No. 18-11486-GG

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ENESHIA CARLYLE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case Nos. 8:14-cr-123 & 8:14-mj-1597, Hon. Charlene E. Honeywell

APPELLANT'S BRIEF OF ENESHIA CARLYLE

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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. Adams, Natalie Hirt – Assistant United States Attorney;
2. Alvarado, Teodoro – Victim;
3. Bentley, A. Lee, III – Former United States Attorney;
4. Bodnar, Roberta J. – Assistant United States Attorney, Appellate Division;
5. Broderick, Jeanette – Victim;
6. Burns, P.A. – Appellate counsel for Eneshia Carlyle;
7. Burns, Thomas A. – Appellate counsel for Eneshia Carlyle;
8. Carlyle, Eneshia – Defendant-Appellant;
9. Chapa Lopez, Maria – United States Attorney;
10. Ciaravella, Mark – Trial counsel for James Lee Cobb, III;
11. Cobb, III, James Lee – Defendant;
12. Culver, Jeffrey – Victim;
13. Cummings, John – Victim;
14. Gallant, Timothy – Victim;
15. Gershow, Holly Lynn – Assistant United States Attorney, Appellate Division;
16. Goker, Arda – Appellate counsel for Eneshia Carlyle;

17. Harris, Mary – Victim;

18. Herren, Connie – Victim;

19. Holcombe, James – Victim;

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

21. Hunt, Judy K. – Appellate counsel for Defendant James Lee Cobb, III in Case No. 15-12817;

22. Internal Revenue Service – Victim;

23. Larson, Virgil – Victim;

24. Loper, Timothy P. – Department of Justice Attorney;

25. Mark W. Ciaravella, P.A. – Trial counsel for James Lee Cobb, III;

26. Mathias, Rose – Victim;

27. Mauro, Florence – Victim;

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

29. Nebesky, Suzanne C. – Assistant United States Attorney;

30. Palermo, Thomas Nelson – Assistant United States Attorney;

31. Phillips, William – Victim;

32. Pizzo, Hon. Mark A. – United States Magistrate Judge;

33. Reynolds, Harold – Victim;

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

35. Rothstein-Youakim, Susan Hollis – Former Assistant United States Attorney, Appellate Division (now District Judge for the Second District Court of Appeal for the State of Florida);

36. Schachter, Ori – Victim;

37. Trombley & Hanes, P.A. – Trial counsel for Eneshia Carlyle;

38. Trombley, Wesley E. – Trial counsel for Eneshia Carlyle;

39. Verbiest, Maria – Victim.

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

September 21, 2018

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant, Eneshia Carlyle, requests oral argument. This is the second time since her original sentencing that she has called upon this Court to vacate an improper forfeiture award. Her first appeal succeeded, and this Court remanded for the District Court to reconsider the original forfeiture in light of *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017). This appeal, in turn, seeks review of the District Court's interpretation and application of *Honeycutt* on remand. Crucially, it requires the Court to construe *Honeycutt* under a novel set of factual and procedural circumstances. It also requires the Court to determine if, by misinterpreting and misapplying *Honeycutt,* the District Court imposed an amended forfeiture money judgment that violated the Excessive Fines Clause. Oral argument will assist the Court.

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STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Carlyle was indicted (Doc. 37) 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 amended forfeiture money judgment on April 9, 2018 (Doc. 355), which Carlyle timely appealed on April 10, 2018 (Doc. 356).

STATEMENT OF THE ISSUE

Did the District Court misinterpret *Honeycutt* v. *United States* and, as a result, impose a forfeiture money judgment that violated the Excessive Fines Clause and exceeded the statutory maximum?

STATEMENT OF THE CASE

This appeal concerns the forfeiture of proceeds derived from tax-refund fraud, which is sometimes called Stolen Identity Refund Fraud, or SIRF.

Course of proceedings

In a superseding indictment, a grand jury charged Carlyle with numerous criminal offenses relating to her role in a wire-fraud scheme her codefendant-husband, James Cobb, had orchestrated:[1]

> **Count One:** Conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349;
>
> **Counts Two Through Five:** Wire fraud in violation of 18 U.S.C. § 1343 and 2;
>
> **Counts Six Through Nine:** Aggravated identity theft in violation of 18 U.S.C. § 1028A and 2.

[1] Cobb received a four-level sentencing enhancement for being the scheme's "organizer or leader." *United States* v. *Cobb*, 842 F.3d 1213, 1216 (11th Cir. 2016).

Doc. 37 at 1-6. Additionally, the superseding indictment sought forfeiture from Carlyle of, among other things, a money judgment of "at least" $610,000 and a 2006 red Mercedes-Benz. Doc. 37 at 8.

Pursuant to a plea agreement with a sentence-appeal waiver (Doc. 94), Carlyle pled guilty to Count Two (a substantive count of wire fraud, not conspiracy) and Count Six (aggravated identity theft) (Docs. 112; 215). Thereafter, the Government sought a forfeiture money judgment in the amount of $1,820,759, which represented the wire-fraud scheme's proceeds. Docs. 120; 141.

To justify that figure, the Government relied on Internal Revenue Service ("IRS") Special Agent Glenn Hayag's affidavit (Doc. 120.1), which explained how the IRS had calculated the scheme's proceeds. Carlyle objected to the proposed forfeiture. Doc 149 at 1. She argued the IRS's calculation methodology was insufficient for the Government to carry its burden of proving the scheme had yielded $1,820,759 in proceeds. Doc. 149 at 1-2. She also argued a money judgment in that amount would violate the Eighth Amendment's Excessive Fines Clause. Doc. 149 at 3-4.

After hearing Agent Hayag's testimony and counsels' arguments at sentencing, the District Court found the wire-fraud scheme had obtained $1,820,759 in proceeds. Doc. 244 at 103. Accordingly, it entered a $1,820,759 forfeiture money judgment, which held Carlyle and Cobb jointly and severally liable for the scheme's proceeds. Docs. 187; 189 at 5-7. It also ordered Carlyle to forfeit her Mercedes. Docs. 189 at 5-7; 244 at 103; 265 at 1-2. The District Court then sentenced her to a 114-month below-guidelines prison term for Count Two and a consecutive, 24-month term for Count Six. Doc. 244 at 97-98.

Notwithstanding the plea agreement's sentence-appeal waiver, Carlyle appealed the forfeiture money judgment. Doc. 194. After briefing concluded but before this Court issued an opinion, the Supreme Court decided *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017), which addressed joint and several forfeiture liability.

Carlyle brought *Honeycutt* to this Court's attention by filing a notice of supplemental authority. *See* Carlyle Fed. R. App. P. 28(j) Letter (filed June 6, 2017). In response, the Government conceded that, under *Honeycutt*, Carlyle and Cobb could not be held jointly and severally liable for the wire-fraud scheme's proceeds. *See* U.S. Fed. R. App. P. 28(j)

Letter (filed September 18, 2017). For that reason, the Government asked this Court to vacate the forfeiture money judgment and remand for the District Court to enter a money judgment holding Carlyle liable for only the proceeds she had personally obtained. *See id.* This Court obliged. Docs. 315; 321.

On remand, the Government sought an amended forfeiture money judgment. Doc. 334. Carlyle opposed. Docs. 335; 347. The District Court convened a hearing (Doc. 360) at which Agent Hayag testified Carlyle had personally obtained $1,457,293.95 in proceeds. *See* Docs. 360 at 9-108; U.S. Forfeiture Ex. 1. In contrast, Carlyle admitted to personally obtaining and benefitting from only $100,000. Doc. 360 at 108-09, 119. The District Court accepted Agent Hayag's testimony (Doc. 360 at 119-20) and entered a $1,457,293.95 amended forfeiture money judgment against Carlyle (Doc. 355).

Instead of stating the forfeiture was joint and several with Cobb's, the amended forfeiture money judgment stated:

> The value of any assets or proceeds forfeited from Co-Defendant James Cobb shall be offset against the Defendant's forfeiture liability. In no event shall the United States collect more than $1,820,759.00 from the Defendants, collectively, towards forfeiture ordered in this case.

Doc. 355 at 7-8. Once again, Carlyle appealed. Doc. 356.

Statement of facts

A. Carlyle's guilty plea

1. The wire-fraud scheme

From sometime in 2011 through November 2013, Carlyle, Cobb, and others used stolen personally identifying information ("PII") to fraudulently acquire tax refunds by filing false tax returns. Doc. 94 at 17. The PII included names, social security numbers, and birthdates. Doc. 94 at 17-18. It had been stolen from various healthcare providers across several states. *See* Doc. 94 at 17-18.

Using laptops and hotspot devices, Carlyle and Cobb electronically filed the false tax returns via the Internet. Doc. 94 at 17. They arranged for the refunds those returns generated to be loaded onto prepaid debit cards and mailed to them. Docs. 94 at 18; 244 at 23. The plan worked, at least initially, and they obtained the cards. Doc. 94 at 18.

In October 2013, law enforcement conducted a trash pull outside Carlyle and Cobb's residence and found PII, prepaid debit cards, and a Walmart receipt. Doc. 94 at 18. They used that information to secure a warrant to search the residence. Doc. 94 at 18. There, they "recovered a

massive amount of SIRF-related evidence," including PII, "debit cards, computers, and money." Doc. 94 at 19. They also found Carlyle's purse, which contained keys to two storage units. Doc. 94 at 19.

The first unit (B47) contained trash bags filled with SIRF-related evidence, such as PII and debit cards. Doc. 94 at 19. The second unit (A16) contained a denim purse, a cheetah-print purse, and Carlyle's Mercedes. Docs. 94 at 19; 244 at 21-22. Inside the Mercedes's trunk were several debit cards. Doc. 94 at 19. The purses contained PII, debit cards, and handwritten notes confirming the receipt of fraudulent refunds. Doc. 244 at 21-22, 41-42.[2]

The debit cards found in the residence and storage units had been opened in other people's names (*i.e.*, not Carlyle's or Cobb's) and loaded with SIRF proceeds. *See* Doc. 94 at 20-21. Many of them "had direct connections to Carlyle." Doc. 94 at 20.

For example, Carlyle had used one of the cards officers found in the residence to make four back-to-back ATM withdrawals. *See* Doc. 94

[2] At sentencing, Agent Hayag testified only Carlyle had access to the storage units. Doc. 244 at 44.

at 20.[3] Additionally, Carlyle had accessed three cards found in storage unit B47 "multiple times via telephone." Doc. 94 at 21-23. During one of those calls, she attempted to unblock funds the card company had frozen "due to fraudulent activity." Doc. 94 at 21. Because she could not answer the security questions, however, "she became flustered and … handed the phone to Cobb for him to take over the call." Doc. 94 at 21-22. This sequence of events "appear[ed] to demonstrate" Cobb had a greater role in the offense than Carlyle. Doc. 94 at 22.

Overall, law enforcement recovered more than 7,000 pieces of PII from the residence and storage units combined. Docs. 94 at 23.

2. The plea agreement

Through the plea agreement's forfeiture provision, Carlyle agreed to forfeit her Mercedes. Doc. 94 at 8. She also agreed to the entry of a forfeiture money judgment of "not less than $610,000.00," which, using the passive voice, "represent[ed] the amount of proceeds obtained" by the wire-fraud scheme. Doc. 94 at 8. Additionally, the agreement's forfeiture provision required Carlyle to waive any appellate challenges to

[3] The ATM surveillance footage showed Carlyle driving her red Mercedes while making those withdrawals. Doc. 94 at 21.

the forfeiture, including that the forfeiture constituted an excessive fine. Doc. 94 at 8-9.

Moreover, a separate provision of the plea agreement required Carlyle to waive her right to appeal her sentence. Doc. 94 at 14. But it provided three exceptions. Doc. 94 at 14. Namely, Carlyle could appeal her sentence if (1) it exceeded the applicable guideline range "as determined by the [District] Court," (2) it "exceed[ed] the statutory maximum penalty," or (3) it "violate[d] the Eighth Amendment." Doc. 94 at 14.

3. The plea hearing

At the plea hearing, the prosecutor stated the plea agreement's factual basis in open court. Doc. 215 at 33-37. Carlyle confirmed she heard, understood, and agreed with the factual basis. Doc. 215 at 37-39. She then pled guilty to Count Two (wire fraud) and Count Six (aggravated identity theft) (Doc. 215). Doc. 215 at 39. The Magistrate Judge recommended acceptance of her plea. Doc. 96. The District Court agreed and adjudicated her guilty. Doc. 112.

B. Sentencing

Before sentencing, Probation prepared a Pre-Sentence Investigation Report ("PSR") (Doc. S159). Because Carlyle had pleaded guilty to

wire fraud, the PSR calculated, pursuant to U.S.S.G. § 2B1.1(a)(1), a base offense level of 7. Doc. S159 ¶ 38. After adding several enhancements[4] and concluding Carlyle was not entitled to an acceptance-of-responsibility downward adjustment (Doc. S159 ¶ 48) or a minor-role reduction (Doc. S159 ¶ 44), Probation determined her total offense level was 37 (Doc. S159 ¶ 49). As to criminal history, the PSR scored Carlyle at category I. Doc. S159 ¶ 57.

Based on Carlyle's offense level and criminal history, the PSR calculated a guideline imprisonment range of 210-262 months. *See* Doc. S159 ¶ 98. But, because wire fraud carries a statutory maximum sentence of 20 years, the guideline imprisonment range was actually 210-240 months. Doc. S159 ¶ 98 (citing U.S.S.G. § 5G1.1(c)(1)). Additionally, the PSR calculated a consecutive two-year guideline sentence for Carlyle's aggravated identity theft conviction. Doc. S159 ¶ 98. Carlyle objected to, among other things, the PSR's failure to provide a downward

[4] The PSR increased Carlyle's base offense level by: 18 levels because the scheme's intended loss was $5,613,549 (*see* U.S.S.G. § 2B1.1(b)(1)(J); Doc. S159 ¶ 39); 6 levels because the scheme involved more than 350 victims (*see* U.S.S.G. § 2B1.1(b)(2); Doc. S159 ¶ 40); 2 levels because the scheme involved sophisticated means (*see* U.S.S.G. § 2B1.1(b)(10); Doc. S159 ¶ 41); 2 levels because the scheme involved identity theft (*see* U.S.S.G. § 2B1.1(b)(11)(B)(i); Doc. S159 ¶ 42); 2 levels for obstructing justice (*see* U.S.S.G. § 3C1.1; Doc. S159 ¶ 45).

adjustment for her minor role in the scheme. *See* Docs. S159 at 30-32, ¶ 44; 244 at 67-69.

In that regard, at sentencing, defense counsel argued the plea agreement "specifically contemplated" a minor-role reduction. Doc. 244 at 68; *see also* Doc. 94 at 22 (stating in plea agreement that Cobb's taking control of the phone call with the debit card company "appear[ed] to demonstrate the difference in role between Cobb and Carlyle, with Carlyle having a lesser role than Cobb"). Furthermore, defense counsel explained Cobb was the investigation's primary target when law enforcement executed the search warrant, whereas Carlyle was initially just an "afterthought." Doc. 244 at 68. Indeed, all the discovery defense counsel had received suggested Carlyle had played a minor role. *See* Doc. 244 at 69. That is, Cobb controlled the money that came in from the scheme, Cobb purchased a home in his own name, Cobb bought the Mercedes and provided it to Carlyle as a gift, and the primary inculpatory witness statement was directly related to Cobb and minimally related to Carlyle. *See* Doc. 244 at 69.

In response, the Government argued Carlyle had not established her minor role by a preponderance of the evidence, because "[s]he had

her own storage unit information." Doc. 244 at 72. It noted Carlyle's role was not fully "understood until after the analysis of the search-warrant evidence." Doc. 244 at 73. The Government also claimed recordings of jail phone calls between Cobb and Carlyle, which were not in evidence, showed she was not a minor participant. Doc. 244 at 73-74.[5]

The District Court overruled Carlyle's objection to the PSR's failure to provide a minor-role reduction and most of her other PSR objections. Doc. 244 at 82-86. Nevertheless, it sustained her objections to the obstruction-of-justice enhancement and the absence of an acceptance-of-responsibility reduction. Doc. 244 at 84-86. This yielded a total offense level of 33. Doc. 244 at 88. The District Court then adopted the PSR's factual findings. Doc. 244 at 88. It explained the new guideline range was 135-168 months' imprisonment for Count Two, to be followed by a two-year consecutive sentence for Count Six. Doc. 244 at 88-89.

Carlyle requested leniency (Doc. 244 at 90-91), and the Government suggested a term of 144 months (Doc. 244 at 91-95). The District Court sentenced Carlyle to 138 months' imprisonment, which included 114 months for Count Two to run consecutive to 24 months for Count

[5] The IRS agent testified he viewed Carlyle and Cobb as equally culpable. Doc. 244 at 27.

Six. Doc. 244 at 98. As such, Carlyle received a sentence that was "about half" as severe as Cobb's. Doc. 244 at 97. The District Court explained this sentencing disparity "account[ed] for the fact that [Carlyle] [is] and [was] a victim of Mr. Cobb's" and had "acted based upon his control over [her]." Doc. 244 at 97.

C. The initial forfeiture money judgment

Although the superseding indictment only sought forfeiture of a money judgment of "at least" $610,000 (Doc. 37 at 8), the Government later moved for a $1,820,759 money judgment (Doc. 141 at 1). This figure, which was nearly triple the amount originally sought, "represent[ed] the proceeds obtained [from] the wire fraud scheme." Doc. 141 at 1.[6]

In that regard, the IRS determined that, of the more than 7,000 pieces of PII found during the searches, 5,811 had been used to file false returns during the conspiracy's timeframe. Doc. 244 at 17-18; U.S. Sentencing Ex. 2. Those returns claimed $20,162,148 in refunds, but the IRS paid out only $12,407,679. Doc. 244 at 19-20; U.S. Sentencing Ex. 2.

[6] The Government sought a forfeiture from Carlyle in the form a substitute money judgment because, other than the Mercedes, it "could not locate specific property" that "constitut[ed] or [was derived] from" the scheme's illegal proceeds. Doc. 141 at 5.

To deduce the amount of proceeds attributable to Carlyle and Cobb, the IRS excluded from consideration any refund it had sent to a brick-and-mortar bank, rather than to a debit card, and any return that had been prepared by a paid tax preparer. Doc. 244 at 18-19. Then, taking into account returns that displayed a pattern of similar mailing, email, and IP addresses, it linked 805 fraudulent returns to Carlyle and Cobb's scheme. Doc. 244 at 18-19.

Carlyle argued the IRS's calculation methodology was insufficient to support a $1,820,759 forfeiture. Doc. 149 at 1-2. Relying on the Government's description of the Tampa area as "an epicenter of SIRF" (*see* Doc. 120.1), she contended it was "more probable than not that the lists" of PII on which the IRS had based its calculation "were a common commodity sold and shared among" fraudsters in Tampa and elsewhere (Doc. 149 at 2). As such, Carlyle pointed out that anyone could have used the PII, not just she and Cobb. Doc. 149 at 1; *see also* Doc. 244 at 37 (Agent Hayag confirming the 7,000 pieces of PII "could have been" "used by various and multiple participants throughout Tampa"). For that reason, she asserted the Government had based its loss calculation

"on inferential leaps," and the money judgment it sought thus did not accurately reflect the scheme's proceeds. Doc. 149 at 1.

Specifically, Carlyle asserted she had never "personally received, benefited from, or obtained" proceeds totaling $1,820,759. Doc. 149 at 2-3. Rather, she claimed the evidence showed: there were at least four videos of Cobb making ATM withdrawals and only one video of Carlyle making ATM withdrawals (Doc. 244 at 44-46); there was "not very much" money in Carlyle's personal bank accounts (Doc. 244 at 35-36); and she had a negative net worth of -$48,667 (Doc. S159 ¶ 96).[7] Furthermore, she pointed out the Government could not determine how many of the debit cards and email accounts the IRS had analyzed had been opened by her and not by somebody else. Doc. 244 at 34. The IRS investigation also did not conclude Carlyle ever had access to WiFi. *See* Doc. 244 at 34. It did, however, reveal the hotspot device in Carlyle's home was registered to Cobb's relative, not Carlyle. Doc. 244 at 34.

Ultimately, because of the lack of factual support for the IRS's calculation, particularly with respect to the amount of proceeds Carlyle had personally received, she argued a $1,820,759 forfeiture would be

[7] The District Court adopted the PSR's factual findings. Doc. 244 at 88.

grossly disproportional to her offense and "to any amount contemplated in her plea agreement." Doc. 149 at 3. She therefore claimed a forfeiture in that amount would violate the Eighth Amendment's Excessive Fines Clause. Doc. 149 at 3.

The District Court disagreed and entered a $1,820,759 forfeiture money judgment that held Carlyle and Cobb jointly and severally liable for the scheme's proceeds. Docs. 244 at 103; 187 at 2; 189 at 5-8. It also ordered Carlyle to forfeit her Mercedes. Docs. 244 at 103; 187; 189 at 5-8; 265. [8]

D. Carlyle's first appeal

Carlyle appealed the forfeiture money judgment. Doc. 194. Initially, counsel filed a motion to withdraw and submitted a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967). *See United States* v. *Carlyle*, 712 Fed. App'x 862, 863 (11th Cir. 2017); Doc. 315 at 4. "This Court denied counsel's *Anders* motion and ordered further briefing as to whether

[8] The District Court entered the forfeiture money judgment and ordered Carlyle to forfeit her Mercedes pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). Doc. 187 at 2. In relevant part, § 981(a)(1)(C) allows the Government to seek civil forfeiture of "[a]ny property … which constitutes or is derived from" wire-fraud proceeds. In turn, § 2461(c) makes any property that is civilly forfeitable under § 981 subject to criminal forfeiture.

the forfeiture money judgment violated the Eighth Amendment's Excessive Fines Clause." *Carlyle*, 712 Fed. App'x at 863; Doc. 315 at 4; Order of July 12, 2016 Denying Counsel's Motion To Withdraw.

Obeying that directive, Carlyle, by and through counsel, argued the $1,820,759 forfeiture violated the Excessive Fines Clause because it was grossly disproportional to the gravity of her offenses. *See* Carlyle October 25, 2016 Br. 19, 24-39.

Specifically, she explained the money judgment had required her to forfeit "triple the amount" of proceeds that, according to her admission (*see* Doc. 94 at 8), the scheme had obtained (Carlyle October 25, 2016 Br. 19, 33-38).[9] Additionally, she contended the forfeiture was

[9] She also asserted the money judgment "exceeded the statutory maximum fine by 50 percent" and "exceeded the maximum guideline fine by 1,000 percent." Carlyle October 25, 2016 Br. 19, 33-38. Those arguments were founded on her challenge to the factual basis of the IRS's loss calculation. *See* Carlyle October 25, 2016 Br. 24-25). But she withdrew her challenge to the loss calculation's factual basis after this Court in Cobb's final-judgment appeal affirmed the District Court's finding that the scheme's proceeds totaled $1,820,759. *See* Carlyle March 13, 2017 Br. 2-3; *United States* v. *Cobb*, 842 F.3d 1213, 1220-21 (11th Cir. 2016); *United States* v. *Carlyle*, 712 Fed. App'x 862, 863 n.2 (11th Cir. 2017). Notwithstanding this prior *factual* concession about the loss caused *by the scheme*, in this appeal, Carlyle challenges both the District Court's *legal rulings* that led it conclude (1) *she* had personally obtained $1,457,293.95 in proceeds, *see infra* Argument I.A., and (2) the amended forfeiture was not an excessive fine in violation of the Exces-

grossly disproportional to the limited extent of her participation in the wire-fraud scheme. Carlyle October 25, 2016 Br. 30-32, 37-38. Most importantly, she argued the District Court erred in failing to determine how much, if any, of the scheme's $1,820,759 proceeds she had benefited from or personally obtained. Carlyle October 25, 2016 Br. 25-32. And because she had admitted in her plea agreement that the scheme obtained only a fraction of that amount, she claimed the $1,820,759 forfeiture money judgment was an excessive fine. Carlyle October 25, 2016 Br. 25-32, 37-39.

In response, the Government admitted, "Carlyle's role in the tax-fraud scheme was not as great as her husband's" but argued she had "still played a key part," and the money judgment was therefore not grossly disproportional to her offenses (U.S. February 13, 2017 Br. 7-22). It also posited that, irrespective of Carlyle's role, "a forfeiture money judgment in the amount of the proceeds of an offense cannot be grossly disproportionate to that offense." U.S. February 13, 2017 Br. 8, 16-19. Ultimately, it argued it did not need to prove Carlyle personally obtained any proceeds and that the District Court had correctly held

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sive Fines Clause, the statutory maximum penalty, or the guideline penalty, *see infra* Argument I.B.

Carlyle and Cobb jointly and severally liable for the scheme's entire proceeds. U.S. February 13, 2017 Br. 11-16.

Carlyle's reply brief homed in on the joint and several nature of the money judgment. Carlyle March 13, 2017 Br. 1-15. She explained, "the forfeiture money judgment against [her] was an excessive fine because it held her jointly and severally liable for proceeds she did not admit to possessing or receiving." Carlyle March 13, 2017 Br. 1.

After briefing concluded, Carlyle filed a notice of supplemental authority, which notified this Court of the United States Supreme Court's intervening decision in *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1633, 1635 (2017) (prohibiting joint and several forfeiture liability for coconspirators under 21 U.S.C. § 853, a statute relating to serious drug offenses). *See* Carlyle Fed. R. App. P. 28(j) Letter. The Government agreed that, because the forfeiture money judgment held Carlyle and Cobb jointly and severally liable for the scheme's proceeds, it was improper under *Honeycutt*. *See* U.S. Fed. R. App. P. 28(j) Letter (filed June 6, 2017). Accordingly, the Government asked this Court to vacate the money judgment and remand for the District Court to enter an amended money judgment requiring Carlyle to forfeit only the proceeds she

had personally obtained. U.S. Fed. R. App. P. 28(j) Letter (filed September 18, 2017).

In an unpublished opinion, this Court did just that. *See United States* v. *Carlyle*, Fed. App'x 862, 865 (11th Cir. 2017) (vacating forfeiture judgment and remanding for the District Court to determine *Honeycutt*'s applicability in the first instance); Doc. 315 at 7. In remanding, this Court reasoned *Honeycutt* was likely applicable to Carlyle's forfeiture, because 21 U.S.C. § 853, the forfeiture statute *Honeycutt* dealt with, and 18 U.S.C. § 981(a)(1)(C), the forfeiture statute relevant here, were "largely the same in terms of their pertinent language." *Carlyle*, 712 Fed. App'x at 864-65 (comparing 21 U.S.C. § 853(a)(1) ("'[a]ny person convicted of a violation ... shall forfeit ... any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation") with 18 U.S.C. § 981(a)(1)(C) ("The following property is subject to forfeiture to the United States ... Any property, real or person, which constitutes or is derived from proceeds traceable to a violation.")).

E. The forfeiture proceedings on remand

On remand, the Government moved for an amended forfeiture money judgment. Doc. 334.

1. The amended forfeiture money judgment papers

The Government's forfeiture motion limited the amount it sought to $610,000, which it contended Carlyle "ha[d] already admitted to receiving as a result of the wire fraud scheme." Doc. 334 at 1; *see also* Doc. 334 at 5-7. It asserted Carlyle's admission made it unnecessary for the District Court to hold an evidentiary hearing to determine the amount of proceeds she had personally obtained. Doc. 334 at 1, 4. But it warned that, if the District Court were to hold an evidentiary hearing, it would present evidence showing Carlyle had personally obtained much more than $610,000. Doc. 334 at 1 n.1. And citing Carlyle's plea agreement, her appellant's brief, her reply brief, and this Court's opinion, the Government claimed the doctrine of judicial estoppel barred her from arguing on remand that she had personally obtained less than $610,000. Doc. 344 at 5-7.

In response, Carlyle argued the Government had misinterpreted her statements in the District Court and this Court and had misunder-

stood the doctrine of judicial estoppel. Doc. 335 at 1. She explained that, in her plea agreement, she "merely admitted … the scheme charged in Count Two (which charged both [her] and [Cobb]) obtained at least $610,000." Doc. 335 at 3. Similarly, she noted the statement in her appellant's brief "that a $1.8 million forfeiture judgment was 'triple the amount attributable to her conduct'" "did not admit she personally obtained $610,000." Doc. 335 at 3-4. She also explained that, in context, the statements in her appellant's brief and reply brief that referenced her receipt of proceeds "must be understood as asserting the *scheme* obtained $610,000—not that *she personally* obtained $610,000." Doc. 335 at 4 (emphases added).

Hence, she argued the doctrine of judicial estoppel was inapplicable because she was not advancing a position that was inconsistent with her earlier position, and, even if there were an inconsistency, it was inadvertent and could not create the perception that the District Court or this Court had been misled. Doc. 335 at 4. Nor could it give her an unfair advantage, because the Government was free to prove Carlyle had personally obtained more than $610,000. Doc. 335 at 5. She also contended that, if the Government were put to its burden of proof at an ev-

identiary hearing (Doc. 335 at 6), it would be able to prove she had personally obtained only $100,000 (Doc. 335 at 2).

2. The forfeiture hearing on remand

Before the District Court held the forfeiture hearing (Doc. 360), Carlyle filed a memorandum of law clarifying the nature of the evidentiary inquiry *Honeycutt* required (Doc. 347). She explained that, under *Honeycutt*, in determining the amount of proceeds she had personally obtained, the District Court needed to "look to the amount she personally benefited from or otherwise acquired for her own personal use, not the amount she may have, at one time, possessed." Doc. 347 at 3.

At the hearing, Agent Hayag confirmed the wire-fraud scheme had generated $1,820,759. *See* Doc. 360 at 96. He also testified all the SIRF-funded debit cards that law enforcement found in the marital residence belonged to Cobb (Doc. 360 at 100), there was roughly the same amount of debit cards in the residence and the storage units (Doc. 360 at 42), Cobb and Carlyle, to a certain extent, ran separate tax-fraud businesses (Doc. 360 at 98), and he could not determine how many of the 805 false tax returns that went into the loss calculation Carlyle herself had filed (Doc. 360 at 100). Nevertheless, despite the plea agree-

ment stating Carlyle had played a lesser role than Cobb, Agent Hayag maintained they were "equally responsible." Doc. 360 at 96.

He also testified about the methodology he had used to determine the amount of wire-fraud proceeds Carlyle had personally obtained. Doc. 260 at 9-128. First, he determined how much the IRS had paid out on false returns that were connected to the PII found in Carlyle's storage units. Doc. 360 at 11, 28-30, 95; U.S. Forfeiture Ex. 1. He then pared down that figure by counting in only the refunds that had been generated by Carlyle and Cobb's scheme. *See* Doc. 360 at 28-38; U.S. Forfeiture Exs. 1, 2. According to his calculation, $1,457,293.95 "was obtained using the PII and the records reflected in Miss Carlyle's storage unit[s]." Doc. 360 at 95; *see also* Doc. 360 at 102-03; U.S. Forfeiture Ex. 1. He thus concluded she, and not Cobb, had personally obtained $1,457,293.95 in wire-fraud proceeds. Doc. 360 at 29, 38, 95, 120; *see also* U.S. Forfeiture Ex. 1.

In determining how much in proceeds Carlyle had personally obtained, Agent Hayag did not "even look at" the PII found in the residence. Doc. 360 at 106. He stated that, if he had gone back and added the proceeds associated with that PII to the $1,457,293.95 he had at-

tributed to Carlyle, he could have come up with a figure that exceeded $1,820,759 (the scheme's total proceeds). *See* Doc. 360 at 103-07. In other words, he believed that, although the scheme netted about $1.8 million and Carlyle had supposedly personally obtained about $1.4 million, Cobb could have obtained more than $400,000 (the difference between $1.8 million and $1.4 million). *See* Doc 360 at 103-07. Agent Hayag's calculation thus presumed Carlyle and Cobb could simultaneously personally obtain the same illicit dollar (*i.e.*, he did not have to attribute each dollar to *either* Cobb *or* Carlyle). Doc. 360 at 103-05.

In contrast, Carlyle stipulated she had personally obtained only $100,000 from the scheme. Doc. 360 at 108-09.

In closing argument, the Government argued all "*Honeycutt* opposes is vicarious liability of minor participants." Doc. 360 at 109. It then claimed that, because Carlyle and Cobb had jointly obtained the scheme's entire proceeds, it could have sought a money judgment for $1,820,759 (the scheme's total proceeds) against Carlyle alone. *See* Doc. 360 at 109-10. But it did not request such an extravagant forfeiture. Doc. 360 at 109-10. Rather, it tried to divide up a "joint activity," attributed $1,457,293.95 in proceeds to Carlyle, and asked the District

Court to enter against her a money judgment in that amount. Doc. 360 at 109-110; U.S. Forfeiture Ex. 1.

In contrast, Carlyle argued that, under *Honeycutt*, when a district court is determining the amount of illicit proceeds a codefendant or co-conspirator had personally obtained, it must "assign each dollar to each participant in the crime." Doc. 360 at 110. In other words, the defense viewed *Honeycutt* as requiring district courts to treat a scheme's total proceeds like a pie that must be divided amongst codefendants. Doc. 360 at 110-12, 114-19; *see also* Doc. 360 at 117 ("The total pie is 1.8 and it has to be split up between the two of them."). That is, Carlyle argued *Honeycutt* prohibits district courts from serving multiple codefendants the same slice. *See* Doc. 360 at 110-12, 114-19.

The District Court disagreed. Doc. 360 at 111-12. It interpreted *Honeycutt* as providing for "circumstances under which" two codefendants could "both personally obtain[] goods … as a result of the crime." Doc. 360 at 111. It explained that, under such circumstances, each defendant could properly be ordered to forfeit every jointly obtained illicit dollar. Doc. 360 at 111, 114-15. It further opined that, under such a liability scheme, it would be appropriate for the sum of the defendants' for-

feiture judgments to exceed the amount of the scheme's total proceeds. *See* Doc. 360 at 111, 114-15.

Additionally, the District Court ruled that, in determining how much in proceeds Carlyle had personally obtained, it could not consider how much Cobb had personally obtained, because the Government had presented evidence concerning only the proceeds derived from PII found in Carlyle's storage units. Doc. 360 at 117.

The District Court also rejected the notion that Carlyle could be likened to a low-level drug dealer in a scheme where that dealer temporarily holds drug proceeds that are ultimately obtained by a mastermind trafficker. Doc. 360 at 117-18. Indeed, it stated there was no evidence showing Carlyle temporarily held proceeds Cobb ultimately obtained. Doc. 360 at 118. In response, Carlyle reminded the District Court that Agent Hayag had testified he did not know who had submitted which returns. Doc. 360 at 118. Ultimately, Carlyle contended that, apart from her stipulation to having received $100,000, there was no evidence showing she had personally obtained or benefited from any of the SIRF proceeds. Doc. 118-19.

3. The amended forfeiture money judgment

The District Court concluded *Honeycutt* applied to Carlyle's 18 U.S.C. § 981(a)(1)(C) forfeiture. Doc. 355 at 1, 6. Additionally, it found the Government "ha[d] established, by a preponderance of the evidence, that Carlyle, within the meaning of *Honeycutt*, personally obtained $1,457,293.95 as a result of the wire fraud scheme to which she pleaded guilty." Doc. 355 at 1, 6-7. Apparently interpreting the text of Carlyle's plea agreement and appellate papers, the District Court also found Carlyle "admitted to personally recovering $610,000.00 from the wire fraud scheme." Doc. 355 at 2. Accordingly, it entered a $1,457,293.95 amended forfeiture money judgment against her. Doc. 355 at 7. The District Court also ruled: "The value of any assets or proceeds forfeited from [Cobb] shall be offset against the Defendant's forfeiture liability," and "[i]n no event shall the [Government] collect more than $1,820,759.00 from the Defendants, collectively." Doc. 355 at 7-8.

Standard of review

A district court's legal conclusions regarding forfeiture 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).

Specifically, whether a forfeiture violates the Excessive Fines Clause is reviewed de novo. *United States* v. *Bajakajian*, 524 U.S. 321, 336-37 & n.10 (1998) (rejecting abuse-of-discretion standard because "the question whether a fine is constitutionally excessive calls for the application of a constitutional standard").

"[T]he validity of a sentence appeal waiver" is reviewed de novo. *United States* v. *Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008). The scope of a sentence appeal waiver is also reviewed de novo. *See United States* v. *Weaver*, 275 F.3d 1320, 1333 & n.21 (11th Cir. 2001) (reviewing de novo whether the exceptions to the defendant's sentence appeal waiver applied).

SUMMARY OF THE ARGUMENT

The District Court misinterpreted *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017). Construing a statute pertaining to serious drug offenses, *Honeycutt* held a coconspirator may not be required to forfeit conspiracy proceeds she did not personally obtain. It thus abolished joint and several forfeiture liability for coconspirators. The District Court correctly ruled *Honeycutt* applied to Carlyle's 18 U.S.C. § 981(a)(1)(C) forfeiture. But it erred when it ruled *Honeycutt* allows

courts to conclude multiple codefendants jointly obtained the same proceeds. It also erred when it ruled *Honeycutt* allows joint and several forfeitures of jointly obtained proceeds.

Based on these misguided rulings, the District Court declined to require the Government to attribute each dollar of the scheme's total proceeds ($1,820,759) to either Carlyle or Cobb. This, in turn, caused it to wrongly conclude Carlyle had, within *Honeycutt*'s meaning, "personally obtained" $1,457,293.95 in proceeds. Thus, the money judgment requiring her to forfeit that amount was improper. Under a correct interpretation of *Honeycutt*, the record evidence would have justified a forfeiture of only $100,000 (*i.e.*, the amount to which Carlyle stipulated).

For these reasons, the amended forfeiture money judgment exceeded the maximum penalty authorized by 18 U.S.C. § 981(a)(1)(C). It also far exceeded the maximum statutory fine and the maximum guidelines-range fine applicable to Carlyle's offenses. Moreover, it did not accurately reflect the harm she caused. As such, the $1,457,293.95 forfeiture money judgment was grossly disproportional to the gravity of her offenses and violated the Eighth Amendment's Excessive Fines Clause.

The plea agreement's sentence-appeal waiver allows Carlyle to appeal her sentence on Eighth Amendment grounds or if it exceeds the statutory maximum. Therefore, it does not bar her Excessive Fines Clause challenge to the amended forfeiture money judgment.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court misinterpreted *Honeycutt* v. *United States* and, as a result, imposed a forfeiture money judgment that violated the Eighth Amendment's Excessive Fines Clause and exceeded the statutory maximum

The District Court misinterpreted *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017). Its legal error caused it to misunderstand the relevant facts and impose a forfeiture money judgment that violated the Excessive Fines Clause and exceeded the statutory maximum.

A. The District Court misinterpreted *Honeycutt*

The District Court misconstrued what it means for a codefendant to personally obtain criminal proceeds under *Honeycutt*. It also resurrected an unauthorized exception to *Honeycutt*'s prohibition of joint and several forfeitures. But no amount of smelling salts can bring back to life what the Supreme Court has already killed, buried, and eulogized.

Honeycutt did three things. First, it held courts may require a co-conspirator to forfeit only the conspiracy proceeds she personally ob-

tained. 137 S. Ct at 1635. Second, it explained that, in the forfeiture context, the definition of "obtain" does not support the notion that two people can "obtain" the same proceeds. *Id.* at 1632. Third, it abolished joint and several forfeiture liability for coconspirators. *Id.* at 1633.

Contrary to these principles, the District Court ruled there could be situations in which codefendants jointly obtain the same proceeds. *See* Doc. 360 at 11, 114-15. On that basis, it declined to require the Government to assign each dollar of the scheme's $1,820,759 proceeds to *either* Carlyle *or* Cobb. Doc. 360 at 11, 114-15, 117-18. Instead, it ruled that any proceeds obtained from Cobb must be subtracted from Carlyle's forfeiture liability. Doc. 355 at 7. This shows: (1) a portion of Carlyle's $1,475,293.95 money judgment accounted for proceeds obtained by Cobb, not Carlyle; and (2) the District Court interpreted *Honeycutt* to allow joint and several forfeiture liability in some instances.

Because *Honeycutt* prevents courts from holding codefendants liable for proceeds they did not personally obtain and unequivocally prohibits joint and several forfeitures, the District Court erred when it entered the $1,475,293.95 forfeiture money judgment against Carlyle.

1. *Honeycutt* abolished joint and several forfeiture liability and held money judgments may not exceed the amount of proceeds a coconspirator personally obtained

Honeycutt held a coconspirator may not be required to forfeit conspiracy proceeds she did not personally obtain. 137 S. Ct. at 1635. It thereby eradicated joint and several forfeiture money judgments for coconspirators. *Id.* at 1632-33, 1635.

Honeycutt's factual background reads like a cautionary tale coauthored by Johnny Cash and Walter White.[10] *See id.* at 1630. It involved two brothers, a hardware store in southeastern Tennessee, and a conspiracy to sell over 20,000 bottles of Polar Pure, which is an iodine-based water-purification product often used to make methamphetamine. *Id.* The brothers' roles in the conspiracy were somewhat unremarkable: Tony owned the store and acquired the illicit Polar Pure proceeds, whereas Terry managed the store and collected a modest salary. *Id.* On the other hand, the forfeiture proceedings were anything but

[10] Walter White, the infamous antihero of AMC's Emmy-Award-winning television series *Breaking Bad*, is a fictional high school chemistry teacher who, facing a cancer diagnosis, abandons the banality of his daily life to become a meth producer. *See Breaking Bad, About the Show*, https://www.amc.com/shows/breaking-bad/exclusives/about.

routine and ended up producing an important change in federal law. *See id.* at 1631-35.

The government charged the brothers together, and pursuant to 21 U.S.C. § 853(a)(1), sought forfeiture of the conspiracy's proceeds (*i.e.*, the store's Polar Pure profits). *Id.* at 1630. Notably, it asked for a separate forfeiture money judgment in the amount of the scheme's entire proceeds to be entered against each brother. *Id.* Tony, the owner, pled guilty and agreed to forfeit a portion of the Polar Pure profits. *Id.* But Terry, the employee, took his chances at trial. *Id.* A jury convicted him of, among other things, conspiring to and knowingly distributing iodine to manufacture meth. *Id.*

The government then sought to recoup from Terry the Polar Pure profits that remained "outstanding after [Tony's] forfeiture payment." *Id.* at 1631. It conceded Terry neither had a "'controlling interest in the store'" nor stood to benefit personally from the Polar Pure sales. *Id.* Nevertheless, it argued he was jointly and severally liable for the conspiracy's total proceeds. *Id.* The district court "declined to enter a forfeiture judgment," but the Sixth Circuit agreed with the government and held that, as coconspirators, "each brother bore full responsibility for

the entire forfeiture judgment." *Id.* That rationale, however, did not pass muster in the Supreme Court. *See id.* at 1635 (reversing the Sixth Circuit).

In addressing "whether § 853 embraces joint and several liability for forfeiture judgments," *Honeycutt* analyzed how § 853(a)'s text curbs the statute's reach. *Id.* at 1631. As relevant here, it noted, "§ 853(a)(1) limits forfeiture to 'property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of' the crime." *Id.* at 1632 (quoting 21 U.S.C. § 853(a)(1)). Similarly, "§ 853(a)(2) restricts forfeiture to 'property used, or intended to be used, … to commit' … the crime." *Id.* (quoting 21 U.S.C. § 853(a)(2)). 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.* (quoting 21 U.S.C. § 853(a)(3)).

Honeycutt reasoned, "These provisions, by their terms, limit forfeiture under § 853 to tainted property," *i.e.*, property derived from or used to commit "the crime itself." *Id.* Importantly, it explained, "§ 853(a) defines forfeitable property solely in terms of personal possession or use." *Id.* It further observed these limitations thus demonstrate "the statute

does not countenance joint and several liability, which, by its nature, would require forfeiture of untainted property." *Id.*[11]

Ultimately, *Honeycutt* held § 853(a)(1) forfeitures are limited "to property the defendant himself actually acquired as the result of the crime." *Id.* at 1635. It further held § 853's limitation of forfeitures to personally obtained and tainted property "foreclose[s] joint and several liability for co-conspirators." *Id.* at 1633. Because Terry neither had an ownership interest in the store nor "personally benefit[ed] from the Polar Pure sales," *Honeycutt* concluded he "never obtained tainted property as a result of the crime." *Id.* at 1635. As such, "§ 853 [did] not require any forfeiture." *Id.*

So under *Honeycutt*, before entering a forfeiture money judgment against a coconspirator, a district court must determine the amount of proceeds she personally obtained. *See, e.g.*, *United States* v. *Bradley*, 897 F.3d 779, 784, 786 (6th Cir. 2018) (vacating a joint and several forfeiture award and remanding for the district court to conduct "fresh

[11] For example, if a coconspirator were to be held liable for $10 in conspiracy proceeds when he personally obtained only one of those dollars, he would have to forfeit $9 he acquired by other means (such as a legitimate salary, inheritance, etc.). Because that $9 would have been untainted by the conspiracy, requiring its forfeiture would, in effect, require the forfeiture of untainted property.

factfinding" about the amount of proceeds the defendant had personally obtained). Once it makes that determination, it cannot impose forfeiture liability exceeding that amount. *Honeycutt*, 137 S. Ct. at 1635.

2. *Honeycutt* applies to 18 U.S.C. § 981(a)(1)(C) forfeitures

The District Court correctly ruled *Honeycutt* applied to Carlyle's 18 U.S.C. § 981(a)(1)(C) forfeiture. *See* Doc. 355 at 1, 6.

The Third Circuit has extended *Honeycutt* to 18 U.S.C. § 981(a)(1)C) forfeitures. *See United States* v. *Gjeli*, 867 F.3d 418, 427-28 & n.16 (3d Cir. 2017). Specifically, it reasoned that, because the text and structure of 21 U.S.C. § 853(a)(1) and 18 U.S.C. § 981(a)(1)(C) were "substantially the same," there was "no reason why the holding in *Honeycutt* does not apply with equal force to" § 981(a)(1)(C) forfeitures. *Id.*[12]

[12] To date, however, not all courts have agreed with *Gjeli*. For instance, the Sixth Circuit has recently held *Honeycutt*'s reasoning "is not applicable to § 981(a)(1)(C)." *United States* v. *Sexton*, 894 F.3d 787, 799 (6th Cir. 2018), *cert. petition filed*, No. 18-5391 (July 25, 2018). Similarly, because the Second Circuit has not yet ruled on whether *Honeycutt* applies to § 981(a)(1)(C) forfeitures, *see United States* v. *Fiumano*, 721 Fed. App'x 45, 51 n.3 (2d Cir. 2018), the Southern District of New York has continued to hold coconspirators jointly and severally liable for § 981(a)(1)(C) forfeitures, *see United States* v. *McIntosh*, 2017 WL 3396429, at *6 (S.D.N.Y. Aug. 8, 2017); *Pierce* v. *United States*, 2018 WL 4179055, at *8 & n.9 (S.D.N.Y. Aug. 31, 2018); *Lasher* v. *United States*, 2018 WL 3979596, at *10 n.5 (S.D.N.Y. Aug. 20, 2018).

In Carlyle's first appeal, this Court, like *Gjeli*, recognized § 981(a)(1)(C) and § 853 "are largely the same in terms of their pertinent language." *United States* v. *Carlyle*, 712 Fed. App'x 862, 864 (11th Cir. 2017).[13] For that reason, *Carlyle* ruled *Honeycutt* "likely appli[es]" to 18 U.S.C. § 981(a)(1)(C) forfeitures and remanded for "the district court to determine in the first instance the applicability of *Honeycutt* to the present case." *Id.* at 865; *see also Sexton*, 894 F.3d at 799 (recognizing *Carlyle* "determined that [*Honeycutt*'s] reasoning also applies to forfeiture under 18 U.S.C. § 981(a)(1)(C)).

On remand, the District Court ruled, "*Honeycutt* is applicable to Carlyle's forfeiture." Doc. 355 at 6. That ruling was correct because § 981(a)(1)(C) (the statute in this case), like § 853 (the statute in *Honeycutt*), authorizes forfeiture of only *tainted* property, *see Carlyle*, 712 Fed. App'x at 865, whereas any joint and several forfeiture award would, by necessity, require the forfeiture of *untainted* property, *see Honeycutt*, 137 S. Ct. at 1632.

[13] 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.

3. The District Court misinterpreted *Honeycutt* to mean codefendants can personally obtain criminal proceeds jointly

Under *Honeycutt*, multiple codefendants cannot simultaneously personally obtain the same proceeds. Rather, in terms of forfeiture liability, a scheme's total proceeds must be divided amongst the scheme's participants (*i.e.*, a court may not hold multiple codefendants responsible for the same illicit dollar).

At the forfeiture hearing on remand, the District Court ruled it was possible, within *Honeycutt*'s meaning, for two or more codefendants to personally obtain the same illicit dollar. Doc. 360 at 111. It further explained that, under such circumstances, *Honeycutt* did not require district courts to assign criminal proceeds to "one [defendant] or the other." Doc. 360 at 111. But that interpretation of what it means to personally obtain forfeitable proceeds belies *Honeycutt*'s rationale.

Honeycutt explained that when "Congress enacted § 853(a)(1), the verb 'obtain' was defined as 'to come into possession of' or to 'get or acquire.'" 137 S. Ct. at 1632 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 995 (1966)). Hence, *Honeycutt* ruled, "Neither the dictionary definition nor the common usage of the word 'obtain' sup-

ports the conclusion that an individual 'obtains' property that was acquired by someone else." 137 S. Ct. at 1632; *see also United States* v. *Chittenden*, 896 F.3d 633, 637 (4th Cir. 2018) ("one does not obtain property acquired by someone else").

To illustrate the difference between proceeds that are personally obtained by a conspirator and those that are not, *Honeycutt* presented a hypothetical involving a mastermind marijuana farmer and a college student who sold the mastermind's product. *See* 137 S. Ct. at 1631-33. In that hypothetical, the mastermind earned $3 million in one year from the marijuana sales, and, out of the scheme's proceeds, paid the student $300 per month for his services ($3,600 in one year). *Id.* at 1631. Under *Honeycutt*'s interpretation of § 853(a)(1), the student would have personally obtained only the portion of the proceeds he had received as salary, *i.e.*, $3,600. *Id.* at 1361-62. Indeed, *Honeycutt* explained that, "[o]f the $3 million, $2,996,400 would have no connection whatsoever to the student's participation in the crime and would have to be paid from the student's untainted assets." *Id.* at 1362.

Specifically, the hypothetical shows the "personally obtained" inquiry turns on where and with whom the proceeds terminate, not where

they may have been temporarily stored or through whose hands they may have passed. *See id.* at 1633 ("The adverbs 'directly' and 'indirectly' modify—but do not erase—the verb 'obtain.'" (citation omitted)). For example, "the marijuana mastermind might receive payments directly from drug purchasers, or he might arrange to have drug purchasers pay an intermediary such as the college student." *Id.* In all instances, however, the mastermind "ultimately 'obtains' the property—whether 'directly or indirectly.'" *Id.*[14]

United States v. *Bradley,* 897 F.3d 779 (6th Cir. 2018), further sheds light on what it means to personally obtain proceeds under *Hon-*

[14] Several cases that were decided before *Honeycutt* also support the principle that a defendant personally obtains criminal proceeds only when they terminate in his pocket. *See Sekhar* v. *United States*, 570 U.S. 729, 734 (2013) (holding in the Hobbs Act context that "[o]btaining property requires 'not only the deprivation but also the acquisition of property'" (citation omitted)); *United States* v. *Rouhani*, 598 Fed. App'x 626, 633 (11th Cir. 2015) (holding "in personam forfeiture reaches only that property, or portion thereof, *owned* by the defendant" and reversing a forfeiture money judgment because the criminal proceeds had been received by the company the defendant owned, not the defendant himself, and the company was neither a coconspirator nor a codefendant (emphasis added)); *United States* v. *Contorinis*, 692 F.3d 136, 139 (2d Cir. 2012) (concluding the district "court erred in ordering appellant to forfeit gains acquired by his employer but not by him"); *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1211 (11th Cir. 2013) ("proceeds of crime constitute a defendant's 'interest' in property" (citation omitted)).

eycutt. In *Bradley*, a forfeiture judgment held 18 codefendants jointly and severally liable for $1 million in drug-trafficking and money-laundering proceeds. *Bradley*, 897 F.3d at 782. The defendant argued the joint and several $1 million forfeiture was improper in light of *Honeycutt*. *Id.* at 782-83. The government conceded *Honeycutt* prohibited such forfeitures. *Id.* at 783. Nevertheless, it asserted that, under plain-error review, the appellate court did not have to vacate the forfeiture judgment, because the record showed the defendant had "personally obtained at least one million dollars anyway." *Id.*

In *Bradley*, a coconspirator had deposited $850,000 "into four bank accounts." *Id.* Two of those accounts were "owned by [the defendant] or his wife." *Id.* The other two were owned by another coconspirator, who withdrew money from that account and gave it to the defendant. *Id.*

Based on these facts, the government's calculation methodology considered the defendant to have personally obtained the $850,000 that had been deposited into the four accounts. *Id.* The government then added other amounts, pointing out that, "[o]nce the trafficking ring stopped using banks," one of the coconspirators "took plenty of cash

back to" the defendant. *Id.* It then claimed there were "approximately fifteen such exchanges," and "at least some of them grossed $20,000 or more." *Id.* In sum, the government asserted, "'it [was] easy to see'" the defendant "'directly received'" proceeds that "'exceeded [a million dollars].'" *Id.* (citation omitted).

Bradley rejected that methodology as "wishful math." *Id.* Indeed, the district court had found "only that the proceeds of the conspiracy amounted to a million dollars." *Id.* As such, *Bradley* explained the fact that a coconspirator delivered money to the defendant told the court "nothing about what happened to the money after that," so "[t]he evidence sa[id] nothing about whether [the defendant] kept all of this money." *Id.* And that "*Honeycutt* problem" could not "be resolved solely by addition," because "[i]t [was] a net, not a gross, monetary forfeiture." *Id.* In that regard, the forfeiture order required "the assets of any co-defendant [to] be subtracted from the judgment," so there were "many candidates for lessening [the defendant's] liability." *Id.*

The same is true here: that the IRS connected $1,457,293.95 in proceeds to the storage-unit PII says nothing about in whose pocket those proceeds terminated. Any or nearly all of those proceeds could

have ended up, and almost certainly did end up, in Cobb's pocket. This is the only reasonable inference that is consistent with Cobb's role as the scheme's leader and other record evidence.[15]

Moreover, the IRS's method of attributing proceeds to Carlyle was insufficient to under *Honeycutt* and *Bradley*. Agent Hayag testified Carlyle had received $1,457,293.95 in proceeds. Doc. 360 at 119-20. Yet he did not analyze or count out proceeds derived from any of the PII in the marital residence (Doc. 360 at 106), which belonged exclusively to Cobb (Doc. 360 at 100). He further claimed that, if he had looked at that PII, the proceeds derived from that PII plus the proceeds he had attributed to Carlyle could have exceeded the scheme's total proceeds (*i.e.*, $1,820,759). Doc. 360 at 103-07. That is the exact type of "wishful math" *Bradley* rejected. 897 F.3d at 783. Because a scheme's total proceeds represent a net amount, the proceeds attributed to Carlyle and those at-

[15] *See United States* v. *Cobb*, 842 F.3d 1213, 1216 (11th Cir. 2016) (Cobb "was an organizer or leader of the conspiracy"); Doc. 244 at 35-36 (Carlyle barely had any money in her bank accounts); Doc. S159 ¶ 96 (Carlyle's negative net worth was -$48,667); Doc. 244 at 44-46 (only one video of Carlyle making ATM withdrawals and four videos of Cobb making ATM withdrawals); Doc. 360 at 100 (the Government did not know how many of the 805 fraudulent returns Carlyle herself had filed).

tributed to Cobb could not have totaled more than the $1,820,759 attributed to the scheme.

Therefore, to accurately calculate the amount of proceeds Carlyle had personally obtained, the IRS would have also had to determine the proceeds that were connected to Cobb (*i.e.*, the proceeds derived from the marital-residence PII). Then, if the amount it had attributed to Carlyle and the amount it had attributed to Cobb exceeded the scheme's total proceeds (*i.e.*, $1,820,759), the District Court would have had to "figure out 'an amount proportionate with the property'" that Carlyle "'actually acquired through the'" scheme. *Bradley*, 897 F.3d at 784 (quoting *United States* v. *Elliot*, 876 F.3d 855, 868 (6th Cir. 2017)). The District Court failed to make that determination, instead concluding, "We're not here on Mr. Cobb." Doc. 360 at 117.

To summarize, the District Court made several legal errors that show Carlyle did not, within *Honeycutt*'s meaning, personally obtain $1,457,293.95; instead, she obtained much less. Initially, the District Court incorrectly ruled that, in the forfeiture context, codefendants can jointly obtain illicit proceeds. Based on that ruling, it declined to require the Government to attribute each illicit dollar to either Carlyle or Cobb.

Relatedly, it ruled the amount of proceeds the IRS could have connected to the PII in the residence, and thus connected to Cobb, was irrelevant to Carlyle's forfeiture liability. That ruling ignored the principle that a "personally obtained" inquiry under *Honeycutt* treats a scheme's total proceeds as a net figure that must be divided amongst codefendants in a manner proportionate to the amount of proceeds obtained by each one. In other words, after *Honeycutt*, no matter how delicious it might be, codefendants cannot be served the same slice of forfeiture pie.

Given these errors, the Government's evidence at the forfeiture hearing did not establish that, within *Honeycutt*'s meaning, Carlyle had personally obtained $1,457,293.95 (*i.e.*, over three quarters of the scheme's total proceeds). Instead, it merely showed that a portion of the scheme's total proceeds were derived from PII in the storage units and said nothing about where those proceeds ended up. In other words, the Government's evidentiary presentation asked and answered the wrong question. Ultimately, the only evidence at the hearing that showed the amount of proceeds Carlyle had personally obtained was her stipulation to having personally acquired $100,000 from the scheme. *See* Doc. 360 at 108-09. The District Court should have served her that slice of pie.

4. The District Court erred when it created an exception to *Honeycutt*'s unequivocal prohibition of joint and several forfeiture liability

Codefendants cannot, within *Honeycutt*'s meaning, jointly obtain criminal proceeds. *See supra* Argument I.A.3. And even if they could, *Honeycutt* provided no indication that jointly obtained proceeds would be exempt from its prohibition of joint and several forfeitures.

Honeycutt explained joint and several liability, "[a] creature of tort law," has three components. 137 S. Ct. at 1361. First, it applies when "two or more defendants jointly cause harm." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 875 (1977)). Second, it allows each defendant to be "held liable for the entire … harm." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 875 (1977)). Third, it requires "that the plaintiff recover only once for the full amount." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 875 (1977)). Here, the forfeiture money judgment bore each of those hallmarks of joint and several liability.

For starters, it listed as a factual finding that Carlyle aided Cobb "in the execution of the wire fraud scheme." Doc. 355 at 2. As such, the District Court necessarily found (Doc. 355 at 2) they "jointly cause[d]

harm," *Honeycutt*, 137 S. Ct. at 1361 (citing RESTATEMENT (SECOND) OF TORTS § 875 (1977).

Furthermore, the judgment required "[t]he value of any assets or proceeds forfeited from" Cobb to "be offset against [Carlyle's] forfeiture liability." Doc. 355 at 7-8. This requirement shows the District Court held both Carlyle and Cobb jointly liable for the $1,457,293.95 worth of harm addressed in the judgment. Indeed, if the District Court had not intended to hold both Carlyle and Cobb jointly liable for those proceeds, there would have been no reason to credit proceeds Cobb forfeits towards Carlyle's liability. This further demonstrates the $1,457,293.95 sum accounted for proceeds obtained by Cobb, not Carlyle, *see supra* Argument I.A.3, and provides the second clue that the forfeiture judgment was in fact joint and several.

Lastly, by expressly forbidding the "collect[ion] [of] more than $1,820,759.00 from [Carlyle and Cobb], collectively" (Doc. 355 at 8), the money judgment ensured the Government would "recover only once for the full amount," *Honeycutt*, 137 S. Ct. at 1361 (citing RESTATEMENT (SECOND) OF TORTS § 875 (1977)). And since the preclusion of double or overlapping recovery is the final component of joint and several liabil-

ity, the money judgment imposed a type of liability that fits squarely within the joint and several framework.

Hence, the District Court essentially imposed joint and several forfeiture liability without actually calling it joint and several liability. *Cf. Wood* v. *Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.) ("The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."); WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2 ("What's in a name? That which we call a rose by any other word would smell as sweet."). As the amended forfeiture money judgment currently stands, if Carlyle were to forfeit $1 and Cobb were to forfeit $1,457,292.95 (*i.e.*, Carlyle's judgment amount minus $1), the money judgment would be satisfied. Conversely, if Carlyle were to forfeit $1,457,292.95 and Cobb were to forfeit $1, the money judgment likewise would be satisfied. That is joint and several liability in a nutshell. Therefore, the money judgment violated *Honeycutt*. *See Bradley*, 897 F.3d at 783 ("*Honeycutt* puts an end to such collective liability.").

Moreover, to the extent the District Court read into *Honeycutt* an exception that would allow joint and several forfeitures when codefend-

ants jointly obtain proceeds, it was mistaken. As argued above, under *Honeycutt*, codefendants cannot jointly obtain proceeds. *See supra* Argument I.A.3. And more importantly, *Honeycutt*'s abolition of joint and several forfeitures was unequivocal.

In that regard, the question presented in *Honeycutt* was "whether § 853 embraces joint and several liability for forfeiture judgments." 137 S. Ct. at 1631. The Supreme Court answered that question with a resounding no.[16] Since then, this Court has expressly confirmed that "joint and several [forfeiture] liability is impermissible under *Honeycutt*," *United States* v. *Elbeblawy*, 899 F.3d 925, 940 (11th Cir. 2018), as have many others.[17] Crucially, no federal appellate court has recog-

[16] *See Honeycutt*, 137 S. Ct. at 1632 ("This case requires determination whether [joint and several] liability is permitted under § 853(a)(1). The Court holds that it is not."), 1632 (§ 853(a)'s limitations "provide the first clue that the statute does not countenance joint and several liability"), 1632 ("Joint and several liability would thus represent a departure from 853(a)'s restriction of forfeiture to tainted property"), 1633 (§ 853(a)(1)'s text "foreclose[s] joint and several liability for co-conspirators"), 1633 (§ 853(p) "lays to rest any doubt that the statute permits joint and several liability"), 1635 n.2 (§ 853's limitation of forfeiture to tainted property "is incompatible with joint and several liability").

[17] *See, e.g.*, *Gjeli*, 867 F.3d at 427 ("forfeiture was imposed jointly and severally," so it was "no longer permissible in light of *Honeycutt*"); *United States* v. *Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017) (*Honeycutt* "rejected the government's position that the statute allowed joint and

nized a "jointly obtained proceeds" exception to *Honeycutt*'s prohibition of joint and several forfeitures.[18]

Additionally, the forfeiture this Court struck down in *Elbeblawy* is factually analogous to the forfeiture money judgment here. *Elbeblawy* involved a healthcare-fraud conspiracy. 899 F.3d at 930. The district court imposed upon the defendant an eight-figure forfeiture, which represented the scheme's total proceeds. *Id.* at 933. It also ruled the defendant's "'convicted coconspirators [were] jointly and severally liable for th[e] forfeiture money judgment up to the amount of their respective forfeiture money judgments.'" *Id.* Applying *Honeycutt*, *Elbeblawy* ruled

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several forfeiture liability for coconspirators"); *United States* v. *Elliot*, 876 F.3d 855, 868 (6th Cir. 2017) (*Honeycutt* "held that [§ 853(a)(1)] forfeiture is not subject to joint and several liability"); *Chittenden*, 896 F.3d 633, 640 (holding that, in light of *Honeycutt*, 18 U.S.C. § 982(a)(2) "precludes joint and several forfeiture liability"); *United States* v. *Djibo*, 730 Fed. App'x 52, 60 (2d Cir. 2018) ("the government can no longer obtain forfeiture under § 853(a)(1) on a theory of joint-and-several liability"); *Bradley*, 897 F.3d at 782 (holding "[p]recedent forbids the joint-and-several nature of the forfeiture order").

[18] *United States* v. *Hoffman* observed the defendants in that case might have declined to invoke *Honeycutt* to challenge their joint and several forfeiture because they were co-owners of the company through which they had perpetrated the fraud scheme. 2018 WL 4042217, at *26 n.27 (5th Cir. Aug. 24, 2018). Nevertheless, *Hoffman* neither conducted a *Honeycutt* analysis nor recognized a "jointly obtained proceeds" exception to *Honeycutt*'s prohibition of joint and several forfeiture liability.

the forfeiture statute for healthcare fraud "does not permit joint and several liability." *Id.* at 941-42.

Here, the scheme's proceeds totaled $1,820,759, and the District Court capped Carlyle's forfeiture liability for those proceeds at $1,457,293.95. Because the District Court required the proceeds forfeited by Cobb to be subtracted from Carlyle's forfeiture judgment, it essentially held them jointly and severally liable for the amount of Carlyle's forfeiture judgment. And since there still exists a forfeiture judgment against Cobb holding him liable for the scheme's entire proceeds, *see United States* v. *Cobb*, 842 F.3d 1213, 1221 (11th Cir. 2016), he would presumably be required to forfeit the balance of the scheme's proceeds that were not accounted for in the money judgment against Carlyle.

Taken together, these attributes show the forfeiture money judgment in this case, was exactly like the one in *Elbeblawy*: one codefendant was liable for the scheme's entire proceeds, and he was jointly and severally liable with his codefendant "'up to the amount of [her] respective forfeiture money judgment[].'" 899 F.3d at 933 (citation omitted). Accordingly, the forfeiture money judgment against Carlyle was likewise improper and should be vacated.

***

In sum, the $1,457,293.95 forfeiture money judgment against Carlyle was improper because it (1) accounted for proceeds Carlyle had not, within *Honeycutt*'s meaning, personally obtained and (2) violated *Honeycutt*'s unequivocal prohibition of joint and several forfeiture liability.

B. The District Court's misinterpretations of *Honeycutt* caused it to enter a forfeiture money judgment that violated the Excessive Fines Clause and exceeded the statutory maximum penalty

The $1,457,293.95 amended forfeiture money judgment, which was based on the District Court's misinterpretations of *Honeycutt*, exceeded the forfeiture liability authorized by 18 U.S.C. § 981(a)(1)(C). It was therefore an excessive fine.

1. Carlyle's forfeiture is subject to Eighth Amendment scrutiny

The Excessive Fines Clause applies to Carlyle's 18 U.S.C. § 981(a)(1)(C) forfeiture.

The Eighth Amendment's Excessive Fines Clause prohibits sovereigns from imposing excessive fines as criminal punishment. U.S. Const. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposes, nor cruel and unusual punishments inflicted."). That

prohibition applies to punitive forfeitures. *See Austin* v. *United States*, 509 U.S. 602, 610 (1993) (applying Excessive Fines Clause to punitive civil forfeiture). A forfeiture is punitive when it is "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony." *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998); *accord United States* v. *Browne*, 505 F.3d 1229, 1281-82 (11th Cir. 2007).

Here, the District Court ordered Carlyle to forfeit $1,457,293.95 pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). Doc. 355 at 7. Section 981(a)(1)(C) allows the Government to forfeit "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" an offense that 18 U.S.C. § 1956(c)(7) defines as a "specified unlawful activity." The offenses that qualify as "specified unlawful activity" are listed in 18 U.S.C. § 1961(1). *See* 18 U.S.C. § 1956(c)(7)(A). Wire fraud (18 U.S.C. § 1343) qualifies. *United States* v. *Rouhani*, 598 Fed. App'x 626, 633 (11th Cir. 2015). In turn, 28 U.S.C. § 2461(c) permits any property that is civilly forfeitable under § 981 to be criminally forfeited upon the defendant's conviction. Because the $1,457,293.95 forfeiture money judgment was predicated on Carlyle's wire-fraud con-

viction,[19] it was a punitive forfeiture that is subject to scrutiny under the Excessive Fines Clause.

2. Punitive forfeitures violate the Excessive Fines Clause when they are grossly disproportional to the offense committed

If a punitive forfeiture is "'grossly disproportional to the gravity of the defendant's offense,'" it violates the Excessive Fines Clause. *Browne*, 505 F.3d at 1281 (quoting *Bajakajian*, 524 U.S. at 337).

Gross disproportionality "is determined by examining three factors: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." *Id.* Here, the last two factors are dispositive. *See infra* Argument I.B.3.

3. The $1,457,293.95 forfeiture money judgment was an excessive fine

The forfeiture money judgment was grossly disproportional to the gravity of Carlyle's offenses because it far exceeded the maximum statutory fine for wire fraud and aggravated identity theft, far exceeded the

[19] Although Carlyle also pled guilty to aggravated identity theft, there is no forfeiture provision for that offense. Docs. 94; 215.

range of permissible fines under the sentencing guidelines, and did not accurately reflect the harm caused by Carlyle.

This Court "follow[s] three rules of thumb when" determining whether a forfeiture award is constitutionally excessive. *United States* v. *Sperrazza*, 804 F.3d 1113, 1127 (11th Cir. 2015). "First, 'if the value of the property forfeited is within or near the permissible range of fines under the sentencing guidelines, the forfeiture almost certainly is not excessive.'" *Id.* (citation omitted). Second, forfeiture amounts that exceed the "'statutory maximum fine or the Guidelines range' [are] not 'presumptively invalid,' but will 'receive closer scrutiny.'" *Id.* (quoting *United States* v. *Chaplin's, Inc.*, 646 F.3d 846, 852 (11th Cir. 2011)). Third, a forfeiture amount that is "'far in excess of the statutory fine range … is likely to violate the Excessive Fines Clause.'" *Id.* (citation omitted).

Here, the $1,457,293.95 forfeiture money judgment dwarfed the maximum statutory fine for Carlyle's wire fraud and aggravated identity theft convictions. The "default statutory maximum" fine for those offenses is $250,000. *United States* v. *LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006); 18 U.S.C. § 3571(b)(3) (unless another statuto-

ry maximum applies, individuals convicted "for a felony" may not be fined "more than $250,000"). Yet § 3571 also fashions an "'alternative fine.'" *United States* v. *Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010) (quoting 18 U.S.C. § 3571(d)). The "alternative fine" provides that a defendant may be fined up to "twice the gross gain or twice the gross loss." 18 U.S.C. § 3571(d).

Under the Sixth Amendment principles established in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and *Blakely* v. *Washington*, 542 U.S. 296, 303 (2010), the maximum "alternative fine" must be based on a pecuniary gain or loss amount that was either found by a jury or admitted by the defendant. *Pfaff*, 619 F.3d at 175 ("it is the clear implication of *Apprendi* and *Blakely* that when a jury does not make a pecuniary gain or loss finding, § 3571's default statutory maximums cap the amount a district court may fine the defendant"); *Southern Union Co.* v. *United States*, 567 U.S. 343, 360 (2012) (holding "the rule of *Apprendi* applies to the imposition of criminal fines"). Put otherwise, the maximum "alternative fine" may not be based on a district court's gain or loss findings. *LaGrou Distrib. Sys., Inc.*, 466 F.3d at 594 (holding that, under *Apprendi*, a fine that exceeds § 3571's default statutory maxi-

mum cannot be based on a district court's pecuniary loss finding); *Pfaff*, 619 F.3d at 175 (same). Thus, in a case such as this one, where the defendant has pleaded guilty pursuant to a plea agreement, the maximum "alternative fine" must be based on a loss or gain amount that was admitted by the defendant.

Carlyle admitted obtaining no more than $100,000 from the wire-fraud scheme.[20] Doc. 360 at 108-09. As such, the gain-based maximum "alternative fine" for Carlyle's offenses would have been $200,000. She also admitted the scheme had cause a $610,000 loss. *See* Doc. 94 at 8. The loss-based maximum "alternative fine" therefore would have been $1,220,000.[21] And of course, the "maximum default fine" for Carlyle's offenses would have been $250,000. *See* Doc. S159 ¶ 105; 18 U.S.C.

[20] There is no merit to the contention that Carlyle's plea agreement or appellate papers in the prior appeal made some other admission. *See* Doc. 335 at 2-4. The plea agreement did not admit that the $610,000 represented the amount of the proceeds *personally* obtained *by Carlyle* as a result of the scheme charged in Count Two; instead, it merely admitted that *the scheme* charged in Count Two (which charged both Carlyle and Cobb) obtained at least $610,000. For similar reasons, the appellate papers also did not admit Carlyle personally obtained $610,000.

[21] In light of *Honeycutt*'s limitation of forfeiture liability to personally obtained proceeds, a proportionality analysis using a loss-based "alternative fine" would be improper. Nevertheless, Carlyle calculates the applicable loss-based maximum "alternative fine" above just in case this Court decides a loss-based proportionality analysis is relevant here.

§ 3571(b)(3). The $1,457,293.95 forfeiture money judgment easily surpasses all of these figures.

Therefore, regardless of which of the above statutory maximum fines the Court considers to be the relevant comparator, the forfeiture money judgment was "'far in excess of the statutory fine range.'" *Sperrazza*, 804 F.3d at 1127 (citation omitted). Thus, it was not subject to the strong presumption of constitutionality that applies to forfeitures that are less than the maximum statutory fine allowed for the defendant's offense. *Id*. Rather, because the money judgment eclipsed the maximum statutory fine for Carlyle's offenses, it was grossly disproportional their gravity. *See Bajakajian*, 524 U.S. at 339-40 ($357,144 forfeiture sought in a reporting-offense case was an excessive fine when statutory maximum fine was $250,000 and maximum guideline fine was $5,000).

Additionally, that the money judgment greatly exceeded the $175,000 maximum guideline-range fine (*see* Doc. 244 at 89) also shows it was constitutionally excessive. *See United States* v. *Ramirez*, 421 Fed. App'x 950, 952 (11th Cir. 2011) (forfeiture was "excessive and unconstitutional" because the guideline fine the defendant faced was "about 12

times less than the amount demanded by the forfeiture statute" and sought by the government).

Lastly, as previously explained, the record evidence concerning the extent of Carlyle's participation in the scheme shows she should not have been held responsible for over three-quarters of the scheme's harm. *See supra* Argument I.A.3. Indeed, the plea agreement and the Government's brief in Carlyle's first appeal acknowledged she had a lesser role in the scheme than Cobb. *See* Doc. 94 at 22 (Cobb taking over the phone call "demonstrate[ed] the difference in role between Cobb and Carlyle"); U.S. February 13, 2017 Br. 7 ("Carlyle's role in the tax-fraud scheme was not as great as her husband's.").

Accordingly, the $1,457,293.95 forfeiture money judgment was grossly disproportional to the gravity of Carlyle's offenses. Hence, it violated the Excessive Fines Clause.

C. The plea agreement's sentence appeal waiver does not bar Carlyle's appeal

Carlyle's appellate challenge to the forfeiture money judgment is properly before the Court.

Carlyle's plea agreement contained a sentence-appeal waiver. Doc. 94 at 14. One of the listed exceptions to that waiver, however, allows

her to appeal her sentence on "the ground that [it] violates the Eighth Amendment to the Constitution." Doc. 94 at 14. In this appeal, Carlyle challenges the $1,457,293.95 forfeiture money judgment as unconstitutional under the Eighth Amendment's Excessive Fines Clause. Notably, this Court "ordered further briefing" on that very issue notwithstanding the plea agreement's sentence-appeal waiver, *see United States* v. *Carlyle*, 712 Fed. App'x 862, 863 (11th Cir. 2017); Doc. 315 at 4, and the Government never moved to dismiss Carlyle's first appeal on waiver grounds. Therefore, that appeal waiver does not bar the issue raised in this appeal.

Relatedly, "an effective waiver" will not preclude "'appellate review of a sentence imposed in excess of the maximum penalty provided by statute.'" *United States* v. *Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008) (quoting *United States* v. *Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993)). The plea agreement's waiver provision likewise permits Carlyle to pursue an appeal challenging her sentence on the basis that it violates a statutory maximum. *See* Doc. 94 at 14. Here, Carlyle argues the money judgment, which was a punitive forfeiture that was imposed as part of her sentence, exceeded the maximum penalty author-

ized by 18 U.S.C. § 981(a)(1)(C). *See* Argument I.A. Accordingly, this Court can and should decide the merits of this appeal even if it concludes the appeal waiver's Eighth Amendment exception does not apply.

CONCLUSION

The Court should reverse the District Court's conclusion that Carlyle personally obtained $1,457,293.95 in proceeds, vacate the forfeiture money judgment, and remand with instructions for the District Court to enter a judgment ordering Carlyle to forfeit $100,000, the amount of proceeds she admitted personally obtaining.

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 12,348 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.

September 21, 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 21st day of September, 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 21st day of September, 2018, to:

United States

AUSA Holly Lynn Gershow

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

Eneshia Carlyle (61078-018)
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September 21, 2018

/s/ Thomas Burns
Thomas A. Burns