2.05 DEFENDANT'S DECISION NOT TO TESTIFY OR PRESENT EVIDENCE

A defendant has an absolute right not to testify [or present evidence]. You may not consider in any way the fact that [the; a] defendant did not testify [or present evidence]. You should not even discuss it in your deliberations.

Committee Comment

No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. *Carter v. Kentucky*, 450 U.S. 288, 303 (1981).

In a multi-defendant trial, this instruction must be given at the request of a non-testifying defendant over the objection of a defendant who testifies. *Bruno v. United States*, 308 U.S. 287 (1939); *United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970); *United States v. Kelly*, 349 F.2d 720, 768–69 (2d Cir. 1965).

18 U.S.C. § 201(b)(1)(A) GIVING A BRIBE – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] giving a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant directly or indirectly [promised, gave, offered] something of value to a public official; and

2. The defendant acted with intent to influence an official act; and

3. The defendant acted corruptly.

A person acts corruptly when that person acts with the intent that something of value is given, offered, or promised to influence the public official in the performance of any official act.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

An "offer" under § 201 need not constitute an "offer" in the sense of what would otherwise be a binding contractual offer. *United States v. Synowiec*, 333 F.3d 786, 789 (7th Cir. 2003) ("The requirement that a defendant expresses 'an ability and desire to pay a bribe' in order to satisfy the bribery statute is a less demanding requirement that what the civil law requires for an enforceable offer.")

As explained in the Committee Comment for § 201 Accepting a Bribe—Elements, the Seventh Circuit has explicitly equated the definition of "corruptly" under 18 U.S.C. § 666 with the same term in 18 U.SC. § 201. *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015) ("This court has used the same definition of "corruptly" in a prosecution under 18 U.S.C. § 201. *See United States v. Peleti*, 576 F.3d 377, 382 (7th Cir.2009)."). The Committee thus proposes the same definition

here as set forth for § 666(a)(1)(B) Accepting a Bribe. For further discussion, see the Committee Comment for that section.

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 201(b)(2)(A) ACCEPTING A BRIBE – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [demanding; seeking; receiving; accepting; or agreeing to receive or accept] a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant was a public official; and

2. The defendant directly or indirectly [demanded; sought; received; accepted; or agreed to receive or accept] something of value in return for being influenced in the performance of any official act; and

3. The defendant did so corruptly.

A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to influence [him/her] in the performance of any official act.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The definition of "corruptly" derives from two cases: a § 201 case, *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir. 2009); and a § 666 case, *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015), which approvingly discusses *Peleti*. In *Peleti*, the public official argued that he did not actually intend to commit the official act for which he had been paid. 576 F.3d at 382. In discussing the definition of corruptly, the Seventh Circuit explained:

> An officer can act corruptly without intending to be influenced; the officer need only "solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act."

Id. (quoting *United States v. Arroyo*, 581 F.2d 649, 657 (7th Cir. 1978)). The public official "knew, when he accepted the money, that [the bribe payer] gave Peleti the money for the purposes of influencing Peleti's official actions." *Id.* That was enough to act "corruptly." *See id.*

Peleti was approvingly discussed in a § 666 case that discussed the definition of "corruptly" interchangeably with § 201. *Hawkins*, 777 F.3d at 882. In Hawkins, the Seventh Circuit approved the district court's definition of corruptly: the official acts corruptly when the official takes the payment "with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties." Id. at 882. The opinion explicitly equated the approved definition under § 666 with the § 201 definition from *Peleti*. *Hawkins*, 777 F.3d at 882 ("This court has used the same definition of "corruptly" in a prosecution under 18 U.S.C. § 201. See *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir.2009).").

With regard to the definition of "corruptly," in cases involving an undercover agent or a cooperator, jurors might be confused if they are asked to determine whether a defendant understood the intent to influence or to reward when the undercover or cooperator of course did not *in fact* have the intent to influence or to reward. In those cases, some courts might prefer "with the belief" as a more appropriate term than "with the understanding." The term "believes" is used in explaining attempt offenses for which "the defendant's conduct should be measured according to the circumstances as he *believes* them to be, rather than the circumstances as they may have existed in fact." *See United States v. Williams*, 553 U.S. 285, 300 (2008) (quoting ALI, Model Penal Code § 5.01, Comment at 307, governing attempts) (emphasis added).

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] bribery. In order for you to find [a; the] defendant guilty of this count, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. The defendant was an agent of [an organization; a [state; local; Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]]; and

2. The defendant [solicited], [demanded], [accepted] [or] [agreed to accept] a thing of value from another person; and

3. The defendant did so corruptly, that is, with the understanding that something of value is to be offered or given to reward or influence [him/her] in connection with [his/her] [organizational; official] duties; and

4. The defendant acted with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization; government; government agency]; and

5. This business, transaction, or series of transactions involved a thing of a value of $5,000 or more; and

6. The [organization; government; government agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised. The federal-funds element is not a requirement of subject matter jurisdiction. *United States v. Bowling*, 952 F.3d 861, 867 (7th Cir. 2020). Instead, it is an element that goes to the merits. *Id.*

The definition of "corruptly" set forth above is derived from *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015) (An agent "act[s] corruptly if they *know* that the payor is trying to get them to do the acts forbidden by the statute, and take the money anyway.") (emphasis in original); and *United States v. Mullins*, 800 F.3d 866, 870 (7th Cir. 2015) ("An agent acts corruptly when he *understands* that the payment given is a bribe, reward, or gratuity.") (emphasis added).

With regard to the definition of "corruptly," in cases involving an undercover agent or a cooperator, jurors might be confused if they are asked to determine whether a defendant understood the intent to influence or to reward when the undercover or cooperator of course did not *in fact* have the intent to influence or to reward. In those cases, some courts might prefer "with the belief" as a more appropriate term than "with the understanding." The term "believes" is used in explaining attempt offenses for which "the defendant's conduct should be measured according to the circumstances as he *believes* them to be, rather than the circumstances as they may have existed in fact." *See United States v. Williams*, 553 U.S. 285, 300 (2008) (quoting ALI, Model Penal Code § 5.01, Comment at 307, governing attempts) (emphasis added).

A defendant need only be partially motivated by the expectation of or desire for reward. *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive branch grants: "This confuses influence with power to act unilaterally…. One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in *McDonnell v. United States*, 136 S. Ct. 2355, 2371- 72 (2016), the Supreme

Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of *McDonnell* on § 666 cases.

Lawyers and judges should consider whether intent to "influence" and intent to "reward" are two separate theories of liability, that is, bribery ("influence") versus gratuity ("reward"). Although Seventh Circuit opinions have stated, in broad terms, that a specific *quid pro quo* is not required under § 666(a), *see United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir.1997), those cases involved the government's pursuit of a "reward" theory as well. It is not clear that the Seventh Circuit has directly answered whether a case presenting only an intent to "influence" theory requires a *quid pro quo*.

The reasoning of *United States v. Boender* arguably suggests that there is a difference between "influence" and "reward." *Boender* reaffirmed that § 666(a)(2) does not require a *quid pro quo*, but the opinion examined the federal-employee bribery counterpart, 18 U.S.C. § 201(b), and relied on the distinction between bribes and gratuities:

> Whereas § 201(b) makes it a crime to "corruptly give[], offer[] or promise[] anything of value to any public official ... with intent to influence any official act," § 666(a)(2) criminalizes corrupt giving "with intent to influence *or reward*" a state or local official. Further, § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or because of any official act performed or to be performed," § 201(c)(1)(A)—for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: by its plain text, it already covers both *bribes and rewards*.

Boender, 649 F.3d at 655 (first emphasis in original). In that explanation, the Seventh Circuit appears to emphasize that the intent to "reward" is the add-on that distinguishes § 666(a)(2) from § 201(b) bribery. *Id.* The passage's concluding sentence says that § 666(a)(2) "covers both bribes and rewards." *Id.* Arguably, then, under § 666(a)(2), "intent to influence" covers bribes whereas "intent to reward" covers

gratuities. Also, *Boender* relied on the bribery-versus-gratuity distinction drawn by the Supreme Court in interpreting § 201(b) versus § 201(c), 649 F.3d at 655 (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404, 406 (1999)), and § 201(b) uses the same intent to "influence" statutory language as § 666(a).

In dictum, one Circuit arguably has treated the two theories of liability independently, noting that where a defendant is charged with bribery only, the jury instructions should not include the "reward" language. *See United States v. Munchak*, 527 F. App'x 191, 194 (3d Cir. May 31, 2013) ("As [the defendant] was charged with bribery under § 666, the Court's instructions should not have included the 'reward' language."). It is worth noting too that the Statutory Appendix of the Sentencing Guidelines directs § 666 corruption offenses to both Guideline § 2C1.1, which covers bribery, and § 2C1.2, which covers gratuities.

In light of the uncertainty in the case law, the Committee does not take a position on this issue. If the district court decides that there is a distinction between the two forms of intent, then the court should provide separate instructions for them.

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 666(a)(2) PAYING A BRIBE

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [paying or offering to pay] a bribe. In order for you to find [a; the] defendant guilty of this count, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant gave, offered, or agreed to give a thing of value to another person; and

2. The defendant did so corruptly with the intent to influence or reward an agent of [an organization; a [State; local; Indian tribal] government, or any agency thereof] in connection with some business, transaction, or series of transactions of the [organization; government; government agency]; and

3. This business, transaction, or series of transactions involved a thing with a value of $5,000 or more; and

4. That the [organization; government; government or agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the intent that something of value is given or offered to reward or influence an agent of an [organization; government; government agency] in connection with the agent's [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Sabri v. United States*, 541 U.S. 600, 606 (2004); *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised. The federal-funds element is not a requirement of subject matter jurisdiction. *United States v. Bowling*, 952 F.3d 861, 867 (7th Cir. 2020). Instead, it is an element that goes to the merits. *Id.*

The bracketed definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995) ("person acts corruptly, for example, when he gives or offers to give something of value intending to influence or reward a government agent in connection with his official duties"). Although the Seventh Circuit has defined "corruptly" in cases in which the defendant was a bribe *recipient* (not the bribe payer), *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015); *United States v. Mullins*, 800 F.3d 866, 870 (7th Cir. 2015), there is no definitive holding from the Seventh Circuit on the definition as to bribe *payers*. The Committee notes that the definition does not appear to add any requirement beyond the intent requirement in the second element of the Pattern Instruction, but absent a Seventh Circuit holding on the issue, the Committee takes no further position.

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive branch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in *McDonnell v. United States*, 136 S. Ct. 2355, 2371- 72 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of *McDonnell* on § 666 cases.

Lawyers and judges should consider whether intent to "influence" and intent to "reward" are two separate theories of liability, that is, bribery ("influence") versus gratuity ("reward"). Although Seventh Circuit opinions have stated, in broad terms, that a specific *quid pro quo* is not required under § 666(a), *see United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir.1997), those cases involved the government's pursuit of a "reward" theory as well. It is not clear that the Seventh Circuit has directly answered whether a case presenting only an intent to "influence" theory requires a *quid pro quo*.

The reasoning of *United States v. Boender* arguably suggests that there is a difference between "influence" and "reward." *Boender* reaffirmed that § 666(a)(2) does not require a *quid pro quo*, but the opinion examined the federal-employee bribery counterpart, 18 U.S.C. § 201(b), and relied on the distinction between bribes and gratuities:

> Whereas § 201(b) makes it a crime to "corruptly give[], offer[] or promise[] anything of value to any public official ... with intent to influence any official act," § 666(a)(2) criminalizes corrupt giving "with intent to influence *or reward*" a state or local official. Further, § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or because of any official act performed or to be performed," § 201(c)(1)(A)—for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: by its plain text, it already covers both *bribes and rewards*.

Boender, 649 F.3d at 655 (first emphasis in original). In that explanation, the Seventh Circuit appears to emphasize that the intent to "reward" is the add-on that distinguishes § 666(a)(2) from § 201(b) bribery. *Id.* The passage's concluding sentence says that § 666(a)(2) "covers both bribes and rewards." *Id.* Arguably, then, under § 666(a)(2), "intent to influence" covers bribes whereas "intent to reward" covers gratuities. Also, *Boender* relied on the bribery-versus-gratuity distinction drawn by the Supreme Court in interpreting § 201(b) versus § 201(c), 649 F.3d at 655 (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404, 406 (1999)), and § 201(b) uses the same intent to "influence" statutory language as § 666(a).

In dictum, one Circuit arguably has treated the two theories of liability

independently, noting that where a defendant is charged with bribery only, the jury instructions should not include the "reward" language. *See United States v. Munchak*, 527 F. App'x 191, 194 (3d Cir. May 31, 2013) ("As [the defendant] was charged with bribery under § 666, the Court's instructions should not have included the 'reward' language."). It is worth noting too that the Statutory Appendix of the Sentencing Guidelines directs § 666 corruption offenses to both Guideline § 2C1.1, which covers bribery, and § 2C1.2, which covers gratuities.

In light of the uncertainty in the case law, the Committee does not take a position on this issue. If the district court decides that there is a distinction between the two forms of intent, then the court should provide separate instructions for them.

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 981(a)(1)(A) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove both of the following elements by a preponderance of the evidence:

The property was involved in a transaction or attempted transaction as charged in Count[s] ___ [or is property traceable to such property]; and

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Although 18 U.S.C. § 981(a)(1)(A) is a civil forfeiture provision, 28 U.S.C. § 2461(c) authorizes its use in a criminal case. *United States v. Venturella*, 585 F.3d 1013, 1016 (7th Cir. 2009); *United States v. Silvious*, 512 F.3d 364, 369 (7th Cir. 2008). Section 981(a)(1)(A) applies where the real or personal property was involved in a transaction or attempted transaction in violation of one or more of these offenses: 1) 18 U.S.C. § 1956, laundering of monetary instruments; 2) 18 U.S.C. § 1957, engaging in monetary transactions in property derived from specified unlawful activity; or 3) 18 U.S.C. § 1960, unlicensed money transmitting businesses.

Nexus is defined in a separate instruction. Rule 32.2 requires that "the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(4). For the most part, the nexus requirement of the Rule will

be met under the statutory requirement of what property is subject to forfeiture. The Committee recognizes that there may be overlap between the statutory requirement and the nexus requirement of the Rule, but the Committee has concluded that this separate instruction is necessary to meet both the statutory and Rule requirements.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C. § 981. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably also applies to civil forfeiture statutes such as 18 U.S.C. § 981. Section 981 authorizes *in rem* forfeiture of all proceeds of one or more criminal offenses. *See* 18 U.S.C. § 981(a)(1)(C) (authorizing forfeiture of any property, "which constitutes, or is derived from proceeds traceable" to the enumerated criminal statutes). When § 981 is used in conjunction with 28 U.S.C. § 2461(c) to authorize a criminal forfeiture, however, the resulting *in personam* criminal forfeiture is necessarily limited to the defendant's interest in the proceeds. *See United States v. Gjeli*, 2017 WL 3443691, at *6 (3d Cir. Aug. 11, 2017) (applying *Honeycutt* to 18 U.S.C. § 981(a)(1)(C)); *but see United States v. McIntosh*, 2017 WL 3396429, at *3 (S.D.N.Y. Aug. 8, 2017) (not applying *Honeycutt* to Section 981(a)(1)(C)). In *Honeycutt*, the Supreme Court rejected the government's *Pinkerton* argument, reasoning that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634–35.

18 U.S.C. § 982(a)(1) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property:

[LIST PROPERTY]

In order for you to find that the property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

The [real] or [personal] property was involved in the offense[s] as charged in Count[s] ___ or is property traceable to real or personal property involved in [that] [those] offense[s];

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(1) applies where the real or personal property was involved in one or more of these offenses: 1) 18 U.S.C. § 1956, laundering of monetary instruments; 2) 18 U.S.C. § 1957, engaging in monetary transactions in property derived from specified unlawful activity; or 3) 18 U.S.C. § 1960, unlicensed money transmitting businesses. Section 982(a)(1) does not require a specific connection between the property and the defendant. The only required connection is between the property and the offense.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime

but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, e.g., 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(2) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the property constitutes or was derived from proceeds the defendant[s] obtained directly or indirectly as a result of the offense[s] charged in Count[s] —; and

2. That the offense charged in Count[s] __ affected a financial institution.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(2) applies where the property constitutes or was derived from proceeds the defendant obtained directly or indirectly as a result of the violation of, or conspiracy to violate one of the following statutes, as long as it affects a financial institution: 1) 18 U.S.C. § 215, receipt of commissions or gifts for procuring loans, theft; 2) 18 U.S.C. § 656, embezzlement, or misapplication by a bank officer or employee; 3) 18 U.S.C. § 657, embezzlement, or misapplication by a lending, credit or insurance institution officer or employee; 4) 18 U.S.C. § 1005, false entries by a bank officer or employee; 5) 18 U.S.C. § 1006, false entries by officers or employees of federal credit institutions; 6) 18 U.S.C § 1007, false

statements to influence the Federal Deposit Insurance Corporation; 7) 18 U.S.C. § 1014, false statement on loan or credit application; 8) 18 U.S.C. § 1341, mail fraud; 9) 18 U.S.C. § 1343, wire fraud; 10) 18 U.S.C. § 1344, bank fraud.

Section 982(a)(2) also applies where the property at issue constitutes or was derived from proceeds the defendant obtained directly or indirectly as a result of the violation of, or conspiracy to violate one of the following statutes: 1) 18 U.S.C. § 471, false obligation of security; 2) 18 U.S.C. § 472, uttering counterfeit obligations or securities; 3) 18 U.S.C. § 473, dealing in counterfeit obligations or securities; 4) 18 U.S.C. § 474, plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities; 5) 18 U.S.C. § 476, taking impressions of tools used for obligations or securities; 6) 18 U.S.C. § 477, possessing or selling impressions of tools used for obligations or securities; 7) 18 U.S.C. § 478, false foreign obligations or securities; 8) 18 U.S.C. § 479, uttering counterfeit foreign obligations or securities; 9) 18 U.S.C. § 480, possessing counterfeit foreign obligations or securities; 10) 18 U.S.C. § 481, plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities; 11) 18 U.S.C. § 485, false coins or bars; 12) 18 U.S.C. § 486, uttering coins of gold, silver or other metal; 13) 18 U.S.C. §§ 487 or 488, making or possessing counterfeit dies for U.S. or foreign coins; 14) 18 U.S.C. § 501, counterfeit postage stamps, postage meter stamps, and postal cards; 15) 18 U.S.C. § 502, counterfeit postage and revenue stamps of foreign government; 16) 18 U.S.C. § 510, forging endorsements on Treasury checks or bonds or securities of the United States; 17) 18 U.S.C. § 542 entry of goods by means of false statements; 18) 18 U.S.C. § 545, smuggling goods into the United States; 19) 18 U.S.C. § 842, unlawful acts relating to explosive materials; 20) 18 U.S.C. § 844, unlawful importation manufacture, distribution and storage of explosive materials; 21) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents, authentication features, and information; 22) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; and 23) 18 U.S.C. § 1030, fraud and related activity in connection with computers. Unlike the offenses listed above, a violation of one of these statutes does not require that the offense affected a financial institution for purposes of § 982(a)(2).

Section 982 does not define proceeds. Section 981, the civil forfeiture statute, provides two different definitions of proceeds, depending on the

circumstances involved. In the context of the money laundering statute, a plurality of the Supreme Court noted that because of the ambiguity of the meaning of proceeds "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *United States v. Santos*, 553 U.S. 507, 514 (2008). The Seventh Circuit has not ruled on whether *Santos* applies in the forfeiture context. The Committee takes no position on the question.

18 U.S.C. § 982(a)(3) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(3):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of the offense[s] charged in Count[s] ___ ; and

2. That the offense[s] in Counts ___ involved the sale of assets acquired or held by [((the Resolution Trust Corporation) (the Federal Deposit Insurance Corporation) as a conservator or receiver for a financial institution) (any other conservator for a financial institution appointed by (the Office of the Comptroller of the Currency or the Office of Thrift Supervision) (the National Credit Union Administration) as conservator or liquidating agent for a financial institution))].

If you find from your consideration of all the evidence that the government has proved each of these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(3) applies where the real or personal property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of a violation of one of these statutes: 1) 18 U.S.C. § 666(a)(1), Federal program fraud; 2) 18 U.S.C. § 1001, false statements; 3) 18 U.S.C. § 1031, major fraud against the United States; 4) 18 U.S.C. § 1032, concealment of assets from conservator, receiver, or liquidating

agent of insured financial institution; 5) 18 U.S.C. § 1341, mail fraud; or 6) 18 U.S.C. § 1343, wire fraud. The offense under one of these statutes must involve the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration as conservator or liquidating agent for a financial institution.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, e.g., 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(4) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(4):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] [tangible or intangible] property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of the offense[s] charged in Count ___; and

2. That the offense[s] in Count ___ [was] [were] committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(4) applies where the real or personal tangible or intangible property are gross receipts obtained, directly or indirectly, as a result of a violation of one of these statutes: 1) 18 U.S.C. § 666(a)(1), Federal program fraud; 2) 18 U.S.C. § 1001, false statements; 3) 18 U.S.C. § 1031, major fraud against the United States; 4) 18 U.S.C. § 1032, concealment of assets from conservator, receiver, or liquidating agent of insured financial institution; 5) 18 U.S.C. § 1341 mail fraud; or 6) 18 U.S.C. § 1343, wire fraud.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, e.g., 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(5) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(5):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] property represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of the offense of which the defendant [you are considering] was convicted in Count[s] ___.

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(5) applies where the real or personal property represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of a violation of, or a conspiracy to violate 1) 18 U.S.C. § 511, altering or removing motor vehicle identification numbers; 2) 18 U.S.C. § 553, importing or exporting stolen motor vehicles; 3) 18 U.S.C. § 2119, armed robbery of automobiles; 4) 18 U.S.C. § 2312, transporting stolen motor vehicles in interstate commerce; or 5) 18 U.S.C. § 2313, possessing or selling a stolen motor vehicle that has moved in interstate commerce.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and

severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, e.g., 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(6) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(6):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the conveyance was used in commission of the offense of which the defendant [you are considering] was convicted in Count[s] ___; or

2. That the [real] or [personal] property constitutes or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the defendant [you are considering] was convicted in Count[s] __; or

3. That the [real] or [personal] property was used to facilitate or was intended to be used to facilitate the commission of the offense of which the defendant [you are considering] was convicted in Count[s] __.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(6) applies where the defendant has been convicted of a violation of or conspiracy to violate one of these statutes: Section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act; or Section 555, constructing border tunnel or passage; Section 1425, unlawful procurement of citizenship or naturalization; Section 1426,

false/fraudulent reproduction of naturalization or citizenship papers; Section 1427, unlawful sale of naturalization or citizenship papers; Section 1541, issuance of passport without authority; Section 1542, false statement in application and use of passport; Section 1543, forgery or false use of passport; Section 1544, misuse of passport; Section 1546, fraud and misuse of visas, permits, and other documents; or Section 1028, fraud and related activity in connection with identification documents, if committed in connection with passport or visa issuance or use.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, e.g., 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(7) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(7):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] property that constitutes or was derived, directly or indirectly, from the gross proceeds traceable to the commission of the federal health care offense of which the defendant [you are considering] was convicted in Count[s] __.

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States,* 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to

facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, e.g., 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(8) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by preponderance of the evidence:

1. That the [real; personal] property was used or intended to be used to commit, to facilitate or to promote the offense of which the defendant [you are considering] was convicted in Count[s] ___, and that the offense involved telemarketing; or

2. That the [real; personal] property constituted, was derived from or traceable to the gross proceeds that the defendant [you are considering] obtained directly or indirectly as a result of the offense of which the defendant [you are considering] was convicted in Count[s] ___, and that the offense involved telemarketing.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(8) of Title 18 applies where the real or personal property was used or intended to be used to commit, to facilitate or to

promote the violation of one of these statutes: 1) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents; 2) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; 3) 18 U.S.C. § 1341, mail fraud; 4) 18 U.S.C. § 1342, fictitious name or address; 5) 18 U.S.C. § 1343, wire fraud; or 6) 18 U.S.C. § 1344, bank fraud where the conviction involved telemarketing.

21 U.S.C. § 853 DRUG FORFEITURE – ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege that the following property is subject to forfeiture under Title 21, United States Code, Section 853:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove both of the following by a preponderance of the evidence:

1. [That the property constituted or was derived from the proceeds obtained personally by the defendant, directly or indirectly, as a result of the defendant's[s'] participation in the drug offense[s] charged in Count[s] ;] [That the property was used or intended to be used by the defendant, in any manner or part, to commit, or to facilitate the commission of, [that] [those] drug offense[s];]

2. .

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

In *Honeycutt v. United States*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. 1626, 1632 (2017). The pattern instruction has been revised to make clear that the property subject to forfeiture under § 853(a)(1) must be found to be property the defendant himself obtained as a result of the crime.