NO. 18-11086

In the United States Court of Appeals for the Eleventh Circuit

Gregory Bane,

Appellant,

v.

United States of America,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rule 26.1-1, counsel for the National Association of Criminal Defense Lawyers states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Counsel further certifies that, in addition to the persons listed in the certificates of interested persons filed by the parties, the following persons and entities have an interest in the outcome of this case (solely as a result of their role in connection with this brief):

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 counting affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case raises such issues. Joint and several liability forfeiture orders that are imposed without statutory authority violate criminal defendants' basic rights and can

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[1] Counsel for both parties have consented to the filing of this brief. No counsel for any party authored any part of this brief. No party or counsel for any party contributed money that was intended to fund its preparation or submission. No person other than *amicus*, its members, and its counsel contributed money intended to fund its preparation or submission.

have devastating consequences for such defendants that persist far beyond final judgment. It is crucial that this Court provide a remedy for such fundamental errors on collateral review.

STATEMENT OF THE ISSUES

1. Whether the Supreme Court in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), announced a new substantive rule that applies retroactively on collateral review.

2. Whether the imposition of forfeiture orders like the one at issue in this case that violate the Supreme Court's decision in *Honeycutt* result in fundamental errors warranting relief under a writ of coram nobis.

SUMMARY OF ARGUMENT

In *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), the Supreme Court held that 21 U.S.C. § 853 does not authorize the Government to impose forfeiture orders against criminal defendants on the basis of joint and several liability. That holding overturned decades of precedent in which numerous Courts of Appeals, including the Eleventh Circuit, had ruled that defendants could be held jointly and severally liable to forfeit proceeds or property that co-conspirators had obtained through the conspiracy. *Honeycutt* thus fundamentally changed the landscape of criminal forfeiture actions. *See* Section I.A, *infra*.

Under longstanding Supreme Court precedent, the new rule announced in *Honeycutt* applies retroactively on collateral review because it is substantive, not procedural. Rather than merely specifying the mechanisms or processes by which a defendant's culpability or sentence must be determined, the rule in *Honeycutt* prohibits a category of punishment for a class of defendants; in particular, forfeiture orders against defendants who were co-conspirators but did not themselves obtain the

property or proceeds sought to be forfeited. *Honeycutt* also clarifies that forfeitures based on joint and several liability are beyond the Government's power to impose. *See* Section I.B, *infra*. These features render the rule substantive, and therefore applicable retroactively on collateral review.

Further, in contravening the rule announced in *Honeycutt*, forfeitures orders like the one at issue in this case result in fundamental errors that warrant extraordinary relief in the form of a writ of coram nobis. *See* Part II, *infra*. This is so for at least three reasons. First, where a defendant is punished and deprived of his property pursuant to a forfeiture order that is issued without any lawful authority, that deprivation violates fundamental principles of due process of law—which permit the Government to take property or exact criminal punishments *only* pursuant to lawful authority—and represents an error that must be corrected on collateral review. *See* Section II.A, *infra*. Second, where a forfeiture order takes a defendant's property in a situation where Congress has determined that *no* forfeiture at all is permissible, it violates the Eighth Amendment's prohibition on excessive fines. *See* Section II.B, *infra*. Finally, allowing these fundamental due process and Eighth Amendment violations to stand serves no legitimate public interest. The Court must therefore afford the defendant relief in the form of a writ of coram nobis. *See* Section II.C, *infra*.

ARGUMENT

I. *HONEYCUTT* PRONOUNCED A NEW SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY ON COLLATERAL REVIEW.

When the Supreme Court announces a new rule in a criminal case, individuals whose cases are already final can benefit from the rule retroactively on collateral review if the rule is substantive. *Schriro v. Summerlin*, 542 U.S. 348, 351–53 (2004). In *Honeycutt*, the Court ruled that 21 U.S.C. § 853 does not permit the Government to hold defendants jointly and severally liable for criminal forfeiture of property or proceeds obtained through the crime by their co-defendants. *Honeycutt*, 137 S. Ct. at 1633.[2] That rule was new. But it was also substantive, and therefore qualifies for retroactive application on collateral review—a conclusion the Government has acknowledged before federal appellate and district courts around the country. *See, e.g.*, Gov't's Mot. for Summ. Disposition at 12, *United States v. Levine*, Nos. 18-1161, 18-1529 (1st Cir. Oct. 19, 2018) ("The government agrees that by construing 21 U.S.C. § 853(a) to limit criminal forfeiture to the tainted proceeds 'obtained, directly or indirectly,' by the individual defendants, the Supreme Court announced a substantive rule that has retroactive effect."); *United States v. Georgiou*, Criminal No. 09-88, 2018 U.S. Dist. Lexis 102662, *8

[2] Although *Honeycutt* involved the interpretation of a different statute than the one under which the forfeiture order was entered in this case, as Appellant's Opening Brief notes, this Court has held that *Honeycutt* is equally applicable in this context. See Op. Br. at 9 n.3 (citing *United States v. Elbeblawy*, 899 F.3d 925, 941 (11th Cir. 2018)).

(E.D. Pa. June 19, 2018) ("[T]he government states that the decision in *Honeycutt* is a new substantive rule that may be applied retroactively, even on collateral review.").

A. *Honeycutt* changed the landscape of criminal forfeiture.

A case announces a new rule for purposes of a retroactivity analysis if it "'breaks new ground'"; that is, "'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *United States v. Swindall*, 107 F.3d 831, 835 (11th Cir. 1997) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)).

Before the Supreme Court decided *Honeycutt* in 2017, nearly every Court of Appeals had concluded that courts could hold defendants jointly and severally liable in a forfeiture order for property or proceeds that a co-conspirator obtained through the crime.[3] "[C]ourts routinely ordered a criminal defendant to forfeit the value of assets obtained from the entire criminal scheme, regardless of whether the defendant personally obtained the illegal proceeds." Sharon C. Levin, et al., *Supreme Court*

[3] *See United States v. Van Nguyen*, 602 F.3d 886, 904 (8th Cir. 2010) (applying joint and several liability to forfeiture under 21 U.S.C. § 853); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (same); *United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996) (same); *United States v. Benevento*, 836 F.2d 129, 130 (2d Cir. 1988) (per curiam) (same); *see also United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995) (applying joint and several liability to forfeiture under RICO's forfeiture statute, 18 U.S.C. § 1963(a)); *United States v. Edwards*, 303 F.3d 606, 643–44 (5th Cir. 2002) (same); *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003) (same); *United States v. Caporale*, 806 F.2d 1487, 1509 (11th Cir. 1986) (same). *But see United States v. Cano-Flores*, 796 F.3d 83, 91 (D.C. Cir. 2015) (declining to apply joint and several liability to forfeiture under 21 U.S.C. § 853).

Substantially Reduces Government's Ability to Seek Criminal Forfeitures, NYU School of Law: Compliance and Enforcement (June 15, 2017), https://bit.ly/2rvbU9i.

Honeycutt reversed this longtime practice of imposing joint and several liability in criminal forfeiture orders. Interpreting 21 U.S.C. § 853, the Court held that the Government could only seek forfeiture against those who actually "obtained, directly or indirectly," the forfeitable property, and further limited the amount of the forfeiture the Government could seek to "tainted property acquired or used *by the defendant*." *Honeycutt*, 137 S. Ct. at 1633 (emphasis added); *see* Steven L. Kessler, *Applying the Brakes on a Runaway Train: Forfeiture and Recent Supreme Court Developments*, Champion, Jan./Feb. 2018, at 44 (*Honeycutt* "require[s] the government to trace the property sought to be forfeited to a particular defendant"). The Court's decision rejected the reasoning of longstanding decisions from nine courts of appeal, including the Eleventh Circuit, which had permitted joint and several liability under either § 853 or a virtually identical forfeiture provision in 18 U.S.C. § 1963(a), *see supra* note 3. The decision thus fundamentally changed the landscape of criminal forfeiture across the country.

B. *Honeycutt*'s rule is substantive and therefore applies retroactively on collateral review.

Because the new rule announced in *Honeycutt* is substantive, it applies retroactively on collateral review. *See Schriro*, 542 U.S. at 351. Substantive rules include rules that forbid "'criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their

status or offense.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (quoting *Penry v. Lynaugh*, 493 U.S. 302, 330 (1989)). More fundamentally, substantive rules "place certain criminal laws and punishments altogether beyond the [Government's] power to impose." *Id.* at 729. Procedural rules, in contrast, "regulat[e] 'the *manner of determining* the defendant's culpability'" or sentence. *Id.* at 730 (quoting *Schriro*, 542 U.S. at 353). Substantive rules, unlike procedural rules, "apply retroactively because they necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352 (internal quotation marks omitted).

The Court's decision in *Honeycutt* qualifies as substantive under the standards set forth above. First, it prohibits a "category of punishment"—a criminal forfeiture order—for a class of defendants based on their status as co-conspirators who did not themselves obtain the property or proceeds the Government seeks to forfeit. *Montgomery*, 136 S. Ct. at 728. Second, the Court's decision places a certain form of punishment—a forfeiture order based on joint and several liability—wholly outside of the Government's power to impose. Under *Honeycutt*, defendants who do not themselves obtain the property or proceeds the Government seeks to forfeit are never subject to forfeiture of their untainted property. *See* 137 S. Ct. at 1633.

Just as plainly, *Honeycutt*'s rule is not procedural. It does not regulate the *manner* in which the Government or the courts determine who those defendants are or what (if any) of their property may be forfeited. Rather, as has been discussed, *Honeycutt* narrows the class of defendants subject to criminal forfeiture by limiting the

Government to seeking forfeiture against those who actually "obtained, directly or indirectly," the forfeitable property, and by limiting the amount of the forfeiture "to tainted property acquired or used by the defendant." *Honeycutt*, 137 S. Ct. at 1633. In other words, it defines the class of defendants and property subject to forfeiture.

The Supreme Court's decision in *Welch v. United States*, 136 S. Ct. 1257 (2016), provides an instructive example. There, the Court addressed the retroactivity of *Johnson v. United States*, 135 S. Ct. 2551 (2015), a case in which the Court had held that a provision of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague and could not be used to enhance the sentence of individuals convicted of being felons in possession of a firearm. *Johnson*, 135 S. Ct. at 2563. The Court in *Welch* explained that its *Johnson* decision was substantive and not procedural because "[it] had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the [ACCA]. . . . [It] affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." 136 S. Ct. at 1265.

Like the Court's decision in *Johnson*, *Honeycutt* affected "the reach of the underlying statute"—21 U.S.C. § 853—not the "judicial procedures by which the statute is applied." *Welch*, 136 S. Ct. at 1265. Just as *Johnson* held that the ACCA does not authorize sentences based on a particular enhancement, *Honeycutt* held that § 853 does not authorize forfeiture orders based on joint and several liability. By finding that particular kinds of punishment were not authorized by statute, both decisions

established what is "altogether beyond the [Government's] power to impose," *Montgomery*, 136 S. Ct. at 729, rather than announcing procedural rules governing *permissible* exercises of power. That is, "'even the use of impeccable factfinding procedures could not legitimate'" a forfeiture order based on joint and several liability. *Welch*, 136 S. Ct. at 1265. As a result, the rule announced in *Honeycutt*—like the one announced in *Johnson*—is substantive and applies retroactively on collateral review.

II. A CRIMINAL FORFEITURE ORDER ENTERED WITHOUT AUTHORITY OF LAW IS A FUNDAMENTAL ERROR WARRANTING EXTRAORDINARY RELIEF.

When relief under 28 U.S.C. § 2255 is not available because a defendant has been released from federal custody or because his claim is not cognizable in habeas corpus, a writ of coram nobis serves as an important remedy to correct violations of the defendant's fundamental rights. *See United States v. Morgan*, 346 U.S. 502, 513 (1954). This remedy of last resort is reserved for circumstances in which the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review" is necessary "to achieve justice." *Id.* at 511; *see also Swindall*, 107 F.3d at 834 (same). It is "available only when the error alleged is of the most fundamental character." *Lowery v. United States*, 956 F.2d 227, 228–29 (11th Cir. 1992) (internal quotation marks omitted)).

The error at issue here rises to that level. Forfeiture orders that are based on joint and several liability are contrary to law and violate fundamental rights, including basic principles of due process and the Eighth Amendment's prohibition on excessive fines. Allowing such orders to persist after final judgment also serves no legitimate public

interest. Put simply, the Government had no statutory right and no legal authority to require Gregory Bane to forfeit any of his property, and the consequences of that improper deprivation persist to this day. Providing a remedy on collateral review is therefore necessary to achieve justice, warranting coram nobis relief.

A. The Government's seizure of property without lawful authority violates fundamental principles of due process.

One of the foundational principles underlying the Due Process Clause is that the Government cannot take an individual's property or exact a criminal punishment without lawful authority exercised through a fair and just process. *See* U.S. Const. amend. V. A criminal forfeiture that is imposed without valid authority violates this foundational principle. Permitting such an unauthorized seizure to persist, without any remedy or opportunity for redress, would be the kind of fundamental error warranting extraordinary relief.

As the Supreme Court has observed, the Due Process Clause is derived from Chapter 39 of the Magna Carta, which offered "a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed." *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna [Carta]*."). The Clause thus incorporates the idea that there is a fundamental "right to be tried by independent

and unprejudiced courts using established procedures and *applying valid pre-existing laws*." *Duncan*, 391 U.S. at 169 (emphasis added). Where courts impose a criminal sentence without the authority of valid substantive law—where, as here, a sentence is imposed on, and property taken from, a person who falls entirely outside the class of persons covered by the relevant criminal statute—the sentence necessarily violates due process of law.

And courts have repeatedly concluded that extraordinary relief on collateral review is warranted to remedy such fundamental sentencing errors. Indeed, collateral relief is designed precisely to address circumstances where a court lacked authority in the first instance to impose a particular sentence, and where the defendant still suffers the consequences of that action. In *Montgomery v. Louisiana*, for example, the Supreme Court explained (albeit in the context of a statutory review provision) that collateral relief was warranted to remedy a sentence imposed without lawful authority because such a sentence "is not just erroneous but contrary to law and, as a result, void." 136 S. Ct. at 731. The Court endorsed the idea that "[b]roadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense . . . or because the sentence was one the court could not lawfully impose." *Id.* (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970)). It further explained that a court considering such a case on collateral review "has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the

conviction or sentence became final before the rule was announced." *Id.* at 731; *see also Welch*, 136 S. Ct. at 1268 (explaining that substantive rules based on statutory interpretation apply retroactively because "a court lacks the *power* to exact a penalty that has not been authorized by any valid criminal statute" (emphasis added)).

As a matter of first principles, then, where a court initially lacked the legal authority to impose a sentence—and, as in the circumstances of *Honeycutt*, where an individual's property was unlawfully confiscated as a result of that unauthorized sentence—collateral relief is required to remedy the fundamental violation of the defendant's due process rights. *Cf. Lowery v. Estelle*, 696 F.2d 333, 337 (5th Cir. 1983) ("An absence of jurisdiction in the convicting court is . . . a basis for federal habeas corpus relief under the due process clause."). If no statutory mechanism exists for such relief, extraordinary relief under the writ of coram nobis is appropriate.

B. Forfeiture orders based on joint and several liability violate the Eighth Amendment when the defendant received no proceeds from the crime.

Forfeiture orders based on joint and several liability may result in excessive and arbitrary punishment in many circumstances. When such orders are imposed against defendants who obtained no financial benefit from the crime, they violate the Eighth Amendment. They therefore represent fundamental errors warranting coram nobis relief for that reason as well.

The *Honeycutt* decision brought about a "sea change" in criminal forfeiture law by requiring the Government to tether forfeiture orders to the individuals who actually

obtained proceeds or property from a crime. *See* Levin, *supra*. Prior to *Honeycutt*, the Government would frequently identify the total proceeds obtained through the commission of a crime and impose a forfeiture order for that amount against each defendant jointly and severally, without tying the amount in the order to the individuals who actually obtained the proceeds. *Id.* As a result, forfeiture orders based on joint and several liability often resulted in criminal penalties that had no relation to the defendant's acquisition of tainted property or the defendant's ability to pay the judgment. In the case of Gregory Bane, for example, the forfeiture order imposed by the court held him liable for over $5.8 million, when he had obtained no proceeds from the crime and that amount far exceeded the net worth attributed to him in his Presentence Report. Op. Br. at 8; Presentence Report at ¶ 81.[4]

Even if a defendant could not pay the entire forfeiture judgment, the practice prior to *Honeycutt* allowed the Government to seek forfeiture of whatever resources a defendant had available, regardless of whether the forfeited property was in any way acquired through or otherwise tainted by the crime. Gregory Bane ultimately forfeited his home and car—both of which he had obtained with untainted funds—that were worth over $148,000, even though he had not obtained any property or proceeds from the crime. Op. Br. at 3. A forfeiture order such as this "can be financially devastating,"

[4] *Amicus* obtained the Presentence Report from counsel for appellant and references it in this brief with the permission of appellant.

because "the loss of funds that would otherwise be used to cover basic needs—a vehicle one depends on to get to work or school, or a family home—can have profound consequences for those against whom forfeiture is imposed." Beth A. Colgen, *Fines, Fees, and Forfeitures*, *in* Academy for Justice: A Report on Scholarship and Criminal Justice Reform 207 (Erik Luna, ed., 2017).

The Eighth Amendment prohibits the imposition of "excessive fines," U.S. Const. amend. VIII, and serves to "limit[] the government's power to extract payments, whether in cash or in kind, as punishment for some offense," *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks omitted). The Supreme Court has held that forfeiture orders entered as part of a criminal sentence are punitive for purposes of the Eighth Amendment, and thus subject to its limitation on "excessive" fines. *Id.* at 328–34; *see also Alexander v. United States*, 509 U.S. 544, 548 (1993) (holding that forfeiture of assets used and proceeds from a RICO enterprise is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine'").

In determining whether a fine is excessive, courts typically assess whether the fine is "grossly disproportional to the gravity of [the] defendant's offense." *Bajakajian*, 524 U.S. at 334. Fundamental to that inquiry, however, is an analysis of what the legislature would have considered an appropriate punishment for the offense. In *Bajakajian*, the Court explained that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," *id.* at 336, and that "[r]eviewing

courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," *id.* (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)). As this Court stated in *United States v. 817 N.E. 29th Drive*, "[b]ecause Congress is a representative body, its pronouncements regarding the appropriate range of fines for a crime represent the collective opinion of the American people as to what is and is not excessive. Given that excessiveness is a highly subjective judgment, the courts should be hesitant to substitute their opinion for that of the people." 175 F.3d 1304, 1309 (11th Cir. 1999). It follows that where Congress has not authorized a particular type of punishment *at all*—as in the case of a forfeiture order based on joint and several liability—an imposition of that type of punishment may be excessive, because it disregards the legislature's judgment that *no* punishment of the particular type is warranted. Imposing a kind of punishment the legislature thought should *never* be imposed at minimum raises serious questions under the Eighth Amendment.

Where, as in this case, an unauthorized forfeiture order is imposed on a defendant who received no financial benefit from the crime, the punishment is clearly excessive, and squarely violates the Eighth Amendment. In such instances, the statute provides that the Government does not have authority to impose *any* criminal forfeiture at all, under any theory of liability, because there are no proceeds to forfeit under direct liability, and no forfeiture can be imposed under a theory of joint and several liability. *Honeycutt*, 137 S. Ct. at 1633. Such situations thus cannot be rationalized as merely

resulting in a somewhat larger fine imposed on someone who was subject to a valid forfeiture of some amount. Instead, they result in a situation where a fine is imposed on a defendant as to whom Congress has determined that the maximum permissible fine is zero. In this case, for example, Gregory Bane received no financial benefit from the crime, *see* Op. Br. at 3, and thus could not be lawfully subject to any criminal forfeiture at all pursuant to *Honeycutt*. Yet he was ordered to forfeit property worth more than $148,000 without authority of law. *Id.*

The imposition of a forfeiture order in these circumstances flatly contradicts the legislature's judgment about what fine is appropriate—indeed, about *whether* any fine is appropriate—and as a result violates the Eighth Amendment. For this reason as well, imposition of such a fine is a fundamental error that justifies extraordinary relief.

C. Permitting a forfeiture order entered without legal authority to stand serves no legitimate public interest.

Providing a remedy for a *Honeycutt* error that violates an individual's Fifth and Eighth Amendment rights is necessary to "achieve justice" not just because it would correct due process and Eighth Amendment violations, but also because leaving the judgment in place serves no legitimate public interest. *See Morgan*, 346 U.S. at 511. In the related context of retroactivity analysis, the Supreme Court has recognized the need to balance "the need for finality in criminal cases" against "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law." *Welch*, 136 S. Ct. at 1266. But, "where the … sentence in fact is not authorized by substantive

law, then finality interests are at their weakest," because "'[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring)); *see also Montgomery*, 136 S. Ct. at 732 (noting that the finality "concern has no application in the realm of substantive rules, for no resources marshaled by [the government] could preserve a conviction or sentence that the Constitution deprives the [government] of power to impose"). These same rationales, which support applying the new substantive rule announced in *Honeycutt* retroactively, also support the conclusion that there is no legitimate public interest in the finality of the judgment at issue here that should prevent subjecting it to collateral review.

Indeed, the finality interest is at its lowest ebb here, where the record is clear that Gregory Bane did not obtain a financial benefit from the crime, yet still forfeited property untainted by the crime under joint and several liability. To remedy that fundamental error, there is no need for a retrial or an extensive rehearing with further introduction of evidence; the Government need only reimburse Gregory Bane for the value of the forfeited property. *See* United States' Response to Supplemental Jurisdictional Question, 2. Even if a rehearing were required, determining the amount—if any—a defendant obtained as a result of the conspiracy is a limited inquiry. "[A] remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1348–49 (2016).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the District Court and remand for resentencing.

Dated: December 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 4557 words, as determined by the Microsoft Word 2016 program used to prepare it.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Garamond.

Dated: December 27, 2018

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CERTIFICATE OF SERVICE

I certify that on December 27, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the ECF system. All parties will be served by the ECF system.

Dated: December 27, 2018

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