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## Supreme Court Substantially Reduces Government's Ability to Seek Criminal Forfeitures

JUNE 13, 2017

On June 5, 2017, the Supreme Court issued a unanimous opinion in *Honeycutt v. United States* (No. 16-142), holding that a criminal defendant can be held liable to forfeit only crime proceeds the defendant personally obtained, and cannot be made jointly and severally liable for proceeds acquired by a co-conspirator. The decision upends decades of nearly uniform precedent from the federal courts of appeals,<sup>1</sup> and will likely have wide-ranging effects on the government's ability to obtain criminal forfeiture. While *Honeycutt* is a narcotics case, the procedures in the forfeiture statute in question apply to all criminal forfeitures, including criminal forfeiture in cases involving securities fraud, healthcare fraud, corruption, insider trading, economic sanctions, mail fraud and wire fraud.

### Background

The case concerns a federal criminal action against Terry Honeycutt and his brother for conspiracy to distribute iodine while having reasonable cause to believe that it would be used to manufacture methamphetamine. Honeycutt was a salaried employee at his brother's hardware store, which sold a water-purification product containing iodine. His position involved stocking shelves and working the cash register; he did not own the store. After Honeycutt was convicted of conspiracy, the government sought to hold him jointly and severally liable for forfeiture of the store's profits from selling iodine. It invoked 21 U.S.C. § 853(a)(1), which requires forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly" as a result of a drug crime.

The district court declined to order Honeycutt to forfeit all of the store's profits from selling the iodine product, on the ground that Honeycutt did not personally obtain any profits from those sales. The Sixth Circuit reversed. Relying on precedent interpreting RICO's analogous forfeiture provision, the majority read § 853(a)(1) to allow joint and several forfeiture liability among co-conspirators.

### Decision

The Supreme Court unanimously reversed. In an opinion by Justice Sotomayor, the Court held that § 853(a)'s "provisions, by their terms, limit forfeiture ... to *tainted* property; that is, property flowing from

(§ 853(a)(1)), or used in (§ 853(a)(2)), the crime itself.” Slip op. 5 (emphasis added). If joint and several liability were permitted, co-conspirators who obtained less than the full profits of the conspiracy might be required to forfeit *untainted* assets: property wholly unconnected with the crime. The Court held that this conclusion is supported by the plain meaning of § 853(a)(1)’s reference to property the defendant “obtained ... as the result of” the crime. A defendant “obtain[s]” property, in the Court’s view, only if he acquires it for himself. Slip op. 6.

The Court also relied on the relationship between § 853(a) and other provisions of § 853 to support its conclusion. The Court observed that § 853(p) provides for forfeiture of untainted substitute property only in limited circumstances where the tainted property is no longer available for forfeiture. Those limitations could be circumvented, the Court explained, if § 853(a)(1) allowed forfeiture of untainted property through the device of joint and several liability. Slip op. 8-9.

The Court rejected the government’s theory that co-conspirators should be jointly and severally liable for forfeiture of the proceeds of a conspiracy just as they are substantively liable for their co-conspirators’ conduct under *Pinkerton v. United States*, 328 U.S. 640 (1946). The Court regarded that argument as inconsistent with the traditional distinction between *in personam* proceedings regarding substantive criminal liability and *in rem* proceedings regarding forfeiture. Section 853 “effectively merg[es] the *in rem* forfeiture proceeding with the *in personam* criminal proceeding,” the Court explained, but it “maintains traditional *in rem* forfeiture’s focus on tainted property.”

### **Implications for Future Cases**

*Honeycutt* represents a sea change in asset forfeiture law that has implications far beyond the narcotics provision at issue. Section 853 outlines the federal government’s principal mechanism for obtaining forfeiture judgments in criminal actions. The Court’s holding limiting forfeiture judgments to proceeds that a defendant “obtains” breaks with years of practice under the statute and may fundamentally transform how the federal government will seek forfeiture.

Prior to *Honeycutt*, courts routinely ordered a criminal defendant to forfeit the value of assets obtained from the entire criminal scheme, regardless of whether the defendant personally obtained the illegal proceeds. As a result, prosecutors often sought criminal forfeiture from parties with the resources to pay the forfeiture judgment, such as corporate defendants or co-conspirators with deep pockets, regardless of whether the entity or individual acquired any of the crime proceeds. This authority enabled the government to secure multimillion-dollar forfeiture payments in cases involving securities fraud, sanctions violations, health care fraud and corruption.

*Honeycutt*’s reasoning is consistent with the Court’s skepticism in recent years toward the government’s expansive forfeiture powers. Last term, in *Luis v. United States*, the Court prohibited the government from restraining a defendant’s untainted assets before trial where doing so would prevent her from hiring counsel of choice.<sup>2</sup> This term, Justice Thomas issued a statement in a decision denying certiorari in *Leonard v. Texas*, questioning whether the modern civil forfeiture statutes can be squared with the Due Process Clause and commenting on the proliferation of abusive civil forfeiture practices.<sup>3</sup>

This trend may signal how the Court will decide another open question in forfeiture jurisprudence.

The Supreme Court is currently considering a petition for certiorari in *Lo v. United States*, which presents the question of whether a district court can impose an *in personam* forfeiture money judgment against a criminal defendant, despite the absence of any express statutory authority for the entry of a forfeiture money judgment. Prior to *Honeycutt*, prosecutors routinely obtained criminal forfeiture money judgments against defendants for the full value of the crime proceeds obtained from the criminal offense. A forfeiture money judgment eliminates the need for the government to trace the crime proceeds to specific assets and enables the government to enforce the forfeiture money judgment against any property of the defendant, including untainted assets. Given the Court's analysis in *Honeycutt*, there is a possibility that the Court could reject this longstanding practice and place another limitation on the government's ability to employ this powerful prosecutorial tool against criminal defendants.

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<sup>1</sup> Until 2015, courts uniformly held that co-conspirators are jointly and severally liable for proceeds received by co-conspirators under federal criminal forfeiture statutes. See, e.g., *United States v. Elder*, 682 F.3d 1065, 1072 (8th Cir. 2012) (brackets and citation omitted); *United States v. Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1640 (2012); *United States v. Genova*, 333 F.3d 750, 762 (7th Cir. 2003); *United States v. Edwards*, 303 F.3d 606, 643-644 (5th Cir. 2002), *cert. denied*, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999); *United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000); *United States v. Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), *cert. denied*, 520 U.S. 1281 (1997); *United States v. Benevento*, 836 F.2d 129, 130 (2d Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1507-1508 (11th Cir. 1986), *cert. denied*, 482 U.S. 917, and 483 U.S. 1021 (1987). In 2015, the D.C. Circuit in *United States v. Cano*, 796 F.3d 83 (D.C. Cir. 2015), declined to follow the other circuits and rejected joint and several liability for co-conspirators.

<sup>2</sup> 136 S. Ct. 1083 (2016).

<sup>3</sup> 137 S. Ct. 847 (2017).