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 a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY

1. The Petition presents questions that should be decided now, rather than await the mandated imposition of an extra-statutory forfeiture penalty.

Characterizing the decision below as "interlocutory," the Government argues "as a threshold matter" that the Court should not "depart from its usual practice" of deferring review until after the district court obeys the appellate mandate to "determine the required amount of the forfeiture money judgment in the first instance, as well as whether that amount complies with the Eighth Amendment under the correct legal framework." Opposition:9-10. But the decisions below are not "interlocutory" insofar as the district court entered a final forfeiture judgment of zero, which the Government successfully appealed. The Eleventh Circuit expressly declared that, "unless and until Congress, the Supreme Court, or this Court sitting *en banc* changes the law of forfeiture," it would mandate the imposition of a forfeiture money judgment in this, and in all other, criminal cases. App. 13. The Eleventh Circuit declined to hear the case *en banc*, leaving only this Court to review the legality of this widely applied, non-statutory means of imposing mandatory forfeitures.

There is no reason for the lower courts to first determine *the amount* of the mandated forfeiture money judgment given that the petition challenges the imposition of *any amount* of forfeiture: "The question presented can be subdivided into three stand-alone questions, any one of which, if answered in favor of petitioner, requires that … the judgment of the Court of Appeals [be] reversed," Petition:i, and the district court's final judgment of zero forfeiture be reinstated. Thus, if the Court

agrees that the Court of Appeals got it wrong as to any one of the three questions, there will be nothing left for the lower courts to do.

2. The Court should decide whether a district court can impose a forfeiture money judgment against a criminal defendant in the absence of any statutory authority.

Whether Congress has authorized the imposition of criminal forfeiture money judgments permitting government confiscation of a defendant's property wholly unrelated to any criminal offense is an important and recurring issue. The Solicitor General does not deny, and in fact relies upon, the fact that this practice is ubiquitous. She invokes extensive, indeed unanimous, circuit precedent approving the imposition of non-statutory criminal forfeiture judgments, even though all cited cases pre-date *Honeycutt v. United States*, *see* Opposition:11 n.2 (citing thirteen circuit opinions from 1999 to 2014), in which the Court remarked: "Congress provided just one way for the Government to recoup substitute property when the tainted property itself is unavailable—the procedures outlined in § 853(p)." 137 S. Ct. 1626, 1634 (2017).

The Government makes no claim that any statutory language authorizes forfeiture money judgments. The Government does not refute that money judgments are a wholly judge-made means of imposing forfeiture liability which pre-date the enactment of subsection 853(p). *See* Petition:10 (citing *United States v. Conner*, 752 F.2d 566, 577 (11th Cir. 1985)). Despite *Honeycutt*'s holding that the enactment of subsection 853(p) re-affirmed Congressional intent to prohibit the criminal forfeiture of a defendant's untainted property by any other means, the Government is silent on

this identified legislative intent. For example, it makes no effort to reconcile money judgments with any of the inter-related and cross-referenced statutory structures throughout section 853 that were harmonized in *Honeycutt*, codifying Congressional intent that section 853 "maintains traditional *in rem* forfeitures focus on tainted property." *Honeycutt*, 137 S. Ct. at 1633-34 (citing 21 U.S.C. §§ 853(c), (d), (e)(1)). The cumulative "end run" on all of these legislative structures and provisions by use of money judgments makes each superfluous.

Similarly, the Government fails to account for the only statutory reference to criminal forfeiture money judgments in the United States Code: 31 U.S.C. § 5332(b)(4) (forfeiture for bulk cash smuggling at the border). Even that statute, enacted in 2000, requires exhaustion of substitute assets forfeiture for missing bulk cash *before* a court can even consider entering a money judgment against a defendant. *Id*. § 5332(b)(4). The uniqueness of this single forfeiture money judgment provision refutes the government claim that forfeiture money judgments are universally authorized for any criminal offense.

The Government nonetheless defends the imposition of forfeiture money judgments in every criminal case by noting that "such judgments have been *expressly mentioned* in the Federal Rules of Criminal Procedure [32.2(a)] for more than twenty years." Opposition:11. This Rule merely describes *procedures* a court may use for the imposition of money judgments and was issued to accommodate those courts that had then recognized this species of forfeiture. But the mere "mention" of such a judgment in a rule of procedure is hardly the equivalent of statutory authorization for

increasing the punishment attendant to a criminal conviction. "[T]he reference to the Federal Rules of Criminal Procedure is necessarily limited to procedural matters because the Rules themselves cannot expand or contract the potential forfeiture penalty authorized by Congress." *United States v. Andrews*, 2014 WL 11309767 (W.D. Mich. Aug. 14, 2012) (Jonker, J.). The Government's authority to punish using criminal forfeiture cannot be the product of accretion or prescription—Congress must approve it first. The Government identifies no such statutory authority.

Moreover, the unorthodox claim of forfeiture authority flowing solely from a criminal procedural rule cannot survive the Rule's Drafters express refusal to endorse such a claim, saying of the court opinions imposing money judgments: "The Committee takes no position on the correctness of those rulings." 2000 Adv. Cmtee Notes Rule 32.21 (comment on subdivision (b)(1)). This express disclaimer by the Drafting Committee as to its own Rule language—that it was not thereby endorsing money judgments—is wholly ignored by the Government. The Rule's authors' denial that they "answer[ed] the question in dispute" should preclude any claim that the Rule was adopted to be an independent source of such forfeiture authority. *See Shady Grove Orthopedic Associates, P.A. v. Allstate Ins., Co.*, 559 U.S. 393, 398 (2010).

The Committee's explicit disclaimer of having resolved whether money judgments are legal is an acknowledgement that this Court had not yet answered this question, which remains true today. The self-restraint by the Rule's draftsmen, moreover, is fully justified by the prohibition of the Rules Enabling Act, 28 U.S.C. § 2072(b), on federal procedural rules abridging, enlarging, or modifying "any

substantive right." "[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress;" "the constitutional principle of separation of powers" restricts federal courts to "impose only such punishments as Congress has seen fit to authorize." *Whalen v. United States*, 445 U.S. 684, 689 & n.4 (1980).

The Government suggests that the Court has implicitly endorsed the imposition of money judgments insofar as "'*Honeycutt* itself addressed the permissible *scope* of a money judgment,' [for] it is 'hard to maintain' that the Court was 'absentmindedly cutting off the branch it sat on when it 'refined' that *scope*. Opposition:10-11 (emphasis added) (quoting *United States* v. *Bradley,* 969 F.3d 585, 588 (2020), *cert. denied*, No. 20-7198 (June 14, 2021). But as the Government itself told this Court, the petitioner in *Honeycutt* did not challenge the propriety of money judgments, so the issue was not before the Court in that case. *Honeycutt*, 2017 WL 1165184 (U.S.), 38-39, 48 (U.S. Oral. Arg., 2017) ("Petitioner didn't make those arguments…. The question, as this case has been litigated and as it comes to the Court, there's no question that the government can get a money judgment."); *see also* Brief for the United States filed in *Lo v. United States*, No. 16-8327, p.23 ("*Honeycutt* did not address the propriety of forfeiture money judgments.").

And while it is true that the Court has repeatedly denied review of petitions challenging forfeiture money judgments in the past, Opposition:11 n.3 (citing eight denials of certiorari from 2011 to 2019), these recurring challenges demonstrate the

breadth of this practice. And until the Court decisively weighs in on the question, the Court will continue to receive a steady stream of petitions challenging mandatory forfeiture punishment, particularly given the burdens these "extra-statutory" judgments place on defendants, wealthy and indigent alike. *See* Brief of Amicus Curiae Florida Association of Criminal Defense Lawyers at 2 ("Because unpaid forfeiture money judgments deprive so many citizens of their voting rights, this Court should decide whether such judgments have a statutory basis or are instead an impermissible mandatory criminal fine."); Martha Boersch, *Forfeiture Money Judgments: Will the Supreme Court Clamp Down on These Unconstitutional Judicial Punishments?,* The Champion**,** June 2021, p. 38.

3. The Court should decide whether *Honeycutt* likewise limits criminal forfeiture under 18 U.S.C. § 982(a)(1) to the tainted property "involved in" the money laundering offense that "the defendant himself actually acquired as the result of the crime."

The Government contends that the Eleventh Circuit "correctly rejected [petitioner's] contention" that *Honeycutt's* tainted property requirement "limits forfeiture liability to property that the defendant himself acquired and retained as a result of a money-laundering crime under 18 U.S.C. 982(a)(l)." Opposition:12. But neither the Eleventh Circuit nor the Government offer any linguistic explanation for why the "involved in" statutory language marks an intention by Congress to eschew *Honeycutt's* acquisition limitation on forfeiture and instead expand criminal forfeiture beyond tainted property that "came to rest with [petitioner] as a result of his crimes." *United States v. Thompson*, 990 F.3d 680, 691 (9th Cir. 2021).

The Government emphasizes that "*Honeycutt* construed a different forfeiture provision with materially different language," that by its terms limits forfeiture to 'any proceeds *the person obtained,* directly or indirectly, as the result of' such violations. 21 U.S.C. 853(a)(l) (emphasis added)." Opposition:12. But the Government conceded in this Court that *Honeycutt*'s acquisition limitation does not turn on section 853(a)(1)'s "the person obtained" language. *Peithman v. United States,* 140 S. Ct. 340, 340 (2019) (Sotomayor, J., dissenting from the denial of certiorari) ("[T]he Government now concedes that the rationale of *Honeycutt* applies equally to § 981(a)(1)(C) [which does not contain "the person obtained" language] as it does to § 853(a)(1)."). Section 981(a)(1)(C), at issue in *Peithman,* renders forfeitable "any property, real or personal, which *constitutes or is derived from proceeds traceable to* a violation…."

Before conceding in *Peithman* that *Honeycutt*'s acquisition limitation applies to section 981(a)(1)(C) despite the absence of "the person obtained" language, it successfully argued that "[t]he plain language under § 981 is *broader* than § 853 and less focused on personal possession…. The statute does not contain any language that requires possession of the property by the defendant, either explicitly or implicitly. We think these differences are significant." *United States v. Peithman*, 917 F.3d 635, 652 (8th Cir. 2019) (emphasis added); contra *Thompson*, 990 F.3d at 689 (9th Cir. 2021) ("[T]he absence of the phrase, 'the person obtained' in Section 981 strikes us as immaterial in light of the reasoning in *Honeycutt*, that 'the most important background principles underlying § 853' are 'those of forfeiture.'"). Opposing

certiorari review of the "disagreement among the courts of appeals regarding the application of *Honeycutt* to statutes other than 21 U.S.C. 853," Opposition:16, the Government in *Peithman* ultimately conceded that the "differences" in the supposedly "broader" language of section 981(a)(1)(C) are not "significant" enough to avoid *Honeycutt*'s acquisition limitation on forfeiture under that section. *Peithman,* 140 S. Ct. at 340 (Sotomayor, J., dissenting from the denial of certiorari). So, the Government now must offer more than *ipse dixit* to support its virtually identical contention that section 982(a)(1)'s supposedly "broad 'involved in' requirement" is even broader than and somehow "materially different" from the language of both sections 981(a)(1)(C) and 853(a). *See* Opposition:17.

Congress used "involved in" language consistent with "maintain[ing] traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions of § 853(p) exists." *Honeycutt*, 137 S. Ct. at 1635. Subsection 982(a)(1) is thus exclusively paired with substitute property under subsection 853(p). 18 U.S.C. § 982(b)(1). Importantly, the language of section 853(p) authorizes forfeiture of "any other property of the defendant," (i.e., untainted property), but only "if any property described in subsection [853](a)" (i.e., tainted property) has been dissipated. Thus, the "*other* property of the defendant," according to section 853(p)(2), can be forfeited as a substitute for the *tainted* "property of the defendant."

In stating that the defendant shall forfeit the property "involved in" the offense, § 982(a)(1), Congress carried forward the traditional limitation of criminal forfeitures that a defendant can be ordered to forfeit only that property which he acquired in

violation of the law, subject to his acts or omissions of later dissipation under § 853(p), for which he can be held responsible by forfeiting his "other property." 21 U.S.C. § 853(p)(2). In 2000, Congress enacted another "involved in" criminal forfeiture statute in 31 U.S.C. § 5332(b)(2) which was also expressly paired with a corresponding substitute asset provision, § 5332(b)(3). While this same pairing of tainted property with untainted "other property" of the defendant recurs throughout the criminal forfeiture laws, it is especially revealing that this pairing has been consistently and repeatedly enacted by Congress through use of "involved in" forfeiture language, including under § 982(a)(1). See § 982(b)(1) (incorporating §853(p)).

In short, Congress did not simultaneously impose the tainted property requirement under subsection 853(p) while relinquishing this same requirement through use of the same nexus phrase "involved in." *Honeycutt* holds that the Congressional intent demonstrated by the former precludes the latter, as a result of the Congressional decision to merge and extend the long established *in rem* property taint limitation to criminal forfeitures.

That Congress first defined as forfeitable "only 'the gross receipts a person obtains' as a result of a money-laundering crime, and later "replaced that formulation with Section 982(a)(1)'s current ["involved in"] language, Opposition:13, does not reflect an intent by Congress to authorize direct forfeiture beyond tainted property of the defendant. Nor did the enactment of 18 U.S.C. § 982(b)(2) evidence a departure from the centuries-old taint doctrine. See Opposition:14.

4. The Court should confirm that returning tainted property to its rightful owner before sentencing does not trigger forfeiture of a defendant's untainted property.

The Government contends that, "even though laundered funds were returned to the victim bank as part of the scheme," petitioner's untainted property in an equivalent value is forfeitable under section 853(p), because "[p]etitioner was convicted not of bank fraud but of money laundering—an offense whose harms fall 'upon society in general' rather than a single victim." Opposition:18, 20 (quoting App. 24). No doubt, if petitioner had been convicted of bank fraud, not money laundering, the Government would have had no recourse against his untainted property because Congress explicitly provided that:

> In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

18 U.S.C. § 981(a)(2)(C). The Government must admit that it could not forfeit petitioner's substitute property in that case, "even though [tainted] funds were returned to the victim bank as part of the scheme."

The Government thus resorts to a counter-intuitive, statutory interpretation that the return of *laundered* funds to its *rightful owner* is a transfer to a "third party" that triggers substitute property forfeiture liability. Opposition:18-19. Meanwhile, the Government concedes that transferring *stolen* funds to *a co-conspirator* "as part of the scheme" reduces a defendant's forfeiture liability. *See United States v. Vescuso,* 2021 WL 3674476 at *29-30 (9th Cir. 2021) (government conceding and court holding that under 18 U.S.C. § 981, where the defendant "shared proceeds" of the crime with

a conspirator, the defendant "can be ordered to forfeit only the amount of money that 'came to rest with him as a result of his crimes.'").

The Government posits that Congress intended a more severe forfeiture for money laundering offenses, "even when a defendant did not personally retain the laundered funds," to "ensure[] that defendants like petitioner … do not commit extensive financial crimes yet avoid a monetary penalty." Opposition:21. That makes no sense because, even absent forfeiture, a (non-indigent) defendant remains subject to a substantial fine of up to $250,000 per money laundering count, 18 U.S.C. § 3571(b)(3), or "twice the amount of the criminally derived property involved in the transaction." 18 U.S.C. § 1957(b)(2).

The Government denies the conflict with *United States v. Hawkey*, a money laundering case in which the Eighth Circuit explicitly held that "the total funds subject to forfeiture must reflect any funds returned prior to the forfeiture order…." 148 F.3d 920, 928 (8th Cir. 1998). The Government says there is "no division of authority on the third-party question" because "*Hawkey* did not consider the availability of substitute-assets forfeiture under Section 853(p)(l)(B)." Opposition:22. Not so.

Addressing tainted funds "involved in … the unlawful monetary transaction" under section 982(a)(1)—which explicitly incorporates section 853(p) through section 982(b)(1)—the Eighth Circuit held: "We find no support *in the statute*, however, for the proposition that a defendant should not be credited with returning misappropriated funds." *Id.* (emphasis added). So, *Hawkey* rejected *any* theory of

forfeiture of "involved in" property returned to its rightful owner, whether "out of the goodness of [petitioner's] heart" or not. *Hawkey* forecloses *any* forfeiture as a substitute for the tainted funds returned to the victim, including the Government's musing that it "may be able to establish another basis for substitute-assets forfeiture in the district court proceedings on remand." Opposition:23.

To avoid "patently absurd consequences," that "Congress could not *possibly* have intended." *Pub. Citizen v. U.S. Dep't of Just.,* 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (citations and quotations omitted) (emphasis in original), the Court should resolve the conflict between the Eleventh Circuit—"which *punishes* criminals for returning stolen property to the victim"—and the Eighth Circuit, which "*credit[s]* a defendant for doing the same thing." Brief of *Amicus Curiae* the National Association of Criminal Defense Lawyers at 1.

Conclusion

The petition should be granted.

Respectfully submitted,

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