# No. 20-1370

In The

# Supreme Court of the United States

## NIDAL AHMED WAKED HATUM,

*Petitioner,*

**v.**

## UNITED STATES OF AMERICA,

*Respondent.*

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

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**BRIEF OF *AMICUS CURIAE***
**THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**
**IN SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICI 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 is concerned that the decision below would provide courts with a statutorily unauthorized, draconian, and unlimited means of imposing forfeiture. Indeed, in this case, the Eleventh Circuit's decision allows the government to seek forfeiture of $20,852,000 (double the value of the stolen property) even though Petitioner returned all of the stolen property, plus interest, to the victim bank.

## SUMMARY OF ARGUMENT

This Court should grant certiorari to resolve the conflict between the Eleventh Circuit's extra-statutory "forfeiture" decision below – which punishes criminals for returning stolen property to the victim – and the Eighth Circuit's rule that a sentencing court must credit a defendant for doing the same thing.

[1] Counsel of record for all parties received timely notice of the intention to file this brief and consented to the filing. No counsel for a party authored this brief in whole or part, and no person other than amici and their counsel made any monetary contribution intended to fund this brief.

Under Eighth Circuit precedent deciding "the proper application of [18 U.S.C.] § 982(a)(1)," if a defendant returns stolen property to the victim before conviction, his or her sentence cannot include forfeiture for that property. *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998). The decision below establishes an opposite rule in the Eleventh Circuit under the same statutory scheme and the very same statute: If a defendant steals property and returns it before conviction, the sentencing judge must nevertheless impose a forfeiture money judgment to be paid to the government in the full amount of the stolen (but returned) property.

Review is warranted for at least three reasons in addition to the unmistakable circuit split. First, if allowed to stand, the Eleventh Circuit's rule would have absurd and undesirable consequences: It would perversely incentivize criminals not to return stolen property by punishing those who do so, which would inevitably and unnecessarily harm countless victims. Second, the decision below violates Congress's intent and the plain language of the governing statutes by improperly converting criminal forfeiture into a mandatory fine – a result with no statutory basis. Third, the decision also violates the same intent and statutory text by judicially amending § 982(a)(1) to mandate forfeiture money judgments, whereas Congress has decided to enact only one statute authorizing such judgments: 31 U.S.C. § 5332(b)(4), a part of the Patriot Act passed in 2001. In this respect, the Eleventh Circuit's extra-statutory decision conflicts not only with Eighth Circuit precedent, but also with the Solicitor General's statement to this Court in a previous case that the government will not use mechanisms outside the applicable statutes to enforce forfeiture money judgments.

## ARGUMENT

The Thomas Crown Affair, starring Pierce Brosnan, illustrates the absurdity of the decision below. IMDB, https://www.imdb.com/title/tt0155267/?ref_=ttfc_fc_tt (last visited May 18, 2021). In that 1999 movie, billionaire Thomas Crown steals a Monet painting worth $100 million from the Metropolitan Museum of Art. He and a charming investigator, Catherine Banning (played by Rene Russo), engage in a cat-and-mouse game as Banning searches for the stolen painting and fall in love. Unbeknownst to Banning, Crown secretly returned the painting unharmed before Banning's search began. As a police detective remarks after this fact is revealed during the key scene: "He returned the damn [painting] practically as soon as he stole it." YouTube, *Thomas Crown Affair - Returning the Painting*, https://youtu.be/Smx1HeHwR4Q (last visited May 18, 2021).

In every circuit in the country, Crown is guilty of theft and may be ordered to serve a prison sentence, to pay restitution, and to pay a fine.[2] But due to the holding below, in the Eleventh Circuit, because Crown returned the painting, the sentencing judge will be required to impose a forfeiture money judgment of $100 million in addition. If only Crown had not returned the property; then the sentencing court could only order Crown to forfeit the painting.

Under the Eighth Circuit's precedent, which precludes a thief who returns stolen property from owing forfeiture for that property, *Hawkey*, 148 F.3d at 928, Crown would owe no forfeiture because he returned the painting to the victim. In

[2] Because Crown returned the painting, restitution could include only investigative and other costs the museum incurred as a result of the theft.

contrast to that common-sense result, the Eleventh Circuit's rule would force the sentencing judge to impose a mandatory forfeiture money judgment on Crown even though he returned the property (and even though there is no statutory authority for such a punishment). In real life, this counterintuitive rule would deter criminals from returning stolen property because they would be punished for doing so. Victims would suffer as a consequence.

The clear circuit split and the absurd, victim-harming incentives created by the decision below are alone sufficient to warrant certiorari. Several additional considerations further confirm the need for this Court's review. The decision below is unmoored from forfeiture's traditional *in rem* foundation. Indeed, it contradicts that tradition by improperly imposing what is actually a mandatory fine under the guise of "forfeiture." Further, it cannot be reconciled with the only forfeiture money judgment statute that Congress has enacted (31 U.S.C. § 5332(b)(4)) because the decision renders that statute superfluous.

Moreover, there is a growing consensus among the public and Congress that mandatory punishments thwart judges' ability to impose just punishments. This Court perhaps foreshadowed this consensus when it decided that the Federal Sentencing Guidelines are "effectively advisory," not "mandatory," and that district judges have discretion to "tailor the sentence" in light of the factors that Congress set forth in 18 U.S.C. § 3553(a). *United States v. Booker*, 543 U.S. 220, 245 (2005). This Court has also rejected mandatory punishments in the forfeiture context, repeatedly overturning even widespread practices that were not authorized by statute. *E.g.*,

*Honeycutt v. United States*, 137 S. Ct. 1626, 1630-31 & n.1 (2017) (holding that joint-and-several co-conspirator liability for property the defendant himself did not acquire "is inconsistent with [21 U.S.C. § 853's] text and structure," rejecting rulings by all but one court of appeals to decide the issue).

Here, the Eleventh Circuit has held that sentencing courts *must* impose an "extra-statutory" forfeiture money judgement in every money laundering case.[3] This judicial mandate applies even where – as with Petitioner Nidal Waked – (i) the sentencing judge declined to do so, (ii) the defendant is indigent, and (iii) the defendant returned all of the stolen property before the investigation began. The Eleventh Circuit's ruling thus conflicts with the Eighth Circuit's decision in *Hawkey* – a conflict that to varying degrees relates to all three issues that the petition raises.

## I. CONTRARY TO THE EIGHTH CIRCUIT'S PRECEDENT, THE ELEVENTH CIRCUIT'S DECISION CREATES ABSURD INCENTIVES FOR CRIMINALS NOT TO RETURN STOLEN PROPERTY OR MAKE THEIR VICTIMS WHOLE.

The decision below creates a circuit split that warrants this Court's review in light of the perverse incentives and harms that the Eleventh Circuit's holding creates: It punishes more severely criminals who return stolen property to the victim before conviction than those who keep the stolen property.

In *Hawkey*, the Eighth Circuit decided "the proper application of § 982(a)(1)" and held that there is "no support in the statute . . . for the proposition that a

[3] *Cf.* Tr. of Oral Arg. at 46:13-15, *Honeycutt v. United States*, No. 16-142 (Mar. 29, 2017) (Justice Kagan: "And let's put aside the extra[-]statutory money judgments, since I don't understand really how that works, so let's just focus on [§ 853](p). All right?"), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-142_4gc5.pdf (last visited May 18, 2021).

defendant should not be credited with returning misappropriated funds." *Hawkey*, 148 F.3d at 928. The Eighth Circuit explained:

> [I]f Hawkey misappropriated $10,000 and returned $5,000 prior to the forfeiture order, he would only be required to forfeit the remaining $5,000 of the corpus.

*Id.* The Eighth Circuit "conclude[d] that while Hawkey must forfeit the entire corpus of his ill-gotten gains, the total funds subject to forfeiture must reflect any funds returned prior to the forfeiture order or expended to procure property forfeited under § 982(a)(1)'s 'traceable to' provision." *Id.* (emphasis added).

The decision below purported to distinguish *Hawkey* on the ground that Mr. Waked did not return the funds "out of the goodness of his heart." App. 14-15. Nothing in the text of any statute from which the Eleventh Circuit claimed support, however, allows such an inquiry into a defendant's motive when ruling on forfeiture. Indeed, the plain language of these statutes offers no basis to believe that motive is relevant at all in this context.

21 U.S.C. § 853(p) is the only relevant statute that authorizes forfeiture of "substitute" property (*i.e.*, "innocent assets"), as opposed to "tainted" property. *See Honeycutt*, 137 S. Ct. at 1633; *Luis v. United States*, 136 S. Ct. 1083, 1091 (2016) (discussing the distinction). Section 853(p) sets forth a series of factors that have nothing to do with whether a defendant returned property in good faith. Instead, § 853(p) focuses on the defendant's conduct, *viz.*, whether he or she placed the tainted funds "beyond the court's reach." *E.g.*, *United States v. Chamberlain*, 868 F.3d 290, 293-94 (4th Cir. 2017) (en banc). As this Court has recognized, the "text and structure [of] § 853" make "clear" that it "maintains traditional *in rem* forfeiture's focus on

tainted property unless one of the preconditions of § 853(p) exists." *Honeycutt*, 137 S. Ct. at 1635. The decision below judicially amends the statute to include a precondition that Congress chose not to enact. The plain language of § 853(p) offers no basis to conclude that it ever authorizes forfeiture of a defendant's innocent assets unless he returned stolen property "out of the goodness of his heart." Such an extratextual inquiry is therefore inappropriate in any case. It is especially inappropriate where a thief returned stolen property before an investigation even began, as in Mr. Waked's case.

The decision below also violates Congress's intent that the forfeiture statutes be interpreted to remedy harms to victims. Section 853(o) provides, "The provisions of this section shall be liberally construed to effectuate its remedial purposes." A core remedial purpose of § 853 is "returning property, in full, to those wrongfully deprived or defrauded of it." *Honeycutt*, 137 S. Ct. at 1631 (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629-30 (1989)). The decision below does the opposite: It first engrafts onto § 853(p) an extra-statutory provision for forfeiture money judgments and then applies its judicial invention in a manner that incentivizes criminals not to return stolen property to victims.[4]

[4] As the Solicitor General correctly acknowledged last week – and as this Court recognized in *Honeycutt* – "'returning property, in full, to those wrongfully deprived or defrauded of it'" vindicates an important objective of forfeiture. Br. for the United States in Opp'n at 16, *Bradley v. United States*, No. 20-7198, https://www.supremecourt.gov/DocketPDF/20/20-7198/178812/20210510194623115_20-7198%20Bradley%20Opp%20vf.pdf (filed May 10, 2021) (quoting *Honeycutt*, 137 S. Ct. at 1631). Like this Court in *Honeycutt*, the Solicitor General did *not* suggest that a defendant's *motive* in returning property to a victim has any bearing on whether that objective is satisfied. *See id.*

## II. THE ELEVENTH CIRCUIT'S JUDICIAL INVENTION IMPROPERLY CONVERTS CRIMINAL FORFEITURE INTO A MANDATORY FINE.

Consistent with "traditional *in rem* forfeiture's focus on tainted property," *Honeycutt*, 137 S. Ct. at 1635, Congress wrote the forfeiture statutes to apply only to tainted property, with the exceptions of 21 U.S.C. § 853(p) and 31 U.S.C. § 5332(b)(4). Contrary to tradition and Congress's intent, the decision below converts the same statutory scheme into a mandatory fine regime. In dismissing the Eighth Circuit's holding in *Hawkey* that returning stolen funds negates any basis for forfeiture, the Eleventh Circuit noted that Mr. Waked had "made no payment to the government body seeking forfeiture." App. 15. The applicable statutes, however, do not authorize a court to consider whether a defendant made a payment to the government in deciding any forfeiture issue. By focusing on the government's recovery, the decision below conflates mandatory forfeiture money judgments (which have no statutory basis) with a mandatory fine regime (which by definition is not "forfeiture").

Traditionally, *in rem* forfeitures were remedial measures designed to compensate the government for a loss. *United States v. Bajakajian*, 524 U.S. 321, 329-32 (1998) (citing *The Palmyra*, 12 Wheat., at 14-15; *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1877); *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-84 (1974); *Taylor v. United States*, 3 How. 197, 210 (opinion of Story, J.) (laws providing for in rem forfeiture of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] . . . truly deserve to be called, remedial"); *United*

*States v. Ursery*, 518 U.S. 267, 293 (1996) (Kennedy, J., concurring) ("[C]ivil in rem forfeiture is not punishment of the wrongdoer for his criminal offense").

Criminal forfeiture also "serve[s] important governmental interests such as 'separating a criminal from his ill-gotten gains,' 'returning property, in full, to those wrongfully deprived or defrauded of it,' and 'lessen[ing] the economic power' of criminal enterprises." *Honeycutt*, 137 S. Ct. at 1631 (quoting *Caplin & Drysdale*, 491 U.S. 617, 629-30).

None of these interests is served by the mandatory forfeiture money judgment in this case. The government suffered no loss from the offense; the defendant had already been separated from his ill-gotten gains by returning the property before he was charged; the property was already returned, in full, to the victim; and the defendant is indigent and has no "economic power."

Rather than furthering any of the interests that forfeiture serves, the Eleventh Circuit's holding creates a mandatory fine. That is particularly inappropriate here because the district court made factual findings, which the government has not disputed on appeal, that the defendant is indigent and lacks substantial future earning potential. *See* U.S.S.G. § 5E1.2 (providing that no fine is required "where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine").

## III. THE ELEVENTH CIRCUIT'S DECISION VIOLATES CONGRESS'S INTENT BY RENDERING SUPERFLUOUS THE ONLY STATUTE THAT AUTHORIZES A FORFEITURE MONEY JUDGMENT.

Congress has chosen to authorize forfeiture money judgments only in one specific circumstance: when a defendant has been convicted of bulk cash smuggling in violation of 31 U.S.C. § 5332(a) and where substitute property under § 853(p) is unavailable. Section 5332(b), which governs punishment for a violation of § 5332(a), provides:

> (1) Term of imprisonment.--A person convicted of a currency smuggling offense under subsection (a), or a conspiracy to commit such offense, shall be imprisoned for not more than 5 years.
>
> (2) Forfeiture.--In addition, the court, in imposing sentence under paragraph (1), shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property.
>
> (3) Procedure.--The seizure, restraint, and forfeiture of property under this section shall be governed by [21 U.S.C. § 853].
>
> (4) Personal money judgment.--If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to [21 U.S.C. § 853(p)], the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

(Emphases added.)

If another statute mandated forfeiture money judgments in every case – as the decision below held – § 5332(b)(4) would be surplusage, violating a basic canon of statutory construction. More specifically, if § 853(p) compelled district judges to impose forfeiture money judgments, as the Eleventh Circuit reasoned, the "personal money judgment" provision in § 5332(b)(4) – which is part of the same statutory scheme – would be superfluous. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."

*City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion)). That is the case with § 5332(b)(4) here.

Therefore, § 5332(b)(4) shows that the Eleventh Circuit's holding that § 853(p) implicitly authorizes forfeiture money judgments is contrary to Congress's intent and the statutes' text. Congress plainly distinguished the substitute property forfeitures that it authorized under § 853(p) from forfeiture money judgments, which it authorized only under § 5332(b)(4). The Solicitor General has previously refused to endorse the same statutory-text-defying position on which the decision below rests.[5]

Because forfeiture is a criminal punishment, it may be imposed only when a statute authorizes it. For more than 150 years, it has been settled that a court would "transcend[ ] its jurisdiction" if it ordered forfeiture of property beyond that authorized "under [an] act of Congress." *Bigelow v. Forrest*, 9 Wall. 339, 351 (1870). The decision below mandating extra-statutory forfeiture money judgments cannot be reconciled with this principle. Section 853(p) is "the sole provision of § 853 that permits the Government to confiscate property untainted by the crime." *Honeycutt*, 137 S. Ct. at 1633. Section 5332(b)(4) shows that § 853(p) does not authorize forfeiture money judgments, which seek to confiscate assets untainted by any crime. The decision below violates these statutes and this Court's precedents by mandating a criminal punishment that is plainly beyond any that Congress has authorized.

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[5] *See* Br. for the United States in Opp'n at 18, *Lo v. United States*, No. 16-8327 ("[I]f the government can establish that petitioner transferred, commingled, or otherwise rendered the proceeds unavailable under the applicable statutory criteria, it may seek to forfeit substitute property in accordance with Section 853(p) and Rule 32.2(e)(1)(B). But the government no longer takes the position that it can enforce a forfeiture money judgment like the one entered here by seizing the defendant's property using mechanisms outside the applicable forfeiture statutes."), *available at* https://www.scotusblog.com/wp-content/uploads/2017/09/16-8327-BIO.pdf (last visited May 18, 2021).

## CONCLUSION

The Court should grant the petition.

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