

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

ALLEN FONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Ninth Circuit Memorandum Disposition..... 1a

Ninth Circuit Order Denying Rehearing..... 4a

District Court Forfeiture Order..... 6a

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLEN FONG, AKA John Fujimoto,
AKA Steve Fujimoto, AKA Jeff Law,
AKA David Lee, AKA May Lee, AKA
Steve Nguyen, AKA Sakura Susa, AKA
Jeff Woo,

Defendant-Appellant.

No. 19-10254

D.C. No. 3:14-cr-00527-RS-1

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Submitted December 10, 2020**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: W. FLETCHER and IKUTA, Circuit Judges, and SCHREIER,^{***} District Judge.

Appellant Allen Fong challenges the district court's forfeiture order, claiming that: (1) the forfeiture order violated *Honeycutt v. United States*, 137 S.Ct. 1626 (2017); (2) the forfeiture order violated the Constitution's Excessive Fines Clause; (3) the district court lacked statutory authority to impose an *in personam* forfeiture money judgment; and (4) the facts triggering the mandatory forfeiture should have been found by a jury. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

The forfeiture order does not violate *Honeycutt*. The government presented sufficient evidence to prove by a preponderance that Fong personally obtained about one-third of the conspiracy's proceeds. The district court's factual findings as to the corresponding amounts are not clearly erroneous.¹ See *Honeycutt*, 137 S.Ct. at 1632-33.

^{***} The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

¹ Fong argues that the district court erred by failing to hold an evidentiary hearing regarding the factual basis for the district court's calculation of the forfeiture amount. Any error would be harmless, because the district court had previously held an evidentiary hearing to determine the proceeds of the entire conspiracy. And after remand, Fong presented no new evidence on the issue, and the court made a reasonable estimate of the fraction of the proceeds obtained by Fong.

The forfeiture order does not violate the Excessive Fines clause because the forfeiture is not “grossly disproportional to the gravity of [the] defendant’s offense.” *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The forfeiture amount in this case was less than half the authorized statutory fine allowable. *See United States v. Beecroft*, 825 F.3d 991, 1001 (9th Cir. 2016).

As Fong acknowledges, his arguments that the district court lacked authority to impose an *in personam* forfeiture money judgment and that the court violated the Sixth Amendment by finding the facts triggering mandatory criminal forfeiture are both foreclosed by this circuit’s precedent. *See United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019) (reaffirming pre-*Honeycutt* cases authorizing *in personam* forfeiture money judgments); *United States v. Phillips*, 704 F.3d 754, 769–71 (9th Cir. 2012) (rejecting argument that a jury must determine forfeiture issue).

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 11 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLEN FONG, AKA John Fujimoto,
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Defendant-Appellant.

No. 19-10254

D.C. No. 3:14-cr-00527-RS-1
Northern District of California,
San Francisco

ORDER

Before: W. FLETCHER and IKUTA, Circuit Judges, and SCHREIER,* District Judge.

Judges Ikuta and Schreier have voted to deny the petition for panel rehearing. Judge Fletcher would grant the petition for panel rehearing and remand for reconsideration in light of *United States v. Thompson*, 990 F.3d 680 (9th Cir. 2021).

Judges Fletcher and Ikuta have voted to deny the petition for rehearing en banc, and Judge Schreier has so recommended.

* The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

The full court has been advised of appellant's petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Amended Petition for Panel Rehearing and Rehearing En Banc, filed by appellant on March 22, 2021, (Dkt. Entry 54), is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN FONG,

Defendant.

Case No. [14-cr-00527-RS](#)**ORDER GRANTING MOTION FOR
FORFEITURE**

In June of 2016, defendant Allen Fong entered an open guilty plea to all thirty-two counts of the indictment in this matter. *See* Dkt. Nos. 190 and 208. Thereafter, in February of 2017, judgment was entered against Fong, which included a forfeiture money judgment of \$5,269,698. *See* Docket Nos. 273- 74.

The Ninth Circuit subsequently vacated the forfeiture order, and remanded for further consideration in light of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). *See* Dkt. No. 457. The Government then filed an application for an Amended Preliminary Order of Forfeiture, seeking a forfeiture money judgment in the amount of \$1,756,566, which the court approved. The parties, however, then stipulated to set aside that order and to have the issue briefed and heard.

Upon full consideration of the parties' briefing and arguments at the hearing, the Government's application for a forfeiture money judgment in the amount of \$1,756,566 will be granted. *Honeycutt* stands for the proposition that "joint and several liability" does not apply to

1 forfeiture. Rather, the government may “confiscate assets only from the defendant who initially
2 acquired the property and who bears responsibility for its dissipation.” 137 S. Ct. at 1634. The
3 *Honeycutt* court offered the following hypothetical:

4
5 Suppose a farmer masterminds a scheme to grow, harvest, and distribute marijuana
6 on local college campuses. The mastermind recruits a college student to deliver
7 packages and pays the student \$300 each month from the distribution proceeds for
8 his services. In one year, the mastermind earns \$3 million. The student, meanwhile,
9 earns \$3,600. If joint and several liability applied, the student would face a
forfeiture judgment for the entire amount of the conspiracy's proceeds: \$3 million.
The student would be bound by that judgment even though he never personally
acquired any proceeds beyond the \$3,600.

10 *Id.* at 1631–32.

11 Although *Honeycutt* makes clear that the college student of the hypothetical cannot be held
12 jointly and severally liable under the forfeiture laws for the entire \$3 million, it does not
13 specifically address whether the “mastermind” could reduce his or her liability by the \$3600 paid
14 out to the student. Thus, the parties’ respective arguments as to the applicability of *Honeycutt* in
15 this case fall short of supporting any particular result. There certainly can be no dispute that Fong
16 is not jointly and severally liable for forfeiture of all proceeds of the scheme, without regard to
17 what he personally received. The issue remains, however, as to what must be shown to support a
18 particular amount of a forfeiture order.

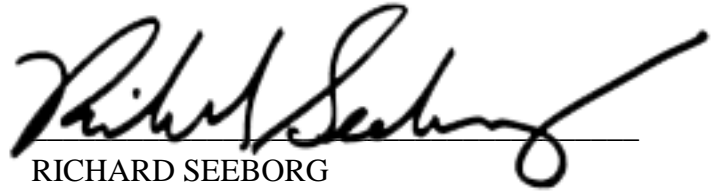
19 The government’s request for a forfeiture order in the amount of \$1,756,566 is based on
20 evidence that Fong received one-third of the proceeds from each “sex appointment.” The sum
21 therefore represents one-third of the total proceeds found to have been acquired from the scheme,
22 a dollar figure Fong does not challenge. The amended forfeiture application conforms to Fong’s
23 contention that “courts across the country” have “drastically reduc[ed] forfeiture orders post
24 *Honeycutt*.” Fong nonetheless contends that the government’s present request remains excessive
25 because, he contends, the bulk of the funds not retained by the prostitutes was paid out in various
26 expenses and/or to other conspirators, both indicted and unindicted.

27 Fong’s insistence that *Honeycutt* requires the government to do more than it has to
28

1 establish the forfeiture amount is not persuasive. *Honeycutt* precludes joint and several liability,
2 but does not otherwise set any particular standards for how a defendant's actual receipt of funds
3 must be shown. The holding is merely that forfeiture is "limited to property the defendant himself
4 actually acquired as the result of the crime." 137 S. Ct. at 1635. Here, the government has made an
5 adequate showing that it is appropriate to charge Fong with receipt of one-third of the proceeds
6 from the criminal enterprise. The amended forfeiture motion is granted.

7
8
9 **IT IS SO ORDERED.**

10
11 Dated: July 17, 2019



RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California