No. _____

In the
Supreme Court of the United States

ANTHONY LEON WAITS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 9, 2021

QUESTION PRESENTED

Federal Rule of Criminal Procedure 32.2(a) prohibits a district court from entering a forfeiture judgment "unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." The indictment against Waits did not give notice of the applicable statute; it gave notice of an inapplicable statute. The district court nevertheless entered a forfeiture judgment against Waits. The Eighth Circuit affirmed, finding that all Rule 32.2(a) requires is notice that the government intends to seek forfeiture without giving notice of the applicable statute. The Seventh and Ninth Circuits agree with the Eighth Circuit, but the Second Circuit reads Rule 32.2(a) to mean that a defendant is entitled to know not only that the government seeks forfeiture but also the statutory basis for doing so.

The question presented is:

Does Federal Rule of Criminal Procedure 32.2(a) prohibit a district court from entering a forfeiture judgment when the indictment does not give notice of the applicable forfeiture statute?

STATEMENT OF RELATED PROCEEDINGS

The following cases from the United States District Court for the Eastern District of Arkansas and the United States Court of Appeals for the Eighth Circuit are directly related to this case as "directly related" is defined in this Court's Rule 14.1(b)(iii):

- *United States of America v. Gladys Elise King, Jacqueline D. Mills, Tonique D. Hatton, and Anthony Leon Waits*,No. 4:14-cr-250 (E.D. Ark.) (judgment as to Anthony Leon Waits entered Oct. 23, 2017; order of forfeiture entered May 4, 2017; and amended order of forfeiture entered Aug. 22, 2019);
- *United States of America v. Anthony Leon Waits*, No. 17-3399 (8th Cir.) (judgment entered March 29, 2019);
- *United States of America v. Anthony Leon Waits*, No. 19-3382 (8th Cir.) (judgment entered Dec. 8, 2020);

- *United States of America v. Jacqueline Mills*, No. 17-3762 (8th Cir.) (judgment entered Mar. 29, 2019);
- *United States of America v. Jacqueline Mills*, No. 20-1889 (8th Cir.) (judgment entered Jan. 19, 2021);
- *United States of America v. Rosie Farr and John Farr*, No. 20-2790 (8th Cir.) (judgment not yet entered);
- *United States of America v. Jacqueline Mills*, No. 21-1085 (8th Cir.) (judgment entered April 27, 2021).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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OPINIONS BELOW

The Eighth Circuit's December 8, 2020 opinion is available at 830 Fed. App'x 790, and is reproduced at App. 1. The United States District Court for the Eastern District of Arkansas's August 22, 2019 amended order of forfeiture is not published in an official or unofficial reporter, but it is at App. 4. The Eighth Circuit's March 29, 2019 opinion is available at 919 F.3d 1090, and is reproduced at App. 6. The United States District Court for the Eastern District of Arkansas's judgment and order of forfeiture are not listed in an official or unofficial reporter, but they are, respectively, at App. 17 and App. 26.

JURISDICTION

The Eighth Circuit issued judgment on December 8, 2020, and denied rehearing on January 12, 2021.

App. 3, 28. On March 19, 2020, this Court extended the deadline to file any certiorari petition due on or after that date to 150 days. Waits then timely filed this petition, and this Court thus has jurisdiction under 28 U.S.C. §1254(1).

RULE INVOLVED

A. Federal Rule of Criminal Procedure 32.2 Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify

the amount of any forfeiture money judgment that the government seeks.

(b) ENTERING A PRELIMINARY ORDER OF FORFEITURE.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court

must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. 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. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. 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. The 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).

(B) Timing. Unless doing so is impractical, the court must 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 under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Sentence and Judgment.

(A) When Final. At sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) Notice and Inclusion in the Judgment. The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) Time to Appeal. The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) Jury Determination.

(A) Retaining the Jury. In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the

jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) Special Verdict Form. If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) Notice of the Forfeiture Order.

(A) Publishing and Sending Notice. If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who

reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) Means of Publication; Exceptions to Publication Requirement. Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) ANCILLARY PROCEEDING; ENTERING A FINAL ORDER OF FORFEITURE.

(1) In General. If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. When the ancillary proceeding ends, the court must enter a final order of

forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.

(d) STAY PENDING APPEAL. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. There is no right to a jury trial under Rule 32.2(e).

STATEMENT OF THE CASE

A. Federal Rule of Criminal Procedure 32.2(a)

Under Federal Rule of Criminal Procedure 32.2(a), a district court "must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute."

The Second Circuit reads the rule to mean "a criminal defendant has the right to know not only that forfeiture is being sought, but also the statutory basis for forfeiture." *United States v. Annabi*, 746 F.3d 83,

85 (2d Cir. 2014). But the Eighth Circuit, consistent with the Seventh and Ninth Circuits, concluded here that all Rule 32.2(a) requires is that the indictment let a defendant know that the government seeks forfeiture, not the statute under which forfeiture is sought. App. 1; *United States v. Soto*, 915 F.3d 675, 681 (9th Cir. 2019); *United States v. Silvious*, 512 F.3d 364, 370 (7th Cir. 2008).

B. Factual and Procedural Background

The operative indictment alleged that Anthony Waits and others, in violation of 18 U.S.C. §§ 1349 and 3237, schemed to fraudulently obtain USDA child-nutrition funds administered by the Arkansas Department of Human Services. App. 29–42. Because the allegation was that Waits had violated federal law, the district court had jurisdiction. 18 U.S.C. § 3231. Only one of the 54 counts was against Waits: a charge that he had conspired to commit wire fraud. App. 29–

42. The jury found Waits guilty, the district court entered judgment (including a $3,316.280.85 forfeiture order), and Waits appealed. App. 17. In that first appeal, the Eighth Circuit affirmed the conviction but remanded to the district court to address the indictment's citation to an incorrect forfeiture statute. App. 6. On remand, the district court reduced the forfeiture amount to $1,163,134.25 and entered an amended forfeiture order. App. 4.

Waits again appealed. He argued that Rule 32.2(a) prohibits a district court from entering a judgment of forfeiture "unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." The Eighth Circuit rejected that argument and concluded that it was enough under Rule 32.2(a)

that "Waits had adequate notice that the government intended to seek forfeiture." App. 2.

The Eighth Circuit denied Waits's petition for rehearing. App. 28. He now petitions this Court for a writ of certiorari.

REASONS TO GRANT THE PETITION

I. The Eighth Circuit widened a circuit split on the meaning of Federal Rule of Criminal Procedure 32.2(a).

Federal circuit courts of appeal are divided on the meaning of Rule 32.2(a). The Second Circuit reads the rule to mean "a criminal defendant has the right to know not only that forfeiture is being sought, but also the statutory basis for forfeiture." *Annabi*, 746 F.3d at 85. But the Seventh, Eighth, and Ninth Circuits read the rule to mean that all Rule 32.2(a) requires is that the indictment let a defendant know that the

government seeks forfeiture, not the statute under which forfeiture is sought. App. 2; *Soto*, 915 F.3d at 681; *Silvious*, 512 F.3d at 370. The Court should grant certiorari to resolve the split.

II. The Eighth Circuit disregarded the text of Federal Rule of Criminal Procedure 32.2(a).

The Court should resolve the split in favor of the Second Circuit and the text of Rule 32.2(a). Courts follow the plain meaning of their rules. *See City of San Antonio v. Hotels.com, L.P.*, 593 U.S. ——, —— (2021) (slip op., at 5–9). The issue for the Court here is the meaning of "must not," "unless," and "in accordance with the applicable statute" in Rule 32.2(a):

> A court *must not* enter a judgment of forfeiture in a criminal proceeding *unless* the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence *in accordance with the applicable statute*. (Emphases added.)

The words mean what they say: a court must not enter forfeiture unless the indictment gives notice of the applicable statute. The Eighth Circuit disregarded that prohibition by affirming the amended forfeiture order when the indictment did not contain notice that the government would seek forfeiture "in accordance with the applicable statute."

III. The issue is important because Federal Rule of Criminal Procedure 32.2(a) governs the many criminal forfeitures in federal court.

Federal Rule of Criminal Procedure 32.2 is titled "Criminal Forfeiture." It establishes rules the government must follow before taking property from its citizens in criminal proceedings. From the notice the government must give, to the procedure for preliminary forfeitures, to the procedure for final forfeitures, Rule 32.2 provides important procedural safeguards to protect citizens from improper

forfeitures. Given the many forfeiture proceedings the government institutes each year and the significant value of the property and funds involved, this Court's clarification of the threshold guarantee of notice in Rule 32.2(a) is needed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition under this Court's Rule 10.

Respectfully submitted,

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June 9, 2021

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In the
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ANTHONY LEON WAITS,
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v.

UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A
App. 1

United States Court of Appeals
For the Eighth Circuit

No. 19-3382

United States of America,

Plaintiff - Appellee,

v.

Anthony Leon Waits,

Defendant - Appellant.

Appeal from United States District Court
for the Eastern District of Arkansas - Little Rock

Submitted: November 24, 2020
Filed: December 8, 2020
[Unpublished]

Before COLLOTON, SHEPHERD, and KOBES, Circuit Judges.

PER CURIAM.

Anthony Waits appeals after the district court[1] entered an amended order of forfeiture, following this court's affirmance of his wire fraud conviction and remand of the forfeiture issue for further proceedings.

Upon careful review, we conclude that the district court did not err by ordering forfeiture under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). Although the indictment cited only 18 U.S.C. § 982, Waits had adequate notice that the government intended to seek forfeiture. *See* Fed. R. Crim. P. 32.2(a); *United States v. Silvious*, 512 F.3d 364, 370 (7th Cir. 2008). Accordingly, we affirm, *see* 8th Cir. R. 47B, and deny Waits's pending motion as moot.

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[1]The Honorable James M. Moody Jr., United States District Judge for the Eastern District of Arkansas.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3382

United States of America

Plaintiff - Appellee

v.

Anthony Leon Waits

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:14-cr-00250-JM-6)

JUDGMENT

Before COLLOTON, SHEPHERD, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the order of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 08, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

v. No. 4:14CR00250-6 JM

ANTHONY LEON WAITS

AMENDED ORDER OF FORFEITURE

The United States moves to amend the order of forfeiture entered against Anthony Leon Waits (ECF No. 216). The motion is GRANTED.

IT IS HEREBY ORDERED THAT:

1. As the result of the jury's determination that Anthony Leon Waits ("Defendant") conspired to commit wire fraud, Defendant shall forfeit to the United States, under Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), a personal money judgment in the amount of $1,163,134.25, which represents the proceeds traceable to the conspiracy that Defendant obtained or from which he benefitted.

2. Upon the entry of this Order, the United States is authorized to conduct any discovery proper in identifying, locating, or disposing of this money judgment. Fed. R. Crim. P. 32.2(b)(3).

3. No ancillary proceeding is required because this order of forfeiture only consists of a money judgment. Fed. R. Crim. P. 32.2(c)(1).

4. The Court shall retain jurisdiction to enforce this Order and to amend it as necessary. *See* Fed. R. Crim. P. 32.2(e). The United States is authorized to execute the money judgment against any property the Defendant owns. Further the United States may, at any time, move to amend this Order of Forfeiture to substitute property having a value not to exceed $1,163,134.25 to satisfy this money judgment in whole or in part. *See* Fed. R. Crim. P. 32.2(e).

SO ORDERED this 22nd day of August 2019.

James M. Moody Jr.
United States District Judge

Appendix D
App. 6

United States Court of Appeals
For the Eighth Circuit

No. 17-3399

United States of America,

Plaintiff - Appellee,

v.

Anthony Leon Waits,

Defendant - Appellant.

No. 17-3762

United States of America,

Plaintiff - Appellee,

v.

Jacqueline D. Mills,

Defendant - Appellant.

Appeals from United States District Court
for the Eastern District of Arkansas - Little Rock

Submitted: September 25, 2018
Filed: March 29, 2019

Before COLLOTON, BEAM, and GRASZ, Circuit Judges.

COLLOTON, Circuit Judge.

A jury convicted Anthony Waits and Jacqueline Mills after a trial in a fraud case. The district court sentenced Waits and Mills to 175 and 150 months' imprisonment, respectively, and entered forfeiture orders against them. On appeal, Waits and Mills challenge their convictions, and Waits also challenges his term of imprisonment and forfeiture order. We affirm the convictions and Waits's term of imprisonment. We vacate the forfeiture order against Waits and remand for further proceedings on that issue.

I.

The United States Department of Agriculture's Food and Nutrition Service provides federal funding to after-school and summer programs that serve food to children in low-income areas. The agency acts through the Child and Adult Care Feeding Program, which includes an At-Risk Afterschool component, and the Summer Food Service Program.

In Arkansas, the Department of Human Services administers these programs. An organization in Arkansas must receive approval from the Department to become a sponsor who participates in a feeding program. A sponsor may serve snacks or meals to eligible children and receive reimbursement from the Department for the food served. As a condition of participation, a sponsor must follow the Department's

regulations governing feeding programs, including those that require keeping and maintaining records related to the program.

Waits and Mills were convicted of conspiracy to commit wire fraud related to their involvement with these feeding programs. The jury also found Mills guilty of multiple substantive counts of wire fraud, bribery of an agent of a program receiving federal funds, and money laundering.

According to evidence at trial, Mills participated in the programs as a sponsor and claimed inflated or fabricated reimbursements for more than thirty sites. To avoid scrutiny of her false claims, she paid money to Department officials in exchange for approval of her programs and help in avoiding detection. Waits was not a program sponsor, but he recruited others to become sponsors. Waits helped others to claim fraudulent reimbursements and to create receipts that supported their false claims. He then collected a share of the profits of the fraud.

After a jury convicted Waits and Mills, the district court sentenced them to 175 and 150 months' imprisonment, respectively. The court also ordered Waits to forfeit a personal money judgment of $3,316,280.85, based on the gross amount that he and his co-conspirators received from their participation in the conspiracy.

II.

Waits and Mills first argue that the district court erred in rejecting their proposed theory-of-defense instructions. We review the district court's rulings for abuse of discretion. *United States v. Christy*, 647 F.3d 768, 770 (8th Cir. 2011).

Waits's proposed instruction stated: "Anthony Leon Waits submits that he did not voluntarily or intentionally agree or conspire with anyone to commit the crime of wire fraud. Furthermore, he denies that he had knowledge of any agreement, plan or

scheme to commit wire fraud." The proposal then stated that the burden of proof is always on the prosecution, and that the jury must acquit Waits if his theory caused them to have a reasonable doubt.

Mills's proposed instruction would have informed the jury of her position that she did not intentionally participate in a scheme to defraud, and that she "relied on individuals working under her to provide accurate numbers of meals served to children." The proffered instruction continued by saying that Mills felt the witnesses who testified against her had a "personal stake" in the outcome of the case and testified "in the hopes that they will receive a lessor [sic] prison sentence."

Two well-established propositions on theory-of-defense instructions are applicable here. A district court need not adopt a defendant's proposed instruction if other instructions given to the jury adequately cover the substance of the requested instruction. *See United States v. Serrano-Lopez*, 366 F.3d 628, 637 (8th Cir. 2004). And a defendant is not entitled to a judicial narrative of her version of the facts, even though such a narrative might be characterized as a "theory of the defense." *Christy*, 647 F.3d at 770.

The substance of Waits's instruction was adequately covered by other instructions. The court elsewhere advised the jury of the government's burden of proof and the elements of the conspiracy and wire fraud charges. Waits was not entitled to an instruction that covered essentially the same ground in different words. Mills's proposal likewise conveyed information about burden of proof, elements of the offense, and weighing the credibility of witnesses that was addressed by other instructions. The portion in which Mills addressed her alleged reliance on employees amounted to a judicial narrative of her version of the facts that the court was not obliged to present—especially where the instruction was in tension with Mills's trial testimony denying that she blamed her employees. The district court did not abuse its discretion by refusing the proffered instructions.

Mills argues for the first time on appeal that the court erred by failing to include instructions regarding the testimony of an accomplice or credibility of a cooperating witness. *See* 8th Cir. Model Jury Instructions §§ 4.05A, 4.05B. Because Mills did not object to the omission of these instructions, we review only for plain error, *see United States v. Olano*, 507 U.S. 725 (1993), and the district court did not make an obvious mistake by failing to include these instructions *sua sponte*. The suggested instructions address the credibility of accomplices or cooperating witnesses in a specific way, but the court gave a general instruction about evaluating witness credibility that was not plainly insufficient to address the topic. The jury was able to give weight to any concerns about the credibility of accomplices and cooperating witnesses under the instructions delivered by the court. There was no plain error.

Waits next argues that the district court erred in admitting into evidence a recording of a conversation between Waits and a co-conspirator named Weeams. Weeams secretly recorded the conversation during the investigation at the behest of a federal investigator. Among other things, Waits was heard to make the following statement to Weeams while discussing the ongoing investigation:

> I hope them n*****s don't say nothing cause if they indict me I'm going to trial. Swear to God see that's what they don't know, I'm going to trial. And in trial, god damn me, they got to release that information. They might give me ten, twelve years, fifteen years, but when I get out I'm gonna knock on the door. (knocking noise) Who is it? Doom, doom, doom, doom, doom.

Weeams testified that Waits pointed his hand like a gun while saying, "[d]oom, doom, doom, doom, doom."

Waits complains that the government violated his Sixth Amendment right to counsel by recording the conversation, but the right does not attach until a prosecution is commenced. *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001). The

disputed conversation occurred before the grand jury charged Waits, so the recording did not interfere with his right to counsel.

Waits also asserts that the district court abused its discretion by refusing to exclude the quoted statement under Federal Rule of Evidence 403. We accord great deference to the district court's balancing of probative value and prejudicial effect, *United States v. Castleman*, 795 F.3d 904, 914-15 (8th Cir. 2015), and we see no abuse of discretion here. The disputed statement, as explained by Weeams, suggests that Waits threatened harm to anyone who might cooperate against him. Threats against witnesses are generally admissible to show consciousness of guilt. *Id.* at 915. That Waits did not identify any specific witness who might be the subject of his wrath did not substantially weaken the probative value of the evidence. Evidence that Waits would retaliate against anyone who helped to convict him was relevant to show the defendant's mindset, and the jury reasonably could infer that he was concerned about witnesses who could implicate him in wrongdoing. The court did not abuse its discretion by allowing the evidence.

Waits next contends that the district court erred by denying, without a hearing, his motion for a new trial based on the exposure of jurors to publicity about the case. There was media coverage during Waits's trial, including an article in a local newspaper that discussed evidence that the district court had excluded. After defense counsel alleged during jury deliberations that jurors had been exposed to prejudicial publicity, the district court followed the three-step process set forth in *Tunstall v. Hopkins*, 306 F.3d 601, 610 (8th Cir. 2002):

> [A] federal district court must: 1) determine whether the publicity creates a danger of substantial prejudice to the accused; 2) if so, poll jurors individually to see if they were exposed; and 3) if they were exposed, then ascertain the extent and effect of infection, and determine what measure must be taken to protect the rights of the accused.

The court determined that the newspaper article "could create a danger of substantial prejudice to Mr. Waits," so the court polled the jurors to determine whether they had seen television coverage or read the newspaper article. After one juror replied in the affirmative, the court excused the other jurors and asked the juror what she had learned. The juror replied that she saw only video of the lawyers walking in front of the courthouse. The court determined that the juror's observations did not cause prejudice, and allowed the deliberations to proceed.

After the verdicts were returned, Waits moved for a new trial based on the jury's exposure to publicity during trial. In addition to relying on one juror's admitted exposure to television coverage, he submitted an affidavit from a witness who averred that she saw two jurors reading a newspaper in their vehicles before entering the courthouse. The district court denied the motion, finding that Waits had not demonstrated that he was prejudiced by any juror's exposure to publicity. The court credited the juror's testimony that she did not view anything prejudicial on television, and no other juror reported seeing any media coverage of the trial. The court further noted that the jury already had completed a verdict form saying that Waits was guilty before the testifying juror saw the attorneys on television.

The court did not abuse its discretion in denying the motion for new trial. The court followed the correct procedure to evaluate the claim of exposure to mid-trial publicity, and the account of the single juror did not support a finding of prejudice. The affidavit submitted after trial did not contradict the testimony of other jurors who denied reading coverage of the proceedings. Waits has not shown that he is entitled to a new trial.

III.

Waits also challenges the sentence imposed. He contends that the district court committed procedural error in calculating his advisory sentencing guideline range.

We review the district court's factual findings for clear error, and its interpretation of the sentencing guidelines *de novo*. *United States v. Rickert*, 685 F.3d 760, 767 (8th Cir. 2012).

Waits first argues that the district court erred in applying a two-level adjustment for obstruction of justice under USSG § 3C1.1. The sentencing guidelines provide for the adjustment "[i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing." *Id.* The commentary includes a nonexhaustive list of actions that qualify, including when a defendant "threaten[s] . . . a co-defendant," "attempt[s] to suborn perjury," or engages in other conduct prohibited by obstruction of justice provisions under Title 18. *Id.*, comment. (n.4).

The record supports the district court's finding that Waits engaged in obstruction of justice. The recorded conversation and testimony from Weeams supported a finding that Waits threatened to retaliate against Weeams and other potential witnesses with his "doom, doom, doom" remark. The threat was communicated directly to Weeams, and even though Waits did not personally convey the threat to other conspirators, there was a sufficient basis for the court to infer that Waits's statements to Weeams—that other conspirators who testified would face "doom"—was an attempt by Waits to threaten or intimidate others. *See United States v. Capps*, 952 F.2d 1026, 1028-29 (8th Cir. 1991). There was also sufficient evidence to support a finding that Waits attempted, with consciousness of wrongdoing, to prevent others from communicating evidence of wrongdoing to law enforcement officers. *See United States v. Gaye*, 902 F.3d 780, 788 (8th Cir. 2018); 18 U.S.C. § 1512(b). In a recorded conversation, Waits instructed co-conspirator Weeams to lie to investigators, and another co-conspirator testified that Waits encouraged him to tell investigators falsely that he "fed the kids" and did everything that he was supposed to do. In light of this evidence, the district court did not err in applying the adjustment for obstruction of justice.

Waits next challenges the calculation of his criminal history score. He contends the district court erred by counting prior sentences for two different offenses—failure to appear in 1997 and battery in 2002—because he was sentenced for both offenses on the same day. There is no merit to this point, because prior sentences are counted separately when there is an intervening arrest. *See* USSG § 4A1.2(a)(2). Waits was arrested on the failure to appear charge in 1997, long before he committed the battery offense in 2002. Thus, even assuming that Waits was ultimately sentenced for both offenses on the same day, the offenses were separated by an intervening arrest. Accordingly, the district court properly assessed criminal history points for both prior sentences.

Waits also challenges the assessment of one criminal history point for a revocation of probation in Arkansas. He argues that the revocation was invalid because the state court record does not establish that the State issued a revocation warrant before his term of probation ended. This argument fails because Waits may not collaterally attack the state court's revocation determination in this federal sentencing proceeding. *See Moore v. United States*, 178 F.3d 994, 997 (8th Cir. 1999). Waits contends that this court allowed such a collateral attack in *United States v. Gleason*, 33 F. App'x 234 (8th Cir. 2002) (per curiam), but he is mistaken. The question there was whether the defendant committed a prior offense while on probation. *Id.* at 235. While this court looked to state law to determine whether the offender was on probation at the time of the prior offense, there was no collateral attack on a prior judgment of a state court. Here, an Arkansas state court already revoked Waits's probation in 2002, and Waits may not litigate in this case whether the 2002 revocation was proper. There was thus no error in calculating his criminal history score.

IV.

Waits next challenges the district court's order of forfeiture on two grounds. The first objection, raised for the first time on appeal, is that the district court

premised the order on a statute that does not apply. The indictment noticed a claim of forfeiture under 18 U.S.C. § 982. After trial, the government moved for an order of forfeiture under § 982(a)(3)(F), and the court ordered forfeiture under that provision. Section 982(a)(3)(F), however, applies only to offenses that involve a sale of assets acquired or held by the Federal Deposit Insurance Corporation, the National Credit Union Administration, or another conservator appointed by the Office of the Comptroller of the Currency. The assets at issue did not meet those criteria. The statutes that authorize forfeiture of property traceable to a wire fraud conspiracy, 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), were not cited in the government's motion or the forfeiture orders.

Waits's second complaint about the forfeiture order is that the court should not have included proceeds of the fraud scheme that Waits did not himself acquire. Citing the intervening decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), Waits argues that joint and several liability for proceeds received by co-conspirators is contrary to the forfeiture statute on which the district court relied. *Honeycutt* held that forfeiture under 21 U.S.C. § 853 of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain drug crimes is limited to property that the defendant himself acquired. *Id.* at 1630. Waits contends that because the district court's forfeiture order relied on 18 U.S.C. § 982(a)(3)(F), and the forfeiture of property under § 982 is governed by the provisions of 21 U.S.C. § 853, the rationale of *Honeycutt* applies and precludes joint and several liability.

The government responds that the incorrect statutory citation does not require vacating the forfeiture order. The implicit suggestion is that if Waits had objected, then the government could have amended its motion to cite the correct statutes, and the district court could have ordered the same forfeiture under those statutes, so Waits was not prejudiced. *See United States v. Silvious*, 512 F.3d 364, 369-70 (7th Cir. 2008). On the issue of joint and several liability, however, the government does not

urge that Waits failed to preserve the issue or that the question should be analyzed under the correct forfeiture statutes. The government responds only that *Honeycutt* changed the law with respect to joint and several liability, and "agrees that a limited remand is appropriate to reevaluate Anthony Waits's forfeiture judgment." This court recently held that joint and several liability is available in a forfeiture under § 981(a)(1)(C), *United States v. Peithman*, No. 17-2721, 2019 WL 942825, at *10 (8th Cir. Feb. 27, 2019), but the court has not addressed the issue under § 982(a)(3)(F).

Rather than address the propriety of the forfeiture order without adversarial briefing in a case already complicated by the government's reliance in the district court on an incorrect forfeiture statute, we vacate the forfeiture order and remand for further proceedings on forfeiture. *See Ragland v. United States*, 756 F.3d 597, 602 (8th Cir. 2014); *cf. Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 168 (1996). As the government agrees that the district court should reevaluate the forfeiture order in the first instance under current law, it is unnecessary to address at this juncture whether the district court's reliance on an inapplicable forfeiture statute by itself would require *vacatur*. Nor do we resolve whether the availability of joint and several liability under § 981(a)(1)(C) would be sufficient reason to uphold the entirety of a forfeiture order that was incorrectly premised on § 982(a)(3)(F). *Cf. United States v. Annabi*, 746 F.3d 83, 86 (2d Cir. 2014).

* * *

For the foregoing reasons, we affirm the judgment of the district court except for the forfeiture order as to Waits, and we remand for further proceedings. Mills's *pro se* motion for leave to file a supplemental brief and to supplement the record is denied.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Arkansas

UNITED STATES OF AMERICA
v.
ANTHONY LEON WAITS

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:14CR00250-06 JM

USM Number: 29502-009

Willard Proctor, Jr.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) Count 1s of Third Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1349	Conspiracy to commit wire fraud, a Class C felony	8/30/2014	1s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) Count 1 of 2nd SS Indictment ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/19/2017
Date of Imposition of Judgment

Signature of Judge

James M. Moody, Jr., U.S. District Judge
Name and Title of Judge

10/23/17
Date

AO 245B (Rev. 11/16) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ANTHONY LEON WAITS
CASE NUMBER: 4:14CR00250-06 JM

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
175 MONTHS

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant participate in mental health counseling with an emphasis in domestic violence or anger management, and educational and vocational programs during incarceration. The Court recommends placement in either the FCI Forrest City, Arkansas, facility or the FCI Texarkana, Texas, facility so as to remain near his family.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: ANTHONY LEON WAITS
CASE NUMBER: 4:14CR00250-06 JM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : THREE (3) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ANTHONY LEON WAITS
CASE NUMBER: 4:14CR00250-06 JM

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ANTHONY LEON WAITS
CASE NUMBER: 4:14CR00250-06 JM

ADDITIONAL SUPERVISED RELEASE TERMS

14) The defendant must participate in a domestic violence counseling program under the guidance and supervision of the probation office. The defendant will pay for the cost of treatment at the rate of $10 per session, with the total cost not to exceed $40 per month, based on ability to pay as determined by the probation office. If the defendant is financially unable to pay for the cost of treatment, the co-pay requirement will be waived.

15) The defendant must provide the probation officer with access to any requested financial information (including unexpected financial gains) and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

16) The defendant may not incur new credit charges or open additional lines of credit without the approval of the probation officer unless all criminal penalties have been satisfied.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: ANTHONY LEON WAITS
CASE NUMBER: 4:14CR00250-06 JM

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 3,316,280.85

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
USDA/FNS (Lockbox)		$3,316,280.85	

TOTALS	$ 0.00	$ 3,316,280.85

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ANTHONY LEON WAITS
CASE NUMBER: 4:14CR00250-06 JM

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 3,316,380.85 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Restitution is due immediately, and any unpaid balance will be payable during incarceration. During incarceration, the defendant will pay 50 percent per month of all funds that are available to him. During residential reentry placement, payments will be 10 percent of the defendant's gross monthly income. Beginning the first month of supervised release, payments will be 10 percent per month of the defendant's monthly gross income. The interest requirement is waived.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Restitution will be joint and several with any other person who has been or will be convicted on an offense for which restitution to the same victim on the same loss is ordered.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
See attached ORDER OF FORFEITURE entered on 5/4/2017.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

v. No. 4:14CR00250-6 JM

ANTHONY LEON WAITS

ORDER OF FORFEITURE

IT IS HEREBY ORDERED THAT:

1. As the result of the jury's determination that Anthony Leon Waits ("Defendant") conspired to commit wire fraud, Defendant shall forfeit to the United States, under 18 U.S.C. § 982(a)(3)(F), a personal money judgment in the amount of $3,316,280.85, which represents the gross receipts Defendant and his co-conspirators received from their participation in the Feeding Programs. *See* Government's Trial Exhibits 58C, 73 through 77; Dorothy Harper Plea Agreement, Dkt. 190, at 7.

2. Upon the entry of this Order, the United States is authorized to conduct any discovery proper in identifying, locating, or disposing of this money judgment. Fed. R. Crim. P. 32.2(b)(3).

3. This Order of Forfeiture shall become final as to Defendant at the time of sentencing and shall be made part of the sentence and included in the judgment. Fed. R. Crim. P. 32.2(b)(4)(A).

4. No ancillary proceeding is required because this order of forfeiture only consists of a money judgment. Fed. R. Crim. P. 32.2(c)(1).

5. The Court shall retain jurisdiction to enforce this Order and to amend it as necessary. *See* Fed. R. Crim. P. 32.2(e). The United States is authorized to execute the money judgment against any property the Defendant owns. Further the United States may, at any time,

move to amend this Order of Forfeiture to substitute property having a value not to exceed $3,316,280.85 to satisfy this money judgment in whole or in part. *See* Fed. R. Crim. P. 32.2(e).

SO ORDERED this 4th day of May 2017.

James M. Moody Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

v. No. 4:14CR00250-6 JM

ANTHONY LEON WAITS

ORDER OF FORFEITURE

IT IS HEREBY ORDERED THAT:

1. As the result of the jury's determination that Anthony Leon Waits ("Defendant") conspired to commit wire fraud, Defendant shall forfeit to the United States, under 18 U.S.C. § 982(a)(3)(F), a personal money judgment in the amount of $3,316,280.85, which represents the gross receipts Defendant and his co-conspirators received from their participation in the Feeding Programs. *See* Government's Trial Exhibits 58C, 73 through 77; Dorothy Harper Plea Agreement, Dkt. 190, at 7.

2. Upon the entry of this Order, the United States is authorized to conduct any discovery proper in identifying, locating, or disposing of this money judgment. Fed. R. Crim. P. 32.2(b)(3).

3. This Order of Forfeiture shall become final as to Defendant at the time of sentencing and shall be made part of the sentence and included in the judgment. Fed. R. Crim. P. 32.2(b)(4)(A).

4. No ancillary proceeding is required because this order of forfeiture only consists of a money judgment. Fed. R. Crim. P. 32.2(c)(1).

5. The Court shall retain jurisdiction to enforce this Order and to amend it as necessary. *See* Fed. R. Crim. P. 32.2(e). The United States is authorized to execute the money judgment against any property the Defendant owns. Further the United States may, at any time,

move to amend this Order of Forfeiture to substitute property having a value not to exceed $3,316,280.85 to satisfy this money judgment in whole or in part. *See* Fed. R. Crim. P. 32.2(e).

SO ORDERED this 4th day of May 2017.

James M. Moody Jr.
United States District Judge

Appendix G
App. 28

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3382

United States of America

Appellee

v.

Anthony Leon Waits

Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:14-cr-00250-JM-6)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 12, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	)	4:14CR00250 - JM
	)	
v.	)	18 U.S.C. §1349
	)	18 U.S.C. §1343
JACQUELINE D. MILLS	)	18 U.S.C. §666(a)(2)
DORTHA M. HARPER	)	18 U.S.C. §1957
a/k/a DOROTHY HARPER	)	18 U.S.C. §982
ANTHONY LEON WAITS	)	18 U.S.C. §3237

THIRD SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

A. INTRODUCTION

At all times material herein:

1. The Food and Nutrition Service is an agency of the United States Department of Agriculture ("USDA") which administers the Child Nutrition Programs. The Child Nutrition Programs include the Child and Adult Care Food Program ("CACFP") and the Summer Feeding Service Program ("SFSP").

2. The CACFP has an At-Risk Afterschool component which offers federal funding to afterschool programs that serve a meal and/or snack to children in low-income areas.

3. The SFSP ensures that children in low-income areas continue to receive nutritious meals during the summer when school is not in session. The At-Risk Afterschool component of the CACFP and the SFSP are hereinafter referred to as the "Feeding Programs."

4. In Arkansas, the Feeding Programs are administered by the Arkansas Department of Human Services ("DHS").

5. Sponsors are organizations which participate in the Feeding Programs. Public and private nonprofit and for-profit organizations can participate as Sponsors in the At-Risk Afterschool component of the CACFP. However, only nonprofit organizations are eligible to participate as Sponsors in the SFSP. Sponsors seeking to participate in the Feeding Programs are required to submit an application to DHS for approval. Sponsors are required to obtain DHS approval for each Site from which they intend to operate the Feeding Programs.

6. A Site is the location where meals are served under each of the Feeding Programs during a supervised time period, and a Site can include locations such as schools, recreation centers, playgrounds, parks, churches, community centers, and housing projects.

7. When Sponsors enter into an agreement with DHS, they acknowledge their responsibility to oversee the administration of their Feeding Program(s) at their approved Site(s).

8. Based on guidance published by the USDA, DHS has requirements for persons who are eligible to receive meals under the Feeding Programs ("Eligible Persons") and for meals that are eligible to be served under the Feeding Programs ("Eligible Meals").

9. Based on guidance published by the USDA, Sponsors must keep and maintain certain records, which include, but are not limited to, daily site records in order to document the number of Eligible Meals served and documentation of the allowable operating and administrative costs for the Feeding Programs.

10. In order to receive reimbursement, Sponsors access the DHS website using their personalized login information and submit data for their Sites, which include the number of eligible meals served to generate a reimbursement claim ("Claim"). The amount on each Claim is based on a straight-forward calculation ("Claim Amount"). The number of Eligible Meals served to Eligible Persons is multiplied by a rate established by Congress. Additionally, the

average daily attendance of each feeding site is calculated by dividing the number of Eligible Meals served by the number of days in operation ("Average Daily Attendance").

11. Sponsors must provide a budget with the submission of an application to participate in each Feeding Program. The budget is made up of Revenues (Claim Amounts), Operating Expenses (food, food service labor, supplies, rent, maintenance, utilities) and Administrative Expenses (administrative labor, office rent, office supplies, audit fees, communication, insurance and legal fees). DHS generally prohibits Sponsors from making capital expenditures; i.e. vehicles, buildings, and equipment. The Sponsors' budgets are evaluated and approved by DHS employees.

12. GLADYS ELISE WAITS, f/k/a GLADYS ELISE KING, (hereinafter KING) and TONIQUE D. HATTON (hereinafter HATTON) worked for DHS and their responsibilities included processing applications from Sponsors applying to participate in the Feeding Programs and determining the eligibility of Sponsors and their proposed Site(s).

13. ANTHONY LEON WAITS, (hereinafter ANTHONY WAITS) was KING's husband.

14. JACQUELINE D. MILLS (hereinafter MILLS) was a Sponsor for the Feeding Programs through R & J's After-School At-Risk Program (Agreement Number P45) and King Solomon M.B. Church (Agreement Number TA620), which had approved Sites in cities including, Blytheville, Cotton Plant, DeValls Bluff, Hazen, Helena, Jonesboro, Marianna, Marvell, Osceola, West Helena, and West Memphis. MILLS was associated with Lamars Angel Haven (Agreement Number P169) which had approved Sites in Marvell and Wynne, Arkansas.

15. All three programs as referenced in paragraph 14 above received over $2,500,000.00 in federal funds from DHS.

16. KATTIE LANNIE JORDAN (hereinafter JORDAN) participated as a Sponsor for the Feeding Programs beginning in June 2012. Jordan was a Sponsor for the Feeding Programs through Save Our Youth (Agreement Number TA273) and Save Our Community (Agreement Number P136), which had approved Sites in cities including Dermott, Dumas, Eudora, and Lake Village, Arkansas.

17. Both programs as referenced in paragraph 16 above received over $3,500,000.00 in federal funds from DHS.

18. DORTHA M. HARPER, a/k/a DOROTHY HARPER (hereinafter HARPER) was a Sponsor for the Feeding Programs through Kingdom Land Youth Outreach Ministries (Kingdom Land) (Agreement Numbers TA674 and P196), which had approved Sites in cities including Allport, Altheimer, Coy, England, Humnoke, Keo, Lowell, Scott, Toltec, and Tucker, Arkansas.

19. Kingdom Land as referenced in paragraph 18 above received over $1,300,000.00 in federal funds from DHS.

20. KING and HATTON were responsible for approving MILLS' Feeding Programs, JORDAN's Feeding Programs and HARPER's Feeding Programs at various times.

B. THE CHARGE

From in or about August 2011 to in or about August 2014, in the Eastern District of Arkansas and elsewhere, the defendants,

JACQUELINE D. MILLS,
DORTHA M. HARPER a/k/a DOROTHY HARPER, and
ANTHONY LEON WAITS

knowingly and intentionally conspired with GLADYS ELISE WAITS f/k/a GLADYS ELISE KING, TONIQUE D. HATTON, KATTIE LANNIE JORDAN, each other, and others, known to the Grand Jury, to devise and participate in a scheme to defraud and for obtaining USDA program funds by means of materially false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 1343.

C. MEANS AND MANNER

As a part of the conspiracy, the following occurred:

1. MILLS participated as a Sponsor for the Feeding Programs during the school years 2011-12, 2012-13, and 2013-14 and during the summer months in the years 2012 and 2013.

2. In MILLS' applications to participate as a Sponsor, she listed Sites where children would be fed and the maximum number of children that would be fed at each Site.

3. MILLS made payments by checks to DHS employee HATTON, directly and indirectly, beginning in or about January 2012, to DHS employee KING, directly and indirectly, beginning in or about January 2013 and to ANTHONY WAITS directly beginning in or about April 2013. The checks to ANTHONY WAITS totaled approximately $23,000. In exchange for these bribe payments, HATTON and KING, knowing that inflated claims would be submitted, approved the applications containing a specified number of Sites and a maximum number of children who would be fed at each Site and helped MILLS avoid DHS's detection of the fraud.

4. During the time MILLS participated in the Feeding Programs, MILLS inflated the number of Eligible Meals provided, thus claiming more children were fed at her Sites than were actually fed.

5. Because MILLS' applications were approved for a specified number of Sites and a specified number of children, MILLS' inflated Claims were approved and paid by DHS without further scrutiny. The Claims were approved because the number of Eligible Meals submitted for reimbursement did not exceed the number which had been approved in the applications.

6. The Claims by MILLS were submitted through the internet and most Claims, including those set forth below in Counts 2 – 26, were paid through transfers from the State of Arkansas which travelled interstate to MILLS' bank account.

7. Out of the money referenced in paragraph 15, Section A, that MILLS received from the Feeding Programs, no less than $950,000.00, was transferred to MILLS' personal bank accounts.

8. JORDAN participated as a Sponsor for the Feeding Programs during the summer months in the years 2012, 2013, and 2014 and during the school years 2012-13 and 2013-14.

9. In JORDAN's applications to participate as a Sponsor, JORDAN listed Sites where children would be fed and listed the maximum number of children fed at each Site.

10. JORDAN made payments by check to DHS employee HATTON, both directly and indirectly, beginning in or about February 2013, and to DHS employee KING directly beginning in or about February 2013 and to ANTHONY WAITS directly beginning in or about June 2013. JORDAN also made cash payments to HATTON and KING prior to making the payments by check. In exchange for these bribe payments, HATTON and KING, knowing that inflated claims would be submitted, approved the applications containing a specified number of Sites and a maximum number of children who would be fed at each Site and helped Jordan avoid DHS's detection of the fraud.

11. On April 9, 2013, JORDAN made one such payment by check number 1093 in the amount of $10,000 which was made payable to KING.

12. On August 31, 2013, JORDAN made one such payment by check number 1287 in the amount of $8,519.63 which was made payable to HATTON.

13. On June 24, 2013, JORDAN made one such payment by check number 1283 in the amount of $8,000 which was made payable to ANTHONY WAITS.

14. During the time JORDAN participated in the Feeding Programs, JORDAN inflated the number of Eligible Meals served, thus claiming more children were fed at the Sites than were actually fed.

15. Because JORDAN's applications were approved for a specified number of Sites and a specified number of children, JORDAN's inflated Claims were approved and paid by DHS without further scrutiny. The Claims were approved because the number of Eligible Meals submitted for reimbursement did not exceed the number which had been approved in the applications.

16. The Claims by JORDAN were submitted through the internet and most Claims were paid through transfers from the State of Arkansas which travelled interstate to JORDAN's bank account.

17. HARPER participated as a Sponsor for the Feeding Programs during the 2013 summer months and the 2013-2014 school year.

18. In HARPER's applications to participate as a Sponsor, she listed Sites where children would be fed and the maximum number of children that would be fed at each Site.

19. HARPER made payments by cash to ANTHONY WAITS. In exchange for these bribe payments, KING, knowing that inflated claims would be submitted, approved the

applications containing a specified number of Sites and a maximum number of children who would be fed at each Site and helped HARPER avoid DHS's detection of the fraud.

20. During the time HARPER participated in the Feeding Programs, HARPER caused inflated numbers of Eligible Meals provided to be submitted to DHS, thus claiming more children were fed at her Sites than were actually fed.

21. Because HARPER's applications were approved for a specified number of Sites and a specified number of children, HARPER's inflated Claims were approved and paid by DHS without further scrutiny. The Claims were approved because the number of Eligible Meals submitted for reimbursement did not exceed the number which had been approved in the applications.

22. The Claims were submitted through the internet and most Claims, including those set forth below in Counts 27-41, were paid through transfers from the State of Arkansas which travelled interstate to HARPER's bank account.

23. Out of the money referenced in paragraph 19, Section A, which HARPER received from the Feeding Programs, there were personal financial transactions totaling over $850,000 which included cash withdrawals, transfers to personal accounts, checks written to HARPER and HARPER's family members and purchases of cashier's checks.

24. ANTHONY WAITS recruited additional Sponsors to participate in the Feeding Programs who received payments for inflated claims. These Sponsors provided a percentage of the money received from the Feeding Programs to ANTHONY WAITS. Those Sponsors' applications were approved by KING.

All in violation of Title 18, United States Code, Sections 1349 and 3237.

COUNTS 2 – 26

Paragraphs 1 – 20 of Section A, Count 1, and Paragraphs 1 - 7 of Section C, Count 1, are hereby realleged and incorporated as though set forth in full herein.

Between in or about August 2011 and in or about August 2014, in the Eastern District of Arkansas, the defendant,

JACQUELINE D. MILLS,

with intent to defraud, voluntarily and intentionally devised and participated in the above described scheme to defraud and to obtain money by means of false and fraudulent pretenses and representations, and for the purpose of executing the scheme, caused wire communications to be transmitted in interstate commerce on or about the dates as set forth below, that is, transfers from the State of Arkansas which travelled interstate to MILLS' bank accounts in the approximate amounts as follows:

Count	Date	Amount of Deposit	Amount of Claim(s) for Feeding Programs
2	12/18/2011	$202,631.25	$202,631.25
3	05/06/2012	$46,919.08	$46,919.08
4	05/20/2012	$106,586.20	$106,586.20
5	06/03/2012	$114,385.65	$114,385.66
6	07/08/2012	$151,431.81	$151,431.83
7	10/21/2012	$17,597.13	$17,597.13
8	10/28/2012	$13,432.35	$13,432.35
9	11/04/2012	$93,051.99	$93,051.99
10	11/18/2012	$82,281.06	$82,281.07
11	12/09/2012	$78,120.41	$78,120.42
12	01/13/2013	$86,626.12	$86,626.12
13	02/17/2013	$121,185.97	$121,185.98
14	03/24/2013	$115,209.97	$115,209.97
15	05/12/2013	$147,618.48	$147,618.49
16	07/07/2013	$113,500.30	$113,500.31
17	08/04/2013	$113,515.29	$113,515.29
18	11/03/2013	$27,732.59	$27,732.59

19	12/08/2013	$95,430.46	$84,796.95
20	01/05/2014	$208,268.34	$198,857.22
21	01/12/2014	$83,756.89	$83,756.89
22	03/16/2014	$129,679.08	$117,947.22
23	04/27/2014	$113,740.93	$103,325.76
24	05/04/2014	$9,340.83	$9,340.83
25	06/01/2014	$122,369.12	$113,890.72
26	06/22/2014	$99,964.15	$99,964.16

All in violation of Title 18, United States Code, Section 1343.

COUNTS 27 - 41

Paragraphs 1-20 of Section A, Count 1, and Paragraphs 17-23 of Section C, Count 1, are hereby realleged and incorporated as though set forth in full herein.

Between in or about the June 2013 and August 2014, in the Eastern District of Arkansas, the defendant,

DORTHA M. HARPER, a/k/a DOROTHY HARPER

with intent to defraud, voluntarily and intentionally devised and participated in the above described scheme to defraud and to obtain money by means of false and fraudulent pretenses and representations, and for the purpose of executing the scheme, caused wire communications to be transmitted in interstate commerce on or about the dates as set forth below, that is, transfers from the State of Arkansas which travelled interstate to HARPER's bank account in the approximate amounts as follows:

Count	**Date**	**Amount of Deposit**	**Amount of Claim(s) for Feeding Programs**
27	07/07/2013	$46,968.79	$46,968.79
28	07/14/2013	$37,988.52	$37,988.52
29	07/21/2013	$47,970.04	$47,970.04
30	07/28/2013	$51,093.40	$51,093.40

31	08/04/2013	$50,326.67	$50,326.67
32	08/11/2013	$58,212.87	$58,212.87
33	08/18/2013	$41,943.61	$41,943.61
34	08/25/2013	$35,287.19	$35,287.19
35	12/15/2013	$147,147.44	$147,147.45
36	01/05/2014	$68,032.16	$68,032.17
37	02/09/2014	$99,114.01	$99,114.01
38	03/09/2014	$128,583.13	$128,583.14
39	04/13/2014	$104,487.16	$104,487.17
40	05/11/2014	$135,151.51	$135,151.51
41	08/03/2014	$126,055.05	$126,055.07

All in violation of Title 18, United States Code, Section 1343.

COUNT 42

Paragraphs 1 – 20 of Section A, Count 1, and paragraphs 1 - 7 of Section C, Count 1, are hereby realleged and incorporated as though set forth in full herein.

On or about the date set forth below, in the Eastern District of Arkansas, the defendant,

JACQUELINE D. MILLS,

corruptly gave, offered, and agreed to give a thing of value to any person intending to influence and reward GLADYS ELISE KING, a DHS employee, in connection with a transaction and series of transactions of DHS, an agency of a state government that received federal assistance in excess of $10,000 during the calendar year 2013, involving $5,000 or more as follows:

Count	Date	Check No.	Amount(Approx.)	Memo
42	03/13/2013	[BLANK]	$7,000.00	Supplies

All in violation of Title 18, United States Code, Section 666(a)(2).

COUNTS 43-51

Paragraphs 1 – 22 of Section A, Count 1, and paragraphs 1 - 7 of Section C, Count 1, are hereby realleged and incorporated as though set forth in full herein.

On or about the dates set forth below, in the Eastern District of Arkansas, the defendant,

JACQUELINE D. MILLS,

corruptly gave, offered, and agreed to give a thing of value to any person, both directly and indirectly, to wit, checks made payable to TONIQUE D. HATTON and to a third party for her benefit, intending to influence and reward TONIQUE D. HATTON, a DHS employee, in connection with a transaction and series of transactions of DHS, an agency of a state government that received federal assistance in excess of $10,000 during calendar years 2012 and 2013, involving $5,000 or more as follows:

Count	Date	Check No.	Amount(Approx.)	Memo
43	01/10/2012	2266	$9,890.00	Furniture
44	01/11/2012	2267	$9,980.00	[Blank]
45	02/11/2013	2393	$7,000.00	Dec
46	02/11/2013	[BLANK]	$5,000.00	Supplies-set-up Jan
47	02/11/2013	[BLANK]	$5,000.00	Jan Supplies/Food
48	03/13/2013	[BLANK]	$8,500.00	At-Risk Materials for Building
49	05/25/2013	1059	$16,000.00	Furniture/Set-up
50	08/20/2013	3002	$5,000.00	Gutters/House Painting
51	08/30/2013	2448	$5,900.00	[BLANK]

All in violation of Title 18, United States Code, Section 666(a)(2).

COUNTS 52-54

Paragraphs 1 - 20 of Section A, Count 1, and paragraphs 1 - 7 of Section C, Count 1, are hereby realleged and incorporated as though set forth in full herein.

On or about the dates set forth below, in the Eastern District of Arkansas,

JACQUELINE D. MILLS,

the defendant, knowingly engaged and attempted to engage in monetary transactions affecting interstate commerce, that is, transfers by, through and to a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation, of criminally derived property of a value greater than $10,000.00, such property having been derived from the specified unlawful activity of wire fraud as set forth in Count 2 as follows:

COUNT	DATE	AMOUNT	PAYEE
52	12/30/2011	$202,631.25	MILLS
53	02/17/2012	$70,820.00	MILLS
54	02/17/2012	$50,000.00	Purchase of a Certificate of Deposit

All in violation of Title 18, United States Code, Section 1957.

FORFEITURE ALLEGATION NO. 1

Upon conviction of Counts 1 – 26 of this Third Superseding Indictment, the defendant, JACQUELINE D. MILLS, shall forfeit to the United States, under 18 U.S.C. § 982, all property, real or personal, that represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation to include but is not limited to the following:

1. The property and residence located at 648 Beechwood Drive, Helena, Arkansas;

2. The property, residence and vacant lot located at 430 St. Jean Drive, West Helena, Arkansas.

FORFEITURE ALLEGATION NO. 2

Upon conviction of Counts 52 - 54 of this Third Superseding Indictment, the defendant, JACQUELINE D. MILLS, shall forfeit to the United States, under 18 U.S.C. § 982, all property, real or personal, involved in such offense, or any property traceable to such property, as a result of such violation.

FORFEITURE ALLEGATION NO. 3

Upon conviction of Counts 1, 27 – 41 of this Third Superseding Indictment, the defendant, DORTHA M. HARPER a/k/a DOROTHY HARPER, shall forfeit to the United States, under 18 U.S.C. § 982, all property, real or personal, that represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

FORFEITURE ALLEGATION NO. 4

Upon conviction of Count 1 of this Third Superseding Indictment, the defendant, ANTHONY LEON WAITS, shall forfeit to the United States, under 18 U.S.C. § 982, all property, real or personal, that represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(End of text. Signature page to follow.)