APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 13, 2023
Lyle W. Cayce
Clerk

No. 22-50763

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID DAVALOS, SR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:16-CR-1115-11

Before HAYNES and ENGELHARDT, *Circuit Judges*, and deGRAVELLES, *District Judge*.[*]

PER CURIAM:[**]

Appearing before us again after remand, this sentencing-related case concerns whether the district court: (1) ordered the proper amount of money to be forfeited; and (2) adhered to our previous directives to conform the

[*] United States District Judge for the Middle District of Louisiana, sitting by designation.

[**] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

written judgment to the oral sentence. For the reasons set forth below, we AFFIRM in part, REVERSE in part, and RENDER a modified judgment.

I. Facts and Procedural History

Appellant David Davalos, Sr., was charged with conspiracy to possess with intent to distribute five or more kilograms of cocaine and with the use and maintenance of a premises for the purpose of distributing cocaine. The indictment included, *inter alia*, a notice of demand for forfeiture of certain real property, and a money judgment of $5,980,000 with a provision as to substitute assets.

Davalos pleaded guilty to the charged offenses without a plea agreement. The following offense conduct was set forth in the PSR:[1] Between October 2012 and August 2016, law enforcement agencies investigated the drug trafficking activities of the Genaro Balboa-Falcon Drug Trafficking Organization ("Balboa-Falcon" or "DTO"), which was based in Mexico. The DTO was involved in smuggling kilograms of cocaine from Mexico into the area of Crystal City, Texas. Cocaine distribution took place out of at least three "crack houses" in Crystal City. Davalos operated and maintained one of the "crack houses."

After the cocaine had been distributed and sold from the Crystal City locations, coconspirators would gather the drug proceeds gained from the sales; other coconspirators would transport the proceeds back to Mexico. Nearly 230 kilograms of cocaine were distributed during the duration of the conspiracy (i.e., approximately five kilograms of cocaine each month). Each

[1] The factual basis in support of Davalos's guilty plea was similar to the offense conduct detailed in the PSR.

"crack house" sold roughly 1.5 kilograms of cocaine. Over the course of the conspiracy, the total drug proceeds were equal to nearly $5,980,000.

The district court sentenced Davalos to 235 months of imprisonment on each count of conviction and ordered the prison terms to be served concurrently. It also sentenced Davalos to five total years of supervised release and imposed certain conditions associated with that supervised release.

In relevant part, the district court imposed a condition requiring Davalos to live in a residential reentry center for six months after his release from prison. The court stated that it imposed the condition "out of an abundance of caution" because it was uncertain whether Davalos would have a "valid place" to live after he was released. The court indicated that, if Davalos had a place to live, probation "would file a motion"; the court asserted that it then would "remit" the condition. The court instructed the probation officer to "put [ ] in [her] chronos" that the condition would be remitted if Davalos "ha[d] a valid residence to go to when he [got] out." The judgment reflected the imposition of a condition requiring Davalos to live in a residential center for six months but did not state that the condition would be remitted if he had a valid residence to go to following his release from prison.

The district court additionally imposed the standard condition of supervised release providing that, unless Davalos obtained permission from the court, he was prohibited from communicating or interacting with someone whom he knew had been convicted of a felony or was engaged in criminal activity. The district court orally stated that Davalos was allowed to associate with his son, brothers, nephew and six others who were exempted from the condition. The written judgment did not set forth the announced

exceptions to the standard condition or name the people with whom the court granted Davalos permission to associate.

In addition to imposing sentence, the district court addressed the forfeiture demand. The court initially pronounced that there was "a money judgment in the case of the amount alleged of [$]5,980,000, but that is joint and several liability." However, the government instructed the court that it only sought a money judgment of $1,794,000. The government referred to *Honeycutt v. United States*, 581 U.S. 443 (2017),[2] wherein the Supreme Court concluded that a defendant is not jointly and severally liable under 21 U.S.C. § 853 for any property that his coconspirator derived from the offense but that he did not acquire himself. The district judge, then, concluded that the amount of the money judgment was $5,980,000 for "everybody combined," but the amount attributable to Davalos alone was $1,794,000. The judgment included a money judgment stating that Davalos must forfeit a sum of money equal to $1,794,000.

Davalos filed an appeal in which he, *inter alia*, challenged the money judgment and alleged that it was inconsistent with *Honeycutt*. *See United States v. Davalos*, 810 F. App'x 268, 272-73 (5th Cir. 2020) ("*Davalos I*"). He argued that the district court failed to make any factual findings as to whether he actually acquired $1,794,000 or other substitute property as a result of the crime. *Id.* at 273. We agreed, *see id.* at 272-73, reasoning that the money judgment lacked sufficient factual support and ordered that it be vacated and remanded for the purpose of making factual findings as to the appropriate money judgment in accordance with *Honeycutt*. *Id.* at 270, 273, 276.

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[2] *Honeycutt* was decided after the filing of the indictment and before the sentencing hearing.

Moreover, we noted that both parties acknowledged on appeal that there were conflicts between the written judgment and the orally pronounced sentence as to several conditions of supervised release. *Id.* at 275. We identified two conflicts: one with condition regarding Davalos's communication or interaction with persons whom he knew had been convicted of a felony or engaged in criminal activity, the other with the condition regarding the requirement that Davalos live in a residential reentry center for six months after his release from prison. First, we observed that the district court gave permission to associate with specific individuals exempted from the known-felon condition, yet "[t]hat amendment to the standard condition d[id] not appear in the written judgment." *Id.* Second, we explained, despite the court stating that the residential-reentry condition would be "remitted" if he had a "valid residence to go to" after his release from prison, the judgment did not reflect that the condition could be remitted. *Id.* Thus, we reasoned that the case should be remanded to the district court to allow it to conform the judgment to the oral sentence. *Id.* at 270, 274, 276.[3]

Upon remand, the district court entered an order addressing the issues for which the case had been remanded. Again, it ordered a money judgment in the amount of $1,794,000. The district court found that 1.5 kilograms of cocaine were distributed each month through the "crack house" operated by Davalos; the length of time of the conspiracy was 46 months; and the "amount for each kilo was $26,000 per kilo." Accordingly, the district court concluded that "1.5 kilos per month multiplied by 46 months and multiplied by $26,000 totals $1,794,000."

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[3] The Supreme Court subsequently denied a writ of certiorari. *Davalos v. United States*, 1415 S. Ct. 1518 (2021).

As to the conditions of supervised release, the district court found that an amended judgment was not required. The district court rejected this Court's decision that the orally pronounced conditions conflicted with those in the judgment. Specifically, the district court indicated that its naming of the family members with whom Davalos was permitted to interact was not an "amendment" to the standard condition precluding him from associating with known felons. It explained that it was informing Davalos that he had the court's "permission to interact with [those] family members, as stated in the condition," and noted that it "reserve[d] the right to grant or revoke permission to [the] list in the future." It then stated that, if such permission were granted or revoked, the court could do so via the United States Probation Office or through an order or oral pronouncement on the record.

Further, the district court noted that it did not intend to issue an amended condition as to where Davalos could live after his release. The district court explained that it was merely informing Davalos "of the process to change [the] condition, if necessary," such that an amendment was unnecessary. The court noted that, if Davalos had a place of residence upon his release, "probation will notify the [c]ourt and the condition will be amended at that time."

Davalos timely appealed, raising two issues. First, Davalos argues that the district court's forfeiture order was erroneous and that it should determine an award based on the property Davalos "actually acquired." Second, he argues that the district court erroneously declined to conform the written judgment to its oral pronouncement of sentence, contrary to our dictates in *Davalos I*.

II. Standards of Review:

We review the district court's findings of fact pertaining to a forfeiture order for clear error, and the question of whether those facts constitute

legally proper forfeiture *de novo*. *United States v. Ayika*, 837 F.3d 460, 468 (5th Cir. 2016).

We review *de novo* a district court's application of a remand order, including whether the district court's actions on remand were foreclosed by the law-of-the-case doctrine or the mandate rule. *United States v. Carales-Villalta*, 617 F.3d 342, 343 (5th Cir. 2010).

III. Order of Forfeiture:

We first consider Davalos's forfeiture challenge. Davalos contends that the district court erred because it "did not determine what portion of the $1.794 million was 'actually acquired' by Davalos as directed by Honeycutt." But the district court did not need to identify which portion of the $1.794 million Davalos "actually acquired."

Under 21 U.S.C. § 853, a person convicted of certain drug crimes, like Davalos's crimes, "shall forfeit to the United States … any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a)(1). "In *Honeycutt*, the Supreme Court read the phrase 'obtained ... as the result of such violation' to mean that the defendant himself must 'get' or 'acquire' the tainted property." *United States v. Moya*, 18 F.4th 480, 484 (5th Cir. 2021) (quoting *Honeycutt*, 581 U.S. at 449). "This excludes 'joint and several liability' for property obtained not by the defendant but by a co-conspirator." *Id.* (citing *Honeycutt*, 581 U.S. at 449-50); *see also Honeycutt*, 581 U.S. at 453 ("The plain text and structure of § 853 leave no doubt that Congress did not incorporate [the] background principles ... [of] conspiracy liability[.]").

"To illustrate its holding, *Honeycutt* posed this hypo[:] A farmer pays a student $300 per month to sell the farmer's marihuana on a college campus; the farmer earns $3 million and the student earns $3,600." *Moya*, 18 F.4th at 484 (citing *Honeycutt*, 581 U.S. at 448). "Under § 853(a)(1), the student

would forfeit the $3,600 he 'obtained as a result of' the drug trafficking," "[b]ut not the remaining $2,996,400." *Id.* (citing *Honeycutt*, 581 U.S. at 448-49). "Those tainted proceeds were 'obtained' by the farmer, not the student." *Id.* at 484-85 (citing *Honeycutt*, 581 U.S. at 449-50). "In other words, to make the student forfeit the entire $3 million would impose '[j]oint and several liability,' which 'would represent a departure from § 853(a)'s restriction of forfeiture to tainted property.'" *Id.* at 485 (citing *Honeycutt*, 581 U.S. at 449).

According to Davalos, he is the student in the *Honeycutt* hypo. He concedes that "approximately $1.794 million flowed through [his] crack house." But then, says Davalos, "the $1.794 million flowed south to Balboa-Falcon in Mexico," meaning that the tainted drug proceeds were obtained by Balboa-Falcon, not by Davalos. He argues that because some portion of that tainted money was acquired by Davalos's supplier, holding Davalos liable for the entire $1.794 million would mean that he would have to pay that portion of it from his own untainted assets.

In addition to the *Honeycutt* hypo, Davalos relies on *Moya*. There, we decided that the defendant was not liable for the conspiracy's entire $4 million, when "[t]he evidence show[ed] that Moya [*i.e.*, the defendant] earned up to $1,000 per kilo to distribute [a foreign drug trafficker's] narcotics" and "made roughly $150,000 from these sales, while the rest of the money flowed south to [the foreign drug trafficker]." *Moya*, 18 F.4th at 485. We noted that the foreign drug trafficker "obtained the vast majority of the trafficking proceeds through Moya's efforts," such that the foreigner, "not Moya, obtained those proceeds 'indirectly'" and "Moya obtained only the $150,000 he personally acquired as profit for his trafficking." *Id.* at 485. This, we said, "[was] the *Honeycutt* hypo to a T." *Id.* Because the forfeiture order "ma[de] Moya responsible for drug proceeds that [the foreign drug trafficker] obtained," we vacated the order and remanded the case to the

district court to determine an award based on the property that Moya obtained as a result of the conspiracy." *Id.* at 485-86.

But Davalos's reliance on *Moya* and the *Honeycutt* hypo is misplaced. The central concern in the *Moya* case and the *Honeycutt* hypo was whether Moya or the *Honeycutt* student would be liable for the *total* amount of money gained from the conspiracy: either $4 million (in Moya's case) or $3 million (in the *Honeycutt* student's case). In both *Moya* and *Honeycutt*, the Courts concluded that joint-and-several liability under § 853(a)(1) is impermissible. This Court never decided what portion of the total $4 million – profits or not – Moya needed to forfeit. *Moya*, 18 F.4th at 485-86.

Further, we have already held that a forfeiture order may reach beyond profits. *See United States v. Olguin*, 643 F.3d 384, 399-400 (5th Cir. 2011).[4] In *Olguin*, the defendants argued that the district court erred when it computed the forfeiture amount based upon the gross amount of the conspiracy yielded, and not the net profits. *Id.* at 399. The defendants, however, acknowledged that § 853 forfeiture orders had been traditionally based on gross proceeds. *Id.* Relying on our opinion in *United States v. Fernandez*, 559 F.3d 303 (5th Cir. 2009), we explained that we had previously affirmed a district court's forfeiture order characterizing proceeds as receipts, not profits. *Id.* "When considering the sale of contraband and the operation of a criminal organization," we explained that we previously held in the *Fernandez* case "that the defendant in *Fernandez* could not, on appellate review, render the district court's proceeds-not-profits

[4] This Court in *Moya* did not address the *Olguin* case. Moreover, the Supreme Court in Honeycutt made no specific holding about "profits," rather that joint and several liability is impermissible under § 853(a)(1). *Honeycutt*, 581 U.S. at 448. To the extent that *Moya* and *Olguin* conflict, *Olguin* controls. *See Arnold v. U.S. Dep't of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("[U]nder the rule of orderliness, to the extent that a more recent case contradicts an older case, the newer language has no effect.").

characterization of the forfeiture order as plainly erroneous." *Id.* at 400. Accordingly, the *Olguin* defendants' argument failed, and we affirmed "the district court's judgment that the forfeiture order apply to gross receipts, and not simply profits." *Id.*

We also noted that "there is a logical inconsistency in holding that a forfeiture order reaches only profits and not receipts in a context where narcotics are illicitly trafficked for profit." *Id.* "Such a holding," we explained, "would excuse monies spent on the cost of running the conspiracy and the enterprise," like, in the *Olguin* defendants' case, "the cost of renting a U–Haul, the monies spent on the communications apparatus erected to further the enterprise, and any other monies expended to fuel the conspiracy." *Id.* But, we concluded, "the [Comprehensive Forfeiture Act, which includes § 853,] was intended to reach every last dollar that flowed through the criminal's hands in connection with the illicit activity." *Id.* "Were we to hold otherwise, and the [*Olguin* defendants'] arguments embraced, it would essentially mean that criminal defendants have an in-road by which to thwart Congressional intent in wanting to punish parties for their involvement in a criminal enterprise." *Id.*

So, where a forfeiture order should reach "every last dollar that flowed through a criminal's hands," *id.*, we need not remand, as Davalos suggests, for the district court to "determine an award based on the property that Davalos *actually acquired*." Davalos is one trafficker in a scheme of at least three trafficking houses, and it is clear, based off Davalos's own admission, what precise amount of the total operation flowed through his hands, $1,794,000, as opposed to the total $5,980,000. By ordering Davalos to pay only the $1,794,000 – and not the $5,980,000 – the district court applied the central holding in *Honeycutt*: that joint and several liability is not permitted under § 853(a)(1). *Honeycutt*, 581 U.S. at 448. Because the district

court's order reaches all $1.794 million that Davalos concedes "flowed through [his] crack house," we find no error.[5]

IV. Other Provisions of Sentence:

We next address Davalos's argument that the district court failed to adhere to our previous directives to conform the written judgment to the oral sentence. Davalos maintains that the district court disagreed with this Court's explicit mandates and refused to modify the judgment as directed. And he is correct.

"Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (quoting *Tollett v. City of Kemah,* 285 F.3d 357, 363 (5th Cir. 2002)). "Without this doctrine, cases would end only when obstinate litigants tire of re-asserting the same arguments over and over again." *Id.* "Moreover, the doctrine discourages opportunistic litigants from appealing repeatedly in hopes of obtaining a more sympathetic panel of this court." *Id.* (citation omitted).

A specific application of the general doctrine of law of the case, the mandate rule, requires a district court to follow "the letter and spirit of the mandate by taking into account the appeals court's opinion and circumstances it embraces." *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006). The mandate rule, however, has three exceptions that, if present, would permit a district court to exceed our mandate on remand: "(1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier

[5] The government argues that Davalos waived his forfeiture challenge. Because Davalos's claim fails on the merits, we decline to address the waiver argument.

decision is clearly erroneous and would work a manifest injustice." *Matthews*, 312 F.3d at 657 (citation omitted). We have adopted "a restrictive rule for interpreting the scope of the mandate in the criminal resentencing context." *Id.* at 658.

We expressly determined in Davalos's initial appeal that the written judgment conflicted with the oral pronouncement of sentence as to the two particular conditions of supervised release. *Davalos I*, 810 F. App'x at 275-76. We identified the conditions and detailed the conflicts. *See id.* at 275. In particular, we explained that, while the district court orally modified the standard condition barring Davalos from associating with known felons and named specific persons with whom Davalos could associate, the written judgment did not include that information. *Id.* Likewise, we detailed that, while the district court orally pronounced that the condition requiring Davalos to live in a residential reentry center for six months would be remitted if he had a valid residence to go to after he was released from prison, the judgment omitted that contingency. *Id.* We held that the judgment broadened the restrictions of requirements of supervised release from the oral sentence, concluded that the proper remedy was to remand the case to the district court to amend the judgment to the oral sentence, and ordered that the case be remanded for the district court to conform the judgment to its oral sentence as to the two conditions. *Id.* at 270, 274, 276. We did not leave the district court the option to ignore our order.

The district court did not adhere to our directives. Rather, it rejected our decision that there was a conflict between the judgment and the oral sentence, determining that there only was an "ambiguity." It clarified that the statements excluded from the written judgment were not "amendments." Rather, it explained that it merely: (1) granted Davalos permission to interact with certain family members with respect to the associating-with-known-felons condition; and (2) informed him of the

process to change the residential-reentry condition in the future. The district court, therefore, declined to conform the judgment to the orally pronounced sentence and instead chose to clarify its intentions as to the conditions of supervised release.

By ignoring our holding that there was a conflict and refusing to modify the judgment in accordance with our order, the district court violated the mandate rule. *See Pineiro*, 470 F.3d at 205; *Matthews*, 312 F.3d at 658. *See United States v. Bagley*, 639 F. App'x 231, 232-33 (5th Cir. 2016). But no exception to the mandate rule applies in this instance. *See Matthews*, 312 F.3d at 657 (discussing exceptions).

Appellate courts may "affirm, modify, vacate, set aside or reverse any judgment . . . and may remand the cause and direct the entry of such appropriate judgment." 28 U.S.C. § 2106. We have construed § 2106 to confer discretion on this Court to reform the judgment or to remand for the district court to do so. *United States v. Hermoso*, 484 F. App'x 970, 972-73 (5th Cir. 2012); *see, e.g.*, *United States v. Wheeler*, 322 F.3d 823, 828 (5th Cir. 2003) (remanding to correct judgment in light of conflict); *United States v. Rodriguez-Barajas*, 483 F. App'x 934, 935-36 (5th Cir. 2012) (affirming without remand after modifying the written judgment to excise a special condition of supervised release not orally pronounced). Seeing that the district court did not follow our dictates on remand, we conclude that it is proper to reform the judgment at this juncture.

The two contested conditions of supervised release are modified as follows:

(1) The defendant shall reside in a residential reentry center for a term of Six (6) months. The defendant shall follow the rules and regulations of the center. Should the defendant have a valid place of residence at the time of his release, probation shall notify the Court which shall amend that portion

of this order to delete the requirement to reside in a residential reentry. Further, once employed the defendant shall pay 25% of his/her weekly gross as long as it does not exceed the contract rate.

(2) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the Court. Notwithstanding this condition, the Court permits communication with the following family members: David Davalos, Jr., Jacinto Davalos, Bruce Davalos, Maricela Davalos, Ronald Davalos, and William Davalos. The court retains the right to revoke its permission at any given time as to any of these individuals.

V.

The district court did not err in calculating the proper forfeiture amount. It did err, however, in failing to follow the mandate of this Court to conform the written judgment to the oral pronouncement of sentence. Accordingly, we AFFIRM in part, REVERSE in part, and RENDER a modified judgment in accordance with this opinion.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
v.	§	**Cause No.**
	§	**DR-16-CR-01115-AM**
DAVID DAVALOS, SR. (11),	§	
Defendant.	§	

ORDER

The United States Court of Appeals for the Fifth Circuit remanded two issues to this Court in the above captioned matter. (ECF No. 1277.) On January 26, 2021, this Court ordered the parties to submit briefs on the Court's pending factfinding as to the appropriate value of the money judgment, in accordance with the Circuit's opinion. (ECF No. 1293.) On February 26, 2021, the parties submitted briefs for the Court's review. (ECF Nos. 1294, 1295.) The Court has reviewed the parties' briefs, as well as the record from the Defendant's sentencing hearing held on August 29, 2018 (ECF No. 1193), and makes the following findings:

On March 30, 2017, the Defendant pled guilty to Count Three of the indictment, Conspiracy to Possess with Intent to Distribute More than 5 Kilograms of Cocaine, in violation of Title 21 U.S.C. § 846; and Count Five of the Indictment, Maintaining Drug Involved Premises, in violation of Title 21 U.S.C. § 856. (ECF No. 1146.) On August 29, 2018, this Court sentenced the Defendant to 235 months of imprisonment as to Count Three and 235 months of imprisonment as the Count Five to run concurrent with credit for time served from August 17, 2016 through September 1, 2016. (*Id.* at 2.)

As stated on the record (ECF No. 1193 at 66) and in the Judgment (ECF No. 1146 at 7), the Defendant is ordered to forfeit the following money judgment to the United States: A sum of

money equal to One Million Seven Hundred Ninety-Four Thousand Dollars ($1,794,000.00). The Court finds that 1.5 kilos of cocaine were distributed through the Defendant's crack house per month. (ECF No. 1193 at 19; ECF No. 975 at 10.) The length of time of the conspiracy, from on or about October 1, 2012 until August 10, 2016, was 46 months. (ECF No. 1193 at 21; ECF No. 975 at 9.) The amount for each kilo was $26,000 per kilo. (ECF No. 1193 at 21.) 1.5 kilos per month multiplied by 46 months and multiplied by $26,000 totals $1,794,000.00.

The Circuit also remanded two conditions the Court imposed on the Defendant upon his release from imprisonment. First, standard condition 8 states, "If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the Court." (ECF No. 1146 at 5.) The Court stated at the Defendant's sentencing that the Defendant has the Court's permission to interact with the following family members who are also convicted felons: David Davalos, Jr., Jacinto Davalos, Bruce Davalos, Maricela Davalos, Ronald Davalos, and William Davalos. (ECF No. 1193 at 63.) The Circuit noted that this "amendment to the standard condition does not appear in the written judgment." The Court notes that this statement was not an amendment to the standard condition. The Court was informing the Defendant he had the Court's permission to interact with these family members, as stated in the condition. The Court reserves the right to grant or revoke permission to this list in the future. Whenever permission is granted or revoked, the Court may do so through written order, oral pronouncement on the record, or through the U.S. Probation Office—an amended judgment is not necessary. Therefore, an amendment judgment is not necessary for this condition.

Second, another condition of supervised release for the Defendant is that he "shall reside in a residential reentry center for a term of Six (6) months." (ECF No. 1146 at 3.) At sentencing,

the Court stated that it was imposing this condition out of an abundance of caution based on the uncertainty with the forfeiture of the Defendant's house. The Court stated, "If, when you get out, you've got a place to live, probation will file a motion with me, I'll remit this next condition." (ECF No. 1193 at 61.) The Circuit noted that the written judgment does not provide that the condition may be "remitted." Again, the Court was not imposing an amended condition to the terms of the Defendant's supervised release. The Court was informing the Defendant of the process to change this condition, if necessary. Should the Defendant have a place of residence at the time of his release, probation will notify the Court and the condition will be amended at that time.

SIGNED on this 19th day of August, 2022.

ALIA MOSES
United States District Judge

APPENDIX C

Title 21 United States Code – Food and Drugs
Chapter 13 – Drug Abuse Prevention and Control
Subchapter I – Control and Enforcement
Part D – Offenses and Penalties
Section 853 - Criminal Forfeitures

- (a) Property subject to criminal forfeiture
  Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law -
  - (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
  - (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
    (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise. The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.
- (b) Meaning of term "property"
  Property subject to criminal forfeiture under this section includes -
  - (1) real property, including things growing on, affixed to, and found in land; and
    (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.
- (c) Third party transfers
  All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

- (d) Rebuttable presumption
  There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that -
    - (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
      (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.
- (e) Protective orders
    - (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section -
        - (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
        - (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that -
            - (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
              (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:
            - Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.
    - (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the

property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

- (3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.
- (4) ORDER TO REPATRIATE AND DEPOSIT-
  - (A) IN GENERAL- Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.
  - (B) FAILURE TO COMPLY- Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

- (f) Warrant of seizure
  The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.
- (g) Execution
  Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from

property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

- (h) Disposition of property
  Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.
- (i) Authority of the Attorney General
  With respect to property ordered forfeited under this section, the Attorney General is authorized to -
  - (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;
  - (2) compromise claims arising under this section;
  - (3) award compensation to persons providing information resulting in a forfeiture under this section;
  - (4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and
    (5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.
  - (j) Applicability of civil forfeiture provisions
    Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.
  - (k) Bar on intervention
    Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may -

- (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
- (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

- (l) Jurisdiction to enter orders
  The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.
- (m) Depositions
  In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.
- (n) Third party interests
  - (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
  - (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.
  - (3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

- (4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.
- (5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.
- (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -
    - (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave
      rise to the forfeiture of the property under this section; or
    - (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property
      was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.
- (7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

- (o) Construction
  The provisions of this section shall be liberally construed to effectuate its remedial purposes.
- (p) Forfeiture of substitute property
  (1) IN GENERAL- Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant--
    (A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) SUBSTITUTE PROPERTY- In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) RETURN OF PROPERTY TO JURISDICTION- In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

- (q) Restitution for cleanup of clandestine laboratory sites
  The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture of methamphetamine, may -
  - (1) order restitution as provided in sections 3612 and 3664 of title 18;
  - (2) order the defendant to reimburse the United States for the costs incurred by the United States for the cleanup associated with the manufacture of methamphetamine by the defendant; and
    (3) order restitution to any person injured as a result of the offense as provided in section 3663 of title 18.