No. _____

IN THE
Supreme Court of the United States

TERRY M. HONEYCUTT,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under 21 U.S.C. § 853(a)(1), a person convicted of violating a federal drug law must forfeit to the government "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation."

The question presented is:

Does 21 U.S.C. § 853(a)(1) mandate joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?

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Terry M. Honeycutt petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The decision of the Sixth Circuit (Pet. App. 1a-34a) is reported at 816 F.3d 362 (6th Cir. 2016). The District Court's oral determination on forfeiture (Pet. App. 35a-46a) is unreported. The Sixth Circuit's order denying the petition for rehearing en banc (Pet. App. 47a-48a) is unreported.

## JURISDICTION

The judgment of the Sixth Circuit was entered on March 4, 2016. A timely petition for rehearing en banc was denied on May 31, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 303, 98 Stat. 2040, 2044, are codified at 21 U.S.C. § 853. 21 U.S.C. § 853(a)(1) provides:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.

## INTRODUCTION

Under 21 U.S.C. § 853(a)(1), any person convicted of a federal drug crime must forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." This case concerns the application of § 853(a)(1) to individuals convicted of participating in a drug conspiracy who did not personally receive proceeds of that conspiracy. The question presented is whether all members of the conspiracy are jointly and severally liable for forfeiture of all of the reasonably foreseeable proceeds of the conspiracy, even if they did not personally receive those proceeds.

The courts of appeals have divided over that question. In the decision below, the Sixth Circuit held that "§ 853 mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." Pet. App. 25a-26a. The Sixth Circuit observed that its decision was consistent with the decisions of "[a] number of other circuits," Pet. App. 26a. But it expressly acknowledged that its decision conflicted with *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), which "held that § 853 does not countenance joint and several liability." Pet. App. 26a. Rather, *Cano-Flores* held that a defendant is required to forfeit only those "funds that actually *reach* the defendant." 796 F.3d at 92 (emphasis in original). Judge Moore's concurring opinion conceded that the panel opinion was mandated by binding Sixth Circuit precedent, but she argued that the "prior panel was likely incorrect" and that *Cano-Flores* was correctly decided. Pet. App. 29a, 32a.

This case is a perfect vehicle to resolve the circuit split. The government expressly conceded in the District Court that Petitioner "did not stand to benefit personally from the illegal sales," Pet. App. 60a, and the District Court found that Petitioner had not "personally … profited from the illegal conspiracy." Pet. App. 40a. The Sixth Circuit nonetheless ordered forfeiture based entirely on its application of the legal rule that Petitioner must be jointly and severally liable for forfeiture of the proceeds obtained by his co-conspirator. Thus, this case squarely presents the question of whether that legal rule is correct.

The question presented in this case recurs frequently and is the subject of an acknowledged conflict of authority. The Court should grant certiorari to resolve the conflict.

## STATEMENT OF THE CASE

### A. Petitioner's Drug Convictions

Petitioner Terry Honeycutt worked as the salaried employee in charge of sales and inventory at a hardware store in Tennessee called the Brainerd Army Store. Pet. App. 2a. Petitioner's brother, Tony Honeycutt, co-owned the store. Pet. App. 2a.[1] The Brainerd Army Store stocked an iodine-based water purification product known as Polar Pure. Pet. App. 2a. In 2008, Petitioner noticed an increased number of "edgy looking folks" purchasing Polar Pure. Pet. App. 2a. He promptly contacted the Chattanooga Police Department to ask whether Polar Pure could be used to

[1] Petitioner's father, Bill Honeycutt, was the other co-owner.

manufacture methamphetamine. Pet. App. 2a. The Chattanooga Police Department advised Petitioner that it could, and urged him not to sell Polar Pure if he felt "uncomfortable." Pet. App. 2a. The Brainerd Army Store continued to sell Polar Pure, however, and sold it to undercover officers. Pet. App. 2a-3a.

Petitioner and his brother were both indicted for federal drug crimes related to the sale of Polar Pure. Petitioner's brother pleaded guilty, but Petitioner went to trial. Pet. App. 4a. A jury convicted Petitioner of two counts of conspiracy to distribute iodine, while knowing or having reasonable cause to believe that it would be used to make methamphetamine, in violation of 21 U.S.C. §§ 841(c), 843(a)(6), and 846. Pet. App. 4a, 5a; *see also* Pet. App. 63a-68a (second superseding indictment). The jury also convicted Petitioner of nine other counts related to the possession and distribution of iodine, while acquitting him of three counts. Pet. App. 4a.

### B. Forfeiture Proceedings in District Court

Petitioner's indictment specified that the government would be seeking forfeiture in the amount of $269,751.98. Pet. App. 67a. After trial, the government sought forfeiture in that amount. The government contended that this figure corresponded to the Brainerd Army Store's "total profit from iodine sales." Pet. App. 52a. Because Petitioner's brother had already forfeited $200,000 pursuant to his plea agreement, the government argued that Petitioner should have to forfeit the remaining $69,751.98. Pet. App. 39a, 62a.

Petitioner, however, argued that he should not have to forfeit the Brainerd Army Store's profits from the sale of Polar Pure, because he never received any of those profits—they flowed solely to his brother, the owner of the Brainerd Army Store. Petitioner pointed out that he did not have any ownership interest in the Brainerd Army Store. To establish this point, he relied on documentary evidence establishing that he had no ownership interest, Dkt. 107, Ex. A (Brainerd Army Store's annual corporate reports filed with Tennessee Secretary of State).[2] He also testified at trial that he held no ownership interest in the store. Pet. App. 72a-73a. Petitioner also pointed out that he had no authority to withdraw money from the Brainerd Army Store's Bank of America account. Again, to prove this point, Petitioner proffered documentary evidence, in the form of bank records. Dkt. 107, Ex. B (Bank of America records). His trial testimony confirmed his lack of authority on the bank account. Pet. App. 74a.

The District Court then solicited additional briefing on whether Petitioner should be liable for forfeiture. In its brief, the government acknowledged that Petitioner "did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales." Pet. App. 60a. It argued, however, that because "defendant's coconspirator did have an ownership role and did stand

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[2] All citations to "Dkt." are to the District Court docket at *United States v. Honeycutt*, No. 1:12-cv-00144-HSM-WBC (E.D. Tenn.). All materials cited in this petition are available on PACER.

to benefit personally from the $269,751.98 in profit from the sales of the listed chemical … the Court should hold the defendant jointly liable for the profit from the illegal sales." Pet. App. 60a-61a.

The District Court declined to require forfeiture. In its oral decision, the court noted that the "Brainerd Army Store itself" was not "a criminal enterprise," and that "some of the Polar Pure was being used for legal purposes." Pet. App. 39a. The court stated that it was "cognizant that the statute mandates that I do order forfeiture if the proceeds were directly or indirectly derived from the criminal enterprise." Pet. App. 40a. It acknowledged that Petitioner "was involved in a criminal conspiracy," but nonetheless concluded that "it's difficult for me to say that [Petitioner] personally … profited from that illegal conspiracy." Pet. App. 40a. The District Court relied on Petitioner's "lack of an ownership interest in the Brainerd Army Store," noting that Petitioner was "a salaried employee." Pet. App. 40a. The Court also explained that "the government has conceded" that "what Mr. Honeycutt's financial motivations may have been, are just not clear in this case." Pet. App. 40a. The Court therefore "decline[d] to order forfeiture against [Petitioner] in this case." Pet. App. 41a.

### C. Sixth Circuit's Decision

The Sixth Circuit reversed the District Court's decision not to order forfeiture. It concluded that Petitioner was jointly and severally liable for all of the conspiracy's profits, regardless of whether he ever received those profits. Pet. App. 24a-28a.

The court noted that there was a conflict of authority on whether § 853(a)(1) countenances joint and several liability for co-conspirators. As the court observed, four courts of appeals have held that "§ 853 mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." Pet. App. 25a-26a (citing decisions from the Second, Third, Fourth, and Eighth Circuits). "On the other hand," the court noted, the D.C. Circuit "has held that has held that § 853 does not countenance joint and several liability." Pet. App. 26a (citing *Cano-Flores*, 796 F.3d at 90-95).

The court found it "unnecessary to probe the reasoning of *Cano-Flores*," because in its view, it was precedentially bound by a prior Sixth Circuit decision which imposed joint-and-several liability under RICO's forfeiture provision. Pet. App. 26a-27a (citing *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000)). The court held that "[a]lthough *Corrado* did not specifically concern § 853, the relevant language and structure of the two statute's forfeiture provisions are virtually identical," and that *Corrado* therefore required the court to impose joint-and-several liability on Petitioner. Pet. App. 27a-28a. The court noted that "the D.C. Circuit's criticisms in *Cano-Flores*, 796 F.3d at 90-95—if valid—would apply with equal force to both the RICO and § 853 forfeiture provisions. And so, again, we would need to overrule *Corrado* if we were to follow *Cano-Flores*." Pet. App. 28a n.3.

Judge Moore concurred in the judgment. She acknowledged that *Corrado* dictated that Petitioner be held jointly and severally liable for all of the profits

from Polar Pure. But she wrote "to emphasize why that prior panel was likely incorrect, and to suggest that the full court consider the issue en banc." Pet. App. 29a.

Judge Moore explained that § 853(a)(1) requires forfeiture only of illicit property that a defendant "obtained," yet Petitioner never obtained anything—his brother did. As Judge Moore observed, "a lack of evidence suggesting that Honeycutt 'obtained' anything would seem to be problematic," and concluded that the imposition of joint-and-several liability is "contrary to the statute." Pet. App. 30a-31a. Judge Moore acknowledged that several circuits had held that § 853(a)(1) and RICO's forfeiture statute require joint-and-several liability, but that those decisions "largely gloss over the statutory text." Pet. App. 32a. She noted that "[a]lthough no contrary authority existed when we decided *Corrado*," the D.C. Circuit had reached the contrary conclusion in *Cano-Flores*. Pet. App. 32a. She concluded that "[t]he D.C. Circuit's textual argument is more thorough than any conducted by the many circuits that hold that joint-and-several liability is available, and it persuades me that we should reconsider *Corrado*." Pet. App. 32a.

Judge Moore rejected the reasoning of other circuits which had imposed joint-and-several liability based on *Pinkerton v. United States*, 328 U.S. 640 (1946), which holds that conspirators are liable for the reasonably foreseeable crimes of their co-conspirators. Relying on *Cano-Flores*, Judge Moore explained that "the *Pinkerton* doctrine 'speaks only to a defendant's substantive liability—not to the consequences of such

liability' … making it an especially thin basis for overruling the statute's plain text." Pet. App. 33a (quoting *Cano-Flores*, 796 F.3d at 94). Judge Moore also argued that "the general rule that §§ 853(a) and [the RICO forfeiture statute] be construed broadly," is not "a sufficient reason to override their plain language." Pet. App. 33a.

Judge Moore was "sensitive to concerns that precluding joint-and-several liability may frustrate the government's ability to collect illicit proceeds," but was "not convinced that the absence of joint-and-several liability would frustrate collections as much as these decisions anticipate." Pet. App. 33a-34a. Moreover, she noted that even without joint and several liability, a "higher-level conspirator" who "ultimately controls" and "reaps the financial benefits of the illegal operation" could still be subject to a forfeiture judgment. Pet. App. 34a. She concluded by reiterating that "en banc consideration is appropriate." Pet. App. 34a.

Petitioner filed a timely petition for rehearing en banc, which the court denied on May 31, 2016. Pet. App. 47a-48a.

## REASONS FOR GRANTING THE WRIT

This case meets all of this Court's criteria for granting certiorari. As the Sixth Circuit acknowledged, its decision is consistent with the decisions of several other circuits, but conflicts with *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015). The arguments on both sides of the split have been fully aired in the courts of appeals, and only this

Court can resolve the conflict. The question presented is important and recurs frequently, and this case provides a perfect vehicle. The Court should grant certiorari.

## I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED

### A. Like the Sixth Circuit, the Second, Third, Fourth, and Eighth Circuits Have Interpreted § 853(a)(1) To Impose Joint and Several Liability On All Co-Conspirators.

In the decision below, the Sixth Circuit concluded that § 853(a)(1) mandates joint and several liability among coconspirators for forfeiture of the proceeds of a drug conspiracy. The Second, Third, Fourth, and Eighth Circuits have reached the same conclusion.

***Second Circuit.*** In *United States v. Benevento*, 836 F.2d 129 (2d Cir. 1988) (per curiam), the Second Circuit concluded that "the forfeiture provision" of § 853(a)(1) "creates joint and several liability" and is not "limited to the share of proceeds equivalent to [a co-conspirator's] ownership interest in the criminal enterprise." *Id.* at 130. The Second Circuit adopted the reasoning of the District Court decision under review, *id.*, which in turn concluded that joint and several liability was necessary to avoid "giv[ing] criminals an incentive to engage in complex financial transactions in order to hide their share of the proceeds." *United States v. Benevento*, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987). The Second Circuit reaffirmed its interpretation of § 853(a)(1) in *United States v. Roberts*, 660 F.3d 149 (2d Cir. 2011), holding that "[i]n the case of a narcotics

conspiracy," "mandatory liability" for forfeiture "is joint and several among all conspirators." *Id.* at 165.

***Third Circuit.*** In *United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999), the Third Circuit similarly concluded that "21 U.S.C. § 853(a)(1) imposes joint and several liability with respect to forfeiture." *Id.* at 765. In reaching that conclusion, the Third Circuit cited the Fourth Circuit's decision in *United States v. McHan*, discussed *infra*. *Id.* It also relied on its analysis of the federal statute mandating forfeiture of money-laundering proceeds, in which it explained: "The statute does not say that each conspirator shall forfeit only such property involved in the offense which is or has ever been in that conspirator's possession. Rather, the statute recognizes that the amount of property … cannot be different for different conspirators." *Id.*

***Fourth Circuit.*** The Fourth Circuit reached the same conclusion in *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), holding that § 853(a)(1) "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise." *Id.* at 1043. The court reasoned:

> Just as conspirators are substantively liable for the foreseeable criminal conduct of a conspiracy's other members, *see Pinkerton v. United States*, [328 U.S. 640] (1946), they are responsible at sentencing for co-conspirators' "reasonably foreseeable acts and omissions ... in furtherance of the jointly undertaken criminal activity," U.S.S.G. § 1B1.3(a)(1)(B) (Relevant

> Conduct). … Because a criminal forfeiture ordered under § 853(a) is "an element of the [defendant's] sentence," *Libretti v. United States*, [516 U.S. 29, 38-39] (1995), it follows that conspirators should be liable under § 853 for their drug partnerships' receipts.

*Id.*

***Eighth Circuit.*** *United States v. Van Nguyen*, 602 F.3d 886 (8th Cir. 2010), adopted the same view of § 853(a)(1). The court concluded that under § 853, the defendant "may be held jointly and severally liable for all of the foreseeable proceeds of the conspiracy." *Id.* at 891, 904. The court cited its own prior decision in *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998), which took the same view of the RICO forfeiture statute; the *Simmons* court relied on "the traditional rules with respect to criminal conspiracy, under which all members of a conspiracy are responsible for the foreseeable acts of co-conspirators taken in furtherance of the conspiracy." *Id.* at 770. The Eighth Circuit reiterated its interpretation of § 853(a)(1) in *United States v. Elder*, 682 F.3d 1065 (8th Cir. 2012), holding that in "a forfeiture under 21 U.S.C. § 853(a)(1)," "[a] conspirator's forfeiture liability is not limited to the amount the government proves he personally obtained. He is jointly and severally liable to forfeit the proceeds of the criminal enterprise," as long as they "were reasonably foreseeable to him." *Id.* at 1073.[3]

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[3] As the Sixth Circuit noted below, RICO's forfeiture statute is closely similar to § 853(a)(1). *See* Pet. App. 27a (noting that RICO's forfeiture provision is "virtually identical" to

### B. The D.C. Circuit Has Held That § 853(a)(1) Does Not Impose Joint-and-Several Liability, and Instead Requires Forfeiture Only of Those Funds Which Actually Reach the Defendant.

In *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), the D.C. Circuit concluded that § 853(a)(1) "does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable." *Id.* at 91. Rather, the court read "the statutory language as providing for forfeiture *only* of amounts 'obtained' by the defendant on whom the forfeiture is imposed"—that is, only "funds that actually *reach* the defendant." *Id.* at 91-92. The court acknowledged that other courts of appeals had reached the contrary conclusion, but "respectfully disagree[d]" with the conclusions of those courts. *Id.* at 91.

The court's detailed analysis began "with the statutory text itself." *Id.* The court observed that the forfeiture obligations extends only to "property that a defendant has 'obtained,'" and that "the government's view reads the word 'obtained' out of the statute." *Id.*

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the forfeiture provision in § 853(a)(1)); Pet. App. 30a-31a (concurring opinion) (same). Four additional courts of appeals have held that RICO's forfeiture statute requires joint and several liability for co-conspirators. *See United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995); *United States v. Edwards*, 303 F.3d 606, 643-44 (5th Cir. 2002); *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *United States v. Caporale*, 806 F.2d 1487, 1509 (11th Cir. 1986).

It observed that "[i]n ordinary English a person cannot be said to have 'obtained' an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it." *Id.* It rejected the government's argument that joint-and-several liability was necessary to give meaning to the portion of the statute requiring forfeiture of illicit property obtained "indirectly," finding that "'indirectly' can be meaningfully understood in ways completely consistent with giving 'obtained' its ordinary meaning." *Id.* It gave the examples of "any situation where funds are transferred by a victim (or purchaser) to a defendant through an intermediary"; situations where an employee "may receive increased compensation as an indirect benefit of the fraud"; and situations where property is "received by persons or entities that are under the defendant's control" or "applied to the benefit of persons for whom that defendant has a legal or moral obligation of support." *Id.* at 92. The court also noted that the government's interpretation is at odds with the Sentencing Guidelines, which assume that "proceeds 'indirectly' obtained by a violator refer exclusively to proceeds actually obtained by him *individually*." *Id.* (emphasis in original).

The court next "turn[ed] to the reasoning of the decisions that … adopt a view equivalent to the government's." *Id.* at 93. The court first rejected the reasoning of courts which relied on the admonition in § 853(o) that the statute should be construed "liberally" in order "to effectuate its remedial purposes." The court explained that there was no evidence that Congress had the "purpose" of expanding the amount

of property subject to forfeiture, and that "even if Congress explicitly asserts a particular purpose, the courts do not assume that it intended to pursue that purpose to the exclusion of all others." *Id.* at 93 (internal quotation marks omitted). The court also noted that the rule of lenity, and the canon of constitutional avoidance, weighed against the government's interpretation. *Id.* 93-94.

The court also rejected its sister circuits' reliance on *Pinkerton v. United States*, 328 U.S. 640 (1946), which held that members of a conspiracy are liable for the foreseeable criminal conduct of their co-conspirators. The court explained that "vicarious liability's supposed 'resonance' with *Pinkerton* seems a woefully inadequate reason for disregarding the normal meaning of the word 'obtained.'" 796 F.3d at 94. It noted that Congress "made no mention of the case or the principle in either the statute or in the legislative history," and that "*Pinkerton*, even on its own terms, is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability." *Id.* The court observed that applying *Pinkerton* to forfeitures would cause forfeiture amounts to balloon at a much greater rate than imprisonment lengths relative to the size of the conspiracy. *Id.* at 94-95.

Finally, the court stated that "the language of 'joint and several liability' is derived from torts, but the courts invoking it have not deeply considered where there is a sound analogy between forfeiture and tort law. We doubt there is one." *Id.* at 95. The court explained that the rationale for joint and several liability in tort law is "the judgment that it is better

that the risk of an insolvent co-defendant should fall on a partially guilty defendant than on a completely innocent victim." *Id.* It acknowledged that "the tort analogy might well apply to *restitution* in a criminal case," and that courts are indeed authorized to apply joint and several liability in the restitution context, but "the reasoning doesn't extend to forfeitures, which are collected by the government." *Id.* The court also noted that "in the normal tort case a defendant who is jointly and severally liable has at least a chance of securing contribution from co-defendants, but there appears to be no suggestion by any court imposing joint and several liability that defendants would have a right of contribution among themselves." *Id.* (internal citation omitted).

## II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

This case meets all of the Court's criteria for granting certiorari. First, it presents an intractable and developed circuit split on a recurring question that only this Court can resolve. Second, it is a flawless vehicle.

### A. This Court Should Resolve the Circuit Split.

This case merits the Court's review. As the large number of cases on this issue attests, the question presented recurs frequently. That is not surprising, given that forfeiture of ill-gotten property is mandatory under § 853(a)(1). *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or

broader words to define the scope of what was to be forfeited."). Thus, the question presented can arise in any case involving a drug conspiracy in which any member of the conspiracy earns money from drug crimes.

Only this Court can resolve the conflict of authority between the D.C. Circuit and its sister circuits. There is no realistic possibility of the D.C. Circuit reconsidering *Cano-Flores*: *Cano-Flores* was a decision by a unanimous panel, which expressly considered and rejected the reasoning of cases from other circuits, and the government declined to file a petition for rehearing en banc or a petition for certiorari. Nor is the Sixth Circuit likely to reconsider its position—it denied rehearing en banc in the case below, notwithstanding Judge Moore's contrary recommendation. Thus, the circuit split will persist until this Court grants certiorari to resolve it.

There is no need for additional percolation. Five circuits have considered whether § 853(a)(1) provides for joint-and-several liability in decisions dating back to 1988, and an additional four have considered the issue in the RICO context. Although the majority of circuits have sided with the government, the D.C. Circuit's decision rejecting the government's position contains by far the most detailed analysis of any case on either side of the split. The arguments on both sides of the split have now been fully aired, and the question is ripe for this Court's review.

The Court should not be deterred by the fact that the D.C. Circuit is the only circuit on its side of the split. The Court routinely grants certiorari in cases

when one side of the split is represented by only one circuit–including cases involving far less developed circuit splits than this one. Indeed, it did so in seven federal criminal cases last Term. *See Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Lockhart v. United States*, 136 S. Ct. 958 (2016) (5-1 split); *Voisine v. United States*, 136 S. Ct. 2272 (2016) (approximately 9-1 split).

Finally, this Court's review is especially warranted because the circuit split creates the prospect of venue manipulation by the government in drug conspiracy investigations. In conspiracy cases, venue is proper in any jurisdiction where any co-conspirator has committed an overt act in furtherance of the conspiracy. *See Hyde v. United States*, 225 U.S. 347, 356-67 (1912). Thus, for example, if a member of a D.C. drug conspiracy engages in an overt act in Maryland or Virginia, all co-conspirators can be prosecuted there. Federal investigators conducting sting operations will have a powerful incentive to induce a co-conspirator to leave D.C., in order to ensure that all co-conspirators can be charged within the Fourth Circuit and subjected to the Fourth Circuit's joint-and-several liability rule. Federal law should be uniform; the incentives of law enforcement officials should not be affected by diverging interpretations of federal law in different jurisdictions. Only this Court can harmonize the meaning of federal law nationwide.

### B. This Case is a Perfect Vehicle.

The straightforward facts of this case make it a strong vehicle to consider the question presented. The government effectively conceded in the District Court that Petitioner would not be liable for forfeiture under the D.C. Circuit's approach in *Cano-Flores*, and rested its forfeiture case on the principles that co-conspirators should be jointly and severally liable. Thus, the Sixth Circuit's application of a joint-and-several liability rule was plainly outcome-determinative.

After Petitioner was convicted, the government argued that Petitioner should be jointly and severally liable for forfeiture of $269,751.98, which consisted of the profits from the sales of Polar Pure during the period of the conspiracy. Pet. App. 51a-52a. In seeking forfeiture of those profits, the government relied exclusively on principles of joint-and-several liability; it expressly admitted that Petitioner "did not stand to benefit personally from the illegal sales." Pet. App. 60a. Here is the complete quotation from the government's brief:

> Admittedly, the defendant did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales. However, the defendant's coconspirator did have an ownership role and did stand to benefit personally from the $269,751.98 in profit from the sales of the listed chemical. Because the jury convicted the defendant of a conspiracy with the defendant's coconspirator, the Court should hold the defendant jointly liable for the profit from the illegal sales. As the

> employee responsible for ordering products and inventory (doc. 104, Tr. Defendant's Testimony at 41, 43) and because the defendant had knowledge of both the use of the listed chemical in the manufacture of methamphetamine and law enforcement had warned the defendant, the sales and proceeds from those sales were reasonably foreseeable.

Pet. App. 60a-61a.

In view of the government's concession that Petitioner had not personally benefitted from the illegal sales, the District Court declined to order forfeiture. It concluded that "it's difficult for me to say that Mr. Terry Honeycutt personally, you know, profited from that illegal conspiracy." Pet. App. 40a. It found that Petitioner's "financial motivations … are just not clear in this case." Pet. App. 40a. The Sixth Circuit reversed the District Court, but it did not question the District Court's factual finding that Petitioner did not profit from the conspiracy. Instead, the Sixth Circuit premised its decision entirely on its view that joint and several liability was required under § 853(a)(1).

Thus, the Sixth Circuit's application of a rule of joint and several liability dictated the outcome of this case. This case is an ideal vehicle for the Court to consider whether that rule is correct.

## III. THE SIXTH CIRCUIT'S DECISION IS WRONG.

The Sixth Circuit erred in holding that § 853(a)(1) mandates joint and several liability among co-conspirators. The D.C. Circuit's interpretation of

§ 853(a)(1), under which a defendant is liable for forfeiture only of the proceeds that actually reach that defendant, is correct. Because the profits from the sale of Polar Pure flowed only to Petitioner's co-conspirator, Petitioner should not have been held liable for forfeiture of those profits.

The statutory text resolves this case. Under 21 U.S.C. § 853(a)(1), a defendant must forfeit illicit proceeds that he "obtained." Petitioner did not "obtain" $269,751.98; his brother did. *See Cano-Flores*, 796 F.3d at 91 ("In ordinary English a person cannot be said to have "obtained" an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it."). Therefore, he should not have been held jointly and severally liable for that sum.

The fact that the statute mandates forfeiture of illicit proceeds obtained "directly or indirectly" does not change the analysis. As the D.C. Circuit explained in *Cano-Flores*, "'indirectly can be meaningfully understood in ways completely consistent with giving 'obtained' its ordinary meaning." *Id.* For instance, a defendant "indirectly" obtains funds when "funds are transferred … to a defendant through an intermediary," when he "receive[s] increased compensation as an indirect benefit of the fraud," or when property is received by "persons or entities that are under the defendant's control" or is "applied to the benefit of persons for whom that defendant has a legal or moral obligation of support." *Id.* at 92. But the government never made any such showing with respect to Petitioner. Instead, it argued that merely because

Petitioner's co-conspirator obtained the profits of Polar Pure, Petitioner himself should be required to forfeit those profits. That holding read the word "obtained" out of the statute.

Congress is well aware of how to draft a statute imposing joint-and-several liability. In the restitution context, Congress provided: "If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h). Thus, Congress expressly granted a *permissive* rule of joint-and-several liability in the context of restitution. Congress enacted no analogous provision with respect to forfeiture, and the Sixth Circuit had no basis to impose a *mandatory* rule of joint-and-several liability based only on the term "obtained."

The government's interpretation is also inconsistent with the statutory purpose. "In enacting § 853, Congress decided to give force to the old adage that 'crime does not pay.'" *Monsanto*, 491 U.S. at 614. Thus, a person who actually *receives* tainted assets must give up those assets, so as not to benefit from his crimes. But that rationale does not apply to defendants such as Petitioner, who never received those assets. Forfeiture judgments imposed on defendants who never received any tainted assets are the functional equivalent of large criminal fines—except they are imposed without regard to the procedural protections in 18 U.S.C. § 3572(a), which require a court to consider

factors such as the defendant's income, the burden the fine will pose on the defendant, and other considerations that are irrelevant to the calculation of a forfeiture judgment.

In fact, joint-and-several liability actually *undermines* the government's goal of ensuring that "crime does not pay," because every dollar forfeited by a co-conspirator that did *not* receive the assets is a dollar that a co-conspirator who *did* receive the assets is allowed to keep. Consider the case of two co-conspirators, one of whom obtained $200,000 from the crime and one of whom obtained nothing. Suppose both are held jointly and severally liable for a $200,000 forfeiture judgment, and both end up satisfying $100,000 of that judgment. As the D.C. Circuit observed in *Cano-Flores*, the defendant who obtained nothing has no legal right of contribution against his co-conspirator who obtained $200,000. 796 F.3d at 95. Thus, the co-conspirator who earned $200,000 will only pay $100,000 – which means that he actually ends up retaining $100,000 that he earned as a result of his criminal activity.

Joint-and-several liability cannot be justified based on § 853(o), which states that the statute should be construed "liberally" in order "to effectuate its remedial purposes." *Cano-Flores*, 796 F.3d at 93 (quotation marks omitted). As the D.C. Circuit explained in detail, there is no evidence that joint-and-several liability is consistent with the statutory purpose. *Id.* Indeed, as explained above, it arguably *undermines* that purpose. Nor can a liberal-construction rule be used to override the unambiguous

text of § 853(a)(1), which requires forfeiture only of assets that a defendant "obtained."

Joint-and-several liability cannot be justified based on an analogy to *Pinkerton v. United States*, 328 U.S. 640 (1946). *Pinkerton*'s reasoning focused exclusively on the fact that a defendant could be held liable for his co-conspirator's *mens rea* and *actus reus*. 328 U.S. at 647. Thus, as the D.C. Circuit correctly explained, "*Pinkerton*, even on its own terms, is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability." 796 F.3d at 94.

Indeed, joint-and-several liability is contrary to the *Pinkerton* rule as ordinarily understood. Under *Pinkerton*, if five defendants are held liable for the substantive crime of one co-conspirator, they are assessed five separate criminal sentences and criminal fines, which they must satisfy individually; one defendant's payment of a criminal fine does not satisfy a co-defendant's obligation to pay a criminal fine. Joint-and-several liability is a concept borrowed not from *Pinkerton*, but instead from tort law. But as the D.C. Circuit explained, the analogy to tort law does not work, because the purpose of joint-and-several liability is to ensure complete *compensation*. *Cano-Flores*, 796 F.3d at 95. Thus, joint-and-several liability may make sense in the context of restitution—and, as noted above, Congress has indeed explicitly authorized joint-and-several liability in that context. But it does not make sense in the context of forfeiture, where the goal is to require a defendant to surrender ill-gotten gains to the government, not to compensate a victim. *See id.*

Finally, the D.C. Circuit observed in *Cano-Flores*

that the absence of any right of contribution was an indication that Congress did not intend to impose joint-and-several liability. *Id.* In *Paroline v. United States*, 134 S. Ct. 1710 (2014), this Court similarly held that the absence of a federal right of contribution was evidence that Congress did not intend to impose joint-and-several liability in the context of restitution for victims of child pornography crimes. *Id.* at 1725. That reasoning applies with full force here. Given that the tort-law concept of contribution does not apply in the forfeiture context, courts should not import the tort-law concept of joint and several liability into the law of forfeiture.

The Sixth Circuit erred in holding Petitioner jointly and severally liable for forfeiture of a drug crime's proceeds that he never personally obtained. The judgment of the Sixth Circuit should be reversed.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
*Plaintiff–Appellee/Cross–Appellant*,

v.

TERRY MICHAEL HONEYCUTT,
*Defendant–Appellant/Cross–Appellee*.

Nos. 14–5790, 14–5850.
Argued: Dec. 2, 2015.
Decided and Filed: March 4, 2016.

Before: SILER, MOORE, and GIBBONS, Circuit Judges.

## OPINION

SILER, Circuit Judge.

A jury convicted Defendant Terry Honeycutt ("Honeycutt") of eleven counts of conspiring to and knowingly distributing iodine while knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(c)(2), 843(a)(6), and 846. The district court sentenced Honeycutt to concurrent terms of 60 months' imprisonment for each count, but declined to order any forfeiture. Honeycutt now appeals his conviction, and the Government cross-appeals on the issue of forfeiture. For the following reasons, we **AFFIRM** Honeycutt's § 841(c)(2) convictions,

**VACATE** his sentences on the § 843(a)(6) convictions, and **REVERSE** the district court's determination that forfeiture is not warranted.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### I. Factual Background

Honeycutt worked as the salaried employee in charge of sales and inventory in the Brainerd Army Store—which was owned by his brother (and codefendant), Tony Honeycutt ("Tony"). In 2008, having noticed an increasing number of "edgy looking folks" purchasing Polar Pure, an iodine-based water purification product, Honeycutt called the Chattanooga Police Department to ask if the iodine in Polar Pure could be used to manufacture methamphetamine. He spoke to Tommy Farmer, Director of the Tennessee Meth and Pharmaceutical Task Force, who confirmed that Polar Pure was being used to manufacture methamphetamine throughout the community and urged Honeycutt not to sell it "if [he] fe[lt] uncomfortable about it." Afterwards, Director Farmer informed the Police Department and the Drug Enforcement Administration ("DEA") that Honeycutt was selling Polar Pure.

The Brainerd Army Store was the only local retailer that stocked Polar Pure; the product was kept out of sight behind the sales counter, and only Honeycutt and his brother sold it. Each bottle of Polar Pure contains about eight grams of iodine crystals that, if used as instructed, could purify up to five hundred gallons of water. Over time, Honeycutt sold increasing

quantities of iodine, including as many as twelve bottles of Polar Pure in a single transaction (i.e., enough iodine to purify six thousand gallons of water).

In 2009, the DEA, in conjunction with state and local law enforcement, began investigating the Polar Pure sales at the store. The investigation involved surveillance, monitoring of iodine sales, controlled buys by an undercover agent, direct conversations with Honeycutt and his brother, attempts by officers to convince the brothers to stop selling the product to meth producers, and, ultimately, the execution of a search warrant in 2010.

The search revealed that in a three-year period, Polar Pure became the store's highest-grossing item, generating upwards of $269,000 in profit from the sale of more than 20,000 bottles of Polar Pure. Upon questioning, Honeycutt indicated that he and his brother had adopted a "don't-ask-don't-tell" policy after discussions with their iodine supplier. Pursuant to the warrant, agents seized the store's inventory of 307 bottles of Polar Pure. Agent David Shelton testified that after the Brainerd Army Store closed, following the execution of the warrant, the meth labs using the red phosphorus method that required iodine dropped to an "insignificant level," becoming "rare" and "fairly non-existent" in the region.

## II. Procedural History

A federal grand jury indicted the brothers for various offenses regarding their distribution of iodine while knowing or having reasonable cause to believe it would be used to manufacture methamphetamine.

Tony pled guilty, and Honeycutt went to trial. Honeycutt was acquitted of three charges in the indictment, and convicted of the remaining eleven—which involved conspiring to and knowingly distributing iodine in violation of 21 U.S.C. §§ 841(c)(2), 843(a)(6), and 846—although at sentencing the district court merged the counts of the §§ 841(c)(2) and 843(a)(6) offenses that occurred on the same day.

The district court sentenced Honeycutt to concurrent terms of 60 months' imprisonment for each count. It declined to order any forfeiture, reasoning in particular that, as a salaried employee, Honeycutt did not reap the proceeds of the conspiracy.

## DISCUSSION

### I. Sufficiency of the Evidence

#### A. Waiver

As a threshold matter, Honeycutt disputes the sufficiency of the evidence at various points in his appeal, and yet no sufficiency challenge appears in his statement of the issues. Federal Rule of Appellate Procedure 28(a) explicitly states that an "appellant's brief *must* contain ... a statement of the issues presented for review." Fed. R.App. P. 28(a)(5) (emphasis added); *United States v. Baylor*, 517 F.3d 899, 903 (6th Cir. 2008). Because Honeycutt failed to list these evidentiary challenges among his nine issues presented on appeal, we could dismiss Honeycutt's sufficiency arguments as waived. *See, e.g., Barrett v. Detroit Heading, LLC*, 311 Fed. Appx. 779, 796 (6th Cir. 2009) (holding that "[t]he provisions of Rule 28(a)

are ... unambiguously mandatory," and deeming waived an argument not listed in the statement of issues presented). Even assuming that this issue was properly preserved, however, his arguments are plainly meritless.

### B. Standard of Review

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when "*all of the evidence* is ... considered." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

### C. Conspiracy to Violate §§ 841(c)(2) and 843(a)(6)

To prove the existence of the conspiracy alleged in Counts One and Two, "the government was required to prove, beyond a reasonable doubt, '(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.'" *United States v. Pritchett*, 749 F.3d 417, 431 (6th Cir. 2014) (quoting *United States v. Gibbs*, 182 F.3d 408, 420 (6th Cir. 1999)). Here, the Government presented ample evidence for a rational juror to convict Honeycutt of conspiracy to violate §§ 841(c)(2) and 843(a)(6).

Regarding the first element, the evidence showed that Honeycutt and his brother jointly agreed to violate the drug laws by providing iodine for the manufacture of methamphetamine. On November 23, 2009, Tony

said, in Honeycutt's presence, "we really don't ask and [the customers] don't tell" why they are buying iodine—even though they had been warned that the type of iodine they were selling was preferred by meth cooks. In 2010, Honeycutt told Agent Shelton that they adopted their don't-ask-don't-tell policy based on the advice of Bob Wallace, their iodine supplier. Honeycutt and his brother both admitted selling iodine, and they were the only ones selling iodine at the store. The evidence thus showed that the brothers shared "a tacit or mutual understanding among the conspirators [that] is sufficient" to show an agreement to violate the drug laws. *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007).

As for the second and third elements, the evidence was more than adequate to establish Honeycutt's knowledge of and willing participation in the conspiracy. For instance, the placement of the iodine behind the counter out of view of regular customers, as well as Honeycutt's deceptive response to Agent Shelton's request for an estimate of the monthly iodine sales reflected knowledge of the conspiracy to violate drug laws and possible intent to delay discovery of the conspiracy. Knowledge of the conspiracy was also manifest in Honeycutt's assertion of a limit on iodine sales that was repeatedly exceeded. Finally, his knowledge of and participation in the conspiracy was proven by his possession and distribution of extraordinary quantities of iodine; his responsibility for the store inventory and for ordering iodine from the supplier; and his engagement in direct sales. With the increasing sales in the face of multiple warnings from

law enforcement officers, Honeycutt clearly demonstrated his knowledge about, and continued intent to participate in, the conspiracy.

### D. Substantive Violations of §§ 841(c)(2) and 843(a)(6)

The evidence also sufficed to support Honeycutt's substantive convictions under §§ 841(c)(2) and 843(a)(6). To prove a violation of § 841(c)(2), the Government must establish that a defendant (1) knowingly or intentionally possessed a listed chemical while (2) knowing, or having reasonable cause to believe, that the listed chemical would be used to manufacture a controlled substance. *See Pritchett*, 749 F.3d at 428. Similarly, § 843(a)(6) requires that the Government prove that a defendant possessed a chemical or other item which could be used to manufacture a controlled substance, and, at the time of such possession, knew, intended, or had reasonable cause to believe it would be used in the manufacture of a controlled substance. *See United States v. Swafford*, 512 F.3d 833, 845 n. 7 (6th Cir. 2008). The main difference between the two provisions is that § 841(c)(2) requires that the chemical be listed and § 843(a)(6) does not. In this case, the Government presented sufficient evidence for a rational juror to convict Honeycutt of violating both statutes.

With respect to the element of possession, the store's records reflected the sale of more than 20,000 bottles of iodine, and only Honeycutt and his brother sold it.

As for the element of knowing, or having reasonable cause to believe, that the iodine would be used to manufacture a controlled substance, Honeycutt was familiar with the manufacturing process for methamphetamine. He knew cooking meth requires pseudoephedrine, and he understood that although iodine is used in the process, it is not part of the finished product.

Despite repeated warnings by several law enforcement officers that the iodine he was selling was flowing directly into the meth labs of the area, Honeycutt nonetheless continued to sell Polar Pure. And again, although it became the store's best-selling product, he did not display it openly, but rather hid it under the sales counter and sold it only to those customers who requested it—and did so on a don't-ask-don't-tell basis. Moreover, when agents asked Honeycutt to look at photos of suspects who they believed purchased iodine at the store to cook meth, Honeycutt became visibly nervous, indicating that he knew, or reasonably should have known, that said customers were using his iodine to make methamphetamine.

## II. Multiplicitous Convictions Under 21 U.S.C. §§ 841(c)(2) and 843(a)(6)

Honeycutt next argues that the district court erred by allowing the jury to consider the charged violations of both §§ 841(c)(2) and 843(a)(6). Asserting that "the district court erroneously treated [§§ 841(c)(2)] and [843(a)(6)] as redundant statutes," he contends that § 841(c)(2) applies only to listed chemicals, while

§ 843(a)(6) applies only to "unlisted" chemicals. Because the facts of his case did not involve an "unlisted" chemical, Honeycutt contends that "the 'mirrored' § 843(a)(6) counts reduced the Government's burden of proof, unduly confused the jury, and the result of the trial would have been different absent the § 843(a)(6) counts." He is mistaken.

First, he erroneously states that de novo review is the applicable standard. If he were claiming that he had actually been convicted and sentenced for multiplicitous counts in violation of the Double Jeopardy Clause, we would apply a de novo review to determine the issue of multiplicity. *See Swafford*, 512 F.3d at 844. However, when a district court permits multiplicitous counts to go to a jury and then merges them post-verdict, we apply an abuse-of-discretion standard in reviewing that decision. *See United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990) ("[T]he district court has discretion in deciding whether to require the prosecution to elect between multiplicitous counts.... [and] [w]e may reverse only for an abuse of discretion.") (citing *United States v. Reed*, 639 F.2d 896, 904 n. 6 (2d Cir. 1981)).

Second, our decision in *Swafford* does not support his view that § 843(a)(6) applies only to "unlisted" chemicals, nor does *Swafford* dictate a different outcome from the district court's decision. In that case, we applied the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932), determined that §§ 841(c)(2) and 843(a)(6) are in fact multiplicitous, and held that "[b]ecause

multiplicity exists, the charges must be merged under § 841(c)(2) to satisfy the prohibition against double jeopardy." *Swafford*, 512 F.3d at 844–46. In this case, the district court agreed with *Swafford* that the overlapping convictions were multiplicitous and remedied the issue by merging the convictions at sentencing.

We have previously held that multiplicity can be thus resolved. *Throneburg*, 921 F.2d at 657 ("[W]hen multiplicitous prosecutions and convictions occur, 'the only remedy consistent with the congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions.'" (quoting *Ball v. United States*, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L.Ed.2d 740 (1985))).

## III. The Jury Instructions and Verdict Form

### A. Standard of review

Honeycutt challenges several of the jury instructions issued in this case. In reviewing jury instructions, we must determine "whether the charge, taken as a whole, fairly and adequately submit[ted] the issues and applicable law to the jury." *Fencorp, Co. v. Ohio Kentucky Oil Corp.*, 675 F.3d 933, 943 (6th Cir. 2012) (quoting *Fisher v. Ford Motor Co.*, 224 F.3d 570, 575–76 (6th Cir. 2000)). "While the correctness of jury instructions is a question of law, which we review *de novo*, the refusal to give a specifically requested instruction is reviewed for abuse of discretion. A judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or

prejudicial." *Id.* (quoting *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 881 (6th Cir. 2007) (internal citation omitted)). Moreover, absent a timely objection, we review only for plain error. *United States v. Newsom*, 452 F.3d 593, 605 (6th Cir. 2006).

### B. Constructive Amendment of the *Mens Rea* for the Offenses

Honeycutt argues that the district court constructively amended the indictment, in that: (1) the jury instructions repeatedly described the violations as involving the possession and distribution of iodine while "knowing and having reasonable cause to believe that [it] would be used to manufacture methamphetamine," and (2) the verdict form summarized the charged offenses as distribution or possession of chemicals "used to manufacture methamphetamine." In Honeycutt's view, the jury instructions and verdict form invited the jury to convict him without proof of the requisite *mens rea*—that he knew or had reasonable cause to believe that the chemical "*will be used* to manufacture a controlled substance."

Insofar as he is challenging the district court's "would be used" phrasing—in light of the statutory language "will be used"—he did not raise that objection below. As "would" is the past tense of "will," *see* Oxford English Dictionary Online (3d ed. 2012) (under "will" definition), and as the jury was charged to assess Honeycutt's *mens rea* at the time of the offenses, the district court's use of "would" was entirely appropriate. Moreover, the district court said "will" and not "would" when reading the statutes, and we have previously

affirmed convictions under § 841(c)(2) where the jury was asked to decide whether the defendants possessed and distributed a listed chemical, "knowing and having reasonable cause to believe that the chemical *would* be used to manufacture methamphetamine." *Pritchett*, 749 F.3d at 428 (emphasis added). Thus, the district court's use of this phrasing in its jury instructions did not constitute error—plain or otherwise.

Regarding Honeycutt's claim that the indictment was constructively amended because the verdict form did not exactly mirror its language, he raised that concern during the charge conference, and suggested that the jury should receive only the indictment and a generic form on which to mark guilty or not guilty for each count. The district court refrained from changing the verdict form, but instead invited defense counsel to inform the jury during closing argument that the verdict form was simply a "condensed" version of the indictment. In its charge to the jury, the district court mentioned that the verdict form presented fourteen questions that corresponded to the indictment's fourteen counts, and emphasized that the verdict form did "not [contain] a complete statement, but a brief summary of the charges in the indictment." Moreover, after informing the jury that it would receive a copy of the indictment to review during deliberations, the district court reemphasized the summary nature of the verdict form. Therefore, Honeycutt cannot establish that the verdict sheet "so modif[ied] essential elements of the offense charged that there is a substantial likelihood that [he] may have been convicted of an offense other than that charged in

the indictment." *United States v. Barrow*, 118 F.3d 482, 488 (6th Cir. 1997) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)).

### C. Constructive Amendment with the Term "Precursor Chemical"

Next, Honeycutt claims that, because the district court said "precursor chemicals" instead of "listed chemicals" at various points in its instructions and on the verdict form, "[t]he jury was permitted to assume that all 'chemicals' are treated alike in the law." However, not only did the district court clearly use the term "listed chemical" throughout its instructions, but this is not a case in which the jury heard evidence about multiple chemicals or controlled substances, not all of which would be sufficient to sustain a conviction; rather, iodine was the only "chemical" at issue in this case, and uncontroverted evidence established that iodine was a listed chemical. Accordingly, as with the prior claim, Honeycutt has failed to prove any constructive amendment of the indictment.

### D. Entrapment by Estoppel Instruction

Honeycutt asserts that the Sixth Circuit pattern instruction about entrapment by estoppel improperly shifted the Government' burden of proof to him. However, given that entrapment by estoppel is an affirmative defense, the district court properly required Honeycutt to bear the burden of proof on that issue.

The challenged pattern instruction—which is principally based on the standard applied in *United*

*States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992)—requires a defendant to prove the following factors by a preponderance of the evidence:

> First, that an agent of the United States government announced that the charged criminal act was legal.
>
> Second, that the defendant relied on that announcement.
>
> Third, that the defendant's reliance on the announcement was reasonable.
>
> Fourth, that given the defendant's reliance, conviction would be unfair.

6th Cir. Pattern Crim. Jury Instr. 6.09 Entrapment by Estoppel (2015). The Supreme Court has repeatedly upheld the practice of requiring a defendant to prove an affirmative defense by a preponderance of the evidence. *See, e.g., Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977) ("Proof of the nonexistence of all affirmative defenses has never been constitutionally required.") (upholding a statute that required a defendant charged with murder to bear the burden of proof as to the affirmative defense of acting under extreme emotional distress).

Entrapment by estoppel is an affirmative defense that does not negate an element of either of the crimes charged here. As the Supreme Court has stated, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Dixon v. United States*, 548 U.S. 1, 5, 126 S. Ct. 2437,

165 L.Ed.2d 299 (2006). "Knowingly" does not require knowledge that the facts underlying the criminal violation were unlawful. *See id.* (contrasting "knowingly" with "willfully," the latter of which "requires a defendant to have 'acted with knowledge that his conduct was unlawful'" (quoting *Bryan v. United States*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L.Ed.2d 197 (1998))). Thus, the Government needed only to establish that Honeycutt acted knowingly, not that he knew his conduct was illegal.

By raising the defense of entrapment by estoppel, Honeycutt was not asserting that he did not know he was distributing iodine, nor that he did not know or have reasonable cause to believe that the iodine would be used to manufacture methamphetamine, but that government officials had led him to believe that such conduct was lawful. *See United States v. Triana*, 468 F.3d 308, 316 (6th Cir. 2006) (noting that the defense of entrapment by estoppel applies "when an official tells a defendant that certain conduct is legal and the defendant believes that official to his detriment") (citations omitted). Accordingly, the defense of entrapment by estoppel—like the defenses of necessity and duress—serves to "excuse conduct that would otherwise be punishable," yet "does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly." *Dixon*, 548 U.S. at 7, 126 S. Ct. 2437 (citations omitted). And as with the defense of duress, entrapment by estoppel enables a defendant to "avoid liability" where "coercive conditions ... negate[ ] a conclusion of guilt

even though the necessary *mens rea* was present." *Id.* at 6–7, 126 S. Ct. 2437.

Additionally, Honeycutt argues that the pattern instruction regarding entrapment by estoppel violates Due Process.[1] In particular, he focuses on the third and fourth prongs—the former, regarding reasonable reliance, and the latter concerning the unfairness of conviction for the crimes—although he has failed to show precisely how either factor is unconstitutionally burdensome.

Moreover, laying the third and fourth factors aside, Honeycutt was unable to prove that any federal agent affirmatively "announced that the charged criminal act was legal," much less that he reasonably relied on such an announcement. The agents did not tell him his distribution of iodine was legal; rather, they repeatedly warned him that his customers were buying iodine to manufacture methamphetamine.

In any event, given that his challenge to the district court's "refusal to give [his] specifically requested instruction is reviewed for abuse of discretion," and the "judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial," *Fencorp*, 675 F.3d at 943 (quoting *Micrel*, 486 F.3d at 881), his shot at this instruction falls well

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[1] He also asserts that the pattern instruction is an inaccurate and/or anomalous statement of the law. However, insofar as he indicates that the fourth factor is unique to the Sixth Circuit, he is mistaken. *See, e.g.*, *United States v. Villafane–Jimenez*, 410 F.3d 74, 81 (1st Cir. 2005) (reciting essentially the same four-part test).

short of the mark. The pattern instruction about entrapment by estoppel did not render the instructions, as a whole, "confusing, misleading, or prejudicial," and the district court did not abuse its discretion by declining to modify that instruction.

### E. Deliberate Indifference Instruction

Next, Honeycutt challenges the district court's deliberate-ignorance instruction. This instruction "is appropriately given when it addresses an issue reasonably raised by the evidence, i.e., when two predicates are met: '(1) the defendant claims a lack of guilty knowledge; and (2) the facts and evidence support an inference of deliberate ignorance.'" 6th Cir. Pattern Crim. Jury Instr. 2.09 Deliberate Ignorance Commentary (2013 ed.) (quoting *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012)). "We have repeatedly held that this instruction is an accurate statement of the law." *Mitchell*, 681 F.3d at 876 n.51.

Honeycutt denied any guilty knowledge, and the evidence offered at trial clearly justified a deliberate-ignorance instruction. Thus, the district court reasonably issued the instruction. *See id.* at 877 (noting that "[b]oth parties had the right to have the case submitted to the jury under instructions that would allow a full and fair evaluation of the evidence of record in light of the theories proffered by each side").

The deliberate-ignorance instruction did not encourage the jury to convict Honeycutt on less than beyond a reasonable doubt. *Id.* at 879. Moreover, as we have previously held, "at worst, any error in giving the instruction was harmless," since "there is

substantial evidence of actual knowledge," *Williams*, 612 F.3d at 508 (quoting *United States v. Mendoza–Medina*, 346 F.3d 121, 134 (5th Cir. 2003)), and given our conclusion that "a deliberate ignorance instruction that properly states the law is harmless error," *id.* (quoting *United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007)).

### F. Jury Finding of Iodine's Status as a List I Chemical

Honeycutt asserts that the specific listing of a chemical is an element of a § 841(c)(2) offense, because List I chemicals carry a higher statutory penalty; hence, he argues that the district court erred by not requiring the jury to determine whether iodine was, in fact, a List I chemical. Given that he did not raise this issue below, it is reviewable only for plain error.

As an initial matter, Honeycutt's 60–month sentence does not run afoul of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), since it did not exceed "the statutory maximum that would have applied even without the enhancing factor." *United States v. Osborne*, 673 F.3d 508, 512 (6th Cir .2012) (quoting *United States v. Burns*, 298 F.3d 523, 544 (6th Cir. 2002)).

As to whether iodine's status as a List I chemical constitutes an element of a § 841(c)(2) offense, Honeycutt correctly notes that § 841(c)(2) establishes a twenty-year maximum penalty for a violation "involving a List I chemical" and a ten-year maximum for all other violations, and that "any fact that increases the penalty for a crime ... must be submitted to a jury,

and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S. Ct. 2348. However, we need not decide whether he has identified a plain error, given that his substantial rights were clearly not affected. *See United States v. Stewart*, 306 F.3d 295, 317 (6th Cir. 2002) (finding it unnecessary to discuss the first three parts of the plain-error test because the fourth part had not been satisfied).

Even where a district court improperly withholds an element of an offense from the jury, however, the Supreme Court has held that the error is harmless if "a defendant did not, and apparently could not, bring forth facts contesting the omitted element." *Neder v. United States*, 527 U.S. 1, 6, 19, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).[2] Likewise, we have held that "where the evidence regarding the omitted element is undisputed, 'answering the question of whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.'" *United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008) (quoting *Neder*, 527 U.S. at 19, 119 S. Ct. 1827). Here, each side offered evidence establishing that iodine is a List I chemical, and

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[2] Although *Neder* involved harmless error analysis under Rule 52(a), rather than plain error under Rule 52(b), that difference is immaterial because both standards require a showing that the error affected the defendant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993) (noting that the only difference between the two is that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice" under the plain-error standard).

Honeycutt specifically elicited testimony that iodine has been thus classified since 2007.

Like *Neder*, this case is "one[] where a defendant did not, and apparently could not, bring forth facts contesting the omitted element," and the "omitted element is supported by uncontroverted evidence." 527 U.S. at 18–19, 119 S. Ct. 1827. Therefore, the absence of a jury finding regarding iodine's status as a List I chemical did not affect Honeycutt's substantial rights, and the district court did not plainly err by not requiring the jury to make such a finding.

## IV. Vagueness Challenge

Honeycutt also asserts that § 841(c)(2) is unconstitutionally vague. We review challenges to the constitutionality of a statute de novo, and "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *United States v. Caseer*, 399 F.3d 828, 839 (6th Cir. 2005) (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995)). With a vagueness claim, a defendant "bears the burden of establishing that the statute is vague as applied to his particular case, not merely that the statute could be construed as vague in some hypothetical situation." *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) (quoting *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001)).

Honeycutt contends that, because list chemicals are not themselves controlled substances nor per se illegal, he may not be convicted without proof that he knew both that iodine is a listed chemical and that it appears

on List I. The district court rejected this argument, in particular because § 841(c) does not include a different knowledge requirement between List I and List II chemicals.

In support of his position, Honeycutt discusses at length our decision in *Caseer*, in which we held that, to satisfy the *mens rea* requirement of § 841(a) for an offense involving khat, the United States needed to prove the defendant knew that khat contained a controlled substance—since khat did not appear on the listed controlled substances schedules. 399 F.3d at 841. Confronting and rejecting the argument that the statute was unconstitutionally vague, we explained that "the more important aspect of vagueness doctrine 'is not actual notice, but ... the requirement that a legislature establish minimal guidelines to govern law enforcement,'" *id.* at 836 (quoting *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983)), and concluded that the "scienter requirement" of the statute overcame "the threat to due process posed by the failure of the controlled substances schedules to identify that as a source of cathinone." *Id.* at 830.

Unlike khat, iodine is specifically listed in the Controlled Substances Act and the Federal Register as a list chemical. *See* 21 U.S.C. § 802(35); 72 Fed. Reg. 35920–01. Further, *Caseer's* concerns about a person of "ordinary intelligence" who "could unwittingly expose himself ... to criminal penalties," 399 F.3d at 839, does not apply to Honeycutt, as he clearly understood that iodine was a crucial ingredient for the

methamphetamine manufacturing process. Convictions under § 841(c)(2) require proof of "actual knowledge," which is an "unusually specific *mens rea* requirement," *United States v. Truong*, 425 F.3d 1282, 1288–91 (10th Cir. 2005), that serves to excuse the unwitting and convict the culpable. Accordingly, Honeycutt has failed to prove that the statute was unconstitutionally vague as applied.

## V. Honeycutt's Sentencing

### A. The Iodine Quantity Attributed to Honeycutt

At sentencing, the district court determined Honeycutt's Guideline range based upon a finding that his offenses involved "1.3 KG or more of Iodine" and a "List I chemical." Citing *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014), Honeycutt asserts that "drug quantity is an element of the offense in § 841," and argues that the jury should have made a specific finding regarding this element. However, *Dado* involved § 841(b)(1)(A), under which drug quantity affects the statutory minimum and maximum and, thus, requires a jury finding under *Apprendi.* In this case, the amount of iodine attributed to Honeycutt had no impact on the statutorily-authorized maximum penalty, so *Dado* is of no help to him. The district court was authorized to determine the iodine quantity for which Honeycutt would be held responsible, and its determination was not clearly erroneous. *See United States v. Samuels*, 308 F.3d 662, 670 (6th Cir. 2002) (reviewing drug quantity factual findings for clear error). Moreover, "drug quantity need only be

established by a preponderance of the evidence, and an estimate will suffice so long as it errs on the side of caution." *United States v. Anderson*, 526 F.3d 319, 326 (6th Cir. 2008) (citing *United States v. Davis*, 981 F.2d 906, 911 (6th Cir. 1992)).

In the instant case, the evidence strongly supported the district court's analysis of the iodine quantity attributable to Honeycutt. The store records indicated sales of more than 21,000 bottles of Polar Pure, each containing roughly eight grams of iodine crystals. Further, any quantity above 1.3 kilograms of iodine yields the same offense level of 30. Since the record establishes a quantity of iodine over 1.3 kilograms, the district court did not clearly err in its quantity determination.

### B. Term in Excess of Statutory Maximum

Honeycutt asserts, and the Government concedes, that the district court's sentence of concurrent terms of 60 months' imprisonment for the three § 843(a)(6) violations exceeds the statutory maximum. Given that § 843(a)(6) does in fact establish a maximum penalty of four years' imprisonment, we will vacate the sentence on those counts. Even though Honeycutt's aggregate 60–month sentence remains unchanged in light of the § 841(c)(2) violations, we will remand this case to permit the district court to impose a sentence within the four-year maximum for the § 843(a)(6) counts.

## VI. Forfeiture

In its cross-appeal, the Government asserts that the district court erred in refusing to order any forfeiture, given that the governing statute mandates the order of forfeiture if the requisite elements are satisfied. We review a district court's interpretation of federal forfeiture law de novo, *United States v. Hill*, 167 F.3d 1055, 1073 n. 13 (6th Cir. 1999), a district court's findings of fact for clear error, and the sufficiency of those facts de novo, *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007).

Section 853(a)(1) states that "[a]ny person convicted of a violation of this subchapter or subchapter II of this chapter ... shall forfeit ... any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation." Although the district court properly noted that "the statute mandates that [the district court] order forfeiture if the proceeds were directly or indirectly derived from the criminal enterprise," *see* 28 U.S.C. § 2461(c); 21 U.S.C. § 853(a), it declined to order forfeiture for a number of reasons. In particular, it found that (1) although "there was a criminal conspiracy being operated out of the Brainerd Army Store ... the Brainerd Army Store itself was [not] a criminal enterprise"; (2) "at least some of th[e] Polar Pure was sold for legal purposes.... [and] there is no evidence that would permit the Court to make a reasoned assessment of what percentage of that Polar Pure was due to illegal activity"; and (3) as "a salaried employee," the district court could not "say that

[Honeycutt] personally ... profited from th[e] illegal conspiracy." Of these reasons, it appears that the district court's decision was driven mostly by its determination that Honeycutt did not directly or indirectly reap the proceeds of the criminal enterprise.

The Sixth Circuit has not yet squarely addressed the issue of whether joint and several liability applies to forfeiture of proceeds under 21 U.S.C. § 853. Although under another statute we have previously reversed a district court's forfeiture order based on insufficient proof that a defendant had received any proceeds from fraudulent activity, observing that "[i]t is well-established that a defendant 'cannot be ordered to forfeit profits that he never received or possessed,'" *United States v. McLaughlin*, 565 Fed. Appx. 470, 475 (6th Cir. 2014) (quoting *United States v. Contorinis*, 692 F.3d 136, 145 (2d Cir. 2012)), we also recognized that "a defendant may 'forfeit proceeds received by others who participated jointly in the crime'—which is comparable to the possibility of forfeiting 'indirectly' obtained proceeds," *id.* (quoting *Contorinis*, 692 F.3d at 147). In fact, the lack of "an underlying conspiracy" in *McLaughlin* is one of the reasons that we distinguished that case from *United States v. Warshak*, 631 F.3d 266, 332 (6th Cir. 2010)—a case in which we invoked theories of corporate and accomplice liability to apply joint and several liability to forfeiture of revenue. 565 Fed. Appx. at 475. Here, the conspiracy factor distinguishes *McLaughlin* from the instant case.

A number of other circuits that have addressed this issue have concluded that § 853 mandates joint and

several liability among coconspirators for the proceeds of a drug conspiracy. *See, e.g., United States v. Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), *cert. denied*, —— U.S. ——, 132 S. Ct. 1640, 182 L.Ed.2d 239 (2012) ("In the case of a narcotics conspiracy [under § 853(a)(1)], this mandatory liability [regarding forfeiture] is joint and several among all conspirators."); *United States v. Van Nguyen*, 602 F.3d 886, 904 (8th Cir. 2010) (holding that under § 853, a defendant "may be held jointly and severally liable for all of the foreseeable proceeds of the conspiracy"); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) ("21 U.S.C. § 853(a)(1) imposes joint and several liability with respect to forfeiture."); *United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996) (concluding that § 853(a)(1) "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise"), *cert. denied*, 520 U.S. 1281, 117 S. Ct. 2468, 138 L.Ed.2d 223 (1997). On the other hand, at least one circuit has held that § 853 does not countenance joint and several liability. *See United States v. Cano–Flores*, 796 F.3d 83, 90–95 (D.C. Cir. 2015) (criticizing the circuits that have invoked *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946), to apply joint and several liability to § 853, and holding otherwise—based on the plain meaning of "obtained," the language of related Sentencing Guidelines passages, the rule of lenity, and the canon of constitutional avoidance). It is unnecessary to probe the reasoning of *Cano–Flores*,

however, given that we are precedentially bound by our own reasoning as laid down in the RICO forfeiture context. *See McHan*, 101 F.3d at 1042 ("We generally construe the drug and RICO forfeiture statutes similarly.").

In *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000), we determined that "co-conspirators in a RICO enterprise should be held jointly and severally liable for any proceeds of the conspiracy." *Id.* at 553. Echoing the rationale of sister circuits that had so concluded, we held that "[t]he government is not required to prove the specific portion of proceeds for which each defendant is responsible. Such a requirement would allow defendants 'to mask the allocation of the proceeds to avoid forfeiting them altogether.'" *Id.* (quoting *United States v. Simmons*, 154 F.3d 765, 769–70 (8th Cir. 1998) (quoting *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986))).

Although *Corrado* did not specifically concern § 853, the relevant language and structure of the two statute's forfeiture provisions are virtually identical: both contain the mandatory "shall forfeit" phrasing; both demand the forfeiture of "any property constituting, or derived from, any proceeds [that] the person obtained, directly or indirectly," as result of the violation; and both dictate that their provisions "shall be liberally construed to effectuate [their] purposes." *Compare* 21 U.S.C. § 853(a), (a)(1), (*o*), *with* 18 U.S.C. § 1963(a), (a)(3), *and* 18 U.S.C. § 3731. We find that our holding and rationale in *Corrado* carries equal weight in the § 853 context. Moreover, neither the

district court's above-mentioned concerns nor Honeycutt's arguments militate otherwise. *See Warshak*, 631 F.3d at 332 ("[T]he argument that certain sales were legitimate gains no traction. Any money generated through these potentially legitimate sales is nonetheless subject to forfeiture, as the sales all resulted 'directly or indirectly' from [the] conspiracy."); *United States v. Darji*, 609 Fed. Appx. 320, 321–22 (6th Cir. 2015) (upholding a district court's application of joint and several liability for forfeiture of proceeds, even though a defendant "received only a reasonable salary"). And finally, and most importantly, "[e]ven if we were persuaded by [Honeycutt]'s argument and [the district court]'s rationale, we are bound by the [*Corrado* ] decision," as "[i]t is firmly established that one panel of this court cannot overturn a decision of another panel; only the court sitting en banc can overturn such a decision." *United States v. Lanier*, 201 F.3d 842, 846 (6th Cir. 2000) (citing *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996)). [3] Accordingly, we conclude that the district court erred in declining to order forfeiture in this case.

## CONCLUSION

For the reasons stated above, we **AFFIRM** Honeycutt's § 841(c)(2) convictions, **VACATE** Honeycutt's sentences on the § 843(a)(6) convictions,

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[3] It is also worth noting that the D.C. Circuit's criticisms in *Cano–Flores*, 796 F.3d at 90–95—if valid—would apply with equal force to both the RICO and § 853 forfeiture provisions. And so, again, we would need to overrule *Corrado* if we were to follow *Cano–Flores*.

**REVERSE** the district court's determination that forfeiture is not warranted, and **REMAND** the case to permit the district court to resentence Honeycutt on the § 843(a)(6) convictions and reconsider a forfeiture order consistent with this opinion.

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## CONCURRENCE

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KAREN NELSON MOORE, Circuit Judge, concurring in the judgment.

I agree that Terry Honeycutt's convictions and his sentence should be affirmed, except insofar as we must vacate the sentences imposed for his § 843(a)(6) convictions as exceeding the applicable statutory maximum. I also agree that we must reverse the district court's refusal to order forfeiture, bound as we are by a decision of a prior panel of this court that a statute involving identical language to 21 U.S.C. § 853(a) allows the imposition of joint-and-several forfeiture liability. I write to emphasize why that prior panel was likely incorrect, and to suggest that the full court consider the issue en banc.

In declining to order forfeiture, the district court focused quite reasonably on the dearth of evidence regarding Honeycutt's financial motivations for participating in this conspiracy. Honeycutt's lack of ownership interest in the store and the absence of evidence describing what, if anything, Honeycutt himself gained from the sales of Polar Pure gave the

district court pause. This concern would seem to flow directly from the forfeiture statute the district court was tasked with applying, which provides: "Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a). The government "must prove forfeiture by a preponderance of the evidence," *United States v. Warshak*, 631 F.3d 266, 331 (6th Cir. 2010) (quoting *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007)), so a lack of evidence suggesting that Honeycutt "obtained" anything would seem to be problematic.

As the majority explains, this seemingly clear statute has been interpreted otherwise. Although no published Sixth Circuit authority addresses the issue under 21 U.S.C. § 853(a), the forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1963(a), contains *identical* language, and both provisions were enacted as part of the same law. *See* Comprehensive Forfeiture Act of 1984 §§ 302–303, Pub. L. No. 98–473, 98 Stat. 2040–45 (1984). We previously interpreted that provision of RICO to allow for the imposition of joint-and-several forfeiture liability, *United States v. Corrado*, 227 F.3d 543, 553 (6th Cir. 2000), and have since indicated in unpublished decisions that the same applies to § 853(a), *see, e.g.*, *United States v. Darji*, 609 F. App'x 320, 331–32 (6th Cir. 2015); *United States v. Logan*, 542 F.

App'x 484, 498–99 (6th Cir. 2013). Because I see no principled basis for distinguishing the two statutes, I agree with the majority that we are bound to follow *Corrado* and hold that joint-and-several liability is available under 21 U.S.C. § 853(a).

As the district court's concerns demonstrate, this holding seems to be contrary to the statute, which reaches only that property that a defendant "obtained." Although many circuits have held that § 853(a) allows for joint-and-several liability, Maj. Op. at 379–80, and many others have held the same under § 1963(a),[1] there has been surprisingly little explanation of the textual basis for such a rule. In *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), the court determined that the statute's use of the phrase "obtained ... indirectly" means that it applies to "all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise," *id.* at 1043, but joint-and-several liability reaches further than that. It would hold a defendant responsible for property he never had, so long as a co-defendant obtained the property. The same argument was made in a decision of the U.S. District

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[1] *See United States v. Edwards*, 303 F.3d 606, 643 (5th Cir. 2002), *cert. denied*, 537 U.S. 1192, 123 S. Ct. 1272, 154 L.Ed.2d 1025 (2003); *United States v. Simmons*, 154 F.3d 765, 769–70 (8th Cir. 1998); *United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995), *cert. denied*, 517 U.S. 1105, 116 S. Ct. 1322, 134 L.Ed.2d 474 (1996); *United States v. Masters*, 924 F.2d 1362, 1369 (7th Cir.), *cert. denied*, 500 U.S. 919, 111 S. Ct. 2019, 114 L.Ed.2d 105 (1991); *United States v. Caporale*, 806 F.2d 1487, 1506–08 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021, 107 S. Ct. 3265, 97 L.Ed.2d 763 (1987).

Court for the Southern District of New York—which the Second Circuit adopted on appeal—but that decision also conflated property obtained indirectly by a defendant through a co-conspirator, with property obtained by a co-conspirator alone. *See United States v. Benevento*, 663 F.Supp. 1115, 1118 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 129 (2d Cir. 1988). Other decisions, including our decision in *Corrado*, largely gloss over the statutory text.

Although no contrary authority existed when we decided *Corrado*, the D.C. Circuit has recently questioned the circuit consensus, emphasizing the plain language of § 853(a). *See United States v. Cano–Flores*, 796 F.3d 83 (D.C. Cir. 2015). The statute, the D.C. Circuit held, "appears, on its face, to embrace only property that a defendant has 'obtained,'" and using the term "indirectly" to impose co-conspirator liability "reads the word 'obtained' out of the statute." *Id.* at 91. Simply put, "[i]n ordinary English a person cannot be said to have 'obtained' an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it." *Id.* The D.C. Circuit's textual argument is more thorough than any conducted by the many circuits that hold that joint-and-several liability is available, and it persuades me that we should reconsider *Corrado*.

I find that the other reasons given by courts for applying joint-and-several liability are likely to be equally inadequate. Many rely on a *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed.

1489 (1946), theory that a conspirator is liable for the reasonably foreseeable actions of co-conspirators, *Simmons*, 154 F.3d at 770; *McHan*, 101 F.3d at 1043; *Hurley*, 63 F.3d at 22; *Caporale*, 806 F.2d at 1508, but the *Pinkerton* doctrine "speaks only to a defendant's substantive liability—not to the consequences of such liability," *Cano–Flores*, 796 F.3d at 94, making it an especially thin basis for overruling the statute's plain text. Nor is the general rule that §§ 853(a) and 1963(a) should be construed broadly, *United States v. Russello*, 464 U.S. 16, 26–29, 104 S. Ct. 296, 78 L. Ed.2d 17 (1983); 21 U.S.C. § 853(*o*), a sufficient reason to override their plain language, contrary to the suggestions of *McHan*, 101 F.3d at 1043, and *Caporale*, 806 F.2d at 1507. In any event, "even if the statute were ambiguous in the sense of *permitting* the government's construction, '[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.'" *Cano–Flores*, 796 F.3d at 93–94 (quoting *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 170 L. Ed.2d 912 (2008)).

I am sensitive to concerns that precluding joint-and-several liability may frustrate the government's ability to collect illicit proceeds, either due to the Eighth Circuit's concern that it might "allow defendants to mask the allocation of the proceeds," *Simmons*, 154 F.3d at 770 (internal quotation marks omitted), or the First Circuit's warning that "[i]f conclusive weight were given to who physically handled the money, a low-level courier or money counter could be liable for vast sums, while other higher level conspirators could easily escape responsibility,"

*Hurley*, 63 F.3d at 22, but I am not convinced that the absence of joint-and-several liability would frustrate collections as much as these decisions anticipate. Moreover, the First Circuit's concern ignores the ways in which property may be "indirectly obtained" by a higher-level conspirator, who may not possess it, but who ultimately controls it and reaps the financial benefits of the illegal operation. *See Cano–Flores*, 796 F.3d at 92. In any event, in the absence of a statutory basis for requiring the imposition of joint-and-several liability, it would seem to be Congress's job to provide an expanded mechanism for obtaining forfeiture.

In light of my concerns regarding the correctness of our decision in *Corrado*, I believe en banc consideration is appropriate to consider whether *Corrado* should be overturned.

## Appendix B

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

AT CHATTANOOGA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| | : | |
| Plaintiff, | : | |
| -versus- | : | CR-1-12-144 |
| | : | |
| TERRY MICHAEL HONEYCUTT, | : | |
| | : | |
| Defendant. | : | |

Chattanooga, Tennessee
June 16, 2014

BEFORE:THE HONORABLE HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JAY WOODS,
Assistant United States Attorney
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

CHRISTOPHER A. TOWNLEY, of
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THE COURT: The clerk will call the next case.

THE CLERK: United States of America versus Terry Michael Honeycutt. Case No. is 1:12-CR-144.

THE COURT: All right. Yeah. Why don't you go over there, Mr. Honeycutt.

Counsel, I continued this hearing from a few weeks ago. And my recollection is I imposed a sentence and considered everything, correct me if I'm wrong, if I need to reread this, the only thing that I didn't rule on was the forfeiture request by the government.

Is that accurate, Mr. Woods?

MR. WOODS: Yes, sir. That is correct.

THE COURT: Is that accurate, Mr. Townley?

MR. TOWNLEY: It is, Your Honor.

THE COURT: All right, And I ordered counsel to submit briefs, which you did, and I have read your briefs. And thank you very much. They're very informative. I think they outline the case law that's out there regarding forfeiture. Is there anything else either of you want to — I've read your briefs. I've read some of the cases. I think I understand the issues. And is there anything you want to add before I rule on that?

MR. WOODS: I have nothing further, Judge.

THE COURT: All right. Having read all of the cases, I am going to decline to order forfeiture in this case. And let me explain why based upon the cases. While many of the cases were very informative to the

Court, I found that none of the cases that I reviewed were on all fours with this case. And let me go into some of my reasoning in making this decision.

First of all, one of the cases that I found to be most informative was *United States versus Warshak*, which is reported at 631 F.3d 266 from the Sixth Circuit in 2010. I find *Warshak* to be, again, instructive, but I find this case to be somewhat distinguishable from *Warshak* in this regard. Having heard all of the evidence, I believe that the Sixth Circuit in *Warshak* found that pretty much the entire enterprise in which the defendant was engaged in to be a criminal enterprise. And that the defendant made some efforts to show that there were some legitimate legal sales involved in that enterprise, but, I think that the Court described it, I can't remember, as cosmetic, I can't remember. The Court was not convinced that the entire enterprise was not a criminal enterprise.

Having listened to all of the evidence in this case, I don't believe that — I find that the Brainerd Army Store itself was not a criminal enterprise, either before they began these very large sales of Polar Pure, and I find that while, clearly, it has been found by a jury, and by Mr. Honeycutt's brother pleading guilty, that there was a criminal conspiracy [4] being operated out of the Brainerd Army Store, I do not find that the Brainerd Army Store itself was a criminal enterprise. That is sort of reflected in the fact that in this case that the conspiracy to which Mr. Honeycutt's brother pled guilty and to which Mr. Honeycutt, Terry Honeycutt,

stands convicted was between those two individuals and not the, and not the store.

The other factors that I find compelling here, which is shared by some of the other cases, is the government really hasn't shown with any — what the government has shown is the total amount of sales of Polar Pure that occurred over the course of the conspiracy. But, I mean, everybody concedes that Polar Pure itself is a product which does have legal uses. And there were sales of Polar Pure before this massive build-up. Now, I think that the jury's verdict is reflective that a large proportion of that Polar Pure that was sold during the period of the conspiracy was sold with knowledge or reasonable cause to believe that it was going to be used for illegal purposes. However, the fact remains that it's probably undoubtedly true that some of the Polar Pure was being used for legal purposes.

Now, Mr. Honeycutt's brother, of course, part of his guilty plea, I believe, pled guilty to and has paid 200,000 in forfeiture. Is that correct, Mr. Woods?

MR. WOODS: That is correct, Judge.

[5] THE COURT: So, that remains for all of the Polar Pure that was sold during this period just short of 70,000, about 69,000. Is that accurate, Mr. Woods?

MR. WOODS: $69,751.

THE COURT: And given that the Court concludes that at least some of that Polar Pure was sold for legal purposes, there is simply no evidence before me to suggest that every single bottle of Polar Pure was used for illegal purposes. And the lacking of that

evidence and having found that Brainerd Army Store itself was not a criminal enterprise, you know, I'm left, the Court is left with having to say either all of the remaining Polar Pure was for a criminal enterprise, or none of it, because there is no reasoned, there is no evidence that would permit the Court to make a reasoned assessment of what percentage of that Polar Pure was due to illegal activity.

Now, I'm cognizant that the statute mandates that I do order forfeiture if the proceeds were directly or indirectly derived from the criminal enterprise. And while I do — the jury has found, and I, obviously, so find that Mr. Terry Honeycutt was involved in a criminal conspiracy with Mr. Tony Honeycutt, it's difficult for me to say that Mr. Terry Honeycutt personally, you know, profited from that illegal conspiracy. And part of what I'm basing my finding in that regard on is his lack of an ownership interest in the [6] Brainerd Army Store. I mean, he was a salaried employee. It is not clear to me, and I think that, you know, the government has conceded, I mean, what Mr. Honeycutt's financial motivations may have been, are just not clear in this case. And that further adds to the Court's difficulty in coming up with a reasoned determination of a monetary amount to order forfeiture on.

So, having said all of that, those are the principal factors that the Court has considered. Again, I've read your briefs. And I thank you for the briefs. I've read the cases. I think that this is a relatively close case, but given all of facts and circumstances of

the case, as I see it, I'm going to decline to order forfeiture against Mr. Terry Honeycutt in this case.

All right. Now, counsel, are we fairly confident, because if I didn't read this sentence before, I need to do it again. Do we — should I do that out of an abundance of caution or — has it been read? Do you agree, Mr. Townley, it's been read?

MR. TOWNLEY: Yes, sir.

THE COURT: Do you agree, Mr. Woods?

MR. TOWNLEY: We're aware of the sentence, yes, sir.

MR. WOODS: Judge, my recollection is that the Court has imposed sentence, that only the money judgment was left to be determined.

[7] THE COURT: You know what I think I'm going to do, just so we don't have to do this again, I think I'm going to reread the sentence. There is going to be no forfeiture. All right. Let me reread the sentence.

The Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory guideline range, as well as the other factors listed in Title 18, United States Code, Section 3553(a).

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Terry Michael Honeycutt, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months on each of Counts 1, 5, 6, 8, 9, 12 and 13, to be

served concurrently. Counts 2, 10, 11 and 14 have been merged with Counts 1, 5, 6 and 13.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of two years. This consists of terms of two years on each of Counts 1, 5, 6, 8, 9, 12 and 13, all such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not [8] commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this Court in Local Rule 83.10, and shall not illegally possess a controlled substance.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA, as directed.

In addition, the defendant shall comply with the following special condition:

The defendant shall submit to a search of his property, real or personal, residence, place of business or employment, and/or vehicles at the request of the United States Probation Officer. The defendant shall permit confiscation and/or disposal of any material considered contraband or any other item that may be

deemed to have evidentiary value related to violations of supervision.

It's further ordered that the defendant shall pay to the United States a special assessment of $700, pursuant to Title 18, United States Code, Section 3013, which shall be due immediately.

The Court finds that the defendant does not have the ability to pay a fine, and the Court will waive the fine in this case.

All documents sealed in this case are now ordered to [9] be unsealed with the exception of the presentence investigation report unless counsel has reasons that they should not be.

Does either party have any objections to the sentence just pronounced that have not previously been raised. Mr. Townley?

MR. TOWNLEY: Not other than those raised previously.

THE COURT: All right. Mr. Woods?

MR. WOODS: That's correct, Judge. We stand on the position detailed in our papers filed with the Court.

THE COURT: All right. Okay. All right.

All right. Now, Mr. Honeycutt, I think I explained this to you before, but if I didn't, I'm going to explain it to you again. You do have the legal right to appeal this sentence, as well as your conviction. If you want to do that, you must file what's known as a notice of appeal within 14 days after the entry of the judgment

in your case. The judgment is simply a formal, legal document that outlines all of the sentence that I've imposed back a few weeks ago and today. And Mr. Townley can tell you when it's filed on the Court's record thereby triggering your 14 days.

All right. There is a fee associated with filing a notice of appeal. If you can't afford to pay that fee, you may file an application for what's known as in forma pauperis [10] or IFP status which, if granted, will have the affect of reducing or eliminating that fee. Mr. Townley can help you with that as well. If for any reason Mr. Townley doesn't help you, which I think is highly unlikely, but if he doesn't, you can contact the Clerk of the Court, and the Clerk of the Court will provide you with the necessary documents for both the notice of appeal and the IFP application.

Do you understand your appeal rights, Mr. Honeycutt?

THE DEFENDANT: Yes, sir.

THE COURT: All right. All right. Anything else on behalf of Mr. Honeycutt this morning, Mr. Townley?

MR. TOWNLEY: No, sir.

THE COURT: Anything else from the government, Mr. Woods?

MR. WOODS: No, Judge.

MR. TOWNLEY: And, Your Honor, I say that, may I speak with Mr. Honeycutt for just a second?

THE COURT: Sure.

(Brief pause.)

MR. TOWNLEY: No, sir.

THE COURT: All right. Good luck to you, Mr. Honeycutt.

THE DEFENDANT: Thank you, sir.

THE COURT: Court will be in recess until 2:00 p.m.

END OF JUDGMENT PROCEEDINGS

[11] I, Shannan Andrews, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause held June 16, 2014, and that this transcript is an accurate record of said proceedings.

s/Shannan Andrews
Shannan Andrews
Official Court Reporter

## Appendix C

Nos. 14-5790/5850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee/Cross-Appellant, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| TERRY MICHAEL HONEYCUTT, | ) | |
| | ) | |
| Defendant-Appellant/Cross-Appellee. | ) | |
| | ) | |

FILED May 31, 2016

**BEFORE:** SILER, MOORE, and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/s Deborah S. Hunt
Deborah S. Hunt, Clerk

## Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | **1:12-CR-144** |
| v. | ) | |
| | ) | **Judge Mattice** |
| TERRY MICHAEL HONEYCUTT | ) | |

**RESPONSE TO DEFENDANT'S MONEY JUDGMENT FORFEITURE MEMORANDUM**

COMES NOW the United States of America by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, and Jay Woods, Assistant United States Attorney, and responds to the defendant's Money Judgment Forfeiture Memorandum (doc. 107).

Following a conviction for any offense that authorizes forfeiture, the Court must order forfeiture. 28 U.S.C. § 2461(c) (providing that "the court *shall* order the forfeiture of the property as part of the sentence" (emphasis added)). In requiring forfeiture in certain criminal cases, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory." *United States v. Monsanto*, 491 U.S. 600, 606 (1989). Where the United States has included a notice of forfeiture in the indictment, as required by Rule 32.2(a) of the Federal Rules of

Criminal Procedure, and has then established the required nexus to the offense, the Court has no discretion; it is required to order the forfeiture of the property, and its refusal to do so is subject to appeal. *See, e.g.*, *United States v. Carpenter*, 317 F.3d 618, 626 (6th Cir. 2003) (holding that because criminal forfeiture is mandatory, the court must order the forfeiture of the property used to commit the offense in its entirety, even if the defendant used only part of it for that purpose; the only limitation is the Excessive Fines Clause of the Eighth Amendment); *aff'd en banc*, 360 F.3d 591 (6th Cir. 2004); *United States v. Corrado*, 227 F.3d 543, 549, 552 (6th Cir. 2000) (explaining that forfeiture is a mandatory aspect of the sentence; district court erred in refusing to order forfeiture of "sufficiently quantifiable" proceeds of RICO offense and further holding that because forfeiture is mandatory, refusing to order forfeiture judgment constitutes a sentence imposed in violation of law for which appeal is authorized).

The defendant first argues that the Court should not impose a money judgment (Doc. 107, Defendant's Money Judgment Forfeiture Memorandum ("Def. Memo") at 1.) Clearly, as detailed above, this argument must fail. Forfeiture is a mandatory consequence of the defendant's convictions.

The defendant next asserts that the United States failed to present evidence at trial to support the amount of forfeiture, deeming his own business records "an unsupported proclamation." (*Id.* at 3.) The defendant further contends that some of his sales of

iodine were legitimate (*id.*), an argument he advanced—but did not support with evidence—at trial. In reality, the United States did present evidence sufficient to support the forfeiture amount alleged in the indictment. At trial, the United States presented testimony that law enforcement officers executed a search warrant at the defendant's business and, on that day, the defendant himself provided electronic copies of four "Top Items" reports to the officers. The United States presented these four reports as exhibits, and the Court accepted them as evidence without objection from the defendant. Each Top Item report supplied the same information for an item of inventory: a lookup code and description, the quantity sold, and the sales and profit generated, and each report represented a different calendar year. The reports were ordered based on the sales of each item, with the highest grossing item at the top of each report. The four reports together covered the entire scope of the defendant's conspiracy. A review of these exhibits details the profits generated from the sales of iodine, in the form of Polar Pure:

| Exhibit Number | Year | Sales | Profit |
|---|---|---|---|
| 26 | 2007—partial | $ 29.68 | $ 15.88 |
| 27 | 2008 | $ 53,545.77 | $ 35,263.43 |
| 28 | 2009 | $251,724.01 | $170,733.41 |
| 29 | 2010—partial | $ 94,187.71 | $ 63,739.26 |
| Total | | | **$269,751.98** |

In the indictment, the United States alleged a money judgment of $269,751.98 against the profit from iodine sales. (Doc. 74, Second Superseding

Indictment at 4.) At trial, the United States established through detailed proof the total profit from iodine sales as $269,751.98.

While the defendant correct noted that the jury acquitted him on three counts (doc. 107, Def. Memo at 3), he failed to acknowledge that the jury convicted him of unlawfully selling iodine on every date alleged in the indictment (doc. 96, Verdict Fonn). In other words, the jury found the defendant guilty of a substantive unlawful act on every date alleged in the indictment. The defendant's claim that the three acquittals somehow made his sales on those three days legitimate, when the jury convicted him of the same substantive act on an alternate theory, does not support his otherwise unsubstantiated claim that his iodine sales were lawful.

Next, the defendant argues that his role as employee and his lack of ownership or controlling interest in the Brainerd Army Store, from where he unlawfully sold iodine, should limit the Court's money judgment against him. (Doc. 107, Def. Memo at 3-4.) However, the defendant's argument misconstrues the plain language of 21 U.S.C. § 853. There, Congress provided that, upon a conviction that authorizes forfeiture, the defendant shall forfeit to the United States "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a)(1).

As demonstrated at trial, the defendant was directly involved in deriving proceeds from the sale of iodine. His responsibilities at the Brainerd Army Store included managing the inventory and data entry. (Doc. 104, Tr. Defendant's Testimony at 41, 43.) Consequently, the defendant was familiar with the more than 21,000 bottles of iodine sold in two and one-half years, as he stocked and restocked those items throughout the conspiracy, and he knew that the Store was selling "an awful lot of" iodine; furthermore, the defendant sometimes worked at the cash register and made the actual sales of iodine. *(Id.* at 47-49.) Thus, the defendant was directly involved in obtaining the proceeds for the sale of iodine, and a money judgment is appropriate. The fact that the defendant retained only a small percentage of the proceeds does not limit the Court's enforcement of a money judgment up to the full amount sought by the United States. The defendant's argument must yield to the strong language of 28 U.S.C. § 2461(c) and the clear intent of 21 U.S.C. § 853.

Finally, the defendant claims that any money judgment against him will constitute an excessive punishment in violation of the Eighth Amendment. (Doc. 107, Def. Memo at 4-5.) Forfeiture is unconstitutionally excessive only if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *United States v. Droganes*, 728 F.3d 580 (6th Cir. 2013) (explaining "[w]here the government seeks to punish the defendant by an *in personam* criminal forfeiture . . . the contours of the

defendant's Eighth Amendment rights are defined by the 'proportionality test'" outlined in *Bajakajian).* The test articulated in *Bajakajian* established four factors for the Court to consider in determining whether a forfeiture violates the Excessive Fines Clause: (a) "the essence of the crime" of the [defendant] and its relation to other criminal activity, (b) whether the [defendant] fit into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the [defendant's] conduct. *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003) *(per curiam)* (citing *Bajakajian*, 524 U.S. at 337-39.

Applying the four factors of *Bajakajian* to the defendant's case clearly supports a money judgment. First, the essence of the crime—unlawful distribution of iodine—was related to the manufacture and distribution of methamphetamine. Next, the defendant and his co-defendant sought to profit from the sale of iodine, placing them squarely in a class subject to a money judgment. Third, the defendant is subject to a maximum fine up to $250,000.00; the net punishment of a money judgment would be approximately $69,751.98, well below the maximum fine and the defendant's net worth. Finally, the United States has detailed the harm caused by the defendant's offense in a Sentencing Memorandum filed April 14, 2014. *(See* doc. 108, Sentencing Memorandum at 8-11.) When assessing whether a money judgment exceeds the bounds of

the Eighth Amendment's limitations, the "'touchstone of the constitutional inquiry. . . is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.'" *United States v. Malewicka*, 664 F.3d 1099, 1103 (7th Cir. 2011). The defendant has never acknowledged the harm he caused society or the danger consequent of his distribution of iodine. A guideline range sentence along with a money judgment would address the gravity of the defendant's offense with a proportional sentence.

WHEREFORE, the Court should impose a money judgment against the defendant for $269,751.98.

Respectfully submitted,

WILLIAM C. KILLIAN
United States Attorney

By: /s/ Jay Woods
Jay Woods
Assistant United States Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/Jay Woods
Jay Woods
Assistant United States Attorney

## Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | **1:12-CR-144** |
| v. | ) | |
| | ) | **Judge Mattice** |
| TERRY MICHAEL HONEYCUTT | ) | |

**MEMORANDUM BY THE UNITED STATES ON ISSUES RELATED TO DEFENDANT'S MONEY JUDGMENT**

COMES NOW the United States of America by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, and Jay Woods, Assistant United States Attorney, and offers this memorandum to assist the Court in setting an appropriate money judgment. The defendant stands convicted of conspiring to distribute a list chemical to methamphetamine manufacturers and multiple substantive acts related to the conspiracy. At the defendant's sentencing hearing on May 12, 2014, the Court questioned how it could correctly calculate the amount of the money judgment when, in theory, some of the list chemical transactions could have been legal—though the defendant presented no proof of even one legal sale—and neither party could show conclusively the

exact profit generated from unlawful sales of the list chemical. In addition, the United States brought *United States v. McLaughlin*, decided by the Sixth Circuit on the Friday prior to the defendant's Monday sentencing hearing, to the Court's and the defendant's attention. The Court ordered memoranda from both parties on the calculation of the money judgment and the relevance of the *McLaughlin* decision.

As noted previously, upon a conviction for any offense that authorizes forfeiture, the Court must order forfeiture. 28 U.S.C. § 2461(c) (providing that "the court *shall* order the forfeiture of the property as part of the sentence" (emphasis added)). The forfeiture statute, 21 U.S.C. § 853(a)(1), requires the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly" from criminal conduct. Though the Sixth Circuit has not determined whether joint and several liability applies to this mandatory obligation, "the circuits that have addressed the issue have concluded that the statute mandates joint and several liability among co-conspirators for the proceeds of a drug conspiracy." *United States v. Logan*, 542 F. App'x 484, 498 (6th Cir. 2013) (listing cases holding, *e.g.*, "'In the case of a narcotics conspiracy, this mandatory liability is joint and several among all conspirators.'"). Furthermore, the Sixth Circuit has not previously addressed whether "the amount of proceeds attributable to a defendant" are limited "to those reasonably foreseeable to that defendant." *Id.* at

499. Nevertheless, "most circuits" have. *Id.* (listing cases). In *Logan*, the defendant did not dispute the district court's use of this foreseeability test but argued that the proceeds of the conspiracy were not foreseeable to him. *Id.* The Sixth Circuit determined that the defendant knew that his coconspirator was a drug dealer and that the drug dealer was using the defendant to distribute controlled substances. *Id.* Therefore, the Sixth Circuit determined that the total drug quantity and, thus, the total proceeds were foreseeable to the defendant and that liability for a forfeiture based on the proceeds from the total drug quantity was appropriate. *Id.*

On this issue, *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) is instructive, though the United States pursued the money judgment in *Warshak* under Title 18. Warshak was the primary player in a massive fraud and money-laundering scheme. *Id.* at 274-282. Following Warshak's conviction, the United States obtained money judgments totaling more than half a billion dollars. *Id.* at 281. At trial and on appeal, Warshak argued that the United States had failed to prove that the entirety of his revenue constituted the proceeds of fraud. *Id.* at 281-282, 331-332. Specifically, Warshak argued that his ameliorative efforts, his indirect retail sales, and the majority of his product line—which was lawful—provided a legitimacy to his revenue and that the district court erred in accepting the argument that all of the revenue resulted from fraud. *Id.* at

331-332. Citing 18 U.S.C. § 982(a)(2)[1], the Sixth Circuit held that the ameliorative efforts were "cosmetic" and "ineffective" and that, "[m]oreover, the argument that certain sales were legitimate gains no traction. Any money generated through these potentially legitimate sales is nonetheless subject to forfeiture, as the sales all resulted 'directly or indirectly' from a conspiracy to commit fraud." *Id.* at 332. Thus, the Sixth Circuit upheld the money judgments, "including money generated through supposedly legitimate transactions." *Id.* at 333.

The United States must prove forfeiture by a preponderance of the evidence. *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007). Admittedly, the defendant did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales. However, the defendant's coconspirator did have an ownership role and did stand to benefit personally from the $269,751.98 in profit from the sales of the listed chemical. Because the jury convicted the defendant of a conspiracy with the defendant's

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[1] 18 U.S.C. § 982(a)(2) reads, " . . . shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation." Likewise, 21 U.S.C. § 853, which applies here, reads, " . . . shall forfeit to the United States, irrespective of any provision of State law—(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." In other words, the language of the two forfeiture statutes is almost identical.

coconspirator, the Court should hold the defendant jointly liable for the profit from the illegal sales. As the employee responsible for ordering products and inventory (doc. 104, Tr. Defendant's Testimony at 41, 43) and because the defendant had knowledge of both the use of the listed chemical in the manufacture of methamphetamine and law enforcement had warned the defendant, the sales and proceeds from those sales were reasonably foreseeable. Finally, consistent with *Warshak*, all of the list chemical sales—including the theoretical lawful sales—generated proceeds subject to forfeiture.

The Friday before the defendant's sentencing hearing, the Sixth Circuit decided *United States v. McLaughlin*, No. 13-5693, 2014 U.S. App. LEXIS 8794 (6th Cir. May 9, 2014). *McLaughlin* reversed a forfeiture award because the United States could not show that McLaughlin, personally, benefitted from the unlawful funds. *Id.* at *8. However, *McLaughlin* specifically distinguished *Warshak* because *McLaughlin* did not involve a conspiracy while the forfeiture in *Warshak* was "was based on an underlying conspiracy between the corporation, its owner, and its main officers" implicating "theories of corporate and accomplice liability which justified the forfeiture order" whereas McLaughlin alone committed fraud. *Id.* at *19.

WHEREFORE, a money judgment of $69,751.98 is appropriate for the defendant.

Respectfully submitted,

WILLIAM C. KILLIAN
United States Attorney

By: s/ Jay Woods
Jay Woods
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/ Jay Woods
Jay Woods
Assistant United States Attorney

## Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | **1:12-cr-144** |
| v. | ) | |
| | ) | **Judge Mattice** |
| TERRY MICHAEL HONEYCUTT | ) | **Magistrate Judge Carter** |

**SECOND SUPERSEDING INDICTMENT**

Count One

The Grand Jury charges that from in or about April, 2008, and continuing to in or about November, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, and others known and unknown to the Grand Jury, did combine, conspire, confederate, and agree to knowingly, intentionally, and without authority possess and distribute iodine, a Listed chemical, knowing and having reasonable cause to believe that the listed chemical would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 846 and 841(c).

Count Two

The Grand Jury further charges that from in or about April, 2008, and continuing to in or about November, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, and others known and unknown to the Grand Jury, did combine, conspire, confederate, and agree to knowingly, intentionally, and without authority possess chemicals, products, and materials which may be used to manufacture methamphetamine, a Schedule II controlled substance, knowing, intending, and having reasonable cause to believe that the chemicals, products, and materials would be used to manufacture methamphetamine, in violation of Title 21, United States Code, Sections 846 and 843(a)(6).

Counts Three through Seven

The Grand Jury further charges that on or about the dates listed below, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly and intentionally distribute iodine, a Listed chemical, knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(c) and Title 18, United States Code, Section 2:

| Count | Date |
|---|---|
| 3 | October 26, 2009 |
| 4 | November 2, 2009 |
| 5 | November 6, 2009 |
| 6 | November 18, 2009 |
| 7 | November 8, 2010 |

Counts Eight through Twelve

The Grand Jury further charges that on or about the dates listed below, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly, intentionally, and without authority possess chemicals, products, and materials which may be used to manufacture methamphetamine, a Schedule II controlled substance, knowing, intending, and having reasonable cause to believe that the chemicals, products, and materials would be used to manufacture methamphetamine, in violation of Title 21, United States Code, Sections 843(a)(6) and Title 18, United States Code, Section 2:

| Count | Date |
|---|---|
| 8 | October 26, 2009 |
| 9 | November 2, 2009 |

| | |
|---|---|
| 10 | November 6, 2009 |
| 11 | November 18, 2009 |
| 12 | November 8, 2010 |

Count Thirteen

The Grand Jury further charges that on or about November 9, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly and intentionally possess iodine, a Listed chemical, knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, § 841(c) and Title 18, United States Code, Section 2.

Count Fourteen

The Grand Jury further charges that on or about November 9, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly, intentionally, and without authority possess chemicals, products, and materials which may be used to manufacture methamphetamine, a Schedule II controlled substance, knowing, intending, and having reasonable cause to believe that the chemicals, products, and materials would be used to manufacture methamphetamine, in violation of Title 21, United States Code, Sections 843(a)(6) and Title 18, United States Code, Section 2.

Forfeiture Allegation

1. The allegations contained in Counts One through Fourteen of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 21, United States Code, Section 853.

2. Pursuant to Title 21, United States Code, Section 853, upon conviction for the offenses alleged in Counts One through Fourteen, the defendant TERRY MICHAEL HONEYCUTT, shall forfeit to the United States any property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of such offenses and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the offenses. The property to be forfeited includes, but is not limited, to the following:

Money Judgment

A Money Judgment in favor of the United States and against the defendant, TERRY MICHAEL HONEYCUTT, in the amount of at least $269,751.98 in U.S. Currency, which represents proceeds obtained as a result of the offenses listed above in Counts One through Fourteen. The defendant shall be held jointly and severally liable with his co-defendant for the money judgment.

3. If any of the property described above, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty

the United States shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p).

A TRUE BILL:

_____
GRAND JURY FOREPERSON

WILLIAM C. KILLIAN
United States Attorney

By: /s/
Jay Woods
Assistant United States Attorney

Filed October 22, 2013

## Appendix G

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

AT CHATTANOOGA

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | |
| Plaintiff, | : | |
| -versus- | : | CR-1-12-144 |
| TERRY MICHAEL HONEYCUTT, | : | |
| Defendant. | : | |

---

Chattanooga, Tennessee
January 23, 2014

BEFORE: THE HONORABLE HARRY S. MATTICE, JR.,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JAY WOODS,
Assistant United States Attorney
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

CHRISTOPHER A. TOWNLEY, of
Townley & Lindsay
1406 South Crest Road
P.O. Box 278
Rossville, Georgia 30741

THIRD DAY OF TRIAL
PAGES 318 THROUGH 521

* * * * *

[437]Q And did you do -- did you ever work there at Brainerd Army Store in your younger days?

A I did.

Q And when roughly, about how old were you when you worked there?

A Fifteen, 16.

Q And how long was it that you continued to work there?

A Until I started to school.

Q At some point did you start working in some other area or field?

A Yes.

Q And then later did you come back to work at Brainerd Army Store?

A I did.

Q When you came back to work at Brainerd Army Store, about how old were you at that point?

A Let's see. I was probably 30ish.

Q Now, did you have any brothers or sisters?

A I have one brother.

Q And what's that brother's name?

A Tony Dewayne Honeycutt.

Q And is Tony younger or older than you are?

A He's 18 months older.

Q And Tony if you look at him and look at you, is [438] there any significant difference in size?

A They are.

Q And that difference is what?

A He's about 6'3" about 100 pounds more, weighs about 100 pounds more than me.

Q Now, Tony, was he working when you came back when you were around 30 at Brainerd Army or did he come to work there at a later time?

A Since he was about 15 he's always worked there or 16 rather, he started driving.

Q So, Tony worked continuously and you left then you came back?

A Correct.

Q Now, as far as the business itself, have you ever had any ownership interest in this business?

A. I have.

Q And when did you have ownership interest in it?

A When I was probably 17, 18.

Q And what did you do with that ownership interest.?

A I went to school. I used that money and went to school and sold out of or sold it out of the business.

Q After you sold out of the business, have you ever had any ownership interest since then?

A I have not.

Q Do you have any ownership interest now?

[439]A I do not.

Q As far as the store itself, I want to kind of move up a little bit to around the 2008/2009 time.

A Sure

Q You've been working there for a period of time by the time we hit 2008 –

A Correct.

Q -- since like about '99? Had you and your brother sort of taken on roles there?

A Yes. He was the manager and I was the assistant manager.

Q And as far as the assistant manager, can you tell me, basically, what your responsibilities and duties were?

A I set up the schedules for the other employees. I had mostly started probably all of the data entry when we switched over to the POS system. And anywhere from changing a ballast in a bulb to whatever needed to be done.

Q Now, as far as your responsibilities and Tony's, what were Tony's duties more of?

A He more or less did the bank. We both did orders depending upon the company. Any of the

accounting stuff he pretty much did and I did the orders and the data entry.

Q Back 2008, 2009, 2010, did you have any -- did you have signature authority on the bank accounts?

A I did not.

[440]Q As far as the money that came in or came out of the bank accounts, did you write checks on it?

A I did not.

Q How were you paid?

A Salary.

Q As far as your salary, did it make a difference how many hours you worked?

A No.

Q Did it make a difference as far as commissions or bonuses or anything like that?

A No. We didn't receive those.

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