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

REPLY 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. Additions are noted in italicized text.

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 Domenico Cingari;

9. Gaugush, Simon A. – Assistant United States Attorney;

10. Gershow, Holly G. – Assistant United States Attorney, appellate division;

11. Goker, Arda – Appellate counsel for Defendant-Appellant Domenico Cingari;

12. Harris, Stacie B. – Assistant United States Attorney;

13. Honeywell, Hon. Charlene Edwards – United States District Judge;

14. Hoppmann, Karin B. – Assistant United States Attorney, Appellate Division;

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

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

17. Law Office of John L. Liguori – Trial counsel for Defendant-Appellant Rosa Enedia Pazos Cingari;

18. Law Office of Stephen M. Crawford – Trial counsel for Defendant-Appellant Domenico Cingari;

19. Liguori, John Lawrence – Trial counsel for Rosa Enedia Pazos Cingari;

20. Lopez, Maria Chapa – United States Attorney;

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

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

23. Muldrow, W. Stephen – Former Acting United States Attorney;

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

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

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

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

28. Victims (list attached to the Government's amended certificate of interested persons);

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

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

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

June 21, 2018

/s/ Thomas Burns
Thomas A. Burns

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Domenico Cingari adopts the portion of Rosa Cingari's reply brief concerning the District Court's application of U.S.S.G. § 2B1.1 over § 2L2.1. *See* Rosa Reply Br. 1-5.

ARGUMENT AND CITATIONS OF AUTHORITY

I. 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 Government argues the cross-reference in U.S.S.G § 2B1.1(c)(3) did not apply to Mr. Cingari's offense level calculation. U.S. Br. 14-19. On that basis, it contends the District Court did not procedurally err when it calculated Mr. Cingari's offense level using § 2B1.1 instead of § 2L2.1. U.S. Br. 11-19. It is mistaken.

A. The Government misinterprets the cross-reference's "specifically covered by" language

The Government argues the cross-reference in § 2B1.1(c)(3) did not apply here because the conduct involved in Mr. Cingari's mail fraud counts of conviction was not specifically covered by § 2L2.1. U.S. Br. 12-15. That is not the case.

The cross-reference instructs that when a defendant has been convicted of mail fraud, and "the conduct set forth in [that] count of conviction establishes an offense *specifically covered by* another guideline in Chapter Two," a district court must "apply that other guideline." U.S.S.G. § 2B1.1(c)(3) (emphasis added). Here, the conduct involved in Mr. Cingari's mail fraud counts of conviction established the offense of

submitting false statements in an immigration application (18 U.S.C. § 1546(a)), which is covered by § 2L2.1. *See* Domenico Br. 37-39; U.S. Br. 12-13 ("the applicable guideline section was … 2L2.1 for the [Cingaris'] immigration-document convictions"). Therefore, as Mr. Cingari explained in his appellant's brief (Domenico Br. 37-39), a plain reading of just the cross-reference (*i.e.*, not the application note) would have required the District Court to calculate Mr. Cingari's offense level using § 2L2.1, not § 2B1.1.

The Government does not dispute that the conduct involved in Mr. Cingari's mail fraud counts of conviction established the elements of submitting false statements in an immigration application. *See* U.S. Br. 14-19; Domenico Br. 38-39. Instead, the Government argues that conduct was not *specifically* covered by § 2L2.1, because it entailed *more than* "simply the submission of false immigration applications to the United States." U.S. Br. 14. But that argument misperceives the inquiry the cross-reference's plain language mandates.

The cross-reference *does not* require the application of another Chapter-Two offense guideline *only if* that guideline covers all of the conduct alleged in the count of conviction. Rather, the cross-reference

inquiry turns on whether the conduct involved in a particular count of conviction establishes the elements of another offense. *See, e.g.*, *United States* v. *Genao*, 343 F.3d 578, 584 (2d Cir. 2003) ("we hold that § 2B1.1(c)(3) is applicable only if the elements of another offense are established by conduct set forth in the count of conviction"). Because the conduct involved in Mr. Cingari's mail fraud counts established the elements of submitting false statements in an immigration application, it was "specifically covered by" § 2L2.1, which was "another guideline in Chapter Two." U.S.S.G. § 2B1.1(c)(3); *see also* Domenic Br. 37-39. As such, the cross-reference did apply here.

To be clear, whether a particular Chapter-Two offense guideline covers *all* the conduct involved in a count of conviction, or otherwise more aptly covers that conduct (*see* U.S. Br. 14-15), is an inquiry that pertains only to the cross-reference's application note, not the cross-reference itself. *See infra* Argument I.B, C. And because the cross-reference's application note conflicts with the cross-reference, the guideline language governed. *See id.* The District Court thus committed an

elementary error of law when, relying on the guideline commentary, it decided not to apply the cross-reference. *See id.*[1]

B. *United States* v. *Baldwin* and *United States* v. *Accime* do not foreclose Mr. Cingari's argument that the District Court should have applied only the cross-reference, not its commentary

The Government contends *United States* v. *Baldwin*, 774 F.3d 711 (11th Cir. 2014), and *United States* v. *Accime*, 278 Fed. App'x 897 (11th

[1] In plain English, the issue is as follows. The § 2B1.1 guideline applies to the offense level calculation (including base offense level and increases for specific offense characteristics) for a mail fraud conviction. But it contains an exception (*i.e.*, the cross-reference) when the conduct charged in the indictment and proven in the count of conviction is "specifically covered by" another Chapter Two offense. Nevertheless, application note 16 suggests there could be an exception to the exception when that conduct is "more aptly covered by" the fraud-and-deceit guideline (*i.e.*, § 2B1.1).

The Government seizes on application note 16 to conflate the inquiries required by the guideline's "specifically covered by" language and application note 16's "more aptly covered by" language. The problem with its argument, however, is that these inquiries can (and, in this case, did) lead to different results. *See* Domenico Br. 43 n.14 (explaining hypotheticals). For that reason, the phrases are necessarily inconsistent, and under this Court's precedent, the guideline must trump the application note. *See United States* v. *Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011) (application notes are authoritative except to the extent they are inconsistent with or a plainly erroneous reading of a guideline's plain language).

Cir. 2008),[2] foreclose Mr. Cingari's argument that the District Court should have applied the cross-reference, but not the related commentary. U.S. Br. 15-19. It is wrong, however, because *Baldwin* and *Accime* are inapposite.

At the heart of Mr. Cingari's argument that only the cross-reference itself applied is the assertion that the cross-reference's application note, § 2B1.1(c)(3) cmt. n.16, is "inconsistent with" or "a plainly erroneous reading of" the cross-reference. *United States* v. *Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011); *see also* Domenico Br. 36-37, 40-43. Neither *Baldwin* nor *Accime* addressed arguments whether the commentary to the cross-reference was consistent with the cross-reference's plain text. *See Baldwin*, 774 F.3d at 732-33; *Accime*, 278 Fed. App'x at 900-01.[3] Therefore, *Baldwin* and *Accime* do not control this Court's determination of the sentencing-guideline argument Mr. Cingari raises.

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[2] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1163 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

[3] In contrast, *Genao* did address the incompatibility between the cross-reference and its commentary. *See* 343 F.3d at 583-84 & n.8 (explaining the plain meaning of the cross-reference controls over its guideline commentary to the extent that the cross-reference application note's "'more aptly covered' language" conflicts with the guideline language); *see also infra* Argument I.C.

In *Baldwin*, a defendant made two arguments about § 2B1.1's cross-reference. 774 F.3d at 732-33. But both of those arguments fundamentally differed from those Mr. Cingari makes here.

First, the *Baldwin* defendant argued the district court should have applied the § 2T tax guidelines instead of § 2B1.1 because the "§ 2T guidelines [were] more applicable … than a calculation under § 2B1.1." *Id.* at 732. That argument necessarily relied on the cross-reference's application note. *See* U.S.S.G. § 2B1.1(c)(3) cmt. n.16 (explaining the cross-reference applies when "the count of conviction establishes an offense involving fraudulent conduct that is *more aptly covered by* another guideline" (emphasis added)). In other words, the *Baldwin* defendant had *assumed* the rule the Government now requests in this appeal; as such, *Baldwin* never addressed the issue presented here.[4]

Here, in contrast, Mr. Cingari argues the District Court should have applied the cross-reference's plain language and *not applied the application note*. Domenico Br. 39-44. Accordingly, *Baldwin*'s holding

[4] In Aristotelian terms, the *Baldwin* defendant had raised an argument about the minor premise (*i.e.*, is Socrates in fact a man?), whereas Mr. Cingari is raising an argument about the major premise (*i.e.*, are all men in fact mortal?). Because the arguments raised concerned different premises, *Baldwin* and this appeal necessarily concern different issues.

that "the § 2B1.1 guidelines more aptly fit the specifics of the crimes committed by [the defendant]," 774 F.3d at 733, does not foreclose Mr. Cingari's argument that the District Court should have applied § 2B1.1(c)(3)'s plain language over its inconsistent commentary. To the contrary, this Court's prior panel precedent actually prohibits the application of guideline commentary when it contradicts the plain meaning of the guideline text. *See Fulford*, 662 F.3d at 1178 (courts are not "bound to follow" guideline commentary when it is contrary to the plain meaning of the guideline).

Second, the *Baldwin* defendant argued, "if either section could cover the offense conduct, the district court should have applied the § 2T guidelines pursuant to the rule of lenity." 774 F.3d at 733. Again, that argument differs significantly from the Rule-of-Lenity argument Mr. Cingari raises here. To be clear, Mr. Cingari does not argue § 2L2.1 and § 2B1.1 were equally applicable. *See* Domenico Br. 45 n.15. ("only one guideline (§ 2L2.1) was applicable"). Rather, he argues the Rule of Lenity is implicated because the discrepancy between the cross-reference and its commentary renders § 2B1.1(c)(3) grievously ambiguous. *See* Domenico Br. 44. Therefore, *Baldwin*'s holding that the de-

fendant could point to "no 'grievous ambiguity or uncertainty in the statute,'" 774 F.3d at 733, does not, as the Government contends (U.S. Br. 16 n.7), foreclose Mr. Cingari's Rule-of Lenity argument.[5]

Accime also does not foreclose Mr. Cingari's sentencing-guideline arguments. For starters, it is a nonbinding, unpublished opinion. *See* 11th Cir. R. 36-2; *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., Inc.* v. *Ohio Cas. Ins. Co., Inc.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007) (same). Additionally, *Accime* did not consider whether the commentary to the cross-reference "was inconsistent with or a plainly erroneous reading of [that] guideline." Domenico Br. 40. Therefore, *Accime* cannot guide this Court's resolution of the dispositive inquiry involved in the sentencing-guideline issue Mr. Cingari raises (*i.e.*, whether application note 16 conflicts with the plain language of § 2B1.1(c)(3)).

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[5] Indeed, *Baldwin* explained the reason why that defendant's Rule-of-Lenity argument failed was that the commentary to § 1B1.1 "provide[d] a clear solution," 774 F.3d at 733, for when "'two or more guideline provisions appear equally applicable,'" *id.* (citing U.S.S.G. § 1B1.1 cmt. n.5). As mentioned above, Mr. Cingari argues "the District Court should not have consulted that commentary, because" only "(§ 2L2.1) was applicable." Domenico Br. 45 n.15.

C. *United States* v. *Genao* does not conflict with *United States* v. *Baldwin*, and it explains why the cross-reference's commentary is inconsistent with the guideline language

The Government argues this panel is bound to follow *Baldwin* under the prior-panel-precedent rule and thus cannot apply *Genao*, a Second Circuit opinion. U.S. Br. 17 n.9. It further argues *Genao* is inapposite. U.S. Br. 17 n.9. Both arguments are misguided.

In particular, the Government contends this Court is bound to follow *Baldwin* over *Genao* because *Baldwin* "holds that the [§ 2B1.1 cross-reference] commentary governs." U.S. Br. 17 at n.9. But this Court had previously held guideline commentary is not authoritative if it contradicts the guideline's plain meaning. *Fulford*, 662 F.3d at 1177. And because *Baldwin* did not address whether the § 2B1.1 cross-reference's commentary conflicts with the cross-reference itself, *see supra* Argument I.B, it is not the first Eleventh Circuit panel opinion to address that issue for purposes of the prior-panel-precedent rule, *see Scott* v. *United States*, 890 F.3d 1239, 1257 (11th Cir. 2018) ("under the prior-panel-precedent rule, we must follow the reasoning behind a prior holding if we cannot distinguish the facts or law of the case under con-

sideration" (citing *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1301-04 (11th Cir. 2001))). Instead, *Fulford* is the prior panel precedent.

The Government also argues *Genao* is inapposite because it does not apply to a situation where, like here, the offense conduct (1) established all the elements of an offense covered by another Chapter-Two guideline but (2) was more aptly covered by § 2B1.1. *See* U.S. Br. 17 n.9; *Genao*, 343 F.3d at 584 (another Chapter-Two guideline specifically covers offense conduct only if that conduct establishes all the elements of another offense). In other words, the Government asserts *Genao* does not contravene the proposition that under § 2B1.1's cross-reference, another Chapter-Two guideline (*i.e.*, not § 2B1.1) specifically covers offense conduct only if that other guideline more aptly covers that conduct. *See* U.S. Br. 17 n.9. As such, according to the Government, for cross-reference purposes, the phrases "specifically covers" and "more aptly covers" essentially mean the same thing.

The Government is wrong because its interpretation ignores a crucial part of *Genao*'s reasoning. *Genao* explained a guideline's plain language governs when there is tension between that guideline and its commentary, and a harmonizing interpretation is impossible. *See* 343

F.3d at 584 n.8. Further, *Genao* held the phrases "more aptly cover[s]" (used in the commentary) and "specifically cover[s]" (used in the guideline) do not mean the same thing, as the former is "substantially broader" (*i.e.*, it covers a broader range of conduct) than the latter. *Id.* at 583.

Hence, as argued in Mr. Cingari's appellant's brief (*see* Domenico Br. 41-45, 43 n.14), harmonizing application note 16's "more aptly covered by" language, U.S.S.G. § 2B1.1(c)(3) cmt. n. 16, with the guideline's "specifically covered by" language, *id.* § 2B1.1(c)(3), is impossible. As such, the cross-reference's plain language "controls," *Genao*, 343 F.3d at 584 n.8, and the District Court should have applied the cross-reference's plain text, but not its application note. Doing so would have required the District Court to calculate Mr. Cingari's offense level using § 2L2.1 instead of § 2B1.1. *See supra* Argument I.A. Accordingly, the District Court procedurally erred when it calculated Mr. Cingari's offense level using § 2B1.1. *See* Domenico Br. 36-45.[6]

[6] Although not mentioned by the Government, this Court has previously cited *Genao* one time. *See United States* v. *Ochoa*, 291 Fed. App'x 265, 268 (11th Cir. 2008). But *Ochoa*, which is unpublished, did not consider whether application note 16's "more aptly covered by" language was inconsistent with the cross-reference's "specifically covered by" language. Rather, without addressing the correctness of *Genao*, *Ochoa* held the defendant could not rely on *Genao*'s holding (*i.e.*, that

II. This Court should vacate the joint and several forfeiture money judgment regardless whether it reviews the forfeiture issue de novo or for plain error

The District Court plainly erred when it held Mr. and Mrs. Cingari jointly and severally liable for the $740,880 forfeiture money judgment. Accordingly, this Court should vacate that judgment regardless whether it reviews the forfeiture issue de novo or for plain error.

A. The Court should review the joint and several money judgment's validity de novo

The forfeiture issue in this case should be reviewed de novo, not for plain error.

Noting Mr. Cingari did not object to the forfeiture money judgment in the District Court and citing *United States* v. *Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005), the Government accurately states "this Court applies plain-error review even when, as here, the law was settled at the time of trial and a later Supreme Court decision changed

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another guideline "specifically cover[s]" offense conduct only if that conduct establishes all the elements of another offense), because it was reviewing his cross-reference argument for plain error, and "*Genao* [wa]s not a decision from the Supreme Court or this Court." *Id.* at 268. Here, however, Mr. Cingari objected below, so the standard of review for the sentencing-guideline issue is de novo. *See* Domenico Br. 21. Put otherwise, *Ochoa* is distinguishable because it did not reject *Genao*'s holding.

that law." U.S. Br. 20.[7] And although *Rodriguez* did not involve the application of *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017), it is this Court's binding prior panel precedent.

Nevertheless, this Court, sitting en banc, should adopt the Third Circuit's approach in *United States* v. *Gjeli*, 867 F.3d 418, 427 n.15 (3d Cir. 2017) (declining to apply plain-error review to the defendants' forfeiture arguments because *Honeycutt* was decided while appeal was pending), which dealt specifically with unpreserved challenges to joint and several forfeiture liability, and refrain from applying plain-error review to the forfeiture issue in this case.[8] Mr. Cingari acknowledges

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[7] Additionally, in its brief, the Government correctly observes this case is distinguishable from *United States* v. *Carlyle*, 712 Fed. App'x 862 (11th Cir. 2017), *United States* v. *Elliot*, 876 F.3d 855 (6th Cir. 2017), and *United States* v. *Pickel*, 863 F.3d 1240 (10th Cir. 2017), to the extent that "the defendants [in those cases] had preserved their objections to their forfeiture judgments," whereas Mr. and Mrs. Cingari did not. U.S. Br. 20. For that reason, Mr. Cingari agrees *Rodriguez* and those cases do not support the assertion that a panel of this Court should review the forfeiture issue in this case de novo. Instead, Mr. Cingari is preserving the standard-of-review issue for further appellate review by this Court en banc or the Supreme Court. *See United States* v. *Travis*, 747 F.3d 1312, 1314 n.1 (11th Cir. 2014) (allowing defendant to make argument "foreclosed by binding precedent" for "purposes of preservation only").

[8] In *Gjeli*, neither codefendant had objected to the entry of the joint and several forfeiture orders in the district court. 867 F.3d at 427 n.15. On appeal, however, the defendants and the government "agree[d]

this argument is foreclosed by *Rodriguez* but makes it to preserve it for further review before this Court en banc or the Supreme Court. *See supra* note 7 (citing *Travis*, 747 F.3d at 1314 n.1).

B. Mr. Cingari's challenge to the joint and several money judgment clears the high hurdles of plain-error review

The Government argues "[p]lain-error review is fatal to the Cingaris' challenge" to the forfeiture money judgment. U.S. Br. 21. It is mistaken.

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that forfeiture [had been] imposed jointly and severally and that such liability [was] no longer permissible in light of [*Honeycutt*]." *Id.* at 427. Recognizing the defendants' failure to object in the district court, *Gjeli* explained their appellate challenge to joint and several forfeiture liability "would ordinarily be subject to plain error review." *Id.* at 427 n.15. Yet *Gjeli* did not review the defendants' *Honeycutt* arguments for plain error, because "there was an intervening change in the law that provided a basis for appeal that did not exist at the time the District Court ruled on the preliminary orders of forfeiture." *Id.* (citing *Hamling* v. *United States*, 418 U.S. 87, 102 (1974) ("a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review")).

1. Under *Honeycutt* v. *United States*, the District Court plainly erred when it held Mr. and Mrs. Cingari jointly and severally liable for the forfeiture money judgment

The District Court's forfeiture error was plain under *Honeycutt*.[9] In that regard, the Government's assertion that "*Honeycutt* does not plainly extend to the facts and circumstances of this case" (U.S. Br. 22) is misguided for three reasons.

First, the District Court held Mr. and Mrs. Cingari jointly and severally liable for the forfeiture money judgment (Docs. 219 at 1-2; 266 at 7, 14-15) because they were coconspirators who jointly operated the scheme through which they received the criminal proceeds (*see* Docs. 68; 266). But that is exactly what *Honeycutt* forbade in the context of 21 U.S.C. § 853(a) forfeitures. *Honeycutt*, 137, S. Ct. at 1633, 1635. Thus, because the Government does not dispute that *Honeycutt* applies to for-

[9] As a threshold matter, in its brief, the Government never challenged Mr. Cingari's argument that *Honeycutt* applies to forfeiture money judgments awarded under 18 U.S.C. § 981(a)(1)(C) and § 982(a)(6). *Compare* U.S. Br. 19-26, *with* Domenico Br. 26-29. As such, the Government has waived any arguments to the contrary and cannot present them for the first time at oral argument because, even for an appellee, that "'comes too late.'" *Hamilton* v. *Southland Christian Sch., Inc.,* 680 F.3d 1316, 1319 (11th Cir. 2012) (appellee waived argument by failing to include it in answer brief) (citation omitted); *La Grasta* v. *First Union Sec., Inc.,* 358 F.3d 840, 847 n.4 (11th Cir. 2004) (same).

feitures under 18 U.S.C. § 981(a)(1)(C) and § 982(a)(6), the critical procedural facts of this case fall squarely within *Honeycutt*'s scope.

Second, in arguing this case falls outside *Honeycutt*'s purview, the Government unduly relies on the District Court's finding that the Cingaris "jointly operated the illegal business." U.S. Br. 22 (citing Doc. 321 at 138). *Honeycutt* had ruled the less culpable coconspirator could not be held jointly and severally liable for the money judgment even though he had managed the store that was selling the methamphetamine manufacturing agent (*i.e.*, Polar Pure). 137 S. Ct. at 1630-31.[10] Hence, *Honeycutt* "foreclose[d] joint and several liability for co-conspirators" even when they, like the Cingaris, jointly operated an illegal business. 137 S. Ct. at 1633.

Third, the Government mischaracterizes the forfeiture money judgment by claiming "the district court found that Mr. and Mrs. Cingari … *jointly* received the proceeds of their crime." U.S. Br. 22 (citing Doc. 219) (emphasis added). On that faulty premise, it attempts to dis-

[10] Similarly, *Carlyle* vacated the joint and several forfeiture money judgment even though that defendant had pled guilty to wire fraud and aggravated identity theft charges "that arose out of a scheme in which" she and her codefendant husband "used stolen identities to file fraudulent tax returns." 712 Fed. App'x at 863.

tinguish that judgment from the money judgments in *Honeycutt* and *Carlyle* and contends *Honeycutt* does not plainly apply here because that case "does not address whether codefendants can be held liable for" jointly obtained criminal proceeds. U.S. Br. 22-23. The District Court did not, however, find the Cingaris had *jointly* received the scheme's proceeds. Rather, it found "the Defendants received criminal proceeds in the amount of $740,880.00." Doc. 219 at 1.

That statement could reasonably be interpreted in two ways. It could mean, as the Government contends, that both Mr. and Mrs. Cingari received each dollar included in the $740,880 sum. *See* U.S. Br. 22. But it could also mean Mr. Cingari received part of that sum and Mrs. Cingari received the rest. In either case, the District Court's finding does not pass muster under *Honeycutt*, because it does not specifically indicate how much of the illicit proceeds Mr. and Mrs. Cingari each personally obtained. 137 S. Ct. at 1633 (limiting forfeiture under § 853(a) "to property the defendant himself obtained"). In that regard, the forfeiture money judgment here suffers from the same deficiency as those in *Honeycutt* and *Carlyle*. *See Honeycutt*, 137 S. Ct. at 1635 (the district court did not find the defendant "personally benefit[ed] from the Polar

Pure sales"); *Carlyle*, 712 Fed. App'x at 864 (remanding for "the district court to make factual findings regarding the amount of proceeds directly obtained by" the defendant).[11]

Moreover, the Government invites this Court to endorse a rule that allows "multiple defendants [who] jointly receive [criminal] proceeds" to "be held accountable for the entire amount of [those] proceeds" so long as they are "entitled to an offset for any money collected from a codefendant." U.S. Br. 23 n.11. Essentially, this request asks the Court to authorize joint and several forfeiture liability for codefendants without calling it joint and several liability. *See Honeycutt*, 137 S. Ct. at 1631 (joint and several liability, which is a "creature of tort law," applies when multiple "defendants jointly cause harm" and requires that "each defendant [be] held liable for the entire … harm" as long as "the plaintiff recover[s] only once for the full amount" (citing Restatement

[11] That this Court has not considered whether coconspirators can be held jointly and severally liable for criminal proceeds they received together (*see* U.S. Br. 23) is of no moment. As explained above, the forfeiture money judgment did not expressly state the Cingaris each received every dollar included in the $740,880 sum. Therefore, the District Court's forfeiture error is plain under *Honeycutt* because it imposes joint and several forfeiture liability on coconspirators (Doc. 219 at 2) while failing to expressly find how much in proceeds each coconspirator personally obtained. *See Honeycutt*, 137 S. Ct. at 1633.

(Second) of Torts § 875 (1977))). Such a rule would violate *Honeycutt*. *See id.* at 1633 (§ 853(a) "foreclose[s] joint and several liability for co-conspirators").

Furthermore, even if this Court interpreted the District Court's forfeiture judgment as finding the Cingaris jointly received each dollar of the illicit $740,880, the imposition of joint and several forfeiture liability would still be improper. An exception to *Honeycutt's* prohibition on joint and several forfeiture money judgments where "codefendants *jointly* obtain proceeds of a crime" (U.S. Br. 23 n.11 (emphasis added)) would contravene *Honeycutt*'s rationale. *Honeycutt* requires that joint actors be held liable only for the illicit proceeds they personally benefit from. 137 S. Ct. at 1635. The logical extension of this principle is that for forfeiture purposes, two or more people cannot personally obtain the same illicit dollar. *Cf. id.* at 1362 ("[n]either the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else").

In other words, according to *Honeycutt*, each dollar of a criminal enterprise must terminate in a specific defendant's pocket; it cannot terminate in multiple defendants' pockets. Thus, an interpretation of

Honeycutt that is faithful to its reasoning would require District Courts to apportion the total amount of proceeds between each codefendant or coconspirator based on the amount he personally obtained, without assigning the same dollar to more than one person.

In sum, the District Court's forfeiture error was plain under *Honeycutt* because the forfeiture money judgment held the Cingaris jointly and severally liable for the entire amount of criminal proceeds, lacked findings on the amount of proceeds each codefendant personally obtained, and did not apportion the money judgment based on the amount each codefendant personally benefited from.

2. The imposition of a joint and several money judgment affected Mr. Cingari's substantial rights because it was prejudicial, not harmless

The Government argues Mr. Cingari has not and cannot establish he was prejudiced by the joint and several money judgment and that he therefore cannot show the judgment affected his substantial rights. U.S. Br. 23-25. It is incorrect.

Mr. Cingari was prejudiced by the joint and several forfeiture money judgment because, contrary to the Government's arguments, there was evidence suggesting and reason to believe the Cingaris did

not treat the scheme's "proceeds as jointly acquired marital property." U.S. Br. 24-25. At trial, the Cingaris' family members testified: (1) Mrs. Cingari handled the family finances, which included paying bills and taxes (*see* Doc. 340 at 94-95, 172, 235); (2) Mr. Cingari's duties at 130 West Park Street consisted primarily of running errands, fetching and preparing meals, and taking care of the yard (Doc. 340 at 103, 117, 171-72); and (3) Mr. Cingari spent most of his time at 130 West Park Street watching television programs and playing computer games in the back room (Doc. 340 at 96, 102, 123, 154-55). Mr. Cingari's testimony was consistent with these accounts. *See* Doc. 341 at 75-91.

From this testimony, one could reasonably infer Mr. Cingari did not receive all of the scheme's criminal proceeds, as such a distribution would be greatly disproportionate to his role in the acquisition of those proceeds. And under the "reasonable probability of a different result formulation," *Rodriguez*, 398 F.3d at 1299, this discrepancy sufficiently shows that if the trial court had made factual findings concerning how much proceeds Mr. and Mrs. Cingari individually obtained, it was at least *reasonably probable* it would not have found Mr. Cingari had received all of the criminal proceeds while Mrs. Cingari received none.

Accordingly, because the joint and several money judgment prejudiced Mr. Cingari and affected his substantial rights, his challenge to that judgment satisfies the third prong of the plain-error test.

3. The District Court's forfeiture error seriously affected the fairness, integrity, and public reputation of the judicial proceedings

The Government's argument that Mr. Cingari cannot meet the fourth prong of the plain-error test is premised exclusively on the Cingaris being married coconspirators and the Government's assertion that they jointly received the scheme's proceeds. *See* U.S. Br. 25-26. Under the circumstances of this case, however, the District Court's forfeiture error (*see supra* Argument II.B.1) seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

The District Court never expressly found the Cingaris jointly received the scheme's proceeds (*see supra* Argument II.B.1), and there was evidence showing they did not treat the scheme's proceeds as jointly acquired marital property (*see supra* Argument II.B.2). Moreover, although the District Court found Mr. Cingari did more than grab lunch and answer the door, and thus denied his request for a minor-role re-

duction, it did remark "that perhaps he didn't participate in the completion of as many applications" as Mrs. Cingari. Doc. 347 at 142-43.

Taken together, this evidence and the court's remarks paint a picture of Mr. Cingari's participation in the offense and his likely share in the criminal proceeds that is comparable to that of the hypothetical college student who delivered marijuana in *Honeycutt*. *See* 137 S. Ct. at 1631-32 (explaining joint and several forfeiture liability would hold a student who earned $3,600 delivering marijuana financially liable to the same extent as the mastermind distributor whose criminal profits totaled $3,000,000); Domenico Br. 32-33; U.S. Br. 25-26. As the Government correctly observes, "*Honeycutt* 'protects incidental figures from forfeiture of amounts far beyond what would be justified by their role in the offense.'" U.S. Br. 26 (quoting *SEC* v. *Metter*, 706 Fed. App'x 699, 702 n.2 (2d Cir. 2017)). Hence, Mr. Cingari is the exact type of defendant *Honeycutt* endeavors to protect.

Ultimately, because the joint and several money judgment requires Mr. Cingari to pay an amount that is beyond the proceeds he personally obtained and is disproportionate to his criminal conduct relative to Mrs. Cingari's, the money judgment seriously affected the fair-

ness, integrity, and public reputation of the judicial proceedings.[12] Other courts that have reviewed challenges to joint and several money judgments for plain error have reached the same conclusion. *See, e.g.*, *United States* v. *Sanjar*, 876 F.3d 725, 750 (5th Cir. 2017) (joint and several § 982 forfeiture was plainly erroneous); *Elliot*, 876 F.3d at 868 (noting it had "the power to correct plain error" and remanding for a re-calculation of forfeiture liability as to a defendant who had failed to raise the forfeiture issue in his appellate briefing).

[12] The Government argues the money judgment was "not manifestly unjust." U.S. Br. 25. To the extent that argument means any forfeiture error in this case would not "'shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge,'" *Rosales-Mireles* v. *United States*, 2018 WL 3013806, at *6 (U.S. June 18, 2018) (citation omitted), it misperceives the plain-error test's fourth prong, *see id.* at *12 (holding the Fifth Circuit applied an "unduly burdensome articulation" of the plain-error test's fourth prong when reviewing an unpreserved guideline-calculation error). Here, establishing the District Court's plain forfeiture error affected Mr. Cingari's substantial rights is sufficient for him to carry his burden under the plain-error test's fourth prong. *See id.* ("In the ordinary case … the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings."). As such, Mr. Cingari's challenge to the joint and several money judgment meets the plain-error test regardless whether the dichotomy between his role in the offense and his forfeiture liability was independently sufficient to establish the fourth prong.

* * *

Accordingly, Mr. Cingari's challenge to the joint and several forfeiture money judgment survives plain error review.[13]

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

[13] In its brief, the Government does not respond to Mr. Cingari's argument that "if the Court vacates the forfeiture money judgment, it should also vacate the order for forfeiture of a substitute asset." Domenico Br. 35. Therefore, it has waived any arguments to the contrary. *See supra* Argument II.B.1.

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 5,334 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.

June 21, 2018

/s/ Thomas Burns
Thomas A. Burns

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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 21st day of June, 2018, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 21st day of June, 2018, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 21st day of June, 2018, to:

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