No. 20-280

IN THE

Supreme Court of the United States

GEORGE GEORGIOU,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

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INTEREST OF *AMICUS 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 files in support of petitioner in this matter because the imposition, without statutory authority, of joint and several liability forfeiture orders violates criminal defendants' Due Process and Eight Amendment rights and can have devastating consequences for such defendants that persist far beyond final judgment. Yet no remedy exists for defendants like Mr. Georgiou unless this Court determines that an extraordinary writ under 28 U.S.C. § 1651 is available. Whether it is available is squarely the question presented here.

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus* and its counsel made any monetary contribution toward the preparation and submission of this brief. No party objected to the filing of this brief upon notice by counsel.

SUMMARY OF ARGUMENT

In *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1633 (2017), this Court held that 21 U.S.C. § 853 does not authorize the Government to impose forfeiture orders against criminal defendants on the basis of joint and several liability. That holding overturned decades of precedent in which numerous Courts of Appeals had ruled that defendants could be held jointly and severally liable to forfeit proceeds or property that co-conspirators had obtained through the conspiracy. *Honeycutt* thus fundamentally changed the landscape of criminal forfeiture actions.

The forfeiture order imposed below, like many before it, contravenes the rule announced in *Honeycutt*. The result is an error that warrants relief in the form of an extraordinary writ under 28 U.S.C. § 1651, such as a writ of coram nobis or audita querela. This is so for at least three reasons. First, where a defendant is punished and deprived of his property pursuant to a forfeiture order that is issued without any lawful authority, that deprivation violates fundamental principles of due process of law—which permit the Prosecutor to take property or exact criminal punishments *only* pursuant to lawful authority—and represents an error that must be corrected on collateral review. See Section I.A, *infra*. Second, when a forfeiture order takes a defendant's property in a situation where Congress has determined that *no* forfeiture at all is permissible, it violates the Eighth Amendment's prohibition on excessive fines. See Section I.B, *infra*. Finally, allowing these fundamental due process and Eighth Amendment violations to stand serves no legitimate public interest. Nor could it because the public, through Congress, has declared its interest to the contrary. The Prosecutor's actions in

this case are thus the equivalent of a theft. See Section II, *infra*.

ARGUMENT

I. A CRIMINAL FORFEITURE ORDER ENTERED WITHOUT AUTHORITY OF LAW IS A FUNDAMENTAL ERROR WARRANTING EXTRAORDINARY RELIEF.

Honeycutt reversed a longtime practice of imposing joint and several liability in criminal forfeiture orders. Interpreting 21 U.S.C. § 853, the Court held that the Government could seek forfeiture only against those who actually "obtained, directly or indirectly," the forfeitable property, and further limited the amount of the forfeiture the Government could seek to "tainted property acquired or used *by the defendant*." *Honeycutt*, 137 S. Ct. at 1633 (emphasis added); see Steven L. Kessler, *Applying the Brakes on a Runaway Train: Forfeiture and Recent Supreme Court Developments*, Champion, Jan./Feb. 2018, at 44 (*Honeycutt* "require[s] the government to trace the property sought to be forfeited to a particular defendant"). The Court's decision rejected the reasoning of longstanding decisions from nine courts of appeal, which had permitted joint and several liability under § 853 or other virtually identical forfeiture statutes. The decision thus fundamentally changed the landscape of criminal forfeiture across the country.

Defendants seeking relief from a sentence infected with a *Honeycutt* error must have a way to navigate this new landscape. Relief under 28 U.S.C. § 2255 is not available in many cases, such as where a defendant has been released from federal custody or the claim is not otherwise cognizable in habeas corpus. As relevant here, lower courts have held that habeas

corpus petitioners may not challenge fines or restitution imposed as part of a criminal sentence. See, *e.g.*, *Kaminski* v. *United States*, 339 F.3d 84, 87 (2d Cir. 2003) ("[Section] 2255 may not be used to bring collateral challenges addressed solely to noncustodial punishments like the one at issue here."); *Blaik* v. *United States*, 161 F.3d 1341, 1343 (11th Cir. 1998) (holding that "§ 2255 cannot be utilized by a federal prisoner who challenges only the restitution portion of his sentence because § 2255 affords relief only to those prisoners who 'claim[ ] the right to be released' from custody" (alteration in original)); *United States* v. *Watroba*, 56 F.3d 28, 29 (6th Cir. 1995) ("The plain language of § 2255 provides only prisoners who claim a right to be released from custody an avenue to challenge their sentences . . . ."). In these circumstances, an extraordinary writ, such as coram nobis or audita querela, serves as an important remedy to correct violations of a defendant's fundamental rights. See *United States* v. *Morgan*, 346 U.S. 502, 512–13 (1954) ("Otherwise a wrong may stand uncorrected which the available remedy would right."). This remedy of last resort is reserved for circumstances in which the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review" is necessary "to achieve justice." *Id.* at 511.

The errors at issue here rise to that level. Forfeiture orders based on joint and several liability are contrary to law and violate fundamental rights, including basic principles of due process and the Eighth Amendment's prohibition on excessive fines. Allowing such orders to persist after final judgment also serves no legitimate public interest. Put simply, the Prosecutor had no statutory right and no legal authority to require George Georgiou to forfeit the property at issue if he

did not personally "obtain" it, "directly or indirectly," and the consequences of that improper deprivation persist to this day. Providing a remedy on collateral review is therefore necessary to achieve justice, warranting the grant of an extraordinary writ in the form of coram nobis or audita querela.

A. The Government's seizure of property without lawful authority violates fundamental principles of due process.

The Due Process Clause ensures that the Prosecutor cannot take an individual's property or exact a criminal punishment without lawful authority exercised through a fair and just process. See U.S. Const. amend. V. A criminal forfeiture imposed without valid authority violates this foundational principle. Permitting such an unauthorized seizure to persist, without any remedy or opportunity for redress, would be the kind of fundamental error warranting extraordinary relief.

As this Court has observed, the Due Process Clause is derived from Chapter 39 of the Magna Carta, which offered "a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed." *Duncan* v. *Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring); *Den ex dem. Murray* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna* [*Carta*]."). The Due Process Clause thus incorporates the idea that there is a fundamental "right to be tried by independent and unprejudiced courts using established procedures and *applying valid pre-existing laws*." *Duncan*, 391 U.S. at 169 (Black, J., concurring) (emphasis added). When

courts impose a criminal sentence without the authority of valid substantive law—where, as here, a sentence is imposed on, and property taken from, a person who falls entirely outside the class of persons covered by the relevant criminal statute—the sentence necessarily violates due process of law.

Courts have repeatedly concluded that extraordinary relief on collateral review is warranted to remedy such fundamental sentencing errors. Indeed, collateral relief is designed precisely to address circumstances where a court lacked authority ab initio to impose a particular sentence, and where the defendant still suffers the consequences of that action. In *Montgomery* v. *Louisiana*, for example, the Court explained (albeit in the context of a statutory review provision) that collateral relief was warranted to remedy a sentence imposed without lawful authority because such a sentence "is not just erroneous but contrary to law and, as a result, void." 136 S. Ct. 718, 731 (2016). The Court endorsed the idea that "[b]roadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense . . . or because the sentence was one the court could not lawfully impose." *Id.* (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970)). It further explained that a court considering such a case on collateral review "has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.*; see also *Welch* v. *United States*, 136 S. Ct. 1257, 1268 (2016) (explaining that substantive rules based on statutory interpretation apply retroactively because "a court *lacks the power* to exact

a penalty that has not been authorized by any valid criminal statute" (emphasis added)).

As a matter of first principles, then, when a court initially lacked the legal authority to impose a sentence—and, as in the circumstances of *Honeycutt*, where an individual's property was unlawfully confiscated as a result of that unauthorized sentence—collateral relief is required to remedy the fundamental violation of the defendant's due process rights. Cf. *Lowery* v. *Estelle*, 696 F.2d 333, 337 (5th Cir. 1983) ("An absence of jurisdiction in the convicting court is . . . a basis for federal habeas corpus relief cognizable under the due process clause."). If no statutory mechanism exists for such relief, extraordinary relief under a writ of coram nobis or audita querela is appropriate.

B. Forfeiture orders based on joint and several liability violate the Eighth Amendment when the defendant received no proceeds from the crime.

Forfeiture orders based on joint and several liability or otherwise directed at property the defendant never obtained, directly or indirectly, as "proceeds," may result in excessive and arbitrary punishment in many circumstances. When such orders are imposed against defendants who obtained no personal financial benefit from the crime, they violate the Eighth Amendment. They therefore represent fundamental errors warranting coram nobis relief for that reason as well.

The *Honeycutt* decision brought about a "sea change" in criminal forfeiture law by requiring the Prosecutor to tether forfeiture orders to the individuals who actually obtained proceeds or property from a crime. See Sharon C. Levin et al., NYU School of Law; Compliance and Enforcement, *Supreme Court*

Substantially Reduces Government's Ability to Seek Criminal Forfeitures (June 15, 2017), https://bit.ly/2rvbU9i. Prior to *Honeycutt*, the Government would frequently identify the total proceeds obtained through the commission of a crime and impose a forfeiture order for that amount against each defendant jointly and severally, without tying the amount in the order to the individuals who actually obtained the proceeds. *Id.* As a result, forfeiture orders based on joint and several liability often resulted in criminal penalties that had no relation to the defendant's acquisition of tainted property or the defendant's ability to pay the judgment.

Even if a defendant could not pay the entire forfeiture judgment, the practice prior to *Honeycutt* allowed the government to seek forfeiture of whatever resources a defendant had available, regardless of whether the forfeited property was in any way acquired through or tainted by the crime. Such forfeiture orders "can be financially devastating," because "the loss of funds that would otherwise be used to cover basic needs—a vehicle one depends on to get to work or school, or a family home—can have profound consequences for those against whom forfeiture is imposed." Beth A. Colgan, *Fines, Fees, and Forfeitures, in* 4 *Reforming Criminal Justice* 205, 207 (Erik Luna ed., Acad. for Justice 2017).

The Eighth Amendment prohibits the imposition of "excessive fines," U.S. Const. amend. VIII, and serves to "limit[] the government's power to extract payments, whether in cash or in kind, as punishment for some offense," *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998). The Supreme Court has held that forfeiture orders entered as part of a criminal sentence are punitive for purposes of the Eighth Amendment, and thus subject to its limitation on "excessive" fines.

Id. at 328–34; see also *Alexander* v. *United States*, 509 U.S. 544, 558 (1993) (holding that forfeiture of assets used and proceeds from a RICO enterprise is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine'").

In determining whether a fine is excessive, courts typically assess whether the fine is "grossly disproportional to the gravity of [the] defendant's offense." *Bajakajian*, 524 U.S. at 334. Fundamental to that inquiry, however, is an analysis of what the legislature would have considered an appropriate punishment for the offense. In *Bajakajian*, the Court explained that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," *id.* at 336, and that "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," *id.* (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 (1983)). It follows that where Congress has not authorized a particular type of punishment *at all*—as in the case of a forfeiture order based on joint and several liability or otherwise not limited to proceeds the defendant actually obtained—an imposition of that type of punishment may be excessive, because it disregards the legislature's judgment that no punishment of the particular type is warranted. Imposing a kind of punishment the legislature thought should never be imposed at minimum raises serious questions under the Eighth Amendment.

Where an unauthorized forfeiture order is imposed on a defendant who did not receive the proceeds of the crime, the punishment is clearly excessive, and squarely violates the Eighth Amendment. In such instances, the statute provides that the Prosecutor

does not have authority to impose any criminal forfeiture at all, under any theory of liability, because there are no proceeds to forfeit under direct liability, and no forfeiture can be imposed under a theory of joint and several liability. See *Honeycutt*, 137 S. Ct. at 1633. Such situations thus cannot be rationalized as merely resulting in a somewhat larger fine imposed on someone who was subject to a valid forfeiture of some amount. Instead, they result in a situation where a fine is imposed on a defendant as to whom Congress has determined the maximum permissible fine is zero (or at most a figure substantially less than that imposed).

The imposition of a forfeiture order in these circumstances flatly contradicts the legislature's judgment about what "fine" is appropriate—indeed, about whether any fine is appropriate—and as a result violates the Eighth Amendment. For this reason as well, imposition of such a "fine" is a fundamental error that justifies extraordinary relief.

II. PERMITTING A FORFEITURE ORDER ENTERED WITHOUT LEGAL AUTHORITY TO STAND SERVES NO LEGITIMATE PUBLIC INTEREST.

Providing a remedy for a *Honeycutt* error that violates an individual's Fifth and Eighth Amendment rights is necessary to "achieve justice" not just because it would correct due process and Eighth Amendment violations, but also because leaving the judgment in place serves no legitimate public interest. See *Morgan*, 346 U.S. at 511. In the related context of retroactivity analysis, the Court has recognized the need to balance "the need for finality in criminal cases" against "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law." *Welch*, 136 S. Ct. at 1266. But, "where the . . . sentence

in fact is not authorized by substantive law, then finality interests are at their weakest," because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* (quoting *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring)); see also *Montgomery*, 136 S. Ct. at 732 (noting that the finality "concern has no application in the realm of substantive rules, for no resources marshaled by [the government] could preserve a conviction or sentence that the Constitution deprives the [government] of power to impose"). These same rationales support the conclusion that there is no legitimate public interest in the finality of the judgment at issue here that should prevent subjecting it to collateral review.

Indeed, the finality interest is at its lowest ebb here. As explained in the petition, the record does not support the contention that George Georgiou obtained "millions" in financial benefits from the crime. Pet. 24–25 & n.19. Yet he still forfeited property untainted by the crime under joint and several liability and was liable for disgorgement of sums he never obtained. To remedy that fundamental error, there is no need for a retrial or an extensive rehearing with further introduction of evidence; the Prosecutor need only reimburse petitioner for the value of the forfeited property and cancel the judgment as to any amount that remains uncollected. Even if a rehearing were required, determining the amount—if any—a defendant obtained as a result of the conspiracy is a limited inquiry. "[A] remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1348–49 (2016). That is especially true where a resentencing is necessary to

remedy an unauthorized seizure of property by the Prosecutor. *Molina-Martinez* addressed excess incarceration resulting from a Sentencing Guidelines calculation error. *See id.* at 1341. A similar mistake under forfeiture law is no less an ultra vires punishment. See *S. Union Co.* v. *United States*, 567 U.S. 343, 360 (2012) (holding that fines, like incarceration, are covered by the *Apprendi* doctrine). An extraordinary writ is all the more appropriate here to ensure that Mr. Georgiou and others like him can regain property unjustly forfeited.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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