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File Name: 18a0160p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN EDWARD HENRY BRADLEY,

Defendant-Appellant.

No. 17-5725

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:15-cr-00037-2—Aleta Arthur Trauger, District Judge.

Argued: July 26, 2018

Decided and Filed: August 1, 2018

Before: SUTTON, McKEAGUE, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Sinéad Redmond, UNIVERITY OF MICHIGAN LAW SCHOOL, Ann Arbor, Michigan, for Appellant. Cecil Woods VanDevender, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee. **ON BRIEF:** Sinéad Redmond, Melissa M. Salinas, UNIVERITY OF MICHIGAN LAW SCHOOL, Ann Arbor, Michigan, for Appellant. Cecil Woods VanDevender, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee.

OPINION

SUTTON, Circuit Judge. Having pled guilty to distributing painkillers and laundering money, Benjamin Bradley challenges his sentence: a million-dollar forfeiture order and a 204-

month prison term. He is right and wrong. Precedent forbids the joint-and-several nature of the forfeiture order, but his prison sentence was reasonable.

I.

Between 2012 and 2015, an eighteen-member trafficking ring ran opiate pills from Detroit to central Tennessee. On the Detroit end, Bradley and others collected pills. They would drive patients to the doctor, pay them for their prescription refills, and store the pills in various places, including a house Bradley owned. Bradley recruited Pamela O'Neal to live in the stash house and accept pill deliveries from several individuals. She received deliveries of 300 pills (usually oxycodone) every day between July 2014 and March 2015. Other participants handled similar amounts.

The group shipped pills to a buyer in Nashville, Donald Buchanan, who sold the pills to redistributors. Buchanan deposited the payments into different bank accounts that belonged to Bradley, Bradley's wife, and Felicia Jones. Half of these accounts belonged to Jones, who would wait for a call from Buchanan or Bradley confirming a new payment was in her account, then withdraw between $3,000 and $5,000 and take the money to Bradley or one of the others.

A grand jury indicted the members of the drug ring in the Middle District of Tennessee. Count 1 charged the eighteen individuals with conspiring to possess with intent to distribute oxycodone and oxymorphone. *See* 21 U.S.C. §§ 841(a)(1), 846. Count 2 charged Bradley, Buchanan, and two others with conspiring to launder the operation's proceeds. *See* 18 U.S.C. § 1956(a)(1)(A)(i), (h). Bradley pleaded guilty to both counts.

The court ordered Bradley to forfeit currency that the police seized and real property that he used in the conspiracy and at least a million dollars in cash, reasoning that Bradley obtained the real property with tainted funds or used it to facilitate his crimes, *see* 21 U.S.C. § 853(d), and that the gross proceeds of the drug-distribution and money-laundering schemes reached a million dollars, *see id.* § 853(a). The forfeiture order applies the million-dollar judgment jointly and severally to Bradley and his co-defendants. The court sentenced Bradley to seventeen years.

II.

Forfeiture. Bradley objects to the forfeiture order on several grounds, but one leaps off the page: its creation of joint and several liability. Precedent stands in the way.

The criminal forfeiture statute says that persons convicted of certain drug crimes must forfeit to the United States (1) "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [the offense]," and (2) "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, [the offense]." *Id.* The Supreme Court recently clarified that the statute bars joint and several liability for forfeiture judgments. *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017). The two requirements of the statute, the Court observed, "limit forfeiture under § 853 to tainted property" and "define[] forfeitable property solely in terms of personal possession or use." *Id.* But joint and several liability puts defendants on the hook regardless of their share of the fault or the proceeds, meaning it would "require forfeiture of untainted property" as well as amounts the defendant did not "obtain[]." *Id.* at 1632–33. *Honeycutt* puts an end to such collective liability.

That ruling invalidates this order. The court ordered Bradley to pay one million dollars not because the government showed that he pocketed that much money from his misdeeds, but because the district court found that "the foreseeable amount of the proceeds of the drug-distribution conspiracy" and "the foreseeable value of property involved in the money laundering conspiracy" totaled that much. R. 1005 at 1. That's just what *Honeycutt* bars.

It's not that clear, the government responds, because Bradley did not raise the issue below. That means Bradley must show an error that is plain, that affects his substantial rights, and that seriously affects the fairness or integrity of the proceedings. *Johnson v. United States*, 520 U.S. 461, 466–67 (1997).

Accepting that the forfeiture order satisfies the first two prongs, the government maintains that it falls short on the last two. As the government reads the record, the evidence shows that Bradley personally obtained at least one million dollars anyway, precluding any violation of substantial rights or serious unfairness. It first points to the $850,000 Buchanan

deposited into four bank accounts, two owned by Bradley or his wife and two owned by Jones, who withdrew Buchanan's deposits for Bradley. It then adds other amounts. Once the trafficking ring stopped using banks and switched to cash exchanges, it points out, Jones took plenty of cash back to Bradley. There were approximately fifteen such exchanges between Jones and Buchanan, and at least some of them grossed $20,000 or more. All told, says the government, "it is easy to see that the total amount that Bradley directly received exceeded [a million dollars]." App'ee Br. 30.

That is wishful math, it seems to us, too wishful to uphold this million-dollar order. The district court did not make any factual findings about how much money Bradley obtained. It found only that the proceeds of the conspiracy amounted to a million dollars. That Jones delivered Buchanan's payments to Bradley tells us nothing about what happened to the money after that. The evidence says nothing about whether Bradley kept all of this money—an improbable development in an eighteen-member conspiracy.

The reality is that the district court looked in one direction (the proceeds attributable to all members of the conspiracy) and *Honeycutt* required it to look in another (the proceeds attributable just to Bradley). Back-of-the-envelope calculations cannot justify this million-dollar order without affecting Bradley's substantial rights and the fairness of the forfeiture proceeding.

Nor can the *Honeycutt* problem be resolved solely by addition. It is a net, not a gross, monetary forfeiture judgment. The order says that the value of Bradley's real property and the seized currency, as well as the assets of any co-defendant, must be subtracted from the judgment. That leaves just as many candidates for lessening Bradley's liability as for increasing it. Better on this record, we think, to vacate the entire forfeiture order and remand to the district court so that it can conduct fresh factfinding and figure out "an amount proportionate with the property [Bradley] actually acquired through the conspiracy." *United States v. Elliott*, 876 F.3d 855, 868 (6th Cir. 2017).

That conclusion disposes of the harm incurred by the forfeiture order and requires new factfinding before the court may impose an individual forfeiture order on Bradley. In that light,

it's worth adding a word or two about Bradley's other challenges—as one of them might preclude new factfinding (says Bradley) and the other might affect how it is done.

As to the first: Bradley argues that, when the district court permitted the government to introduce new evidence after the sentencing hearing in support of its request for a criminal forfeiture, it violated Rule 32.2(b) of the Federal Rules of Criminal Procedure and due process. New factfinding should cure any complaint about adherence to the Criminal Rules. But to clear away some of the brush for the next round of proceedings and to eliminate any doubt about a second round of factfinding, we take up Bradley's protest that the court denied him "fair and adequate proceedings for contesting the deprivation of his property rights." Appellant Br. 26.

That isn't so. The initial proceedings, to be sure, presented Rule 32.2 irregularities. The government moved for forfeiture late. The court held off on entering a forfeiture order until after sentencing. And the court allowed the government to reply to Bradley with new evidence. But not all coloring outside the lines produces a constitutional violation. The most prejudicial irregularity was the government's introduction of new evidence. But the court softened the impact of this development by giving Bradley the chance to file a sur-reply to the government's new evidence—with proof and argument of his own. That does not violate due process, as Bradley had serial opportunities to be heard and retained the last word. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

As to the second argument: Bradley argues that the Sixth Amendment prohibits a judge, as opposed to a jury, from finding facts that trigger a mandatory criminal forfeiture. That is an unanswered question in this circuit. It prompts these questions: Does the Supreme Court's extension of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), to fines in *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012), apply to criminal forfeitures? Is the Court's statement in *Libretti v. United States*, 516 U.S. 29, 48–49 (1995), that the Sixth Amendment does not provide a right to a jury trial over criminal forfeiture necessary to the disposition of that case? Do any of our precedents bear on the question? What do historical practices tell us about the original understanding of the judge's and jury's factfinding roles in criminal forfeiture proceedings? The parties may wish to address these questions on remand.

Procedural reasonableness. Bradley claims that the district court failed to explain the amount of drugs for which it held him accountable, making his sentence procedurally unreasonable. In sentencing an individual, a district court must properly calculate the advisory guidelines range, consider the § 3553(a) factors, rely on facts that aren't clearly erroneous, and explain the selected sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007). In the context of drug-quantity determinations, the court must rule on disputed calculations, Fed. R. Crim. P. 32(i)(3)(B), and explain its factual foundation for doing so, *United States v. Poulsen*, 655 F.3d 492, 512–13 (6th Cir. 2011). In this instance, we assess Bradley's complaint for plain error because he did not object to the adequacy of the court's explanation, even after the court gave him a chance to do so. *See United States v. Vonner*, 516 F.3d 383, 385 (6th Cir. 2008) (en banc).

The district court relied on the probation officer's calculation in finding the relevant drug amounts. The officer used the pill counts from Buchanan's and O'Neal's testimony, and reduced those counts in several places to err on the side of a conservative estimate. The pre-sentence report attributed to Bradley 110 oxycodone pills and 2 oxymorphone pills, drawn from Buchanan's statement that, for years, he bought 50 to 60 pills at a time from Bradley and that the latter was his main source of supply for oxycodone. The report attributed another 186,300 oxycodone pills to Bradley, drawn from O'Neal's statement that she mainly received oxycodone pills, about 300 every day from July 2014 to March 12, 2015. Even so, the probation officer started counting on the last day of July and assumed all of the pills were oxycodone, which carries a lower penalty than oxymorphone. After considering Bradley's objections to this calculation, the court found that the evidence supported the report, noting it was "about the best estimate we can get" and "a very conservative estimate" at that. R. 919 at 235.

Even if we assume error—that this explanation did not satisfy our requirements—no plain error occurred. The record amply supports this conservative estimate. The two statements represent zoomed-in snapshots of an expansive landscape. Keep in mind that O'Neal's 300-pills-a-day estimate is substantial and does not stand in isolation. She was not the only stash-house operator he directed. Jones's intercepted phone call with Bradley revealed that she had received more than 300 pills on that one day. Out of caution, the probation officer also assumed that Bradley barely traded in oxymorphone, the more serious drug at issue, when the evidence

indicates that the group's oxymorphone to oxycodone ratio by the end of the relevant period was close to 2 to 1. Even if we excised the 110 oxycodone and 2 oxymorphone pills that Bradley purportedly sold to Buchanan over their years-long relationship, Jones regularly sold to Buchanan *hundreds* of each kind of opiate on behalf of Bradley. On this record, no violation of Bradley's substantial rights occurred.

Bradley separately claims that the district court erred in assessing drug weights. At one point, the U.S. Attorney's Office for the Middle District of Tennessee measured the weight of oxymorphone and oxycodone by the weight of the active ingredients in the pills. That was a mistake. The guidelines measure oxymorphone by total weight. U.S.S.G. § 2D1.1(c) n.*(A)–(B). The U.S. Attorney's Office realized the error at some point before Bradley pleaded guilty and notified Bradley and his co-defendants about the new and proper weighing of the drugs.

Bradley contends that the district court should have considered the sentence disparities between the defendants whose sentences preceded the U.S. Attorney's Office's change in drug-weight-calculation method and those who followed it. No doubt, district courts should consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). But even if we read § 3553(a)(6) as contemplating intra-district sentence disparities, *but see, e.g.*, *United States v. Conatser*, 514 F.3d 508, 521 (6th Cir. 2008) (the factor concerns *national* sentence disparities), any such differences would not be "unwarranted." Now that the government has realized its mistake, the guidelines do not set it at liberty to weigh oxymorphone in the old manner. Yes, that means a proper weighing subjects Bradley to a higher base offense level than oxymorphone dealers from a few years ago. But this is not the kind of disparity § 3553(a)(6) is after. There is nothing "unwarranted" about correct sentencing calculations. Maintaining accuracy in guidelines calculations is one way to accomplish a key goal of the guidelines system: parity in the federal system's treatment of similar defendants. *See* U.S.S.G. ch. 1, pt. A, subpt. 1. Accepting Bradley's argument would perpetuate disparity with other districts.

Substantive reasonableness. Bradley claims that his seventeen-year sentence is too long—substantively unreasonable in sentencing lingo. That is a tall order, particularly when a defendant challenges a sentence that does not exceed the guidelines range, *Vonner*, 516 F.3d at

389–90, and a still taller order when a defendant challenges a sentence that is less than half of the recommended range, as here, *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008).

In claiming that his sentence is too high, he argues by analogy—namely an analogy to co-defendant Buchanan's sentence of twelve years. The five-year differential between the two sentences, Bradley maintains, must turn on the trial court's differential (and unfair) weighing of the same discretionary factor—the purported unfairness of the intra-district sentence disparities wrought by the government's course correction on drug-weight calculation.

But this comparison overstates Buchanan's role in the conspiracy and understates Bradley's. Bradley played an instrumental role in collecting the pills, at least partly through fraudulent use of prescriptions. He owned a stash house. He recruited several people, some in desperate circumstances, to run the house and get the drugs to Buchanan. Buchanan was isolated from these more abusive and blameworthy links in the supply chain—and simply bought from his supplier and sold to redistributors, who in turn sold to end users. The five-year difference in their sentences turns on differences in their conduct.

For these reasons, we vacate the forfeiture order, affirm Bradley's prison sentence, and remand for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5725

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENJAMIN EDWARD HENRY BRADLEY,

Defendant - Appellant.

FILED
Aug 01, 2018
DEBORAH S. HUNT, Clerk

Before: SUTTON, McKEAGUE, and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the forfeiture order is VACATED, Benjamin Bradley's prison sentence is AFFIRMED, and the case is REMANDED for proceedings consistent with this opinion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0251p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN EDWARD HENRY BRADLEY,
Defendant-Appellant.

No. 19-5985

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:15-cr-00037-2—Aleta Arthur Trauger, District Judge.

Decided and Filed: August 10, 2020

Before: SUTTON, McKEAGUE, and KETHLEDGE, Circuit Judges.

COUNSEL

ON BRIEF: Melissa M. Salinas, UNIVERSITY OF MICHIGAN LAW SCHOOL, Ann Arbor, Michigan, for Appellant. Cecil W. VanDevender, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee.

OPINION

SUTTON, Circuit Judge. Between 2009 and 2015, Benjamin Bradley ran a drug trafficking conspiracy that distributed a lot of opioid pills in Tennessee. After he pleaded guilty to drug trafficking and money laundering charges, the district court sentenced him to 17 years in prison and ordered him to forfeit a million dollars, two cash payments, and five properties. We vacated the forfeiture order in light of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). On

remand, the court found additional facts and issued a similar forfeiture order requiring Bradley to give up a million dollars, the two cash payments, and four (instead of five) properties. Bradley challenges that order on statutory, factual, and constitutional grounds. We affirm.

I.

Between 2009 and 2015, Bradley split his time between working as a medical technician in Detroit and running an opioid trafficking conspiracy. Bradley headed the conspiracy's drug collection efforts in Detroit. Some pills came from people he paid to drive patients to doctor's appointments and after that to pharmacies to collect their prescriptions. Others dropped off hundreds of pills a day at arranged houses on their own.

Donald Buchanan headed up the conspiracy's distribution efforts in Tennessee. To get the pills to Tennessee, Bradley directed coconspirators to pack them into empty candy boxes and glue the boxes closed. At first Bradley mailed the boxes to Tennessee, but later he asked couriers to drive them down.

Drugs flowed south, and cash flowed north. Buchanan paid Bradley for the goods by making deposits into bank accounts Bradley owned or controlled. From 2012 until halfway through 2014, the deposits totaled close to $800,000. Bank deposits stopped in June 2014, when Bradley told Buchanan to pay his couriers in cash.

Bradley pleaded guilty to one count of conspiracy to distribute a controlled substance and one count of conspiracy to launder money. The court sentenced him to 17 years and ordered him to forfeit the proceeds of the crime. On appeal, we affirmed his prison sentence but vacated the forfeiture order because the Supreme Court had ruled in the interim that forfeiture must be based on the defendant's own receipts, not the conspiracy's. *Honeycutt v. United States*, 137 S. Ct. 1626, 1630 (2017). The court held another evidentiary hearing and entered a judgment requiring Bradley to forfeit a million dollars, the cash bundles, and four properties. Bradley appealed.

II.

When a defendant is convicted of certain crimes, a federal statute requires district courts to order forfeiture of "any property constituting, or derived from, any proceeds the [defendant]

obtained as the result of" the crimes, along with "any of the [defendant's] property used, or intended to be used . . . to commit, or to facilitate the commission of," the crime. 21 U.S.C. § 853(a)(1)–(2). If the defendant no longer has the property, the court "shall order the forfeiture of any other property of the defendant" as a substitute. *Id.* § 853(p)(1)–(2).

Bradley first argues that § 853 does not authorize money judgments like this one. But we have already rejected that view. *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013). So have several of our sister circuits. *See, e.g.*, *United States v. Hall*, 434 F.3d 42, 58–60 (1st Cir. 2006); *United States v. Awad*, 598 F.3d 76, 78–79 (2d Cir. 2010); *United States v. Vampire Nation*, 451 F.3d 189, 201–03 (3d Cir. 2006).

Bradley responds that *Honeycutt*, decided in 2017, displaces our 2013 *Hampton* decision and requires the opposite conclusion. That's so, he says, because *Honeycutt* said § 853 does not expand forfeiture beyond its traditional limits, and forfeiture did not traditionally include money judgments. But *Honeycutt* acknowledged that § 853 *did* expand traditional forfeiture in some ways. Forfeiture traditionally proceeded directly against the property rather than the property owner, but § 853 "adopt[ed] an *in personam* aspect to criminal forfeiture." 137 S. Ct. at 1635. Supporting the point, *Honeycutt* itself addressed the permissible scope of a *money judgment* under § 853. *Id.* at 1631. It's hard to maintain that the Court always prohibited what it refined, absentmindedly cutting off the branch it sat on. *See United States v. Elbeblawy*, 899 F.3d 925, 941 (11th Cir. 2018).

Bradley separately argues that the court did not respect the statute when it calculated the money judgments. Section 853 requires forfeiture of a crime's "proceeds," and that term, he insists, does not include money received by the defendant from the crime but paid to coconspirators. But § 853(a) holds defendants responsible for the "proceeds" they "obtained" through the conspiracy, no matter their eventual destination. Both words, "proceeds" and "obtained," confirm the point. As we pointed out in an unpublished and well-reasoned opinion, "proceeds" in § 853(a) means gross receipts. *United States v. Logan*, 542 F. App'x 484, 498 (6th Cir. 2013). "Proceeds" in isolation, sure enough, might mean gross receipts or profits. *Id.* But § 853(a) refers to "profits or other proceeds," indicating "proceeds" means more than just "profits." It means the gross receipts from the criminal activity. *Id.* Other circuits agree.

United States v. Bucci, 582 F.3d 108, 123 (1st Cir. 2009); *United States v. Heilman*, 377 F. App'x 157, 211 (3d Cir. 2010); *United States v. Olguin*, 643 F.3d 384, 400 (5th Cir. 2011). No circuit to our knowledge disagrees. So long as "proceeds" means gross receipts, it is beside the point whether the money stayed in Bradley's pocket (e.g., kept as profits) or went toward the costs of running the conspiracy (e.g., used to pay coconspirators).

The second word, "obtained," points in the same direction. Section 853, *Honeycutt* explained, ties forfeiture liability to the proceeds obtained by the defendant—the money or other assets he "c[a]me into possession of" or "g[o]t or acquire[d]." *Honeycutt*, 137 S. Ct. at 1630, 1632–33 (quotation omitted); *United States v. Sexton*, 894 F.3d 787, 798 (6th Cir. 2018). Section 853 asks only whether the defendant obtained the money, not whether he chose to reinvest it in the conspiracy's overhead costs, saved it for a rainy day, or spent it on "wine, women, and song." *United States v. Newman*, 659 F.3d 1235, 1243 (9th Cir. 2011) (quotation omitted).

For today's purposes, that is all we need to say. We do not decide what would happen if forfeiture orders were to exceed the conspiracy's total proceeds, say by ordering both a lower-level conspirator and a mastermind to forfeit the same money. The government did no such thing here.

Bradley separately claims that the district court misjudged the facts. Property is forfeitable under § 853(a) when the defendant used it to commit the crime or it represents the crime's proceeds. Courts presume that property is forfeitable if the government shows that the defendant acquired the property during the offense and there was no other likely source for the property. *See* 21 U.S.C. § 853(d). The district court's forfeiture order covered three categories: a money judgment representing the amount Bradley received from the conspiracy, two bundles of cash found in a search during the investigation, and four properties. Clear error is the test. *United States v. Evers*, 669 F.3d 645, 660 (6th Cir. 2012).

As for the money judgment, the court found that Bradley personally received a million dollars from his drug trafficking scheme. Ample evidence supports the finding. During most of the conspiracy, coconspirator Donald Buchanan paid for the drugs he received by depositing

money into bank accounts Bradley controlled. He deposited $268,006 in Bradley's and his wife's bank accounts, and he deposited another $530,618 in a bank account held by coconspirator Felicia Jones. Jones testified that Buchanan deposited the money in her account so that she could give it to Bradley. Based on bank records alone, that means the forfeiture tally reached close to $800,000.

Bradley later turned to hand deliveries of cash. Jones picked up cash from Buchanan to deliver it to Bradley about fourteen times, and the record shows that Jones was not the only person carrying cash from Buchanan to Bradley. Buchanan was arrested on his way to one of his meetings with Jones carrying about $24,000 in cash. The court estimated that Bradley received just $12,000 from each of 17 meetings for a total of $204,000. On this record, no clear error haunts the court's finding that Bradley obtained at least a million dollars during the conspiracy.

As to the bundles of cash, DEA officers seized an additional $46,000 or so in cash from Bradley's parents' house and $78,000 or so in cash from Bradley's house. Recalling that Bradley made between $44,000 and $68,000 a year in his regular job, the court found that Bradley likely had not withdrawn as cash his entire legitimate income for approximately two years, then stored it in his or his parents' house near an assault rifle, a sawed-off shotgun with an obliterated serial number, and several liters of narcotic-laden cough syrup. No clear error infects the cash finding either.

As to the properties—his home and three other properties—a similar conclusion applies. The court had no trouble finding that Bradley's home was forfeitable. Bradley purchased it off the books, paying about $100,000 in scrap gold and gold coins. He made those payments over 14 months, all during the conspiracy. During that time, his annual legitimate income was around $68,000. It's unlikely that Bradley purchased the property with legitimately obtained scrap gold worth more than his regular salary, all while supporting a wife and two children.

The other three properties are a closer call. But the court did not commit clear error in finding they should be forfeited too. Bradley purchased all three during the conspiracy, between 2011 and 2012. They didn't cost Bradley much in real estate terms, just $5,700 total. Bradley presumably could have afforded that purchase price from his legitimate income. But he owned a

total of 21 pieces of real estate during the conspiracy, and the court found that added up to a bill Bradley likely could not have footed from his legitimate income. *See United States v. Real Prop. 10338 Marcy Rd. Nw.*, 938 F.3d 802, 811–12 (6th Cir. 2019). That was not clear error.

Bradley counters that he had enough legitimate cashflow to cover the various categories of forfeiture because he received a total of $99,700 from selling some of his investment properties in 2013 and because he earned $90,000 in 2014 from a party-promoting business. But the court did not overlook either income source. It found that neither number changed the picture, because they came too late to make a difference for the three properties purchased in 2011 and 2012. Bradley's tax return, moreover, showed that he made a profit of just $23,529 on the sale of the investment properties. The court used that profit rather than the gross sale price to measure Bradley's ability to save up bundles of cash or purchase his own house. The party-promoting business, notably, operated at a loss, as he spent $92,680 to make $90,465. The court permissibly observed that the business did not increase Bradley's resources.

Bradley adds that the court impermissibly discounted evidence that some of the profits Jones received came from her own dealings with Buchanan outside the conspiracy. But the court accounted for that possibility by ruling out one of Jones's bank accounts that received $56,000 in deposits from Buchanan.

Bradley next lodges a Sixth Amendment challenge, claiming the court had no business finding facts in the first place. "In all criminal prosecutions," the Amendment says, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. But no jury right exists in criminal forfeiture proceedings. *Libretti v. United States*, 516 U.S. 29, 49 (1995); *United States v. McAuliffe*, 490 F.3d 526, 540 (6th Cir. 2007).

The Sixth Amendment requires juries to find the facts, other than the fact of a prior conviction, that lead to an increase in the statutory maximum or minimum sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). That rule does not constrain judicial factfinding about aspects of the sentence that lack a determinate statutory maximum or minimum. *United States v. Hall*, 411 F.3d 651, 655 (6th Cir. 2005). Criminal forfeiture is one such indeterminate piece of a sentence. *Id.*; *see also United States v. Fruchter*, 411 F.3d 377, 382–83 (2d Cir. 2005); *United*

States v. Alamoudi, 452 F.3d 310, 314–15 (4th Cir. 2006); *United States v. Vera*, 278 F.3d 672, 672–73 (7th Cir. 2002). Unlike a statutory minimum or maximum based on a certain fact—say a fine for every day of a violation—criminal forfeiture requires a defendant to forfeit the property he used in or received from his crime. *Hall*, 411 F.3d at 654–55.

Bradley pushes back on the ground that *Libretti*'s rejection of a jury right was dicta. He points out that the Court took the case to decide "the requisites for waiver of the right to a jury determination of forfeitability under [Criminal] Rule 31(e)." *Libretti*, 516 U.S. at 37. But that does not make its Sixth Amendment conclusion dicta. Before the decision, some circuits held the jury right sprang from the Criminal Rules; others held that it was a constitutional right guaranteed by the Sixth Amendment. *Id.* at 37 n.3. Libretti argued that the right "has both a constitutional and a statutory foundation," such that waiving it in a plea agreement required "specific advice from the district court as to the nature and scope of" the right. *Id.* at 48. The Court disagreed: "Given that the right to a jury determination of forfeitability is merely statutory in origin, we do not accept Libretti's suggestion that the plea agreement must make specific reference to Rule 31(e)." *Id.* at 49.

For these reasons, we have described the statement as a holding. *Hall*, 411 F.3d at 654. So has one circuit after another. *United States v. Carpenter*, 941 F.3d 1, 11–12 (1st Cir. 2019); *United States v. Fruchter*, 411 F.3d 377, 380–82 (2d Cir. 2005); *United States v. Leahy*, 438 F.3d 328, 332 (3d Cir. 2006); *United States v. Day*, 700 F.3d 713, 733 (4th Cir. 2012); *United States v. Simpson*, 741 F.3d 539, 559–60 (5th Cir. 2014); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005); *United States v. Sigillito*, 759 F.3d 913, 934–35 (8th Cir. 2014); *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012); *Elbeblawy*, 899 F.3d, at 941.

Bradley persists that *Libretti* cannot coexist with *Apprendi*. True, *Libretti* preceded *Apprendi*, and its reasoning did not anticipate *Apprendi*'s. But *Apprendi* did not purport to overrule *Libretti*. In situations like this, where an advocate insists a new Supreme Court decision undermines a previous decision, the earlier decision stands until the Court says otherwise. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). We have already said *Libretti* survived *Apprendi*. *Hall*, 411 F.3d at 654.

Bradley takes a similar tack with our own precedents. He points out that we have not addressed the constitutionality of judge-found facts in criminal forfeiture cases since *Southern Union Co. v. United States*, 567 U.S. 343 (2012). But *Southern Union* dealt with facts that increased the statutory maximum fine a court could impose. *Id.* at 349–50. We have already said it does not undermine our determination that the jury need not find the facts underlying restitution in criminal sentences, since the restitution statute does not specify a maximum. *United States v. Churn*, 800 F.3d 768, 782–83 (6th Cir. 2015). As *Southern Union* reiterated, no *Apprendi* violation exists where no statutory maximum exists. 567 U.S. at 353. *Southern Union* changes nothing about our holdings about the indeterminate criminal forfeiture regime. Here, too, the circuits uniformly agree about *Southern Union*'s impact on criminal forfeiture. *See United States v. Stevenson*, 834 F.3d 80, 86 (2d Cir. 2016); *United States v. Day*, 700 F.3d 713, 733 (4th Cir. 2012); *Simpson*, 741 F.3d at 559–60; *Phillips*, 704 F.3d at 769–70.

Bradley grounds his last argument in the Constitution too. He says the court's forfeiture order violates the Eighth Amendment, which says that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Bradley says the forfeiture judgment is excessive because it will ruin him. Having failed to make the argument below, he must establish plain error. *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc).

No such error occurred. The Supreme Court tells us to evaluate such challenges by asking whether the criminal forfeiture order was "grossly disproportionate to the gravity of [the] defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). We see no mismatch between the offense and the forfeiture order. Bradley committed his crimes on a large scale. The conspiracy lasted for years. It distributed jaw-dropping quantities of opioids. And his criminal profits allowed him to live lavishly despite his modest salary as a medical technician. He rented private jets. He owned a $33,000 Rolex watch and collected 60-plus pairs of expensive shoes. He threw himself a $20,000 birthday party. He spent $11,000 on a single night's entertainment in Las Vegas. The crime paid Bradley very well while it lasted.

Bradley's crimes were not just profitable but deathly serious. His drug conspiracy fanned the flames of an opioid epidemic that has ravaged communities across America. The governing statutes recognize that severity by authorizing fines of more than a million dollars and imprisonment for up to 40 years. 18 U.S.C. § 1956(a)(1); 21 U.S.C. § 841(b)(1)(C). We see no error, let alone plain error, in an order requiring Bradley to forfeit the proceeds of his years at the top of an opioid trafficking conspiracy.

Bradley offers no authority, much less clear authority, for his argument that the statute prohibits "financially ruinous" forfeiture orders. That does not suffice to establish plain error.

However allegedly ruinous this judgment may be as a financial matter, it's worth remembering that the properties and the cash bundles will be credited toward the money judgment. The record suggests they will add up to about three-fourths of it. That leaves about a $250,000 debt. No small sum for sure, but it's not clear that counts as financially ruinous even if it were the standard.

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5985

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENJAMIN EDWARD HENRY BRADLEY,

Defendant - Appellant.

Before: SUTTON, McKEAGUE, and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 19-5985

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 10, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN EDWARD HENRY BRADLEY,

Defendant-Appellant.

O R D E R

BEFORE: SUTTON, McKEAGUE, and KETHLEDGE, 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 case. 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

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

UNITED STATES OF AMERICA, Plaintiff, vs. BENJAMIN EDWARD HENRY BRADLEY, Defendant.	)	Case No. 3:15-cr-00037-2

- -

BEFORE THE HONORABLE TODD J. CAMPBELL, DISTRICT JUDGE

TRANSCRIPT

OF

PROCEEDINGS

June 8, 2016

Plea Hearing

- -

APPEARANCES:

For the Government: Mr. Brent Hannafan
Asst. U.S. Attorney
110 Ninth Avenue S., Suite A961
Nashville, TN 37203

For the Defendant: Mr. James E. Mackler
Attorney at Law
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PREPARED BY:

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Joelton, TN 37080
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I N D E X

The above-styled cause came on to be heard on June 8, 2016, before the Honorable Todd J. Campbell, District Judge, when the following proceedings were had, to-wit:

THE COURT: Good morning. We're here in the case of *United States versus Bradley*. The purpose of this hearing is to consider a petition to enter a plea of guilty.

I have a couple of questions about the petition, at least the latest draft that was submitted to my office. And you can correct me if I am wrong if it has been changed, but as to paragraph 12 which defendant is offering to plead guilty to Counts One and Two, Count Two is described as laundering of monetary instruments. And as I understand the indictment, it is conspiracy to launder monetary instruments, so it would appear that would need to be changed.

I have noticed the change in the supervised release period for Count One and Count Two that seems appropriate under Section 841 of Title 21 it would be not less than three years. And under Count Two, it would be not more than three years since it is a Class C felony, so that seems right to me. But I want to get feedback from the lawyers about that whether changes need to be made.

Also, just to be clear, my understanding of the law is that if Mr. Bradley or anyone else pleads guilty to the indictment, they are waiving their right to challenge the denial of the motion to suppress before the Court of Appeals.

So I want to make sure that there is no misunderstanding. There often is a misunderstanding about that. I want to make sure that there is not in this case.

Mr. Hannafan.

MR. HANNAFAN: Yes, Your Honor. I have noted some changes Your Honor was talking about on the plea petition. I think it also should note paragraph 12, it is actually 21 U.S.C. Section 841(a)(1) and 846.

THE COURT: That's correct, because it is a conspiracy count. The object of the conspiracy is 841.

MR. HANNAFAN: Yes.

THE COURT: But it is a conspiracy count. I did not see that citation. Thank you.

MR. HANNAFAN: Then the same thing with respect to the next line, guilty as to Count Two, conspiracy to launder monetary instruments should be 1956(h), which is the conspiracy charge.

THE COURT: As I understand it, both are conspiracy counts. The object of the conspiracy is the citation that at least in my version.

MR. HANNAFAN: Yes.

THE COURT: Are you satisfied with the supervised release period?

MR. HANNAFAN: Yes. I emailed counsel about that. I think there is with respect to on page 2, I just noticed I

had emailed counsel about this I guess just this morning that the penalty as to Count Two, the fine is up to $500,000, twice the amount of the value of the property involved in the transaction. That is typo. It says after $500,000 or twice, it says, or twice twice.

THE COURT: Now that I am looking at page 2 where it says as to Count Two, it describes the wrong charge. It is the object rather than the conspiracy.

MR. HANNAFAN: I have noted that on here, and I have initialed the proposed changes, Your Honor.

THE COURT: After you make those typographical corrections, if you'd let Mr. Mackler look at it and see if he is satisfied.

MR. HANNAFAN: Yes, Your Honor. And then the Court's other question was whether by entering an open plea the defendant is waiving his right to appeal denial of the motion to suppress.

THE COURT: Correct.

MR. HANNAFAN: Yes. I agree.

Is there anything else, Your Honor?

THE COURT: No. I am just I have had a constant stream of 2255s over that issue petitions on, and I want to avoid that inevitability.

MR. HANNAFAN: My understanding is that is the law.

THE COURT: That's the law.
MR. HANNAFAN: If you plead open.
THE COURT: That doesn't mean I don't have a docket full of it, but that's the law.
MR. HANNAFAN: Doesn't stop the 2255s, as I am well aware in dealing with those as well, Your Honor. But, no, I agree that is the law; by pleading open, the defendant waives the right to appeal the denial of the motion to suppress.
Your Honor.
THE COURT: Yes, sir.
MR. HANNAFAN: One other thing before I forget. There also there are a number of forfeiture allegations against the defendant both with respect to Count One and Count Two, and there were some bills of particulars that were filed subsequent to the indictment. And I just wanted to, I guess, remind the Court, make sure the Court is aware that we'll have to proceed on those between now and sentencing.
THE COURT: Well, I was going to mention that the plea of guilty would be to Counts One and two, but the indictment also mentions a Forfeiture Allegation One and Forfeiture Allegation Two --
MR. HANNAFAN: Yes.
THE COURT: -- that Mr. Bradley is named in. It is something that would result from a plea of guilty of

Counts One and Counts Two would be the forfeiture. The allegation is not something, as I understand it, that he would need to plead guilty to, but he needs to be aware that of course that that's the natural result.

MR. HANNAFAN: Yes, Your Honor. I was just bringing to the Court and counsel's attention as a reminder.

THE COURT: Mr. Mackler.

MR. MACKLER: Judge, in regard to those forfeiture allegations, that is not -- that wasn't my understanding necessarily. Obviously, Mr. Bradley is acknowledging agreement he committed the crimes here but not that the property seized is necessarily directed in the way required for forfeiture. In fact, he would contest some of the direct forfeiture allegations.

THE COURT: Well, you certainly can contest them, but the result, as I understand, of pleading to Counts One and Two would be that there is a possibility of forfeiture of named and unnamed property in these forfeiture allegations.

MR. MACKLER: Judge, I guess I understand there is that possibility. Maybe I don't fully understand the degree of that possibility. If it is a foregone conclusion, it is a necessary consequence of the plea, then I am going to need to take some more time to discuss this with my client. That wasn't my understanding and certainly not his.

THE COURT: Well, let's let Mr. Hannafan respond

to that.

MR. HANNAFAN: Your Honor, under 32.2 it talks about how -- well, the short answer is this. Is that by pleading guilty, there are now the United States can now proceed on its forfeiture allegations as alleged in the indictment. And there is to be, you know, the question of what exactly is forfeited and how much money or property is a question to be determined later, not to be determined today. And by pleading guilty the defendant is not admitting as to any specific amount or specific property. But the property and amounts as alleged in the indictment is now subject to forfeiture.

THE COURT: That's my understanding is that Mr. Mackler would still be able to contest the property that would be subject to forfeiture, but the forfeiture allegation would be operative at that point of pleading guilty.

MR. HANNAFAN: Yes.

THE COURT: Okay.

Mr. Mackler, are we -- do we have a misunderstanding?

MR. MACKLER: I don't believe we do, although I may need to make sure my client fully understands that. My understanding is exactly that he is pleading guilty. He understands that certainly makes the forfeiture issue ripe, but he intends to contest the amount and items to be

forfeited.

THE COURT: Bear with me just a second. I will give you a break in a minute, but as to Forfeiture Allegation One, it alleges forfeiture of any property derived from the proceeds of the drug activity, specifically Section 846, Title 21. And that could be including a money judgment in the amount to be determined. And it goes on in summary says if that property can't be located, the United States could attempt to prove substitute property to be forfeited.

On count Forfeiture Allegation Two, it alleges in substance that any property traceable to the conspiracy to commit money laundering could be forfeited. If that property can't be located, the government could seek forfeiture of substitute property.

So the specific property to be forfeited is not, for instance, a house, car; it is proceeds or substitute assets of proceeds.

Is that a fair summary, Mr. Hannafan?

MR. HANNAFAN: Yes. Although, Your Honor, the United States did file in subsequent pleadings just giving notice of specific pieces of property and specific amounts of money and some other personal items such as watches that the United States would be seeking to forfeit. But it is our burden to prove that either these are proceeds of or were involved in the crimes to which the defendant has pleaded

guilty.

THE COURT: Are you making reference to the bill of particulars?

MR. HANNAFAN: Yes. Docket Number 279. And there is a second one at 432.

THE COURT: And describe the property again that's in the bill of particulars.

MR. HANNAFAN: In the first one, it lists a number of amounts of currency that have been seized, seven amounts of currency.

It also lists personal items, five different items, various watches.

THE COURT: And those are items that the government intends to seek forfeiture of?

MR. HANNAFAN: Yes. And then in the second bill of particulars, it was a notice with respect to real property, and it alleged five different pieces of real property.

THE COURT: And the government's position is that those are proceeds of either the conspiracy to violate the drug statute or conspiracy to money laundering essentially?

MR. HANNAFAN: Yes.

THE COURT: Okay.

Mr. Mackler.

MR. MACKLER: I think, Judge, we are all on the

same page in that sense Mr. Bradley denies or will deny that those particular items are proceeds of the drug conspiracy or the money laundering conspiracy. Not to get into too much detail now, but he was gainfully employed. He had other sources of income. So when the time comes, the burden, as Mr. Hannafan correctly stated, will be on them to demonstrate that connection. And that will be presumably a contested hearing. I just want to make sure my client understands and there is no misunderstanding here that he is certainly not admitting to that connection by entering his plea of guilty here today.

THE COURT: It is my understanding that he can contest that those are items of property that are proceeds of illegal conduct. And the government's position is they are, and yours apparently is they are not. That's not what we're here about today, but I want to make sure that Mr. Bradley understands if he pleads guilty to Counts One and Two, whether certain property would be forfeited will be determined at another time but that the forfeiture allegation, in your words, becomes ripe as a result of the plea of guilty. Whether there is any of his property that would be forfeited is yet to be determined.

MR. MACKLER: That's my understanding. I believe that's Mr. Bradley's understanding as well.

THE COURT: Would you like a break to talk with

him?

MR. MACKLER: Let me double check.

No, he understands.

THE COURT: Okay.

All right then, if Mr. Bradley would if he wants to proceed would sign the petition and initial any changes and have the lawyers sign, and we'll talk about it.

All right. If Mr. Bradley and Mr. Mackler would come up to the podium, we'll talk about this.

Mr. Bradley, before the Court can accept a plea of guilty, it must be determined that it is being done knowingly, intelligently, and voluntarily. In order to do that, I need to ask you some questions. The questions will be under oath. It is very important to tell the truth. If you don't tell the truth, you could be prosecuted for perjury or false statement.

Would you raise your right hand please, sir.

BENJAMIN BRADLEY

was called, and being first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q. Mr. Bradley, I am going to be asking you a number of questions. If at any time you feel confused or you don't understand, let me know, and I will clarify.

I am going to begin by going over what you have

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 3:15-cr-00037-2**
	)	**Judge Aleta A. Trauger**
BENJAMIN EDWARD HENRY BRADLEY	)	
	)	

MEMORANDUM

Before the court are the United States' Motion for Entry of a Preliminary Order of Forfeiture (Doc. No. 858) and Motion for an Order of Forfeiture of at Least a $1,000,000 United States Currency Money Judgment (Doc. No. 861). The defendant has now responded to both motions. (Doc. No. 958.) The United States filed a Reply, and the defendant, a Sur-reply. (Doc. Nos. 986, 996.) For the reasons set forth herein, the United States' motions will be granted.

I. Background

On March 3, 2015, the United States filed a two-count Indictment against the defendant, charging him with conspiracy to possess with intent to distribute and conspiracy to distribute Schedule II controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One) and money laundering in violation of 18 U.S.C. § 1956 (Count Two). (Doc. No. 3.) The Indictment also contained forfeiture allegations, giving notice that, upon conviction, the defendants would be jointly and severally responsible for forfeiting to the United States any "property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of" the conspiracy to distribute drugs, "including but not limited to a money judgment in an amount to be determined, representing the gross drug proceeds obtained as a result of such offense," and "any property used, or intended to be used, . . . to commit, or to facilitate the

commission of, such violation," pursuant to 21 U.S.C. § 853(a)(1) and (2). (Doc. No. 3, at 5.) The Indictment further provided for the forfeiture of any real or personal property involved in the conspiracy to commit money laundering or traceable to such property, "including but not limited to the proceeds of the violation and including but not limited to a money judgment in an amount to be determined" (Doc. No. 3, at 7), and for the forfeiture of substitute property in accordance with 21 U.S.C. § 853(p).

On August 17, 2015, the United States filed a Bill of Particulars for Forfeiture of Property that identified specific assets to be forfeited, including currency in the amount of $46,300 seized from 15540 Prevost Street, Detroit, Michigan, and approximately $78,300 seized from 45669 Harmony Lane, Belleville, Michigan. (Doc. No. 279.) On May 19, 2016, the United States filed a Bill of Particulars for Forfeiture of Real Property, giving notice that it sought the forfeiture of real property located at and commonly known as 14425 Curtis, 14427 Curtis, 16617 Leisure, and 15355 Ohio Street, in Detroit, Michigan, and 45669 Harmony Lane, Belleville, Michigan. (Doc. No. 432.)

The defendant, Benjamin Bradley, entered a guilty plea to both counts of the Indictment on June 8, 2016 (*see* Order accepting Plea Petition, Doc. No. 478), and, after several postponements, sentencing was scheduled for February 1, 2017 (Order, Doc. No. 784). The United States filed the forfeiture motions and accompanying memoranda on January 31, 2017, one day before the sentencing, making them, as the government acknowledged during the sentencing hearing, somewhat "tardy." (Doc. No. 919, at 5.) At the sentencing hearing, the government represented that it intended to introduce whatever factual proof it had on forfeiture and, specifically, that the evidence would "establish a nexus between the Subject Property and the crimes of conviction." (*Id.*)

In discussing the issue of forfeiture, the court recognized on the record that the applicable rule requires that, "[a]s soon as practical . . . after a plea of guilty . . . , the court must determine what property is subject to forfeiture." Fed. R. Crim. P. 32.2(b)(1)(A). (*See* Doc. No. 191, at 282.) The court also noted that, if forfeiture is contested, "at either party's request the Court is to conduct a hearing and the Court is to enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant." (Doc. No. 191, at 282 (referencing Fed. R. Crim. P. 32.2(b)(1)(A)).) Because the defendant had not had the opportunity to respond to the government's forfeiture motions, the court established a briefing schedule and stated that it would "rule on the papers" unless the defendant requested a hearing. (*Id.*) The motions have now been fully briefed and are ripe for review. The defendant has not requested a hearing, but he contends that the United States has failed to carry its burden of proof to support the forfeiture of the real property located at 45669 Harmony Lane, Belleville, Michigan.

II. Legal Standards

The criminal forfeiture statute provides that an individual convicted of a drug-related felony or money laundering (among other crimes) "shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation," and any property used or intended to be used to commit or facilitate the commission of the crime of conviction. 21 U.S.C. § 853(a)(1) & (2). Courts construe § 853 liberally in order to effectuate its remedial purpose. *United States v. Darji*, 609 F. App'x 320, 332 (6th Cir. 2015) (citing 21 U.S.C. § 853(o)).

Criminal forfeiture is part of a defendant's sentence, to be imposed as provided by statute. 21 U.S.C. § 853(a); *United States v. Hall*, 411 F.3d 651, 654 (6th Cir. 2005). If, as here,

the government "include[s] notice of the forfeiture in the indictment or information," and "the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case," in accordance with the procedures set out in § 853. 28 U.S.C. § 2461(c). "The indictment . . . need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks." Fed. R. Crim. P. 32.2(a).

The criminal forfeiture statute creates a "rebuttable presumption" that any property of a defendant convicted of a felony drug offense or money laundering is subject to forfeiture, so long as the United States establishes by a preponderance of the evidence that the defendant acquired the property "during the period of the [criminal] violation", "or within a reasonable time after such period", and that "there was no likely source for such property other than" the offenses of conviction. 21 U.S.C. § 853(d).

Moreover, title to property subject to forfeiture vests in the United States "upon the commission of the act giving rise to forfeiture." 21 U.S.C. § 843(c). Consequently, if the defendant transfers the forfeitable property to a third person after commission of the offense, that property "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is the bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." *Id.*

In the event that property subject to forfeiture under § 853(a) cannot be located or has been sold or transferred to a third party, "the court shall order the forfeiture of any other property of the defendant, up to the value of any property" that has been sold or transferred or cannot be located. *Id.* § 843(p)(2).

Finally, to protect the interests of third parties, the United States must publish notice of any order of forfeiture and of its intent to dispose of the property. Thereafter, "[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property." *Id.* § 843(n)(2). If the third-party petitioner is able to establish at the hearing that he or she had a valid and superior legal interest in the property "at the time of the commission of the acts which gave rise to the forfeiture of the property" and that "renders the order of forfeiture invalid in whole or in part," or that he or she is "a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section," then the court shall amend the order of forfeiture accordingly. *Id.* § 843(n)(6).

Procedurally, as noted above, the court is without authority to enter a judgment of forfeiture unless the indictment or information contains notice to the defendant that the government intends to seek forfeiture. Fed. R. Crim. P. 32.2(a). Assuming that that requirement has been met, the next step, typically, is to enter a preliminary order of forfeiture. The determination of whether a preliminary order should enter is to be made "as soon as practical" after a jury verdict or plea of guilty, based on "whether the government has established the required nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1)(A). That determination "may be based on evidence already in the record . . . and on any additional evidence or information . . . accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). If either party so requests, the court is to conduct a hearing after the verdict or plea.

"If the court finds that property is subject to forfeiture, it must promptly enter a

preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria." Fed. R. Crim. P. 32.2(b)(2)(A). Unless "impractical," the order is to be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B). Further, "[t]he court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c)." Fed. R. Crim. P. 32.2(b)(2)(A).

III. Discussion

In its first motion, the United States generally seeks a "Preliminary Order of Forfeiture" of the defendant's interest in the same currency and real property identified in the Bills of Particulars. In the second, the government specifies that it seeks "an Order of Forfeiture consisting of at least $1,000,000 United States currency Money Judgment" against the defendant. In his response, the defendant raises only two objections. First, he seeks clarification that entry of the $1,000,000 money judgment is not *in addition to* the forfeiture of other enumerated assets and does not constitute "double dipping." (Doc. No. 958, at 9.) Second, he objects to the forfeiture of the real property commonly known as 45669 Harmony Lane, Belleville, Michigan, on the basis that (1) it is the current residence of the defendant's wife and children; (2) the government has introduced no evidence that this home represents the proceeds of the defendant's offenses; and (3) the government concedes that the property is not owned by the defendant.

A. The Money Judgment

The defendant asserts that the government's proposed Order of Forfeiture Consisting of a

Money Judgment is "potentially ambiguous in numerous ways" and seeks clarification of several points:

> (1) Is the money judgment offset by the value of the assets that the government claims to be "tainted" property, or is it separate? (2) Is the money judgment offset by the value of the assets that the government claims to be substitute property? (3) Given that the government has represented in its indictment that all codefendants are jointly and severally liable for any forfeiture award, are Mr. Bradley and Mr. Buchanan (whom counsel believes to be the only remaining defendants subject to forfeiture awards) equally liable for this award? (And if not, is that a fatal variance with the indictment?) (4) Is the value of this money judgment subject to offset by the value of any personal or real property of Mr. Buchanan, whether such property is "tainted" or "substitute" property?

(Doc. No. 958, at 9–10.)

In response to the defendant's concerns, the United States asserts that the proposed Order of Forfeiture expressly "provides for a limit of $1,000,000 and for the government to amend the Order of Forfeiture to reflect any substitute property forfeited." (Doc. No. 986, at 2.) The government characterizes its proposed order of forfeiture as "provid[ing] that the Money Judgment is joint and several with any other coconspirators" against whom a similar money judgment is entered.[1] The United States also represents that, "after entry of the Order of Forfeiture, the value of the net proceeds of any specific property of Bradley or a similar situated coconspirator that is forfeited to the government will reduce Bradley's money judgment." (Doc. No. 986, at 2.)

Contrary to the government's representation, the United States' proposed order of forfeiture does not expressly provide for a limit of $1,000,000. Rather, it provides for forfeiture of money "in the amount of *at least* $1,000,000 United States currency." (Doc. No. 861-1

[1] The other co-defendants against whom orders of forfeiture have been entered are Donald Buchanan, whose Judgment specifies the forfeiture of two Rolex watches identified in the Preliminary Order of Forfeiture (Doc. Nos. 900, 945), and Andrew Bradley Froome, whose Judgment provided for the forfeiture of a firearm and $43,244 in currency (Doc. No. 378).

(emphasis added).) In addition, the proposed Order is ambiguous with regard to whether the Money Judgment is in addition to or incorporates the value of certain real property and other assets the forfeiture of which the government seeks or has already obtained.

The government's response, however, appears to concede that the value of any "tainted" assets, substitute property, and real property seized or recovered from the defendant and any co-conspirators, including Donald Buchanan, should be applied toward the Money Judgment. (*See* Doc. No. 986, at 2 ("Thus, after entry of the Order of Forfeiture, the value of the net proceeds of any specific property of Bradley or a similarly situated coconspirator that is forfeited to the government will act to reduce Bradley's money judgment.").) The court will therefore grant the motion for entry of an order of forfeiture in the amount of up to, but not more than, $1,000,000, specifying that the value of any other assets forfeited to or seized by the government shall be applied toward satisfaction of the Money Judgment.

B. Forfeiture of Real Property

Although the United States seeks the forfeiture of five specific parcels of real property, the defendant disputes only the forfeiture of the parcel located at 45669 Harmony Lane (the "Property"). He argues that (1) the United States presented no evidence at the sentencing hearing to satisfy its burden of proving that Property is "tainted"—that is, that it was purchased from the proceeds of the crimes of conviction or used to commit the offense; and (2) the Property does not qualify as substitute property subject to forfeiture either, because it is not "property of the defendant" as required by 21 U.S.C. § 853(p)(2).

(i) Whether the Property Qualifies as Tainted

As set forth above, any property derived from the proceeds of the crimes of conviction or used to commit or facilitate the commission of those crimes is subject to forfeiture. 21 U.S.C. §

853(a)(1) & (2). Section 853 creates a rebuttable presumption that any property owned by the defendant is subject to forfeiture, but only if the government proves by a preponderance of the evidence that "(1) such property was acquired . . . during the period of the violation of this subchapter . . . or within a reasonable time after such period; and (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter." 21 U.S.C.A. § 853(d).

At the sentencing hearing, the United States represented that it would offer "whatever factual proof [it] ha[d] on forfeiture during this hearing." (Doc. No. 919, at 5.) In fact, the evidence presented at the sentencing hearing concerning the Property was very limited. IRS Special Agent William DeSantis testified that, during the course of the conspiracy, the defendant had a job earning approximately $55,000 per year. (Doc. No. 919, at 199.) Although DeSantis presented evidence regarding when each of the other properties subject to forfeiture was purchased and for how much, he had no information regarding when the defendant acquired the Property at 45669 Harmony Lane or how much he paid for it. (*See id.* at 201 ("Now, we did a title search . . . , and they could never find a recorded deed that transferred the ownership to Mr. Bradley himself.").) Instead, the title search yielded a recorded deed conveying the property from the defendant to his wife, Kareema Hawkins, on April 23, 2015, approximately six weeks after the defendant's arrest. (*Id.*)

In short, the government presented no evidence at the sentencing hearing from which the court could conclude either that the Property was acquired during the course of the criminal conspiracy or that there was no likely source for funds to purchase the property other than the defendant's criminal activity. 21 U.S.C.A. § 853(d). Moreover, the United States offered no evidence suggesting that the Property was purchased using funds derived from the defendant's

criminal activity or that the Property itself was used to commit or facilitate the commission of that crime is subject to forfeiture. 21 U.S.C. § 853(a).[2] The United States therefore failed to establish at the sentencing hearing that the Property is subject to forfeiture under § 853(a).

In response to the defendant's argument in that regard, the United States has submitted the Affidavit of DeSantis, in which he attests that further investigation, apparently conducted after the sentencing hearing, led him to the previous owner of the Property, Krikor Holding Company, and the owner of Krikor Holding Company, Majid Krikor. Although Majid Krikor was unable to find a deed reflecting this conveyance, Krikor allegedly told DeSantis that the defendant purchased the Property from him in early 2014 for approximately $105,000 in gold coins and scrap gold. (Doc. No. 986-1 ¶ 2.b.) Also attached to DeSantis's Affidavit are a Quitclaim Deed showing the conveyance of the Property from Wayne County, Michigan to Krikor Holding LLC on October 18, 2012 at a tax sale for $87,499 (Doc. No. 986-2), and a print-out from the website of the Treasurer for Wayne County, Michigan, showing that the defendant, Benjamin Bradley, was listed as the Taxpayer for the Property in 2014. (Doc. No. 986-3.)

The defendant objects to this evidence, and particularly to DeSantis's report regarding what Krikor told him, on the basis that it consists of inadmissible hearsay. (Doc. No. 996, at 3 (citing *United States v. $64, 595.00 in U.S. Currency*, No. 5:13-CV-265-REW, 2014 WL 5432119 (E.D. Ky. Oct. 27, 2014), and *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 508–10 (5th Cir. 2008)).) The precedent upon which the defendant relies, however, establishes only that hearsay may be inadmissible in proceedings under the Civil Asset Forfeiture

[2] At the time of sentencing, the only evidence in the record of a connection between the Property and the drug conspiracy was that $78,300 in cash and several Rolex watches were found at the Property in the course of a search conducted on or around the time of the defendant's arrest. The United States made no attempt to argue that this evidence *per se* is sufficient to establish the requisite nexus between the Property and the crime to justify forfeiture.

Reform Act of 2000 (CAFRA), 18 U.S.C. § 983.

This court is not persuaded that the standards applicable under CAFRA—particularly CAFRA proceedings at the summary judgment stage—have any bearing in the context of criminal forfeiture. Those courts holding that hearsay may not be considered in ruling on a motion for summary judgment in the CAFRA context have determined that, because the proceeding is strictly civil, ordinary Rule 56 standards and the Federal Rules of Evidence apply. *See, e.g.*, *$92,203.00 in U.S. Currency*, 537 F.3d at 508–10. Conversely, the Federal Rules of Evidence generally do not apply to sentencing proceedings, Fed. R. Civ. P. 1101(d)(3), and the Supreme Court has recognized criminal forfeiture as "an element of the sentence imposed following conviction." *Libretti v. United States*, 516 U.S 29, 38 (1995). Moreover, the procedural rules governing criminal forfeiture proceedings expressly provide that the court may consider "evidence already in the record, including any written plea agreement, and . . . any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). Consequently, those courts to consider the question have uniformly concluded that hearsay is admissible to establish the elements of § 853(d). *See, e.g.*, *United States v. Jafari*, 85 F. Supp. 3d 679, 684–85 (W.D.N.Y. 2015) (holding that "the traditional rules of evidence do not apply [to criminal forfeiture proceedings], and courts may consider hearsay and other inadmissible evidence so long as it is sufficiently reliable" (citing Fed. R. Evid. 1101(d)(3)), *aff'd*, 663 F. App'x 18 (2d Cir. 2016); *United States v. Evanson*, No. 2:05CR00805 TC, 2008 WL 3107332, at *2 (D. Utah Aug. 4, 2008) ("Because criminal forfeiture is viewed as part of the sentencing process, hearsay is admissible." (citing *Libretti*, 516 U.S. at 38–39); *United States v. Ivanchukov*, 405 F. Supp. 2d 708, 709 n.1 (E.D. Va. 2005) (noting that "the traditional rules of evidence do not apply in determining issues related to

criminal forfeiture" (citing *United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003))).

Although the United States clearly was dilatory in waiting until the submission of its Reply brief to present evidence of the nexus between the Property and the drug-distribution and money-laundering crimes to which the defendant pleaded guilty, the court will not exclude that evidence. The defendant has had the opportunity to respond to the government's evidence, which he did by filing a sur-reply. He also had the opportunity to request a hearing but has not done so.

The court finds that Agent DeSantis's testimony about what Krikor told him about the purchase of the Property, though hearsay, is both relevant and reliable, particularly insofar as it is coupled with documentary evidence showing when and for what price Krikor purchased the property and that the defendant was listed as the taxpayer on the property for the year 2014 by the records of the Treasurer for Wayne County, Michigan. The Indictment, to which the defendant pleaded guilty, alleges that the drug conspiracy began in 2012 and continued until March 11, 2015. (Doc. No. 3.) In other words, reliable evidence shows that the defendant acquired the property while the drug-distribution and money-laundering conspiracies were in full swing. Moreover, the property was purchased by Krikor at a tax sale for $87,499 in October 2012 and its value in May 2017 is estimated to be $400,000. (Doc. No. 986-9.) That evidence substantiates Krikor's statement that he sold the Property to the defendant in early 2014 for approximately $100,000. Even disregarding Krikor's statement that the Property was purchased primarily with gold coins and scrap gold, the fact that the defendant, who earned a salary of $55,000, paid cash to purchase the Property for $100,000 at a time when the drug-distribution and money-laundering conspiracies were ongoing, constitutes strong circumstantial evidence that he purchased the house with proceeds from the criminal enterprise. The various officers' testimony at the sentencing hearing regarding the sums of cash cycling through the various bank

accounts implicated in the conspiracy around that time, as well as the fact that approximately $78,300 in cash was seized from the Property on the date of the defendant's arrest, constitutes additional circumstantial evidence that the Property was purchased with money derived from the criminal enterprise. Likewise, as the United States argued in support of its Motion for Preliminary Order, the location, manner of storage and packing of the currency sought for seizure constitutes evidence that the real property sought for forfeiture was either purchased with the use of commingled funds or with cash that was not obtained through legitimate activity. (Doc. No. 859, at 5.)

Based on all of this evidence, the court finds that the United States has carried its burden of establishing, by a preponderance of the evidence, the requisite nexus between the Property at 45669 Harmony Lane and the offenses to which the defendant has pleaded guilty. That is, the defendant acquired the Property while the drug distribution and money laundering conspiracies were ongoing, and there was no likely source for the funds to purchase the property other than his criminal activity, which gives rise to a presumption that the Property was purchased from proceeds the defendant obtained, directly or indirectly, from the crimes of conviction. 21 U.S.C. § 853(a) & (d). The defendant offered no evidence to rebut that presumption. The court will therefore overrule the defendant's objection to the forfeiture of the Property located at 45669 Harmony Lane.

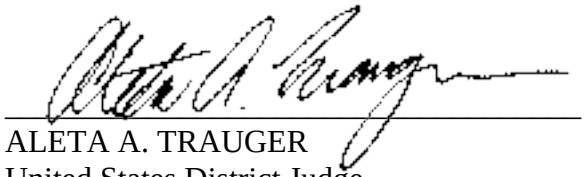
(ii) Substitute Property

Having determined that the Property is subject to forfeiture under § 853(a), the court has no need to address the parties' arguments regarding whether the Property is subject to forfeiture as substitute property under § 853(p). In any event, to the extent any third party contests the forfeiture of the Property, she may petition the court under the procedures outlined in § 853(n) to

adjudicate the validity of her interest in the Property.

IV. Conclusion

Consistent with the discussion above, the court will grant the United States' motions. An appropriate Order of Forfeiture is filed herewith.



ALETA A. TRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Case No. 3:15-cr-00037-2**
	)	**Judge Aleta A. Trauger**
	)	
BENJAMIN BRADLEY	)	

MEMORANDUM

Following the Sixth Circuit's vacatur of this court's previous order, again pending before the court are the government's forfeiture motions pertaining to defendant Benjamin Bradley, specifically the Motion for Entry of a Preliminary Order of Forfeiture (Doc. No. 858) and Motion for an Order of Forfeiture of at Least a $1,000,000 United States Currency Money Judgment (Doc. No. 861). The court having denied the defendant's post-remand Motion to Dismiss the Forfeiture Allegations and Deny the Government's Request for a Money Judgment (*see* Doc. Nos. 1125 (motion), 1154 and 1155 (Memorandum and Order)), the question before the court is not *whether* to award forfeiture, but in what amount.

For the reasons set forth herein, the government's motions will be granted.

I. Procedural Background

Benjamin Bradley was indicted, along with numerous co-defendants, in March 2015 on charges of conspiracy to possess with intent to distribute and conspiracy to distribute Schedule II controlled substances (oxycodone and oxymorphone pills) (Count One) and money laundering (Count Two). (Doc. No. 3.) The Indictment specifically alleged that the conspiracy began no later than November 2012 and continued until March 11, 2015. It also contained forfeiture allegations. Forfeiture Allegation One alleged that, upon conviction, all the defendants would be jointly and severally liable for forfeiting to the United States (1) any property constituting or

derived from proceeds obtained as a result of the drug conspiracy, including, but not limited to, a money judgment in an amount to be determined, representing the gross drug proceeds obtained from the drug offense, under 21 U.S.C. § 853(a)(1); and (2) under § 853(a)(2), any property used or intended to be used to facilitate the commission of the drug offense. (Doc. No. 3, at 5.) The government also gave notice that, in the event any of the proceeds or property directly related to the drug conspiracy could not be located for any reason, the government would be entitled to the forfeiture of substitute property under § 853(p). (Doc. No. 3, at 5–6.) Forfeiture Allegation Two sought the forfeiture, upon the defendants' conviction on Count Two, of any real or personal property involved in or traceable to the money laundering, "including but not limited to a money judgment in an amount to be determined, representing the property involved" in the conspiracy to commit money laundering or traceable to such property, based on 18 U.S.C. § 982(a)(1). (*Id.* at 7.) The government also gave notice of its intent to seek forfeiture of substitute property up to the value of the property actually traceable to the conspiracy, if such property could not be located, under § 853(p). (*Id.* at 7–8.)

The government filed a Bill of Particulars for Forfeiture of Property on August 17, 2015, identifying specific assets to be forfeited under Forfeiture Allegation One. These items included, among others: (1) currency in the amount of $46,300 seized from 15540 Prevost Street, Detroit, Michigan; and (2) $78,300 seized from 45669 Harmony Lane, Belleville, Michigan. (Doc. No. 279.)[1]

In May 2016, the government filed a Bill of Particulars for Forfeiture of Real Property (Doc. No. 432), giving notice that it sought the forfeiture, under Forfeiture Allegations One and Two, of certain parcels of real property, identified by street address as follows: (1) 14425 Curtis,

[1] Specific items of personal property were sought under Forfeiture Allegation Two as well, but the government's Memorandum in Support of its Forfeiture Motion (Doc. No. 862) does not address those items, apparently because they were never in the possession of Benjamin Bradley.

Detroit, Michigan; (2) 14427 Curtis, Detroit, Michigan; (3) 16617 Lesure, Detroit, Michigan; (4) 15355 Ohio Street, Detroit, Michigan; and (5) 45669 Harmony Lane, Belleville, Michigan. (Doc. No. 432.)

Bradley pleaded guilty to both counts in the Indictment in June 2016 before Judge Todd Campbell. (Doc. No. 478.) Sentencing was postponed several times. Following the retirement of Judge Campbell, the case was reassigned to the undersigned, and the sentencing hearing was held on February 1, 2017. Because the government did not file its forfeiture motions (Doc. Nos. 858, 861) until January 31, 2017, the court did not include forfeiture as part of the sentence at that time. Bradley was sentenced to a seventeen-year prison term, and the court ordered briefing on the forfeiture issue. (*See* Minute Entry, Doc. No. 873.)

In his original Response to the government's forfeiture motions, Bradley did not object to the forfeiture of any piece of real property other than that known as 45699 Harmony Lane, which he contended belonged to his wife and was his family's home. (*See* Doc. No. 958.) In addition, he did not object to the forfeiture of the two bundles of cash, nor did he actually contest the forfeiture money judgment or even the amount of it. Instead, he only sought clarification on the issue of whether the $1,000,000 money judgment was in addition to, or included the value of, the real property and cash that was already ordered to be forfeited. (*See id.* at 1.)

The court entered an Order and accompanying Memorandum granting the government's motions on June 22, 2017. (Doc. Nos. 1004, 1005.) The court found, based on the evidence presented at the sentencing and in the briefing on the forfeiture issue, that a preponderance of the evidence established that the foreseeable proceeds of the drug-distribution conspiracy totaled at least $1,000,000 and that the foreseeable value of the property involved in the money laundering scheme was at least $1,000,000. The court ordered that forfeiture consisting of a money judgment in the amount of $1,000,000 be taken against Bradley, "jointly and severally with any other co-conspirator against whom a similar money judgment is taken." (Doc. No. 1005, at 1.)

The court further ordered that, "insofar as some portion of the $1,000,000 derived from or connected with the crimes of conviction . . . cannot be located . . . , the United States may engage in discovery . . . in an action or claim for a debt to identify additional substitute assets having a value up to $1,000,000." (*Id.* at 2.)[2] The court also ordered the immediate forfeiture of a total of $124,600 cash seized during searches of the defendant's real property and forfeiture of the real property identified as 14425 Curtis, 14427 Curtis, 16617 Lesure, 15355 Ohio Street, all in Detroit, and 45669 Harmony Lane in Belleville, Michigan. (*Id.* at 2–3.) The court ordered that the value of the real property be applied to the money judgment, but there were no specific findings regarding the value of those properties. The court also ordered that the value of other assets forfeited to the United States by the defendant or any co-conspirator "against whom a similar money judgment is taken" be applied to reduce the amount of the money judgment. (*Id.* at 3.)[3] Following entry of the forfeiture order, the court entered Judgment, which specifically incorporated the terms of the forfeiture order. (Doc. No. 1006, at 7.)

Bradley appealed his sentence and the million-dollar forfeiture judgment. The Sixth Circuit affirmed the prison sentence but reversed the forfeiture order on the basis that it violated *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), in which the Supreme Court had held that the forfeiture statute, 21 U.S.C. § 853, bars joint and several liability for forfeiture judgments. *United States v. Bradley*, 897 F.3d 779, 783–84 (6th Cir. 2018). In particular, in rejecting the government's argument that the evidence clearly showed that Bradley himself directly received well over a million dollars during the course of the conspiracy, the Sixth Circuit noted that the

[2] The court determined that $1,000,000 was the maximum total to be forfeited and that this figure incorporated the value of other forfeited assets.

[3] The Memorandum noted that the only two co-defendants against whom a forfeiture order of any kind had been entered were Donald Buchanan, whose Judgment specified the forfeiture of two Rolex watches (Doc. Nos. 900, 945), and Andrew Bradley Froome, whose Judgment provided for the forfeiture of a firearm and $42,244 in currency (Doc. No. 378). All co-defendants have now been sentenced, and none was subject to any kind of money judgment other than the currency Froome forfeited.

district court "did not make any factual findings about how much money Bradley obtained." *Id.* at 783. It further concluded that "back-of-the-envelope calculations cannot justify this million-dollar order without affecting Bradley's substantial rights and the fairness of the forfeiture proceeding." *Id.*

The Sixth Circuit also observed that this court's forfeiture order was "a net, not a gross, money forfeiture judgment," specifically indicating that the value of the real property and seized currency, "as well as the assets of any co-defendant," should be subtracted from the judgment." *Id.* "That leaves just as many candidates for lessening Bradley's liability as for increasing it. Better on this record, we think, *to vacate the entire forfeiture order and remand to the district court so that it can conduct fresh factfinding and figure out 'an amount proportionate with the property [Bradley] actually acquired through the conspiracy.'*" *Id.* at 783–84 (quoting *United States v. Elliott*, 876 F.3d 855, 868 (6th Cir. 2017)) (emphasis added).

Following remand and issuance of the mandate, the defendant filed his Motion to Dismiss the Forfeiture Allegations, in light of the Sixth Circuit's invitation that he might want to do so. *See Bradley*, 876 F.3d at 784 (suggesting that the "parties may wish to address" the question of whether the Sixth Amendment prohibits a judge, as opposed to a jury, from finding facts that trigger mandatory forfeiture, as this is "an unanswered question in our circuit"). The undersigned denied the motion, finding that it was bound by the Supreme Court's holding in *Libretti v. United States*, 516 U.S. 29, 48–49 (1995), that "the right to a jury verdict on forfeitability does not fall within the Sixth Circuit's constitutional protection." The court also rejected the defendant's argument that money judgments are not authorized by 21 U.S.C. § 853.

Following the denial of that motion, the court scheduled an evidentiary hearing to adjudicate the amount of the money judgment to be imposed. Although the court initially signaled that the parties would not be required to present evidence regarding the forfeiture of the currency and real property identified in the original forfeiture order, as the defendant had not

expressly appealed those issues and had not contested the forfeiture of those items during the initial forfeiture proceedings, the defendant filed a Motion to Reconsider, pressing the point that the Sixth Circuit had vacated the entirety of the forfeiture order and put the parties back to square one on that issue. In light of the breadth of the remand order, the court granted the Motion to Reconsider in part,[4] clarifying that the "purpose of the evidentiary hearing will be to establish the amount of the money judgment as well as the cash and real property forfeitures sought by the government" in its original forfeiture motions. (Doc. No. 1163, at 3.) The court ordered the parties to be prepared to present "any relevant evidence in their possession concerning the forfeitures sought by the government in its Motion for Entry of a Preliminary Order of Forfeiture (Doc. No. 858) and Motion for an Order of Forfeiture of at Least a $1,000,000 United States Currency Money Judgment (Doc. No. 861)." (Doc. No. 1163, at 4.)

At the evidentiary hearing conducted on May 24, 2019, the government presented two witnesses, and both parties introduced numerous exhibits. At the court's invitation, the parties have exhaustively rebriefed the forfeiture issues, including the government's Supplemental Memorandum in Support of Motion for Forfeiture (Doc. No. 1176), Bradley's Memorandum in Opposition to the Government's Motions for Forfeiture (Doc. No. 1191), and the government's Reply Memorandum (Doc. No. 1192). The defendant, this time around, concedes nothing; he contests the forfeiture of the two bundles of cash and all parcels of real estate, as well as the money judgment and the amount of the money judgment. For its part, the government states that it no longer seeks the forfeiture of one of the real properties specified in its Bill of Particulars and original forfeiture motions, the property identified as 14425 Curtis Street, but only because it "has since been found to have a net equity . . . too low to make forfeiture worthwhile for the government." (Doc. No. 1176, at 2 n.2.) Otherwise, the government maintains that the evidence

[4] The court denied that portion of the motion requesting a jury determination of the forfeiture judgment amount.

supports the forfeiture of the other four parcels of real property, the bundles of cash, and a money judgment in the amount of $1,000,000, toward which the value of the other forfeited items would be credited.

In addressing the forfeiture motions, the court will first outline the governing legal standards and then consider the evidence presented in support of the money judgment and as to the forfeiture of the real property and currency sought by the government.

II. Legal Standards

An individual convicted of a drug-related felony or money laundering "shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation" and any property used or intended to be used to commit or facilitate the commission of the crime of conviction. 21 U.S.C. § 853(a)(1) & (2). Courts construe § 853 liberally in order to effectuate its remedial purpose. *United States v. Darji*, 609 F. App'x 320, 332 (6th Cir. 2015) (citing 21 U.S.C. § 853(o)).

Criminal forfeiture is part of a defendant's sentence, to be imposed as provided by statute. 21 U.S.C. § 853(a); *United States v. Hall*, 411 F.3d 651, 654 (6th Cir. 2005). If, as in this case, the government "include[s] notice of the forfeiture in the indictment or information," and "the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case," in accordance with the procedures set out in § 853. 28 U.S.C. § 2461(c). "The indictment . . . need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks." Fed. R. Crim. P. 32.2(a).

The criminal forfeiture statute creates a "rebuttable presumption" that any property of a defendant convicted of a felony drug offense or money laundering is subject to forfeiture, so long as the United States establishes by a preponderance of the evidence that the defendant acquired the property "during the period of the [criminal] violation . . . or within a reasonable time after

such period" and that "there was no likely source for such property other than" the offenses of conviction. 21 U.S.C. § 853(d); *see also Honeycutt*, 137 S. Ct. at 1633. In the absence of evidence to support the presumption, the government must prove that the property is subject to criminal forfeiture under § 853(a), also by a preponderance of the evidence, either by showing that the defendant "used, or intended to . . . use[]," the property to facilitate his drug-distribution offense, *id.* § 853(a)(2), or that the property "constitute[s], or [is] derived from, any proceeds" of the defendant's drug-distribution offense, *id.* § 853(a)(1). *See United States v. Evers*, 669 F.3d 645, 660 (6th Cir. 2012) (citing *United States v. Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992)).

Moreover, title to property subject to forfeiture vests in the United States "upon the commission of the act giving rise to forfeiture." 21 U.S.C. § 853(c). Consequently, if the defendant transfers the forfeitable property to a third person after commission of the offense, that property "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is the bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." *Id.*

In the event that property subject to forfeiture under § 853(a) cannot be located or has been sold or transferred to a third party, "the court shall order the forfeiture of any other property of the defendant, up to the value of any property" that has been sold or transferred or cannot be located. *Id.* § 853(p)(2).

Procedurally, as noted above, the court is without authority to enter a judgment of forfeiture unless the indictment or information contains notice to the defendant that the government intends to seek forfeiture. Fed. R. Crim. P. 32.2(a). Assuming that that requirement has been met, the next step, typically, is to enter a preliminary order of forfeiture. The determination of whether a preliminary order should enter is to be made "as soon as practical" after a jury verdict or plea of guilty, based on "whether the government has established th

required nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1)(A). That determination "may be based on evidence already in the record . . . and on any additional evidence or information . . . accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). If either party so requests, the court is to conduct a hearing after the verdict or plea.

Ordinarily, if the court finds that property is subject to forfeiture, it should "promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria." Fed. R. Crim. P. 32.2(b)(2)(A). Unless "impractical," the order is to be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B). Further, "[t]he court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c)." Fed. R. Crim. P. 32.2(b)(2)(A).

III. Analysis

From the beginning, this case was procedurally irregular insofar as the government did not file its forfeiture motions until the day before sentencing, and it filed the motion for a preliminary order on the same day that it filed the motion for a final order of forfeiture. Recognizing these irregularities, the court postponed ruling on the issue of forfeiture and ordered additional briefing. Post-remand, the parties have submitted a new round of briefing. The defendant, in short, maintains that the government has not established a rebuttable presumption under § 853(d) that the property or cash at issue is subject to forfeiture nor established by a preponderance of the evidence that these items were derived from, or used to facilitate, the drug-distribution conspiracy. He also argues that the government has failed to meet its burden of

showing that it is entitled to a money judgment in any amount.

A. The Money Judgment

The government has moved for a money forfeiture judgment under 21 U.S.C. § 853(a)(1), which, as set forth above, authorizes the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result" of the drug-distribution conspiracy. The government argues that the amount sought, $1,000,000, represents a very conservative estimate of the amount of funds the defendant actually obtained, directly or indirectly, during the course of his participation in the conspiracy, as required by 21 U.S.C. § 853(a)(1). In response, the defendant argues that: (1) *Honeycutt* and the Sixth Circuit's remand opinion establish that the amount of the money judgment is limited to the defendant's net profit from the conspiracy; (2) the government has not carried its burden of proof to establish that the defendant actually obtained $1,000,000 through his participation in the conspiracy; and (3) permitting a $1,000,000 money judgment against Bradley would result in an unreasonable sentencing disparity, a factor the court may consider under 18 U.S.C. § 3553(a)(6).

1. Net Versus Gross Proceeds

In *Honeycutt*, the Supreme Court analyzed the meaning of the phrase "obtained, directly or indirectly" in § 853(a)(1). There, the issue was "whether, under § 853, a defendant may be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." *Honeycutt*, 137 S. Ct. at 1630. The defendant and his brother were part of a conspiracy to sell large quantities of iodine, knowing that it would be used to manufacture methamphetamine. *Id.* The government sought forfeiture of the net profits from the sales of the iodine—$269,751.98. *Id.* The defendant's brother eventually pleaded guilty and agreed to forfeit $200,000. The defendant went to trial and was subsequently convicted of several drug charges, including conspiring to distribute iodine. *Id.* Following the defendant's conviction, the government sought forfeiture against him in the amount of the outstanding net

profits derived from the conspiracy, $69,751.98. *Id.* at 1631. Although the defendant had no "controlling interest in the store" and "did not benefit personally," the Sixth Circuit held that the brothers were "jointly and severally liable for any proceeds of the conspiracy." *Id.* (quoting *United States v. Honeycutt*, 816 F.3d 362, 380 (6th Cir. 2016)).

The Supreme Court reversed on the basis that joint and several liability is contrary to the plain language of § 853. *Honeycutt*, 137 S. Ct. at 1632–34. The Court found that the language of the statute limits forfeiture to property that was actually "obtained" by the individual, and "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. The Court stated:

> Section 853(a)(1) further provides that the forfeitable property may be "obtained, directly or indirectly." The adverbs "directly" and "indirectly" modify—but do not erase—the verb "obtain." In other words, these adverbs refer to how a defendant obtains the property; they do not negate the requirement that he obtain it at all. For instance, the marijuana mastermind might receive payments directly from drug purchasers, or he might arrange to have drug purchasers pay an intermediary such as the college student. In all instances, he ultimately "obtains" the property—whether "directly or indirectly."

Id. at 1633. Ultimately, the Court concluded that "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime." *Id.* at 1635. Because the defendant did not have an ownership interest in the store and did not "personally benefit" from the iodine sales, forfeiture was not appropriate. *Id.*

The defendant argues that *Honeycutt* requires that forfeiture be limited to Bradley's "net share" of the proceeds actually acquired by him, which requires deducting the distributions made to other members of the conspiracy. (Doc. No. 1191, at 10.) As suggested above, however, *Honeycutt* did not actually address the issue of net versus gross proceeds, because the government only sought forfeiture based on net profits. Nor does *Honeycutt* suggest that the calculation of the forfeiture amount based on gross proceeds obtained by a particular defendant is improper. To the contrary, *Honeycutt* indicates that a defendant "obtains" the payments he

receives through an intermediary and thus may be liable for forfeiture of funds thus received, suggesting that forfeiture may be based on gross proceeds.

The Sixth Circuit's remand decision is somewhat more ambiguous on the topic of whether the forfeiture amount must be a "net" amount, but, because the issue was not squarely presented, the court did not squarely address it. It stated only:

> The district court did not make any factual findings about how much money Bradley obtained. It found only that the proceeds of the conspiracy amounted to a million dollars. That Jones delivered Buchanan's payments to Bradley tells us nothing about what happened to the money after that. The evidence says nothing about whether Bradley kept all of this money—an improbable development in an eighteen-member conspiracy.

Bradley, 897 F.3d at 783. The court does not read this dictum as an actual holding that forfeiture is limited to the "net" amount *re*tained, as opposed to *ob*tained, by a defendant.

Although the Sixth Circuit has not addressed the question directly in a reported opinion, it has held in an unreported opinion that the term "proceeds" as used in § 853(a) must mean gross and not net proceeds. *United States v. Logan*, 542 F. App'x 484, 498 (6th Cir. 2013) (citing *United States v. Olguin*, 643 F.3d 384, 400 (5th Cir. 2011); *United States v. Heilman*, 377 F. App'x 157, 211 (3d Cir. 2011); *United States v. Bucci*, 582 F.3d 108, 123 (1st Cir. 2009)). The court found "persuasive" these courts' determinations, based largely on "the plain language of 21 U.S.C. § 853." *Logan*, 542 F. App'x at 498. For example, the court noted that § 853 "also uses the phrase 'profits or proceeds,' and '[t]o interpret the term "proceeds" in the phrase "profits or other proceeds" to mean profits would render the word "profits" redundant.'" *Id.* (quoting *Bucci*, 582 F.3d at 123).

Post-*Honeycutt*, other circuit court decisions have continued to recognize, albeit without much discussion, that § 853(a) "contemplates the [forfeiture of] gross proceeds and not merely profits." *United States v. Purify*, 743 F. App'x 187, 191 n.5 (10th Cir. 2018); *see also United States v. Leyva*, 916 F.3d 14, 29–30 (D.C. Cir. 2019) (noting that, even following *Honeycutt*, it is "far from clear that property acquired by an organization cannot qualify as property 'obtained,

directly or indirectly' by a leader of that organization" since, in the case of a defendant who is the leader of a criminal enterprise, "property obtained 'indirectly' might include 'property received by persons or entities that are under the defendant's control,' such as 'an employee or other subordinate of the defendant'").

Several district courts, as well, have rejected arguments that *Honeycutt* must mean that a defendant can only be liable for the forfeiture of his net proceeds from the criminal conduct. In particular, this court is persuaded by the analysis in *United States v. Carey*, 267 F. Supp. 3d 29 (D.D.C. 2017), which analyzed in depth the issue. The defendant there, like Bradley here, argued that the term "proceeds" as used in § 853(a) must mean the net profit to the particular defendant against whom forfeiture is sought. The court disagreed:

> Carey's primary argument is that the term "proceeds" as used in § 853(a)(1) refers to net profit (that is, all of the income from the crime minus the expenses) not gross proceeds (simply all of the income). . . . However, the text of the statute and the weight of relevant precedent convince the Court that "proceeds" as used in § 853(a) means gross proceeds . . . .
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> The Court first looks to the statute's text and context to understand its meaning. Section 853 does not explicitly state which meaning of "proceeds" it employs. As the Supreme Court has explained, the term "'[p]roceeds' can mean either 'receipts' or 'profits' . . . in ordinary usage." [*United States v. Santos*, 553 U.S. 507, 511 (2008) (plurality opinion).] Thus, "[r]ecognizing the word's inherent ambiguity, Congress has defined 'proceeds' in various criminal provisions, but sometimes has defined it to mean 'receipts' and sometimes 'profits.'" *Id.* at 512 (citations omitted).
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> Here, however, "since context gives meaning," the word "proceeds" as used in the context of § 853 is not ambiguous. *See id.* at 512. The section repeatedly uses language that indicates its scope is as broad as possible. It emphasizes that "any property constituting, or derived from, any proceeds" is included, whether obtained "directly or indirectly." 21 U.S.C. § 853(a)(1). The expansive definition of covered property—that is, any property "used, or intended to be used, in any manner or part" to commit the crime, *id.* § 853(a)(2), including "tangible and intangible personal property, including rights, privileges, interests, claims, and securities," *id.* § 853(b), underscores the point. As the Supreme Court has remarked regarding § 853(a), "Congress could not have chosen . . . broader words to define the scope of what was to be forfeited." *United States v. Monsanto*, 491 U.S. 600, 607 (1989). The majority of circuit courts to consider whether "proceeds" in § 853 means net profits or gross receipts have reached the same conclusion.

> Neither of the two cases relied on by the defendant convince[s] the Court that this interpretation based on the statute's plain text is incorrect. Recently, the D.C. Circuit considered whether a single conspirator could be ordered to forfeit proceeds gained by all co-conspirators that were reasonably foreseeable to him, rather than the proceeds that he alone acquired. The court held that the phrase "any proceeds the person obtained" in § 853(a)(1) limited the permissible forfeiture amount to the defendant's proceeds alone. [*United States v. Cano–Flores*, 796 F.3d 83, 90–95 (D.C. Cir. 2015).] The court provided extensive reasoning, but as relevant here, it explained that even if the statute "permit[ed] the government's construction, '[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.'" *Id.* at 93–94 (quoting *Santos*, 553 U.S. at 514) (second alteration original). The court further explained that the rule of lenity carried more weight than § 853(o)'s instruction to construe the forfeiture statute liberally. *Id.* at 94. . . . But [the rule of lenity] only applies when the statutory text is ambiguous. Here, as explained above, the text is clear: proceeds means gross receipts, not net profits. The rule of lenity is thus inapplicable.
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> The Supreme Court's decision in *Santos* has even less bearing on this case. In *Santos*, the court held that the term "proceeds" in the statute defining predicate offenses for money-laundering crimes, 18 U.S.C. § 1956(a)(1), was ambiguous and therefore under the rule of lenity must mean only net profits, not gross receipts. That ruling concerned a different statute than the one at issue here, with different statutory text. Moreover, the Court (in both the plurality and the concurring opinions) was concerned with the "merger" problem that would arise if the same underlying conduct—paying the expenses of running an illegal gambling operation—sufficed for both the gambling offense and the money-laundering offense. That problem is not relevant here, because § 853 is only a forfeiture provision; it does not define a substantive offense. For these reasons, multiple circuits have concluded that, despite *Santos*, "proceeds" as used in § 853 refers to gross receipts, not net profits. This Court finds the reasoning of those circuits to be persuasive, and adopts it here. Thus, the Court reads the term "proceeds" as used in § 853(a)(1) to mean gross proceeds.

United States v. Carey, 268 F. Supp. 3d 29, 31–33 (D.D.C. 2017) (footnotes and some internal citations omitted); *accord United States v. Ward*, No. 2:16-CR-6, 2017 WL 4051753, at *3 (W.D. Mich. Aug. 24, 2017) (report and recommendation) ("Moreover, *Honeycutt* does not suggest that calculating forfeiture based on gross proceeds is improper. . . . [T]he amount of forfeiture in this case is properly calculated based on gross proceeds."), *report & recommendation adopted*, No. 2:16-CR-06-01, 2017 WL 3981160 (W.D. Mich. Sept. 11, 2017), *aff'd*, 757 F. App'x 507 (6th Cir. 2019) (finding right to appeal waived by the failure to object to report and recommendation).

Given the direct opportunity, the Sixth Circuit may conclude otherwise, but at this juncture, this court is persuaded by the existing precedent from the Sixth Circuit and elsewhere that the statutory term "proceeds" means gross proceeds, not net. Thus, in particular because Bradley was at the head of the conspiracy, the question of what he might have done with the money after "obtaining" it is largely irrelevant. This is true, whether he spent the money to pay his employees or on Nike Air Jordan shoes and weekend trips to Las Vegas.

2. What "Proceeds" Did the Defendant "Obtain" in this Case?

The government bears the burden of proving the amount of the proceeds subject to forfeiture by a preponderance of the evidence. *United States v. Warshak*, 631 F.3d 266, 331 (6th Cir. 2010); *United States v. Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992). Applying that standard, and regardless of how narrowly the terms are construed, the court finds that the government has established that Bradley obtained well in excess of $1,000,000 during the course of the conspiracy and that it is entitled to a forfeiture judgment in the amount of $1,000,000.

In this case, the defendant concedes that the government has established that Bradley "acquired" $268,007 in "illicit proceeds—the total value of cash deposited from Tennessee into Bradley's and his wife's bank accounts." (Doc. No. 1191, at 10.)[5] However, in addition to that sum, co-defendant Felicia Jones testified under oath at Bradley's sentencing that co-defendant Donald Buchanan paid for the pills he was buying from Bradley by depositing funds into an account held in Jones' name. Once Buchanan deposited the funds, Jones would "withdraw the money and . . . give it to Mr. Bradley." (Doc. No. 919, at 17.) That is, Bradley obtained this money. This practice started in 2012 and continued until the bank closed the account in approximately June 2014. (*Id.* at 19.) Agent William DeSantis, Special Agent with the IRS Criminal Investigation Unit, testified that the amount deposited into Jones' Bank of America account, the one she testified she held for the purpose of depositing funds that she would later

[5] He argues that Bradley should not be responsible for that gross amount, however.

transfer to Bradley, from 2012 through 2014, was $530,618.[6] That figure, added to the amount deposited by Buchanan directly into Bradley's and his wife's accounts during the same time frame, adds up to $798,624.

DeSantis also testified about $55,953 deposited into an account held in Jones' name at Fifth Third Bank. However, Jones never testified that she held the funds in that account for or on behalf of Bradley. In addition, Jones testified that Buchanan had her pick up pills from other people and deliver them to him at the same time that she delivered pills from Bradley and that Bradley had nothing to do with this side endeavor. Thus, she apparently had income from Buchanan that Bradley never in any sense "obtained." Accordingly, the court finds that the government has not established by a preponderance of the evidence that Bradley "obtained" the $55,953 deposited into Jones' Fifth Third Bank account, regardless of whether that figure is nonetheless attributable to the conspiracy as a whole.

Despite that finding, the amount of money that Bradley actually obtained during the course of the drug-distribution conspiracy is not limited to those funds that were part of the money-laundering conspiracy. The court found at sentencing that the government had established by a preponderance of the evidence that the conspiracy began no later than 2009. (Doc. No. 919, at 218–19.) Bradley obviously obtained funds from the conspiracy before the money laundering began in 2012. In addition, following the closure of Jones' Bank of America account in 2014, after the bank apparently began to suspect money laundering, the defendant continued distributing prescription opioids for an additional eight to ten months and continued to profit from that endeavor.

In particular, Jones testified that, after her bank account was closed in mid-2014, Bradley

[6] Notably, if forfeiture had been sought against Felicia Jones, the fact that the money from Buchanan was deposited into her account, for Bradley's benefit, and that she conveyed the money to Bradley after Buchanan made the deposits would likely not have been sufficient to establish that Jones herself "obtained" this money. Rather, it was through her that Bradley obtained the money, indirectly, from Buchanan.

had her drive to Cincinnati to deliver pills in exchange for money. She initially made two trips with "a guy named Eric," and then ten to twelve trips on her own. (Doc. No. 919, at 34–35.) She delivered anywhere from 300 to more than 1000 pills per trip, which she exchanged for money that she delivered to Bradley. (*Id.* at 36.)

The government points to two "snapshots" that it claims are revelatory of how substantial each of the hand-deliveries was and how much money each generated in return. First, on January 8, 2015, agents learned through wiretap interceptions that Buchanan would be flying from Nashville to Detroit to meet with Bradley and had enlisted a friend who worked at the airport to help him get a large sum of cash through security. Buchanan later told agents that he had roughly $12,000 in cash with him that day, with some of it hidden in his shoes. Second, on March 12, 2015, Buchanan was arrested as he left his house in Antioch to drive to Cincinnati to meet Jones. Inside his car, he had $24,830 in cash that he was planning to hand to Jones to deliver to Bradley. The government asks the court to "extrapolate" these two snapshots over the "eight-plus months between June 2014 and March 2015," arguing that it supports a conclusion that Bradley personally obtained somewhere between $288,000 and $595,920 during that time frame.

The court has no difficulty in construing the testimony presented during the sentencing hearing as adequate to establish by a preponderance of the evidence that Bradley obtained at least another $202,000 during that time, from Buchanan alone, based on Jones' approximately fourteen trips to Cincinnati (counting the initial two with McEwen), the fact that Jones was not the only person making such trips, and the reasonable presumption that Jones and others brought back a minimum of approximately $12,000 to Bradley after each trip. The evidence presented at sentencing established that, at a minimum, Jones or another co-conspirator made a trip to deliver pills from Bradley to Buchanan at least two to three times per month over the course of at least eight or nine months. Seventeen trips multiplied by $12,000 is $204,000. That figure, when combined with the $798,624 deposited into bank accounts for Bradley's benefit, means that h

personally obtained a gross amount of more than $1,000,000 during the course of the conspiracy.

Alternatively, as summarized in the Presentence Report ("PSR"), co-conspirators Donald Buchanan and Pamela O'Neal provided statements about the number of pills Bradley actually obtained, directly or indirectly, during the course of the conspiracy:

> In making a conservative estimate, based on Buchanan's statements, the defendant is responsible for at least 50 OxyContin (80 mg) pills and 60 Roxicodone (30 mg) pills, both [of] which are oxycodone pills. In addition, the defendant is responsible for 1 Opana (15 mg) pill and 1 Opana (40 mg) pill, both of which are oxymorphone pills.
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> 15. Further Pamela O'Neal . . . stated that in 2012, she moved into a residence owned by the defendant located at 14425 Curtis Street, Detroit, Michigan. Beginning in approximately July 2013, the defendant had individuals "drop off" pills at the residence in which she resided. O'Neal stated the main pills she received were oxycodone (30 mg) pills and reported that she received 300 pills per day from July 2013 to March 2012, 2015. In making a conservative estimate of the additional quantity for which the defendant is responsible based on Pamela O'Neal's statements, one can estimate 300 pills per day from July 31, 2013, to March 12, 2015, for a total of 621 days and 186,300 pills (300 x 621). . . .[7]
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> 16. In regard to Count One, the total amount of controlled substances for which the defendant is being held accountable is 50 oxycodone (80 mg) pills, 1 oxymorphone (15 mg) pill, 1 oxymorphone (40 mg) pill, and 186,360 (60 + 186,300) oxycodone (30 mg) pills.

(Doc. No. 1019, at 8–9.)

O'Neal's testimony at the sentencing hearing was largely consistent with the information given at her proffer and used by the Probation Office in drafting the PSR. She testified that, to the best of her recollection, she began driving people to the doctor for Bradley "to get their prescriptions." (Doc. No. 919, at 84.) She would drive three to six people a day, three or four days a week. (*Id.* at 85.) This arrangement continued for approximately a year. (*Id.* at 86.) She "got tired" of driving people so, instead, people began dropping pills off at the house owned by Bradley in which O'Neal lived for free. She collected these pills for Bradley. She estimated that,

[7] At the sentencing hearing, O'Neal testified that she received five to ten bags of pills per day, and each bag contained from 60 to 90 pills (Doc. No. 919, at 90), so an estimate of 300 pills per day appears to be very conservative.

beginning in August or September 2012, at least ten people were dropping off baggies of pills at the house on a daily basis. She would receive five to ten bags of pills per day, and she estimated that each bag contained from 60 to 90 pills. (Doc. No. 919, at 88–90.) This arrangement continued until she was arrested in March 2015.

Based on the information in the PSR and the testimony presented at the sentencing hearing, the court found that the government established that Bradley himself is responsible for distributing at least 186,412 opioid pills. The court finds that Bradley, as the leader of the conspiracy, obtained, directly or indirectly, that number of pills. As the government argues, the government may, in a narcotics case, sustain its burden of proof as to the amount of a forfeiture by multiplying the number of pills sold by the price for which the defendant sold them, and not merely the net profit pocketed by the defendant from the sale of each pill. *See, e.g.*, *United States v. Basciano*, 649 F. App'x 42, 43 (2d Cir. 2016) ("[I]n a narcotics case, the government may sustain its burden by proving the quantity of [narcotics] dealt . . . multiplied by the price it could have commanded." (internal quotation marks and citation omitted)); *United States v. Prather*, 456 F. App'x 622, 626 (8th Cir. 2012) (holding that a personal money judgment was correctly calculated based on the defendant's cocaine sales and that "[t]he law does not demand mathematical exactitude in calculating the proceeds subject to forfeiture" (quoting *United States v. Roberts*, 660 F.3d 149, 166 (2d Cir. 2011)); *United States v. Huggins*, 392 F. App'x 50, 63 (3d Cir. 2010) (upholding a district court's determination of a forfeiture amount based on statements the defendant made about the amount of cocaine he possessed and law enforcement officers' statements regarding the price of cocaine at the time of the conspiracy).

Here, multiplying the number of pills sold by $10, a very conservative estimate in light of the evidence that many of the pills sold for as much as $32 each, Bradley personally obtained at

least $1,864,120 from the sale of these pills.[8] Bradley likely "obtained" substantially more than this estimate.

In sum, the court finds that the government has established by a preponderance of the evidence that the defendant personally obtained, directly or indirectly, at least $1,000,000 from his participation in the opioid distribution and money laundering conspiracies to which he pleaded guilty.

3. Section 3553(a)(6) Does Not Apply to Forfeiture Determinations

Forfeiture under § 853 is mandatory rather than discretionary. *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."). Moreover, "the statute provides that all right, title, and interest in property subject to forfeiture 'vests in the United States upon the commission of the act giving rise to forfeiture under this section.' This means that '[a]fter the commission of the criminal acts, title to the forfeitable property, by operation of the relation-back clause, actually belongs to the government.'" *United States v. Galemmo*, 661 F. App'x 294, 296 (6th Cir. 2016) (quoting 21 U.S.C. § 853(c) and *United States v. Huntington Nat'l Bank*, 682 F.3d 429, 433 (6th Cir. 2012)). No part of § 853 suggests that courts are to take into account the equitable factors enumerated in § 3553(a) in calculating the amount to be forfeited. *Accord United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) ("Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning

[8] Moreover, even if only his net profit on the sale of each pill is considered to have been "obtained" by Bradley—that is, the price at which he sold each pill minus the amount he paid for each pill—the evidence supports a presumption that this net figure was at least an average of $6.00 per pill. The Government's Exhibit 1b consists of a transcript of TT9–Call 3192 Line Sheet of a March 2, 2015 telephone call between Bradley and co-defendant Eric McEwan. During this call, McEwen appears to be asking for a break in the sale price. Bradley scoffs that he "can't just make two dollars, three dollars, that's preposterous." Instead, he appears to be insisting on a profit of $6.00 per pill. A profit of $6.00 per pill yields a net profit of at least $1,118,472, still more than the $1,000,000 sought by the government.

was in error."); *United States v. Taggert*, 484 F. App'x 614, 615 n.2 (2d Cir. 2012) (noting that it is "not apparent that § 3553(a)(6) applies to an order of forfeiture," given that both 18 U.S.C. § 3554 and 21 U.S.C. § 853(a) mandate forfeiture where they apply, and neither "incorporates or makes reference to the sentencing factors listed under § 3553(a)"); *United States v. Fleet*, 498 F.3d 1225, 1229 (11th Cir. 2007) ("The word 'shall' [in § 853(p)(2)] does not convey discretion. It is not a leeway word, but a word of command." (internal quotation marks and citation omitted)).

Moreover, as the court found during Donald Buchanan's sentencing hearing, where the government argued that his conduct was comparable to Bradley's, Bradley is significantly more culpable than Buchanan. Bradley was "the one amassing all of the pills in Detroit," sending people to the doctor to obtain prescriptions, and paying them for those prescriptions; he recruited three middle-aged women, Felicia Jones, Pam O'Neal, and his own sister, to run stash houses and store and transport money and drugs, and he generally got them into a "whole lot of trouble." (Doc. No. 948, at 109–10.) None of the other defendants is remotely comparable to Bradley in terms of the seriousness of the conduct. Thus, there are no similarly situated comparators against whom Bradley can claim an unwarranted disparity.

Section 3553(a) does not authorize the court to reduce the amount of forfeiture to be ordered.

B. The Bundles of Cash

The government seeks the forfeiture of two parcels of cash that were discovered during the execution of search warrants on March 12, 2015 at Bradley's parents' home at 15540 Prevost in Detroit ($46,300) and at Bradley's home on Harmony Lane ($78,300).

Regarding the first parcel, Bradley's sister, Bernadette Bradley, testified at the sentencing hearing in February 2017 that she assisted her brother in distributing money and prescription bottles of pills to people, both of which she would retrieve from their parents' house at hi

direction. (Doc. No. 919, at 134–40.) She specifically testified that, at one point, Bradley called her to tell her that their mother wanted him to "move some money because [their] dad was dipping in it." (*Id.* at 139.) Bernadette moved a bundle of money from inside a piano bench to the bar at their parents' house. (*Id.* at 140.) DEA Task Force Officer Frank DeRiggi testified that he assisted in the execution of the search warrant at the house on Prevost and that the evidence seized from that location included a "large sum of currency, firearms and narcotics." (Doc. No. 919, at 150.) Narcotics were found hidden, for instance, inside an ottoman in a poolroom area. Currency in the amount of $46,300 was found hidden behind a bar in the kitchen area of the house, "where Mr. Bradley, the defendant, told his sister to put it." (*Id.* at 152.) DeRiggi was personally involved in locating the money. (*Id.* at 150–52.).

DEA Special Agent John Krieger testified at the sentencing hearing that he was present at the search of Bradley's house on March 12, 2015, when approximately $78,000 in cash was found. (*Id.* at 177.) "[S]ome of the cash was vacuum sealed. The other cash was in bundles." (*Id.* at 178.) Krieger testified regarding the other items found at the house that were "indicative of large sums of money being spent," including expensive jewelry, three Rolex watches, a receipt from the Marquee Nightclub in Las Vegas, Nevada for $11,108.76, and "60-plus pairs of Nike Air Jordans." (*Id.* at 177, 183.)

In his initial Response to the forfeiture motions, as indicated above, the defendant did not object to or even address the forfeiture of the parcels of cash. (Doc. No. 958, at 1.) Now, while he does not dispute that the funds at issue were obtained during the course of the conspiracy, he argues that the government is not entitled to the presumption provided by 21 U.S.C. § 853(d), because it cannot show that "there was no likely source for such property other than" the drug conspiracy. Specifically, he contends that he had "substantial legitimate income before and during the conspiracy," earning "over $292,000 through pension distributions, real estate sales, and his work at Sinai Grace Hospital" between 2010 and 2014. (Doc. No. 1191, at 3 (citing Hr'

Tr., Doc. No. 1185, at 62–74, and Exhibits 1A, 2A, 3A, 5A, and 6A (Bradley's tax returns for 2010–14)).) Bradley also contends that the amounts reflected on his tax returns "understate" the total amount of funds at his disposal, because he also received almost $100,000 from the sale of eleven investment properties, although he reported a gain of only $23,529 from those sales. In other words, Bradley says, he collected an additional $76,171 in "legitimate funds not reflected" in his tax returns. (Doc. No. 1191, at 3.) He also claims that he received $90,465 in sales from his event promotion business in 2014, but none of that amount is reflected in his gross income for the year, because the business operated at a loss. (*Id.* (citing Exhibit 6A).) He claims that this evidence shows that he had sufficient income from legitimate sources to rebut the presumption in § 853(d). (Doc. No. 1191, at 4.)

Regarding the $46,300 found at Bradley's parents' house, the government, through Bernadette Bradley's testimony, clearly carried its burden of establishing by a preponderance of the evidence that that parcel of cash directly constituted or was derived from proceeds obtained through the sale of drugs, 21 U.S.C. § 853(a)(1), without the need to resort to § 853(d).

Regarding the other parcel of cash, the court finds that the evidence is sufficient to give rise to the § 853(d) presumption and that Bradley has not rebutted it. Bradley pleaded guilty to participation in a multi-year conspiracy to distribute controlled substances including Oxycodone and Oxymorphone. As set forth above, the government has established that Bradley personally obtained at least $1,000,000 in the course of his participation in this conspiracy. From 2010 through 2014, his income from his legitimate job averaged about $58,000 annually. While Bradley suggests that this figure understates his actual income, the evidence to which he points does not support that conclusion. First, although Bradley states that he received over $90,465 in sales from his event-planning business in 2014, the same tax return upon which he relies for that figure also reflects direct overhead expenses of $90,892 and an operating loss for the business. (Hr'g Ex. 6A (2014 Tax Return).) There is no evidence that this business contributed positively

to his cash flow or income. He also states that he received approximately $100,000 from the sale of eleven pieces of property during that relevant time frame, but the actual gains on the properties he purchased was very modest. (*See, e.g.*, Def.'s Exs. 4A and 5A; Doc. No. 1191, at 3.) Moreover, it also appears that he used whatever funds were generated from the sale of property to buy other properties. (*See* Doc. No. 919, at 200 (IRS Special Agent William DeSantis's testimony that the defendant at one time owned 21 pieces of property and, at the time of his arrest, still owned 17).) And his income from his legitimate job, with which he supported a wife and two children, generally would not have allowed him to spend thousands of dollars on investment real estate in the first place, but for the fact that he was also making a substantial amount of money from selling prescription pills.

His legitimate annual income from his job, while sufficient to support his family, was nonetheless modest. A package of cash in the amount of $78,300—substantially more than his annual income—cannot be explained except by his participation in the drug conspiracy. The defendant attempts to avoid this conclusion by citing to various court opinions that support the general proposition that "oddly packaged" currency, "without more, . . . does not suggest a connection to drug trafficking." (Doc. No. 1191, at 9 (quoting *United States v. Mondragon*, 313 F.3d 862, 866 (4th Cir. 2002)).) *See also United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 452 (7th Cir. 1997) ("[T]he mere existence of currency, even a lot of it, is [not] illegal. . . . Absent other evidence connecting the money to drugs, the existence of money or its method of storage are not enough to establish probable cause for forfeiture . . . ."); *United States v. One Lot of U.S. Currency Totaling $14,665*, 33 F. Supp. 2d 47, 49 (D. Mass. 1998) ("The possession of cash, even in large amounts, does not create a rebuttable presumption that one is engaged in criminal activity."). Courts do recognize, however, that "the presence of large quantities of cash reasonably raises suspicions as to its origins and the intent of its holder." *One Lot of U.S. Currency Totaling $14,665*, 33 F. Supp. 2d at 53 (citing *United States v. $150,660*, 980 F.2d

1200, 1206 (8th Cir. 1992)). And in this case, unlike most of those cited by the defendant, the person from whom the cash was seized was actually convicted of participating in a drug-distribution conspiracy, and many other factors beyond simply the existence of a large sum of money contribute to the conclusion that the money is linked to that conspiracy. Moreover, as the court previously found, the location, manner of storage and packaging of the currency constitutes further evidence that the cash was not obtained through legitimate activity.

The court finds that the government has established by a preponderance of the evidence that the cash found at Bradley's house, too, was acquired during the conspiracy and that there was no likely source for the cash—which substantially exceeded his annual income from legitimate sources—other than the drug conspiracy. The motion for forfeiture of both of the cash parcels, therefore, will be granted. The total of the two parcels, $124,600, will be credited against the $1,000,000 money judgment.

C. The Real Properties

a. 45669 Harmony Lane

Bradley contested the forfeiture of this property prior to the remand. Agent DeSantis testified at the sentencing hearing that he had conducted a title search but never found a recorded deed that transferred ownership of the property to Bradley, though he did find a recorded deed that transferred the property from Bradley to his wife, Kareema Hawkins, on April 23, 2015, six weeks after Bradley was indicted. (Doc. No. 919, at 201–02.)

DeSantis submitted an Affidavit in May 2017 that included additional information. Specifically, he had discovered that Krikor Holding Company ("KHC") owned the Harmony Lane property in 2012 and that Majid Krikor was the owner of KHC. KHC had purchased the property from Wayne County, Michigan in 2012 for $87,499. (Doc. No. 986-1 ¶ 1.) Majid Krikor had further told DeSantis that he sold the property to Benjamin Bradley in 2014 for "approximately $105,000 in gold coins and scrap gold." (*Id.* ¶ 2(b).) Krikor did not remember

the exact date of the transaction but recalled signing a deed and giving it to Bradley. (*Id.*) Krikor had been able to locate a Tax Form 1120s that he had filed with his 2014 tax return, reflecting that he had sold the property on January 1, 2014. Krikor stated that he did not recall the exact date of the transaction but believed that it had taken place in early 2014. (*Id.* ¶ 2(d).) Benjamin Bradley was listed as the taxpayer for the property at the Wayne County Treasurer's Office in 2014. (*Id.* ¶ 3 & Ex. 2.)

DeSantis's Affidavit also indicated that Bradley had been arrested on March 12, 2015 and remained in custody continuously after that time. Nonetheless, DeSantis had located a deed, purporting to show Bradley's signed and notarized signature, conveying the Harmony Lane property to Kareema Hawkins. The visitor logs for the jail where Bradley was detained did not reflect a visit from the notary, Sonja Halton. (Doc. No. ¶¶ 4–9.)

At the May 2019 hearing, DeSantis testified that he had done additional research since the sentencing hearing and the submission of his affidavit. He had spoken again with Krikor, who told DeSantis that he had sold the property to Bradley "probably a couple months after he purchased the house" for "[a]round a hundred thousand dollars. He wasn't sure of the exact amount." (Doc. No. 1185, at 47.) Bradley paid for the property "in gold coins [and] scrap gold," "including some watches," in installment payments over the course of "a year or so." (*Id.* at 47, 48.) DeSantis had also obtained a tax document from Krikor that reflected the sale of 45669 Harmony Lane on January 1, 2014 for $91,350. (*Id.* at 9 & Gov't Ex. 3A.) DeSantis explained that that figure would reflect the "proceeds from the sale. So if . . . there were some expenses that were paid, then that would come off the top line." (Doc. No. 1185, at 50.)

Although DeSantis searched for a deed reflecting the transfer from Krikor to Bradley, he was unable to find one, but he did receive a document from the tax division of the Wayne County clerk's office. The document reflects that the property was sold by Krikor Holding, LLC to Benjamin Bradley on October 31, 2012 for $100,000. (Doc. No. 1185, at 51 and Gov't Ex.

4A.) It was signed by Ben Bradley on February 3, 2014. According to DeSantis, the purpose of submitting this document would have been to ensure that the property tax bill was sent to Bradley instead of Krikor. (Doc. No. 1185, at 50.)

DeSantis had also done additional research into the question of whether the deed conveying the property to Kareema Hawkins was forged. Besides having established that the jail records did not reflect that the notary, Sonja Halton, had visited Bradley in jail, DeSantis tracked down Halton, who told him she had not notarized the deed and, in fact, had never notarized a real estate document. Finally, DeSantis noted that he had researched the current status of the Harmony Lane property and discovered that, as of January 2019, it was listed for sale for $449,000. (Doc. No. 1185, at 55–56.)

On cross-examination, defense counsel attempted, essentially, to impeach Krikor through DeSantis and to highlight inconsistencies regarding the sale price and the lack of specificity regarding when, exactly, the sale had taken place. DeSantis agreed that, when he first spoke to Krikor in 2017, Krikor had told him he sold the Harmony Lane property to Bradley for $105,000. (Doc. No. 1185, at 57.) Questioned again in 2019, he remembered the sale price as being "around $100,000." (*Id.* at 59.) The tax document reflected a sale price of around $91,000. DeSantis conceded that any major expenses and capital improvements would have been reflected in the cost basis and not the sales proceeds but maintained that any sales expenses would be deducted from the sales price. (Doc. No. 1185, at 58.) Counsel asked whether Krikor had originally told him that Bradley had paid for the property in one lump sum. DeSantis explained that he probably had not asked how Bradley had paid: "I don't know that I asked him how it was paid until yesterday. . . . I just assumed at the beginning maybe that he paid it in one lump sum. . . . I asked him how much [Bradley] paid for it." (*Id.* at 60.) DeSantis reiterated that he was not aware until his conversation with Krikor just before the May 2019 hearing that Bradley had paid in installments over time and that there was no actual documentation reflecting how or when th

sale took place:

> I don't know that the actual sale took place in 2012 or 2013 or 2014. There's no documentation regarding the actual date.
>
> The only dates that we know that are recorded are the deed when Mr. Krikor purchased the property and the time [Bradley] transferred it to Kareem Hawkins.
>
> His statement on the property tax bill is the statement that was submitted to the clerk's office. I don't have any way to verify that date. I don't know if October 31st was the date.
>
> I have a . . . range of time when the transaction could have occurred. That's October 18th of 2012 when Mr. Krikor bought it and then ultimately sold it to Mr. Bradley, and he started receiving tax bills.

(Doc. No. 1185, at 61–62.)

In his post-remand Response to the government's forfeiture motions, Bradley argues that (1) the government's evidence does not show that Bradley paid for the Harmony Lane house with funds drawn from an account where he stored illicit proceeds; (2) the government's evidence does not establish any direct link between payments Bradley received through the conspiracy and funds used to purchase the Harmony Lane property; (3) payment in gold over an approximately fourteen-month period is insufficient to establish that the property was purchased with funds derived from the drug-distribution offense, particularly since no evidence was presented to establish the source or origin of the gold supposedly used to pay for the house; (4) Bradley's tax records establish that he had sufficient funds to pay for the purchase of the Harmony Lane house, whether in gold or otherwise; and (5) Krikor's statements are not reliable.[9]

[9] Bradley also asserts, in a footnote, that "[t]he government has never reconciled Krikor's contentions with the auction sheet introduced at Bradley's sentencing hearing (Def.'s Ex. 3), which indicates that Bradley purchased Harmony Lane through an auction." (Doc. No. 1191, at 7 n.6.) The exhibit to which he refers, however, simply shows that someone purchased the property at a tax auction for $87,499 on September 20, 2012. At the sentencing hearing, the court agreed to accept the exhibit but noted that no foundation had been laid for it and that it constituted hearsay. Nothing in the record remotely suggests that Bradley purchased the property at auction in 2012. The tax record signed by Bradley states that he purchased the house in October 2012 from Krikor Holding, LLC for $100,000. (Gov't Ex. 4A.) Moreover, DeSantis testified that he had ascertained that KHC had purchased the property in 2012 for $87,499. The defendant's Exhibit 3 is entirely consistent with DeSantis's testimony.

Most of the defendant's arguments are beside the point. The government's evidence is sufficient to establish by a preponderance of the evidence that the Harmony Lane house was purchased during the course of the conspiracy and that it was purchased for approximately $100,000 over the course of just over a year. Bradley's income from legitimate sources was not sufficient to have allowed him to pay cash to purchase the house within such a short time frame irrespective of whether payment was in the form of gold coins and jewelry or U.S. dollars. The § 853(d) presumption in favor of forfeitability therefore arises, and Bradley has not rebutted that presumption.

In particular, while Bradley asserts that he "took home roughly $290,000 in post-tax, legitimate income between 2010 and 2014" (Doc. No. 1191, at 3), suggesting that this sum somehow would have been enough to fund the purchase of the home, this figure, divided by five years, amounts to an average annual income of $58,000—a significant but nonetheless modest salary. Annual income in the amount of roughly $58,000 would certainly have been sufficient to permit Bradley to provide for his family's needs, but it is not enough to allow him to purchase a home for $100,000 in cash in one year, particularly in the absence of any evidence that he had been setting aside savings from his legitimate income over the course of several years (at a minimum).[10]

Bradley also asserts that the more reasonable assumption is that he purchased the property by "reinvesting" funds he obtained from selling other properties. As set forth above, however, the evidence introduced by the government indicates that the net income from Bradley's real estate business—like the net income from his event-planning business—was minimal. Moreover, it appears that Bradley used the funds obtained from selling investment

[10] As William DeSantis testified at the May 2019 hearing, an income of $60,000 annually yields approximately $5,000 per month, but paying off a $100,000 house over the course of fourteen months would mean payments of roughly $7,000 per month. (Doc. No. 1185, at 86.) Bradley's legitimate work income was clearly not sufficient to afford these payments.

properties to buy other investment properties. The only realistic source of the funds used to purchase the Harmony Lane house was the drug-dealing conspiracy.

The court has no need to consider the circumstances of Bradley's conveyance of the property to Kareema Hawkins, which took place after he had been arrested. If she believes that she is a bona fide purchaser for value or otherwise has a legal claim to the property, she may assert a claim to establish her entitlement to the property by following the procedure set out in the accompanying Order.

b. 14427 Curtis, 16617 Lesure, and 15355 Ohio

At the sentencing hearing in February 2017, IRS Special Agent William DeSantis testified that Bradley purchased 16617 Lesure on November 18, 2011 for $3,000. (Doc. No. 919, at 200–01.) He purchased 14427 Curtis and 15355 Ohio Street on November 16, 2012 for $1,800 and $900. (*Id.* at 201.) Regarding these properties, Bradley argues that the government has not established that the § 853(d) presumption arises and that the government has not carried its burden of establishing that these properties were used for or purchased with funds derived from the drug distribution conspiracy.

In particular, he claims that he purchased all of the properties for "very modest sums" and that his income, whether from his job or from selling other properties, was more than sufficient to cover the purchase prices. The court finds, again, that, while Bradley's income was sufficient to support his family, it was not so great that he would likely have had cash on hand to begin purchasing investment properties in 2011, but for his participation in the drug-distribution conspiracy. Moreover, although the purchase prices of each of the properties individually was relatively small, Bradley at one point owned as many as twenty-one properties. In other words, the total he spent on real estate added up, and his income from his job was not sufficient to support the purchase of these properties and his family as well. Specifically, given that Bradley's legitimate income was less than $5,000 per month, pulling together $3,000 to pay for a piece of

real estate (and he actually bought two pieces of real estate in November 2011, each for about $3,000) from that salary is not realistic. There is no evidence that the defendant had a savings account in which he had been stashing away a few hundred dollars per month from his salary over a long period of time to make these purchases, nor is there evidence of any real estate loans. The court therefore finds that the government has established that "there was no likely source [of funds for the purchase] for such property other than" the offenses of conviction, 21 U.S.C. § 853(d), and Bradley has not come forward with any actual evidence to rebut the presumption that the properties are subject to forfeiture.

IV. Conclusion

For the reasons set forth herein, the government's Motion for Entry of a Preliminary Order of Forfeiture (Doc. No. 858) and Motion for an Order of Forfeiture of at Least a $1,000,000 United States Currency Money Judgment (Doc. No. 861) will be granted. To be clear, the $1,000,000 forfeiture judgment is the maximum total to which the government is entitled, and the value of the forfeited real estate and cash by Bradley shall be credited toward the $1,000,000. An appropriate Order is filed herewith.

ENTER this 20th day of August 2019.

ALETA A. TRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Case No. 3:15-cr-0037-2**
	)	**Judge Aleta A. Trauger**
	)	
BENJAMIN BRADLEY	)	

MEMORANDUM

Before the court is Benjamin Bradley's Motion to Dismiss the Forfeiture Allegations of the Indictment and Deny the Government's Request for a Money Judgment. (Doc. No. 1125.) For the reasons set forth herein, the motion will be denied.

I. Procedural Background

In March 2015, the United States filed a two-count Indictment charging eighteen members of a drug trafficking ring, including Benjamin Bradley, with conspiracy to possess with intent to distribute and conspiracy to distribute Schedule II controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One), and money laundering in violation of 18 U.S.C. § 1956 (Count Two). (Doc. No. 3.) The Indictment also contained forfeiture allegations, giving notice that, upon conviction, the defendants would be jointly and severally responsible for forfeiting to the United States any "property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of" the conspiracy to distribute drugs, "including but not limited to a money judgment in an amount to be determined, representing the gross drug proceeds obtained as a result of such offense," and "any property used, or intended to be used,

. . . to commit, or to facilitate the commission of, such violation," pursuant to 21 U.S.C. § 853(a)(1) and (2). (Doc. No. 3, at 5.) The Indictment further provided for the forfeiture of any real or personal property involved in the conspiracy to commit money laundering, "including but not limited to the proceeds of the violation and including but not limited to a money judgment in an amount to be determined" (Doc. No. 3, at 7), and for the forfeiture of substitute property in accordance with 21 U.S.C. § 853(p).

Bradley pleaded guilty to both counts. (Doc. No. 478.) The court sentenced him to serve seventeen years in prison and, after additional briefing, also ordered him to forfeit currency seized by police, several parcels of real property that he had used in the conspiracy, and up to a million dollars in cash (offset by the value of funds and property seized), on the grounds that Bradley obtained the real property with tainted funds or used it to facilitate his crimes, *see* 21 U.S.C. § 853(d), and that the gross proceeds of the drug-distribution and money-laundering schemes reached at least a million dollars, *see id.* § 853(a). The forfeiture order applied the million-dollar judgment jointly and severally to Bradley and "any other co-conspirator against whom a similar money judgment is taken." (Doc. No. 1005, at 1.) During the initial forfeiture proceedings, Bradley objected only to the forfeiture of one parcel of real property on which was located the house where his wife and minor children resided. He did not object to the money judgment or to joint and several liability.

Bradley appealed both the sentence and the order of forfeiture, raising, for the first time, an objection to joint and several liability based on the Supreme Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). That decision, which was issued approximately two weeks before this court's forfeiture order, clarified that 21 U.S.C. § 853 bars joint and several liability for forfeiture judgments. *Id.* at 1632. In reviewing the appeal, the Sixth Circuit affirmed the

prison sentence but vacated the forfeiture order in its entirety in light of *Honeycutt*. *United States v. Bradley*, 897 F.3d 779, 784 (6th Cir. 2018).[1]

Following issuance of the Mandate, this court conducted a status conference to permit the parties to discuss how to proceed following remand. There, the parties indicated both that they were having discussions about the possibility of resolving the forfeiture issue by a agreement and that the defendant intended to file a motion to dismiss the forfeiture allegations. (Doc. No. 1123.)

In accordance with the briefing schedule to which the parties agreed during the status conference, the defendant filed his present Motion to Dismiss the Forfeiture Allegations, along with a supporting Memorandum of Law. (Doc. No. 1125.) The government has filed its Response in Opposition to the Motion (Doc. No. 1128), and the defendant, with the court's permission, filed a Reply (Doc. No. 1134). The court has benefited substantially from the thorough and excellent briefing on the issues, for which both parties are commended.

II. The Parties' Positions

In his motion, Bradley asks the court to dismiss the forfeiture allegations set forth in the Indictment altogether and to deny the government's request for a money judgment. (Doc. No. 1125, at 1.) In support of his motion, he makes two broad arguments: (1) that the Sixth Amendment bars the courts—as opposed to juries—from making factual findings to support criminal forfeiture; and (2) that a money judgment is not actually authorized by the forfeiture statute.

[1] All co-defendants have now pleaded guilty and been sentenced, and none received a forfeiture money judgment of any kind. In effect, therefore, rather than actually imposing joint and several liability, the forfeiture order made Bradley solely liable for all gross proceeds of the criminal scheme. Such liability would also run afoul of *Honeycutt*, which, in accordance with the language of the statute, authorizes forfeiture only of property or proceeds the defendant actually "'obtained, directly or indirectly, as the result of' certain drug crimes." *Honeycutt*, 137 S. Ct. at 1630 (quoting 21 U.S.C. § 853(a)(1)).

In *Southern Union Co. v. United States*, 567 U.S. 343 (2012), the Supreme Court extended the rule established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to hold that the courts are prohibited by Sixth Amendment considerations from imposing a criminal fine based on facts not contained in the jury's verdict or admitted by the defendant. Bradley asks this court to apply *Southern Union* to hold that the Sixth Amendment likewise bars forfeiture money judgments based on facts not contained in the jury's verdict or admitted by the defendant.

An apparently insurmountable barrier lies between this court and such a holding, however. In *Libretti v. United States*, 516 U.S. 29, 49 (1995), the Supreme Court held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." Bradley attempts to circumvent that obstacle by arguing that *Libretti* has been misconstrued by every court that has considered it. He maintains that the quoted statement from *Libretti* is mere dictum and not part of, or necessary to, the Court's actual holding and, as dictum, is not binding on the lower courts. Thus, the argument proceeds, this court is free to apply *Southern Union* to this case.

In support of his contention that criminal forfeiture falls within the scope of *Apprendi*, Bradley argues that forfeiture is a mandatory criminal penalty rather than an "indeterminate and open-ended" scheme and, as such, that it falls within the scope of *Apprendi* and its progeny. Finally, Bradley contends that the historical record establishes that juries, for most of American history, decided forfeiture issues and that this remained the practice in the United States until 2000, when former Rule 31(e) of the Federal Rules of Civil Procedure was repealed and replaced by current Rule 32.2, which severely limits a defendant's right to a jury on the issue of forfeiture.

In the alternative to his constitutional argument, Bradley insists that the language of the forfeiture statute itself, 21 U.S.C. § 853, does not authorize money judgments; those courts

holding otherwise over the past two decades are simply wrong; and the "plain language" of *Honeycutt* "undercuts" prior decisions allowing money judgments. (Doc. No. 1125, at 21.) He points out that a number of district courts have held that money judgments are not authorized by the statutes. He concedes that each of those opinions has been reversed on appeal, but, he says, the appellate decisions offer "no persuasive reason" for their reversals. (*Id.* at 23.)

In response to the defendant's Sixth Amendment argument, the government asserts that (1) the Supreme Court's statement in *Libretti* that "the right to a jury verdict on forfeitability does not fall within the Sixth Circuit's constitutional protection," 516 U.S. at 48–49, was not dictum but part of the holding and that binding Sixth Circuit precedent has construed *Libretti* thus; (2) even if *Libretti* were not dispositive of the issue, the Sixth Circuit has also held that the Sixth Amendment right to a jury trial does not extend to criminal forfeiture; (3) the Supreme Court's holding in *Southern Union* is not a contrary decision that requires modification of the prior Sixth Circuit holdings; (4) every circuit court of appeals to consider the issue has reached the same conclusion: that the Sixth Amendment right to a jury does not extend to forfeiture; (5) even if the court were to conclude that forfeiture statutes fall within the rule of *Apprendi*, the court would have to consider the history of criminal forfeiture to show that the right to a jury trial applies in this context, and the defendant is simply incorrect in stating that history supports his position; and (6) extending *Apprendi* to criminal forfeiture would pose serious practical problems in the administration of criminal justice. Finally, the government argues that, even if the Sixth Amendment applied in this context, Bradley waived his right to a jury trial on this issue, and, even if the issue were adequately preserved, dismissal is not the appropriate remedy in this case.

Regarding the statutory argument, the government maintains that the defendant waived the issue by not raising it previously, such that it is not part of the remand. The government also

contends that, regardless of waiver, every court to consider the question has held that the applicable forfeiture statute, 21 U.S.C. § 853(p), authorizes forfeiture money judgments; Rule 32.2 reflects the same understanding; and *Honeycutt* does not change the analysis.

III. Discussion

In vacating the court's forfeiture order in its entirety—not merely the money judgment aspect of it—and remanding, the Sixth Circuit made it clear that the parties would begin again with a clean slate:

> [The question of whether the Sixth Circuit prohibits the imposition of criminal forfeiture absent a supporting admission or jury verdict] is an unanswered question in this circuit. It prompts these questions: Does the Supreme Court's extension of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2012), to fines in *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012), apply to criminal forfeitures? Is the Court's statement in *Libretti v. United States*, 516 U.S. 29, 48–49 (1995), that the Sixth Amendment does not provide a right to a jury trial over criminal forfeiture necessary to the disposition of that case? Do any of our precedents bear on the question? What do historical practices tell us about the original understanding of the judge's and jury's factfinding roles in criminal forfeiture proceedings? The parties may wish to address these questions on remand.

United States v. Bradley, 897 F.3d 779, 784 (6th Cir. 2018). In other words, the Sixth Circuit strongly suggested that this court's review is plenary, and the defendant has not waived review of any argument.

The government also appears to believe that the court's order of forfeiture of property and specific assets is unaffected by the remand and that only the question of the money judgment is at issue. Although the defendant's arguments primarily concern the money judgment, the Sixth Circuit vacated the entirety of the forfeiture order, thus putting every aspect of it back on the table.

A. The Defendant's Constitutional Argument

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury . . . .” This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 104 (2013). At the time *Libretti* was issued, the Supreme Court drew a distinction between elements of a criminal offense and mere sentencing factors. The former required a jury’s determination; the latter did not:

> [The petitioner] would have us equate this statutory right to a jury determination of forfeitability with the familiar Sixth Amendment right to a jury determination of guilt or innocence. . . . Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed.

Libretti, 516 U.S. at 48–49.

Fast forward a mere five years, and the landscape changed dramatically. In *Apprendi*, the Court held that any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is an “element” that must be submitted to a jury. 530 U.S. at 494. And in the years following *Apprendi*, the Supreme Court has extended that rule to the context of plea bargains, *Blakely v. Washington*, 542 U.S. 296 (2004); sentencing guidelines, *United States v. Booker*, 543 U.S. 220 (2005); criminal fines, *S. Union*, 567 U.S. at 350; mandatory minimums, *Alleyne*, 570 U.S. at 117;and capital punishment, *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016); *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

The Supreme Court has never expressly held that criminal forfeiture is a sentencing element that must be submitted to a jury. To the contrary, in fact. In *Libretti*, the Court addressed the defendant’s challenge to “the adequacy of his waiver of a jury determination as to the forfeitability of his property under Federal Rule of Criminal Procedure 31(e).”[2] *Libretti*, 516 U.S. at 48. Libretti argued that this right had “both a constitutional and a statutory foundation, and

[2] Rule 31(e) was repealed and replaced by Rule 32.2 in 2000.

cannot be waived absent specific advice from the district court as to the nature and scope of his right and an express, written agreement to forgo the jury determination on forfeitability." *Id.* The Court rejected his argument, expressly finding that the jury right in that context was purely statutory rather than constitutional in origin:

> Federal Rule of Criminal Procedure 31(e) provides that, "[i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Libretti would have us equate this statutory right to a jury determination of forfeitability with the familiar Sixth Amendment right to a jury determination of guilt or innocence. Without disparaging the importance of the right provided by Rule 31(e), our analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that *the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection*.

Libretti, 516 U.S. at 48–49 (emphasis added). As a direct result of that conclusion, the Court ultimately found that the procedures accompanying the waiver in that case were sufficient. *See id.* at 49 ("*Given that the right to a jury determination of forfeitability is merely statutory in origin*, we do not accept Libretti's suggestion that the plea agreement must make specific reference to Rule 31(e). Nor must the district court specifically advise a defendant that a plea of guilty will result in waiver of the Rule 31(e) right." (emphasis added)).

The defendant now argues that the *Libretti* Court's statement that criminal forfeiture does not implicate the Sixth Amendment right to a jury was mere dictum, neither necessary to the Court's holding nor binding on subsequent courts. The court disagrees. As the passage quoted above demonstrates, *Libretti*'s conclusion that the Sixth Amendment does not require forfeiture issues to be resolved by a jury was a holding by the Court and not mere dictum. In addition, and contrary to the defendant's assertion, Justice Souter's separate concurrence further substantiates that conclusion. There, Justice Souter stated that he "would not reach the question of a Sixth Amendment right to trial by jury on the scope of forfeiture," 516 U.S. at 52 (Souter, J.,

concurring in part and concurring in the judgment), thus signaling his understanding that the majority of the Court had indeed reached that question.[3]

Every circuit court to consider this issue agrees that the Supreme Court decided this question as part of its holding in *Libretti*. For instance, the Ninth Circuit, in rejecting the same argument as that presented here, characterized *Libretti* as "clear[ly] and dispositive[ly] holding" that "there is no constitutional 'right to a jury verdict on forfeitability' in a criminal forfeiture proceeding." *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012) (quoting *Libretti*, 516 U.S. at 49); *accord United States v. Day*, 700 F.3d 713, 733 (4th Cir. 2012) ("[T]he Supreme Court has expressly held that 'the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection.'" (quoting *Libretti*, 516 U.S. at 49)). The Sixth Circuit has agreed. *See, e.g.*, *United States v. Hall*, 411 F.3d 651 (6th Cir. 2005) ("*Apprendi* did not affect *Libretti*'s holding that criminal forfeitures are part of the sentence alone and as such [t]here is no requirement under *Apprendi* . . . that the jury pass upon the extent of a forfeiture." (internal quotation marks and citation omitted)).

To be sure, the foundation upon which *Libretti* rests has become shaky, as it is no longer true that sentencing never implicates Sixth Amendment rights. Nonetheless, "[b]ecause *Libretti* has direct application in this case, we are bound by its holding even if it might appear 'to rest on reasons rejected in some other line of decisions.'" *United States v. Fruchter*, 411 F.3d 377, 380 (2d Cir. 2005) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *accord United States v. Leahy*, 438 F.3d 328, 332 (3d Cir. 2006) ("The Leahy defendants contend that *Libretti* has been undercut by *Blakely* and *Booker* to such an extent that its precedential value has been eroded. Even assuming that to be true, we nonetheless note that as

[3] Justice Souter joined in Parts I and II, but not Part III, in which the Court addressed the Sixth Amendment issue. Part III was joined by a majority of the Court, however.

a Court of Appeals, we are not free to ignore the Supreme Court's holding in *Libretti*, nor do we possess the authority to declare that the Supreme Court has implicitly overruled one of its own decisions.").

The circuit court opinions cited above predate *Southern Union*. However, regardless of whether, as Bradley argues, *Southern Union* strongly implies that criminal forfeiture falls within the ambit of the Sixth Amendment, the law is clear that only the Supreme Court can overturn a previous Supreme Court decision, and it typically does not reverse itself by implication. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (explaining that Supreme Court decisions "remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality" (internal quotation marks omitted)). Thus, every circuit court that has considered the contention has held that *Southern Union* did not overrule *Libretti*. *See, e.g.*, *United States v. Miller*, 645 F. App'x 211, 225 n.84 (3d Cir. 2016) ("In *Southern Union*, the Supreme Court applied *Apprendi* to the imposition of criminal fines, thereby requiring a jury determination before fines can be imposed. The Appellants urge us to view *Libretti* as effectively overruled, and ask us to now require a jury determination in the context of criminal forfeitures, just as *Southern Union* required it for criminal fines. This, we cannot do. *Libretti* has not been overruled, and we are obligated to follow its clear holding that 'the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection.'" (quoting *Libretti*, 516 U.S. at 49)); *United States v. Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014) (rejecting the defendant's argument that *Southern Union* and *Alleyne* implicitly overruled *Libretti*, stating: "[W]e are compelled to apply *Libretti* and its determination that the Sixth Amendment does not require a jury verdict on criminal forfeitures. . . . [T]he Supreme Court does not normally overturn, or so dramatically limit, earlier authority *sub*

silentio." (citation omitted)); *Day*, 700 F.3d at 733 ("We do not think the Supreme Court intended to overrule [*Libretti*], *sub silentio*, in *Southern Union*. We therefore hold that the rule of *Apprendi* does not apply to a sentence of forfeiture."); *Phillips*, 704 F.3d at 770 ("[E]very Circuit to consider the question has found that *Apprendi* and its progeny did not alter the rule in *Libretti*, and *Southern Union* does not change that determination.").

In short, regardless of the allure of the defendant's position or this court's personal feelings on the matter, this court is bound by Supreme Court precedent to conclude that criminal forfeiture penalties are not within the scope of the Sixth Amendment. The Supreme Court, if called upon to do so, may reconsider its holding in *Libretti* and extend *Southern Union*'s holding to criminal forfeiture, but, until that time, this court's hands are tied.

B. The Statutory Authority for Money Judgment Forfeiture Awards

The defendant argues, in the alternative, that a money judgment is not authorized by the forfeiture statute. He argues that, like joint and several liability, which the Supreme Court invalidated in *Honeycutt*, money judgments represent an improper judicial expansion of the scope of an already harsh criminal statute that simply makes it easier for the government to confiscate the property of individuals convicted of a crime and to keep them in perpetual debt to the government, even following the service of any prison sentence.

Bradley's argument is premised primarily upon the fact that money judgments are not expressly authorized by § 853(p). Instead, money judgments are an invention by the courts, whose only justification for permitting them is that they are not expressly forbidden by the statute. *See, e.g.*, *United States v. Hampton*, 732 F.3d 687, 691–92 (6th Cir. 2013). According to Bradley, that is no longer good enough under *Honeycutt*, which reestablished that criminal statutes, including those authorizing forfeiture, are to be construed strictly and narrowly.

However compelling Bradley's argument may be, this court is again bound by precedent to reject it. First, as set forth below, the Sixth Circuit has expressly held that § 853 authorizes money judgments. Second, that authority was not overruled, expressly or otherwise, by *Honeycutt*.

1. The Sixth Circuit's Application of Section 853

Under 21 U.S.C. § 853(a), any person convicted of a drug-related felony "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 [and] any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation."

Section 853 also provides for the forfeiture of "substitute" property:

> [I]f any property described in subsection (a), 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 . . .
>
> [then] the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) . . . as applicable.

Id. § 853(p).

To be entitled to forfeiture, the government must prove by a preponderance of the evidence that a nexus exists between the property at issue and the criminal offense. *See* Fed. R.

Crim. P. 32.2(b)(1)(A); *United States v. Jones*, 502 F.3d 388, 391–92 (6th Cir. 2007). "The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B).

The pertinent statutory text does not explicitly authorize forfeiture money judgments. *See* 21 U.S.C. § 853(b) (defining the term "property" as either (1) "real property, including things growing on, affixed to, and found in land" or (2) "tangible and intangible personal property, including rights, privileges, interests, claims, and securities"). Nonetheless, "a majority of circuits . . . has coalesced around the view that money judgments are permissible under section 853." *United States v. Young*, 330 F. Supp. 3d 424, 429–30 (D.D.C. 2018) (citations omitted). The Sixth Circuit is very clearly among these. *See, e.g.*, *United States v. Harrison*, No. 18-5176, 2018 WL 7435869, at *1–2 (6th Cir. Oct. 15, 2018) ("Where the government is unable to recover the actual property that is subject to forfeiture, the government can seek a money judgment against the defendant for an amount equal to the value of the property that constitutes the proceeds of the drug violation." (quoting *United States v. Bevelle*, 437 F. App'x 399, 407 (6th Cir. 2011) (citing 21 U.S.C. § 853(p))); *United States v. Hampton*, 732 F.3d 687, 691 (6th Cir. 2013) (citations omitted).

In *Hampton*, the defendant specifically claimed on appeal that the "district court was without authority to enter a forfeiture money judgment against a defendant who had no assets at the time of sentencing." 732 F.3d at 689. The Sixth Circuit recognized that the "forfeiture statutes at issue, including those incorporated from 21 U.S.C. § 853, do not expressly authorize personal money judgments as a form of forfeiture." *Hampton*, 732 F.3d at 692. Observing that "nothing suggests that money judgments are forbidden" and following the "unanimous and

growing consensus among the circuits," the court nonetheless held unequivocally that "in personam money judgments are authorized by the criminal forfeiture statutes." *Id.* (citations omitted). The court found this conclusion to be bolstered by the rule "distinguish[ing] forfeiture of specific assets from a forfeiture money judgment." *Id.* (citing Fed. R. Crim. P. 32.2(b)(1)(A) ("If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.")).

The argument raised in *Hampton* is virtually indistinguishable from that presented here, and this court is bound by the holding in *Hampton* to conclude that the forfeiture statute permits money judgments. *See Hall v. Eichenlaub*, 559 F. Supp. 2d 777 (E.D. Mich. 2008) ("Absent a clear directive from the Supreme Court or a decision of the Court of Appeals sitting *en banc*, a panel of the Court of Appeals, or for that matter, a district court, is not at liberty to reverse the circuit's precedent." (citing *Brown v. Cassens Transp. Co.*, 492 F.3d 640, 646 (6th Cir. 2007)).

***2. The Scope of* Honeycutt**

If an intervening decision of the Supreme Court directly reverses an opinion of the Sixth Circuit or implicitly reverses it through a case with indistinguishable facts, the district court would have an obligation to follow the intervening Supreme Court decision. *United States v. Wehunt*, 230 F. Supp. 3d 838, 846, (E.D. Tenn. 2017) (citing *In re Higgins*, 159 B.R. 212, 215–16 (S.D. Ohio 1993)). However, if the intervening decision neither expressly nor implicitly overrules the prior Sixth Circuit decision, this court must "be extremely careful in concluding that circuit precedent is no longer good law." *Id.* (citation omitted). A lower court should only deviate from clear circuit precedent if it is "powerfully convinced that the circuit will overrule itself at the next available opportunity." *Id.* That is, "*sub silentio* overruling of a Court of Appeals decision by a Supreme Court case resting on different facts is a rare occurrence," and

thus requires strong, objective evidence that the "higher court would repudiate [its holding] if given a chance to do so." *Id.* (citation omitted).

Honeycutt did not expressly overrule *Hampton*, nor does the defendant even argue that it implicitly overruled it. Instead, he argues that *Honeycutt* "undercuts" those prior decisions authorizing money judgments:

> Money judgments contradict *Honeycutt*'s teachings. *Honeycutt* strictly construed the 'procedural' provisions of 21 U.S.C. § 853. . . . Section 853(a) and (p) refer exclusively to forfeiture of "property" of the defendant, as defined in § 853(b). Subsection (b) encompasses all forms of real and personal property, tangible and intangible, but says nothing about the entry of a general "money judgment" against the defendant . . . .
>
> Honeycutt said forfeiture is "limit[ed] to" specific categories of property described in the statute. 137 S. Ct. at 1632. "These provisions, by their terms, limit forfeiture under § 853 to tainted property . . . ." *Id.*

(Doc. No. 1125, at 24.)

After carefully reviewing *Honeycutt*, the court is not persuaded that the Sixth Circuit would interpret it as invalidating *Hampton*. The holding in *Honeycutt* simply was not as broad as the defendant posits and has no application to the present case—beyond its invalidation of a joint and several forfeiture judgment. The issue in *Honeycutt* was just that—whether § 853 supported the imposition of joint and several liability for forfeiture purposes. *Honeycutt* does not espouse a broad rule barring *in personam* money judgments or require that a defendant still be in possession of his ill-gotten proceeds in order for the government to obtain a forfeiture judgment. *Honeycutt* simply cannot be construed as negating the by-now universally recognized rule among the federal courts of appeals permitting *in personam* money judgments against criminal defendants. *Accord United States v. Ford*, 296 F. Supp. 3d 1251, 1258 (D. Or. 2017) (rejecting identical argument based on *Honeycutt*).

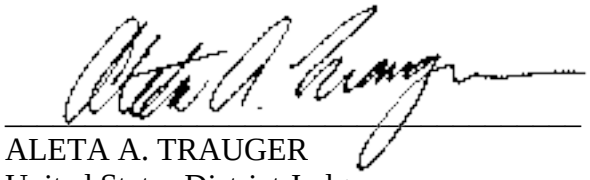
Based on binding Sixth Circuit precedent that has not been expressly or implicitly

overruled by the Supreme Court, this court finds that money judgments are authorized by § 853.

IV. Conclusion

The court is compelled by precedent to deny the defendant's Motion to Dismiss the Forfeiture Allegations. An appropriate order is filed herewith.

The court will enter a separate order scheduling an evidentiary hearing to adjudicate the appropriate amount of the money judgment to be issued. The parties will not be required to present evidence regarding forfeiture of the currency and the real property identified in the original forfeiture order, as the defendant did not expressly appeal the court's findings of fact regarding those items, nor were the factual findings affected by *Honeycutt*.



ALETA A. TRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,	**)**	
	)	
v.	**)**	**Case No. 3:15-cr-00037-2**
	)	**Judge Aleta A. Trauger**
BENJAMIN EDWARD HENRY BRADLEY	**)**	
	)	

ORDER OF FORFEITURE CONSISTING OF MONEY JUDGMENT and PRELIMINARY ORDER OF FORFEITURE

Following a reversal and remand by the Sixth Circuit Court of Appeals, still pending are the United States' Motion for Entry of a Preliminary Order of Forfeiture (Doc. No. 858) and Motion for an Order of Forfeiture of at Least a $1,000,000 United States Currency Money Judgment (Doc. No. 861).

For the reasons set forth in the accompanying Memorandum, the United States' motions (Doc. Nos. 858, 861) are **GRANTED**, and the court **ORDERS** as follows:

1. A preponderance of the evidence establishes that, during the course of the drug-distribution conspiracy to which the defendant pleaded guilty, the defendant personally obtained at least $1,000,000 in proceeds from that conspiracy. The court therefore **ORDERS** that a Forfeiture Consisting of a Money Judgment in the amount of $1,000,000 United States Currency ("Money Judgment") is **HEREBY TAKEN** against defendant Benjamin Bradley. Pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure, this Order of Forfeiture Consisting of a Money Judgment shall become immediately final as to the defendant upon entry and shall be made part of the sentence and included in the Judgment. Pursuant to Rule 32.2(c)(1), "no

ancillary proceeding is required to the extent that the forfeiture consists of a money judgment."

2. If some portion of the $1,000,000 obtained by the defendant as a result of his participation in the conspiracy either cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property not easily divisible, the United States may engage in discovery in accordance with the Federal Rules of Civil Procedure in an action or claim for a debt to identify additional substitute assets having a value up to $1,000,000 United States currency, as authorized by 28 U.S.C. §§ 3001(a)(1) and 3015 and by Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure.

3. This **Preliminary Order of Forfeiture** is **HEREBY ENTERED** against defendant Benjamin Bradley, who shall forfeit to the United States his interest in the following:

(a) Approximately $46,300 United States currency seized from 15540 Prevost Street, Detroit, Michigan on March 12, 2015;

(b) Approximately $78,300 United States currency seized from 45669 Harmony Lane, Belleville, Michigan on March 12, 2015;

(c) Real property commonly known as 14427 Curtis, Detroit, Michigan 48235, and more particularly described in Exhibit A attached to the United States' Bill of Particulars for Forfeiture of Real Property ("Exhibit A") (Doc. No. 432-1);

(d) Real property commonly known as 16617 Lesure, Detroit, Michigan 48235, and more particularly described in Exhibit A;

(e) Real property commonly known as 15355 Ohio Street, Detroit, Michigan 48238, and more particularly described in Exhibit A; and

(f) Real property commonly known as 45669 Harmony Lane, Belleville, Michigan 48111, and more particularly described in Exhibit A.

(The parcels of real property identified herein are collectively referred to below as the "Subject Property").

The value of the seized currency and Subject Property shall be applied to the Money Judgment.

4. With respect to that currency and Subject Property, the court has determined, based on the guilty plea and all the evidence in the record, as noted in the accompanying Memorandum, that the United States has established by a preponderance of the evidence the requisite nexus between these items and the offenses of conviction. The currency and each parcel of the Subject Property are subject to forfeiture pursuant to 21 U.S.C. §§ 853(a)(1) and 18 U.S.C. § 982(a)(1).

5. Upon the entry of this Order, the Attorney General (or his designee) is authorized to seize the Subject Property and to conduct any discovery proper in identifying, locating or disposing of the property subject to forfeiture in accordance with Fed. R. Crim. P. 32.2(b)(3).

6. Upon entry of this Order, the Attorney General (or his designee) is authorized to commence any applicable proceeding to comply with statutes governing third-party rights, including giving notice of this Order, in accordance with Fed. R. Crim. P. 32.2.

7. Upon the issuance of this Order forfeiting the defendant's interest in the Subject Property, the United States shall publish notice of the Order and its intent to dispose of the property in such a manner as the Attorney General (or his designee) may direct on-line at www.forfeiture.gov, the official internet government forfeiture site, for 30 consecutive days. The United States shall also, to the extent practicable, provide written notice to any person known to have alleged an interest in the Subject Property, specifically including, but not limited to, Kareema Hawkins.

8. Any person, other than the above named defendant, asserting a legal interest in the Subject Property shall, within 30 days of the final publication of notice or receipt of notice,

whichever is earlier, petition the court for a hearing without a jury to adjudicate the validity of his or her interest in the Subject Property and for an amendment of this Order of Forfeiture.

9. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, this Preliminary Order of Forfeiture shall become final as to the defendant upon entry and shall be made part of the sentence and included in the judgment. If no third party files a timely claim, this Order shall become the Final Order of Forfeiture, as provided by Rule 32.2(c)(2).

10. Any petition filed by a third party asserting an interest in the Subject Property shall be signed by the third-party petitioner under the penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the Subject Property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the Subject Property, and any additional facts supporting the petitioner's claim and the relief sought.

11. After the disposition of any third-party motion filed under Rule 32.2(c)(1)(A) of the Federal Rules of Criminal Procedure and before a hearing on the petition, discovery may be conducted in accordance with the Federal Rules of Civil Procedure upon a showing that such discovery is necessary or desirable to resolve factual issues.

12. The United States shall have clear title to the Subject Property following the court's disposition of all third-party interests, or, if none, following the expiration of the period provided by 28 U.S.C. § 2461(c), which incorporates by reference the pertinent provision of 21 U.S.C. § 853(n)(2) for the filing of third-party petitions.

13. Regarding the Money Judgment, the United States Probation and Pretrial Services will provide the defendant's Presentence Report and all supporting documentation to the Asset Forfeiture Unit of the United States Attorney's Office for use in discovery.

14. The Internal Revenue Service will provide the defendant's Tax Returns for the

years 2011 through 2016 to the Asset Forfeiture Unit of the United States Attorney's Office for use in discovery.

15. The United States may, at any time, move pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure to amend this Order of Forfeiture to include other substitute property having a value not to exceed $1,000,000 United States currency to satisfy the Money Judgment in whole or in part.

16. Upon payment of the Money Judgment in full, the United States shall file a satisfaction of judgment with the District Court and the appropriate clerk of any county in which a transcript or abstract of the Judgment has been filed.

17. As long as the Order of Forfeiture is not completely satisfied and a sum of money is still owed, the defendant shall remain personally liable pursuant to this Order of Forfeiture, which will continue in full effect until payment of the total amount of $1,000,000 United States currency, plus statutory interest, is made in full.

18. The Court shall retain jurisdiction to enforce this Order and to amend it as necessary, pursuant to Fed. R. Crim. P. 32.2(e).

It is so **ORDERED**.

ENTER this 20th day of August 2019.

ALETA A. TRAUGER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: September 13, 2017

Ms. Melissa M. Salinas
Michigan Clinical Law Program
University of Michigan
801 Monroe Street
363 Legal Research Building
Ann Arbor, MI 48109

Re: Case No. 17-5725, *USA v. Benjamin Bradley*
Originating Case No. : 3:15-cr-00037-2

Dear Counsel,

This confirms your appointment to represent the defendant in the above appeal under the Criminal Justice Act, 18 U.S.C. § 3006A.

You must file your appearance form and order transcript within 14 days of this letter. The appearance form and instructions for the transcript order process can be found on this court's website. Please note that transcript ordering in CJA-eligible cases is a two-part process, requiring that you complete both the financing of the transcript (following the district court's procedures) and ordering the transcript (following the court of appeals' docketing procedures). Additional information regarding the special requirements of financing and ordering transcripts in CJA cases can be found on this court's website at http://www.ca6.uscourts.gov/criminal-justice-act under "Guidelines for Transcripts in CJA Cases."

Following this letter, you will receive a notice of your appointment in the eVoucher system. That will enable you to log into the eVoucher system and track your time and expenses in that system. To receive payment for your services at the close of the case you will submit your voucher electronically via eVoucher. Instructions for using eVoucher can be found on this court's website. Your voucher must be submitted electronically no later than 45 days after the final disposition of the appeal. *No further notice will be provided that a voucher is due*. Questions regarding your voucher may be directed to the Clerk's Office at 513-564-7078.

Finally, if you become aware that your client has financial resources not previously disclosed or is no longer eligible for appointed counsel under the Criminal Justice Act, please contact the Clerk or Chief Deputy for guidance.

Sincerely yours,

s/Ken Loomis
Administrative Deputy
Direct Dial No. 513-564-7067

cc: Mr. Benjamin Edward Henry Bradley
Ms. Robin L. Johnson
Mr. Keith Throckmorton
Mr. Cecil Woods VanDevender