

Supreme Court, U.S.  
FILED

JUN 26 2021

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No. 21-128

In the

**SUPREME COURT of the UNITED STATES**

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ROGER WALDNER and GLENN AMBORT,  
Petitioners,

v.

UNITED STATES OF AMERICA,  
Respondent.

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On Petition for Writ of Certiorari  
To the United States Court of Appeals  
For the Eighth Circuit

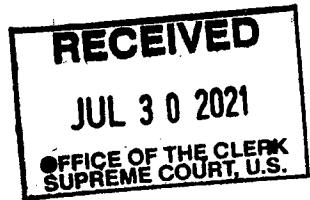
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**PETITION FOR A WRIT OF CERTIORARI**

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## I. **QUESTIONS PRESENTED FOR REVIEW**

In accordance with 18 U.S.C. § 3664(m)(1)(A), the USA may utilize all provisions of 18 U.S.C. § 3613 for the enforcement of an order of restitution.

The USA's garnishment of \$80,000 was identified as restitution in Waldner's criminal case within the 20 years allowed by 18 U.S.C. § 3613 for collection by the USA. The USA's garnishment was timely.

The garnishment was not identified as restitution on Roger's criminal case until 2017.

"Recoupment claims are generally not barred by a statute of limitations so long as the main action is timely." *Reiter v. Cooper*, 507 U.S. 258, 264 (1993).

The following questions are presented for review:

1. Would a GVR Order for a hearing below reveal that no court below gave Glenn a hearing on his recoupment defense?
2. Would a GVR-ordered hearing below likely result in recovery of the \$80,000 without using much of this Court's limited docket?

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## II. ALL PROCEEDINGS BELOW

1. *In re H W Motor Express Co.*, 343 B.R. 208 (N.D. Iowa 2006).
2. *United States v. Waldner*, 564 F.Supp.2d 911 (2:06-cr-01019-LRR-l) (N.D. Iowa 2008).
3. United States Court of Appeals for the Eighth Circuit, No: 20-3705, *United States v. Roger Waldner and Glenn Ambort* (February 24, 2021).

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## **V. PETITION FOR WRIT OF CERTIORARI**

Roger Dean Waldner and Glenn Ambort (“R&G”) petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, Case 20-3705.

## **VI. OPINIONS BELOW**

The Panel denial of R&G’s appeal, Case 20-3705, of the district court’s judgment, Case 2:06-cr-01019-LRR-1, is unpublished and included at Appendix A (“App.”). The denial of petition for rehearing *en banc* is included in App. B. The opinion of the district court is unpublished and is included in App. C. The district court’s denial of R&G’s Rule 59 motion is unpublished and is included in App. D.

## **VII. JURISDICTION**

R&G seek review of the Eighth Circuit’s denial of their appeal, Case number 20-3705, issued on January 21, 2021, App. F. Their timely petition for rehearing was denied on February 24, 2021, App. G. This petition is timely filed pursuant to Supreme Court Rule 13.3, as modified by this Court’s Miscellaneous Order (07/19/2021). This Court has jurisdiction under 28 U.S.C. § 1291.

## **VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS**

“The liability to pay restitution shall terminate on

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the date that is the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution.” 18 U.S.C. § 3613(b) (partial).

“[A]n order of restitution made pursuant to sections 1 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).” 18 U.S.C. § 3613(c) (partial).

An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title. 18 U.S.C. § 3664(m)(1)(A).

## **IX. STATEMENT OF THE CASE**

### ***a. Background***

The docket in Roger’s criminal case shows the word “garnish” or derivatives thereof in Docs. 122, 123, 126, 127, 130. APP E. None of those documents stated the amount or the basis of the garnishment from Jason Sutton, Attorney at Law, Doc. 123. The garnishment action disappeared from sight.

On September 26, 2017, in related bankruptcy

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case, the Trustee's Final Report (TFR) was filed. APP F (partial) Exhibit A of the TFR, Item 5 stated: "Waldner Restitution Payment From Government," showing an amount of \$85,488.00.

The Asset Notes directly below Item 5 read: "Restitution payments, not consistently received. Amount unknown. Unscheduled asset. The \$80,000 lump sum restitution payment received 7/9/2015 is deemed abandoned by the Trustee."

The TFR was the first document in Roger's criminal case or the H&W bankruptcy case (02-02017) that identified the \$80,000 garnished by the USA as "restitution" in Roger's criminal case (2:06-cr-01019).

Roger had previously received a letter from Attorney Jason Sutton on or about May 25, 2012, Doc. 123 in Roger's criminal case, stating: "Sutton does anticipate that Boyce Greenfield may in the future become in possession or control of assets in which the debtor Roger Waldner may own an interest, namely Eighty Thousand Dollars (\$80,000.00) in settlement proceeds to be paid from Mr. Pokela's malpractice insurer relating to two lawsuits in which debtor Roger Waldner was a plaintiff: Roger D. Waldner and Dawn M. Waldner, individually and d/b/a D & R Express, a partnership, and The One Stop, Inc, a South Dakota Corporation v. A. Thomas Pokela, Civ. 08-387, South Dakota Circuit Court for the Second Judicial Circuit, Minnehaha County, South Dakota; and Roger D. Waldner and Dawn M. Waldner, individually and d/b/a D & R Express, a partnership, and The One Stop, Inc, a South Dakota

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Corporation v. A. Thomas Pokela. Civ. 08-388, South Dakota Circuit Court for the Second Judicial Circuit, Minnehaha County, South Dakota (collectively “the Lawsuits”). The settlement proceeds will only be paid if there is a court determination that there is an enforceable settlement which releases debtor Roger Waldner’s claims against Mr. Pokela. Attorneys Thomas J. Welk and Sutton of Boyce Greenfield defended defendant A. Thomas Pokela in the lawsuits. The parties reached an oral settlement for dismissal of both actions for the payment of Eighty Thousand Dollars (\$80,000.00). A draft settlement agreement has been provided to Timothy James, who is Roger Waldner’s counsel in the Lawsuits, but has not been finalized. Sutton and Boyce Greenfield plan to file a motion to enforce the oral settlement and to interplead the settlement funds into the Court. It is unknown at this time when Boyce Greenfield will receive the settlement proceeds from the Lawsuits.”

APP G.

However, Roger did not receive any notice that the \$80,000 had been delivered to the district court.

**b. Lack of Notice & Hearing.**

App. H, the USA’s Motion For Entry Of Final Order In Garnishment, stated: “The defendant was served with a copy of the Writ of Garnishment and notified of his right to a hearing. The defendant has not requested a hearing to determine exempt property.” See ¶3. It contains no certificate of service. The brief ISO the Motion, likewise, contains

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no certificate of service. APP I.

The district court issued its Final Order In Garnishment on September 6, 2012. APP J. Again, no certificate of service is shown on the Order or in the docket sheet. APP E.

The Termination Of Garnishment And Notice Of Final Accounting, APP K, states, at 1: "You are notified that you have ten (10) days from the receipt of the final accounting to file a written objection to the accounting and request a hearing in accordance with Title 28, U.S.C. § 3205(c)(9)(B)."

This Termination document, at 2, contains a certificate of service that states, in part, "COPIES TO: Roger Waldner" but no address.

Yet, Roger never received a copy of Docs. 126, 126-1, 127, or 130 (the termination document).

It is helpful to note that Doc. 126, APP H, states, at ¶ 1: "An Application for Writ of Garnishment was filed by the United States of America, and a Writ of Garnishment directed to Garnishee *was duly issued and served upon the Garnishee.*" (Italics added). No mention is made of the Application or the Writ being served upon the Defendant (Roger).

Roger has vehemently claimed from shortly after he was coerced into signing the plea agreement in his criminal case, that he was legally and factually innocent. He has sought a hearing at every opportunity but has been steadfastly denied one.

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**c. Glenn's Claims in Bankruptcy**

The Judgment in Roger's criminal case, APP L at 5, ordered restitution to be paid to the "Trustee, Northern District of Iowa, Bankruptcy Case No. 02-2017-S."

On or about November 11, 2017, Glenn filed Claims 739-1, 740-1, & 741-1, with the court in the H&W bankruptcy case, for \$50,000, as assignee. He followed on 12/18/2017 with his Consolidated Application for Payment of Unclaimed Funds. APP M. The judge denied them without prejudice:

1. The Trustee's Objection to Ambort's Claims 739, 740, 741 is sustained for the reason that such Claims were filed after the Claims Bar Date.
2. This Order is without prejudice to Ambort seeking recovery of such claims against funds now in the bankruptcy estate (\$80,000) which the Trustee has stated he will remit to the United States District Court for the Northern District of Iowa for administration.

Case # 02-02017, APP N at 1-2 (3/2/2018). Dismissal without prejudice "will also ordinarily (though not always) have the consequence of not barring the claim from other courts." *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (italics in *Semtek*). This was the first notice R&G had that the \$80,000 Jason-garnishment had been

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delivered to the bankruptcy court.

R&G waited patiently for the Trustee to remit the \$80,000 to the district court, as the bankruptcy judge had stated, and for the bankruptcy case to close, so they could file their recoupment counterclaim to the Jason-funds. Even to this day they have not received notice that the restitution funds had been returned to the district court nor did they receive notice that the bankruptcy had been closed, thereby allowing them to appeal.

Finally, on September 8, 2020, after waiting for almost three years for the bankruptcy case to close, R&G filed with the district court their recoupment defense against the USA restitution seizure. APP O.

The district court summarily denied R&G's recoupment defense ten days later. APP P. The district court failed to mention Glenn's claim. Instead, it assumed, without explanation, that the entire \$80,000 belonged to Roger. Glenn was denied a hearing.

The appeals to the Eighth Circuit ensued.

The Eighth Circuit's show cause order, its denial, and the denial of the rehearing are models of brevity. APPs Q, A, B. R&G's Appeal and Petition for rehearing were denied as untimely, without giving any reasons for the alleged untimeliness.

#### **d. Due Process was Violated**

"Due process requires that the notice of a hearing must be . . . reasonably calculated to inform the person to whom it is directed of the nature of the

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proceedings.” *Huntley v. North Carolina State Bd. of Educ*, 493 F.2d 1016, 1019 (4th Cir. 1974) (citing *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 313 (1950)).

The Eighth Circuit show cause order and the two denials thereafter failed to inform R&G why the appeal of their recoupment defense was untimely.

R&G had no idea why their appeal was untimely and no idea how to address the appeal.

Likewise, R&G are not sure what to brief in this Petition for Cert, because the basis for the denials as untimely is not known to them even now.

## X. REASONS FOR GRANTING THE WRIT

**A. A GVR Order, without determining the merits, may be appropriate, leaving it to the lower court to inform R&G of the basis for denial of the appeal as untimely.**

**1. R&G's Appeal was Timely.**

R&G's Response to the Eighth Circuit's Show Cause Order explained in detail that their initial appeal from the district court that their appeal was timely. APP R.

The denial of their appeal failed to identify any basis in support of the denial. APP Q.

**2. Denial of their petition for rehearing also did not inform them why the appeal was untimely.**

The Eighth Circuit denial of R&G's petition

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for rehearing likewise did not inform them as to why their appeal was untimely. APP Q.

The Eighth Circuit's failure to identify why their appeal was denied leaves them ignorant of the basis upon which to seek certiorari from this Court.

3. *The unjust retention of Glenn's funds is immoral and violates the Takings Clause.*

The bankruptcy court specifically stated that Glenn had a right to adjudicate his claims to the \$80,000 in the district court. APP N at ¶2.

Yet, neither the district court nor the appeals court allowed Glenn to adjudicate his claims before them. Instead, the courts allowed the USA to engage in a taking in violation of the Fifth Amendment.

Neither the district court nor the appeals panel devoted a single sentence to Glenn's claims to the \$50,000 assigned to him.

The bankruptcy court gave Glenn the right to adjudicate his claims in the district court. R&G's recoupment claim was Glenn's attempt to comply with the bankruptcy court's order.

This Court has held that "the unjust retention" of money taken even by mistake "is immoral and amounts in law to a fraud on the taxpayer's rights." *Bull v. United States*, 295 U.S. 247, 261 (1935).

A GVR order to provide Glenn a due process hearing is appropriate under the circumstances.

## XI. CONCLUSION

**WHEREFORE**, for the reasons cited and for such other reasons as seem appropriate, Petitioners respectfully ask this Court to issue a GVR Order so that Glenn may have at least one hearing on his claim to \$50,000 of the so-called "restitution" funds.

Dated: July 26, 20221

Respectfully submitted,

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