

UNITED STATES V. HONEYCUTT: A POSSIBLE SEA CHANGE IN ASSET FORFEITURE LAW

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If one defendant receives ten dollars and another ninety dollars as a result of violations of federal narcotics laws, could a district court at sentencing impose a forfeiture order holding both defendants joint and severally liable for one hundred dollars? Prior to 2017, circuit courts were not in agreement as to the answer to this question as to whether joint and several liability could be imposed.² The Supreme Court resolved the circuit split as to joint and several liability in narcotics cases in *Honeycutt v. United States*. While the white collar practitioner might initially react with a decided lack of interest, the case is of singular importance not only as it relates to narcotics offenses but early indications are that the holding may apply to a broad array of other forfeiture statutes, including those arising under the money laundering laws. There is already an emerging circuit court conflict as to the applicability of *Honeycutt* to one civil money laundering forfeiture provision.

By way of background, Terry Honeycutt managed sales and inventory for a hardware store owned by his brother. The store sold large amounts of Polar Pure, an iodine based water-purification product that could be employed to manufacture methamphetamine. The brothers

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² Compare *United States v. Nguyen*, 602 F.3d 886, 894 (8th Cir. 2010) (applying joint and several liability to forfeiture under 21 U.S.C. § 853); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (same) with *United States v. Cano-Flores*, 796 F.3d 81, 93-95 (D.C. Cir. 2015) (declining to apply joint and several liability to forfeiture order under 21 U.S.C. § 853).

were charged with various offenses related to their sale of the iodine product while knowing or having reason to believe it would be used to manufacture a controlled substance. The government sought forfeiture under 21 U.S.C. § 853(a) of “any proceeds the person obtained, directly or indirectly, as a result of” the methamphetamine distribution. The district court sentenced Terry (after conviction on eleven charges) to six months’ imprisonment. The district court, however, refused to enter a money judgement forfeiture, stating that the defendant was a salaried employee who had not personally received any of the profits. On appeal, the Sixth Circuit reversed, holding that as co-conspirators the brothers were jointly and severally liable for any proceeds from the narcotics conspiracy.³

The Supreme Court accepted certiorari to resolve the circuit court split and Justice Sotomayor delivered the Opinion of the Court. The Court began by noting that joint and several liability was a “creature” of tort law and applied when there had been a judgement against multiple defendants. Under that concept, when two or more defendants jointly cause harm, each defendant was liable for the entire amount of the harm provided, however, that a victim may recover only once for the full amount. The Court stated that it had to determine whether this form of liability applied under 21 U.S.C. § 853(a), the narcotics forfeiture statute. The Court concluded that it did not.

The Court first began by reprising the applicable forfeiture statute. It noted that forfeiture applied to “any person” convicted of certain crimes but the statute’s reach was limited by way of three provisions. Section 853(a)(1) permitted forfeiture of “property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of” the offense. Section

³ *United States v. Honeycutt*, 816 F.3d 362, 380 (6th Cir. 2016).

853(a)(2) restricted forfeiture to “property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of” the offense. Section 853(a)(3) applied to persons “convicted of engaging in a continuing criminal enterprise.” The Court stated that these provisions limited forfeiture to tainted property, that is, property flowing from the offense or used in the crime itself.

The Court next stated that in addition to limiting forfeiture to tainted property, the statute defined forfeitable property solely in terms of personal possession or use. The Court noted that 21 U.S.C. § 853(a) limited the statute to property the defendant himself “obtained” as a result of the crime. Relying on dictionary definitions of the word “obtain”, the Court found that neither dictionary definitions nor common usage of the word “obtain” supported the conclusion that an individual “obtains” property acquired by someone else. Importantly, the Court held that even forfeiture of property that was used to facilitate a crime was limited to the “person’s property.” With respect to the section of the statute involving criminal enterprises, the Court stated that forfeiture was limited to defendant’s “interest in” the property.

The Court reviewed other provisions of the statute supported its view that joint and several liability did not apply. The Court first discussed 21 U.S.C. § 853(c), providing that right, title and interest in tainted property vests in the United States upon commission of the act giving rise to the forfeiture. The Court stated that it had previously held that this provision applied to tainted property alone.⁴ The Court then discussed other provisions in 21 U.S.C. § 853(e) and § 853(d) that supported its conclusion. The Court further noted that applying joint and several liability to property the defendant did not obtain would render futile other provisions of the

⁴ *Luis v. United States*, 589 U.S. ___, 136 S.Ct. 1083 (2016).

statute, including 21 U.S.C. § 853(p) which permits the forfeiture of what is known as substitute assets, that is, assets that may be forfeited when no directly traceable property exists. The Court found that permitting the government to force other co-conspirators to turn over untainted (substitute assets) would allow the government to circumvent the carefully constructed statutory scheme which only permitted substitute asset forfeiture when specified statutory requirements were satisfied. The Court further found that Congress provided just one statutory mechanism for the government to recoup substitute property when tainted property was unavailable.

The Court then noted that historically forfeiture began as an *in rem* proceeding where the property was primarily considered the offender independent and unaffected by any criminal proceeding. Congress altered this distinction by effectively merging *in rem* with *in personam* criminal proceedings and by expanding forfeiture to include not only the “thing” but property derived from proceeds of the crime. The Court stated, however, there was nothing to indicate that Congress intended any significant expansion of the scope of property (tainted property alone) that was subject to forfeiture. Holding that forfeiture was limited to the property the defendant actually acquired as a result of the crime, the joint and several liability order was reversed.⁵

The government has announced that as a result of the Supreme Court’s decision in *Honeycutt*, it will no longer argue that a forfeiture money judgment supplies independent authority for seizing a defendant’s untainted property. Instead, if the government locates

⁵ *Honeycutt v. United States*, __ US __, 137 S. Ct. 1626 (2017). See also *United States v. Pickel*, 863 F.3d 1240, 1260-1261 (10th Cir. 2017) (reversing narcotics joint and several order based upon failure to determine amount of funds obtained).

additional property, it will seek to forfeit substitute property only in accordance with Rule 32.2(e)(1)(B) of the Federal Rules of Criminal Procedure.⁶

One critical question is whether the holding from *Honeycutt* will be applicable to other forfeiture regimes, including criminal money laundering forfeitures under 18 U.S.C. § 982 (property “involved in”), which incorporates the 21 U.S.C. § 853 procedures, and civil forfeiture under 18 U.S.C. § 981(a)(1) (proceeds forfeiture) employed in the criminal context by way of 28 U.S.C. § 2461(c), which permits certain civil forfeiture provisions to be employed in criminal cases.

Courts have begun to review the scope of the joint and several liability after *Honeycutt* in a variety of contexts with conflicting results. The Third Circuit applied *Honeycutt* to two other forfeiture regimes. In *United States v. Brown*, in a case arising out of a mortgage fraud scheme, the court held that a forfeiture arising under the criminal money laundering statute, 18 U.S.C. § 982(a)(1), was subject to the joint and several limitations of *Honeycutt*.⁷ In *United States v. Gjeli*, the court vacated a joint and several forfeiture order arising out of a loan sharking and illegal gambling operation. While noting that 21 U.S.C. § 853 was the basis for certain counts of conviction, the forfeiture order for other counts of conviction was based upon 18 U.S.C. § 1963 (the RICO forfeiture provision) and a civil forfeiture statute 18 U.S.C. § 981(a)(1)(C),

⁶ See *Henry Lo v. United States*, No. 16-8327 (Brief for the United States in Opposition) (Sept. 2017). Rule 32.2 outlines procedures for substitute asset forfeiture which is controlled by the substantive provisions of the forfeiture statute at issue. For example, 21 U.S.C. § 853 (p) outlines the procedure for substitute asset forfeiture and provides that substitute asset forfeiture applies when forfeitable property cannot be located upon the exercise of due diligence; has been transferred to a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value, or has been commingled such that it cannot be divided without difficulty. If these conditions are met, untainted (substitute property) up to the amount of the forfeiture order is subject to restraint and may be applied to satisfy a criminal forfeiture order.

⁷ *United States v. Brown*, 694 Fed. Appx. 57 (3d Cir. 2017).

presumably by way of 28 U.S.C. § 2461(c). Significantly, the court stated that it saw no reason why the holding in *Honeycutt* did not apply to those statutes as well.⁸ The Eleventh Circuit has a similar unpublished ruling that applied *Honeycutt* to 18 U.S.C. § 981(a)(1)(C), following *Gjeli*.⁹

The Fifth and Eleventh Circuits applied the joint and several liability limitation to 18 U.S.C. § 982(a)(7), a criminal forfeiture statute that applies in health care fraud cases.¹⁰ And, the Second Circuit has a decision stating that until a joint and several order is corrected, substitute asset forfeiture cannot be ordered because it is necessarily dependent on the prior improperly entered joint and several forfeiture order.¹¹

There have been other cases, however, that have limited or refused to expand the Supreme Court's decision. Notably, the Sixth Circuit has created a circuit court conflict refusing to apply *Honeycutt* to a forfeiture under 18 U.S.C. § 981(a)(1)(C). In *United States v. Sexton*, the court held that 18 U.S.C. § 981(a)(1)(C) does not contain the phrase "the person obtained" and held that while property must be connected to or "traceable" to the offense, it need not be property that the particular defendant received.¹² The Second Circuit has suggested that *Honeycutt* would be limited to the context of an employee who had no control of the proceeds, rather than someone who could control the distribution of the proceeds of the offense.¹³ And,

⁸ *United States v. Gjeli*, 867 F.3d 418, 427-428 (3d Cir. 2017).

⁹ *United States v. Carlyle*, 712 Fed. Appx. 862 (11th Cir. 2017).

¹⁰ *United States v. Sanjar*, 875 F.3d 725, 749 (5th Cir. 2017) (government concession as to application and remanding on plain error review); *United States v. Elbeblawy*, 899 F.3d 925, 941 (11th Cir. 2018) (same ruling without concession).

¹¹ *United States v. Djibo*, 730 Fed. Appx. 52 (2d Cir. 2018).

¹² *United States v. Sexton*, 897 F.3d 787, 798-799 (6th Cir. 2018).

¹³ *SEC v. Metter*, 706 Fed. Appx. 699 (2d Cir. 2017).

several district court cases have limited the scope of the decision. One district court in New York has held that *Honeycutt* does not apply to 18 U.S.C. § 981(a)(1)(C). In *United States v. McIntosh*, involving a series of violent robberies, the district court distinguished 18 U.S.C. § 981(a)(1)(C) from 21 U.S.C. § 853, stating that the word “person” was absent from the civil forfeiture statute, thereby previewing the later holding of the Sixth Circuit in *Sexton*. In addition, the district court stated that it would not cease to apply joint and several liability until the Second Circuit overruled a prior decision providing for joint and several liability for money laundering forfeitures.¹⁴ Moreover, before practitioners begin looking at their closed files to file motions to vacate forfeiture orders, several courts have held either that appellate waivers precluded review of final joint and several orders or that such orders were not subject to retroactive application by way of collateral review.¹⁵ Thus, while a number of circuit courts have applied with little discussion the holding of *Honeycutt* to criminal money laundering forfeitures or civil forfeitures brought in the criminal context by way of 28 U.S.C. § 2461(c) on direct appeal, a circuit court conflict has already emerged and the applicability of *Honeycutt* in these contexts remains unclear.

A potentially important issue is whether *Honeycutt* affects civil money laundering and other civil forfeitures. For example, there is a line of authority in the forfeiture context concerning what is termed “facilitating property,” that is, property that assists or facilitates the

¹⁴ *United States v. McIntosh*, 2017 WL 3396429 (S.D.N.Y. 2017) (citing *United States v. Contorinis*, 692 F.3d 136 (2d Cir. 2012)), *appeal pending*.

¹⁵ *See, e.g., United States v. Filice*, 2018 WL 2326616 (E.D. Ken. May 22, 2018); *United States v. Alquza*, 2017 WL 4451146 (W.D.N.C. Sept. 20, 2017), *aff'd*, 722 Fed. Appx. 348 (4th Cir. 2018).

underlying offense. Courts have held that such property is subject to forfeiture.¹⁶ Under this authority, limited tainted proceeds placed into an account containing untainted funds can, nonetheless, serve to taint an entire account. The language in the Supreme Court's decision about the merging of the concepts of *in rem* and *in personam* forfeitures and its limitation on property "obtained" raises the spectre that this line of authority may be subject to challenge. This is a stay-tuned situation. While the full scope of *Honeycutt* remains to be seen, the decision may yet result in a sea change in the forfeiture law.

¹⁶ See, e.g., *United States v. Previzon Holdings, Ltd*, 251 F. Supp. 3d 684, 698 (S.D.N.Y. 2017) (collecting authorities).