No. 16-142

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Government correctly concedes that the circuits are divided on whether 21 U.S.C. § 853(a)(1) mandates joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy. It nonetheless opposes certiorari by proposing two alternative new theories supporting a forfeiture award that it did not raise below, and pronouncing those theories "vehicle problems." Those new theories are waived by the Government; irrelevant to the Sixth Circuit's decision; and entirely without factual support. This case is an ideal vehicle to resolve the circuit split.

The bulk of the Government's brief argues that the Sixth Circuit's decision was correct on the merits. Yet the Government does not meaningfully grapple with the arguments that led the D.C. Circuit to hold that § 853(a)(1) does not mandate joint and several liability among co-conspirators, in conflict with the decision below. *See United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015). The Court should grant certiorari and reverse.

I. The Court Should Grant Certiorari In This Case.

The Government acknowledges that the circuits are divided on the recurring question of law presented by this case. BIO 8, 18. It nonetheless opposes certiorari, primarily by advancing two alternative theories under which a forfeiture verdict could purportedly be upheld even without a rule of joint and several liability. BIO 19-22. The Government's arguments are waived, irrelevant, and meritless.

The Government's first theory is that Petitioner "obtained" the funds from Polar Pure sales because Petitioner physically handled the money before putting it in the cash register. BIO 20-21. The Court should disregard this argument, as it is completely new. The Government did not raise it when it sought forfeiture in the District Court; the District Court did not consider it; the Government did not raise it in the Sixth Circuit as a ground for reversal; and the Sixth Circuit did not consider it either. Rather, throughout this case, the Government has sought forfeiture exclusively on the basis of joint and several liability for co-conspirators, and that legal theory was the sole basis for the Sixth Circuit's decision. *See* Pet. App. 25a-28a.

On its merits, the Government's argument suffers from numerous problems. For one, the Government seeks to hold Petitioner jointly and severally liable for $269,751.98, which were the total profits of Polar Pure sales. BIO 4; *see* Pet. App. 67a. Yet Petitioner did not handle all that money. As the Government acknowledges, Petitioner testified at trial that his brother worked the sales counter more often than he did. BIO 21 & n.8.

In order to evade this problem, the Government, remarkably, asks the Court to find Petitioner's testimony not credible. *Id.* Instead, citing the testimony of witnesses who only went to the store a few times, it asks the Court to draw an inference that Petitioner spent an "'equal'" amount of time as his brother. *Id.* The Government then speculates that, assuming this baseless inference is correct, Petitioner might have handled some unspecified amount of money

exceeding $69,751.98, which is the remaining amount of money necessary to satisfy the forfeiture judgment. *Id.*

It is inappropriate for the Government to be making these arguments for the first time at the certiorari stage. The Government bears the burden of proving the amount of property that Petitioner acquired during the conspiracy. 21 U.S.C. § 853(d)(1). And the Federal Rules anticipate that any factual disputes over forfeiture will be resolved by the District Court. Fed. R. Crim. P. 32.2(b)(1)(B). The Government made no factual record on the amount of money Petitioner handled and did not request or obtain factual findings on that issue from the District Court. It should not be offering raw factual speculation in a Supreme Court brief.

The Government's argument has other defects. For instance, the Government's premise is that by physically touching money for a few seconds before putting it in the cash register, Petitioner "obtained" that money, such that the Government can obtain forfeiture of the money from Petitioner's general assets. BIO 20-21. This is a counterintuitive proposition to say the least, and the Government cites no case in which property was forfeited under this theory; its sole authority is a pure dictum from a single lower-court decision, and even that case assumes that forfeiture would be appropriate only if the defendant physically possessed the money at the time that it was seized by the government. BIO 10, 20 (citing *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995)); *Hurley*, 63 F.3d at 21 ("imagining" scenario in which defendant "had been caught with the [property] just before

delivering it"). Also, the Government did not seek or obtain any factual findings on what proportion of purchases were made using non-cash methods of payment. Indeed, there is no factual record on the Government's theory whatsoever.

The Government's next "vehicle problem[]" is that Petitioner should be liable for forfeiture because he benefited from the Polar Pure sales. BIO 21-22. As the petition described, however, the Government explicitly acknowledged in the District Court that Petitioner did *not* benefit from the sales of Polar Pure, and its sole basis for seeking forfeiture was joint and several liability for co-conspirators. Pet. 19-20. And when it declined to impose forfeiture, the District Court made a factual finding that Petitioner did not benefit from the sales of Polar Pure. *Id.* As the petition explained, it is these features of this case that make it such a perfect vehicle. *Id.* Tellingly, the Government completely ignores this portion of the petition.

Instead, notwithstanding its explicit waiver and the District Court's factual finding, the Government speculates that Petitioner somehow benefited from the Polar Pure sales. BIO 20-22. Even if it was not waived, this argument would be meritless. The Government seeks to hold Petitioner jointly and severally liable for $269,751.98, yet there is simply no evidence that Petitioner achieved *any* benefit, let alone the amount of the benefit. The Government points out that Petitioner's brother was the store owner, BIO 21-22, but there is no evidence on how, if at all, Petitioner benefited from his brother's earnings. The Government also points out that Petitioner received a

salary. BIO 22. But there is no evidence on how much money in wages Petitioner received during the conspiracy. Nor is there evidence on whether Petitioner's wages were higher during the conspiracy than they were before the conspiracy. Nor is there evidence on the proportion of Petitioner's salary that could be allotted to the conspiracy—a critical question, in light of the District Court's undisputed factual finding that the "Brainerd Army Store itself was not a criminal enterprise." Pet. App. 38a.

Waived and utterly lacking in factual support, the Government's newly-minted theories are two of the least persuasive "vehicle problems" the Court is ever going to see. But the critical point is this: Even if the Government had properly preserved these theories, they still would be irrelevant, because the Sixth Circuit undisputedly did not rely on them. Rather, the Sixth Circuit relied exclusively on the theory that co-conspirators were jointly and severally liable for forfeiture of drug proceeds—the theory that has divided the courts of appeals. That holding is thus squarely presented for the Court's review.

The Government's remaining arguments against certiorari are makeweights. The Government speculates that the D.C. Circuit might someday "revisit" *Cano-Flores*, BIO 19, but *Cano-Flores* is now binding circuit precedent which the Government declined to challenge in an en banc or certiorari petition.

Despite the fact that virtually every circuit has considered either the question presented or its RICO equivalent, the Government weakly suggests that more

percolation might be useful "to respond to the D.C. Circuit's arguments." BIO 20. But as this case illustrates, additional percolation would serve little purpose: the Sixth Circuit found it "unnecessary to probe the reasoning of *Cano-Flores*" in light of its own circuit precedent, Pet. App. 26a-27a, and other circuits would likely follow suit. Moreover, even if other circuits chose to "respond to the D.C. Circuit's arguments," BIO 20, the split would not go away; only this Court can resolve the split.

The Government also argues that the amount of money at issue in *Cano-Flores* was larger than the amount of money here. BIO 22. But that factual distinction was irrelevant to the Sixth Circuit's holding. As the Government admits (BIO 8, 18), this case presents a genuine split. The D.C. Circuit explicitly rejected its sister circuits' view of the law, and held that § 853(a)(1) does not mandate joint and several liability for co-conspirators, Pet. 13-16, while the Sixth Circuit explicitly rejected the D.C. Circuit's view of the law in *Cano-Flores*, and held that § 853(a)(1) does mandate joint and several liability for co-conspirators. Pet. 6-9.[1]

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[1] Moreover, the forfeiture amount in this case, although certainly smaller than the forfeiture amount in *Cano-Flores*, was nonetheless substantial. The U.S. Code prescribes a maximum fine of $250,000 for *any* individual committing *any* felony, unless a defendant achieved pecuniary gain from the crime or a statute states otherwise. 18 U.S.C. § 3571(b)(3). That is the applicable statutory maximum fine for the crimes of conviction in this case. 21 U.S.C. §§ 841(c); 843(a)(6), (d)(1); 846; Pet. 4. Thus, Petitioner was held jointly and severally liable for an amount—$269,751.98—exceeding the maximum theoretical fine for the worst possible

Finally, the Government argues that the Court should defer to the Sixth Circuit's unexplained order denying rehearing en banc. BIO 22; *see also* Pet. App. 47a-48a (order denying petition for rehearing en banc). But the Sixth Circuit and this Court are not similarly situated. As the Government explained to the Sixth Circuit in its opposition to Petitioner's petition for rehearing en banc, "even if the full Court were to … adopt the interpretation of 21 U.S.C. § 853(a) set forth in *Cano-Flores*, the circuit split would still remain." Resp. Opposing Def's Pet. for Reh'g *En Banc* and for Panel Reh'g at 6, No. 14-5790 (6th Cir. Apr. 19, 2016), ECF No. 48. By contrast, if the Court grants certiorari, it would resolve the circuit split nationwide.

II. The Sixth Circuit's Decision Is Wrong.

Contrary to the Sixth Circuit's holding, 21 U.S.C. § 853(a) does not mandate joint and several liability for co-conspirators.

The plain text of the statute supports Petitioner. Under § 853(a)(1), a defendant must forfeit illicit proceeds that he "obtained." "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." *Cano-Flores*, 796 F.3d at 91 (emphasis in original). The Government emphasizes that a

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offender. Additionally, even the amount remaining on the forfeiture judgment—$69,751.98—is very onerous, given that Petitioner is indigent. Notably, the District Court, which declined to order forfeiture, also declined to impose any fine on Petitioner, in light of Petitioner's inability to pay. Pet. App. 43a.

defendant must forfeit proceeds that he obtained "'indirectly,'" BIO 11, 14, but there is a difference between *indirectly* obtaining something and *not* obtaining something. When a tutor assists a college student with his studies, the tutor doubtless foresees that the student will graduate, but he does not "indirectly obtain" the student's degree; likewise, when an accountant fills out a tax return, he does not "indirectly obtain" his client's tax refund; and for the same reason, when a person participates in a criminal conspiracy, he does not "indirectly obtain" the proceeds that were actually obtained by other people.

The Government points out that *Pinkerton v. United States*, 328 U.S. 640 (1946), was on the books at the time that § 853(a)(1) was enacted, and argues that "Congress did not suggest any intent to depart from settled principles governing co-conspirators' responsibility for each other's acts." BIO 10-11. But "*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." *Cano-Flores*, 796 F.3d at 94. Thus, *Pinkerton* did not "settle[]" any "principles" relevant to this case that could overcome the absence of any textual provision for joint and several liability.

Moreover, the far more pertinent "settled principles" are those governing *forfeiture*. For most of American history, forfeiture proceedings were *in rem* proceedings directed at tainted property. *See generally Austin v. United States*, 509 U.S. 602, 613 (1993). A person in Petitioner's position, who never obtained any tainted property, could not have been

affected by such a proceeding. Nothing in § 853(a)(1) suggests that Congress intended to modify that fundamental feature of forfeiture by requiring defendants to forfeit assets they never obtained.

The Government also argues that joint and several liability would advance the statutory purpose of preventing defendants from thwarting forfeiture by transferring tainted assets. BIO 13. But § 853 contains explicit statutory procedures designed to solve that problem. *See* § 853(c) (authorizing forfeiture of property transferred to third parties); § 853(p) (authorizing forfeiture of substitute property when defendant transfers or conceals assets). Section 853 says nothing about joint and several liability, and the Court should not rewrite the statute based on the Government's generic appeals to statutory purpose. Moreover, whereas § 853 contains specific procedures permitting the Government to forfeit assets from co-conspirators who *do* receive tainted assets, *see* §§ 853(c), (n), the Government's interpretation would allow the Government to forfeit assets from co-conspirators who *do not* receive tainted assets—an outcome completely untethered from the Government's stated statutory purpose. Finally, as the petition explained, the Government's interpretation could have the perverse consequence of allowing defendants to *keep* tainted assets, so long as co-conspirators satisfy any portion of the forfeiture judgment—an outcome inconsistent with the Government's asserted statutory purpose. Pet. 23-24. The Government ignores this argument altogether.

The Government points out that an "'*in personam*

criminal forfeiture'" has historically been considered a monetary punishment analogous to a fine. BIO 17. That point is true enough, but it supports Petitioner rather than the Government, because criminal fines have never been subject to joint and several liability for co-conspirators. If a court imposes a criminal fine on a drug felon, the drug felon has to pay out of his own pocket; the court does not collect portions of the fine from his co-defendants. Joint and several liability is a concept borrowed from tort law, not the law of criminal fines, and nothing in § 853(a)(1) suggests that Congress intended to import tort-law principles that historically had nothing to do with forfeiture. Pet. 24.

Finally, the absence of any right of contribution shows that Congress did not intend to impose joint and several liability on co-conspirators. Pet. 24-25 (citing *Paroline v. United States*, 134 S. Ct. 1710 (2014)). The Government asserts that there is no "incongruity" in holding co-conspirators "responsible for each other's foreseeable acts in furtherance of their joint criminal enterprise." BIO 18. But there is an obvious incongruity that arises from the absence of a right of contribution: under the Government's view, a more culpable drug felon who personally received the proceeds of a drug felony could keep all those proceeds, while a less culpable co-defendant who did not receive anything could be forced to pay a large forfeiture award, merely because the less culpable co-defendant was prosecuted first. The absence of a right of contribution for the less culpable co-defendant is strong evidence that Congress did not intend for co-conspirators to be jointly and severally liable for

forfeiture judgments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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