No.

IN THE SUPREME COURT OF THE UNITED STATES

ROSA CINGARI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether United States Sentencing Guideline Commentary which adds to a sentencing guideline is necessarily inconsistent with the guideline such that the commentary is not authoritative?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Rosa Cingari (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), Maria Chapa Lopez, Esquire (United States Attorney), David P. Rhodes (Assistant United States Attorney), Holly Gershow (Assistant United States Attorney), and Jeffrey Wall, Esquire (Acting Solicitor General of the United States of America).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals *infra*, was selected for publication. The decision can be found at *United States v. Cingari,* 952 F.3d 1301, 1304 (11th Cir. 2020), and is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on March 17, 2020. However, a timely Petition for Rehearing En Banc was filed on April 3, 2020, which was not denied until July 28, 2020. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 2B1.1, which is the sentencing guideline for "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States," contains the following cross reference and commentary:

> (c) Cross References
>
> (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or

Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

U.S.S.G. § 2B1.1(c)(1)-(3).

17. **Cross Reference in Subsection (c)(3).**--Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or

> wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

U.S.S.G. § 2B1.1 cmt. n.17 (formerly cmt. n. 16).

STATEMENT OF FACTS

Ms. Cingari was convicted of falsifying immigration forms, in violation of 18 U.S.C. §§ 2 and 1546(a), mail fraud, in violation of 18 U.S.C. §§ 2 and 1341, and conspiracy to do the same, in violation of 18 U.S.C. § 371 in the Middle District of Florida.

The United States Probation Office initially recommended that Ms. Cingari be sentenced under § 2L2.1 of the United States Sentencing Guidelines. According to the Probation Office's Presentence Investigation Report, the sentencing range with use of the guideline was 30–37 months imprisonment. The government argued that under U.S.S.G. § 2B1.1 cmt. n.16 (now cmt. n. 17, and hereinafter referred to as cmt. n. 17), Ms. Cingari's sentence should be calculated under § 2B1.1, because the guideline more aptly covered Ms. Cingari's offense conduct. The Defense argued that § 2L2.1 was the proper guideline because the conduct set forth in the count of conviction established an offense specifically covered by another guideline, and

therefore the other guideline, *i.e.*, § 2L2.1, applied under § 2B1.1(c)(3)'s cross reference. The probation office and the court ultimately agreed with the government's position and applied § 2B1.1 to calculate Ms. Cingari's guideline imprisonment range, which increased the guideline imprisonment range to 210 to 262 months imprisonment.

Ms. Cingari appealed to the Eleventh Circuit Court of Appeal arguing that U.S.S.G. § 2B1.1 cmt. n.17 was inconsistent with the text of § 2B1.1's cross reference and therefore the text of the cross reference, not the commentary, applied. Ms. Cingari further argued that under the text of the cross reference § 2L2.1 should have been utilized for purposes of calculating her guideline imprisonment range as the probation office had originally found. The Eleventh Circuit concluded that based upon its prior precedent and a review of the guideline and the commentary, it could harmonize the language of the guideline with the language of the commentary by adding the commentary's "more aptly" requirement to the guideline, and thus the district court had not erred by utilizing the "more aptly" covered test and calculating Ms. Cingari's guideline imprisonment range with § 2B1.1 rather than § 2L2.1.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT AS TO WHETHER GUIDELINE COMMENTARY WHICH ADDS TO A GUIDELINE IS NECESSARILY INCONSISTENT WITH THE GUIDELINE SUCH THAT THE COMMENTARY IS NOT AUTHORITATIVE.

At issue in this Petition is whether the United States Sentencing Commission may bypass congress and alter the text of a United States Sentencing Guideline through the use of commentary. This Court should grant review because the sentencing guidelines and their commentary impact every federal sentencing hearing held in the United States each year. Additionally, this Court's intervention is necessary to resolve a circuit split as to whether guideline commentary which adds to a guideline is necessarily inconsistent with the guideline such that the commentary is not authoritative, and to insure that guideline commentary does not become a substitute for the guideline text itself.

Unlike the sentencing guidelines themselves, the commentary to the guidelines is not subject to congressional approval, nor is it expressly authorized by the Sentencing Reform Act of 1984. *Stinson v. United States*, 508 U.S. 36, 40–41, 113 S. Ct. 1913, 1916–17, 123 L. Ed. 2d 598 (1993). Accordingly, "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson*, 508 U.S. at 38, 113 S. Ct. at 1915.

In a unanimous en banc opinion, the Seventh Circuit has concluded that guideline commentary which does not simply interpret a guideline but which in effect adds to it is necessarily inconsistent with the guideline and has no authoritative value. *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc). Conversely, the Eleventh Circuit has concluded that the guideline commentary may add to a guideline and nonetheless retain its authoritative status. *United States v. Cingari*, 952 F.3d 1301, 1310 (11th Cir. 2020) (Finding that the commentary added a modifier - more aptly covered - not contained in the corresponding guideline, but finding the commentary was nonetheless consistent with the guideline and thus authoritative). According to the Eleventh Circuit, in these circumstances a reviewing court should seek to harmonize the guideline with the additions contained in the commentary. *Cingari*, 952 F.3d at 1308 (11th Cir. 2020) ("Courts should thus seek to harmonize a guideline's text with its commentary.")(quotations and citations omitted).

The Eleventh Circuit's conclusion conflicts with *Rollins* and *Stinson*. Moreover, the Eleventh Circuit's conclusion that guideline commentary could ever properly add to a guideline is belied by its admission that in such circumstances the reviewing court should seek to harmonize the text of the guideline with the guideline commentary. By definition only that which is not consistent requires harmonizing. *See*, https://www.merriam-webster.com/dictionary/harmonize (Defining the transitive verb harmonize as "to bring into consonance or accord.") Accordingly, by definition, guideline commentary that would require a harmonizing

interpretation by a reviewing court is not authoritative. *Stinson*, 508 U.S. at 38, 113 S. Ct. at 1915. As recognized in *Rollins*, commentary which adds to a guideline is necessarily inconsistent with the guideline by virtue of having added to it, *i.e.* if the guideline is read to include what is added by the commentary, it no longer says what it said, it says what it said plus what has been added, and thus has not remained consistent. Consequently, this Court should accept review and approve the Seventh Circuit's decision in *Rollins*, and disapprove the Eleventh Circuit's conclusion that guideline commentary may properly add to a guideline, as that conclusion is inconsistent with *Stinson*.

Furthermore, Ms. Cingari's case is the ideal case for establishing that guideline commentary may not add to a guideline. Nowhere in § 2B1.1's cross reference does it limit its application to a conviction that establishes an offense involving fraudulent conduct that is "more aptly" covered by another guideline. Instead, the cross-reference states that it applies when the "conduct set forth in the count of conviction establishes an offense specifically covered by another guideline." U.S.S.G. § 2B1.1(c)(3). The "more aptly" test finds its origins in the guideline commentary and adds a requirement not present in the guideline itself. Accordingly, the commentary is not consistent with the guideline and thus not authoritative. *Stinson*, 508 U.S. at 38, 113 S. Ct. at 1915; *Rollins*, 836 F.3d at 742. Consequently, fulfillment of the "more aptly" test is not a condition precedent to application of the guideline, as no such test is provided for in the guideline itself.

See, U.S.S.G. § 2B1.1(c)(1)-(3); *Stinson*, 508 U.S. at 38, 113 S. Ct. at 1915; *Rollins*, 836 F.3d at 742.

Further still, the "more aptly" test does not resolve an ambiguity in the guideline - it, in fact, creates one. The guideline plainly states that the cross reference applies when the "conduct set forth in the count of conviction establishes an offense specifically covered by another guideline," ergo, in Ms. Cingari's case the conduct set forth in the count of conviction established the offense of falsifying immigration forms, and therefore the guideline for that offense, § 2L2.1, applies. If the commentary is consulted the question of whether another guideline applies becomes ambiguous; does the cross reference apply when the offense of conviction establishes an offense specifically covered by another guideline as the guideline states – or only if the conduct is more aptly covered by another guideline as the commentary states? Accordingly, the commentary does not resolve an ambiguity, it creates one because it is inconsistent with the text of the guideline and thus not authoritative under *Stinson*.

Finally, applying the guideline by its terms without adding the commentary's "more aptly" test to it does not produce absurd results; it produces the intended results as explained by the commentary itself. The commentary explains that under § 2B1.1's cross reference, § 2B1.1 itself should only be used where the offender has not committed a more specific fraudulent offense. The Eleventh Circuit postulates that such a construction is absurd because, for instance, an individual could commit one fewer criminal act than Ms. Cingari, *i.e.*, basic mail

fraud, and receive a harsher sentence under § 2B1.1 because its cross reference would not apply. Admittedly, in light of the fact a defendant could receive a lighter sentence by committing two criminal acts rather than one the guideline range called for by § 2B1.1 for basic mail fraud does indeed seem absurd; but that does not render § 2B1.1's cross reference absurd. Using mail fraud as an example, § 2B1.1's cross reference and its commentary recognize that not all mail fraud is the same. Where a defendant has committed a specific fraud through use of the mail the guideline for that specified offense should be utilized. Where a guideline has not been established for the specific fraud orchestrated through the use of the mail, § 2B1.1 is to effectively be used as the default starting point, and the court may then vary upwards or downwards as the circumstances of the fraud specifically perpetuated warrant. Accordingly, application of § 2B1.1's cross reference strictly by its terms does not produce absurd results – it produces the intended result; § 2B1.1 will only be used as a default guideline where the offender has not committed a fraud with a specific guideline in place.

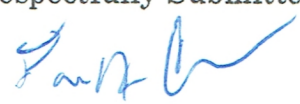
For the foregoing reasons this Court should grant review to establish that guideline commentary which adds to a guideline is inherently inconsistent with the guideline and thus not authoritative, quash the decision below, and remand Ms. Cingari's case to the district court for a new sentencing hearing where Ms. Cingari's guideline sentence is determined through the use of § 2L2.1.

CONCLUSION

For the reasons stated above, this Court should grant Ms. Cingari's Petition for Writ of Certiorari and establish that guideline commentary which adds to a guideline is inherently inconsistent with the guideline and thus not authoritative.

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Respectfully Submitted,



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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12262

D.C. Docket No. 8:14-cr-00054-CEH-AAS-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSA ENEDIA PAZOS CINGARI,
DOMENICO CINGARI,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(March 17, 2020)

Before JORDAN, GRANT, and SILER,* Circuit Judges.

GRANT, Circuit Judge:

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* Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Defendants Domenico and Rosa Cingari, a husband and wife who defrauded hundreds of undocumented aliens into paying about $740,000 for falsified federal immigration forms, contest their sentences. They say that they should not be jointly and severally liable for the forfeiture judgment in the amount that they collected in their scheme; that way, one of them could be liable for some "minimal amount," allowing them to pay off that liability and then "live their lives" as "a happily married couple." Additionally, they say, they should be sentenced under the lesser penalty set out for falsifying immigration forms rather than the greater penalty set out for fraud and deceit. Because the district court committed no plain error in holding them jointly and severally liable for repaying the proceeds of their illegal conduct, and because the Sentencing Guidelines direct that they be sentenced for fraud and deceit, we affirm the judgment of the district court.

I.

A.

For more than four years, migrant workers and other aliens went to the Cingaris' business looking for help getting Florida driver's licenses. The Cingaris had apparently mastered the art of obtaining a key Department of Homeland Security document formally known as a Form I-797C Notice of Action, but nicknamed "the torch" for its torch watermark. Under Florida law, aliens can use "the torch" to prove their identity and lawful status for licensing purposes. *See* Fla. Stat. § 322.08(2)(c)(8).

Those coming to the Cingaris for help knew the couple could get them the document; what they did not know was how the Cingaris did it. To obtain a Form

I-797C, the Cingaris would fill out and mail two other kinds of federal immigration documents: (1) a Form I-589 application for asylum and withholding of removal, and (2) a Form I-130, a document used to establish a relationship between a citizen (or lawful permanent resident) and an alien. Once DHS received these two forms, it would generally issue a Form I-797C.

Without the applicants' knowledge, the Cingaris would often alter the facts provided in applications. Some falsely reported that an applicant had suffered persecution, while others manufactured a false identity. Still others lied about the applicant's lawful status, residential address, and social security number. On each fraudulent application, the Cingaris listed their own business address as the applicant's mailing address, so that they, rather than the applicant, could correspond with the federal government. As several applicants would later testify, they paid the Cingaris to procure the torch document—but would not have done so if they had known about the couple's deceptive practices.

The Cingaris' scheme left behind hundreds of victims. But it also produced a small fortune. During the conspiracy, the Cingaris filed forms for more than 1,000 aliens and usually charged $500–$800 per application. Both spouses fraudulently completed forms, with Domenico personally working on at least 200. All in all, as a direct result of the fraudulent conspiracy, the victims lost more than $791,000. Of that, about $740,000 went to the Cingaris, with the remainder going to immigration attorney fees. Some victims paid a much higher price: several were deported because the Cingaris—who, you will recall, intercepted all application-

related mail—failed to advise applicants when the federal government demanded interviews or requested information about an application.

B.

Domenico and Rosa were tried by jury and convicted of three crimes: (1) falsifying immigration forms, in violation of 18 U.S.C. §§ 2 and 1546(a); (2) mail fraud, in violation of 18 U.S.C. §§ 2 and 1341; and (3) conspiracy to do the same, in violation of 18 U.S.C. § 371.

For their crimes, the Cingaris were sentenced to prison and held jointly and severally liable for a money judgment. "Based on the evidence presented at trial," the district court found that "the Defendants received criminal proceeds in the amount of $740,880.00." Consistent with that conclusion, the court ordered that "the Defendants shall be held jointly and severally liable for a forfeiture money judgment in the amount of $740,880.00." *Cf.* 18 U.S.C. §§ 982(a)(6) (criminal asset forfeiture), 981(a)(1)(C) (civil asset forfeiture); 28 U.S.C. § 2461(c) (allowing forfeiture, including under 18 U.S.C. § 981(a)(1)(C), in criminal proceedings). At that point, the Cingaris did not object to the imposition of joint and several liability.

The district court also sentenced them to prison. The presentence investigation report (PSR) initially recommended that the Cingaris be sentenced under § 2L2.1 of the United States Sentencing Guidelines. According to the PSR calculations, the sentencing range under that guideline was 30–37 months.

Both the Cingaris and the government objected to portions of the PSR. As relevant here, Domenico argued that because he played an insignificant role in the

criminal conspiracy, he should receive a minor-role reduction in his sentence. In arguing for this reduction, Domenico's trial attorney told the district court that he supposed that "the money is going into the family coffers," recognized that "there really has been no testimony as to . . . how they divided it under the circumstances," and conceded that the court could "assume that he did benefit to a point because he was married to Mrs. Cingari." Domenico also objected to the PSR's factual representation that he had operated the business together with Rosa. The district court overruled both objections.

For its part, the government argued that the Cingaris' sentence should be calculated under § 2B1.1, rather than § 2L2.1 as suggested in the PSR. Section 2L2.1 applies specifically to the criminal offense of falsifying federal immigration documents, while § 2B1.1 applies generally to offenses involving deception and fraud. U.S. Sentencing Guidelines §§ 2L2.1, 2B1.1 (Nov. 2016). Section 2B1.1 would also result in a higher sentencing range for the Cingaris: 168–210 months for Rosa, and 108–135 months for Domenico. Only that guideline, the government contended, could account for the totality of the Cingaris' criminal scheme—their deception of both the federal government *and* their victims. The Cingaris conceded that § 2B1.1 applied, at least as an initial matter, but contended that § 2L2.1 was the right provision in the end because of § 2B1.1's cross reference. That cross reference, they said, directs the court to apply § 2L2.1 where the conviction conduct establishes the offense of falsifying immigration forms, an offense "specifically covered" by § 2L2.1. *See* U.S.S.G. §§ 2B1.1(c)(3)(C), 2L2.1.

Agreeing with the government, the Probation Office amended the PSR to recommend sentencing the Cingaris under § 2B1.1 rather than § 2L2.1. The district court also agreed with the government, and sentenced the Cingaris within the higher sentencing range set out in § 2B1.1. "Although making false statements in the immigration applications [was] certainly a component of the mail fraud charges," the district court explained, "the Cingaris' ultimate goal was to obtain money from their clients." The Cingaris now appeal.

II.

When a party does not object to an issue at sentencing, we review only for plain error. *United States v. Beckles*, 565 F.3d 832, 842 (11th Cir. 2009). The party raising the issue on appeal has the burden to show that "(1) there is an error; (2) that is plain or obvious; (3) affecting his substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (punctuation and citation omitted). We review de novo the interpretation and application of the Sentencing Guidelines. *United States v. Fox*, 926 F.3d 1275, 1278 (11th Cir. 2019).

III.

A.

The Cingaris first argue that the district court erred in holding them jointly and severally liable. But because they did not raise this issue below, the plain error standard applies. "As we have repeatedly recognized, an error cannot meet the 'plain' requirement of the plain error rule if it is not clear under current law."

United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006) (per curiam) (citation omitted). The Cingaris have failed to make this showing.

As their chief support for the law's clarity, the Cingaris point to the Supreme Court's recent decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). In *Honeycutt*, the Court rejected the idea that a defendant can be jointly and severally liable under 21 U.S.C. § 853 "for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." *Id.* at 1630. Honeycutt, a salaried employee at his brother's store, sold large amounts of a product that the police had told him could be used to make methamphetamine; he was later convicted of several drug-related crimes. *Id.* at 1630. The Court held that he could not be jointly and severally liable with his brother for the profits from the illegal sales because § 853 requires forfeiture of "'any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of' certain drug crimes." *Id.* at 1630 (quoting 21 U.S.C. § 853). "Neither the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else." *Id.* at 1632. And even the government acknowledged that Honeycutt did not benefit personally from the product's sale—the profits went to his brother. *Id.* at 1630–31.[1]

[1] Although *Honeycutt* was decided after the court below imposed joint-and-several liability, we analyze the plainness of an alleged error "at the time of appellate consideration," at least when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal." *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005) (citation omitted).

But *Honeycutt* cannot establish that imposing joint-and-several liability here was an obvious error. Even if we assume that *Honeycutt* applies to criminal forfeiture under 18 U.S.C. § 982(a)(6)[2]—one of the statutory provisions authorizing forfeiture here—the Cingaris must also show that it plainly applies to civil asset forfeiture under 18 U.S.C. § 981(a)(1)(C)—the other provision independently authorizing forfeiture in this case.[3] They cannot. *See United States v. Brown*, 947 F.3d 655, 682 (11th Cir. 2020). "*Honeycutt* was highly dependent on language found in 21 U.S.C. § 853 but absent from 18 U.S.C. § 981." *Id.* That textual difference, as we recently held, is "fatal" to the plain error argument the Cingaris advance. *Id.*[4]

Besides, even if *Honeycutt* applied to both § 982(a)(6) and § 981(a)(1)(C), the Cingaris have not shown that its analysis plainly applies to them. The Court's analysis in *Honeycutt* turned on the employer–employee relationship: the employer, as owner of the business, obtained the profits; the salaried employee

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[2] We have not applied *Honeycutt* to § 982(a)(6), but we have applied it to the similarly worded provision in 18 U.S.C. § 982(a)(7). *United States v. Elbeblawy*, 899 F.3d 925, 941–42 (11th Cir. 2018).

[3] The civil asset forfeiture statute was at play in this criminal case because of 28 U.S.C. § 2461(c). *See United States v. Padron*, 527 F.3d 1156, 1161–62 (11th Cir. 2008) ("Congress enacted 28 U.S.C. § 2461(c) . . . to make criminal forfeiture available in every case that the criminal forfeiture statute does not reach but for which civil forfeiture is legally authorized.").

[4] Although we conclude that *Honeycutt* does not obviously extend to at least one of the forfeiture statutes at issue, we note that the government attempted to expressly waive this argument (while also setting out other reasons to hold the Cingaris jointly and severally liable). But we cannot find plain error where none existed simply because one party wishes not to contest the point. The Cingaris bear the burden to establish plain error, and we will not hold that the district court plainly erred just because the parties say so. *See Beckles*, 565 F.3d at 842 (burden is on the party raising a new issue).

never saw the fruits of his criminal labor. Here, though, the Cingaris are spouses—spouses who jointly operated their fraudulent business. And contrary to Domenico's argument that he played an insignificant role in the crime, the evidence demonstrated that he personally worked on at least 200 fraudulent applications. With this evidence in mind, the district court unsurprisingly ruled that Domenico did not merit a minor-role reduction in his sentence; Domenico does not challenge that finding on appeal.

More to the point, no evidence shows that the married couple split their co-earned criminal proceeds. In fact, the district court found that "as a result of the conspiracy and fraud offenses, the Defendants received criminal proceeds in the amount of $740,880.00." Although that statement is not *necessarily* a finding of joint ownership of the proceeds, in light of the context—a married couple jointly operating a fraudulent business—the best reading supports that conclusion. Even Domenico's trial attorney understood that "the money is going into the family coffers," recognized that "there really has been no testimony as to . . . how they divided it under the circumstances," and thought the court "can assume that he did benefit to a point because he was married to Mrs. Cingari." Under these circumstances, the Cingaris have failed to establish that they did not mutually obtain, possess, and benefit from their criminal proceeds. We see no plain error.

B.

Next, the Cingaris challenge their sentence as procedurally unreasonable, arguing that the district court's sentencing calculation was incorrect. *See United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008) (per curiam). They say

that they should have been sentenced under § 2L2.1, instead of § 2B1.1. Although their argument requires close consideration, it ultimately fails.

To calculate an offense level, a district court first "must determine which offense guideline section covers the offense of conviction." *United States v. Belfast*, 611 F.3d 783, 824 (11th Cir. 2010) (citations omitted). This requires the court to consult the Sentencing Guidelines Statutory Index, which matches particular guidelines to specific statutory violations. *Id.*; *see* U.S.S.G. app. A. Section 2B1.1 applies to the Cingaris' mail-fraud convictions, while § 2L2.1 applies to their immigration-document convictions. For multi-count convictions, a district court must also group "[a]ll counts involving substantially the same harm." U.S.S.G. § 3D1.2. After that, the court must apply the guideline that produces the highest offense level. U.S.S.G. § 3D1.3. Because the guideline for mail fraud produced a higher offense level than the guideline for falsifying immigration documents, the court below applied § 2B1.1.

But as the Cingaris see it, § 2B1.1 is a beginning rather than an end. They contend that § 2B1.1's cross-reference provision applies—and requires that they be sentenced under § 2L2.1, which covers the offense of falsifying immigration forms. According to its text, § 2B1.1's cross reference triggers application of § 2L2.1 only if the "conduct set forth in the count of conviction establishes an offense specifically covered by" § 2L2.1. U.S.S.G. § 2B1.1(c)(3)(C). The Cingaris say that, luckily for them, the conduct of lying on immigration forms is specifically covered by § 2L2.1. So that provision—which happens to yield a much lighter sentence—covers this case (or so they argue).

The government counters with precedent and Guidelines commentary. It first leans on our decision in *United States v. Baldwin*, where we upheld the district court's application of § 2B1.1 on facts comparable to those here. 774 F.3d 711, 733 (11th Cir. 2014). The government also points to the language of the Guidelines commentary, which states that the cross reference applies only when a defendant's conduct qualifies as an offense "involving fraudulent conduct that is more aptly covered by another guideline." U.S.S.G. § 2B1.1 cmt. n.16.[5] We agree—under those authorities, the district court rightly sentenced the Cingaris under § 2B1.1.

1.

Baldwin controls this case. There, we upheld a sentence under § 2B1.1 because we found that it (rather than another guideline) "more aptly fit the specifics of the crimes committed." *Baldwin*, 774 F.3d at 733. One of the defendants, Belizaire, had participated in a fraudulent scheme to steal victims' identities, file false tax returns, and obtain and use debit cards loaded with fraudulent tax refunds. *Id.* at 720. He pleaded guilty to conspiracy to defraud the government in violation of 18 U.S.C. § 286. *Id.* Although that offense was covered by Guidelines § 2B1.1, Belizaire argued that the district court should have applied § 2B1.1's cross reference and sentenced him under § 2T, a provision specifically addressing fraudulent tax returns. This Court rejected that argument: "the heart of Belizaire's scheme was not simply to file fraudulent tax returns,

[5] This language is now in footnote 17 of the most recent Guidelines commentary. U.S.S.G § 2B1.1 cmt. n.17 (Nov. 2018).

impede the IRS from collecting taxes, or counsel others to falsify their own returns." *Id.* at 733. Rather, "Belizaire's goal was to enrich himself by defrauding the government with entirely fictitious tax returns, and thus the § 2B1.1 guidelines more aptly fit the specifics of the crimes committed by Belizaire." *Id.*

That case is this case in every meaningful respect. Like in *Baldwin*, the "heart" of the Cingaris' scheme was not simply falsifying federal forms; instead, their "goal was to enrich" themselves through a fraudulent scheme, cheating aliens out of several hundred thousand dollars. That much is undisputed. We hold here as we held there: the "§ 2B1.1 guidelines more aptly fit the specifics of the crimes committed," and thus apply.

Despite the similarities between *Baldwin* and this case, the Cingaris try to limit *Baldwin* by arguing that the opinion seemed to assume, but not actually decide, that the guideline and commentary were consistent. Not so. Key to our holding was our determination that the text of § 2B1.1(c) harmonized with its commentary. As we put it, the "commentary further explains" the text. *Id.* That is, our Court decided that the commentary was a consistent explanation of—rather than in contradiction to—the guideline itself, and then decided the case on that ground. We could not today hold that the text and commentary were inconsistent without running headlong into this express determination, effectively overruling *Baldwin*.

The Cingaris' argument amounts to asserting that *Baldwin* does not apply because it did not consider the "inconsistency exception" that prevents the commentary from being authoritative. To be sure, otherwise authoritative

commentary loses that status if it is "inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). That said, the Cingaris' argument is a non-starter. Even if we agreed with their view that the guideline and commentary were inconsistent, we could not free ourselves from a binding opinion just because it "failed to consider" an "exception to the general rule." *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001). Doing so would risk "nullifying the well-established prior panel precedent rule that is an essential part of the governing law of this Circuit." *Id.* at 1302. We therefore follow *Baldwin*.

2.

And even if *Baldwin* did not bind us, we cannot say that the outcome would be different. A closer look at the text and commentary of the Guidelines shows why.

First, some background on our approach. "To properly interpret the Sentencing Guidelines, we begin with the language of the Guidelines, considering both the Guidelines and the commentary." *United States v. Panfil*, 338 F.3d 1299, 1302 (11th Cir. 2003) (per curiam) (citations omitted). We have explained that "the guideline and the commentary must be read together," because the commentary may "interpret the guideline or explain how it is to be applied." *United States v. Ferreira*, 275 F.3d 1020, 1029 (11th Cir. 2001) (quotation marks and citations omitted); *Stinson*, 508 U.S. at 41 (alteration omitted) (quoting U.S.S.G. § 1B1.7 (Nov. 1989)). The commentary sometimes requires interpreting a guideline in a way that "may not be compelled by the guideline text." *Stinson*,

508 U.S. at 47. Yet the commentary for a guideline remains authoritative "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. Courts should thus "seek to harmonize" a guideline's text with its commentary. *United States v. Genao*, 343 F.3d 578, 584 n.8 (2d Cir. 2003) (citation omitted).

Turning to the text of § 2B1.1, we see that courts must apply some other guideline only when "the conduct set forth in the count of conviction establishes an offense specifically covered" by that other guideline. U.S.S.G. § 2B1.1(c)(3)(C). And at least two conditions must be met to trigger the cross reference: (1) the conviction conduct must establish some other offense and (2) that offense must be "specifically covered" by another guideline. But what the language does not state is whether another guideline must capture all, the core, or only some insignificant part of the conviction conduct before the cross reference applies.

The commentary, though, does not leave us guessing on this point. It states that the cross reference applies only when "the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline." U.S.S.G. § 2B1.1 cmt. n.16. In other words, offense conduct matters, and the cross reference is triggered only if another guideline accounts for it.

Although the Cingaris zoom in on the phrase "specifically covered" and contrast it with the commentary's use of "more aptly covered," these phrases are connected to distinct nouns: another *offense* established must be "specifically covered" elsewhere, and the *conduct* "involv[ed]" with that offense must be "more aptly covered." It is not as if the conduct-focused approach somehow overrides the

requirement that the offense be specifically covered. Several courts have held that another guideline specifically covers an offense only when the conduct set forth in the count of conviction establishes the elements of the offense. *See, e.g.*, *United States v. Bah*, 439 F.3d 423, 427 (8th Cir. 2006) (quoting *Genao*, 343 F.3d at 583). That is perfectly consistent with requiring that the core fraudulent conduct *likewise* be covered. Granted, the commentary's conduct-focused approach "may not be compelled by the guideline text," but neither does the guideline foreclose that approach. *Stinson*, 508 U.S. at 47.

In fact, two structural clues indicate that the commentary's conduct-focused reading is not only permissible but also best. *First*, the Commission designed § 2B1.1 to account for harm to victims. For example, the guideline increases the offense level based on the amount of money victims lost, the number of affected victims, and whether their loss "resulted in substantial financial hardship." *See* U.S.S.G. § 2B1.1(b)(1)–(2). Although § 2B1.1 would understandably require sentencing under some other provision that fully captured the relevant harmful conduct, we doubt the guideline would ignore the core offense conduct for cross-reference purposes.

Second, the commentary's construction accords better with the Sentencing Guidelines' efforts to match offense conduct to a proportional sentencing range. Indeed, the first step in calculating a Guidelines range is to determine the offense guideline section "applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." U.S.S.G. § 1B1.2(a); *see id.* § 1B1.1(a)(1). And the Guidelines

presume that cross references "shall be determined on the basis" of "all acts and omissions committed" by a defendant during a crime and even the acts of others for certain "jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a). True, § 2B1.1's cross reference turns on a more limited set of conduct—the "conduct set forth in the count of conviction." U.S.S.G. § 2B1.1(c)(3)(C). Still, against the Guidelines' general instruction to consider all relevant conduct in determining whether cross references apply, we would hesitate to conclude that in the case of this particular guideline only some insignificant part of the conviction conduct must be covered—even if the commentary had not closed that interpretive door.

In light of these structural hints, the Cingaris' reading would produce strange—if not absurd—results. "The oddity or anomaly of certain consequences may be a perfectly valid reason for choosing one textually permissible interpretation over another . . . ." Antonin Scalia & Bryan A. Garner, *Reading Law* 237 (2012). Suppose, for instance, that the Cingaris had falsified federal immigration forms, but had done so with the knowledge and assistance of their customers. In that case, they would have committed the crime of falsifying immigration forms, but would not have defrauded hundreds of victims. For that lesser (albeit still serious) crime, the Cingaris would have been sentenced under § 2L2.1, the same provision they would have us apply today.

On the other hand, imagine that the Cingaris found a way to defraud their victims using mail services, but had not falsified immigration forms. They would probably be sentenced for mail fraud under § 2B1.1, with its harsher range. But they would have us impose a lighter sentence here because they committed a

second criminal act of lying on immigration forms. Ordinarily, criminals are not so lucky as to receive a reduced sentence for piling on more criminal activity.

We are similarly unpersuaded by the Cingaris' argument that the guideline's text and its commentary are inconsistent. They rely on a Second Circuit case, *United States v. Genao*, to show a contradiction. 343 F.3d at 583–84. But that case does not support their position. In *Genao*, the Second Circuit held that the cross reference "is applicable only if the elements of another offense are established by conduct set forth in the count of conviction." 343 F.3d at 584. Although the court noted a "tension" between the text and commentary, that tension has since been resolved. *Id.* at 584 n.8. At the time *Genao* was decided, the cross-reference's text applied only if the conduct established "an offense specifically covered by another guideline"; the commentary also instructed that cross-reference applied only if the conduct established "an offense more aptly covered by another guideline." *Id.* at 583 & 584 n.8 (emphasis omitted) (quoting U.S.S.G. § 2B1.1(c)(3) & n.11 (2002)). In other words, both the text and commentary of the guideline sought to modify the same word—offense—but with different limiting phrases ("specifically covered" versus "more aptly covered"). But as explained above, now the text's "specifically covered" language addresses the word "offense," while the commentary's "more aptly covered" phrase modifies "conduct."

Moreover, that case is the inverse of this one in two respects: there, the government tried to use the cross reference to attain a higher sentence, using offense conduct that was insufficient to establish all the elements of the other

guideline. *Id.* at 583–84. Here, in contrast, the sentence would be lighter if the cross reference applied, and the offense covered by the alternative guideline is not broad enough to capture the conduct.

Nor are we persuaded by the Cingaris' lenity argument. They rightly acknowledge that, if both § 2L2.1 and § 2B1.1 apply, the district court should have applied § 2B1.1. After all, "the guidelines provide a clear solution" when "offense conduct is covered by both guidelines"—"use the provision that results in the greater offense level." *Baldwin*, 774 F.3d at 733 (quoting U.S.S.G. § 1B1.1 cmt. n.5)). Still, the Cingaris argue that the rule of lenity applies because reading the guideline with its commentary creates ambiguity.

Their contention rests on a shaky assumption: "Whether the rule of lenity can be applied to the non-statutory advisory Sentencing Guidelines is an open question upon which this Court has cast doubt." *United States v. Watts*, 896 F.3d 1245, 1255 (11th Cir. 2018). At any rate, the Supreme Court has "repeatedly stated that the rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended"—that is, the court "must conclude that there is a grievous ambiguity or uncertainty." *Holloway v. United States*, 526 U.S. 1, 12 n.14 (1999) (punctuation and citation omitted); *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (quotation marks and citation omitted). Interpreting the cross-reference provision in light of its authoritative commentary does not leave this Court with a mere "guess" and does not create "a grievous ambiguity or uncertainty." Far from it. "Because the Sentencing Commission's intent is clear, we need not address the

rule of lenity" any further. *United States v. Wright*, 607 F.3d 708, 713 (11th Cir. 2010).

* * *

In short, the Cingaris' challenges fail. They cannot show that the district court plainly erred in holding them jointly and severally liable. Nor can they convince us that they were wrongly sentenced: our binding precedent and authoritative Guidelines commentary compel the opposite conclusion. We **AFFIRM** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12262-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ROSA ENEDIA PAZOS CINGARI,
DOMENICO CINGARI,

Defendants - Appellants.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, GRANT, and SILER,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

*Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

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