No. 20-5778

In the

Supreme Court of the United States

DAVID DAVALOS SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The questions presented here are (1) "[w]hether a district court exceeds its jurisdiction by entering a preliminary order of forfeiture and an order of money judgment beyond the time limits set by Federal Rules of Criminal Procedure 32.2 and 35" and (2) "[w]hether a district court lacks authority to enter a preliminary order of forfeiture and an order of money judgment after the defendant files his notice of appeal." Pet. i. The courts of appeals are deeply divided over these two related questions. *See* Pet. 5-18. Here, the Fifth Circuit acknowledged that the district court's deviation from Rule 32.2's mandates was plainly erroneous. *See* Pet. App. 6a. However, the Fifth Circuit held that the petitioner had "not shown that there is a reasonable probability that the result of his proceedings would have been any different had the district court followed the appropriate procedures." *See* Pet. App. 6a. Accordingly, the Fifth Circuit refused to grant relief under plain error review. Petitioner has already explained why the Fifth Circuit's decision is wrong and in conflict with decisions from the Sixth and Eighth Circuits. *See* Pet. 5-18.

Faced with an undeniable conflict among the courts of appeals and an indefensible ruling below on the merits, the Government offers four responses. First, it suggests that because "[t]his case is in an interlocutory posture," it "does not warrant review at this time." BIO 10. Second, it tries to downplay the magnitude of the conflict over the questions presented, claiming that the "decision by the court of appeals does not conflict with a decision from any other court of appeals." BIO 10. Third, the

Government invites this Court to avoid review of petitioner's second issue under the "not pressed or passed upon below" rule. BIO 18-19. Fourth, it argues that "petitioner's arguments lack merit." BIO 10. None of these arguments withstands scrutiny.

ARGUMENT

I. The case's interlocutory posture does not warrant denial of review.

There is no merit to the Government's contention that review is inappropriate because the court of appeals remanded to the district court for further proceedings. BIO 10-11. Whatever relevance that factor may have in other cases, it is no basis for denying review here.

It is well-settled that a case may be "reviewed despite its interlocutory status" where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.18, at 283 (10th ed. 2013) (collecting cases); *see, e.g.*, *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.' "); *United States v. Gen. Motors Corp*., 323 U.S. 373, 377 (1945) (ruling was "fundamental to the further conduct of the case"). The reasons for that rule are obvious. As the Government notes, "judicial efficiency" often favors awaiting final judgment "because the proceedings on remand may diminish the significance of the issues presented in a petition or even render them moot . . . ." BIO 11. But where an interlocutory ruling is fundamental to

the further conduct of the case, there are judicial efficiency considerations pointing the other way too. It is a waste of resources to conduct proceedings on remand under standards that may be fundamentally altered by this Court's eventual decision in the case.

In short, notwithstanding the general preference for reviewing final judgments, this Court routinely reviews interlocutory rulings in criminal cases, whether or not relief could also be granted on appeal from a later conviction. *See, e.g.*, *Kaley v. United States*, 571 U.S. 320 (2014) (asset restraints); *Sell v. United States*, 539 U.S. 166 (2003) (forced medication); *Lewis v. United States*, 518 U.S. 322 (1996) (denial of jury trial for petty offense); *United States v. Monsanto*, 491 U.S. 600 (1989) (asset restraints); *United States v. Karo*, 468 U.S. 705 (1984) (motion to suppress); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Donovan*, 429 U.S. 413 (1977); *United States v. Giordano*, 416 U.S. 505 (1974). The same approach is warranted here. The Fifth Circuit decided an important question of federal law on which there is an intractable circuit conflict implicating "criminal forfeitures [which] are a ubiquitous part of federal law enforcement." Note, Benjamin Gillig, *Nexus Rethought: Toward a Rational Factual Standard for Federal Criminal Forfeitures*, 102 IOWA L. REV. 286, 298-99 (2016) (footnotes omitted). This Court can and should settle that conflict. Its ability to do so will not be aided in the slightest by waiting to see what rulings may emerge from remand.

II. The case conflicts with decisions from other courts of appeals.

The Government claims that the "decision by the court of appeals does not conflict with a decision from any other court of appeals." BIO 10, 16-17, 20-21. That, too, is incorrect, and the Government's argument rests largely on making immaterial distinctions.

A. The Eighth Circuit

Here, as in *Shakur*, petitioner was "denied timely . . . entry of a preliminary order 'directing the forfeiture of specific property,' Rule 32.2(b)(2)(A); and entry of that order 'sufficiently in advance of sentencing' to allow him to seek revisions, Rule 32.2(b)(2)(B)." *Compare* Pet. App. 4a ("The preliminary order of forfeiture was not issued until 83 days after sentencing, and the order of money judgment was entered 97 days after sentencing.") *with United States v. Shakur*, 691 F.3d 979, 985-87 (8th Cir. 2012) (the preliminary order of forfeiture was not issued until 83 days after sentencing). To be sure, a forfeiture hearing arguably took place in this case. See Pet. App. 3a, 7a-8a. However, as in *Shakur*, the district court ordered forfeiture in a written judgment without first entering a preliminary order of forfeiture. *Compare* Pet. App. 4a ("while the written judgment entered by the district court included an order of forfeiture and a forfeiture money judgment, the government did not actually move for a preliminary order of forfeiture or for entry of money judgment until more than a month after sentencing") *with Shakur*, 691 F.3d at 986 ("The court's Judgment in a Criminal Case,

entered the next day [after sentencing], simply stated, "Forfeiture will be imposed by further order of the Court," again violating Rule 32.2(b)(4)(A).").

Surprisingly, the Government claims that the petitioner "did not suffer prejudice from the timing violations." BIO 17. The Government is wrong. As in *Shakur*, the petitioner "was denied inclusion of a preliminary forfeiture order in his judgment of conviction, Rule 32.2(b)(4)(B), which deprived him of 'the right to have the entire sentence imposed as a package and reviewed in a single appeal.'" *Shakur*, 691 F.3d at 988 (quoting *United States v. Koch*, 491 F.3d 929, 932 (8th Cir. 2007)).

In sum, despite the Government's claim that "*Shakur* is materially different from this case in multiple respects," the facts in *Shakur* are indeed similar to the facts in this case.

B. The Sixth Circuit and other courts of appeals

The Government also claims that the decisions in *United States v. Carman*, 933 F.3d 614 (6th Cir. 2019) and *United States v. George*, 841 F.3d 55 (1st Cir. 2016) are distinguishable because the district court below made forfeiture a part of the initial judgment in this case. BOI 20-21. To be sure, *George* is distinguishable as explained in *United States v. Carpenter*, 941 F.3d 1, 5-6 (1st Cir. 2019). However, *Carmen* is not distinguishable from this case, and the reasoning applied there also applies here.

Unlike the First Circuit, the Sixth Circuit has not announced an exception to the appellate divestiture rule if an order of forfeiture is included in the initial judgment. In fact, the Sixth Circuit recently applied the appellate divestiture rule to hold that a district

court "lacked jurisdiction" to grant a motion for leave to file a late notice of appeal. *United States v. Jackson*, 984 F.3d 507, 515 (6th Cir. 2021).

It appears that the First and Sixth Circuits have different interpretations of this Court's holdings in *Hamer v. Neighborhood Hous. Servs. of Chi*., 138 S. Ct. 13 (2017). In *Hamer*, this Court held that "a provision governing the time to appeal in a *civil* action qualifies as jurisdictional only if Congress sets the time." *Id*. at 17 (emphasis added). Although the First Circuit believes that *Hamer* is applicable to both civil and criminal appeals, it appears that the Sixth Circuit believes that *Hamer* only applies to civil appeals. Tellingly, *Hamer* is not even mentioned in either *Carman* or *Jackson*, two criminal cases from the Sixth Circuit holding that a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Carman*, 933 F.3d at 618 (quoting *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58 (1982)); *Jackson*, 984 F.3d at 515 (same).

Further, the Second, Third, Tenth, and Eleventh Circuits also apparently believe that *Hamer* is inapplicable to criminal appeals. *See United States v. Goolsby*, 820 Fed. Appx. 47, 51 (2d Cir. 2020) (unpublished) (pending direct appeal divested district court of jurisdiction); *United States v. Pawlowski*, 967 F.3d 327, 329 (3d Cir. 2020) (same); *United States v. Griffith*, 928 F.3d 855, 876 (10th Cir. 2019) (same); *United States v. Cabezas*, No. 19-12117-HH, 2019 WL 11666248, at *1 (11th Cir. Oct. 30, 2019), *cert. denied sub nom. Fernando Cabezas v. United States*, 140 S. Ct. 2836, 207 L. Ed. 2d

164 (2020), *rh'g denied*, 141 S. Ct. 214, 207 L. Ed. 2d 1159 (2020) (unpublished) (same).

In a subsection titled "Jurisdiction," Appellate Rule 4(b)(5) carves out an exception for Criminal Rule 35(a): "The filing of a notice of appeal . . . does not *divest a district court of jurisdiction* to correct a sentence under Federal Rule of Criminal Procedure 35(a)." FED. R. APP. P. 4(b)(5) (emphasis added). In other words, Appellate Rule 4(b)(5) implicitly recognizes the appellate divestiture rule in criminal cases. Significantly, there is no analogous provision in Appellate Rule 4(a) concerning civil appeals. *See* FED. R. APP. P. 4(a). The Second, Third, Sixth, Tenth, and Eleventh Circuits may have each relied upon this reading of Appellate Rule 4(b)(5) to conclude that *Hamer* only applies to civil appeals.

Accordingly, the *Carman* decision is clearly implicated here. Further, the decisions in *Goolsby*, *Pawlowski*, *Griffith*, and *Cabezas* are also implicated.

III. Petitioner is not confined to the same arguments which were advanced in the court below.

The Government invites this Court to avoid review of petitioner's second issue—whether the filing of a notice of appeal divests a district court of jurisdiction to enter a preliminary order of forfeiture—under the "not pressed or passed upon below" rule. BIO 18-19. Even assuming, without conceding, that petitioner's second issue was not raised below, this does not deprive this Court of jurisdiction or pose any "insuperable bar" to review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). *See also*

Illinois v. Gates, 462 U.S. 213, 219 (1983) (issue "not pressed or passed upon below," may present a prudential or discretionary restriction, not a *per se* lack of jurisdiction); *Heath v. Alabama*, 474 U.S. 82, 87 (1985) (failure to raise below not jurisdictional).

In *Gates*, the Court discussed the character of the "pressed or passed upon" rule stressing that the rule is applied differently depending upon the procedural posture of the case. *Gates*, 462 U.S. at 218-19. Therein, review was sought from a state supreme court decision and the "pressed or passed upon" principle was strictly construed and applied because the case was one where questions were urged by the state that were not "pressed or passed upon" in the state courts below. *Id*. at 217-24. Nevertheless, the Court in *Gates* cautioned that in cases similar to the one *sub judice* where the matter is on review from a federal court, the rule is not as strictly enforced and appellate jurisdiction may still be appropriate even if issues were not "pressed or passed upon." *Id*. at 218-219 (citing *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940)).

The *Gates* Court also distinguishes "enlargement" of questions instructing that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Id*. at 220 (citing *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899)).

In *Dewey*, the Court stated:

> [I]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower

> court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised or argued.
>
> *Id*.

Here, a jurisdictional issue was pressed and passed upon by the Fifth Circuit. *See* Pet. App. 3a-5a. Any "enlargement" of the issue to include petitioner's second issue should certainly be permissible as recognized in *Dewey* and *Gates*.

IV. Petitioner's arguments have merit.

Because petitioner's appeal was pending before the Fifth Circuit, the district court's jurisdiction to decide the motion for a preliminary order of forfeiture and motion for entry of money judgment was confined to: (1) deferring consideration of the motions, (3) denying the motions, or (3) indicating that the motions would be granted if the Fifth Circuit were to remand the case to the district court for that purpose. *See* FED. R. CRIM. P. 37(a) (providing that, where a district court lacks authority to grant a motion because an appeal is pending, the court may "defer considering the motion," "deny the motion," or "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue"). Accordingly, the district court lacked jurisdiction to grant either the motion for a preliminary order of forfeiture or the motion for entry of money judgment. *See Griggs*, 459 U.S. at 58 ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

To be sure, there are exceptions to the appellate divestiture rule. For example, in a subsection titled "Jurisdiction," Appellate Rule 4(b)(5) carves out a single exception for Criminal Rule 35(a): "The filing of a notice of appeal . . . does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a)." FED. R. APP. P. 4(b)(5). Similarly, Appellate Rule 4(b)(3) creates an exception for motions under Criminal Rules 29, 33, and 34. *See* FED. R. APP. P. 4(b)(3)(A)–(B). Neither one, however, creates an exception allowing a district court to grant an untimely motion for a preliminary order of forfeiture or an untimely motion for entry of money judgment. Other exceptions—like district court jurisdiction to issue orders in aid of appellate jurisdiction—likewise do not apply. *See* 16A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 3949.1 (4th ed. 2018) (collecting exceptions).

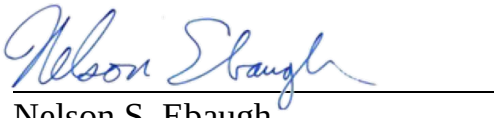
For these reasons and others, the Eighth Circuit correctly concluded that because the error in *Shakur* was "legal" in nature, the trial court was without jurisdiction to enter a preliminary order of forfeiture following the judgment. *Shakur*, 691 F.3d at 988-89. Further, the Sixth Circuit correctly concluded that the defendant's notice of appeal deprived the district court of jurisdiction to enter a forfeiture order. *Carman*, 933 F.3d at 617-618. After all, "[f]iling a notice of appeal transfers adjudicatory authority from the district court to the court of appeals." *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017).

Introducing a wild card into the deck, such as filing an untimely motion for a preliminary order of forfeiture after adjudicatory authority has been transferred to the court of appeals, is conducive to confusion. Therefore, despite the Government's claim to the contrary, petitioner's arguments do have merit.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,



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