

In the
Supreme Court of the United States,

LUCILLE FRIAL-CARRASCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI**

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARROLL LLOYD ELLIOTT (16-6474); LUCILLE M.
FRIAL-CARRASCO (16-6676); PATRICIA ANN SOLOMON
(16-6683),

Defendants-Appellants.

Nos. 16-6474/6676/6683

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 6:13-cr-00040-7—Amul R. Thapar, District Judge.

Decided and Filed: November 30, 2017

Before: KEITH, ROGERS, and McKEAGUE, Circuit Judges.

COUNSEL

ON BRIEF: Kevin M. Schad, FEDERAL PUBLIC DEFENDER SOUTHERN DISTRICT OF OHIO, Cincinnati, Ohio, for Appellant in 16-6474. Edward L. Metzger III, ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC, Covington, Kentucky, for Appellant in 16-6676. Travis A. Rossman, ROSSMAN LAW, PLLC, Barbourville, Kentucky, for Appellant in 16-6683. Charles P. Wisdom, Jr., Dmitriy Slavin, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky for Appellee.

OPINION

ROGERS, Circuit Judge. Defendants are all former employees of a South Florida pill mill. Carroll Elliot was a security guard, Lucille Frial-Carrasco a physician and medical director,

and Patricia Solomon a physician assistant at the clinic in question. They were all convicted in the district court below of conspiracy to distribute oxycodone and sentenced to terms in prison and forfeiture of proceeds. Frial-Carrasco argues that venue was improper in the Eastern District of Kentucky because the customers who were known to be taking large amounts of pills back home to Kentucky were merely purchasers and not coconspirators, and thus no conspirator committed an overt act in Kentucky. Venue in the Eastern District of Kentucky was proper, however, because the conspiracy's intended effects were in Eastern Kentucky, and a conspirator can be tried at the place where a conspiracy targets its acts. The defendants in this combined appeal raise several additional arguments to challenge their convictions, but these arguments lack merit. However, the calculation of forfeiture amounts requires a remand in light of the Supreme Court's intervening decision in *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017).

I.

From 2008 to 2014, the Pain Center of Broward ("PCB") in Ft. Lauderdale, Florida, was the place to go to find cheap pain pill prescriptions. Indeed, the banner hanging in the waiting room advertised exactly that: "Pain Center of Broward, lowest cost prescriptions." At just \$300 for an initial appointment, \$200 for a repeat visit, and with discounts for loyal customers, a patient could leave the PCB with a monthly prescription for 180 30-milligram and 90 15-milligram pills of oxycodone. By way of context, another doctor might prescribe a new patient two 5-milligram pills per day. Business at the PCB boomed. At its height, 60 to 65 patients a day arrived at the PCB. They would overcrowd the waiting room and spill over into the parking lots, creating a mass so substantial that the clinic's staff feared that the crowds would attract the suspicion of federal agents.

The PCB was the brainchild of its owner, Joel Shumrak. Shumrak was not a doctor, nor did he possess medical training. As Shumrak testified at trial, the reason for the PCB's existence was straightforward: "[i]t was a good moneymaking arrangement." Shumrak's assessment was accurate. During its existence, the clinic generated over \$10 million in profits. To earn this sum required more business than the local market alone could provide. Indeed, only about half of the PCB's customers came from Florida. Instead, the clinic grew prosperous on a flow of out-of-

state traffic, with prospective patients traveling to the clinic from locations far outside Ft. Lauderdale, including from Ohio, Georgia, and Massachusetts.

Although the PCB saw patients from states around the nation, Kentucky was among its richest sources. Around 20 percent of the clinic's patients, some 1,800 people, were Kentucky residents. Seven of Eastern Kentucky's largest drug trafficking organizations used the PCB as their source for opioid pills. At the zenith of the PCB's business, one or more such trafficking groups a week, seven to ten people per crew, would travel to the clinic for a new set of prescriptions, to obtain pills to sell in Kentucky. Kentucky patients journeyed to the PCB in large part because government crackdowns had closed unscrupulous providers closer to home, and the PCB supplied prescriptions unavailable in Kentucky. The fact of the PCB's Kentucky clientele was not a secret at the clinic. Kentucky license plates filled the PCB parking lot. Some visitors would even sleep in their cars overnight, exhausted by the journey from Kentucky to Ft. Lauderdale. Kentucky patients continued to flock to the clinic, up until and including the day it closed.

Carroll Elliott began work as a security guard at the PCB in January of 2011. Shumrak hired Elliott because Shumrak feared that the large crowd of patients loitering around the outside of the PCB might arouse law enforcement's suspicions. Elliott spent his days keeping order in and around the clinic. He passed most of his time in the parking lot, guarding the front entrance and ensuring that no patients dawdled outside. Elliott also monitored the area around the clinic for those who might prove too attentive to the PCB, once ordering an undercover agent conducting surveillance off the property. When Elliott observed DEA agents or Ft. Lauderdale police watching the building, he would enter the clinic to warn patients of their presence. Elliott's duties were not confined to the periphery of the PCB. When rowdy patients clashed in the clinic's waiting rooms, Elliott would usher those troublemakers out. Elliott would also escort patients from the entrance of the PCB into waiting rooms. Sometimes, patients would offer Elliott money to reduce their waiting times. Elliott would accept the cash, and move those patients to the front of the line. When a doctor fell ill, Elliott would shuttle prescriptions from the clinic, to the doctor for signature, and then back again to the waiting patients.

Lucille Frial-Carrasco took a job at the PCB in 2012. She worked primarily as a doctor at the clinic, and also spent a term as its medical director. Frial-Carrasco's practice lay in the prescription of oxycodone. She wrote her average patient a prescription of 120 to 150 oxycodone tablets for a month's use. At trial, she testified that such amounts are most commonly appropriate for patients with traumatic injuries or in end-of-life care. Many of Frial-Carrasco's patients were Kentucky residents. She knew that they carpooled down to the PCB together, and considered that fact to be one of many "red flag[s]" that the PCB was a "pill mill." Throughout her tenure, Frial-Carrasco observed several other things she considered to be warning signs about the PCB's legitimacy, including the types of its patients, the distance they traveled to the clinic, the quantities of drugs prescribed, the clinic's cursory examinations, and its advertising techniques.

Frial-Carrasco also had a testy relationship with Shumrak. She testified that he would admonish her for the slowness of her appointments. (Frial-Carrasco aimed to spend 15 minutes per patient.) In January of 2014, Frial-Carrasco began to take greater initiative in reviewing patient files and recommending more tailored treatments. Shumrak objected to Frial-Carrasco's comparatively more measured pace. After several months of conflict between her and Shumrak, Frial-Carrasco resigned from the clinic a few days before its closure in June 2014.

Patricia Solomon joined the PCB as a physician assistant in 2010. As with Frial-Carrasco, Solomon's work involved generating drug prescriptions. With most patients, Solomon would examine them and fill out a form prescribing opioids. Solomon's examinations were brief, usually involving perfunctory questions about diet and exercise, and minimal physical contact. Because physician assistants in Florida cannot write prescriptions on their own authority, Solomon would bring the forms to a doctor for signature; those forms were almost always accepted. However, no doctor supervised Solomon while she gave the patients exams, or filled out their prescription amounts. Solomon would also assist doctors as they examined patients and fill out the prescriptions the doctors authorized. Occasionally, Solomon would suggest that a doctor was overprescribing and recommend a lower dose; the doctor would usually follow that advice. Many of the patients Solomon saw were Kentucky residents, and Solomon

knew that the patients traveled to the clinic for prescriptions. Solomon continued working at the PCB until it closed.

On June 3, 2014, DEA agents raided the PCB. They arrived with an arrest warrant for Shumrak and a search warrant for the clinic. The agents entered with weapons drawn, but quickly holstered them after securing the building. They arrested Shumrak, handcuffed him, and led him away. The agents then escorted clinic employees to a business office in the front of the clinic, and began to search the rest of the building. The lead DEA agent, Officer Dalrymple, told the employees, including Patricia Solomon, “that none of them were under arrest,” but that “the agents” would like to talk to each one of them individually” after the agents completed the search. This search took most of the morning. During that time, clinic employees who needed to use the restroom, which was located in the area being searched, required an escort to prevent them from freely moving about that secured area. The searchers did not otherwise prohibit the employees from leaving the business office, and the front door to the clinic lay open the whole time.

Around 1 p.m., a DEA agent and an investigator from the Florida Department of Health and Human Services brought Solomon to an examination room in the back of the clinic for an interview. Solomon was familiar with this examination room, having frequently examined patients in it. The room was narrow, about twenty-five to thirty-five feet in length, and the agents sat ten to fifteen feet away from Solomon. The door to the room was closed but not locked. The agents informed Solomon that she was not under arrest, and then proceeded to question her about her employment at the clinic. During that conversation, Solomon made a series of incriminating statements, including that she knew many clinic patients came from Kentucky, that the patients had traveled to Florida expressly for medical treatment, and that the clinic saw few Florida residents. Approximately 45 minutes into the interview, DEA Agent Dalrymple entered the room. After about 5 minutes, the other agents concluded their questioning and Agent Dalrymple began speaking with Solomon. Shortly thereafter, believing that Solomon was lying to him, Agent Dalrymple read *Miranda* warnings to Solomon. Her prior questioners had not read Solomon these warnings. Agent Dalrymple concluded the interview with Solomon after about fifteen to twenty minutes of his questioning.

Following the raid, a grand jury in the Eastern District of Kentucky indicted the defendants for conspiracy to dispense oxycodone. Before trial, Solomon moved to suppress the statements made during her questioning, alleging that she was in custody and threatened by agents at the time she made them.¹ After hearing testimony from Solomon and Agent Dalrymple, a magistrate judge filed a Report and Recommendation that the motion to suppress be denied. The magistrate judge found that Solomon had not been in custody, based primarily on factors set forth in *United States v. Panak*, 552 F.3d 462, 465 (6th Cir. 2009). The magistrate judge based this evaluation on the relatively familiar location of Solomon's interview, the comparatively short questioning, and the lack of restraints on her movement. The magistrate judge considered testimony from Solomon that agents had threatened her with penalties for non-cooperation, but specifically found this testimony "not credible." The magistrate judge also rejected Solomon's argument for suppressing her post-*Miranda* statements pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004). The district court adopted the magistrate judge's Report and Recommendation, holding that Agent Dalrymple's testimony that no coercion occurred was credible, and that Solomon's was not.

Also before trial the United States proposed to call Dr. Stanley Golovac, a practicing pain management physician, as an expert witness. Dr. Golovac had reviewed 40 patient files provided to him by the prosecution, and proposed to testify as to how 28 of those files varied from the standard of care he would have used. After evaluating Dr. Golovac's credentials and proposed testimony, the court permitted Dr. Golovac to testify as an opinion witness to the general standard of care and the care received by the patients in the files he reviewed, but not to whether any individual defendant violated that standard of care. Dr. Golovac's trial testimony followed those lines.

After eight days of trial, a jury found the defendants all guilty of conspiracy. Pursuant to that conviction, the court then assessed forfeiture of proceeds from the conspiracy, \$10 million in total, against the defendants. Applying the then-prevailing standards of *United States v. Honeycutt*, 816 F.3d 362, 379–80 (6th Cir. 2016), the court credited the defendants with \$8 million previously forfeited by Joel Shumrak, and found them jointly and severally liable for

¹ Solomon now concedes that she was not threatened. Solomon Brief at 42.

the remaining \$2 million. The court finally reduced the defendants' liability in proportion to the percentage of the conspiracy that they participated in: Frial-Carrasco, for example, involved in 80% of the conspiracy, was jointly and severally liable for 80% of \$2 million, or \$1.6 million.

Defendants now appeal.

II.

Frial-Carrasco objects that the Eastern District of Kentucky was not a proper place to try her, but this argument fails because her participation in a conspiracy distributing oxycodone into Kentucky made the Eastern District of Kentucky a permissible venue for her trial. The Constitution mandates that a criminal prosecution occur in the state and district where a crime is committed. *See* U.S. Const. art. III § 2, cl. 3; *id.* amend. VI. The Federal Rules of Criminal Procedure likewise compel the Government to “prosecute an offense in a district where the offense was committed.” Fed. R. Crim. P. 18. Here, the fact that the conspirators distributed oxycodone to Kentucky residents for use in Kentucky meant that Kentucky was a place of commission for that PCB conspiracy, and the government could prosecute Frial-Carrasco there.

Uncontroverted evidence shows that the defendants knew they were distributing excessive quantities of opiates to Kentucky residents, and that the destination of the oxycodone would be Kentucky. Indeed, the PCB's ability to effect such distribution in Kentucky was a key element in the clinic's success. Kentucky residents were only willing to travel to Florida because Kentucky had sought to address that state's opioid problem by closing down unscrupulous providers closer to home. The PCB gained massive financial benefits by taking advantage of the demand for oxycodone by Kentucky residents. Realizing that gain, however, correspondingly allows trial in Kentucky based on the PCB's distributions.

Where, as here, a crime against the United States lacks a venue otherwise prescribed by statute, Congress has provided that the crime may be prosecuted “in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a). For a drug conspiracy like the one at issue in this case, the relevant offenses are “‘continuous crimes’; that is, they are not completed until the drugs reach their final destination.” *United States v. Turner*, 936 F.2d 221, 226 (6th Cir. 1991). In consequence, this court has held that venue is permissible at the intended

geographic end-point of a drug conspiracy. In *Turner*, for example, we held that Michigan was a permissible venue to try a drug importation offense for defendants who operated an air-strip in the Bahamas, which drug smugglers used to fly cocaine from Colombia into Michigan. *Id.* at 223. In that case, because the drug importation offense continued through the cocaine's arrival in Michigan, the Turners could be tried in Michigan. *Id.* at 226. Here, likewise, Kentucky was the final destination of the oxycodone that Frial-Carrasco and her co-conspirators supplied, and so it was permissible to try their conspiracy in Kentucky.

Finding venue in Kentucky because it was the intended destination of the pills prescribed at the PCB is fully consistent with general principles of venue law. As this and a number of other circuits have long recognized, “[s]o long as an overt act . . . is intended to have an effect in the district where the case is finally brought, venue is proper [there].” *United States v. Frederick*, 835 F.2d 1211, 1215 (7th Cir. 1987); *see also United States v. Williams*, 788 F.2d 1213, 1216 (6th Cir. 1986) (finding that where a defendant jumps bail, the “effect in the district where a defendant is ordered to appear” supports venue there). Indeed, as the Second Circuit has affirmed, “places that suffer the effects of a crime are entitled to consideration for venue purposes. Such districts have an obvious contact with the litigation in their interest in preventing such effects from occurring.” *United States v. Reed*, 773 F.2d 477, 482 (2d Cir. 1985).

Other circuits have thus similarly held that the location of a crime's effects is a permissible place of prosecution for various crimes. For example, multiple circuits, including this one, hold that venue for obstruction of justice “is proper in the district in which the proceeding sought to be obstructed is pending even though the would-be obstructive acts took place elsewhere.” *Id.* at 486. *See also United States v. Cofield*, 11 F.3d 413, 419 (4th Cir. 1993); *Frederick*, 835 F.2d at 1215; *United States v. Tedesco*, 635 F.2d 902, 906 (1st Cir. 1980); *United States v. O'Donnell*, 510 F.2d 1190, 1193 (6th Cir. 1975). Likewise, other circuits have affirmed that venue is proper in the place of an act's intended effect for crimes as diverse as non-payment of child support, *see, e.g., United States v. Muench*, 153 F.3d 1298, 1301 (11th Cir. 1998); *United States v. Murphy*, 117 F.3d 137, 140 (4th Cir. 1997); *United States v. Crawford*, 115 F.3d 1397, 1405 (8th Cir. 1997); and Hobbs Act robbery, *see United States v. Davis*, 689 F.3d 179,

187 (2d Cir. 2012) (“[V]enue may also be informed by where the defendant knew or reasonably should have foreseen that interstate commerce would be affected.”).

This result is also not unjust to a defendant like Frial-Carrasco. As the Second Circuit has explained in another criminal conspiracy case, “defendants, having concocted a scheme that relied so heavily on the actions of [district residents] for its success . . . can hardly complain that their very *modus operandi* subjected them to prosecution in numerous districts, including the Eastern District of New York.” *United States v. Royer*, 549 F.3d 886, 895 (2d Cir. 2008). The same principle operates here. By conspiring to distribute oxycodone to Kentucky residents for use in Kentucky, Frial-Carrasco permitted her prosecution in Kentucky.

Frial-Carrasco urges this court to distinguish her case from *Turner*, objecting that, because the record did not clearly show that the PCB conspirators conspired with Kentucky drug gangs to redistribute the oxycodone in Kentucky, no act of the PCB conspiracy occurred in Kentucky. But this argument ignores the ways in which Kentucky’s status as the intended final destination of the oxycodone supplied by the PCB conspiracy allowed a prosecution of that conspiracy there. There was evidence that the co-conspirators knew that they were distributing prescriptions to Kentucky residents, and that the destination of the prescribed opioids would be Kentucky. It thus does not matter for these venue purposes whether the defendants were aware that they were supplying Kentucky drug distribution rings for subsequent redistribution in Kentucky, or merely thought that the clinic’s patients were the end-users themselves. In either case, the prescriptions issued by the clinic resulted in the distribution of oxycodone to Kentucky, and *Turner* holds that such intended final destinations of drug conspiracies are places of proper venue. *See Turner*, 936 F.2d at 226.

Frial-Carrasco’s argument is also unresponsive to the fact that conspiracy does not always require the presence of a co-conspirator in the venue. For example, hypothetical defendants who conspired in Florida to mail a bomb to a Kentucky address would presumably be subject to prosecution in Kentucky, even if the mail carrier who delivered the package was clearly not a coconspirator. Here, Frial-Carrasco and her coconspirators conspired to deliver oxycodone into Kentucky, and so they face prosecution in Kentucky, regardless of whether the

patients to whom they distributed those drugs were in the conspiracy with them, or were just the conduits for carrying the drugs back to Kentucky.

Frial-Carrasco also identifies a case from the Seventh Circuit, *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010), which emphasized that a drug seller should not be automatically assumed to have entered into a conspiracy with a drug purchaser by virtue of that sale. But *Johnson* is simply not a venue case. Kentucky would be a place of proper venue regardless of whether Frial-Carrasco and the PCB conspiracy conspired with Kentucky patients to redistribute the oxycodone in Kentucky. In short, the district court properly found venue for this prosecution existed in the Eastern District of Kentucky.

III.

Elliott challenges the sufficiency of the evidence against him, but his conviction was proper because the government presented sufficient evidence for a reasonable jury to conclude that Elliott knowingly joined the conspiracy to distribute oxycodone. A criminal conviction will be upheld if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Martinez*, 588 F.3d 301, 314 (6th Cir. 2009) (citations omitted). Elliott’s challenge fails because the record shows ample evidence on which this jury could have come to that conclusion.

For conviction on conspiracy to distribute drugs, “the government must prove, beyond a reasonable doubt, ‘(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.’” *United States v. Caver*, 470 F.3d 220, 232 (6th Cir. 2006) (quoting *United States v. Gibbs*, 182 F.3d 408, 420 (6th Cir. 1999)). Here, the evidence of Elliott’s conduct introduced at trial was sufficient to permit a jury to find that Elliott met all elements of this offense. Elliott was hired to protect the PCB, and worked with diligence to impede those who would scrutinize it. His diligence in clearing the parking lot of lines of patients prevented investigators from realizing the nature of the clinic’s practice. His efforts in chasing away those who would watch the property impeded the investigations once they began. For those investigators whom Elliott could not drive off, he warned patients of their presence.

When patients would otherwise have been deprived of their prescriptions, Elliott shuttled bags of prescriptions back and forth to a doctor for signature. Although his role was not a principal one, Elliott proved instrumental to the success of the conspiracy at the PCB.

Elliott concedes that his actions might allow a jury to conclude that he may have been aware of the conspiracy, but not that he knowingly and willingly joined it. Yet Elliott's behavior permitted the jury to draw such an inference. As we have held, "[a] conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan." *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997) (quoting *United States v. Blakeney*, 942 F.2d 1001, 1010 (6th Cir. 1991)). *Avery* demonstrates how, as in this case, a defendant's actions may be probative of knowing participation in a conspiracy. In *Avery*, we held that a jury could infer that a defendant knowingly participated in a conspiracy to produce marijuana because she lived on a farm where marijuana was being grown, knew that the marijuana was present there, and had helped move grow lights. *Id.* Here, similarly, a jury could consider Elliott's apparent exposure to the nature of the clinic's activities, and reasonably deduce Elliott's knowledge of and participation in the conspiracy from his actions in response, including Elliott's choice to remain employed at the PCB, his work in facilitating its prescriptions, and his warnings about government surveillance.

Elliott suggests that *United States v. Coppin*, 1 F. App'x 283 (6th Cir. 2001), demonstrates how proximity to a conspiracy does not necessarily impute knowledge of and participation in a conspiracy, but the facts of *Coppin* are not analogous to those here. In *Coppin*, we held that there was insufficient evidence of conspiracy to possess and distribute cocaine where a defendant was acquainted with a drug dealer, and was present but unaware when a third party purchased drugs from that drug dealer. *Id.* at 291–92. Here, by contrast, Elliott was not merely in the vicinity while other employees of the PCB carried on a conspiracy behind his back; Elliott instead possessed sufficient information to realize that the conspiracy was occurring, and took actions that furthered the conspiracy's goals. A jury thus could conclude that Elliott knew of and participated in the conspiracy

IV.

Both Frial-Carrasco and Solomon challenge their convictions on similar theories—that the government was required, but failed, to present expert testimony that their actions were not permissible as professional practice. While both defendants identify cases in which courts have held that expert testimony is sometimes required to assess the guilt of a medical professional distributing drugs, this expert testimony is not required where, as here, such distributions plainly exceed medical use. In circumstances like these, a jury is entitled to use its lay understanding of what drug distributions are clearly illegitimate, and therefore did not require additional expert guidance to convict either Frial-Carrasco or Solomon.

A.

Frial-Carrasco challenges her conviction on the grounds that the government failed to present sufficient evidence that the prescriptions she wrote were outside the scope of her professional duties, but this argument fails because the evidence was of such a nature that a lay jury could conclude that Frial-Carrasco's prescriptions were plainly excessive.

Here, the evidence required no expert interpretation to prove that Frial-Carrasco's actions were not within the realm of legitimate medicine. The government showed that Frial-Carrasco prescribed opioids in doses generally not found outside patients with traumatic injuries or in end-of-life care, that she thought the PCB possessed the "red flags" of a pill mill, and that she continued working there regardless. The jury also heard about the extremely short time Frial-Carrasco spent with patients and her knowledge of the distances they traveled to obtain prescriptions at the clinic. Dr. Golovac's expert testimony offered additional evidence to distinguish Frial-Carrasco's actions from those of an ordinary doctor, and thus prove her participation in the conspiracy. Frial-Carrasco objects that Dr. Golovac did not specifically opine that she had prescribed outside the scope of her medical practice, but he was not required to do so. On this evidence, the jury did not require specific expert assistance to guide its decision-making as to Frial-Carrasco's culpability.

Frial-Carrasco objects that the jury was not capable of assessing whether she had committed a crime, but this argument is mistaken because no expert testimony is required where

actions are comprehensible through even lay knowledge. It is true that a physician may only be convicted for violation of the Controlled Substances Act if she “prescribed the drug without a legitimate medical purpose and outside the course of professional practice.” *United States v. Johnson*, 71 F.3d 539, 542 (6th Cir. 1995) (quoting *United States v. Varma*, 691 F.2d 460, 462 (10th Cir. 1982)). Although understanding what a legitimate medical purpose is (and thus whether a prescription violated the Controlled Substances Act) often understandably requires expert guidance, we have also affirmed that “there are cases in which the lay testimony is so clear that no expert testimony is required to determine that the defendant’s actions were not for a legitimate medical purpose nor in the usual course of professional practice.” *United States v. Word*, 806 F.2d 658, 663 (6th Cir. 1986). In *Word*, for example, we held that a physician who wrote great quantities of prescriptions, for large sums of money, and with no examination could be properly convicted without expert testimony. *Id.* at 663–64.

Frial-Carrasco accepts *Word* as controlling but objects to what she views as an anomaly: on her interpretation, expert testimony is required in a malpractice suit where only money damages are at stake, but not in a criminal case where liberty is at stake. It is not clear, however, that evidentiary rules providing some protection to defendants in private money damages suits, under a lenient preponderance-of-the-evidence standard, are at all relevant to public prosecutions, where facts must be found beyond a reasonable doubt. In any event, *Word*’s principles exist in the civil malpractice context as well. Under Kentucky law, for example, in a medical malpractice case, “no expert testimony is needed in situations ‘where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts.’” *Vance By & Through Hammons v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996) (quoting *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965)). Because the common knowledge and experience of this jury here was likewise sufficient to assess Frial-Carrasco’s guilt, *Word*’s rule properly applies to her case.

B.

Solomon similarly contends that expert testimony was required to assess any deficiencies in her practices as a physician assistant, but her challenge fails for the same reasons as does Frial-Carrasco’s. A lay jury using its common understanding could conclude from Solomon’s

practices at the PCB that she knowingly participated in its conspiracy to distribute oxycodone. *See Word*, 806 F.2d at 663. Solomon saw patients and filled out prescriptions recommending unusually large doses of opioids. Solomon was not supervised in her tasks by a doctor, and doctors generally treated their signature on prescriptions filled out by Solomon as a formality. As with Frial-Carrasco, Solomon saw a full range of violations at the PCB, and contributed to many of them. A jury did not require expert instruction on the scope of a physician assistant's duties to determine that Solomon's behavior fell outside of them.

Solomon urges the court to follow *United States v. Binder*, 26 F. Supp. 3d. 656, 658 (E.D. Mich. 2014), and hold that there was insufficient evidence to prove distribution of narcotics outside the scope of Solomon's professional practice. *Binder* is, however, a poor guide to the issues in this case. In *Binder*, a doctor was charged with unlawful distribution of controlled substances, but extensive evidence supported a good-faith defense, including the thoroughness of the doctor's examinations, the regularity of his practice, and the reality of his patients' injuries. *Id.* at 663–64. Here, by contrast, Solomon's examinations were cursory, the practices of the PCB highly irregular, and the doses prescribed at the clinic clearly in excess of any medical need. As *Binder* confirms, expert testimony is not necessary where there is "evidence of plainly improper prescribing practices that a lay juror could recognize as illegitimate." *Id.* at 662. On this evidence as well, a jury was entitled to draw similar conclusions.

V.

Solomon additionally challenges the introduction of incriminating statements she made to investigators without having been read her *Miranda* rights, but because no *Miranda* warnings were required when Solomon incriminated herself, the district court committed no error in refusing to suppress these statements. Under *Miranda*, the Fifth Amendment requires that a person in custodial interrogation must be informed of and choose to waive her rights in order to have the statements used against her. *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966). But no *Miranda* warnings are necessary if a subject is not in custody and is free to leave. *See United States v. Salvo*, 133 F.3d 943, 949 (6th Cir. 1998). Here, because both the magistrate judge and the district court correctly held that Solomon was not in custody at the time she incriminated

herself, she was not entitled to a *Miranda* warning and so there was no error in refusing to suppress her statements.

In this case, the setting and non-coerciveness of Solomon's interview mean that the magistrate judge and district court both correctly held that she was not in custody. The determination of whether a person is in custody is based on the totality of the circumstances. *United States v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003). This court has highlighted four factors as particularly relevant: "the location of the interview, the length and manner of the questioning, whether the individual possessed unrestrained freedom of movement during the interview, and whether the individual was told she need not answer the questions." *United States v. Panak*, 552 F.3d 462, 465 (6th Cir. 2009). In proceedings below, the magistrate judge and the district court correctly determined that the first, second, and third *Panak* factors all favored the government, and that the fourth was of marginal weight. Those conclusions rested on findings of fact, which are reviewed only for clear error, *see United States v. See*, 574 F.3d 309, 313 (6th Cir. 2009), and Solomon fails to meet the burden necessary to overcome any of those determinations.

With regard to the first factor, the location of the interview did not support a finding of custody. The magistrate judge noted that "Solomon was interviewed at her place of business, in an exam room that she was familiar with, with law enforcement remaining ten to fifteen feet from her throughout the interview." The district court similarly credited this factor as operating in the government's favor. Solomon contends that the fact that the door was closed and that the government agents allegedly requested she turn in her license changed the room "from a familiar and comfortable place into a crime scene." This argument is not convincing. The simple fact of being questioned at work, even by government investigators, does not suffice to make an interrogation custodial, especially when the venue is a familiar one. In *United States v. Crossley*, for example, we held that a defendant interviewed in an unused classroom at a base where she worked was "not questioned in a hostile or coercive environment" because she was familiar with that space. 224 F.3d 847, 861–82 (6th Cir. 2000).

Similarly, the length and manner of the questioning also favor a finding that Solomon was not in custody. Solomon concedes that "she was not threatened" by agents, and that the

questioning was short. Solomon nevertheless contends that the combination of the fact of the raid and the alleged request that she surrender her license “transformed the situation into one in which a reasonable person would not feel free to leave.” *Id.* Both the magistrate judge and district court analyzed this situation, however, and determined that the interview was not hostile, because, as the magistrate judge reasoned, “no reasonable person would have, based on these facts, believed that she was in custody.” Solomon’s internal perceptions, even if accurate, do not overcome what is an objective-person test. *See Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004). Neither does Solomon’s assertion that investigators allegedly demanded that she surrender her license change the analysis. While neither the magistrate judge nor the district court made a specific finding of fact about if or when this demand occurred, Solomon did testify in the suppression hearing that she had been asked to surrender her license, and both the magistrate judge and the district court generally found that her testimony was not credible. Solomon’s third repetition of this claim does not result in a different conclusion here.

Solomon places her greatest reliance on the third *Panak* factor, alleging that the nature of the raid into the PCB meant that she did not enjoy unrestrained freedom of movement, and thus was in custody because she was not free to leave. Solomon’s argument again flies in the face of the fact-finding below. The district court expressly found that “agents did not limit [Solomon’s] freedom to leave.” This fact-finding was not clearly erroneous. Solomon contends that the fact she required permission and an escort to use the restroom constituted restraint on her movement. The record, however, shows that such restrictions existed only for the purposes of facilitating the search of the clinic, and did not otherwise restrict Solomon’s movement. The mere existence of a restricted area in a location does not transform questioning in that location into a custodial situation if the defendant is otherwise free to leave. For example, an individual questioned in a police station is not in custody if free to leave that station, *see Biros v. Bagley*, 422 F.3d 379, 389–90 (6th Cir. 2005), even though a police station includes analogously restricted areas. Under Solomon’s theory, suspects questioned in such a station would always be found to be in custody. They are not, and she was not.

With the first three *Panak* factors weighing so strongly in the government’s favor, the fourth factor, whether Solomon knew that she need not answer questions, is not decisive to the

analysis, because *Panak* is a totality of the circumstances test. See *United States v. Conder*, 529 F. App'x 618, 621 (6th Cir. 2013). The district court found that this factor weighed in Solomon's favor, because there was no evidence that she was told that she need not answer questions. Because this factor is so heavily outweighed, however, even finding that it favors Solomon is not sufficient to overcome the weight of the other three factors against her.

Similarly, Solomon notes that she has the benefit of the fact that she did not initiate contact with police. It is true that we have sometimes listed this element as relevant to a totality-of-the-circumstances determination. See *Swanson*, 341 F.3d at 529. The totality of these circumstances continues to favor the government, however, whether or not this additional factor is included. Because Solomon thus has failed to show that the decisions of the magistrate judge and district court were in error, either in fact or in law, she was not entitled to have her statements suppressed.

VI.

Although defendants' convictions stand, the forfeiture judgments must be remanded to the district court for the limited purpose of recalculation, to an amount proportionate with the property defendants actually acquired through the conspiracy.

The United States concedes that, following the Supreme Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017), the forfeiture judgments no longer rest on appropriate legal foundations. In *Honeycutt*, the Supreme Court overturned the standards on which the district court had relied, and found that "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime." *Honeycutt*, 137 S. Ct. at 1635. The Court thus held that 21 U.S.C. § 853(a)(1) forfeiture is not subject to joint and several liability. *Id.* The United States now concedes the need to remand for forfeiture of proceeds up to the amount each defendant acquired from the crime, and without the imposition of joint and several liability. Gov. Brief at 51–52.

This remand applies to all three parties. Both Frial-Carrasco and Solomon properly raised this issue in their briefs. Elliott did not, but the United States agreed to a remand that

extends to Elliott as well, and we retain the power to correct plain error, *see United States v. Graham*, 275 F.3d 490, 521–22 (6th Cir. 2001).

VII.

The judgment of the district court is affirmed with respect to the convictions, but the forfeiture judgments are remanded for recalculation consistent with the standards delineated by the Supreme Court in *Honeycutt*.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 16-6474/6676/6683

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

CARROLL LLOYD ELLIOTT (16-6474);
LUCILLE M. FRIAL-CARRASCO (16-6676);
PATRICIA ANN SOLOMON (16-6683),
Defendants - Appellants.

FILED
Nov 30, 2017
DEBORAH S. HUNT, Clerk

Before: KEITH, ROGERS, and McKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at London.

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

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED with respect to the convictions, but the forfeiture judgments are REMANDED for recalculation pursuant to the standards delineated by the Supreme Court in *Honeycutt*.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICIA ANN SOLOMON,
CARROLL LLOYD ELLIOTT, and
LUCILLE M. FRIAL-CARRASCO,

Defendants.

Criminal Nos. 13-40-ART-(5),(7),(8)

**MEMORANDUM OPINION
AND ORDER**

*** *** *** ***

Two issues linger here. The first concerns forfeiture. Following the Sixth Circuit’s recent decision in *United States v. Honeycutt*, 816 F.3d 362, 379–80 (6th Cir. 2016), the Court entered a preliminary judgment of forfeiture holding Lucille Frial-Carrasco, Patricia Ann Solomon, and Carroll Lloyd Elliott jointly and severally liable for the proceeds of their drug conspiracy. They now object. Their arguments find support in the logic and tradition of criminal forfeiture—just not in Sixth Circuit case law. The time may have come to reconsider that law. But this Court must follow the law as it currently exists, and therefore must overrule the defendants’ objections.

The second issue concerns sentencing enhancements. The government seeks to enhance Frial-Carrasco's sentence because she allegedly obstructed justice and abused a position of trust. She objects. This time, her objections find support in circuit law. Thus, the objections do not apply.

I.

Frial-Carrasco, Solomon, and Elliott worked at the Pain Center of Broward, located in south Florida—Frial-Carrasco as the medical director, Solomon as a physician’s assistant, Elliott as a security guard. From about June 2008 to May 2014, the Pain Center operated as a “pill mill,” dispensing oxycodone prescriptions for no medically necessary reason. Drug mules visited the Pain Center, got prescriptions, and brought pills back to eastern Kentucky. The conspiracy’s ringleader was a man named Joel Shumrak, who owned and ran the Pain Center. None of these defendants got in on the ground floor: Solomon and Elliott began work at the Pain Center in November 2010; Frial-Carrasco began in July 2011. *See* R. 919 at 4; R. 922 at 3; R. 924 at 2.

The government indicted Frial-Carrasco, Solomon, Elliott, and others for participating in the Pain Center conspiracy. R. 279. The indictment notified them that the government would be seeking a money judgment—*i.e.*, forfeiture—to the tune of fifteen million dollars, the sum of “which . . . represent[ed] the gross proceeds” of the conspiracy. *Id.* at 3. Frial-Carrasco, Solomon, and Elliott went to trial, and the jury convicted them. *See* R. 762 (Frial-Carrasco); R. 761 (Solomon); R. 760 (Elliott). That’s when the current issues arose.

A.

First, the government asked the Court to enter a judgment of forfeiture against Frial-Carrasco, Solomon, and Elliott. R. 841. This time, however, the government sought only seven million dollars. R. 841-1 at 1. Seven million is noticeably less than fifteen million. But, the government said, its new estimate was “conservative”—it could have asked for more but, apparently out of leniency, did not. R. 852 at 3. What the government neglected to

mention was that it had already seized about half of the overall proceeds from their co-defendant, and former boss, Joel Shumrak—eight million, give or take. *See* R. 919 at 1.

So the government sought to collect the last seven from Frial-Carrasco, Solomon, and Elliott. The Sixth Circuit recently established that conspirators are jointly and severally liable for their conspiracy's total proceeds. *See Honeycutt*, 816 F.3d at 379–80. So the government sought the seven million from these co-defendants jointly and severally, meaning that any one of them could be on the hook for the entire amount. R. 841-1 at 1.

But when it comes to forfeiture, at least, the government does not get seven million dollars simply by asking. Rather, the Court “must determine the amount of money that the defendant will be ordered to pay.” Fed. R. Crim. P. 32.2(b)(1)(A). And if the defendant contests the forfeiture request and asks for a hearing, the Court must hold one. Fed. R. Crim. P. 32.2(b)(1)(B). Here, the defendants contested the request and asked for a hearing, so the Court held one. R. 846; R. 847; R. 919; R. 921. To establish the conspiracy's overall proceeds, the government called to the stand Agent Richard Dalrymple, who had helped bring the conspiracy down. Based on his testimony, the Court determined that the Pain Center generated not fifteen, but ten million dollars in illegal proceeds. R. 919 at 2.

Following the hearing, the Court needed to put out a preliminary judgment of forfeiture. Fed. R. Crim. P. 32.2(b)(2). First things first, however, the Court had to calculate what proportion of the overall ten million¹ each defendant owed. Conspirators are liable only for the foreseeable “scope” of the crime, *i.e.*, the amount of conspiratorial activity they “agree[d]” to help commit. *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002).

¹ Actually, Agent Dalrymple established that the conspiracy made \$10,325,000. To keep the math easier, the Court rounded the total down to the nearest whole million. Neither party objected at the hearing or since. *See* R. 919 at 4.

Although the present conspirators maintain their innocence, both sides have conceded that Solomon and Elliott were around for the last eighty percent of the conspiracy, and Frial-Carrasco for fifty percent. To state the obvious, one cannot agree to help do what is already done. And the government has not contended that these three defendants agreed to help launder, stash, or otherwise cover up any money the Pain Center made before they got there. Thus, the Court concluded, Solomon and Elliott could be liable for only eighty percent—and Frial-Carrasco for only fifty percent—of whatever forfeiture amount the government could seek from them.

But how much, exactly, is that? There lies the problem. As the government revealed at the hearing, Shumrak has already paid out some eight million dollars. Though good news for the public, that recovery raises a vexing question for this proceeding: When in the calculation does that eight million apply? The parties have proposed two different methods, which would leave the defendants liable for drastically different amounts.

The government argues that the Court should subtract the Shumrak money directly from the ten-million total, leaving a potential two million for it to recover from these three defendants. The Court would then apply each defendant's foreseeability percentage to *that* amount. Thus, Solomon and Elliott would be liable for eighty percent of the remaining two million (or, \$1,600,000), and Frial-Carrasco for fifty percent (\$1,000,000). As a shorthand, the Court and parties have called this the pro-rata method; were it to apply this method, the Court would calculate each defendant's individual liability based on whatever proportion of the total proceeds remains unpaid.

The defendants argue, however, that the order of operations should be reversed—the Court should apply the liability percentages *before* subtracting the Shumrak contribution. In

other words, the Court must first calculate the percent of the total that each could owe: For Solomon and Elliott, eighty percent of ten million (eight million), and for Frial-Carrasco, fifty percent of ten million (five million). And only then, they say, should the Court subtract Shumrak's eight million. By their reasoning, this method leaves their forfeiture obligations at zero. Each of them owes either eight million or less—thus, at least according to them, Shumrak's money covers their shares. The Court and parties have called this the off-the-top method; were it to apply this method, the Court would calculate each defendant's individual liability based on whatever the total was at the very beginning, or, "off the top."

Because the joint-and-several-liability rule has existed in this circuit for about half a year, neither the Sixth Circuit nor any district court within it has yet faced this problem. Specifically, none has explained how a court should calculate forfeiture liability when (1) it must hold defendants jointly and severally liable for the total proceeds of their conspiracy, (2) but only for the percent of those proceeds that each could reasonably have foreseen, and (3) one co-conspirator has already paid off a large part of the whole. So, at the hearing, the Court was left to navigate these convergent waters with few channel markers. Needing to make a decision, the Court adopted the pro-rata method for the purposes of the preliminary judgment. The Court first subtracted Shumrak's eight million from the overall ten, and then it applied each defendant's liability percentage to the remaining two. That calculation yielded a judgment of \$1,600,000 against both Solomon and Elliot, and a judgment of \$1,000,000 against Frial-Carrasco.

But those judgments were only preliminary, and the parties still had a chance to file objections. *See* Fed. R. Crim. P. 32.2(b)(2)(B). The Court asked them to clarify, if they

could, this circuit's rules for calculating forfeiture liability under the present circumstances. R. 919 at 4.

B.

Normally, a court must issue preliminary forfeiture orders “sufficiently in advance of sentencing to allow the parties to suggest revisions,” because forfeiture judgments usually become final at sentencing. Fed. R. Crim. P. 32.2(b)(2)(B), (b)(4)(A). Here, however, the parties wanted get the sentencing over with. So immediately after the forfeiture hearing, the Court proceeded to sentencing—on the understanding that the forfeiture judgment would not become final until the parties filed written objections and the Court issued a written decision (*i.e.*, this one). *See* R. 919 at 3.

At sentencing, the government tried to impose two enhancements on Frial-Carrasco.² *See* R. 909 at 7–10. The first was an enhancement for obstructing justice by lying on the witness stand, pursuant to U.S. Sentencing Guidelines Manual (U.S.S.G.) § 3C1.1 (2015). *See* R. 909 at 9–10. But the government failed to point out any “particular portions” of the record in which Frial-Carrasco had, in fact, perjured herself. *See* R. 919 at 14 (quoting *United States v. Lawrence*, 308 F.3d 623, 632 (6th Cir. 2002)). The Court therefore continued the hearing and asked the government to come back with the necessary specifics. *See id.* at 15, 18–19.

The second enhancement was for allegedly abusing a position of trust, pursuant to U.S.S.G. § 3B1.3. *See* R. 909 at 7–9. For the enhancement to apply, the victim of the crime must have put her trust in the defendant, and the defendant must have taken advantage of that

² Solomon and Elliott's sentencing hearings also involved some disputed enhancements. The Court resolved those disputes at the hearing and need not address them again here. *See* R. 919 at 4–11.

privilege to accomplish the crime. *See United States v. Ragland*, 72 F.3d 500, 502 (6th Cir. 1996). The sentencing guidelines list two kinds of positions of trust that someone can hold and, in turn, abuse: private trust and public trust. *See* U.S.S.G. § 3B1.3.

The government has waived any argument that Frial-Carrasco abused a position of private trust. R. 919 at 17; *see also* R. 926 at 2. According to Frial-Carrasco's presentence report, "no victims can be identified" for her crime. *See* PSR ¶ 36. The government failed to object to that statement, as the rules require a party to do if it thinks it has spotted a problem with the report. Fed. R. Crim. P. 32(f)(1); *see United States v. Ward*, 190 F.3d 483, 492 (6th Cir. 1999) ("[A] failure to object to the presentence report waives any future objections."). Unable now to argue that Frial-Carrasco harmed anyone in particular, the government has no way to prove that she violated anyone's private trust.

But public trust might be different. Doctors, after all, would seem to occupy positions of both private and public trust. In the privacy of the examination room, patients trust their doctors to treat them right. So does the public. Especially given the current drug epidemic, society at large trusts its doctors not to funnel prescription opiates into its communities. Thus, the abuse-of-trust enhancement might still apply to Frial-Carrasco.

But the public-trust enhancement applies only if Sixth Circuit case law confirms this Court's instincts. Namely, the Sixth Circuit must treat public and private trust as separate concepts, so that by waiving its argument as to the first, the government has not also waived its argument as to the second. And the Sixth Circuit must understand doctors as occupying a position of public trust. At the hearing, neither the Court nor the parties knew what the Sixth Circuit has said on the matter. So the Court also asked the parties to brief this issue, too.

C.

Since the hearings, the defendants have filed their objections to the preliminary judgment of forfeiture, arguing that the Court should have applied the off-the-top method and found them all liable for zero dollars. *See* R. 922; R. 924; R. 925. The government has responded, rather briefly, stating, “[i]t is the position of the United States that the Court’s pro rata method is proper These defendants should be liable jointly and severally with Shumrak for the remaining portion of the gross proceeds in the amounts set forth in the preliminary judgment.” R. 927 at 1.

As for the enhancements, the government has submitted a list of the many times that, it believes, Frial-Carrasco perjured herself on the stand. *See* R. 926 at 4–10. Frial-Carrasco denies each accusation and objects to the part of the presentence report that chooses to apply the obstruction-of-justice enhancement. *See* R. 928 at 3–18. Both sides have also briefed whether doctors occupy positions of “public trust,” as the Sixth Circuit and sentencing guidelines understand the term. *See* R. 926 at 1–4; R. 928 at 2–3. The government objects to the part of the presentence report that chooses not to apply the abuse-of-trust enhancement. *See* R. 926 at 1–4.

II.

The forfeiture questions are easy, on the surface. Question one: Are Frial-Carrasco, Solomon, and Elliott jointly and severally liable for the Pain Center’s proceeds? Yes, because the Sixth Circuit has said so. *See Honeycutt*, 816 F.3d at 379–80. Question two: Are they jointly and severally liable for the Pain Center’s *entire* proceeds? No, because they joined the conspiracy after it started and never agreed to help it accomplish, or cover up, what it already had accomplished. *See Campbell*, 279 F.3d at 400. And question three:

Does Shumrak's prior forfeiture zero out these defendants' forfeiture liability? No, because the government still has yet to recover the entire amount (ten million) to which it is entitled; under the theory of joint-and-several liability, then, any of Shumrak's co-conspirators can still be held responsible for the remainder. *See* Restatement (Third) of Torts: Apportionment of Liability § 25 (2000). Thus, these conspirators are jointly and severally liable for the as-yet-unforfeited proceeds that they agreed to help the conspiracy acquire.

Below the surface, however, things start to look differently.

A.

Question one: Are Frial-Carrasco, Solomon, and Elliott jointly and severally liable? Yes, because the Sixth Circuit has said so. *See Honeycutt*, 816 F.3d at 379–80. The criminal-forfeiture statute itself, however, does not. Instead, it dictates, in relevant part, that “[a]ny person convicted of a violation of this subchapter,” including drug conspirators, “shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation.” 21 U.S.C. § 853(a)(1).

Nevertheless, the Sixth Circuit has read the statute to imply joint-and-several liability, largely because the court considered itself bound by an earlier decision, *Corrado*, in which it adopted such liability for forfeiture under RICO. *See Honeycutt*, 816 F.3d at 380 (discussing *United States v. Corrado*, 227 F.3d 543, 553 (6th Cir. 2000)). Since the wording of both forfeiture provisions is “virtually identical,” the court reasoned, they ought to be interpreted the same way. *Id.* This path was the one of least resistance for another reason: The vast majority of circuits have applied joint-and-several liability to forfeiture under Section 853, RICO, or both. *See id.* at 379 (collecting cases).

But on the whole, “there has been surprisingly little explanation” for the rule. *Id.* at 381–82 (Moore, J., concurring in the judgment). Stitching all the relevant opinions together, what explanation there is seems to rest on three pillars: text, background law, and balance-tipping canons of statutory interpretation.³ As for text, the absence of any reference to joint-and-several liability is, apparently, no problem. The word “indirectly,” which Congress also put in the statute, indicates that forfeiture “is not limited to property that the defendant acquired individually but includes all property that [he] derived indirectly from those who acted in concert with him.” *United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996). As for the background law, joint-and-several forfeiture liability “resonates with established criminal law principles.” *Id.* In particular, it is settled that a defendant can be convicted for the foreseeable conduct of his co-conspirators, see *Pinkerton v. United States*, 328 U.S. 640 (1946), and sentenced for that conduct, too, see U.S.S.G. § 1B1.3. It takes no great leap to get from there to making him pay for that conduct, too. And as for the canons, Congress codified one in the statute: Courts must construe the statute “liberally” so that it might realize its remedial purpose. See 28 U.S.C. § 853(o); *United States v. Benevento*, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987) (citing *Russello v. United States*, 464 U.S. 16, 27 (1983)), *aff’d*, 836 F.2d 129 (2d Cir. 1988) (per curiam) (adopting the district court’s opinion).

But in the most thorough opinion on the issue to date, the D.C. Circuit broke ranks. See *United States v. Cano-Flores*, 796 F.3d 83, 91–95 (D.C. Cir. 2015). Writing on a blank slate, joint-and-several liability is probably not the rule this Court would pick.

³ Courts have largely applied the same reasoning to Section 853 and to the RICO forfeiture statute, so these cases often discuss both. For the moment, this Court is only concerned with their reasoning as it applies to Section 853.

What then is the proper scope of a defendant's forfeiture liability under Section 853? Is he jointly and severally liable for the conspiracy's entire proceeds, or is he only liable for some share of them?

Start with the text. See Henry J. Friendly, *Benchmarks* 202 (1967) (describing the Justice Frankfurter method of statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!"). Section 853 requires a defendant to forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" his offense. 21 U.S.C. § 853(a)(1). A little convoluted, maybe, but ambiguous, no. The verb "to obtain" means "[t]o bring into one's own possession . . . esp[ecially] through effort." See Black's Law Dictionary 1247 (10th ed. 2014); see also "obtain, v.," Oxford English Dictionary (3d ed. 2004)⁴ ("To come into the possession of; to procure; to get, acquire, or secure."). In everyday speech, one might say that "I obtained my undergraduate degree from UK," "The agents obtained the perpetrator's whereabouts from their informant," or "We signed young Jordan up for soccer so he could obtain some athletic skills." In those sentences, the people doing the "obtaining" are putting effort toward bringing something—a degree, some information, a skill—into their possession. By using "obtain" in the statute, then, Congress indicated that conspirators are liable to forfeit whatever property they brought into their own possession by joining the conspiracy—not vicariously liable for whatever proceeds the conspiracy might have churned as a whole.

Fortifying this interpretation further, the statute distinguishes between a defendant's property and the conspiracy's proceeds. Defendants must forfeit "any property constituting,

⁴ Available at www.oed.com.

or derived from, any proceeds.” 21 U.S.C. § 853(a)(1). The defendant’s forfeitable property might “constitute” the proceeds or merely be “derived” from them—which makes sense. Sometimes, the property and proceeds are the same, as when a small-time duo strikes out in a drug trade and shares all their profits. But other times, the property and proceeds are not the same, as in those more hierarchical arrangements where pushers take a cut based on what they sell, while the overall take gets rendered unto Caesar—or, at least, unto Stringer Bell. *See generally* *The Wire* (Season Three) (HBO television broadcast Sept. 19–Dec. 19, 2004). For example, just look at the Pain Center—the doctors pushed out drugs and made a salary, but Shumrak reaped the ultimate rewards for running the show. By its wording, Section 853 addresses both types of conspiracies, holding defendants liable for whatever portion of the proceeds they actually shared.

Fortifying this interpretation even further, other provisions of Section 853 focus on the defendant’s own possessions, rather than on the possessions of the conspiracy as a whole. Of course, the only provision that really matters is the one requiring defendants to forfeit what they “obtained,” because that is all the government seeks from these defendants. But that provision must be read in the context of the statute as a whole. *See Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 201–09 (1993); *see also* 1 U.S.C. § 1 (directing readers of the U.S. Code to interpret words in certain ways “unless the context indicates otherwise.”).

Here, context confirms what the words themselves make plain. Right after Section 853(a)(1) comes Section 853(a)(2), in which Congress ruled that any person convicted of a conspiracy must forfeit “any of the person’s property used, or intended to be used, in” the conspiracy. 21 U.S.C. § 853(a)(2). If a person donated his car to the conspiracy, then he would have to forfeit that car. If he used a gun while participating in the conspiracy, then he

would have to forfeit the gun. But Congress did not write that he must forfeit “any of any other person’s property.” Thus, if every other conspirator also used a gun, the defendant would still only have to forfeit his. He would not have to run around collecting his co-conspirators’ guns for the government—which, as a forfeiture system, would make little sense. See *United States v. Jones*, 502 F.3d 388, 391–92 (6th Cir. 2007) (“A district court must order the forfeiture of a defendant’s interest in property when a nexus is drawn between *the defendant’s criminal conduct* and the property.”(emphasis added)).

Thus, if Section 853(a)(1) leaves any room for doubt, Section 853(a)(2) clears it up. The “property” defendants must forfeit under the statute is not the conspiracy’s collective property, but a defendant’s own *personal* property. Depending on the circumstances, that might include “any of the person’s property used” during the crime, under Section 853(a)(2), or “any property . . . the person obtained” from the crime, under Section 853(a)(1). Either way, the statute punishes people for joining conspiracies by taking away the property that they personally gave to or got from the conspiracy—not whatever other property different conspirators might have given or gotten.

Other courts have reasoned that the normal reading of “obtained” does not fit within Section 853(a)(1), where Congress also used the word “indirectly.” “Indirectly,” they say, implies that a defendant can be held liable for proceeds that he put no effort into personally possessing. *E.g.*, *McHan*, 101 F.3d at 1043. But “indirectly” can peacefully coexist with the normal reading of “obtained.” After all, the word “obtain” itself does not specify whether someone came to possess something “directly” or “indirectly.” If someone wants a nice piece of art for the foyer, she can go out and buy one. But if she wants to impress visitors with a museum-grade painting, and has neither the means to buy one from the Louvre nor

qualms about committing crime, she might contact an art thief. And although she would not be the one to repel from the ceiling, dodge the laser tripwires, and escape with the piece, she would still “obtain” the piece—albeit indirectly. Recognizing that such schemes exist, Section 853 is written to capture the unscrupulous art collector and the thief alike. Or to take a more realistic example, the statute is written to capture someone who indirectly makes dirty money through a company he almost entirely owns. *See Cano-Flores*, 796 F.3d at 92. (discussing *United States v. Peters*, 732 F.3d 93, 102–04 (2d Cir. 2013)).

The word “obtained” also puts an important limit on liability. If, while stealing the painting, the thief also nips a priceless statuette, Section 853 would not seem to require that the collector pay for it; she never had that statuette in her possession, and never wanted to. But under joint-and-several liability, the government could seek the statuette from her, too. Some courts, like the Sixth Circuit, attempt to prevent such over-punishment by adding a foreseeability requirement—holding conspirators jointly and severally liable for the proceeds they could have reasonably foreseen that the conspiracy would make. *See United States v. Logan*, 542 F. App’x 484, 498–99 (6th Cir. 2013). Given that the thief is the type of person who steals from a museum, however, it might have been foreseeable that he would also take the statuette. The art collector would probably prefer that a court give the words of the statute their proper meaning, rather than create a problem then apply an imperfect patch.

But by adopting joint-and-several liability, other courts have read this limit—and the word “obtained”—wholly out of the statute. If a defendant really were jointly-and-severally liable for all the conspiracy’s foreseeable proceeds, then Congress had no need to qualify the word “proceeds” in the forfeiture statute with the phrase “any proceeds the person obtained.”

“These words cannot be meaningless, else they would not have been used.” *United States v. Butler*, 297 U.S. 1, 65 (1936).

Giving the words their proper meaning, then, Section 853 does not contemplate joint-and-several liability. *Accord Cano-Flores*, 796 F.3d at 91–95. Rather, the provision appears to require that conspirators forfeit only the property or money they themselves derived from the conspiracy. For a ringleader like Shumrak, that amount might equal the conspiracy’s overall proceeds. But for lower-level wage earners like Frial-Carrasco, Solomon, and Elliott, that amount would equal only the checks—plus the value of any benefits or other assets—they received from the Pain Center.

2.

Background law confirms that Section 853 is not a joint-and-several-liability statute. To see why, a quick visit back to the founding is in order.

a.

Three types of forfeiture existed at English common law. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–83 (1974). The first was called a deodand, from the Latin word for “given to God.” *Id.* at 681 & n.16. Anyone who “directly or indirectly caus[ed] the accidental death of a King’s subject” would have to surrender to the Crown—next-best option to God Himself—the value of whatever object caused the death. *Id.* at 680–81 (citing Oliver Wendell Holmes, *The Common Law* ch. 1 (1880); 1 William Blackstone, *Commentaries* *300). Second was the forfeiture of estate. *See Austin v. United States*, 509 U.S. 602, 611–12 (1993). Anyone convicted of a felony or of treason also had to surrender his property to the Crown, the theory being that “property was a right derived from society which one lost by violating society’s laws.” *Id.* at 612 (citing 1 William Blackstone,

Commentaries *299; 4 *id.* at *382). The third was statutory forfeiture. Certain statutes required the forfeiture of objects—like ships—used to violate customs and revenue laws. *Id.*

Each type of forfeiture “was understood, at least in part, as imposing punishment.” *Id.* at 611. Deodands “properly punished” an object’s owner for allowing it to accidentally kill someone. *Id.* (quoting 1 William Blackstone, *Commentaries* *301). Forfeiture of estate punished felons and traitors for becoming felons and traitors. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827). Statutory forfeitures were likewise “penal” in the sense that they deprived wrongdoers of the property with which they did the wrong. *Austin*, 509 U.S. at 612 (quoting 3 William Blackstone, *Commentaries* *261).

Ultimately, only the third kind—statutory forfeiture—made its way across the pond. *E.g.*, 21 U.S.C. § 853(a)(2). Deodands never took hold. See *Calero-Toledo*, 416 U.S. at 682. And forfeitures of estate were prohibited: The Constitution forbids using forfeiture of estate to punish treason “except during the Life of the Person attained,” U.S. Const. art. III, § 3, cl. 2, and the First Congress forbade using it to punish felons, see *Austin*, 509 U.S. at 613 (citing the Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117).

But statutory forfeitures were already familiar. The colonies—and later the states—had been enforcing forfeiture statutes “[l]ong before” they adopted the Constitution. *Calero-Toledo*, 416 U.S. at 683 (modification in original) (quoting *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943)). The First Congress followed along, passing laws that required the forfeiture of ships and cargo involved in customs offenses. See *Austin*, 509 U.S. at 613 (discussing the Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39).

And as usual, Congress understood those laws as imposing punishment. Indeed, “‘forfeit’ is the word Congress used for fine” in these statutes. *Id.*; see also *id.* at n.7. And

throughout the centuries, the Supreme Court has understood forfeiture the same way. *See generally J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808). As the Supreme Court has said more recently, those cases stand on the theory that the owner of a wrongdoing piece of property is “properly punished” for allowing his property to go and get itself involved in a crime. *Austin*, 509 U.S. at 615.

Those early forfeiture statutes were all civil. Congress passed no criminal forfeiture statutes for about the first two hundred years of the nation's history. *See* 3 Charles Alan Wright et al., *Fed. Prac. & Proc. Crim.* § 571 (4th ed.), Westlaw (database updated Apr. 2016). It got around to doing so in 1970, when it authorized forfeiture for violating RICO and for operating a continuing criminal enterprise. *Id.* n.6 (discussing 18 U.S.C. § 1963 and 21 U.S.C. § 848). Since then, criminal forfeiture provisions have proliferated; forfeiture is now available as a penalty in the “vast majority” of crimes. *Id.* nn.7–12 (surveying statutes). Keeping up with the times, that penalty applies not only to ill-used ships, but also to ill-gotten money. *See* Fed. R. Crim. P. 32.2 (recognizing both kinds of forfeiture).

But “penalty” is, still, the operative word here. Criminal forfeiture provisions, like their aged civil relatives, “are properly considered punishment today,” which the Supreme Court has taken pains to explain in the context of other such provisions. *Austin*, 509 U.S. at 619. Legislative history, to the extent that it is relevant, confirms that Congress intended to follow the “historical understanding of forfeiture as punishment” when enacting these provisions. *Id.* at 621. For example, Congress enacted 21 U.S.C. § 881—which, like Section 853, mandates forfeiture to drug offenses—because “the traditional criminal sanctions of fine

and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.” S. Rep. No. 98–225, at 191 (1983).

Section 853 is no different. Looking at the same words that this Court just analyzed above, *see supra* Part II.A.1, the Supreme Court said that “[t]he text . . . makes clear that Congress conceived of forfeiture as punishment.” *Libretti v. United States*, 516 U.S. 29, 39 (1995). As such, forfeiture under Section 853 is part of a criminal sentence. *Id.* It is therefore still no different “from a traditional ‘fine.’” *Id.* (quoting *Alexander v. United States*, 509 U.S. 544, 558 (1993)). Section 841 holds defendants substantively liable for joining a conspiracy; Section 853 then punishes them for their particular conduct, just like “any other sentence.” *Id.* (quoting 21 U.S.C. § 853(a)). And like the forfeiture provisions before it, Section 853 punishes by taking away the defendant’s ill-used or ill-gotten property.

In short, forfeiture is a punishment. It “help[s] to ensure that crime does not pay.” *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014). And Section 853(a)(1) in particular does so pay taking away the money that the defendant’s crime paid.

b.

Joint-and-several liability, on the other hand, is based on a theory of restitution. The doctrine is a creature of tort law. *See, e.g.*, Restatement (Third) of Tort: Apportionment of Liability § 10. And its aim is to protect plaintiffs from insolvent defendants. If a defendant turns out to be penniless, joint-and-several liability transfers the cost to his co-defendants—who must pay in his stead—rather than the “innocent victim,” who otherwise would not be made whole. *Cano-Flores*, 796 F.3d at 95 (citing Paul Bargren, *Joint and Several Liability: Protection for Plaintiffs*, 1994 Wis. L. Rev. 453, 464). When restitution is the goal—the plaintiff ought to be made whole or, at least, as whole as possible.

If restitution were the point of criminal forfeiture, joint-and-several liability would make sense. Consider splitting a dinner bill among a group of friends. If the goal is simply to ensure, no matter what, that the restaurant gets paid, then they all owe for the entire bill (however they choose to split it up); in other words, they hold themselves jointly and severally liable for the total. That way, if one friend happens conveniently to have forgotten his wallet at home, then one or all of the others will pay more to pick up his slack.

But restitution is not the point of criminal forfeiture. As just discussed, forfeiture is about punishing wrongdoers, not compensating victims. *See* Black's Law Dictionary 765 (defining "criminal forfeiture" as the "seiz[ure] [of] property as punishment for the person's criminal behavior"). Victims can look elsewhere for that; after all, criminal law has a separate doctrine of restitution. It is called criminal restitution. That doctrine has its own set of statutes, like the Mandatory Victims Restitution Act. *See* 18 U.S.C. § 3663A. And rather than punishment, its focus is "to make the victim whole." *See* Federal Criminal Restitution § 13:11 (Catharine M. Goodwin ed.), Westlaw (database updated Aug. 2016).

Imposing joint-and-several liability on Section 853 gets these distinct concepts of punishment and restitution confused. If the dinner party thought about the bill in the same way that Congress and the courts have traditionally thought about forfeiture, they would not split it up evenly. They would ask for separate checks. That way, everyone bears the burden of his own choices; any overeaters are held responsible for ordering too much.

Or consider a 1958 Plymouth. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700–01 (1965) (discussing the "penalty" of forfeiting the sedan used in a crime). The point of forfeiture is not to provide the government more 1958 Plymouths. The point is, rather, to punish those who have done wrong and to force those who are considering doing

wrong to think twice. *See Kaley*, 134 S. Ct. at 1094. Thus, if a person buys a Plymouth with drug money, the Plymouth may not be his for long. *See* 21 U.S.C. § 853(a)(1). If another person uses his Plymouth to carry drugs, he too might have to part with the trusted steed. *See id.* § 853(a)(2). In that case, the government would probably seek that Plymouth from its actual owner. *See One 1958 Plymouth Sedan*, 380 U.S. at 700–01. Such is his punishment for donating it to the conspiracy. The government would probably not seek the doors from one conspirator, the tires from another, and the steering wheel from a third.

But under joint-and-several liability, it could. And that, of course, makes little sense. It also requires disregarding Supreme Court precedent, generally a bad idea. The Court has been clear that forfeiture is a “penalty” with “absolutely no correlation to any damages.” *United States v. Ward*, 448 U.S. 242, 254 (1980). The government does not quite fit into the shoes of a victim—the everyday drug conspiracy will not cause the government to lose any Plymouths or suffer any other direct harm. Thus, when the government seeks forfeiture, it is not seeking to be made whole. And when the government has argued to the contrary, the Supreme Court has struck that argument down. *See Austin*, 509 U.S. at 620–21. Rather, when the government seeks forfeiture, it seeks to punish. Restitution is simply not forfeiture’s job. And so doctrines premised on restitution, like joint-and-several liability, simply have no place under forfeiture provisions like Section 853.

Nevertheless, some courts have reasoned, joint-and-several liability “resonates” with other criminal-law principles—specifically the so-called *Pinkerton* rule that co-conspirators are liable for one another’s foreseeable conspiratorial conduct. *McHan*, 101 F.3d at 1043. But that is a principle of substantive liability: It describes the conduct for which a jury may convict conspirators. It does not determine the consequences of actually getting convicted.

Put differently, *Pinkerton* is about the crime, not the punishment. The forfeiture statute, meanwhile, is about the punishment, not the crime. Just because one conspirator is liable for another's conduct does not mean he should have to pay for it. Similarly, a receptionist at the Pain Center might be as guilty as Shumrak for the crimes that occurred while she was there. But she would not necessarily be sentenced as highly as Shumrak. The punishment, after all, should fit the crime. *Accord Cano-Flores*, 796 F.3d at 93.

Under the current joint-and-several-liability regime, however, the punishment could far outstrip the crime. Bit players could find themselves paying for entire conspiracies. That is a result that neither the text of the statute nor *Pinkerton* demands. And it is a result that fairness and background legal principles counsel against.

3.

Text, logic, and background law thus all agree: Section 853 is not a joint-and-several-liability statute. But if any ambiguity remained, the canons of statutory interpretation would prevent the Court from reading Section 853 the way that other courts have. Those courts have relied on a “liberal construction” canon to resolve any remaining doubts in favor of joint-and-several liability. The Supreme Court has ruled that courts should interpret the RICO forfeiture statute “liberally” so as “to effectuate its remedial purposes.” *Russello*, 464 U.S. at 27 (internal quotation mark omitted). Section 853 contains a provision telling courts to do the same. *See* 21 U.S.C. § 853(o) (“The provisions of this section shall be liberally construed to effectuate its remedial purposes.”). Given that provision—and the similarities between both forfeiture statutes—courts have construed Section 853 liberally. And here, construing the statute liberally apparently means adopting joint-and-several liability, which

courts have deemed necessary to effectuate Congress's remedial goal, *i.e.*, to deter criminal conduct.

If a criminal statute is ambiguous, however, another canon comes into play: lenity. Courts must construe criminal laws strictly, so that a citizen will not find himself serving a punishment he never knew existed—or that Congress never created. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971). Here, unless Congress has said otherwise, it would be unfair to make the bit player foot the entire bill. If Section 853 were ambiguous, therefore, lenity would compel the Court to decide against imposing joint-and-several liability.

So would another canon: constitutional avoidance. Under that canon, if a court can reasonably read a law in one of two ways, but the first would raise “serious constitutional problems,” the court must choose the second. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Forfeitures violate the Eighth Amendment’s Excessive Fines Clause if they are “grossly disproportional to the gravity of a defendant’s offense.” *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Fining the bit player for the entire conspiracy—as joint-and-several liability allows the government to do—would therefore raise serious constitutional problems. So this canon, too, would instruct the Court not to impose such liability.

Although other courts have made much of the “liberally construed” provision, it is not quite as all-powerful as it seems. *See* 21 U.S.C. § 853(o).⁵ The Supreme Court has faced the same phrase in the RICO forfeiture statute, and has made clear that such clauses are not

⁵ One might wonder why the Court would look to any other canons when the statute itself explains how it should be read. But the “liberally construed” clause is not the Alpha and the Omega of the Court’s analysis. Rather, like any other canon, that clause “only serves as an aid for resolving an ambiguity.” *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 n.10 (1985)). And always, in the background, lurks lenity. *See Russello*, 464 U.S. at 303–04 (“Th[e] rule [of lenity] ‘comes into operation at the end of the process of construing what Congress has expressed[.]’” (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961))).

“invitation[s] to apply [a statute] to new purposes that Congress never intended.” *Reves*, 507 U.S. at 183. In other words, such clauses merely serve to clarify—not to outright change—what other nearby provisions mean.

Here, Section 853 never mentions or even hints at joint-and-several liability. Neither does its legislative history, for that matter. *See Cano-Flores*, 796 F.3d at 93 (discussing at length S. Rep. No. 98–225, at 192, 195, 210 (Sept. 14, 1983)). And allowing joint-and-several liability to sneak in through the back door of Section 853(o) would cause another provision—Section 853(a)—to change. The word “obtained” would thereafter become a useless layabout within the text. The “liberally construed” provision is not meant to change the face of the text in that way.

Thus, the canons confirm: Joint-and-several liability and Section 853 are just not meant for each other.

4.

But the Sixth Circuit has concluded differently. Though that conclusion appears ripe for review, this Court must follow the law as the Sixth Circuit has stated it. And for now, the law is that co-conspirators are jointly and severally liable to forfeit the proceeds of their conspiracy. *Honeycutt*, 816 F.3d at 379–80. Thus, Frial-Carrasco, Solomon, and Elliott are jointly and severally liable for the proceeds of the Pain Center conspiracy.

B.

Question two, however, is: Are they jointly and severally liable for the Pain Center’s *entire* proceeds? No, because they joined the conspiracy after it started. Before deciding a defendant’s punishment for joining in a conspiracy, the Court must make “*particularized* findings” about “both [1] the scope of the defendant’s agreement *and* [2] the foreseeability of

his co-conspirators' conduct.” *Campbell*, 279 F.3d at 400. And since *Honeycutt*, the Sixth Circuit has affirmed that this foreseeability limit still applies in criminal forfeiture cases. *See United States v. Wolford*, 2016 WL 3878213, at *5–7 (6th Cir. July 18, 2016) (“[T]he sentencing court must hold each conspirator jointly and severally liable for these proceeds. With joint and several liability, the amount of proceeds attributable to a defendant is limited to those proceeds reasonably foreseeable to that defendant.” *Id.* at *5 (citations omitted)); *see also Logan*, 542 F. App’x at 498–99 (applying the same rule before *Honeycutt*).

Thus, the Sixth Circuit has tried to mitigate the over-punishment problems of joint-and-several forfeiture liability by building a foreseeability requirement on top. This hybrid theory has some theoretical bugs of its own. If co-conspirators truly are jointly and severally liable, then the only question is how much a plaintiff deserves to recover, not how much of the injury a given defendant caused. In other words, foreseeability simply does not matter—each defendant should be liable for the whole. Moreover, the hybrid theory is still likely to over-punish. Compare a hypothetical receptionist and a physician at the Pain Center. Both were present for eighty percent of the conspiracy. But the receptionist only took calls; the physician was the one dispensing the drugs. The physician would appear more culpable. And yet, the government could go after both for the same amount. It could even go after the receptionist alone, fining her for eighty percent of the overall proceeds while leaving the higher-salaried physician to pay nothing.

Rather than fusing these two theories into one, the Sixth Circuit could consider opting for a more nuanced approach to joint-and-several liability. Tort theory supplies a number of different liability “tracks,” including joint-and-several liability, *see* Restatement (Third) of Torts: Apportionment of Liability §§ A18–19; several liability, *id.* §§ B18–19; joint-and-

several liability with reallocation, *id.* §§ C18–21; hybrid liability based on the threshold percentage of comparative responsibility, *id.* §§ D18–19; and hybrid liability based on the type of damages, *id.* §§ E18–19. One such method could enable a court to attribute forfeiture liability fairly across the members of a conspiracy, from the receptionist to the physician.

But for now, the circuit has solved the problem through foreseeability. And here, the defendants never agreed to help the Pain Center make or hide the money it had already made before they ever joined the conspiracy. So the Court cannot make a particularized-enough finding to hold them liable for the conspiracy’s entire proceeds. *Campbell*, 279 F.3d at 400. Since these defendants did not contribute in each and every dollar the Pain Center earned, they are not responsible for forfeiting each and every dollar on behalf of the conspiracy now.

Thus, even though Frial-Carrasco, Solomon, and Elliott are—technically speaking—jointly and severally liable, they must forfeit only the proceeds that were foreseeable to them. Since Solomon and Elliott were around for eighty percent of the conspiracy, they are liable to forfeit eighty percent of the conspiracy’s proceeds. And since Frial-Carrasco was around for fifty percent of the conspiracy, she therefore must forfeit only fifty percent of those proceeds. *See, e.g., Welford*, 2016 WL 3878213, at *6–7.

C.

Finally, question three: Does the eight million Shumrak has already forfeited relieve his co-conspirators of their debts? Under either the “pro rata” or the “off-the-top” calculus, the answer is no.

In a more perfect world, of course, this question would not even arise. As discussed, Section 853(a)(1)—properly read—requires defendants to forfeit only the property that they personally obtained by joining a conspiracy. Thus, Section 853(a)(1)—properly applied—

would require the government to prove with particularity the value that a given Pain Center defendant obtained for himself, whether that be his salary, dental benefits, or what have you. In such a world, each defendant's forfeiture liability is clearly delineated from the others', and each must pay his own regardless of what the others do. But, as discussed, most courts currently do not read this statute this way—leaving this Court to find the next best option.

At the hearing, the Court applied the pro-rata method, first subtracting Shumrak's eight million from the total ten, then applying each defendant's foreseeability percentage to the remaining two. Under the Sixth Circuit's hybrid theory, that method made some sense. Because the baseline is joint-and-several liability, the Court first had to determine how much "restitution" the government was still owed. The government has established that number as two million (the total ten minus the Shumrak eight). Then, to better fit the punishment to the crime, the Court further reduced that amount according to the time that each defendant actually put in at the Pain Center. For example, Frial-Carrasco was around for fifty percent. Thus, she could only have contributed to—or at least foreseen—fifty percent of the proceeds. And thus, the Court held her liable for fifty percent of what the government could recover: half of two million, or, one million. For Solomon and Elliott, who were around longer, the math yields a somewhat bigger number (\$1.6 million).

All three object, arguing that the Court should have used the "off-the-top" method. On further review, that does seem the better option. The pro-rata method rests on a flawed assumption: that a conspirator's foreseeable amount of liability is subject to change. It is not. If a defendant could foresee eighty percent of a ten-million-dollar conspiracy, then he could foresee the conspiracy making eight million dollars. Obviously, he could also foresee it making seven million, six million, five million, and all the way on down to one dollar.

Consequently, he can be liable for anything less than eight million. And if only two million in conspiracy proceeds remain un-forfeited, he can be held liable for all of them; they are within his penalty range. Making him pay only eighty percent of that reduced amount, as the pro-rata method dictates, would thus hold him to account for less than what he is actually accountable for. The pro-rata method skews the penalty.

The off-the-top method largely avoids that problem. Applying this method, the Court must first calculate a defendant's percentage of foreseeable liability "off the top"—in other words, it must apply the percentage to the whole. Then, at step two, the court can consider how much other defendants have already paid. But unlike under the pro-rata method, the Court need not re-calculate the defendant's foreseeable percentage of the new and reduced amount of outstanding proceeds. After all, just because one defendant has paid the price of his crimes does not mean that his co-defendants actually committed less crime themselves. That was all in the past—the crime stays the same. So, too, should the penalty.

Granted, the penalty will not stay *exactly* the same. Co-conspirators are, at present, jointly and severally liable under Section 853. And joint-and-several liability will create accidental martyrs: By serving his punishment, one defendant serves—or at least reduces—the punishment of the rest. This is a funny kind of punishment. The defendants here could not send an uncle to prison in their stead. Nor do they get good-time credits for the time that Joel Shumrak serves on his sentence. But they do get credited for the money he has paid. What if the government had obtained eight million from Elliott before seeking forfeiture from Shumrak? Then the bodyguard will have paid for most of the conspiracy, leaving its ringleader responsible only for the remainder. Nor would the outcome look any fairer if

Elliott and Shumrak were both bodyguards. Elliott would still serve a greater punishment than Shumrak simply because the government sought to punish him first.

These problems would disappear if courts simply stopped thinking about criminal forfeiture in terms of restitution, *i.e.*, joint-and-several-liability. But for as long as they do, the off-the-top method seems to be the one they should use in times like this. That method at least has some logic and law to recommend it. Logically, if Frial-Carrasco could foresee the conspiracy making five million dollars, she could foresee it making two. Hence, if the government could have forced her to pay five million, it can still force her to pay two. Foreseeability merely caps the punishment. Lucky for her that a co-defendant has reduced her share by paying off a chunk of the whole. But if there is still five million (or less) left, and the government seeks it from Frial-Carrasco, Section 853 would require her to pay it.

Legally speaking, under the Sixth Circuit's current hybrid theory a conspirator must forfeit her foreseeable percentage of the conspiracy's total proceeds. The off-the-top theory measures exactly that: It applies the foreseeability percentage to the whole, rather than to whatever amount remains after other defendants chip in. As such, this method approximates the appropriate punishment for Frial-Carrasco's specific criminal conduct—at least, as nearly as a court can approximate it when starting from the baseline of joint-and-several liability.

Ironically, however, were the Court to apply this method that the defendants espouse, they would end up liable for higher amounts than they already are. Take Frial-Carrasco as an example again. She could have foreseen the conspiracy making five million dollars. Thus, her penalty is five million dollars. Because she is jointly and severally liable for that penalty, the government could have sought the entire five million from her. Now, of course, there is

only two million left to seek. But since Frial-Carrasco is jointly and severally liable for a penalty of up to five million dollars, the government can still seek the leftover two from her.

“Far from it!” the defendants would say. According to them, the off-the-top method should in fact reduce their forfeiture obligations to zero. Because the government can only collect five million dollars from Frial-Carrasco, the argument goes, once the government has collected more than that amount from other sources it may never come darkening her door again. That argument conflates what the government may collect *in total* with what it may collect from anyone *in particular*. True, the government is entitled only to call in five million from Frial-Carrasco. But it is still entitled to collect ten million altogether. And it may collect that money from Frial-Carrasco until either (1) the government hits its limit, or (2) Frial-Carrasco hits hers. Until either event occurs, Frial-Carrasco is still on the hook.

So, the Sixth Circuit has not yet told courts whether to use an off-the-top or a pro-rata method for calculating forfeiture liability when one defendant has already paid part of the whole. The off-the-top method, which the defendants claim to support, seems more logical. That said, the defendants mischaracterize the method. To them, “off the top” really means “off the bottom”—every single payment raises the floor, cutting into the amount that the government may force any other defendant to pay. Under that view, if Shumrak had paid one million, then Frial-Carrasco would only be liable for four; if three, then two; and so on. Because that is not how forfeiture works, the Court cannot adopt their proposed method.

Had the government asked the Court to apply the correct version of off-the-top, the Court might have been obliged to modify its preliminary judgment and hold the defendants each liable for two-million dollars apiece. But the government has not objected to—and, indeed, supports—the pro-rata method. *See* R. 927 at 1. The Court therefore will not award

extra money that the government has not asked for, especially when the defendants have had no notice that they might face stiffer penalties. In short, had the government objected each defendant would have been liable for two-million dollars. The government did not object. As such, the Court will limit the forfeiture to the amount that it previously announced. The Court recognizes that the government argued for this amount at the hearing, but it did not ultimately object to the Court's preliminary judgment of forfeiture. As such, it would be unfair to increase that amount now.

D.

Summarizing the math thus far: The Court has held Frial-Carrasco, Solomon, and Elliott liable for the foreseeable portions of the Pain Center proceeds that remain unpaid. But one more problem remains. During these proceedings, the government has not been exactly consistent in its forfeiture requests. First, it asked for fifteen million. Then it asked for seven million. *Compare* R. 279 at 3, *with* R. 841-1 at 1. The defendants argue that the government is bound by its lowest ask, *i.e.*, seven million, in which case, they argue, Shumrak's eight million would have already satisfied their liability. *See* R. 922 at 5; R. 924 at 2.

That argument takes the government's different requests out of context. In context, they make perfect sense. Initially, in the indictment, the government notified the defendants that it would seek fifteen million dollars from all of them. R. 279 at 3. At some point down the road, the government recovered roughly eight of that fifteen million from Joel Shumrak. *See* R. 295 at 4 (money judgment).⁶ Under joint-and-several liability, his co-defendants were then liable for the remaining seven. So that is what the government sought.

⁶ Although that judgment was technically for only seven million, at the forfeiture hearing the government said that it had collected close to eight from Shumrak—and at any rate has not objected to that characterization since.

As discussed, however, at the hearing the government's evidence established that the Pain Center had grossed only ten million. After the Shumrak payment, then, two million dollars was all that definitively remained of the Pain Center. Applying the off-the-top method, Frial-Carrasco, Solomon, and Elliott would all be liable for the entire two million. Had the government objected to the preliminary judgment, the Court would have applied that method. But, as discussed, the government did not object, and the Court will not award the government more money than it is now seeking—and more money than the defendants have anticipated forfeiting.

This is all to say that, from the beginning, the defendants have had proper notice of the amount that they are liable to pay. They have enjoyed better notice, in fact, than the rules of criminal procedure even require. Under those rules, the government “need not” specify any amount in the indictment. Fed. R. Crim. P. 32.2(a). But here, the government did. And as that number evolved, the government kept the defendants updated. *See* R. 852 at 2 n.1. Although the defendants do not agree with the ultimate result, that result could not have come as a surprise. They were on notice that they might have to pay—indeed, that they might have to pay much more than what the Court ordered. Thus, notice provides no excuse: The defendants must pay the amounts listed in the preliminary judgment of forfeiture.

E.

The defendants raise two final challenges to the preliminary judgment of forfeiture. First, Solomon points out that the government chose not to seize some assets from Shumrak that, according to Solomon, would ring up to about \$887,000. R. 924 at 3. She argues that she “should not bear the cost of the government’s forbearance,” and thus should receive credit for that unseized amount. *Id.*

But Solomon is not bearing the cost of the government's forbearance—she is bearing the cost of her crime. She is jointly and severally liable for the foreseeable proceeds of the Pain Center, meaning that the government—if it had wanted to—could have collected those proceeds from her alone (up to \$8 million, at least). And even if the law did not hold her jointly and severally liable, it would still hold her to her own punishment. The government has the discretion to seek different punishments for different defendants. But Solomon is not entitled to see others punished. Actually, the entitlement works in exactly the opposite way: If a person is convicted of participating in a drug conspiracy, the government is entitled to “any property constituting, or derived from, any proceeds th[at] person” obtained through her participation. 21 U.S.C. § 853(a)(1). Thus, this argument fails.

Second, Frial-Carrasco argues that the Court must reduce her forfeiture amount by “approximately 20%” because the Pain Center was “sometimes open four days a week,” yet the government assumed a consistent five-day work week when calculating the conspiracy's gross proceeds. R. 922 at 6. She gets these facts from Agent Dalrymple, who investigated the conspiracy and who testified at the forfeiture hearing. And she accurately recounts one part of his testimony. *See* R. 921 at 6 (testimony of Agent Dalrymple) (“Q: Was there a time period when it was open four days a week? A: Yes, sir. That's correct. Q: Did your calculation take that into account? A: No, sir.”). But by focusing on that part, she misses the import of the whole. Though the government did not discount the four-day weeks, it did discount other values. For example, it lowballed the number of clients who visited the clinic each day and did not factor in some of the clinic's other revenue sources. *See id.* at 6–7.

Ultimately, the government must prove the forfeiture amount by a preponderance of the evidence only. *United States v. Evers*, 669 F.3d 645, 660 (6th Cir. 2012). And here, as

Agent Dalrymple recounted, the government kept its estimate conservative. *See* R. 921 at 6–7. If it erred high on some inputs, it erred low on others. On top of that, the Court rounded high on Shumrak’s forfeiture amount (reducing his co-defendants’ liabilities), and low on the conspiracy’s overall proceeds (again reducing their liabilities). *See* R. 919 at 4. As such, the evidence in the record was sufficient to establish that the Pain Center conspiracy grossed at least ten million dollars.

F.

In sum, the Court must uphold its preliminary judgment of forfeiture. Frial-Carrasco, Solomon, and Elliott are jointly and severally liable for the Pain Center’s proceeds. At the forfeiture hearing, the government proved that those proceeds were ten million dollars. A co-defendant, Joel Shumrak, has already forfeited eight million towards that total. Thus, these three co-conspirators are liable for the remainder, but the court will limit that amount to the preliminary judgment of forfeiture amounts. For Solomon and Elliott, that comes to \$1,600,000, and for Frial-Carrasco, \$1,000,000. They are each liable to forfeit those amounts.

III.

On to the enhancements. The Court continued Frial-Carrasco’s sentencing hearing so that the parties could brief two issues: first, whether Frial-Carrasco deserves a two-level enhancement for obstructing justice by allegedly perjuring herself, and second, whether she deserves a two-level enhancement for abusing a position of trust. *See* R. 919 at 18–19.

A.

The government seeks an obstruction enhancement because, it says, Frial-Carrasco lied on the witness stand at trial. The enhancement applies to those who “commit[ed], suborn[ed], or attempt[ed] to suborn perjury.” U.S.S.G. § 3C1.1 cmt. n.4. Perjury has three elements: It is “(1) a false statement under oath (2) concerning a material matter (3) with the willful intent to provide false testimony.” *United States v. Watkins*, 691 F.3d 841, 851 (6th Cir. 2012). To apply the enhancement, the Court must identify “particular portions” of the defendant’s testimony in which she commits perjury, and then “either make a specific finding for each element of perjury or . . . make a finding that encompasses all” the elements. *Lawrence*, 308 F.3d at 632.

At the same time, however, a court must be careful not to “punish a defendant” for exercising her constitutional right to testify in her own defense. U.S.S.G. § 3C1.1 cmt. n.2. Not every defendant who takes the stand and later gets convicted has therefore committed perjury. Her testimony might have been false for any number of reasons, such as “confusion, mistake, or faulty memory.” *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). And even if her testimony is truthful, “the jury may nonetheless find the testimony insufficient to excuse criminal liability.” *Id.* at 95. It is therefore imperative that, before branding any piece of testimony as perjury, the Court find that it exhibits all three perjury elements.

The government initially contended that Frial-Carrasco committed perjury in nine ways, but it has apparently since bumped the number up to ten. *Compare* R. 909 at 9–10, *with* R. 926 at 5–10. In support, the government highlights some portions of Frial-Carrasco’s testimony in which she describes her work at the Pain Center and her mindset while performing it. The Court can assume that those statements are material, because they all

relate to whether Frial-Carrasco acted (or thought she was acting) within the law when she prescribed oxycodone at the Pain Center. Thus, those statements satisfy the second perjury element, as they “concern[] a material matter.” *Watkins*, 691 F.3d at 851. But the government fails to show how they satisfy the other elements: falsity and willfulness. *Id.* Taking each in turn:

Referrals. According to the government, Frial-Carrasco’s testimony “that she sent patients out for referrals” was “contradicted by the evidence.” R. 926 at 5. As an initial matter, testimony does not become false just because other evidence contradicts it. The point of a trial, after all, is to present two contradicting stories and have the jury decide which one it believes. And while on the stand Frial-Carrasco was careful to explain that by “referrals,” she meant that she often suggested that patients seek further treatment—not that she actually sent the patients to other doctors, as the government seems to imply. *See* R. 928 at 3–4 (quoting trial testimony). Thus, she did not lie, and certainly not willfully.

Examinations. Again, the government says that other evidence “contradicts” Frial-Carrasco’s testimony “that she thoroughly examined her patients.” R. 926 at 5–6. But if some evidence contradicts her, plenty of other evidence seems to support her, as well. *See* R. 928 at 5–7 (relating testimony from, among others, government witnesses who received physical examinations at the Pain Center). Granted, Frial-Carrasco might have a different idea of “thoroughness” than other doctors. But that does not mean she lied.

Discharged patients. Although Frial-Carrasco testified “that many patients were discharged from the clinic due to substance abuse issues,” the government says, “nothing could be further from the truth.” R. 926 at 6. But the government does not explain what the purported “truth” is. And the government seems to accept that Frial-Carrasco discharged at

least ten patients for drug abuse during her time at the Pain Center. *See id.* at 7. Ten might not be “many” in the government’s opinion. But even assuming Frial-Carrasco’s opinion has its faults, expressing a faulty opinion is not the same as willfully lying.

Extent of training. The government argues that Frial-Carrasco “vacillat[ed]” about the amount of pain-management training she had received. R. 926 at 7. But “vacillating,” by itself, is not the same as lying. And the government does not identify any specific statement that it believes was false.

Knowledge of duties. The government argues that Frial-Carrasco must have lied when she said “that she did not know and/or understand her duties as medical director.” R. 926 at 7. As the government points out, she was also the medical director of other clinics. *Id.* at 8. That is an effective argument—for the jury. And clearly, the jury bought it. But just because the government sold the better story does not mean Frial-Carrasco willfully lied. Otherwise, what is the ramification for law enforcement—if the opposite is true? In a case when a jury acquits, does it mean the law enforcement agents who testified were lying? Of course not. Neither, in this case, was Frial-Carrasco.

Letter of resignation. Frial-Carrasco testified that she resigned from the Pain Center and that she had drafted a letter of resignation on May 15, 2014. R. 849; Lucille M. Frial-Carrasco, TR (Day 6) at 321. But, she also admitted, she never delivered the letter to the Pain Center, and only sent the letter to the Florida Department of Health after the DEA shut the Pain Center down in June 2014. *Id.* at 326–38; R. 869; Lucille M. Frial-Carrasco, TR (Day 7) at 32–34. “Nothing could be more deceitful,” the government says, than using that letter to mitigate her involvement with the Pain Center. R. 926 at 9. The problem with that

argument, from an obstruction-of-justice standpoint, is that the jury knew of Frial-Carrasco's "deceit" because she testified truthfully about it.

Knowledge that the Pain Center was a pill mill. According to the government, Frial-Carrasco "testified that she did not tell [Special Agent] Dalrymple that she believed [the Pain Center] was a pill mill" before she started work there, whereas "Dalrymple testified unequivocally" that she had. R. 926 at 9. Actually, she testified to telling Dalrymple that "if [the Pain Center] was [a pill mill], I hoped that it was before my time." See R. 928 at 13 (quoting testimony). Regardless, this he-said-she-said dispute does not establish that Frial-Carrasco willfully lied about the contents of this conversation.

Knowledge of patients traveling in groups. The government says Frial-Carrasco "testified that she did not know patients were traveling together in groups" to the Pain Center. R. 926 at 9. But she admitted to knowing exactly that. See R. 849: Lucille M. Frial-Carrasco, TR (Day 6) at 402–04. She did not perjure herself by admitting the truth.

Accepted range of oxycodone. The government points out that Frial-Carrasco told the jury that "180 to 200 pills per month was an acceptable amount" of oxycodone, whereas other doctors testified the safe limit was half that much. R. 926 at 9–10. Frial-Carrasco might have been—and was probably—wrong. Again, however, that does not mean she willfully lied. And the government provides no evidence showing that she did.

Applicable standard of medical care. Finally, Frial-Carrasco testified that she acted within the normal course of medical practice while working at the Pain Center. R. 849: Lucille M. Frial-Carrasco, TR (Day 6) at 363. In other words, she claimed innocence. The government calls this perjury. If the government is correct, then every defendant who takes

the stand and claims innocence would receive a two-level sentencing enhancement for exercising a constitutional right. Needless to say, the government is not correct.

Obviously, the government disagrees with how Frial-Carrasco characterized her actions while on the stand. Ultimately, so did the jury. But to apply an obstruction-of-justice enhancement on this disagreement alone would punish her simply for asserting a defense, which the guidelines explicitly tell the Court not to do. *See* U.S.S.G. § 3C1.1 cmt. n.2. Accordingly, the Court will sustain Frial-Carrasco's objection to applying the obstruction-of-justice enhancement.

B.

The government also seeks an enhancement because, it says, Frial-Carrasco abused a position of trust. By failing to object to the presentence report, the government has waived its argument that Frial-Carrasco abused a position of *private* trust. But it might have the better side of the *public*-trust argument, since the general public was also the victim of Frial-Carrasco's crime. Thus, the abuse-of-trust enhancement might still apply—unless, that is, the Sixth Circuit has read “public trust” and “private trust” to mean functionally the same thing. In other words, having waived one, can the government assert the other?

The Sixth Circuit has not spoken on this issue—not explicitly, at least. But it has left behind enough tea leaves for the Court to resolve the current case. In general, the Sixth Circuit has applied the abuse-of-public-trust enhancement to public officials and employees, *i.e.*, people who work in and for the government. In *United States v. Brogan*, 238 F.3d 780 (6th Cir. 2001), for example, the court defined “public trust,” albeit in a parenthetical aside, as “the necessary faith citizens must have in government for a well[-]functioning republic.” *Id.* at 783. And in *United States v. Gilliam*, 315 F.3d 614 (6th Cir. 2003), the court applied

the public-trust enhancement to a prison guard, even though he worked for a private employer, because he was performing a “traditionally public function.” *Id.* at 618. Thus, “public trust” appears to mean the kind of trust that citizens place in their representatives—and their representatives’ employees—not to take bribes, embezzle, or otherwise abuse their governmental authority.

By contrast, private trust “is akin to . . . a fiduciary duty.” *Brogan*, 238 F.3d at 783 (discussing *Ragland*, 72 F.3d at 503). Such trust “arises when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position,” leaving their affairs up “to the other’s presumed better judgment.” *Id.* Thus, “private trust” refers to the kind of trust that patients place in their doctors not to misuse their information, or that clients place in their lawyers not to take their money and run.

Recently, in an unpublished decision, the Sixth Circuit appeared to hold that a doctor had abused positions of both private and public trust. *See United States v. Fata*, 650 F. App’x 260, 263–64 (6th Cir. 2016). There, however, the doctor had defrauded public health insurance companies. *Id.* So he abused a literal public trust, embezzling money that citizens believed would go to good use. As such, if the court in fact upheld the enhancement because the doctor abused *public* trust, it did so not because doctors inherently hold such a position; rather, it did so because, like the prison guard, he had temporarily entered such a position. That public money came with an implied promise, to the public, that he would not misuse it.

Here, however, neither abuse-of-trust enhancement applies. Granted, the guidelines themselves do not draw a clear line between public and private trust. *See* U.S.S.G. § 3B1.3. But by giving public trust its own distinct definition, the Sixth Circuit has apparently taken the guidelines to mean that the concepts are distinct. It would certainly seem that Frial-

Carrasco violated a position of private trust. But the government has waived that argument. And of course, the public certainly trusts doctors not to spread drugs through communities. But doctors do not perform the “traditionally public” type of function that the Sixth Circuit has associated with the abuse-of-public-trust enhancement. *Gilliam*, 315 F.3d at 618. Nor has the government contended that, like the doctor in *Fata*, Frial-Carrasco defrauded any public health insurers. Accordingly, the Court will overrule the government’s objection to the presentence report.

* * *

To conclude, neither Frial-Carrasco, Solomon, nor Elliott has shown why their forfeiture amount is incorrect under the current state of the law. Although the controlling case law has left some difficult questions unanswered, the Court holds these co-defendants liable for their foreseeable portions of the Pain Center’s proceeds. For Solomon and Elliott, that amount is \$1,600,000. For Frial-Carrasco, it is \$1,000,000.

As for the enhancements, the government has not proven that any particular portions of Frial-Carrasco’s testimony show the three elements of perjury. Moreover, the government has waived its abuse-of-private-trust argument, and the abuse-of-public-trust enhancement does not appear to apply to the conduct at issue here. The Court therefore cannot apply either sentencing enhancement to Frial-Carrasco.

Accordingly, it is **ORDERED** as follows:

- (1) The defendants’ objections to the preliminary judgment of forfeiture, R. 922, R. 924, R. 925, are **DENIED**.
- (2) The preliminary judgment of forfeiture, R. 920, is **ADOPTED** as the Court’s final judgment.

- (3) Frial-Carrasco's objection to the portion of her presentence report applying the obstruction-of-justice enhancement, R. 904, R. 923, is **SUSTAINED**.
- (4) The government's objection to the portion of Frial-Carrasco's presentence report that does not apply the abuse-of-trust enhancement, R. 909, R. 926, is **OVERRULED**.

This the 31st day of October, 2016.



Signed By:

Amul R. Thapar **AT**

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUCILLE M. FRIAL-CARRASCO and
CATHERINE RUSSELL,

Defendants.

Criminal No. 13-40-ART-(6),(8)

ORDER

*** **

A grand jury indicted Lucille M. Frial-Carrasco, Catherine Russell, and others for conspiring to distribute oxycodone and alprazolam at two alleged “pill mills,” the Pain Center of Broward in Florida and Georgia Health Associates in Georgia. Frial-Carrasco moved for a change of venue to the Southern District of Florida under Federal Rule of Criminal Procedure 18 and Article III, Section 2 and the Sixth Amendment of the United States Constitution. R. 476. Russell filed a response to this motion, which the Court will construe as a motion to join Frial-Carrasco’s motion for a change of venue. R. 486. Russell may join in Frial-Carrasco’s motion for a change of venue. But because venue is proper in the Eastern District of Kentucky, the motion for a change of venue must be denied.

The Eastern District of Kentucky is a proper venue under the United States Constitution. Under Article III of the United States Constitution, criminal trials “shall be held in the State where the said Crimes shall have been committed.” U.S. Const. art. III, § 2, cl. 3. The Sixth Amendment similarly requires that a trial occur in the “district wherein the

crime shall have been committed.” U.S. Const. amend. VI. Here, the alleged crimes were committed in the Eastern District of Kentucky. Conspiracy is a continuous crime; it is not complete “until the drugs reach their final destination.” *United States v. Turner*, 936 F.2d 221, 226 (6th Cir. 1991). While the pain clinics are not located in Kentucky, the government intends to prove that a large amount of the “illegally” distributed prescriptions ended up in Kentucky. Because the alleged crime occurred in this district, venue in the Eastern District of Kentucky is constitutional.

Venue is also proper under Rule 18 of the Federal Rules of Criminal Procedure, which implements the venue provisions of the United States Constitution. *United States v. O'Donnell*, 510 F.2d 1190, 1192 (6th Cir. 1975). Rule 18 states that “the government must prosecute an offense in a district where the offense was committed.” Fed. R. Crim. P. 18. Here, venue is proper in the Eastern District of Kentucky because it was the final destination for a substantial amount of the illegally prescribed drugs. As explained above, conspiracy is not complete until the drugs reach their final destination, and “venue is proper in any district along the way.” *Turner*, 936 F.2d at 226; *see also* 18 U.S.C. § 3237(a) (“[A]ny offense against the United States begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.”). In *Turner*, the defendants operated an airstrip and marina in the Bahamas where cocaine was dropped off en route to the United States. 936 F.2d at 222. Large amounts of cocaine from this conspiracy ended up in Southeastern Michigan. *Id.* at 226. Thus, venue was proper in the Eastern District of Michigan. *Id.* This case is no different. As such, venue is proper in the Eastern District of Kentucky.

Accordingly, it is **ORDERED** that:

- (1) Russell's motion to join Frial-Carrasco's motion for a change of venue, R. 486 is **GRANTED**.
- (2) Frial-Carrasco's motion for a change of venue, R. 476, is **DENIED WITHOUT PREJUDICE**.

This the 13th day of October, 2015.



Signed By:

Amul R. Thapar **AT**
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON

CRIMINAL CASE NO. 6:13-CR-40-8-ART-HAI

UNITED STATES OF AMERICA

PLAINTIFF

v.

LUCILLE M. FRIAL-CARRASCO

DEFENDANT

DEFENDANT LUCILLE M. FRIAL-CARRASCO'S MOTION
FOR CHANGE OF VENUE

Defendant Lucille M. Frial-Carrasco, through counsel, pursuant to the United States Constitution, Art. III, § 2, cl. 3; the Sixth Amendment of the Bill of Rights; and Rule 18 of the Federal Rules of Criminal Procedure, hereby moves the Court for a Change of Venue to the Southern District of Florida. The alleged criminal activity took place in Ft. Lauderdale, Florida, which makes the Southern District of Florida the appropriate venue for this action.

A Memorandum of Law in Support and a Proposed Order are attached.

Respectfully submitted,

/s/ Edward L. Metzger III
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Counsel for Defendant,
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

W. Samuel Dotson, Esq.
Assistant United States Attorney
601 Meyers Baker Road, Ste. 200
London, KY 40741-3035

/s/ Edward L. Metzger III
Edward L. Metzger III

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON

CRIMINAL CASE NO. 6:13-CR-40-8-ART-HAI

UNITED STATES OF AMERICA

PLAINTIFF

v.

LUCILLE M. FRIAL-CARRASCO

DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE OF VENUE

Defendant Lucille M. Frial-Carrasco, through counsel, for her Memorandum in Support of Motion for Change of Venue, hereby states as follows:

Under the United States Constitution, the trial of all crimes “shall be held in the State where the said Crimes shall have been committed.” U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment to the Bill of Rights contains a similar provision, stating that in all criminal prosecutions, the accused has the right to a trial by jury “of the State and district wherein the crime shall have been committed.” U.S. CONST. amend. VI.

In this case, the alleged crimes, if any, were committed in Florida. With the exception of Defendant Johnston, all of the Defendants worked for the Ft. Lauderdale, Florida-based Pain Center of Broward.¹ This pain management facility was located in the Southern District of Florida. The prescriptions at issue in this case originated from

¹ Defendant Stanley Johnston worked for a pain management facility in Georgia, and, based on representations made by his counsel, appears likely to enter into a plea agreement.

this facility.² The named Defendants were not Kentucky residents, nor did they write any prescriptions in Kentucky. Dr. Frial-Carrasco, in particular, treated her patients, wrote prescriptions, and provided medical care in Florida. She lives and works in that state. She did not provide medical care or write any prescriptions in the Commonwealth of Kentucky. Accordingly, the Constitution and Bill of Rights require that she be tried in the Southern District of Florida.

The Federal Rules of Criminal Procedure likewise require that she be tried in Florida. Under the Rules, “[T]he government must prosecute an offense in a district where the offense was committed.” Fed. R. Cr. P. 18. The government bears the burden of proving, by a preponderance of the evidence, that venue is proper as to each count. *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992) (citing *United States v. Barsanti*, 943 F.2d 428, 434 (4th Cir. 1991)). In conspiracy prosecutions, venue is proper in any district where the conspiracy was formed or in any district where an overt act in furtherance of the conspiracy was performed. *Corral v. United States*, 562 Fed. App’x 399, 404 (6th Cir. 2014).

Here, the alleged conspiracy could only have been formed in Florida, which is where the Defendants worked and lived. Any overt acts in furtherance of that alleged conspiracy (which is denied) likewise would have, by necessity, occurred in Florida, as the Defendants – the alleged “co-conspirators” – all lived and worked in that state.³

² Assuming Dr. Johnston pleads guilty, as has been previously suggested, then the prescriptions written at the Georgia pain clinic will no longer be at issue.

³ Again excepting Dr. Johnston, who lived and worked in Georgia, but who likely will not be tried with the remaining Defendants due to his anticipated plea.

Dr. Frial-Carrasco did not write prescriptions or treat patients in Kentucky. It is wholly improper to hale her into court in Kentucky to defend against the charges that have been brought in this case. She has a constitutional right to be tried in the district where the crimes were (allegedly) committed, which is in the Southern District of Florida. Accordingly, based on the Constitution and Federal Rules of Criminal Procedure, she respectfully requests a change of venue to that district.

Respectfully submitted,

/s/ Edward L. Metzger III

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