding what Mr. Cingari would have otherwise received. Oral argument will assist the Court.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Domenico Cingari adopts the portion of Rosa Cingari's appellant's brief concerning the District Court's application of U.S.S.G. § 2B1.1 over § 2L2.1. *See* Rosa Cingari Br. 16-23.

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Mr. Cingari was indicted (Doc. 68) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and authority to examine the sentence under 18 U.S.C. § 3742(a) because the District Court entered a final judgment on May 10, 2017 (Doc. 266), which Mr. Cingari timely appealed on May 19, 2017 (Doc. 270).

STATEMENT OF THE ISSUES

1. Did the District Court err or commit plain error when it entered a forfeiture money judgment holding Domenico and Rosa Cingari jointly and severally liable for the total proceeds of their offenses?

2. Did the District Court commit procedural error when it calculated Mr. Cingari's guideline-range sentence using U.S.S.G. § 2B1.1 instead of § 2L2.1?

STATEMENT OF THE CASE

Course Of Proceedings

A. Indictment

A grand jury returned a 13-count second superseding indictment against Mr. Cingari and Mrs. Cingari, his wife, which charged various offenses relating to a criminal scheme involving several hundred illegal-alien victims. Docs. 68; S217 ¶ 40, 45. The grand jury charged Mr. Cingari as follows:

> **Count One:** Conspiracy (1) to submit to U.S. Citizenship and Immigration Services ("USCIS") immigration documents containing material false statements in violation of 18 U.S.C. § 1546(a), and (2) to commit mail fraud in violation of 18 U.S.C. § 1341, all in violation of 18 U.S.C. § 371;
>
> **Counts Five and Six:** Making false statements in and submitting to USCIS a Form I-589 asylum application in violation of 18 U.S.C. §§ 1546(a) and 2;

Counts Eight through Thirteen: Mail fraud in violation of 18 U.S.C. §§ 1341 and 2.

Doc. 68.

B. Trial

After a 13-day trial (Docs. 331-43), a jury returned verdicts finding Mr. and Mrs. Cingari guilty on all counts. Docs. 162; 163.

C. Forfeiture

After trial, the Government moved the District Court to enter a forfeiture money judgment and preliminary forfeiture order. Doc. 158. The District Court granted the motion. Doc. 173.

Thereafter, the Government sought partial satisfaction of the money judgment by moving for forfeiture of a substitute asset. Doc. 177. The District Court granted the motion (Doc. 183), and the Cingaris objected (Doc. 190). The Government opposed the Cingaris' objection (Doc. 192) and amended its previous motion for a money judgment (Doc. 210).

The District Court then convened a hearing on the motion for forfeiture of a substitute asset. Doc. 211. After the hearing, the District Court entered an amended forfeiture money judgment. Doc. 219.

The initial forfeiture money judgment and preliminary forfeiture order (Doc. 173), the preliminary order of forfeiture of a substitute asset

(Doc. 183), and the amended forfeiture money judgment (Doc. 219) were incorporated into Mr. Cingari's final judgment (Doc. 266 at 7-15).

D. Sentencing

Before sentencing, Probation compiled a Pre-Sentence Investigation Report ("PSR") (Doc. S180), which it twice amended (*see* Docs. S200; S217). The Government and Mr. Cingari submitted written objections (Doc. S200 at 23-52) and filed sentencing memoranda (Docs. 212; 214; 229). Thereafter, the District Court held a hearing (Doc. 346) and entered a written order on the sentencing memoranda (Doc. 233).

At a separate hearing, the District Court sentenced Mr. Cingari to 97 months' imprisonment followed by 3 years' supervised release. 347 at 180-81. It also held Mr. and Mrs. Cingari jointly and severally liable for $791,795 in restitution. Doc. 348 at 10-11; *see also* 266 at 6-7.[1] Mr. Cingari is currently incarcerated.

Statement Of Facts

A. The Offense Conduct

The conspiracy charged in the second superseding indictment involved a scheme in which the Cingaris would charge a fee to help illegal

[1] The Government and the Cingaris entered into a joint stipulation regarding the restitution amount. Doc. 258.

aliens obtain driver's licenses to which they were not legally entitled. Doc. 68 at 1-11. This required knowledge and circumvention of the immigration laws and procedures of the United States and the driver's licensing requirements of the State of Florida. *See* Doc. 68 at 1-11. Accordingly, some explanation of those laws and procedures, including how they applied to the illegal aliens, is necessary. *See* Doc. 68 at 1-11.

1. Background

a. Illegal Aliens

Under federal immigration law, an alien is any non-U.S. citizen who is present in the United States. Doc. 332 at 254. Aliens are classified into three main groups: immigrants; non-immigrants; and illegal aliens. Doc. 332 at 254-55. An immigrant is an alien who is authorized to permanently reside in the United States (*i.e.*, a green card holder). Doc. 332 at 254-55. A non-immigrant is an alien who is temporarily authorized to be present in the United States (*e.g.*, a foreign tourist or student). Doc. 332 at 254. An illegal alien is a non-U.S. citizen "who crossed the United States border without being inspected or admitted by an immigration officer" or overstayed a visa. Doc. 332 at 255. In this

case, all of the fraud scheme's victims were illegal aliens. *See* Doc. S217 ¶ 38.

b. USCIS

USCIS is an agency of the Department of Homeland Security ("DHS"). S217 ¶ 32. Its main function is to adjudicate immigration benefits. Docs. 332 at 243; 334 at 30-31.

c. A-Number

Whenever an alien applies for an immigration benefit, he is assigned an alien registration number ("A-Number"). Doc. 332 at 255-56. Although multiple aliens cannot have the same A-Number, it is possible for one alien to end up with multiple A-Numbers. Doc. 332 at 256. For example, an alien can end up with multiple A-Numbers by applying for an immigration benefit under a different name, a different birthdate, or both. Doc. 332 at 256. In other words, each A-Number is unique to a particular name/birthdate combination. *See* Doc. 332 at 256.

d. Form I-589 Application For Asylum And Withholding Of Removal

Asylum is a type of protective status USCIS can extend to certain aliens. *See* Docs. 68 at 4-5; 333 at 8-9; S217 ¶ 33. To qualify for asylum, an alien must prove "he [is] unable or unwilling to return to his" home

country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group[,] or political opinion." Doc. 68 at 3-4; *accord* Doc. 333 at 8-9. Asylum status allows an alien "to remain in the United States, accept employment, and eventually [become] a lawful permanent resident." Doc. 68 at 4. The denial of an illegal or otherwise out-of-status alien's asylum application, however, can lead to deportation. Doc. 334 at 121-22.

There are two types of asylum applications: affirmative and defensive. Doc. 334 at 34. An asylum applicant who is either in removal proceedings before an immigration court or detained by DHS falls into the defensive category. Doc. 334 at 34. On the other hand, an alien who is physically present in the United States, has entered legally or without inspection, and is not in removal proceedings or detained by DHS may affirmatively apply for asylum. Doc. 334 at 34.

To affirmatively apply for asylum, an alien must submit a Form I-589 application for asylum and withholding of removal. *See* Docs. 68 at 3-4; 333 at 8-9; 334 at 55. The asylum applications involved in this case were affirmative, not defensive, *i.e.*, the illegal-alien victims were not in

DHS custody or in removal proceedings when the Form I-589s were submitted on their behalf. *See* Doc. 68 at 9-18.

Among other things, the Form I-589 asks the asylum applicant to provide information about: his family; his date of birth; his education; his English fluency; how his claim meets the asylum criteria; his criminal history; whether he has previously applied for asylum; the date he entered the United States; his residential address; and his mailing address. *See* Docs. 68 at 7; 333 at 11-14; S217 at 36.

Asylum applicants must sign the Form I-589 under penalty of perjury. Docs. 68 at 4; 333 at 15; 334 at 109. The veracity of the asylum applicant's answers to the Form I-589 questions is important because certain answers will disqualify the applicant from asylum eligibility. *See* Docs. 333 at 13; 334 at 51-54. For example, an alien who seeks asylum must apply within one year of entering the United States. Doc. 334 at 52. If he misses the filing deadline, he will be "barred from filing for asylum" unless he can demonstrate he qualifies for an exception. Doc. 334 at 54. Thus, the answers to the questions "on the Form I-589 [are] material to the decision whether to grant or deny" a particular asylum application. Doc. 334 at 68; *see also* Doc. 334 at 69-108.

The Form I-589 also asks whether someone other than the applicant's spouse, parent, or child assisted the alien in preparing the application. Doc. 334 at 109. Such individuals are referred to as preparers, and they are required to sign the application. *See* Doc. 334 at 109. Additionally, "a preparer ha[s] to certify that he or she read the completed application to the applicant in … a language the applicant [can] understand." Doc. 68 at 4. The alien must then "sign[] the application in the preparer's presence." Doc. 68 at 4.

An alien affirmatively seeking asylum during the time period in which the charged conduct occurred could do so only by mailing a Form I-589 asylum application to "one of the various [USCIS] service centers throughout the nation." Docs. 334 at 55. There is no filing fee for asylum applications, so as long as a Form I-589 is filled out and signed, it will be accepted by USCIS and entered into the central indexing system. Docs. 68 at 3; 334 at 108-09, 156.

Once a Form I-589 is submitted, the applicant is summoned to a USCIS asylum office for an interview. *See* Docs. 333 at 53; 334 at 36-37, 70. If an alien who seeks asylum misses his interview, after an initial

waiting period, the USCIS asylum office will check various databases for a way to contact the alien. Doc. 334 at 37-38.

If the USCIS asylum office cannot find the alien, it "will administratively close out the case." Doc. 334 at 38. And if the asylum applicant is not in status, the USCIS asylum office will refer his "case to the immigration judge so that [the alien] can be put [into] removal proceedings." Doc. 334 at 38. If the alien misses his removal hearing, he will be removed (*i.e.*, deported) *in absentia*. Doc. 334 at 122.

e. Form I-130 Petition For Alien Relative

The purpose of the Form I-130 petition is for an alien relative to establish a qualifying relationship with a United States citizen or lawful permanent resident. Doc. 333 at 26. Hence, a Form I-130 does not alone confer an immigration status upon the alien relative. Doc. 68 at 4-5. It simply establishes that due to the alien relative's relationship to the petitioner, he is "prima facie eligible to file an application for an immigration benefit." Doc. 68 at 5. The qualifying relationship must be supported by documentary evidence such as birth certificates, marriage certificates, and evidence of U.S. citizenship or lawful permanent resident status. Docs. 68 at 5; 333 at 31-32.

Only U.S. citizens and lawful permanent residents can petition for alien relatives, so a non-immigrant or an illegal alien could not be a Form I-130 petitioner. *See* Doc. 333 at 29-31. The Form I-130 elicits from the petitioner information about both him and the alien relative. Doc. 333 at 28-31. Among other things, the petitioner must provide his social security number, provide an address, and state the nature of his lawful status in the United States. Doc. 333 at 26-31; Gov. Ex. 801. He must also sign the Form I-130 under penalty of perjury. Doc. 333 at 30.

Like the Form I-589, during the timeframe within which the offense conduct occurred, the Form I-130 could only be filed by mail. Doc. 333 at 33. Unlike the Form I-589, however, the Form I-130 is associated with a filing fee. Doc. 333 at 32.

Once a Form I-130 has been filed, USCIS will summon the petitioner and alien-beneficiary for an interview. *See* Doc. 332 at 261. As with the asylum application process, failure to appear for an I-130 interview or denial of a Form I-130 petition can lead to the alien's removal. *See* Doc. 343 at 54-56.

f. Form I-797C Notice Of Action

USCIS uses a Form I-797C notice of action "to provide notification that it received a petition or application." Docs. 68 at 3; 333 at 23. The Form I-797C is also used to inform an applicant about the state of his application or petition, and it bears a watermark depicting a torch. Doc. 333 at 22-23. It confers no immigration benefits. Doc. 333 at 22.

Upon receipt of a signed Form I-589, USCIS generates and mails the applicant a Form I-797C. Docs. 68 at 3; 333 at 20. Likewise, so long as the fee is paid, USCIS will send a Form I-797C upon receipt of a Form I-130 petition, regardless whether the supporting documentation was sufficient. *See* Docs. 68 at 5; 333 at 33.

g. The Florida Division Of Motorist's Services

The Florida Division of Motorist's Services ("FDMS") is an agency of the Florida Department of Highway Safety and Motor Vehicles ("FDHSMV"). Doc. 68 at 1. It oversees the "driver's license offices throughout Florida." Doc. 68 at 1.

To receive a Florida driver's license, an alien who is not a lawful permanent resident must provide proof of (1) his identity and (2) his non-immigrant classification. Docs. 68 at 1; 332 at 225-26. Under Flori-

da law, a Form I-797C satisfies both requirements. *See* § 322.08(c), *Fla. Stat*. ("An official documentation confirming the filing of a petition for asylum … or any other relief issued by [USCIS]" "establishes [an] effort[] to maintain[] continuous lawful presence" and is "[p]roof of identity satisfactory to the department"); *accord* Doc. 68 at 2.

During the time period when the offenses occurred, if an alien were to present a Form I-797C, the driver's license office would attempt to verify the alien's lawful status and identity with USCIS using the alien's A-number. Doc. 332 at 229-30. Once USCIS confirmed the alien's lawful status and identity, FDMS would issue the alien a temporary driver's license, which was typically valid for one year. Docs. S217¶ 36; 332 at 233-34.

2. The Conspiracy

Between January 2007 and October 2011, Mr. and Mrs. Cingari conspired to help illegal aliens from Central and South America obtain valid driver's licenses. Docs. 68 at 6-11; S217 ¶ 38.

The illegal-alien clients would travel to the Cingaris' business property, which was located at 130 West Park Street. *See e.g.*, Docs. 332 at 86-87; 333 at 72-75; 334 at 162-66. There, the Cingaris would charge

a fee to fill out and mail to USCIS Form I-589s and I-130s on the aliens' behalf. Docs. 68 at 7-8; S217 ¶ 37-39. They filed these applications and petitions "for the purpose of obtaining a Form I-797C." Doc. 68 at 8. On each application and petition, Mr. and Mrs. Cingari would list their business address as the mailing address. Docs. 68 at 8; S217 ¶ 38-39. As a result, they, not the aliens, would receive all USCIS correspondence pertaining to the case that had been initiated, including the Form I-797Cs. Docs. 68 at 8; S217 ¶ 38-39.

After receiving the Form I-797Cs in the mail, Mr. and Cingari would provide them to the "alien[s], who could then use [them] at FDMS to obtain a [temporary] Florida driver's license." Doc. S217 ¶ 38. Once an alien's license expired, Mr. or Mrs. Cingari would file on the alien's behalf a subsequent petition with a different name/birthdate combination. *See e.g.*, Docs. 332 at 256-57; 343 at 62-63. In turn, USCIS would generate a new A-Number and issue a Form I-797C bearing that A-Number. *See e.g.*, Doc. 343 at 62-63. Had a successive application or petition bearing the original name/birthdate combination been filed, USCIS would not have generated a new A-Number or issued a Form I-797C. Doc. 343 at 63. The aliens were thus able to renew their tempo-

rary driver's licenses while remaining under USCIS's radar. *See e.g.*, Doc. 343 at 63.

Generally, the aliens paid $500-$800 when Mr. or Mrs. Cingari filed a Form I-589. Doc. S217 ¶ 38. Sometimes, those who brought Mr. and Mrs. Cingari other customers would have their fee discounted to $400. When a Form I-130 was filed, the aliens would normally pay $855. Doc. S217 ¶ 38. A few aliens ended up paying the Cingaris "as much as $1,800." Doc. S217 ¶ 38.

Unbeknownst to the aliens, however, many of these applications and petitions contained materially false statements. Docs. 68 at 6-11; S217 ¶¶ 38-39. Some of the Form I-589s included materially false statements concerning the persecution the applicant suffered, his true name, the date he departed from his native country, his residential address, and his date of birth. Docs. 68 at 7; S217 ¶ 38. Some of the Form I-130s included materially false statements concerning the petitioner's lawful status, his social security number, and his residential address within the United States. Docs. 68 at 7-8; S217 ¶ 38.

At trial, several illegal-alien victims testified they would not have paid either Mr. or Mrs. Cingari had they known an immigration appli-

cation containing false statements was being submitted on their behalf. *See e.g.*, Docs. 333 at 94; 334 at 186; 335 at 58, 121; 337 at 45, 105. Despite having filled out the applications and petitions, Mr. and Mrs. Cingari would not identify themselves as preparers. Docs. 68 at 8; S217 ¶ 38.[2]

In many instances, Mr. and Mrs. Cingari "did not advise the aliens about the correspondence they would receive from USCIS." Doc. S217 ¶ 39. As a result, the aliens would not show up for their interviews or comply with official requests for information. *See* Docs. 332 at 24-25; S217 ¶ 39. This would often lead to the immigration court entering *in absentia* removal orders against the aliens. *See* Docs. 332 at 24-25; S217 ¶ 39.

Over the course of the conspiracy, Mr. and Mrs. Cingari "filed at least 702 asylum petitions for … at least 668 illegal aliens." Doc. S217 ¶ 40. They also filed "456 relative petitions … for 416 illegal aliens." Doc. S217 ¶ 40. Mr. Cingari "personally aided in filing" only 200 of these immigration documents. Doc. S217 ¶ 40. Overall, the scheme's ille-

[2] According to the trial testimony, a preparer may seek to conceal his identity because he "prepared the application with false information." Doc. 334 at 110.

gal-alien victims lost $791,795. Doc. 258 at 1. Of that total, $740,025 represented the amount they paid Mr. and Mrs. Cingari directly, and $51,770 was how much they paid for immigration attorney fees incurred in the scheme's aftermath. Doc. 258 at 1-2.

B. Forfeiture

The second superseding indictment sought forfeiture of the Cingaris' business property located at 130 West Park Street,[3] their residence located at 4114 Baywater Place, any property they had used or intended to use to carry out the conspiracy, and the conspiracy's proceeds. Doc. 68 at 17-18. It further sought forfeiture of substitute assets if any of the directly forfeitable property could not be located or otherwise obtained. Doc. 68 at 18.

After the jury returned guilty verdicts, the Cingaris agreed to forfeit 130 West Park Street. Doc. 343 at 192. They also acquiesced to the entry of a forfeiture money judgment. Doc. 343 at 192. They did not, however, specifically agree to undertake joint and several liability for the forfeiture money judgment. *See, e.g.*, Doc. 343 at 192.

[3] Most of the offense conduct occurred at 130 West Park Street. *See e.g.*, Doc. S217 ¶ 37-39.

The Government initially sought a $369,000 money judgment, which represented the proceeds of the Cingaris' offenses. Doc. 158 at 1.[4] After the District Court entered a preliminary money judgment in that amount (Doc. 173), the Government sought partial satisfaction of the money judgment by moving to preliminarily forfeit 4114 Baywater Place as a substitute asset.[5] Doc. 177 at 1. The District Court granted the motion. 183 at 2.

Thereafter, the Government amended its previous motion for a forfeiture money judgment. Doc. 210. This time, the Government alleged the Cingaris' scheme generated $740,880 in proceeds, and it thus sought a judgment in that amount. Doc. 210 at 5. The District Court granted the motion, holding Mr. and Mrs. Cingari jointly and severally liable for a $740,880 forfeiture money judgment. *See* Docs. 219 at 1-2; 266 at 14-15. It also ordered forfeiture of 130 West Park Street (the

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[4] The Government sought the money judgment pursuant to 18 U.S.C. § 981(a)(1)(C) and § 982(a)(6), 28 U.S.C. § 2461(c), and Federal Rule of Criminal Procedure 32.2(b)(2). Doc. 158 at 1.

[5] The Government sought forfeiture of 4114 Baywater Place pursuant to "21 U.S.C. § 853(p), as incorporated by 18 U.S.C. § 982(b)(1) and 28 U.S.C. § 2461(c), and Federal Rule of Criminal Procedure 32.2(e)(1)(B)." Doc. 177 at 1.

business property) and 4114 Baywater Place (the residence). *See* Docs. 173 at 1; 177 at 1; 266 at 8, 11; 360 at 1-2.

C. Sentencing

In calculating Mr. Cingari's base offense level, Probation initially applied U.S.S.G. § 2L2.1. Doc. S180 ¶¶ 48-51. Accordingly, the initial PSR calculated a total offense level of 19 and assigned a criminal history category I. Doc. S180 ¶¶ 50-58, 63. This yielded a guideline-range sentence of 30-37 months' imprisonment. Doc. S180 ¶¶ 50-58, 63, 91.[6]

The Government objected to the initial PSR, arguing Mr. Cingari's base offense level should have been calculated pursuant to U.S.S.G. § 2B1.1, not § 2L2.1. *See* Doc. S200 at 26-27. The final PSR and the amended final PSR adopted the Government's analysis and conclusions and calculated Mr. Cingari's base offense level using U.S.S.G. § 2B1.1 instead of § 2L2.1. *See* Docs. S200 ¶¶ 50-51 (final PSR); S217 at ¶¶ 50-51 (amended final PSR).

The amended final PSR set Mr. Cingari's base offense level at 7. Doc. S217 ¶ 51. It then applied several enhancements, including a two-level, large-number-of-vulnerable-victims enhancement and a two-level,

[6] In the joint sentencing memorandum, the Cingaris conceded "the initial PSR's calculations were accurate." Doc. 214 at 3 n.2.

abusing-a-position-of-trust enhancement. Doc. S217 ¶¶ 52-59. Ultimately, the amended final PSR calculated a total offense level of 35 and assigned a criminal history category I, resulting in a guideline range of 168 to 210 months' imprisonment. S217 ¶¶ 52-59, 63, 68, 97.

In their joint sentencing memorandum, the Cingaris objected to the amended final PSR's guideline calculation. Doc. 214. Pointing to the cross-reference in U.S.S.G. § 2B1.1(c)(3) and relying mainly on *United States* v. *Kuku*, 129 F.3d 1435 (11th Cir. 1997), and *United States* v. *Day*, 943 F.2d 1306 (11th Cir. 1991), they argued the District Court should calculate their base offense levels "under § 2L2.1 rather than § 2B1.1." Doc. 214 at 5. Specifically, they contended the District Court should apply § 2L2.1 because it more aptly characterized the offense conduct than § 2B1.1. Doc. 214 at 6.

In response, the Government argued U.S.S.G. § 2B1.1(c)(3)'s cross-reference did not apply. Doc. 229 at 1. Relying primarily on *United States* v. *Accime*, 278 Fed. App'x 897 (11th Cir. 2008) (unpublished), it claimed U.S.S.G. § 2B1.1 more accurately covered the objective of the Cingaris' offenses. Doc. 229 1-2.

The District Court determined that "[a]lthough making false statements in the immigration applications [was] certainly a component of the mail fraud charges, the Cingaris' ultimate goal was to obtain money from their clients." Doc. 233 at 5. It further reasoned that like *Accime*, the Cingaris' offenses "were part of a larger scheme, … which included the need to mail the documents in order to get the I-797C Receipt Notice." Doc. 233 at 5. Accordingly, the District Court concluded, "§ 2B1.1 [was] the appropriate offense guideline." Doc. 233 at 8.

At sentencing, the District Court sustained Mr. Cingari's objections to the large-number-of-vulnerable-victims and abuse-of-trust enhancements. Doc. 347 at 141-42. Hence, Mr. Cingari's offense level dropped to 31, resulting in a guideline range of 108 to 135 months' imprisonment. Doc. 347 at 168. The District Court then varied downward one level and sentenced Mr. Cingari to a below-guideline sentence of 97 months' imprisonment. Doc. 347 at 179-80. This sentence was more than 2-1/2 times as long as the most severe guideline-range sentence he could have received had his offense level been calculated under § 2L2.1. *See* Doc. S180 ¶¶ 50-58, 63, 91.

Standard Of Review

1. With regard to forfeiture, a district court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. *United States* v. *Hoffman-Vaile*, 568 F.3d 1335, 1340 (11th Cir. 2009). Nevertheless, issues that were not raised in the district court but were timely raised on appeal are reviewed for plain error. *United States* v. *Shelton*, 400 F.3d 1325, 1328 (11th Cir. 2005).

2. The procedural reasonableness of a sentence is reviewed for abuse of discretion. *United States* v. *Williams*, 526 F.3d 1312, 1321-22 (11th Cir. 2008). The interpretation of sentencing guidelines, however, is reviewed de novo. *United States* v. *Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011) (citation omitted).

SUMMARY OF THE ARGUMENT

1. In the context of 21 U.S.C. § 853, which pertains to serious drug offenses, *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017), prohibits joint and several forfeiture liability for coconspirators. The appellate decisions considering criminal forfeitures in *Honeycutt*'s wake have extended its holding to forfeitures under 18 U.S.C. § 981(a)(1)(C) and § 982(a). This case involves a forfeiture money judgment granted under

§ 981(a)(1)(C) and under § 982(a)(6). Notably, § 982(a)(6) closely resembles the § 982 provisions, such as (a)(2) and (a)(7), to which courts have applied *Honeycutt*. Accordingly, the District Court either erred or committed plain error when it held the Cingaris jointly and severally liable for the $740,880 forfeiture money judgment.

2. Instead of applying § 2B1.1's cross-reference, the District Court followed its guideline commentary, which was inconsistent with the guideline language. Applying the commentary, the District Court calculated Mr. Cingari's offense conduct under § 2B1.1 instead of § 2L2.1. In doing so, it committed a procedural error that yielded a substantially longer guideline-range sentence than was appropriate.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED OR COMMITTED PLAIN ERROR WHEN IT HELD THE CINGARIS JOINTLY AND SEVERALLY LIABLE FOR THE $740,880 FORFEITURE MONEY JUDGMENT

Honeycutt v. *United States*, which the Supreme Court decided after Mr. Cingari was sentenced, prohibits district courts from holding coconspirators jointly and severally liable for forfeiture money judgments under 21 U.S.C. § 853(a). 137 S. Ct. 1626, 1633, 1635 (2017). Other courts have extended *Honeycutt* to forfeitures under 18 U.S.C.

§ 981(a)(1)(C) and § 982(a)(2) and (a)(7). *See infra* Argument I.A.3. In this appeal, this Court should apply *Honeycutt* to the forfeiture entered against Mr. Cingari under both 18 U.S.C. § 981(a)(1)(C) and § 982(a)(6). Under *Honeycutt*, the District Court erred or committed plain error when it held the Cingaris jointly and severally liable for a forfeiture money judgment without making a factual finding about how much proceeds each defendant personally obtained from the scheme.

A. Under De Novo Review, *Honeycutt* Forbids Joint And Several Forfeiture Liability For Coconspirators

Honeycutt resolved whether 21 U.S.C. § 853, which addresses criminal forfeiture in the context of certain drug offenses, "embraces joint and several liability for forfeiture judgments." 137 S. Ct. at 1631. It held "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as a result of the crime." *Id.* at 1635. Accordingly, *Honeycutt* prohibits the imposition of forfeiture judgments holding coconspirators jointly and severally liable for the proceeds of their criminal activity. *Id.* at 1633. Instead, when imposing forfeiture, a district court must make a factual finding about how much in proceeds from the scheme a defendant personally obtained.

1. The Court Should Review The *Honeycutt* Issue De Novo

In considering *Honeycutt* challenges that were not raised in the district court, the Tenth and Sixth Circuits did not review for plain error. *See United States* v. *Pickel*, 863 F.3d 1240, 1260 (10th Cir. 2017); *United States* v. *Elliot*, 876 F.3d 855, 868 (6th Cir. 2017).

Pickel "'review[ed] the district court's forfeiture order as [it] would any other sentencing determination—that is, … legal conclusions de novo and … factual findings for clear error.'" 863 F.3d at 1260 (citation omitted). *Elliot* remanded for a recalculation as to all three defendants but mentioned plain-error review applied to only one of their *Honeycutt* challenges. 876 F.3d at 868. Importantly, that defendant had failed to raise the forfeiture issue on appeal, while the others had timely raised the issue on appeal but not in the district court. *Id.* And in *United States* v. *Carlyle*, this Court did not review for plain error in vacating a joint and several, pre-*Honeycutt* money judgment, even though the defendant did not challenge joint and several forfeiture liability in the district court. 2017 WL 4679564, at *3 (11th Cir. Oct. 18, 2017).

2. Forfeiture Under 21 U.S.C. § 853(a) Is Constrained To Tainted Property Each Coconspirator Actually Obtained

At first blush, § 853's reach seems broad because it "applies to 'any person' convicted of" the identified "serious drug crimes." *Honeycutt*, 137 S. Ct. at 1632. *Honeycutt* explained, however, that § 853(a)'s provisions "limit[] the statute's reach by defining the property subject to forfeiture." *Id.*

As relevant here, § 853(a)(1), the specific provision at issue in *Honeycutt*, "limits forfeiture to 'property constituting or derived from, any proceeds the person obtained, directly or indirectly, as the result of' the crime." *Id.* Similarly, "§ 853(a)(2) restricts forfeiture to 'property used, or intended to be used, … to commit' … the crime." *Id.* And § 853(a)(3), which applies to coconspirators, "requires forfeiture of 'property described in paragraph (1) or (2)' as well as 'any of [the defendant's] interest in … the continuing criminal enterprise.'" *Id.*

Honeycutt reasoned that "[t]hese provisions, by their terms, limit forfeiture under § 853 to tainted property," *i.e.*, property derived from or used to commit "the crime itself." *Id.* It further explained these limitations thus demonstrate "the statute does not countenance joint and sev-

eral liability, which, by its nature, would require forfeiture of untainted property." *Id.*

Honeycutt found further support in § 853(a)'s text, which "defines forfeitable property solely in terms of personal possession or use" and "limits forfeiture to property the defendant 'obtained … as a result of' the crime." *Id.* Importantly, *Honeycutt* noted joint and several liability for coconspirators would thus contradict § 853(a)(1) by requiring them to forfeit property they did not actually obtain. *Id.* at 1633.

Ultimately, *Honeycutt* makes clear that "[s]ection 853(a)'s limitation of forfeiture to tainted property acquired or used by the defendant, together with the plain text of § 853(a)(1), foreclose joint and several liability for co-conspirators." *Id.*

3. *Honeycutt* Governs Forfeitures Authorized By 18 U.S.C. § 981(a)(1)(C) And § 982(a)(6)

The District Court awarded the $740,880 forfeiture money judgment pursuant to 18 U.S.C. § 981(a)(1)(C) and § 982(a)(6).[7] Doc. 219 at

[7] The District Court also listed 28 U.S.C. § 2461(c) as statutory authority for the forfeiture money judgment. Doc. 219 at 1-2. Section 2461(c) merely allows any property that is civilly forfeitable under 18 U.S.C. § 981 to be included in an indictment and criminally forfeited upon the defendant's conviction. It does not itself define the property

1-2. For all purposes relevant to this case, these forfeiture provisions are indistinguishable from 21 U.S.C. § 853(a)(1).

Section 981(a)(1)(C) allows a prosecutor to "seek civil forfeiture of '[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to'" mail fraud or a conspiracy to commit mail fraud. *United States* v. *Masilotti*, 495 Fed. App'x 975, 976 (11th Cir. 2012) (citing 18 U.S.C. § 1956(c)(7), which in turn cites *id.* § 1961(1)).[8] It also allows a prosecutor to seek forfeiture of proceeds derived from § 1546 false statements offenses and conspiracies to commit such offenses. *Id.* § 981(a)(1)(C) (citing *id.* § 1956(c)(7), which in turn cites *id.* § 1961(1)).

On the other hand, § 982(a)(6) mandates forfeiture of "any property real or personal—that constitutes, or is derived from … proceeds obtained directly or indirectly from the commission of" a § 1546 offense. As such, the operative forfeiture provisions in this case are § 981(a)(1)(C) and § 982(a)(6).

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that is subject to forfeiture. Accordingly, it is not pertinent to whether *Honeycutt* applies to the forfeiture money judgment here.

[8] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

In an unpublished decision, this Court recently recognized § 981(a)(1)(C) and 21 U.S.C. § 853(a) "are largely the same in terms of their pertinent language." *Carlyle*, 2017 WL 4679564, at *3. Both provisions authorize forfeiture of only tainted property, and under *Honeycutt*, joint and several forfeiture awards improperly exceed the scope of that authorization by allowing forfeiture of untainted property. 137 S. Ct. at 1632. For that reason, the Third Circuit expressly held *Honeycutt* applies to 18 U.S.C. § 981(a)(1)(C). *United States* v. *Gjeli*, 867 F.3d 418, 427-28 & n.16 (3d Cir. 2017).

Honeycutt applies even more definitively to § 982(a)(6), which, like 21 U.S.C. § 853(a)(1), provides for forfeiture of proceeds *obtained* from the offense. *See United States* v. *Brown*, 694 Fed. App'x 57, 58 n.6 (3d Cir. 2017) (focusing on § 982 because it "better parallels § 853" than does § 981). Additionally, § 982 "incorporates many of the drug law provisions on which *Honeycutt* relied in rejecting joint and several liability." *United States* v. *Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017) (citing 18

U.S.C. § 982(b)(1), which incorporates by reference 21 U.S.C. §§ 853(c), 853(e), and 853(p)).[9]

Accordingly, under *Honeycutt*, the District Court erred when it held Mr. and Mrs. Cingari jointly and severally liable for the $740,880 forfeiture money judgment, regardless whether the judgment was entered pursuant to 18 U.S.C. § 981(a)(1)(C) or § 982(a)(6).

B. Even If The Court Reviews The *Honeycutt* Issue For Plain Error, The Forfeiture Error Was Plain, Affected Mr. Cingari's Substantial Rights, And Seriously Affected The Fairness Of The Judicial Proceedings

Because the Supreme Court decided *Honeycutt* after the District Court entered final judgment (*see* Doc. 266), Mr. Cingari was not able to rely on it to challenge the joint and several money judgment in the pro-

[9] Although *Brown* and *Sanjar* dealt specifically with § 982 provisions different from the one involved here, the language of each provision pertinent to a *Honeycutt* analysis is substantially the same. *Compare* 18 U.S.C. § 982(a)(2) (*Brown*) ("The court … shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.), *with id.* § 982(a)(7) (*Sanjar*) ("The court … shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to … the offense."), *and* § 982(a)(6) (Cingari) ("The court … shall order that the person forfeit to the United States … any property real or personal … that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted.").

ceedings below. As such, *Rodriguez* and *Shelton*, which concerned the application of *Booker*, not *Honeycutt*, may indicate this Court might review the *Honeycutt* challenge in this case for plain error. *See United States* v. *Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005); *Shelton*, 400 F.3d at 1331. If so, Mr. Cingari easily satisfies that standard because the error was plain under *Honeycutt*.

Under plain-error review, an appellant "has the burden of establishing that '(1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings.'" *United States* v. *Beckles*, 565 F.3d 832, 842 (11th Cir. 2009) (citation omitted).

The Court may and should correct the *Honeycutt* error in this case even though it was not plain when the District Court entered the joint and several forfeiture money judgment: "Although the error was not 'plain' at the time of sentencing, 'where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that the error be "plain" at the time of appellate consideration.'"

Rodriguez, 398 F.3d at 1299 (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)); *accord Shelton*, 400 F.3d at 1331.

In dicta, this Court explained *Honeycutt* likely applies to 18 U.S.C. § 981(a)(1)(C) as well as 21 U.S.C. § 853(a)(1). *Carlyle*, 2017 WL 4679564, at *3. "Indeed, the Third Circuit [held exactly that in *Gjeli*]." *Id.* (citing *Gjeli*, 867 F.3d, at 427-28 & n.16). Furthermore, in *Brown*, an unpublished decision, the Third Circuit held *Honeycutt* applies to forfeitures under 18 U.S.C. § 982. 694 Fed. App'x at 58. And in *Sanjar*, the Fifth Circuit expressly declared a joint and several § 982 forfeiture "plainly erroneous." 876 F.3d at 750. Therefore, the *Honeycutt* error in this case is plain, regardless whether it was awarded pursuant to 18 U.S.C. § 981(a)(1)(C) or § 982(a)(6).

The *Honeycutt* error in this case also satisfies the substantial-rights prong of the plain-error standard. A defendant's substantial rights are affected when an error changes "'the outcome of the district court proceedings.'" *United States* v. *Cotton*, 535 U.S. 625, 632 (2002) (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)). "The standard for showing that is the familiar reasonable probability of a different result formulation." *Rodriguez*, 398 F.3d at 1299.

Under *Honeycutt*, the District Court would not have been able to hold Mr. and Mrs. Cingari jointly and severally liable for the $740,880 money judgment. *See supra* Argument I.A. Instead, the Government would have had to prove the amount of proceeds each party "actually acquired as a result of the crime." *Honeycutt*, 137 S. Ct. at 1635. And unless Mr. Cingari received the scheme's entire proceeds, which the Government never proved below, the joint and several money judgment required him to forfeit untainted property. *See id* at 1632 (explaining joint and several liability … "by its nature, … require[s] forfeiture of untainted property). Thus, the "nature and substantial impact of this error allow[s]" Mr. Cingari to clear the "high hurdles" of plain-error review. *Sanjar*, 876 F.3d at 749.

Finally, requiring Mr. Cingari to forfeit proceeds he did not obtain would "affect the fairness … of judicial proceedings." *United States* v. *Chafin*, 808 F.3d 1263, 1275 (11th Cir. 2015). By allowing joint and several forfeiture liability under the "now-rejected" standard, *see id.,* the District Court essentially sanctioned punitive financial measures against a defendant without requiring the Government to show he obtained tainted property. As *Honeycutt* recognized, such procedures

would allow parties who derived little financial benefit from their involvement in an otherwise profitable criminal scheme to bear the brunt of the financial ramifications. *See* 137 S. Ct. at 1631-32 (explaining a student who earned $3,600 delivering marijuana would be held financially liable to the same extent as the mastermind distributor whose criminal profits totaled $3,000,000). Congress surely did not intend for the forfeiture statute at issue in *Honeycutt* or the one involved here to operate in such an inequitable manner. *See id.*

C. Whether Reviewed De Novo Or For Plain Error, A Remand Is Necessary To Determine The Amount Of Proceeds Mr. And Mrs. Cingari Individually Received

In the context of joint and several criminal forfeitures, every *Honeycutt* challenge raised on direct appeal has succeeded in having the forfeiture order vacated. *See Carlyle*, 2017 WL 4679564, at *3; *Gjeli*, 867 F.3d at 428; *Sanjar*, 876 F.3d at 751; *Brown*, 694 Fed. App'x at 58; *United States* v. *Lara*, 691 Fed. App'x 244, 244 (6th Cir. 2017); *United States* v. *Pickel*, 863 F.3d at 1261; *Elliot*, 876 F.3d at 868; *United States*

v. *Purify*, 702 Fed. App'x 680, 682 (10th Cir. 2017); *United States* v. *Chamberlain*, 868 F.3d 290, 297 (4th Cir. 2017).[10]

Although *Carlyle* instructed that district court to determine in the first instance whether *Honeycutt* applies to § 981(a)(1)(C) forfeitures, *see* 2017 WL 4679564, at *3, this Court could and should now hold that it does, *see Gjeli*, 867 F.3d at 427-28. It should also hold *Honeycutt* applies to § 982(a)(6) forfeitures. *See Sanjar*, 876 F.3d at 750. In either case, the Court should vacate the forfeiture money judgment and remand for the District Court to determine the amount of proceeds each party "actually acquired as the result of the crime." *Honeycutt*, 137 S. Ct. at 1635.

If the Court does not wish to resolve these questions now, however, it should vacate the forfeiture money judgment and remand for the district court "to determine … the applicability of *Honeycutt* … and to conduct any fact-finding necessary to determine the appropriate amount of monetary forfeiture to be imposed on" each defendant. *Carlyle*, 2017 WL 4679564, at *3.

[10] This Court rejected a *Honeycutt* challenge in *United States* v. *Verdieu*, 2017 WL 5988449 (11th Cir. Dec. 4, 2017) (unpublished). Unlike this case, however, the *Honeycutt* argument in *Verdieu* pertained to an administrative forfeiture, not a criminal forfeiture. *Id.* at *2.

The Court should also vacate the judgment ordering the forfeiture of 4114 Baywater Place (the residence) (Doc. 360 at 1). The District Court ordered the Cingaris to forfeit that asset in partial satisfaction of the money judgment. Doc. 266 at 11-15. So if the Court vacates the forfeiture money judgment, it should also vacate the order for forfeiture of a substitute asset, because 21 U.S.C. § 853(p), the substitute asset provision at issue here, applies only if the Government cannot obtain the directly forfeitable property. *See id.* § 853(p) (citing § 853(a)). It thus follows that a substitute asset cannot be forfeited to satisfy a non-existent money judgment. Nor can a substitute asset be forfeited absent a determination of the amount of criminal proceeds each coconspirator obtained. *See Honeycutt*, 137 S. Ct. at 1634 ("Congress did not authorize the Government to confiscate substitute property [under §853(p)] from other defendants or co-conspirators; it authorized the Government to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation.").

II. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN IT CALCULATED MR. CINGARI'S OFFENSE LEVEL USING U.S.S.G. § 2B1.1 INSTEAD OF § 2L2.1

The District Court miscalculated Mr. Cingari's guideline range. The cross-reference in § 2B1.1(c)(3) mandated application of § 2L2.1, not § 2B1.1. Accordingly, Mr. Cingari's sentence is procedurally unreasonable. *See United States* v. *Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008) ("a sentence may be procedurally unreasonable if the district court improperly calculates the guideline range").

A. Commentary To A Sentencing Guideline Must Be Consistent With That Guideline

In reviewing a "'district court's legal interpretations of the Sentencing Guidelines'" de novo, this Court begins with the guideline language, considering the guideline itself and the commentary. *United States* v. *Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011) (citation omitted). And like statutory language, guideline language "'must be given its plain and ordinary meaning.'" *Id.* (citation omitted). In other words, "[w]hen interpreting the guidelines," this Court applies the "'traditional rules of statutory construction, including the prohibition on rewriting statutes.'" *Id.* (citation omitted). Ultimately, "[t]he guidelines commentary 'is authoritative unless it violates the Constitution or a federal

statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Id.* (citation and punctuation omitted).

B. The Plain Meaning Of U.S.S.G. § 2B1.1(c)(3) Required The District Court To Apply § 2L2.1

The first step in calculating a defendant's offense level involves "determin[ing] which offense guideline [in Chapter Two] covers the offense of conviction." *United States* v. *Belfast*, 611 F.3d 783, 824 (11th Cir. 2010); *accord* U.S.S.G. § 1B1.2(a). The offense guideline applicable to each statute is identified in Appendix A's statutory index. *See* U.S.S.G. App. A; *accord Belfast*, 611 F.3d at 824. Here, the offense guideline for Mr. Cingari's convictions for submission of false statements in an immigration application is § 2L2.1. *See id.* App. A 585. The offense guideline for his mail fraud convictions is § 2B1.1. *See id.* App. A 584.[11]

When a defendant has been convicted of multiple counts, a district court must group together "[a]ll counts involving substantially the same

[11] "If more than one guideline section is referenced for the particular statute, [the district court must] use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted." U.S.S.G. App. A at 573. Although Appendix A lists multiple offense guidelines for 18 § 1546 convictions and § 1341 convictions, *see* App. A 584-85, only § 2B1.1 and § 2L2.1 pertain to the conduct charged in this case.

harm." U.S.S.G. § 3D1.2. And if there are multiple offense guidelines associated with the grouped offenses, a district court must apply the offense guideline that produces the highest offense level. *See* U.S.S.G. § 3D1.3; *accord United States* v. *Kuku*, 129 F.3d 1435, 1438 (11th Cir. 1997). Here, because the offense guideline for mail fraud (§ 2B1.1) produced a higher offense level than the offense guideline for submitting false statements in an immigration application (§ 2L2.1), the District Court was required to apply § 2B1.1, *see* Doc. S217 ¶ 50; U.S.S.G. § 3D1.3.

But the initial application of § 2B1.1 is just a starting point. That offense guideline contains a cross-reference, which, in part, states:

> If … (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) *the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.*

U.S.S.G. § 2B1.1(c)(3) (emphasis added).

"A plain reading of this unambiguous language establishes that the district court may look only to 'the conduct set forth in the count of conviction' when determining whether the cross-reference applies."

United States v. *Bah*, 439 F.3d 423, 427 (8th Cir. 2006) (quoting U.S.S.G. § 2B1.1(c)(3)). In turn, the cross-reference applies only when "the conduct alleged in the count of *indictment* of which the defendant is convicted establishes the elements of another offense." *United States* v. *Genao*, 343 F.3d 578, 583 (2d Cir. 2003) (emphasis added).

Here, Mr. Cingari's mail fraud convictions (Counts Eight through Thirteen) triggered the initial application of § 2B1.1. *See* Doc. S217 ¶ 50. The conduct set forth in those counts of the second superseding indictment established the elements of submitting false statements in an immigration application (18 U.S.C. § 1546(a)). *See* Doc. 68 at 14-18 (incorporating by reference paragraphs 17(a)-(l), of the second superseding indictment, which had alleged the manner and means of the conspiracy). And § 1546(a) "count[s] of conviction" are "specifically covered by" U.S.S.G. § 2L2.1, "another guideline in Chapter Two." *Id.* § 2B1.1(c)(3). Therefore, under the plain meaning of the § 2B1.1(c)(3) cross-reference, the District Court was required to calculate Mr. Cingari's offense level using § 2L2.1, not § 2B1.1.

C. Commentary To The § 2B1.1(c)(3) Cross-Reference Is Inconsistent With And A Plainly Erroneous Reading Of The Guideline

In rejecting the Cingaris' challenge to the application of § 2B1.1, the District Court relied heavily on *United States* v. *Accime*, 278 Fed. App'x 897 (11th Cir. 2008), an unpublished opinion. *See* Doc. 233 at 4-8. *Accime* failed to consider whether the commentary was inconsistent with or a plainly erroneous reading of the guideline. Consequently, the District Court inherited *Accime*'s faulty construction of § 2B1.1(c)(3)'s cross-reference and its commentary. As such, this Court need not and should not rely on *Accime*.[12]

Under factual circumstances very similar to those involved here, *Accime* concluded the applicable offense guideline was § 2B1.1, not § 2L2.1. 278 Fed. App'x at 901. It observed that "[c]ommentary to [§ 2B1.1(c)(3)] instructs that the cross-reference applies when a 'defendant is convicted of a general fraud statute, and *the count of conviction*

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[12] *See Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) ("[u]npublished opinions ... are persuasive only insofar as their legal analysis warrants"); *Twin City Fire Ins. Co.* v. *Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007) (an unpublished opinion is persuasive "only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue").

establishes an offense involving fraudulent conduct that is more aptly covered by another guideline.'" *Id.* (quoting U.S.S.G. § 2B1.1 cmt. n.16) (emphasis added). Administering that wayward guidance, *Accime* reasoned, "[t]he crux of [the defendant's] scheme was to defraud his [alien] clients, even if" the scheme's goal was accomplished by "[submitting] falsified immigration documents." *Id.*[13] But *Accime*'s applicability is limited because it did not analyze whether the commentary was "inconsistent with, or a plainly erroneous reading of, [§ 2B1.1(c)(3)]." *Fulford*, 662 F.3d at 1177 (citation and punctuation omitted).

Unlike *Accime*, however, *Genao* did address the incompatibility of the guideline's "specifically covered by" language and the application note's "more aptly covered by" language. 343 F.3d at 583-84. Originally, what used to be U.S.S.G. § 2F1.1 had used the phrase "more aptly covered by" in its cross-reference provision. *Id.* at 583. In 2001, § 2B1.1 was consolidated with § 2F1.1. *See United States* v. *Maxwell*, 579 F.3d 1282, 1305 (11th Cir. 2009). Section 2B1.1's cross-reference amended § 2F1.1's

[13] Although the District Court did not mention the cross-reference application note in its sentencing order, that commentary was integral to its decision to apply § 2B1.1. *See* Doc. 233 at 6 (explaining why the conduct involved in Mr. Cingari's mail fraud offense of conviction was not more aptly covered by § 2L2.1).

cross-reference. *See Genao*, 343 F.3d at 583. Section 2B1.1's cross-reference used, and continues to use, the "specifically covered by" language which, as *Genoa* observed, is much narrower than the "more aptly covered by" language of § 2F1.1's obsolete cross-reference. *Id.* (citation omitted); *see also* U.S.S.G. § 2F1.1 (deleted), cmt. n.14 (1998); U.S.S.G. § 2B1.1(c)(3). This change "limited [the cross reference's] applicability to situations in which the conduct set forth in the relevant count of conviction establishes [the elements of] an offense 'specifically covered' by another guideline." *Id.* at 584 (quoting U.S.S.G. § 2B1.1(c)(3)).

Ultimately, *Genao* made clear that the cross-reference language, § 2B1.1(c)(3), and the comment language, § 2B1.1(c)(3) cmt. n.16, are inconsistent: "an offense [can] be 'more aptly covered' by another guideline 'even when the elements of [another] offense cannot be established,'" *Genao*, 343 F.3d at 584 (citation omitted). In contrast, under the newer, "specifically covered by" language, the cross reference ap-

plies only if the count of conviction establishes all the elements of an offense covered by another Chapter 2 guideline.[14]

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[14] For example, suppose the count of conviction was *Crime A* (which is covered by the offense guideline in § 2B1.1), and that conduct established all of the elements of *Crime B* (which is covered by any other offense guideline in Chapter 2). The two tests could lead to different results. Under the "specifically covered by" language, a district court would have to choose the guideline for *Crime B* (because *Crime A* established all of *Crime B*'s elements). In contrast, under the "more aptly covered by" language, a district court would determine what *Crime A* was really about and then could choose either the guideline for *Crime A* or the guideline for *Crime B*.

Now suppose the count of conviction was *Crime A* (which is covered by the offense guideline in § 2B1.1), and that conduct established most but not all of the elements of *Crime B* (which is covered by any other offense guideline in Chapter 2). Again, the two tests could lead to different results. Under the "specifically covered by" language, a district court would have to choose the guideline for *Crime A* (because *Crime A* did not establish all of *Crime B*'s elements). In contrast, under the "more aptly covered by" language, a district court would again determine what *Crime A* was really about and then could choose either the guideline for *Crime A* or the guideline for *Crime B*.

Here, the convictions for substantive counts of mail fraud in violation of 18 U.S.C. § 1341 established all of the elements for submitting false statements in an immigration application in violation of 18 U.S.C. § 1546(a). For that reason, under the "more aptly covered by" language—which exists only in the commentary—it might have been within the District Court's discretion to apply either the guideline for mail fraud or the guideline for false statements in an immigration application. But under the "specifically covered by" language—which is what the guideline actually says—the District Court had no discretion at all; instead, it was required to apply the guideline for false statements in an immigration application. That is why the commentary is both inconsistent with and a plainly erroneous reading of the guideline.

Because *Genao* could not harmonize this tension between § 2B1.1(c)(3) and the commentary, it expressly held "insofar as … the 'more aptly covered' language of [the application note] conflicts with the plain meaning of § 2B1.1(c)(3), the language of § 2B1.1(c)(3) controls." *Id.* at 584 n.8. Indeed, this Court's precedent also forecloses the application of guideline commentary when it "'contradict[s] the plain meaning of'" the guideline text. *Fulford*, 662 F.3d at 1178 (citation omitted); *accord* Argument II.A. Therefore, under the plain meaning of § 2B1.1(c)(3), the District Court was required to apply § 2L2.1. *See supra* Argument II.B.

Additionally, notwithstanding the District Court's ruling (Doc. 233 at 5), this "'grievous ambiguity [and] uncertainty'" surrounding § 2B1.1(c)(3), *United States* v. *Baldwin*, 774 F.3d 711, 733 (11th Cir. 2014) (citation omitted), implicated the Rule of Lenity, which requires the application of § 2L2.1. *See United States* v. *Jeter*, 329 F.3d 1229, 1230 (11th Cir. 2003) ("[t]he rule of lenity applies if a statute—[or] a sentencing guideline—is ambiguous").

Therefore, the District Court procedurally erred when it calculated Mr. Cingari's offense level using § 2B1.1 instead of § 2L2.1. This

guideline-application error yielded a sentence more than 2-1/2 times as long as the most severe guideline-range sentence he could have received under § 2L2.1. *See* Doc. S180 ¶¶ 50-58, 63, 91. His sentence should be vacated.[15] That procedural error, which effectively led to a major upward variance, was harmful. *See, e.g.*, *United States* v. *Irey*, 612 F.3d 1160, 1196 (11th Cir. 2010) ("Although there is no proportionality principle in sentencing, a major variance does require a more significant justification than a minor one.").

CONCLUSION

The Court should vacate the final judgment, remand for resentencing with properly calculated guidelines and for fact-finding to determine the amount of offense proceeds each defendant personally ob-

[15] In addition to ruling § 2B1.1 more aptly covered the relevant offense conduct, the District Court ruled: "To the extent that the mail fraud offense of conviction is covered under § 2L2.1, § 2B1.1 is the section resulting in the highest offense level. Therefore, it is the appropriate sentencing guideline." Doc. 233 at 6. That ruling seems to rely on the commentary to § 1B1.1, which states, "'where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level.'" Doc. 233 at 6 (quoting U.S.S.G. § 1B1.1 cmt. n.5). Yet the District Court should not have consulted that commentary, because only one guideline (§ 2L2.1) was applicable. *See supra* Argument II.

tained, and vacate the forfeiture of 4114 Baywater Place (the residence) as a substitute asset.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 9,204 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

January 19, 2018

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 19th day of January, 2018, to:

David J. Smith, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 19th day of January, 2018, to:

United States

AUSA Karin Bethany Hoppmann

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 19th day of January, 2018, to:

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