No. 19-16

In the Supreme Court of the United States

ALLEN E. PEITHMAN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether equally culpable criminal defendants who acted in concert to obtain money through jointly owned businesses may each be required to forfeit the amount of that revenue that has not been forfeited by the others.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Neb.):

United States v. *Peithman*, No. 15-cr-3091 (Aug. 1, 2017)

United States v. *Peithman*, No. 13-cr-3010 (Aug. 1, 2017)

United States Court of Appeals (8th Cir.):

United States v. *Peithman*, No. 17-2721 (Feb. 28, 2019)

United States v. *Peithman*, No. 17-2722 (Feb. 28, 2019)

United States v. *AEP Properties, L.L.C.*, No. 17-2723 (Feb. 28, 2019)

United States v. *Elder*, No. 17-2768 (Feb. 28, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-44a) is reported at 917 F.3d 635. The order of the district court (Pet. App. 47a-60a) is not published in the Federal Supplement but is available at 2017 WL 1682778.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2019. On April 30, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including June 27, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, Allen Peithman, Jr. and Sharon Elder were convicted of conspiracy to distribute drug paraphernalia, in violation of 21 U.S.C. 846;

investing illicit drug profits, in violation of 21 U.S.C. 854; conspiracy to distribute misbranded drugs with the intent to defraud or mislead, in violation of 18 U.S.C. 371 and 21 U.S.C. 331(c), 333(a)(2), and 352(a), (b), (e), and (f); conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 and 1341; and conspiracy to structure financial transactions for the purpose of evading reporting requirements, in violation of 18 U.S.C. 371 and 31 U.S.C. 5324(a)(1) and (3). D. Ct. Doc. 435, at 1 (Aug. 7, 2017) (Peithman Judgment); D. Ct. Doc. 437, at 1 (Aug. 7, 2017) (Elder Judgment). Petitioner AEP Properties, L.L.C., a corporation wholly owned by Peithman, was convicted of conspiracy to structure financial transactions for the purpose of evading reporting requirements, in violation of 18 U.S.C. 371 and 31 U.S.C. 5324(a)(1) and (3). D. Ct. Doc. 440, at 1 (Aug. 7, 2017) (AEP Judgment).

The district court sentenced Peithman to 115 months of imprisonment, to be followed by three years of supervised release; Elder to 63 months of imprisonment, to be followed by three years of supervised release; and AEP Properties to a fine. Pet. App. 11a. The court also ordered petitioners, jointly and severally, to forfeit $1,142,942.32. *Id.* at 12a. The court of appeals affirmed in part, reversed in part, and remanded the case for further proceedings. *Id.* at 9a-44a.

1. In 2008, Peithman set up Dirt Cheap, a shop in Lincoln, Nebraska that sold synthetic marijuana and drug paraphernalia. Pet. App. 13a. Peithman's mother, Elder, helped him to operate Dirt Cheap; she opened and closed the store, made employment decisions, and handled the store's finances. Trial Tr. 819-830. From 2013 to 2014, Peithman was imprisoned for an unrelated federal offense. Pet. App. 13a. During that time, Peithman retained ownership of Dirt Cheap, but Elder

took over the day-to-day operation of the store. *Id.* at 14a; Trial Tr. 1440.

After Peithman's release from prison in 2014, Peithman and Elder reorganized their business. Peithman transferred ownership of Dirt Cheap to Elder; Elder opened another store, Island Smokes; and Peithman himself set up a holding company, AEP Properties, which owned the buildings in which both stores were located. See Pet. App. 14a; Trial Tr. 1537, 1679-1685. Peithman, however, remained involved in operating Island Smokes; for instance, he handled the store's daily finances and helped to determine which products to stock. Trial Tr. 835-836, 919-920.

Petitioners drew the attention of law enforcement in 2015 after synthetic marijuana from Island Smokes caused a series of near-fatal overdoses. Pet. App. 15a. A search of Island Smokes uncovered drug paraphernalia, as well as packets of synthetic marijuana that contained Schedule I controlled substances and that violated the Food and Drug Administration's labeling requirements. *Id.* at 16a. A search of Dirt Cheap uncovered drug paraphernalia, as well business records that demonstrated petitioners' efforts to hide the nature of their financial transactions from financial institutions and law enforcement. *Id.* at 17a.

2. In August 2015, a grand jury in the District of Nebraska returned an indictment charging Peithman, Elder, AEP, and other defendants with various drug and financial offenses. Indictment 1-29. After a 13-day jury trial, Peithman and Elder were convicted of conspiracy to distribute drug paraphernalia, investing illicit drug profits, conspiracy to distribute misbranded drugs, conspiracy to commit mail fraud, and conspiracy to structure financial transactions for the purpose of evading

reporting requirements, and AEP Properties was convicted of conspiracy to structure financial transactions for the purpose of evading reporting requirements. See p. 2, *supra*.

The district court sentenced Peithman to 115 months of imprisonment, Elder to 63 months of imprisonment, and AEP Properties to a fine. Pet. App. 11a. The court also imposed a money judgment ordering petitioners to forfeit over $1.1 million—an amount that represented petitioners' estimated revenues from the sales of synthetic marijuana and drug paraphernalia. See *id.* at 12a; Sent. Tr. 10-14. That judgment rested on three forfeiture statutes: 18 U.S.C. 981(a)(1)(C) (which covers a wide range of offenses), 21 U.S.C. 853 (which covers certain drug offenses), and 31 U.S.C. 5317(c) (which covers certain financial offenses). See Pet. App. 31a. The court specified that the judgment rested on "[a]ll of [those statutes] and each of them." Sent. Tr. 15. The court also found that petitioners' scheme was "a joint operation in which each of the actors is equally culpable," and it accordingly made petitioners jointly and severally liable for the forfeiture. *Id.* at 10; see Pet. App. 55a.

3. The court of appeals affirmed in part, reversed in part, and remanded the case for further proceedings. Pet. App. 9a-44a.

As relevant here, the court of appeals affirmed the district court's order holding petitioners jointly and severally liable under 18 U.S.C. 981 for the forfeiture of the proceeds from the "conspiracy to commit mail fraud regarding misbranded drugs." Pet. App. 33a.; see 4/24/17 Tr. 46. The court of appeals rejected petitioners' contention that the imposition of joint and several liability contradicted *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017), in which this Court had concluded that

21 U.S.C. 853 does not permit a defendant to "be held jointly and severally liable for property that his co-conspirator derived from [a drug crime covered by that statute,] but that the defendant himself did not acquire." 137 S. Ct. at 1630. The court of appeals explained that, in *Honeycutt*, this Court had "declined to hold a co-conspirator responsible for the entire forfeiture judgment when he only managed the sales and inventory, had no ownership interest, and never obtained tainted property." Pet. App. 33a. The court of appeals observed that in this case, by contrast, "Peithman and Elder were equally culpable"; "both [of them] had ownership interests, worked together to operate the businesses, and shared in the proceeds obtained by engaging in criminal activity." *Ibid.*

The court of appeals agreed with petitioners that *Honeycutt* precluded joint and several liability under Section 853 with respect to the portion of the forfeiture traceable to the sale of the drug paraphernalia ($117,653.57). Pet. App. 33a. The court read *Honeycutt* to mean that Section 853 foreclosed joint and several liability for coconspirators even in the circumstances of this case, because that statute "require[d] possession of the property by the defendant" in order to allow forfeiture. *Id.* at 35a. But it declined to extend *Honeycutt* to 18 U.S.C. 981, which it viewed as "less focused on personal possession." Pet. App. 35a. The court thus reversed the forfeiture only with respect to the $117,653.57, and it remanded the case to the district court to revise the judgment. *Id.* at 44a.

ARGUMENT

The imposition of joint and several liability under 18 U.S.C. 981 on equally culpable defendants who acted in concert to obtain the proceeds of the criminal activity

is correct and does not conflict with any decision of this Court or another court of appeals. The government agrees with petitioners that the court of appeals erred in distinguishing 18 U.S.C. 981 from 21 U.S.C. 853 for purposes of joint and several liability, and that the Third Circuit has rejected that distinction in published precedent. This case, however, would be an unsuitable vehicle for addressing that issue, because the circumstances support joint-and-several liability on alternative grounds. Further review is unwarranted.

1. The court of appeals correctly determined that, where two equally culpable defendants act in concert to obtain the proceeds of a crime, the government may seek forfeiture under 18 U.S.C. 981 from each defendant for the full amount of those proceeds that has not been forfeited by the others. Section 981 provides, as relevant here, for the forfeiture of "[a]ny property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of [certain statutory provisions]." 18 U.S.C. 981(a)(1)(D). Where multiple equally culpable defendants jointly own a criminal enterprise, and work in concert to operate that enterprise, each of those defendants has "obtained, directly or indirectly," the full amount of that enterprise's proceeds. *Ibid.* The defendants' later decision to split up those proceeds among themselves does not negate the fact that each of the defendants initially "obtained," and is responsible for, the full amount of those proceeds.

An order requiring each defendant, jointly and severally, to pay the full amount of those proceeds is consistent with this Court's decision in *Honeycutt* v. *United States*, 137 S. Ct. 1626 (2017). In *Honeycutt*, this Court explained that Section 853 "limits forfeiture to property

the defendant 'obtained . . . as the result of' the crime." *Id.* at 1632 (quoting 21 U.S.C. 853(a)(1)). The Court concluded that a person cannot be said to have "obtained" property merely because that property was "obtained by his co-conspirator." *Id.* at 1631; see *id.* at 1632-1633. The Court illustrated its reasoning using a hypothetical example in which a farmer "masterminds a scheme to grow, harvest, and distribute marijuana on local college campuses," but "recruits a college student to deliver packages" of marijuana on campus. *Id.* at 1631. In the Court's example, the farmer's proceeds total "$3 million," but the student's earnings total only "$3,600." *Ibid.* The Court explained that, in that situation, the student has "obtained" only "[t]he $3,600 he received for his part in the marijuana distribution scheme." *Id.* at 1632. The Court concluded that the student has not obtained—and thus may not be held jointly and severally liable for—the remaining "$2,996,400," a sum that "ha[s] no connection whatsoever to the student's participation in the crime." *Ibid.*

Nothing in *Honeycutt* precludes holding a defendant jointly and severally liable under the circumstances of this case, where multiple defendants "had ownership interests, worked together to operate the businesses, and shared in the proceeds." Pet. App. 33a. To adjust the example in *Honeycutt* to make it more parallel to this case, suppose that a marijuana farmer and his mother together mastermind a scheme under which both of them operate a marijuana business, both work together to plant, grow, and sell the marijuana, and both earn a total of $3 million through their joint efforts. In that situation, it would be entirely consistent with *Honeycutt* to hold the farmer and the mother jointly and severally liable for the full $3 million. The defendants

have "obtained" that full sum through their concerted efforts, and the full sum has a "connection * * * to [each defendant's] participation in the crime." *Honeycutt*, 137 S. Ct. at 1632.

Petitioners briefly assert (Pet. 22, 31) that "the theory that 'equal culpability' among co-conspirators justifies joint and several forfeiture liability" is "plainly wrong" because "at most, equal culpability might warrant *equally divided* forfeiture liability, not *joint and several* liability." But petitioners' mechanical equal-division rule has no basis in the text of the forfeiture statutes. If two participants jointly mastermind and operate a drug scheme that produces $3 million, the participants have jointly "obtained" $3 million; they have not individually obtained $1.5 million each. The terms of the forfeiture statutes thus authorize holding the participants jointly and severally liable for the full $3 million.

Petitioners' proposed alternative scheme would encourage gamesmanship and impair the government's efforts to recover the full proceeds of defendants' criminal conduct. Under that scheme, if participants in a conspiracy consolidate their ill-gotten gains in the hands of one particular criminal, leaving the other criminals judgment-proof, the government could obtain only partial recovery from the one participant who holds all the tainted assets, and nothing from all the rest. The risk of such gamesmanship is particularly acute in cases such as this one, where one of the participants in the conspiracy (AEP) is insolvent, and where petitioners have engaged in accounting practices designed to hide the source and use of funds and have opened numerous wholly-owned corporations for the purpose of facilitating their criminal conduct.

In all events, petitioners do not contend that the imposition of joint and several liability on the basis of their equal culpability conflicts with the decision of any other court of appeals. See Pet. 22, 31. Indeed, petitioners do not identify any court of appeals, apart from the court below, that has even addressed that issue. Petitioners instead assert only that the imposition of joint and several liability for forfeiture on that basis would be "wrong." Pet. 31; see Pet. 22 ("[T]he government's attempts to carve out factual exceptions to *Honeycutt* are legally mistaken."). Petitioners do not deny that if such an order is sometimes appropriate, it would be appropriate here, and any argument that they are not equally culpable would be wholly factbound.

2. In addition to identifying the differences in the culpability of the defendants in this case and the defendant in *Honeycutt*, see Pet. App. 33a, the court of appeals also stated that "the reasoning of *Honeycutt* is not applicable to forfeitures under 18 U.S.C. § 981(a)(1)(C)." *Id.* at 35a. The government agrees with petitioners that the court of appeals erred in doing so. Although the government did not specifically express a position on the issue in the court of appeals in this case, the government has since acknowledged in this Court and in various lower courts that *Honeycutt*'s reasoning rejecting joint and several liability also extends to forfeiture orders under Section 981(a)(1)(C). See, *e.g.*, Br. in Opp. at 10-11, *Sexton* v. *United States*, No. 18-5391 (Oct. 1, 2018); Gov't C.A. Br. at 17-18 & n.4, *United States* v. *Villegas*, No. 17-10300 (9th Cir. May 14, 2018); Gov't C.A. Br. at 43-44, *United States* v. *Haro*, No. 17-40539 (5th Cir. Feb. 23, 2018).

Petitioners correctly observe (Pet. 15-22) that the courts of appeals have reached conflicting decisions on

that issue. The Third Circuit has concluded that *Honeycutt* does apply to Section 981(a)(1)(C). See *United States* v. *Gjeli*, 867 F.3d 418, 427-428 & n.16 (3d Cir. 2017), cert. denied, 138 S. Ct. 697, and 138 S. Ct. 700 (2018); see also *United States* v. *Carlyle*, 712 Fed. Appx. 862, 864 (11th Cir. 2017) (per curiam). The court below and the Sixth Circuit have disagreed. Pet. App. 34a-36a; *United States* v. *Sexton*, 894 F.3d 787, 798-799, cert. denied, 139 S. Ct. 415 (2018).

Further review is nonetheless unwarranted. First, this case would be an unsuitable vehicle for resolving the circuit conflict because, as explained above, the case also involves defendants whose equal culpability in itself would support joint-and-several liability for the proceeds of their crimes. Second, all petitioners were convicted of conspiring to structure financial transactions. The statute authorizing forfeitures for such convictions, 31 U.S.C. 5317(c), is substantially broader than both Section 981 and Section 853. Whereas Section 981 provides for the forfeiture of receipts "obtained, directly or indirectly, from a violation" of certain statutes, 18 U.S.C. 981(a)(1)(D), and Section 853 provides for the forfeiture of proceeds "obtained, directly or indirectly, as the result" of a violation of certain statutes, 21 U.S.C. 853(a)(1), Section 5317 authorizes the forfeiture of property that is "involved in" the offense, 31 U.S.C. 5317(c)(1)(A). All three statutes authorize a money judgment, and the district court stated that its money judgment rested on "[a]ll of them and each of them." Sent. Tr. 15.

Third, in all events, the question presented is of diminishing importance because the government has agreed that *Honeycutt*'s reasoning applies to Section 981(a)(1)(C), and has repeatedly expressed that view in

the lower courts. See pp. 9-10, *supra*. Although some cases, like this one, in which *Honeycutt* was decided during the district court (or appellate) proceedings may remain in the system, it is far from clear that a substantial number of further cases implicating the issue is likely to arise. And at least a portion of those cases may, like this one, involve other bases on which a joint-and-several forfeiture order could be supported. At a minimum, any review at this point would be substantially premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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