ASSET FORFEITURE IN FEDERAL CRIMINAL CASES

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TABLE OF CONTENTS

I. Financial punishments in a federal criminal case

Most clients who consult with an attorney when faced with a federal criminal case want to know; "what am I looking at?" The attorney will look at the particular statute, and the more experienced federal practitioner will also consult the wickedly complex Federal Sentencing Guidelines. The lawyer will confidently tell his client, "10-year max, Guideline range of 18-24 months with a plea, likely a bit longer if you are found guilty after a trial." The lawyer and the client are sorely mistaken if they believe these are the only punishments that can be imposed upon a criminal defendant in a federal criminal case.

There are three types of financial penalty that can be imposed in a federal criminal case on top of a custodial sentence. The Judge can impose a "fine." The Court must also require that the Defendant make "restitution." And, most importantly for this presentation, the Government can seek "forfeiture" of the Defendant's assets.

A. Fines

A fine is just what it sounds like, a financial penalty. As a general rule, federal felonies carry a $250,000 maximum for each count of the indictment. 18 U.S.C. §3571(b). An "Alternative Fine" can be even larger if based on the Defendant's pecuniary gain or the victim's loss. §3571(d). Most federal indictments contain

multiple counts, meaning that the fine amount could potentially pile up into the millions of dollars.

Remember those complicated Sentencing Guidelines? These rules also contain a method for calculating the potential fine. Just as they do with the potential for a custodial sentence, the Guidelines express a "range" of potential fines for a Defendant, based on the final "offense level" selected by the Judge after he or she consults these complex rules. U.S.S.G. §5E1.2. For example, for a case with an offense level of 26, 27 or 28, the Guidelines recommend a fine of between $25,000-$250,000.

The Judge is supposed to consider the Defendant's financial ability to pay a fine before imposing this punishment. 18 U.S.C. §3572(a)(1). As a general rule, Courts generally must favor restitution to a victim over a fine imposed upon the Defendant (§3572(a)(4) and §3572(b)), but for the accused person, the result is often the same, an order to pay somebody after being convicted.

A fine is ordered to be due and payable "immediately" upon being sentenced. §3572(d)(1). However, most times there is a payment schedule set up. If the Defendant does not pay the fine during his sentence or supervised release period, the unpaid portion can be converted into a default judgment which the Government can use to go after the person for the next 20 years. 18 U.S.C. §3613(b). An entire subchapter from title 18 of the United States Code is devoted to collection of fines, and these

statutes even sometimes allow for later punishment imposed on a Defendant who willfully avoids payment of a fine when otherwise able to do so. 18 U.S.C. §§3611-3614.

B. Restitution

Restitution is different than a fine or forfeiture, for restitution is supposed to pay back the victim of a crime. Because it has a purpose beyond merely punishing the convicted person, a Defendant can be forced to pay **both** a fine and restitution. The former payments go to the U.S. Treasury, while the restitution amounts go through the Clerk's office and then directly to any identified victims.

Restitution is a creature of statute. For the most part, the practitioner can educate him or herself about federal restitution processes by reading 18 U.S.C.§3663-3664.

C. Forfeiture

Forfeiture is different than, yet similar to, both fines and restitution. The Court orders a convicted person to pay money, and this punishment is above and beyond the custodial sentence, beyond any probation, and beyond any other financial penalty.

The basic theory behind a forfeiture is that, like a fine, it imposes a form of punishment upon the convicted person. The money is paid directly to the Government, not to any victims. The theory is that any property used in or derived from a crime belongs to the Government and must be paid back. As will be developed

further, forfeiture has grown in importance as part of the federal criminal process, and defense counsel need to be aware of this growing financial penalty that clients face.

II. **Types of forfeiture**

As noted before, the theory behind forfeiture is that property used in or derived from a crime belongs to the Government from the point when the crime happened. The opening lines from one of the Supreme Court's most recent forfeiture cases explains this further:

> [F]orfeitures are imposed upon conviction to confiscate assets used in or gained from certain serious crimes. See 21 U. S. C. §853(a). Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and "lessen the economic power" of criminal enterprises. *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 630 (1989); see *id.*, at 634 ("Forfeiture provisions are powerful weapons in the war on crime"). The Government also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training. See *id.*, at 629–630. Accordingly, "there is a strong governmental interest in obtaining full recovery of all forfeitable assets." *Id.*, at 631.

Kaley v. United States, 571 U.S. 320, 321, 134 S. Ct. 1090, 1094, 188 S. Ct. 46 (2014).

Kaley was a criminal forfeiture case. However, there are two other types of forfeiture that are permitted pursuant to federal statutory authority.

For the most part, any property "subject to forfeiture" may be forfeited administratively, except real property, property worth more than $500,000 and some property forfeitable under a statute that does not incorporate the Customs laws. See 18 U.S.C. §985, 19 U.S.C. §1607(a) and e.g. 18 U.S.C. §492. This means that

the forfeiture process is handled by the agency or department that seized the property. Generally, the person who may have an interest in the property is given notice that he or she can challenge the forfeiture either within the agency's administrative process, or else they can choose to take the case to federal court for a civil forfeiture proceeding.

Civil forfeiture is basically a federal civil case. The United States files a lawsuit against the property itself, an in rem proceeding by which the government alleges that the property is subject to forfeiture. A "claimant" can challenge the complaint. As shown in the attached materials from the case of United States v. 214 Kelvington Way, 3:11-CV-22-TWT, the pleading rules can sometimes help claimants who are challenging the government's ability to forfeit the property.

Civil forfeiture is highly complex and regulated. The statutes governing civil forfeiture are generally found at 18 U.S.C. §§981-987. There are special rules of Civil Procedure applicable to civil forfeitures. A forfeiture complaint for the most part is governed by Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims ("Supplemental Rules"). After some 2006 amendments, an in rem forfeiture complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supplemental Rule G(2)(f). The government's burden of

proof at trial will be to prove that the Defendant Property is subject to forfeiture by a preponderance of the evidence. 18 U.S.C. § 983(c)(1). Because civil forfeiture in rem provides the government with a powerful tool to effectuate an immediate deprivation of property (subject to later judicial review), pleading requirements under the Supplemental Rules are more stringent than the general pleading requirements found in the Federal Rules of Civil Procedure. United States v. $38,000.00 Dollars in U.S. Currency, 816 F.2d 1538, fn. 20 (11th Cir.1987).

Administrative and civil forfeitures are separate from any criminal case. While they are separate proceedings, these forfeiture matters can have a huge impact on a criminal matter. Basically, any Defendant who challenges an administrative or civil forfeiture runs the risk that he or she will have to either make some statement or comply with some discovery request that will conflict with the defense in the parallel criminal matter. Because of this danger, many Defendants in a criminal case ask to "stay" the parallel civil forfeiture proceeding. As will be discussed later, there are a few times when defense counsel can get some advantage by going through these parallel forfeiture proceedings, but for the most part the safer route is to request the stay.

Another thing to consider when there are parallel criminal cases at the same time the government is pursuing either administrative or civil forfeiture is the impact of asserting the

client's Fifth Amendment right to not answer questions. A recurring fact pattern is when law enforcement seizes property, for example, in a vehicle stop that reveals a large quantity of hidden currency. The client wants his or her money back, sometimes needing it to pay counsel for representation in the ongoing criminal case where the Government alleges that the seized money is one more piece of evidence. However, the wise attorney knows that if the client makes a claim for the money, the client may be required to sit for a deposition. While the client can always assert his Fifth Amendment right, the government then gets what is called an "adverse inference", meaning that they basically will win the civil forfeiture. This is yet one more reason why many practitioners recommend that their clients seek a stay of the parallel civil forfeiture proceeding when handling the criminal case emanating from the same facts.

III. **Scattered Rules Governing Criminal Forfeitures**

Lawyers who handle criminal cases in federal court are somewhat familiar with how Congress and various agencies love to scatter the rules and regulations all over the United States Code, the Code of Federal Regulations and other places. The same practice is true for criminal forfeitures, for the basic rules and standards are in disparate locations. The following is a partial list of the basic rules and where to find them.

A specific statute is entitled "criminal forfeiture," 18 U.S.C. §982. You think that would end it, read §982 and you know everything you need to know about handling a federal criminal forfeiture. This statute describes how when imposing a sentence, the Court "shall order that the person" forfeit any property "involved in the offense or any property traceable to such property." 18 U.S.C. §982(a)(1). For certain denominated crimes, forfeiture can be ordered for property "constituting, derived from, proceeds the person obtained directly or indirectly as the result of such violation." §982(a)(2). For other crimes, Congress defined forfeitable property as being the "gross proceeds obtained, directly or indirectly, as the result of such violation." §982(b)(5).

So, the wily federal practitioner feels good about him or herself, having scoured §982. Not so fast, for another entire set of statutes within Title 21 of the U.S. Code also impact federal criminal forfeitures. Recall that Title 21 is where all the drug crimes are located, but Congress specifically adopted these dope law forfeiture rules and procedures for just about any other federal crime for which forfeiture can be imposed. 21 U.S.C. §853.

But wait, there's more. Now go over to the laws governing the hated RICO cases, 18 U.S.C. §§1961-1968. You guessed it, more forfeiture rules and procedures, some of which are also cross-referenced back to the "regular" forfeiture cases.

Sorry folks, not done yet with sources of authority governing criminal forfeiture matters, for the now almost downtrodden federal practitioner needs to plow through the Federal Rules of Criminal Procedure. In 2000, the Supreme Court recommended, and Congress adopted Fed.R.Crim.P. 32.2, solely devoted to criminal forfeitures. The Rule has been amended multiple times, so make sure you are reading the most recent version to assure that counsel has the best information on how the forfeiture process might happen.

Finally, it is also worthwhile looking at how the government views these complex matters. Two very good sources of information are published by the Department of Justice. First, there is the United States Attorneys Manual (the "USAM"). https://www.justice.gov/jm/justice-manual The USAM has sections that discuss how and when forfeiture should be requested, when to use civil and administrative forfeiture methods, when and how to settle a forfeiture case, whether it is permissible to go after the attorney's fees in a forfeiture case, and similar issues. USAM 9-111.000-9-121.000. A second helpful source of information is the Asset Forfeiture Policy Manual. https://www.justice.gov/criminal-afmls/file/839521/download This is a compilation of most of the rules and regulations that impact forfeiture matters, and also provides significant insight into how

opposing counsel from the Government will be handing the forfeiture aspect of the case.

IV. **"Typical" Forfeiture Process**

Those attorneys who regularly handle federal criminal cases know that there is no such thing as a "typical" federal case. Despite this, some features related to forfeitures happen often enough so that the practitioner gets to recognize them and learns to counsel her client to be prepared for this form of financial punishment.

A. Seizing the Property

Forfeiture is all about the government's attempt to take property or money from the Defendant. There are three times that the government can try and get the money or property by forfeiture; before the case, at the beginning of the case, or after the sentencing for the criminal case.

Property is often seized by law enforcement officials long before anyone gets indicted in federal court. Many practitioners have handled child pornography cases where the Defendant was lured to a potential meeting with an undercover officer. When the Defendant is arrested, law enforcement regularly seizes computers and anything that was part of the alleged crime. The seized materials become part of the forfeiture allegations in the subsequent criminal indictment, but the government may hold on to

the seized equipment for quite some time before getting an indictment.

The second method of seizing potentially forfeitable property or money is shortly after the indictment has been issued by the Grand Jury. Prosecutors are told to put the forfeiture claims in the indictment so that they can argue that the Grand Jury found probable cause that the property is subject to forfeiture. Armed with this "probable cause", the government can then engage in "pretrial restraint" of the asset. These are fancy words meaning the government then comes and takes the Defendant's property shortly after the ink has dried on the indictment. Kaley v. States, supra, is just such a case.

The Defendants in Kaley knew they were under investigation, so they bought a $500,000 Certificate of Deposit to put aside as legal fees for their incredibly talented defense lawyers. The government got an indictment, and immediately had the bank that held the CD freeze the asset. The Defendants argued that this "pretrial restraint" of their asset unconstitutionally impacted their Sixth Amendment right to secure the counsel of their choice unless they got a hearing where they could challenge whether there was probable causes for the forfeiture. The Supreme Court rejected their arguments.

In a subsequent case, Luis v. United States, ___ U.S. ___, 136 S. Ct. 1083, 194 L. Ed. 2d (2016) the government got a pretrial

order restraining the Defendant's assets that were not even part of the crime. Instead, the prosecution claimed that these basically unrelated assets could be forfeitable pursuant to the "substitute assets" theory. Under this theory, if forfeitable assets have already been spent or hidden, the government can go after the Defendant's other assets that equal the unavailable assets subject to forfeiture. 21 U.S.C. §853(p). The Supreme Court ruled that untainted assets are completely different, and pretrial restraint on these cannot be justified under Sixth Amendment analyses.

The final time that the government can get its hands on assets is during or after the sentencing phase of the case. If the Defendant pleads or is found guilty, the Judge must order the forfeiture of assets set out in the indictment, so long as there is the requisite connection between the asset and the crime as required by the particular statute used in the indictment.

B. The Indictment

Ever since 2000, the Federal Rules of Criminal Procedure have said that a Judge cannot enter a judgment of forfeiture in a criminal case unless "unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of the sentence in accordance with the applicable statute." Fed.R.Crim.P. 32.2(a).

The attached materials contain a somewhat typical federal indictment that includes a forfeiture allegation in the case of United States v. Solarin. Note that the forfeiture is not a separate "count". The Solarin indictment alleges health care fraud and two versions of money laundering. Note that paragraphs 27-29 set out the three distinct methods for forfeiting property, depending on the specific crime. The somewhat different formulations of the distinct forfeiture statutes result in forfeiture if property was used in, derived from or traceable to property in the alleged crimes.

Paragraph 30 then sets out the "substitute assets" theory of forfeiture.

> If, as a result of any act or omission of a defendant, any property subject to forfeiture:
> a. cannot be located upon the exercise of due diligence;
> b. has been transferred or sold to, or deposited with, a third person;
> c. has been placed beyond the jurisdiction of the Court;
> d. has been substantially diminished in value; or
> e. has been commingled with other property that cannot be subdivided without difficulty; the United States intends, pursuant to Title 21, United States Code, Section 853(p) to seek forfeiture of any other property of said defendant up to the value of the forfeitable property. (emphasis added).

Other times, the forfeiture part of the indictment will contain allegations that describe how the government will seek a "money judgment" in the amount of what prosecutors contend was the property subject to forfeiture.

C. Discovery? What Discovery?

Suffice it to say that a criminal case in federal court is sometimes a trial by ambush. The same is true for criminal forfeitures. No rule or constitutional principle requires prosecutors to give you any evidence at all pertaining to their efforts to strip you client of assets under the theory of forfeiture.

D. Negotiating Forfeitures

The wily federal criminal defense lawyer will meet with the Assistant United States Attorney to "work out a deal" in a case where the Defendant will likely get convicted at trial. Understand, the "deal" nowadays often includes the need to account for forfeitures that are either alleged in the criminal indictment or in parallel civil or administrative forfeiture proceedings.

The attached materials contain a Negotiated Plea in the Solarin case which includes an agreement regarding properties that were subject to a parallel civil forfeiture proceeding. The Judge will likely not spend much time on the forfeiture part of the plea agreement at the Guilty Plea proceeding. However, negotiating the forfeiture and including it in the Plea Agreement is only the tip of the iceberg, as will be developed later.

Part of the "deal" in most economic crime cases now includes a requirement that the Defendant basically allow a full financial proctological exam. The attached plea agreements include examples of these "financial cooperation" obligations. These are not the

same obligation to provide financial information to the U.S. Officer. Instead, these are detailed financial forms that are filled out, under penalty of perjury. Then, prosecutors now make it a regular practice to turn this aspect of the post-plea part of the case over to federal prosecutors who are part of "the FLU", shorthand for the Financial Litigation Unit of the US Attorney's Office. Lawyers need to carefully prepare their clients for the dreaded "financial deposition", for a false statement can result in the loss of the reduction for acceptance of responsibility along with an additional 2-level enhancement for obstruction of justice.

E. Forfeiture Trials

Pursuant to Fed.R.Crim.P. 32.2(b)(5), "either party" can ask that the jury make the decision as to whether property is subject to forfeiture. If one side or the other makes such a request, the jurors are kept around for the forfeiture part of the proceedings. There is very little law on this seldom-used aspect of a federal criminal case. Counsel preparing this paper has had only one such trial in 36 years. If there is a jury determination, the jury needs to complete a Special Verdict Form which delineates whether the prosecution has established "the requisite nexus between the property and the offense committed by the Defendant." Fed.R.Crim.P. 32.2(b)(5)(B).

F. Preliminary and Final Order of Forfeiture

If the Defendant either pleads or is found guilty (and either the Jury or Judge made the requisite forfeiture finding), the Court must then enter a Preliminary Order of Forfeiture. The Judge can make this ruling based on evidence already presented at the trial, on the plea agreement, or on "additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." If any issue is contested, the court "must conduct a hearing after the verdict or finding of guilt." Fed.R.Crim.P. 32.2(b)(1)(B).

The Preliminary Order notes that the specified property is subject to forfeiture and does not account for whether third parties might be able to make a claim on the property. That comes later, under Fed.R.Crim.P. 32.2©. Also, the Preliminary Order lets the government go and actually seize forfeitable property if it has not yet done so. Fed.R.Crim.P. 32.2 (b)(3).

Forfeiture is supposed to be finalized by the time of the sentencing hearing and is also supposed to be made part of the Judgment. Fed.R.Crim.P. 32.2(b)(4). Be wary of appeals, for the timing rules when there is an unresolved forfeiture issue are sometimes different than the "usual" federal criminal case. Fecd.R.Crim.P. 32.2(b)(4)(C).

The rules allow for a "stay" of the criminal forfeiture process pending appeal. Fed.R.Crim.P. 32.2(d). Additionally, the forfeiture part of the criminal case can be re-opened if property

is later located or if the government comes across "substitute assets" they want to take away from the already convicted Defendant.

Now, here is where it is important to remember that forfeiture is different than and completely separate from fines or restitution. For example, in a recent bank fraud case counsel's client provided significant cooperation to the government. Victim banks were defrauded, plus the indictment contained forfeiture allegations claiming that the funds the banks gave to the Defendants were subject to forfeiture. The Judge ordered that the cooperating Defendant pay both restitution and forfeiture. It is basically the same money, but more and more Defendants are facing a double financial whack, one time when ordered to pay back the victims (restitution), and a second time when ordered to forfeit the profits from the crime.

V. **Practical tips for handling criminal forfeitures**

As already noted, criminal forfeitures are being used far more frequently in federal criminal cases. These financial penalties can be onerous, and sometimes can follow Defendants for up to 20 years after they finish their prison sentences and period of supervised release. Here are a few suggestions for trying to ameliorate these sometimes harsh penalties.

A. Stay the Forfeiture

As mentioned before, a Defendant needs to make some hard choices when there are civil forfeiture proceedings that parallel a criminal case. The main difficulty is that if the criminal Defendant wants to continue in his or her quest to get back his or her assets, he or she will almost certainly be called on the make some statement or provide answers as to how he or she relates to the seized asset. Most criminal defense lawyers hate having a client say anything prior to trial, no less answer questions from a civil AUSA working alongside the AUSA who is trying to put the Defendant in jail on the criminal case.

One solution to this problem is to seek a stay in the forfeiture proceeding until after the criminal matter has ended. If the Defendant is convicted or pleads guilty, it is far less likely that he or she would win the forfeiture anyway, If the Defendant is acquitted, no harm, he or she can still try to get the seized assets back (but the burden of proof will shift and reduce in any subsequent civil forfeiture trial).

Most prosecutors won't fight a stay, for civil discovery in a parallel forfeiture is a double-edged sword. The criminal prosecutor knows that defense counsel can also depose the case agents and other government witnesses well in advance of the criminal trial as part of the civil forfeiture matter. As a result, most criminal AUSA's will agree to a stay to avoid this happening.

There will always be the odd outlier case where defense counsel sees no problems in letting the Defendant answer questions in the civil forfeiture and sees opportunities when given the chance to depose government witnesses in advance of the criminal trial. Be prepared to see the government seek a stay in these situations, but some judges will refuse to grant the stay under the theory that the government chose to bring the parallel cases and should be stuck with the consequences of such a decision.

B. Consequences of Taking the Fifth

If there is no stay of a parallel civil forfeiture, defense counsel has a hard choice: let the client testify or take the Fifth during the civil discovery process. The dangers from the first option are obvious. Alternatively, refusing to answer questions by relying on the Fifth Amendment protection likely will result in what is called a "adverse inference" against the Defendant in the civil proceedings. For example, if the Defendant refuses to answer the question, "Was the money in the safe deposit box yours?", the government will be allowed to rely on the adverse inference that the answer was "Yes, that was my money."

Again, every case is different, there could be situations where counsel is unconcerned about the adverse inference but be prepared for it if the client decides to rely on the Fifth Amendment during the discovery phase of the parallel civil forfeiture matter.

C. Fight the Civil Forfeiture

The attached materials from the Kelvington Way case show how at the beginning of an investigation, the government will occasionally try to take the Defendant's assets. These attached materials demonstrate that by creative use of the unique pleading rules for civil forfeitures, defense counsel can put the government on its heels, so to speak. Sometimes, an early win in the civil side of the case can be leverage for a better resolution down the road.

D. Fight Pretrial Restraint of Assets

The attached Kaley and Luis cases are premier examples of defense counsel who refused to roll over and play dead when the government seized their client's assets shortly after the indictment was issued. Too often, counsel simply let this happen without a fight. The Luis case shows that if defense counsel can argue that the pretrial restraint took assets completely untainted by any alleged criminal conduct, there is at least a chance of getting some or all of those assets returned well before the trial.

Another subset of this area is the highly dangerous situation in which the government claims that counsel's fees should be seized or potentially are forfeitable if the Defendant is convicted at trial. This is a very complex subject, but if counsel encounters such a situation, always consult with other lawyers, NACDL or

GACDL. No attorney should go it alone through such a dangerous phase of a federal criminal case.

E. Cut a Forfeiture Deal

As also described previously, and as found in the DOJ manuals on forfeitures, the government will sometimes negotiate criminal forfeiture. The attached Negotiated Plea in the Solarin case is a good example of how this can sometimes be done. Counsel can potentially reduce the assets subject to forfeiture, can sometimes have the sale of those assets count toward fines or restitution, and by giving the assets up as part of the "deal", the Defendant is in a much better light when it comes time to ask for the lowest possible sentence. In the Solarin case, the Guideline range was 30-37 months, the client surrendered a series of rental properties, and the Judge ultimately imposed a sentence by which the Defendant served less than a year in custody.

F. Prepare for the Deposition

The government now makes it a regular practice in economic crime cases to require a financial deposition in plea agreements. The client will be deposed by one of the FLU attorneys. The deposition will be an intense focus on all aspects of the client's finances, and the finances of any businesses or family members.

Defense counsel needs to fully prepare the client for this deposition. This includes being prepared to properly assert any

applicable privileges, so long as the privilege was not already waived during the guilty plea colloquy.

CONCLUSION

Forfeitures are now a regular feature of federal criminal cases. Defense counsel need to be more aware of these proceedings than in prior years in order to fully protect their client's rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 3:11-CV-0022-TWT
	)	
214 KELVINGTON WAY, PEACHTREE CITY, FAYETTE COUNTY, GEORGIA 30269, AND ALL BUILDINGS AND APPURTANCES THEREON	)	

CLAIMANTS' MOTION TO DISMISS

COME NOW Claimants Jasen C. Minter and Troy Minter, by and through undersigned counsel, and hereby move to dismiss the complaint in this civil forfeiture case, pursuant to Fed. R. Civ. P 12(b)(6).

Claimants will first outline the allegations in the Complaint. Next, Claimants will look at the standards by which such pleadings must be judged. Finally, Claimants will demonstrate that the Complaint here fails to state a claim upon which relief may be granted.

THE COMPLAINT

Plaintiff United States of America filed a verified forfeiture Complaint against 214 Kelvington Way, Peachtree City, Fayette County, Georgia 30269 (hereinafter "the Defendant Property"). The Complaint seeks forfeiture pursuant to 18 U.S.C. §981(a)(1)(C) (for supposed violations of 18 U.S.C. §641 and §1343), and pursuant to

18 U.S.C. §981(a)(1)(A) (for purported violations of 18 U.S.C. §1956(a)(1)(B)(i)).

Claimant Jasen Minter is the owner of the Defendant Property, where he resides with his wife and four children. Jasen Minter is a Major in the United State Army. At the time when the Defendant Property was purchased, Jasen Minter had the rank of Captain. Claimant Troy Minter is Jasen Minter's father. Troy Minter attended the closing when Jasen Minter purchased the Defendant Property, and is named as a co-owner of the real estate.

In May, 2008 the U.S. Military performed an audit concerning the "Limited Depository Account" ("LDA") for a base located in Saudi Arabia. The audit showed a discrepancy of approximately $2.7 million dollars. (Complaint, paragraph 4).

The U.S. Military conducts banking services at this particular facility in Saudi Arabia. The LDA at this base is kept at Samba Bank in Riyadh, Saudi Arabia. This account is funded from the U.S. Treasury. Large amounts of both U.S. and Saudi currency are required to fund the operations at this base. The currency is removed from the LDA account. The only persons allowed to retrieve currency from this account at Samba Bank are two members of the military, the Disbursement Officer and the Deputy Disbursement Officer. These officers inform the bank ahead of time they are coming for the currency. The Disbursement Officer and Deputy Disbursement Officer must immediately return to the base and

present the money to the Cash Control Officer for logging. (Id., paragraph 5-8).

On January 17, 2006 then-Captain Minter was assigned the position of Finance and Accounting Officer at this military facility in Saudi Arabia. Three days later Captain Minter confirmed his appointment and asked that a Sergeant Nock be added as a signatory to the LDA bank account. Until December 4, 2006, Captain Minter and Sgt. Nock were the only U.S. Military officers with access to the LDA account for purposes of conducting transactions. (Id., paragraphs 9-11).

On June 12, 2006 Captain Minter signed a withdrawal slip showing he had accepted approximately $1.2 million in U.S and Saudi currency from the Samba Bank. The withdrawn currency was not presented to the Cash Control Officer for logging or entry into the cash vault back at the base. On August 30, 2006, Captain Minter signed withdrawal slips showing he had accepted approximately $1.5 million in U.S. and Saudi currency. Again, this currency was not presented to the Cash Control Officer for logging or entry into the vault at the base. (Id., paragraphs 12-19).

Captain Minter earned a salary of approximately $70,000 per year between 2006 and 2009. His wife is a home-maker and had no outside income during this time frame. Co-Claimant Troy Minter is alleged to be retired with benefits of approximately $30,000 each year. Between 2006 and 2008 cash deposits of approximately

$197,000 were made to accounts associated with either the Claimants or their spouses. (Id. Paragraphs 20-24).

The Defendant Property was purchased for a contract price of $618,000 in February, 2008. The property is titled in the name of each of the Claimants. Around $135,000 was paid on or prior to the closing date. Almost $119,000 of this amount is attributable to cashiers checks that were purchased with cash that was deposited to various accounts between June, 2006 and the date of closing. (Id., paragraphs 25-33).

The Complaint alleges that these facts support forfeiture in that the Defendant Property constitutes or is derived from proceeds that are traceable to specified unlawful activity. Specifically, the Complaint alleges three crimes that supposedly support forfeiture: theft of government property (18 U.S.C. §641), wire fraud (18 U.S.C. §1343), and money laundering designed to conceal the source, ownership or control of the proceeds of specified unlawful activity (18 U.S.C. 1956(a)(1)(B)(1)).

The Complaint does not allege the following: that then-Captain Minter took the currency that never made its way to the vault, that Captain Minter removed such U.S. currency out of Saudi Arabia, that Captain Minter deposited any stolen currency into any bank account, that Captain Minter made any cash deposits into the accounts named in the Complaint, or that any of the funds used to purchase the Defendant Residence are in any way connected to the supposedly

missing $2.8 million in currency. Likewise, the Complaint does not allege that Troy Minter did anything other than attend the closing for the purchase of the Defendant Property.

STANDARDS FOR JUDGING FORFEITURE COMPLAINTS

Recent decisions and rule changes demonstrate that courts must now assess forfeiture complaints more carefully. As will be set out below, these changes show that the Complaint here cannot withstand this more stringent scrutiny.

Part of this stricter method for looking at complaints emanates from recent cases interpreting the Federal Rules of Civil Procedure. Until recently, a complaint could not be dismissed under Rule 12(b)(6) unless it appeared certain that plaintiffs could prove no set of facts which would support their claim and entitle them to relief. The Supreme Court recently did away with this "no set of facts" standard. In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Court held that the "no set of facts" standard only describes the "breadth of opportunity to prove what an adequate complaint claims, not the minimum adequate pleading to govern a complaint's survival." Id., at 563. The Court specifically rejected the "no set of facts" standard because it would improperly allow a "wholly conclusory statement of claim" to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support

recovery." Id., at 561 (alteration in original). To survive a Rule 12(b)(6) motion after Twombley, a plaintiff must allege facts in its complaint that "raise a right to relief above the speculative level." Id., at 555.

> [A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do....

Id. (second alteration in original; citation omitted). Further, a complaint will not survive Rule 12(b)(6) review where it contains "naked assertion[s] devoid of further factual enhancement." Id., at 557. Instead, plaintiffs must now plead sufficient facts to state a claim for relief that is "*plausible* on its face." Id., at 570 (emphasis added).

The Court again visited the Rule 12(b)(6) pleading standard in Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (May 18, 2009). In Ashcroft, the Court determined that Rule 8 "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." Id., S.Ct., at 1949. The Court explained that, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" Id. (citing Twombly, is plausible is defined by the Court:

> [A] claim has facial plausibility when the plaintiff pleads sufficient factual content

> that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. This "plausibility standard" requires "more than a sheer possibility that a defendant has acted unlawfully." Id. Thus, a complaint falls short of the plausibility standard where plaintiff pleads "facts that are 'merely consistent with' a defendant's liability . . . ." Id.

Iqbal and Twombly construed the Federal Rules of Civil Procedure. This is a forfeiture complaint, which for the most part is governed by Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims ("Supplemental Rules"). However, as one court recently explained:

> to the extent these decisions (Iqbal and Twombly) and their progeny do not conflict with the Supplemental Rules, they may help to clarify when a civil forfeiture complaint survives the motion to dismiss phase.

United States v. $22,173.00 in U.S. Currency, 2010 WL 1257601 (S.D.N.Y. March 30, 2010).

Changes to the Supplemental Rules reiterate this more stringent method for assessing forfeiture complaints. On December 1, 2006, Rule G of the Supplemental Rules replaced the *in rem* forfeiture provisions of Rule E(2). Prior to 2006, complaints in forfeiture actions were governed by Rule E(2)(a) of the Supplemental Rules. The 2006 Amendments added a new Rule G, supplanting Rule E(2)(a) and governing procedures in civil forfeiture actions. See Rule E

of Supplemental Rules, Advisory Committee's note; Rule G of Supplemental Rules, advisory committee's note on 2006 adoption. Under Rule G of the Supplemental Rules, a complaint in an *in rem* forfeiture case must:

> (a) be verified;
>
> (b) state the grounds for subject-matter jurisdiction, *in rem* jurisdiction over the defendant property, and venue;
>
> (c) describe the property with reasonable particularity;
>
> (d) if the property is tangible, state its location when any seizure occurred and-if different-its location when the action is filed;
>
> (e) identify the statute under which the forfeiture action is brought; and
>
> (f) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

After these 2006 changes, an *in rem* forfeiture complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof *at trial.*" Supplemental Rule G(2)(f)(emphasis added). The government's burden of proof at trial will be to prove that the Defendant Property is subject to forfeiture by a preponderance of the evidence. 18 U.S.C. § 983(c)(1). Because civil forfeiture *in rem* provides the government with a powerful tool to effectuate an immediate deprivation of property (subject to later judicial

review), pleading requirements under the Supplemental Rules are more stringent than the general pleading requirements found in the Federal Rules of Civil Procedure. United States v. $38,000.00 Dollars in U.S. Currency, 816 F.2d 1538, fn. 20 (11th Cir.1987).

Judge Edenfield from the Southern District of Georgia recently provided a good example of how to evaluate forfeiture complaints in this new regime. In United States v. $21,408.00, ___F. Supp. 2d _, (S.D. Ga. 2010)(2010 WL 4687876) the government sought forfeiture of currency that the Claimant possessed while traveling in a taxi from Connecticut to Florida. The Claimant had been unemployed for the previous six months, the cash was "oddly-packaged" (approximately $21,000 in Claimant's pockets and about $161,000 in camping bags in the vehicle's trunk), Claimant was traveling through a known drug corridor, he made false statements to the officers, and police dogs alerted to the presence of drugs on the currency. The complaint alleged that the cash was subject to forfeiture for two reasons: 1) the money was traceable to a drug exchange, or used to facilitate a drug deal, in violation of 21 U.S.C. §881(a)(6), and 2) the money was traceable to money laundering (18 U.S.C. §1956), transactions in property involving specified unlawful activity (18 U.S.C. §1957) or an unlawful money transmitting business (18 U.S.C. §1960).

Judge Edenfield found that the first theory of forfeiture could survive a Motion to Dismiss. The confluence of facts raised

a reasonable belief that the seized cash was traceable to a drug transaction. However, the Court there dismissed the second theory of forfeiture, the allegation that the cash was associated with various forms of money laundering. The complaint mentioned nothing about any transactions, and alleged mere possession of the currency. Under the more stringent method for assessing forfeiture complaints, this second theory was deemed to be insufficient.

THE COMPLAINT HERE IS INSUFFICIENT

Under the rules for assessing forfeiture complaints, the Court should grant Claimants' Motion to Dismiss, pursuant to Fed.R.Civ.P. 12(b)(6). The Complaint lacks facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

Troy Minter

Concerning Claimant Troy Minter, the complaint is woefully lacking in detail. As noted before, Troy Minter is Major Minter's father.

The complaint alleges that Troy Minter's name is on the Defendant Property, that Troy is retired and that cash deposits amounting to over $197,000 were made to various accounts during the period between 2006 and 2008. While the Complaint alleges that such deposits were made to accounts associated with both Claimants and their wives, the Complaint does not allege that such deposits were made after the time when the cash came up missing in Saudi

Arabia. The Complaint likewise does not allege who made such deposits.

The only specific details concerning Troy Minter are found at paragraphs 29-30 in the Complaint. First, paragraph 29 alleges that at least $29,400 of the funds paid at or before the closing on the Defendant Property came from checks drawn on an account in Troy Minter's name. The Complaint does not allege that Troy Minter wrote or authorized these checks. Second, Plaintiff alleges that three cash deposits in the amount of $9,800 each preceded the purchase of checks drawn on this account. Once again, the Complaint does not allege that Troy Minter made such deposits.

The Complaint seeks forfeiture because the government contends that the Defendant Property was purchased with funds that are traceable to theft or embezzlement of government property, wire fraud and money laundering. Not one allegation connects Troy Minter to any theft or embezzlement. Likewise, there is not a single allegation that he engaged in any wire transaction. Money laundering requires proof of an antecedent crime that results in a later financial transaction involving "dirty money". With no connection between any theft or fraud, there simply is no way the government can ever prove that some random deposits or checks from Troy Minter's bank account can justify the forfeiture of the Defendant Property.

The Complaint does not support a reasonable belief that the government will be able to meet its burden of proof at trial concerning Troy Minter. He asks that this Court grant this Motion to Dismiss as to him.

Jasen Minter

The Complaint likewise lacks detail supporting a reasonable belief that the government will be able to meet its burden of proof at trial concerning Jasen Minter. Reduced to its essentials, the Complaint alleges that Jasen Minter had access to cash in Saudi Arabia, that the cash was never logged into the vault where it was supposed to be deposited, and that Jasen Minter bought a house worth over $600,000. The Complaint does not allege any facts showing that Jasen Minter took any government money or property, that he transmitted any currency anywhere, and, most importantly, that any transactions associated with the Defendant Property had any connection whatsoever with what happened in Saudi Arabia where two years later the Army realized it was missing a large volume of currency. These allegations do not yield a reasonable belief that the government will be able to meet its burden of proof at trial. Jasen Minter asks that this Court grant this Motion to Dismiss.

(Signature on following page)

Dated: This 26th day of April, 2011.

Respectfully submitted,

/s/ Paul S. Kish
PAUL S. KISH
Georgia State Bar No. 424277
ATTORNEY FOR JASEN C. MINTER
and TROY MINTER

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing filing into this District's ECF System, which will automatically forward a copy to counsel of record in this matter.

Dated: This 26th day of April, 2011.

/s/ Paul S. Kish
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 3:11-CV-0022-TWT
	)	
214 KELVINGTON WAY, PEACHTREE CITY, FAYETTE COUNTY, GEORGIA 30269, AND ALL BUILDINGS AND APPURTENANCES THEREON	)	

CLAIMANTS' REPLY TO GOVERNMENT'S
RESPONSE CONCERNING MOTION TO DISMISS

COME NOW Claimants Jasen C. Minter and Troy Minter, by and through undersigned counsel, and hereby Reply to the Response filed by the Government Concerning Claimants' Motion to Dismiss.

The Government's Response helpfully explains the glaring factual hole in the Complaint. This explanation demonstrates why the Complaint cannot withstand a Motion under Fed.R.Civ.P. 12(b)(6).

Claimants will first explain this factual issue. Next, Claimants will reply to the remainder of the Government's Response.

THE HOLE IN THE COMPLAINT

The Government argues that the Complaint alleges "an abundance of facts that are sufficiently particular . . .". Plaintiff then summarizes these facts:

> Specifically, the complaint alleges what funds were taken from the United States, lists out what individuals had access to such funds during the time frame the funds were stolen,

> explains that the funds were provided by Samba Bank in currency, details the known, legitimate income of Jasen and Troy Minter, lists the costs of the Defendant Property, alleges that the Defendant Property was purchased after the theft of funds, and explains that a portion of the payment for the Defendant Property originated from currency.

Government Response, at 11.

What is missing from this recitation is any allegation that "the payment for the Defendant Property originated from [**the stolen**] currency." Reduced to the basics, the government has simply failed to allege that the stolen money had anything to do with the purchase of the Defendant Property. Without such a connection, there simply is no "reasonable belief that the government will be able to meet its burden at trial", as required by Supplemental Rule G(2).

The Complaint cannot ever form the basis for forfeiture of the Defendant Property without some connection between a crime and the house. The Government never makes any such allegation. As a result, this Court should grant this Motion to Dismiss.

THE GOVERNMENT'S REMAINING ARGUMENTS

The Government's remaining arguments require little discussion in light of the major factual problem identified above. Claimants will respond briefly to these arguments, and will demonstrate that the glaring hole in the Complaint cannot be filled with the Government's various citations and contentions.

1) Claimants agree with the Government concerning the basic standard for assessing Complaints under Supplemental Rule (G)(2). Claimants also agree that the Federal Rules of Civil Procedure do not completely govern this issue. However, as noted in the cases cited in the Motion to Dismiss, many courts look to the Civil Rules for guidance in this arena.

2) Claimants likewise agree that the Government does not need to have all its evidence lined up at the time it files the Complaint for forfeiture. However, not having evidence is very different from failing to allege a connection between any crime and the purchase of the Defendant Property.

Whether the government has its evidence now or gets it later, the Complaint must contend that the Defendant Property falls within one of the alleged forfeiture theories. There are two theories alleged in the Complaint here, one pursuant to 18 U.S.C. §981(a)(1)(A), the other citing to §981(a)(1)(C).

Under the §981(a)(1)(A) theory used here, the Government must allege that the Defendant Property was involved in a transaction or attempted transaction in violation of one of the money laundering statutes. Again it bears repeating, no such allegation is contained in the Complaint. A reader can scour the Complaint for hours and will never see any connection between the Defendant Property and a money laundering violation. The reason is that the Complaint never alleges (because the Government will never be able

to prove) that any financial dealings related to the Defendant Property were in any way connected to the theft of currency in Saudi Arabia.

The §981(a)(1)(C) forfeiture theory requires an allegation that the Defendant Property constitutes or is derived from proceeds traceable to specified unlawful activity (here, theft of government funds and wire fraud). Once again, the Complaint does not allege that the Defendant Property either "constitutes . . . proceeds traceable to specified unlawful activity." Likewise, the Complaint does not allege that the Property is "derived from proceeds traceable to specified unlawful activity." Instead, the Complaint alleges that somebody stole some currency, and that later a part of the down payment for the Defendant Property was paid in currency. The Complaint never connects these two activities, and without such a connection, the Court must grant this Motion.

3) The Government contends that the Motion to Dismiss confuses the issues of ownership with the question of forfeiture. Government Response, at 12-14. Once again, Claimants agree that, in the abstract, ownership issues are separate from the question of whether a Complaint alleges sufficient grounds for a "reasonable belief that the government will be able to meet its burden at trial."

However, Claimants are not currently raising defenses based on innocent ownership. Instead, Claimants have clearly pointed out

the glaring factual hole in the Complaint. The Complaint quite simply fails to connect the Defendant Property to any activity that could support forfeiture. Innocent ownership has nothing to do with this hole in the allegations.

4) The Government wants permission to amend the Complaint if this Court grants the Motion to Dismiss. Claimants object. Defendant Property is the family home of Major Minter, his wife and four children. They are basically held hostage by the Government's action. The Government will never be able to connect a crime with the Defendant Property, and under these circumstances this Court should not grant leave to amend the complaint.

Dated: This 24th day of May, 2011.

Respectfully submitted,

/s/ Paul S. Kish
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and TROY MINTER

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing filing into this District's ECF System, which will automatically forward a copy to counsel of record in this matter.

Dated: This 24th day of May, 2011.

/s/ Paul S. Kish
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Georgia State Bar No. 424277
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. 214 KELVINGTON WAY PEACHTREE CITY, FAYETTE COUNTY, GEORGIA 30269 AND ALL BUILDINGS AND APPURTENANCES THEREON, Defendant.	CIVIL ACTION FILE NO. 3:11-CV-22-TWT

ORDER

This is a civil forfeiture action. It is before the Court on the Claimants' Motion to Dismiss [Doc. 13]. The Complaint suggests – but does not allege – that Major Minter stole millions of dollars in cash from the United States Army and used it to purchase the property in question. Under Rule G, the Complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2)(f). The Government fails to meet that burden when it fails to allege a connection between the theft of the currency in Saudi Arabia and the purchase of the property to be forfeited. The Government has 21 days from the docketing of this Order to file an amended complaint that satisfies

the pleading requirement of Rule G.

SO ORDERED, this 31 day of May, 2011.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNDER SEAL

UNITED STATES OF AMERICA

v.

OLUWATOYIN SOLARIN

Criminal Indictment

No. 1 16-CR-206

THE GRAND JURY CHARGES THAT:

Count One

Conspiracy to Commit Health Care Fraud
(18 U.S.C. § 1349)

1. Beginning on a date unknown, but from at least in or about April 2009, and continuing through in or about November 2013, in the Northern District of Georgia, the defendant, OLUWATOYIN SOLARIN, did combine, conspire, confederate, agree, and have a tacit understanding with others known and unknown to the Grand Jury to commit health care fraud, that is, to knowingly and willfully execute and attempt to execute a scheme and artifice to defraud Medicaid, which is a health care benefit program affecting commerce, and to obtain by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, the Georgia Medicaid Program and Peach State, in connection with the delivery of and payment for health care benefits, items, and services, in violation of Title 18, United States Code, Section 1347.

Background

At all relevant times to the Indictment:

2. "Care Dental" was a dental clinic with offices in the cities of Doraville, Georgia and Duluth, Georgia, within the Northern District of Georgia. The defendant, OLUWATOYIN SOLARIN, was a licensed dentist and was the primary owner of Care Dental.

3. "Care Investment Properties" and "Care Global Properties" were both registered with the Georgia Secretary of State as for profit businesses. The defendant, OLUWATOYIN SOLARIN, was involved in operating both of these businesses, which are real estate management firms.

4. The Georgia Medicaid Program, administered by the Georgia Department of Community Health ("DCH"), Division of Medical Assistance, was established to provide an array of health care services and benefits to those who, due to economic circumstances, could not otherwise afford such health care services and benefits.

5. The Georgia Medicaid Program is a state-administered healthcare program which provides certain healthcare services for eligible citizens who qualify based on income level under state guidelines. The Georgia Medicaid Program ("Georgia Medicaid") is a "healthcare benefit program" as defined in Title 18, United States Code, Subsection 24(b). Georgia Medicaid is jointly funded by the State of Georgia and federally by the United States Department of Health and Human Services through the Centers for Medicare and Medicaid Services.

Individuals who receive benefits under Georgia Medicaid are commonly referred to as Medicaid "recipients"; specifically those whose providers are reimbursed on a per-service basis through Georgia Medicaid itself, as opposed to managed care entities, are referred to as "fee-for-service" recipients.

6. Peach State Health Plan of Georgia Medicaid ("Peach State") is a managed care entity contracted with Georgia Medicaid to oversee the care of certain Georgia Medicaid recipients who qualify. Peach State is a "healthcare benefit program" as defined in Title 18, United States Code, Subsection 24(b). DentaQuest is a dental benefits administration contractor which receives, processes, and pays dental care providers enrolled with Peach State. Many Peach State Medicaid recipients initially join Medicaid as fee-for-service recipients before moving to Peach State. Peach State is authorized to reimburse medical providers at differing rates than Georgia Medicaid's fee-for-service program pays per service rendered.

7. In order to request reimbursement from Georgia Medicaid or Peach State for services, medical providers, including dentists, must be assigned a unique provider number, and be personally qualified and eligible under Georgia Medicaid policies. As a term of participating in any Medicaid program in Georgia, enrolled providers agree to abide by all applicable Medicaid policies and procedures and agree to take responsibility for all claims for medical services submitted to Medicaid programs for reimbursement. The defendant, OLUWATOYIN SOLARIN, was an enrolled Medicaid provider who was assigned a provider number by the Georgia Department of Community Health.

8. Enrolled Medicaid providers submit requests for reimbursement by means of a "claim." A claim may be submitted either directly in hard copy or by electronic submission to the Georgia Medicaid Program and its fiscal intermediary, HP Enterprises; claims are similarly submitted to Peach State via DentaQuest. Regardless of the method used to submit a claim, dental claims must contain the dentist's unique provider number, the recipient patient's identifying information, the date of service, and the service code matching the specific services rendered.

9. Providers, such as the defendant, OLUWATOYIN SOLARIN, submit claims with the appropriate Current Dental Terminology (CDT) procedure code. These CDT codes are standardized nationwide to ensure submission of claims across information systems and insurance programs remain consistent. Medicaid providers and their staff are required to remain current on appropriate CDT code usage and only bill for codes that are medically necessary, actually performed, and supported by the required medical documentation in patient files.

10. Within dental services, providers may bill for a variety of CDT codes for medically necessary procedures such as cleanings, tooth extractions, and dental restorations, commonly referred to as fillings or sealants, to repair teeth with cavities or other defects, sometimes referred to as "caries" in the dental community. Each tooth is assigned a unique identifier from a standard mouth diagram to assist in tracking services performed on individual teeth.

11. A currency transaction report ("CTR") is a report that is submitted on United States Department of Treasury ("Treasury") Financial Crimes Enforcement Network Form 104. A domestic financial institution is required by federal law to file a CTR with Treasury for each financial transaction that involves United States currency in excess of $10,000. Such financial transactions include deposits, withdrawals, or exchanges of currency, or other transactions involving the physical transfer of currency from one person to another.

Manner and Means

12. The defendant, OLUWATOYIN SOLARIN, and others known and unknown to the Grand Jury, were responsible for directing the insurance billing practices of Care Dental. The defendant, OLUWATOYIN SOLARIN, caused false claims to be submitted to Georgia Medicaid and to Peach State, through DentaQuest, falsely indicating that patients had received dental services on specific dates of service, when in fact patients had not received those services on the dates in question.

13. The defendant, OLUWATOYIN SOLARIN, caused Care Dental to use her unique provider number to bill for services on dates that she did not perform any services because she was outside of the State of Georgia and sometimes the United States.

14. The defendant, OLUWATOYIN SOLARIN, caused Care Dental to bill for patients who were ineligible for Medicaid services. When patients were brought to Care Dental whose eligibility for Medicaid services had expired, the

defendant, OLUWATOYIN SOLARIN, instructed at least one Care Dental employee to backdate claims to false dates that resulted in successfully paid claims for reimbursement. Under defendant OLUWATOYIN SOLARIN's further direction, when recipient patients were currently eligible for a managed care program that paid a lower rate for services than the fee-for-service Medicaid program, Care Dental backdated claims to false dates within the fee-for-service eligibility period instead to maximize payment.

15. The defendant, OLUWATOYIN SOLARIN, hired another dentist, "M.B.", who was not an eligible Georgia Medicaid provider, and caused Care Dental to submit false claims by billing under her provider name and number for services provided by dentist "M.B."

16. The defendant, OLUWATOYIN SOLARIN, then used the proceeds of the conspiracy to purchase rental properties throughout the Atlanta metropolitan area. The defendant, OLUWATOYIN SOLARIN, withdrew substantial funds from Care Dental accounts and then made deposits under $10,000 into at least one separate bank account, which caused at least one financial institution to fail to file a Currency Transaction Report on several occasions.

All in violation of Title 18, United States Code, Section 1349.

Counts Two Through Ten

Health Care Fraud

(18 U.S.C. §§ 1347 and 2)

17. The Grand Jury re-alleges and incorporates by reference paragraphs 2 through 16 of this Indictment as if fully set forth herein.

18. On or about the dates set forth below, in the Northern District of Georgia, the defendant, OLUWATOYIN SOLARIN, aided and abetted by others known and unknown to the Grand Jury, did knowingly and willfully execute and attempt to execute a scheme and artifice to defraud the Georgia Medicaid Program and Peach State, which are health benefit programs affecting commerce, and to obtain by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, the Georgia Medicaid Program and Peach State, in connection with the delivery and payment for health care benefits, items, and services.

19. In executing the health care fraud scheme, the defendant, OLUWATOYIN SOLARIN, aided and abetted by others known and unknown to the Grand Jury, caused claims to be submitted to Georgia Medicaid and Peach State falsely representing that the defendant, OLUWATOYIN SOLARIN, had performed certain procedures on the below-listed dates when in fact, OLUWATOYIN SOLARIN had not performed the procedures on those dates:

Count	Date of Service	Patient Initials	Last 4 Digits of Medicaid Number	Amount Paid	Medicaid Program
2	8/16/2011	P.M.	2074	$1795.66	Fee-for-Service
3	8/16/2011	T.M.	6668	$1803.51	Fee-for-Service
4	12/28/2011	K.T.	5543	$2219.14	Fee-for-Service
5	1/13/2012	S.R.	6848	$2064.52	Fee-for-Service

Count	Date of Service	Patient Initials	Last 4 Digits of Medicaid Number	Amount Paid	Medicaid Program
6	6/12/2012	A.M.	5628	$1755.30	Fee-for-Service
7	6/22/2012	N.G.	1385	$1470.67	Fee-for-Service
8	9/20/2012	R.L.	7771	$569.96	Peach State
9	3/20/2013	C.N.	7335	$2046.93	Fee-for-Service
10	3/30/2013	R.R.	1059	$598.10	Peach State

All in violation of Title 18, United States Code, Sections 1347 and 2.

Counts Eleven Through Sixteen

Money Laundering

(18 U.S.C. §§ 1957 and 2)

20. The Grand Jury re-alleges and incorporates herein by reference the factual allegations set forth in paragraphs 2 through 16.

21. On or about the dates listed below, within the Northern District of Georgia and elsewhere, the defendant, OLUWATOYIN SOLARIN, aided and abetted by each other and others known and unknown to the Grand Jury, did knowingly engage and attempt to engage in monetary transactions by, through and to a financial institution, affecting interstate commerce, as described below, each such transaction knowingly involving criminally derived property of a value greater than $10,000, such property having been derived from a specified unlawful activity, that is healthcare fraud, in violation of Title 18, United States Code, Section 1347, each transaction constituting a separate count as set forth below:

Count	Date	Monetary Transaction
11	09/22/2011	$18,903.19 wired from Bank of America account ending in 1383 in the name of Care Dental LLC to "K.L.F." referencing "2123 //Grove Way."
12	09/28/2012	$29,000.00 wired from Bank of America account ending in 1383 in the name of Care Dental LLC to "W.N.C." referencing "7700 Bernando Dr."
13	01/11/2013	$39,793.76 wired from Bank of America account ending in 1383 in the name of Care Dental LLC to "O. S. A." referencing "2555 Flat Shoals Rd."
14	01/22/2013	$39,336.96 wired from Bank of America account ending in 1383 in the name of Care Dental LLC to "M &C" referencing "N O 11475 South."
15	07/31/2013	$20,000.00 wired from Bank of America account ending in 1383 in the name of Care Dental LLC to "W. N. C" referencing "File No. SL105-13-0050-RC."
16	08/01/2013	$20,000.00 wired from Bank of America account ending in 1383 in the name of Care Dental LLC to "W.N.C." referencing "Incoming Wire Escrow Account."

All in violation of Title 18, United States Code, Section 1957 and 2.

Count Seventeen Through Twenty

Structuring

(31 U.S.C. §§ 5324(a)(1) and 5324(d))

22. The Grand Jury re-alleges and incorporates herein by reference the factual allegations set forth in paragraphs 2 through 16.

23. On or about the dates specified as to each count below, in the Northern District of Georgia, the defendant, OLUWATOYIN SOLARIN, did knowingly, and for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and any regulation prescribed thereunder, cause and attempt to cause JP Morgan Chase, a domestic financial institution, to fail

to file a report required under Title 31, United States Code, Section 5313(a), and any regulation prescribed thereunder, and did so as part of a pattern of illegal activity involving more than $100,000 in a 12-month period:

Count	Date	Deposit Amounts	Bank Account Number
17	11/19/2012 11/19/2012	$9,900.00 $9,900.00	JP Morgan Chase Bank Account Number ending in 3637
18	11/26/2012 11/26/2012	$9,900.00 $9,900.00	JP Morgan Chase Bank Account Number ending in 3637
19	12/31/2012 12/31/2012	$9,900.00 $8,000.00	JP Morgan Chase Bank Account Number ending in 3637
20	1/8/2013 1/8/2013	$9,900.00 $9,900.00	JP Morgan Chase Bank Account Number ending in 3637

All in violation of Title 31, United States Code, Section 5324(a)(1) and 5324(d).

Count Twenty-One Through Twenty-Five

Structuring

(31 U.S.C. §§ 5324(a)(3) and 5324(d))

24. The Grand Jury re-alleges and incorporates herein by reference the factual allegations set forth in paragraphs 2 through 16.

25. On or about the dates specified as to each count below, in the Northern District of Georgia, the defendant, OLUWATOYIN SOLARIN, did knowingly, and for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and any regulation prescribed thereunder, cause and attempt to cause JP Morgan Chase, a domestic financial institution, to fail to file a report required under Title 31, United States Code, Section 5313(a), and

any regulation prescribed thereunder, and did so as part of a pattern of illegal activity involving more than $100,000 in a 12-month period:

Count	Date	Deposit Amounts	Bank Account Number
21	11/27/2012 11/28/2012	$9,900.00 $9,000.00	JP Morgan Chase Bank Account Number ending in 3637
22	12/10/2012 12/11/2012 12/12/2012	$4,000.00 $9,900.00 $3,000.00	JP Morgan Chase Bank Account Number ending in 3637
23	12/20/2012 12/21/2012	$9,900.00 $9,900.00	JP Morgan Chase Bank Account Number ending in 3637
24	12/27/2012 12/28/2012	$9,900.00 $9,900.00	JP Morgan Chase Bank Account Number ending in 3637
25	1/9/2013 1/10/2013	$9,900.00 $9,900.00	JP Morgan Chase Bank Account Number ending in 3637

All in violation of Title 31, United States Code, Section 5324(a)(3) and 5324(d).

Forfeiture

26. The Grand Jury re-alleges and incorporates herein by reference the factual allegations set forth in paragraphs 2 through 16.

27. Upon conviction for one or more of the offenses alleged in Counts 1 through 10 of this Indictment, the defendant shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property constituting or derived from proceeds obtained directly or indirectly as a result of said violations.

28. Upon conviction for one or more of the offenses alleged in Counts 11 through 16 of this Indictment, the defendant shall forfeit to the United States,

pursuant to Title 18, United States Code, Section 982(a)(1), any property, real or personal, involved in the offense, or any property traceable to such property.

29. Upon conviction for one or more of the offenses alleged in Counts 17 through 25 of this Indictment, the defendant shall forfeit to the United States, pursuant to Title 31, United States Code, Section 5317, any property, real or personal, involved in the offense and any property traceable to such property.

30. If, as a result of any act or omission of the defendant, any property subject to forfeiture:

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third person;

c. Has been placed beyond the jurisdiction of the Court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be subdivided without difficulty;

The United States intends, pursuant to Title 18, United States Code, Section 982(b) and Title 21, United States Code, Section 853(p), and Title 28, United

States Code, Section 2461(c) to seek forfeiture of any property of said defendant up to the value of the forfeitable property.

A True BILL

FOREPERSON

JOHN A. HORN
United States Attorney

THOMAS J. KREPP
Assistant United States Attorney
Georgia Bar No. 346781

LYNDIE M. FREEMAN
Special Assistant United States Attorney
Georgia Bar No. 119499

600 U.S. Courthouse
75 Ted Turner Drive SW
Atlanta, GA 30303
404-581-6000; Fax: 404-581-6181

GUILTY PLEA and PLEA AGREEMENT

United States Attorney
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CRIMINAL NO. 1:16-CR-392

The United States Attorney for the Northern District of Georgia ("the Government") and Defendant Oluwatoyin Solarin, enter into this plea agreement as set forth below in Part IV pursuant to Rule 11 (c)(1)(B) of the Federal Rules of Criminal Procedure. Oluwatoyin Solarin, Defendant, having received a copy of the above-numbered Information and having been arraigned, hereby pleads GUILTY to the Information.

I. ADMISSION OF GUILT

1. The Defendant admits that she is pleading guilty because she is in fact guilty of the crime charged in the Information.

II. ACKNOWLEDGMENT & WAIVER OF RIGHTS

2. The Defendant understands that by pleading guilty, she is giving up the right to plead not guilty and the right to be tried by a jury. At a trial, the Defendant would have the right to an attorney, and if the Defendant could not afford an attorney, the Court would appoint one to represent the Defendant at trial and at every stage of the proceedings. During the trial, the Defendant would be presumed innocent and the Government would have the burden of proving her guilty beyond a reasonable doubt. The Defendant would have the right to confront and cross-examine the witnesses against her. If the Defendant wished,

confront and cross-examine the witnesses against her. If the Defendant wished, she could testify on her own behalf and present evidence in her defense, and she could subpoena witnesses to testify on her behalf. If, however, the Defendant did not wish to testify, that fact could not be used against her, and the Government could not compel her to incriminate herself. If the Defendant were found guilty after a trial, she would have the right to appeal the conviction.

3. The Defendant understands that by pleading guilty, she is giving up all of these rights and there will not be a trial of any kind.

4. By pleading guilty, Defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could have been filed.

5. The Defendant also understands that she ordinarily would have the right to appeal her sentence and, under some circumstances, to attack the conviction and sentence in post-conviction proceedings. By entering this Plea Agreement, the Defendant may be waiving some or all of those rights to appeal and to collaterally attack her conviction and sentence, as specified below.

6. Finally, the Defendant understands that, to plead guilty, she may have to answer, under oath, questions posed to her by the Court concerning the rights that she is giving up and the facts of this case, and the Defendant's answers, if untruthful, may later be used against her in a prosecution for perjury or false statements.

III. ACKNOWLEDGMENT OF PENALTIES

7. The Defendant understands that, based on her plea of guilty, she will be subject to the following maximum and mandatory minimum penalties:

As to the sole charge in the Information

a. Maximum term of imprisonment: 5 years.

b. Mandatory minimum term of imprisonment: None.

c. Term of supervised release: 0 year(s) to 3 years.

d. Maximum fine: $250,000.00, due and payable immediately.

e. Full restitution, due and payable immediately, to all victims of the offense(s) and relevant conduct.

f. Mandatory special assessment: $100.00, due and payable immediately.

g. Forfeiture of any and all proceeds from the commission of the offense, any and all property used or intended to be used to facilitate the offense, and any property involved in the offense.

8. The Defendant understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines and that, under certain circumstances, the Court has the discretion to depart from those Guidelines. The Defendant further understands that the Court may impose a sentence up to and including the statutory maximum as set forth in this paragraph and that no one can predict her exact sentence at this time.

9. REMOVAL FROM THE UNITED STATES: The Defendant recognizes that pleading guilty may have consequences with respect to her immigration status if she is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense to which the Defendant is pleading guilty. Indeed, because the Defendant is pleading guilty to this offense, removal is presumptively mandatory. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including her attorney or the district court, can predict to a certainty the effect of her conviction on her immigration status. The Defendant nevertheless affirms that she wants to plead guilty regardless of any immigration consequences that her plea may entail, even if the consequence is her automatic removal from the United States.

IV. PLEA AGREEMENT

10. The Defendant, her counsel, and the Government, subject to approval by the Court, have agreed upon a negotiated plea in this case, the terms of which are as follows:

Dismissal of Counts

11. The Government agrees that, upon the entry of the Judgment and Commitment Order, any and all remaining counts in the above-styled case as well as in Criminal Case No. 1:16-CR-206-TWT-JSA still pending against Defendant shall be dismissed pursuant to Standing Order No. 07-04 of this Court

and to Rule 48(a) of the Federal Rules of Criminal Procedure. The Defendant understands that the Probation Office and the Court may still consider the conduct underlying such dismissed counts in determining relevant conduct under the Sentencing Guidelines and a reasonable sentence under Title 18, United States Code, Section 3553(a).

Sentencing Guidelines Recommendations

12. Based upon the evidence currently known to the Government, the Government agrees to make the following recommendations and/or to enter into the following stipulations.

Base/Adjusted Offense Level

13. The Government agrees to recommend and the Defendant agrees that:

a. The applicable offense guideline is Section 2X1.1, which refers to Section 2B1.1 for determining the offense level under Section 2X1.1(a).

b. The base offense level under Section 2B1.1(a)(2) is 6.

c. The amount of loss resulting from the offense of conviction and all relevant conduct is $996,862.19, resulting in a 14-level enhancement under Section 2B1.1(b)(1)(H).

d. The offense did not involve more than 10 victims, was not committed through mass-marketing, and did not result in

substantial financial hardship to one or more victims, resulting in no enhancement under Section 2B1.1(b)(2).

e. The defendant was an organizer, leader, manager, or supervisor in criminal activity that did not involve 5 or more participants and was not otherwise extensive, resulting in a 2-level enhancement under Section 3B1.1(c).

f. The defendant did not willfully obstruct or impede or attempt to obstruct or impede the investigation or prosecution of the instant offense of conviction, resulting in no enhancement under Section 3C1.1.

Acceptance of Responsibility

14. The Government will recommend that the Defendant receive the two-level adjustment for acceptance of responsibility pursuant to Section 3E1.1 of the Sentencing Guidelines, and the additional one-level adjustment if the offense level is 16 or higher. However, the Government will not be required to recommend acceptance of responsibility if, after entering this Plea Agreement, the Defendant engages in conduct inconsistent with accepting responsibility. Thus, by way of example only, should the Defendant falsely deny or falsely attempt to minimize Defendant's involvement in relevant offense conduct, give conflicting statements about Defendant's involvement, fail to pay the special assessment, fail to meet any of the obligations set forth in the Financial

Cooperation Provisions set forth below, or participate in additional criminal conduct, including unlawful personal use of a controlled substance, the Government will not be required to recommend acceptance of responsibility.

Right to Answer Questions, Correct Misstatements, and Make Recommendations

15. The parties reserve the right to inform the Court and the Probation Office of all facts and circumstances regarding the Defendant and this case, and to respond to any questions from the Court and the Probation Office and to any misstatements of fact or law. Except as expressly stated elsewhere in this Plea Agreement, the parties also reserve the right to make recommendations regarding application of the Sentencing Guidelines. The parties understand, acknowledge, and agree that there are no agreements between the parties with respect to any Sentencing Guidelines issues other than those specifically listed.

Right to Modify Recommendations

16. With regard to the Government's recommendation as to any specific application of the Sentencing Guidelines as set forth elsewhere in this Plea Agreement, the Defendant understands and agrees that, should the Government obtain or receive additional evidence concerning the facts underlying any such recommendation, the Government will bring that evidence to the attention of the Court and the Probation Office. In addition, if the additional evidence is sufficient to support a finding of a different application of the Guidelines, the Government will not be bound to make the recommendation set forth elsewhere

in this Plea Agreement, and the failure to do so will not constitute a violation of this Plea Agreement.

Sentencing Recommendations

Judicial Economy

17. Based on the factors set forth in 18 U.S.C. § 3553(a), the parties agree to recommend that the Defendant receive a one-level downward variance at sentencing. This variance is predicated on the Defendant's expeditiously entered plea of guilty and the resulting conservation of limited judicial and prosecutorial resources.

Restitution

18. The Defendant agrees to pay $996,862.19 as restitution to the Clerk of Court for distribution to the victims of the offense(s) to which she is pleading guilty and all relevant conduct, including, but not limited to, any counts dismissed as a result of this Plea Agreement.

Forfeiture

19. The Defendant acknowledges that each asset listed below is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) and 18 U.S.C. § 2461(c), and agrees that she shall immediately forfeit to the United States any proceeds from and property involved in the commission of the offense(s) in the Information, including, but not limited to, the following:

a. 1103 Hidden Brook Trail, College Park, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 88 of the 13th District of Clayton County, Georgia, being Lot 2, Hidden Brook Subdivision, as per plat thereof recorded in Plat Book 31, Page 1, Clayton County records, which recorded Plat is incorporated herein by reference and made a part of this description. [Tax Parcel ID No.: 13088C-A011].

b. 168 Brookview Drive, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 171 of the 13th District, Clayton County, Georgia, and being Lot 116, Brookview Village Subdivision, Phase 2, as per plat recorded at Plat Book 35, Pages 152-156, Clayton County records, to which Plat is hereby referred to and made a part of this description. [Tax Parcel ID No.: 13171D-A065].

c. 268 Brookview Drive, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 171 of the 13th District, Clayton County, Georgia, and being Lot 129, Brookview Village Subdivision, Phase 2, as per plat recorded at Plat Book 35, Page 152-156, Clayton County records, to which Plat is hereby referred to and made a part of this description and being more particularly described as 268 Brookview Drive, according to the present system of numbering houses in Clayton County, Georgia. [Tax Parcel ID No.: 13171B-C067].

d. 184 Brookview Drive, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being situate in Land Lot 171 of the 13th District, Clayton County, Georgia, and being known as Lot 110, Brookview Village Subdivision, Phase 2, as per plat recorded in Plat Book 35, Pages 152-157, Clayton County records, which plat is hereby referred to and made a part of this description. [Tax Parcel ID.: 13171D-A071]

e. 7109 Brookview Way, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 171 of the 13th District of Clayton County, Georgia, being Phase 1, Lot 186 of Brookview Village Subdivision as recorded in Plat Book 33, Pages 198-199 and re-recorded in Plat Book 34, Pages 01 – 04, which Plat is incorporated herein by reference hereto for a more complete description. [Tax Parcel No.13171B-C013].

f. 1915 Grove Way, Hampton, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 158 of the 6th District, Clayton County, Georgia, being Lot 78, of Southfield Station f/k/a Southfield Townhomes, phase 2 as, as per plat recorded in Plat book 36, Page 70-72, Clayton County, Georgia Records, said plat being incorporated herein by reference thereto. [Tax Parcel No. 06158A-D025].

g. 377 Brookview Drive, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 171 of the 13th district, Clayton County, Georgia, and being Lot 48 of the Brookview Village Subdivision, Phase I, as per plat recorded in Plat Book 34, Pages 22-28, Clayton County records, to which plat is hereby referred to and made a part of this description. [Tax Parcel ID.: 13171B-B071].

h. 7066 Brookview Creek, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 171 of the 13th District, Clayton County, Georgia, being Lot 37, Phase 1 of Brookview Village Subdivision, as per plat thereof recorded in Plat Book 34, Page 22-28, Clayton County, Georgia records, which recorded Plat is incorporated herein by reference and made a part of this description. [Tax Parcel No. 13171B-B059].

i. 1752 Fielding Way, Hampton, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 159 of the 6th District, Clayton County, Georgia, being Lot 38 of Southfield Townhomes, Block A, Phase I, per plat recorded in Plat Book 33, Pages 90-92, Clayton County, Georgia records. Said plat is incorporated herein and made a part of this description hereof by reference. [Tax Parcel ID.: 06159B-A038].

j. 2079 Grove Way, Hampton, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 158 of the 6th District Clayton County, Georgia, being Lot 98 of Southfield Subdivision f/k/a Southfield Townhomes, Phase 2, as per plat recorded in Plat Book 36, Pages 70-72, Clayton County, Georgia records, which plat is incorporated herein and made a part hereof by reference. [Tax Parcel ID.: 06158A-D045].

k. 1761 Glen View Way, Hampton, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 159 of the 6th District, Clayton County, Georgia, being Lot 3, Block C, Southfield Townhomes, Phase 1, as per plat recorded in Plat Book 33, Page 90-92, Clayton County, Georgia records, said Plat being incorporated herein and made a part of this description by reference. [Tax Parcel ID No.: 06159B-C003].

l. 1910 Grove Way, Hampton, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 158 of the 6th District of Clayton County, Georgia, being Lot 32, of Southfield Station, as per plat recorded in Plat Book 36, Page 70-72, Clayton County, Georgia records, which plat is incorporated herein and made a part hereof by reference. [Tax Parcel ID.: 06158A-A037].

m. 1262 Brookstone Road, Atlanta, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 88 of the 13th District, Clayton County, Georgia, being Lot 71, Crystal Lake, as per plat recorded in Plat Book 36, Pages 125-127, Clayton County records, said Plat being incorporated herein by reference thereto. [Tax Parcel ID No.: 13088A-E059].

n. 2555 Flat Shoals Road, Unit No. 1407, College Park, Fulton County, Georgia
All that tract or parcel of land lying and being in Land Lot 125 of the 13th District, Fulton County, Georgia, being Lot 9, Unit 1407, of Providence Place f/k/a Flat Shoals Road Tract Subdivision, Phase Four, as per plat thereof recorded at Plat Book 293, Pages 75-80, Fulton County, Georgia records, which Plat is incorporated herein by reference for a more complete description. [Tax Parcel ID No.: 13-0125-LL-3727].

20. The Defendant waives and abandons all right, title, and interest in the all of the property listed above (referred to hereafter, collectively, as the Subject Property) and agrees to the administrative or judicial forfeiture of the Subject Property. In addition, the Defendant waives and abandons her interest in any

other property that may have been seized in connection with this case. The Defendant agrees to the administrative or judicial forfeiture or the abandonment of any seized property. The Defendant agrees to withdraws her claims in the parallel civil forfeiture case Civil No. 1:14-CV-2813-CAP.

21. The Defendant states that she is the sole and rightful owner of the Subject Property, that to the best of her knowledge no other person or entity has any interest in the Subject Property and that she has not transferred, conveyed, or encumbered her interest in the Subject Property. The Defendant agrees to take all steps requested by the United States to facilitate transfer of title of the Subject Property, including providing and endorsing title certificates, or causing others to do the same where third parties hold nominal title on the Defendant's behalf, to a person designated by the United States. The Defendant agrees to take all steps necessary to ensure that the Subject Property is not hidden, sold, wasted, destroyed, or otherwise made unavailable for forfeiture. The Defendant agrees not to file any claim, answer, or petition for remission or restitution in any administrative or judicial proceeding pertaining to the Subject Property, and if such a document has already been filed, the Defendant hereby withdraws that filing.

22. The Defendant agrees to hold the United States and its agents and employees harmless from any claims made in connection with the seizure, forfeiture, or disposal of property connected to this case. The Defendant

acknowledges that the United States will dispose of any seized property, and that such disposal may include, but is not limited to, the sale, release, or destruction of any seized property, including the Subject Property. The Defendant agrees to waive any and all constitutional, statutory, and equitable challenges in any manner (including direct appeal, a Section 2255 petition, habeas corpus, or any other means) to the seizure, forfeiture, and disposal of any property seized in this case, including the Subject Property, on any grounds.

23. The Defendant acknowledges that she is not entitled to use forfeited assets, including the Subject Property, to satisfy any fine, restitution, cost of imprisonment, tax obligations, or any other penalty the Court may impose upon the Defendant in addition to forfeiture. However, the United States Attorney's Office for the Northern District of Georgia will recommend to the Chief of the Asset Forfeiture and Money Laundering Section (AFMLS) of the United States Department of Justice that property forfeited in this case, or the related civil forfeiture case, be used to compensate the victim(s) specified in the restitution order, provided that the Government determines that the requirements for restoration as set forth in AFMLS Forfeiture Policy Directive 02-1, Paragraph III.A., are met. The Defendant understands that the decision on any petition for remission or restoration is not within the ultimate control of the United States Attorney's Office.

24. The Defendant agrees that any interest she may have in the asset listed below is subject to forfeiture as a substitute asset under Title 18, United States Code, Section 982(b) and Title 21, United States Code, Section 853(p). Defendant agrees to withdraws her claims in the parallel civil forfeiture case Civil No. 1:14-CV-2813-CAP as it pertains to this property. The parties agree that the forfeiture of the Defendant's interest in this property as a substitute asset only binds the Defendant and not individuals who are not parties to this agreement.

a. 7063 Brookview Circle, Riverdale, Clayton County, Georgia
All that tract or parcel of land lying and being in Land Lot 171 of the 13th District, Clayton County, Georgia and being Lot 146, Brookview Village Subdivision, Phase 2 as per plat recorded at Plat Book 35, Pages 152-156, Clayton County records to which plat is hereby referred to and made a part of this description. [Tax Parcel ID.: 13171B-C050].

25. The Defendant consents to the Court's entry of a preliminary order of forfeiture against the Subject Property and the asset listed in paragraph 24, which will be final as to her, a part of her sentence, and incorporated into the judgment against her.

Financial Cooperation Provisions

Special Assessment

26. The Defendant agrees that she will pay a special assessment in the amount of $100 by money order or certified check made payable to the Clerk of Court, U.S. District Court, 2211 U.S. Courthouse, 75 Ted Turner Drive SW, Atlanta, Georgia 30303, on the day of sentencing. The Defendant agrees to provide proof

of such payment to the undersigned Assistant United States Attorney upon payment thereof.

Fine/Restitution - Terms of Payment

27. The Defendant agrees to pay any fine and/or restitution imposed by the Court to the Clerk of Court for eventual disbursement to the appropriate account and/or victim(s). The Defendant also agrees that the full fine and/or restitution amount shall be considered due and payable immediately. If the Defendant cannot pay the full amount immediately and is placed in custody or under the supervision of the Probation Office at any time, she agrees that the custodial agency and the Probation Office will have the authority to establish payment schedules to ensure payment of the fine and/or restitution. The Defendant understands that this payment schedule represents a minimum obligation and that, should Defendant's financial situation establish that she is able to pay more toward the fine and/or restitution, the Government is entitled to pursue other sources of recovery of the fine and/or restitution. The Defendant further agrees to cooperate fully in efforts to collect the fine and/or restitution obligation by any legal means the Government deems appropriate. Finally, the Defendant and her counsel agree that the Government may contact the Defendant regarding the collection of any fine and/or restitution without notifying and outside the presence of her counsel.

Financial Disclosure

28. The Defendant agrees that Defendant will not sell, hide, waste, encumber, destroy, or otherwise devalue any such asset worth more than $1,000 before sentencing, without the prior approval of the Government. The Defendant understands and agrees that Defendant's failure to comply with this provision of the Plea Agreement should result in Defendant receiving no credit for acceptance of responsibility.

29. The Defendant agrees to cooperate fully in the investigation of the amount of restitution and fine; the identification of funds and assets in which she has any legal or equitable interest to be applied toward restitution and/or fine; and the prompt payment of restitution or a fine.

30. The Defendant's cooperation obligations include: (A) fully and truthfully completing the Department of Justice's Financial Statement of Debtor form, and any addenda to said form deemed necessary by the Government, within ten days of the change of plea hearing; (B) submitting to a financial deposition or interview (should the Government deem it necessary) prior to sentencing regarding the subject matter of said form; (C) providing any documentation within her possession or control requested by the Government regarding her financial condition and that of her household; and (D) fully and truthfully answering all questions regarding her past and present financial condition and that of her household in such interview(s); and (E) providing a waiver of her

privacy protections to permit the Government to access her credit report and tax information held by the Internal Revenue Service.

31. So long as the Defendant is completely truthful, the Government agrees that anything related by the Defendant during her financial interview or deposition or in the financial forms described above cannot and will not be used against her in the Government's criminal prosecution. However, the Government may use the Defendant's statements to identify and to execute upon assets to be applied to the fine and/or restitution in this case. Further, the Government is completely free to pursue any and all investigative leads derived in any way from the interview(s)/deposition(s)/financial forms, which could result in the acquisition of evidence admissible against the Defendant in subsequent proceedings. If the Defendant subsequently takes a position in any legal proceeding that is inconsistent with the interview(s)/deposition(s)/financial forms–whether in pleadings, oral argument, witness testimony, documentary evidence, questioning of witnesses, or any other manner–the Government may use the Defendant's interview(s)/deposition(s)/financial forms, and all evidence obtained directly or indirectly therefrom, in any responsive pleading and argument and for cross-examination, impeachment, or rebuttal evidence. Further, the Government may also use the Defendant's interview(s)/deposition(s)/financial forms to respond

to arguments made or issues raised sua sponte by the Magistrate or District Court.

Recommendations/Stipulations Non-binding

32. The Defendant understands and agrees that the recommendations of the Government incorporated within this Plea Agreement, as well as any stipulations of fact or guideline computations incorporated within this Plea Agreement or otherwise discussed between the parties, are not binding on the Court and that the Court's failure to accept one or more of the recommendations, stipulations, and/or guideline computations will not constitute grounds to withdraw her guilty plea or to claim a breach of this Plea Agreement.

Limited Waiver of Appeal

33. LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal her conviction and sentence and the right to collaterally attack her conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or upward variance above the sentencing guideline range as calculated by the district court. Claims that Defendant's counsel rendered constitutionally ineffective assistance are excepted from this waiver. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a

direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

Miscellaneous Waivers

FOIA/Privacy Act Waiver

34. The Defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, United States Code, Section 552, or the Privacy Act of 1974, Title 5, United States Code, Section 552a.

No Other Agreements

35. There are no other agreements, promises, representations, or understandings between the Defendant and the Government.

In Open Court this 4th day of November, 2016.

SIGNATURE (Attorney for Defendant)
Paul Kish

SIGNATURE (Defendant)
Oluwatoyin Solarin

SIGNATURE (Assistant United States Attorney)
Thomas J. Krepp

SIGNATURE (Special Assistant United States Attorney)
Lyndie M. Freeman

SIGNATURE (Approving Official)
Randy S. Chartash

I have read the Information against me and have discussed it with my attorney. I understand the charges and the elements of each charge that the Government would have to prove to convict me at a trial. I have read the foregoing Plea Agreement and have carefully reviewed every part of it with my attorney. I understand the terms and conditions contained in the Plea Agreement, and I voluntarily agree to them. I also have discussed with my attorney the rights I may have to appeal or challenge my conviction and sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, with the narrow exceptions stated, from appealing my conviction and sentence or challenging my conviction and sentence in any post-conviction proceeding. No one has threatened or forced me to plead guilty, and no promises or inducements have been made to me other than those discussed in the Plea Agreement. The discussions between my attorney and the Government toward reaching a negotiated plea in this case took place with my permission. I am fully satisfied with the representation provided to me by my attorney in this case.

SIGNATURE (Defendant)
Oluwatoyin Solarin

DATE 11/09/16

I am Oluwatoyin Solarin's lawyer. I have carefully reviewed the charges and the Plea Agreement with my client. To my knowledge, my client is making an informed and voluntary decision to plead guilty and to enter into the Plea Agreement.

11/9/16

SIGNATURE (Defense Attorney)
Paul Kish

DATE

Paul Kish

Oluwatoyin Solarin

_____State Bar of Georgia Number

Filed in Open Court

This ___ day of _____, 20__

By _____

FILED IN OPEN COURT
U.S.D.C. Atlanta

NOV - 9 2016

JAMES N. HATTEN, Clerk
By: Deputy Clerk

U. S. DEPARTMENT OF JUSTICE

Statement of Special Assessment Account

This statement reflects your special assessment only. There may be other penalties imposed at sentencing.

ACCOUNT INFORMATION	
CRIMINAL ACTION NO.:	1:16-CR-392
DEFENDANT'S NAME:	OLUWATOYIN SOLARIN
PAY THIS AMOUNT:	$100

Instructions:

1. Payment must be made by **certified check** or **money order** payable to:
   Clerk of court, U.S. District Court
   personal checks will not be accepted
2. Payment must reach the clerk's office within 30 days of the entry of your guilty plea
3. Payment should be sent or hand delivered to:
   Clerk, U.S. District Court
   2211 U.S. Courthouse
   75 Ted Turner Drive S.W.
   Atlanta, Georgia 30303
   (Do Not Send Cash)
4. Include defendant's name on **certified check** or **money order.**
5. Enclose this coupon to insure proper and prompt application of payment.
6. Provide proof of payment to the above-signed AUSA within 30 days of the guilty plea.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KALEY ET VIR *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 12–464. Argued October 16, 2013—Decided February 25, 2014

Title 21 U. S. C. §853(e)(1) empowers courts to enter pre-trial restraining orders to "preserve the availability of [forfeitable] property" while criminal proceedings are pending. Such pre-trial asset restraints are constitutionally permissible whenever probable cause exists to think that a defendant has committed an offense permitting forfeiture and that the assets in dispute are traceable or otherwise sufficiently related to the crime charged. *United States* v. *Monsanto*, 491 U. S. 600.

After a grand jury indicted petitioners, Kerri and Brian Kaley, for reselling stolen medical devices and laundering the proceeds, the Government obtained a §853(e)(1) restraining order against their assets. The Kaleys moved to vacate the order, intending to use a portion of the disputed assets for their legal fees. The District Court allowed them to challenge the assets' traceability to the offenses in question but not the facts supporting the underlying indictment. The Eleventh Circuit affirmed.

Held: When challenging the legality of a §853(e)(1) pre-trial asset seizure, a criminal defendant who has been indicted is not constitutionally entitled to contest a grand jury's determination of probable cause to believe the defendant committed the crimes charged. Pp. 5–21.

(a) In *Monsanto*, this Court held that the Government may seize assets before trial that a defendant intends to use to pay an attorney, so long as probable cause exists "to believe that the property will ultimately be proved forfeitable." 491 U. S., at 615. The question whether indicted defendants like the Kaleys are constitutionally entitled to a judicial re-determination of the grand jury's probable cause conclusion in a hearing to lift an asset restraint has a ready answer in the fundamental and historic commitment of the criminal justice system to entrust probable cause findings to a grand jury. A probable

cause finding sufficient to initiate a prosecution for a serious crime is "conclusive[e]," *Gerstein* v. *Pugh*, 420 U. S. 103, 117, n. 19, and, as a general matter, "a challenge to the reliability or competence of the evidence" supporting that finding "will not be heard," *United States* v. *Williams*, 504 U. S. 36, 54. A grand jury's probable cause finding may, on its own, effect a pre-trial restraint on a person's liberty. *Gerstein*, 420 U. S., at 117, n. 19. The same result follows when it works to restrain a defendant's property.

The Kaleys' alternative rule would have strange and destructive consequences. Allowing a judge to decide anew what the grand jury has already determined could result in two inconsistent findings governing different aspects of one criminal proceeding, with the same judge who found probable cause lacking presiding over a trial premised on its existence. That legal dissonance could not but undermine the criminal justice system's integrity, especially the grand jury's constitutional role. Pp. 5–12.

(b) The balancing test of *Mathews* v. *Eldridge*, 424 U. S. 319—which requires a court to weigh (1) the burdens that a requested procedure would impose on the government against (2) the private interest at stake, as viewed alongside (3) "the risk of an erroneous deprivation" of that interest without the procedure and "the probable value, if any, of [the] additional . . . procedural safeguar[d]," *id.*, at 335—if applicable here, tips against the Kaleys. Because the Government's interest in freezing potentially forfeitable assets without an adversarial hearing about the probable cause underlying criminal charges and the Kaleys' interest in retaining counsel of their own choosing are both substantial, the test's third prong is critical. It boils down to the "probable value, if any," of a judicial hearing in uncovering mistaken grand jury probable cause findings. But when the legal standard is merely probable cause and the grand jury has already made that finding, a full-dress hearing will provide little benefit. See *Florida* v. *Harris*, 568 U. S. ___, ___. A finding of probable cause to think that a person committed a crime "can be [made] reliably without an adversary hearing," *Gerstein*, 420 U. S., at 120, and the value of requiring additional "formalities and safeguards" would "[i]n most cases . . . be too slight," *id.*, at 121–122. The experience of several Circuits corroborates this view. Neither the Kaleys nor their *amici* point to a single case in two decades where courts, holding hearings of the kind they seek, have found the absence of probable cause to believe that an indicted defendant committed the crime charged. Pp. 12–20.

677 F. 3d 1316, affirmed and remanded.

KAGAN, J., delivered the opinion of the Court, in which SCALIA, KEN-

Syllabus

NEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 12–464

KERRI L. KALEY, ET VIR, PETITIONERS *v.* UNITED STATES

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

[February 25, 2014]

JUSTICE KAGAN delivered the opinion of the Court.

A federal statute, 21 U. S. C. §853(e), authorizes a court to freeze an indicted defendant's assets prior to trial if they would be subject to forfeiture upon conviction. In *United States* v. *Monsanto*, 491 U. S. 600, 615 (1989), we approved the constitutionality of such an order so long as it is "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." And we held that standard to apply even when a defendant seeks to use the disputed property to pay for a lawyer.

In this case, two indicted defendants wishing to hire an attorney challenged a pre-trial restraint on their property. The trial court convened a hearing to consider the seizure's legality under *Monsanto*. The question presented is whether criminal defendants are constitutionally entitled at such a hearing to contest a grand jury's prior determination of probable cause to believe they committed the crimes charged. We hold that they have no right to relitigate that finding.

I

A

Criminal forfeitures are imposed upon conviction to confiscate assets used in or gained from certain serious crimes. See 21 U. S. C. §853(a). Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and "lessen the economic power" of criminal enterprises. *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 630 (1989); see *id.*, at 634 ("Forfeiture provisions are powerful weapons in the war on crime"). The Government also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training. See *id.*, at 629–630.[1] Accordingly, "there is a strong governmental interest in obtaining full recovery of all forfeitable assets." *Id.*, at 631.

In line with that interest, §853(e)(1) empowers courts to enter pre-trial restraining orders or injunctions to "preserve the availability of [forfeitable] property" while criminal proceedings are pending. Such an order, issued "[u]pon application of the United States," prevents a defendant from spending or transferring specified property, including to pay an attorney for legal services. *Ibid.* In *Monsanto*, our principal case involving this procedure, we held a pre-trial asset restraint constitutionally permissible whenever there is probable cause to believe that the property is forfeitable. See 491 U. S., at 615. That determination has two parts, reflecting the requirements for forfeit-

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[1] Between January 2012 and April 2013, for example, the Department of Justice returned over $1.5 billion in forfeited assets to more than 400,000 crime victims. See Dept. of Justice, Justice Department Returned $1.5 Billion to Victims of Crime Since January 2012 (Apr. 26, 2013), online at http://www.justice.gov/opa/pr/2013/April/13-crm-480.html (as visited Feb. 21, 2014 and available in the Clerk of the Court's case file).

ure under federal law: There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime. See §853(a). The *Monsanto* Court, however, declined to consider "whether the Due Process Clause requires a hearing" to establish either or both of those aspects of forfeitability. *Id.*, at 615, n. 10.[2]

Since *Monsanto*, the lower courts have generally provided a hearing to any indicted defendant seeking to lift an asset restraint to pay for a lawyer. In that hearing, they have uniformly allowed the defendant to litigate the second issue stated above: whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment.[3] But the courts have divided over extending the hearing to the first issue. Some have considered, while others have barred, a defendant's attempt to challenge the probable cause underlying a criminal charge.[4] This case raises the question whether an indicted defendant has a constitutional right to contest the grand jury's prior determination of that matter.

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[2]The forfeiture statute itself requires a hearing when the Government seeks to restrain the assets of someone who has not yet been indicted. See 21 U. S. C. §853(e)(1)(B). That statutory provision is not at issue in this case, which involves a pair of indicted defendants.

[3]At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question. See Tr. of Oral Arg. 45. We do not opine on the matter here.

[4]Compare *United States* v. *E-Gold, Ltd.*, 521 F. 3d 411 (CADC 2008) (holding that a defendant is entitled to raise such a challenge); *United States* v. *Dejanu*, 37 Fed. Appx. 870, 873 (CA9 2002) (same); *United States* v. *Michelle's Lounge*, 39 F. 3d 684, 700 (CA7 1994) (same); *United States* v. *Monsanto*, 924 F. 2d 1186 (CA2 1991) (en banc) (same), with *United States* v. *Jamieson*, 427 F. 3d 394, 406–407 (CA6 2005) (prohibiting a defendant from raising such a challenge); *United States* v. *Farmer*, 274 F. 3d 800, 803–806 (CA4 2001) (same); *United States* v. *Jones*, 160 F. 3d 641, 648–649 (CA10 1998) (same).

B

The grand jury's indictment in this case charges a scheme to steal prescription medical devices and resell them for profit. The indictment accused petitioner Kerri Kaley, a sales representative for a subsidiary of Johnson & Johnson, and petitioner Brian Kaley, her husband, with transporting stolen medical devices across state lines and laundering the proceeds of that activity.[5] The Kaleys have contested those allegations throughout this litigation, arguing that the medical devices at issue were unwanted, excess hospital inventory, which they could lawfully take and market to others.

Immediately after obtaining the indictment, the Government sought a restraining order under §853(e)(1) to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses. Included among those assets is a $500,000 certificate of deposit that the Kaleys intended to use for legal fees. The District Court entered the requested order. Later, in response to the Kaleys' motion to vacate the asset restraint, the court denied a request for an evidentiary hearing and confirmed the order, except as to $63,000 that it found (based on the parties' written submissions) was not connected to the alleged offenses.

On interlocutory appeal, the Eleventh Circuit reversed and remanded for further consideration of whether some kind of evidentiary hearing was warranted. See 579 F. 3d 1246 (2009). The District Court then concluded that it should hold a hearing, but only as to "whether the re-

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[5]An earlier version of the indictment did not include the money laundering charge. In its superseding indictment, the Government also accused Jennifer Gruenstrass, another sales representative, of transporting stolen property and money laundering. Her case went to trial, and she was acquitted. Several other sales representatives participating in the Kaleys' activity entered guilty pleas (each to a charge of shipping stolen goods) during the Government's investigation.

strained assets are traceable to or involved in the alleged criminal conduct." App. to Pet. for Cert. 43, n. 5. The Kaleys informed the court that they no longer disputed that issue; they wished to show only that the "case against them is 'baseless.'" *Id.*, at 39; see App. 107 ("We are not contesting that the assets restrained were . . . traceable to the conduct. Our quarrel is whether that conduct constitutes a crime"). Accordingly, the District Court affirmed the restraining order, and the Kaleys took another appeal. The Eleventh Circuit this time affirmed, holding that the Kaleys were not entitled at a hearing on the asset freeze "to challenge the factual foundation supporting the grand jury's probable cause determination[ ]"—that is, "the very validity of the underlying indictment." 677 F. 3d 1316, 1317 (2012).

We granted certiorari in light of the Circuit split on the question presented, 568 U. S. ___ (2013), and we now affirm the Eleventh Circuit.

II

This Court has twice considered claims, similar to the Kaleys', that the Fifth Amendment's right to due process and the Sixth Amendment's right to counsel constrain the way the federal forfeiture statute applies to assets needed to retain an attorney. See *Caplin & Drysdale*, 491 U. S. 617; *Monsanto*, 491 U. S. 600. We begin with those rulings not as mere background, but as something much more. On the single day the Court decided both those cases, it cast the die on this one too.

In *Caplin & Drysdale,* we considered whether the Fifth and Sixth Amendments exempt from forfeiture money that a convicted defendant has agreed to pay his attorney. See 491 U. S., at 623–635. We conceded a factual premise of the constitutional claim made in the case: Sometimes "a defendant will be unable to retain the attorney of his choice," if he cannot use forfeitable assets. *Id.*, at 625.

Still, we held, the defendant's claim was "untenable." *Id.*, at 626. "A defendant has no Sixth Amendment right to spend another person's money" for legal fees—even if that is the only way to hire a preferred lawyer. *Ibid.* Consider, we submitted, the example of a "robbery suspect" who wishes to "use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended." *Ibid.* That money is "not rightfully his." *Ibid.* Accordingly, we concluded, the Government does not violate the Constitution if, pursuant to the forfeiture statute, "it seizes the robbery proceeds and refuses to permit the defendant to use them" to pay for his lawyer. *Ibid.*

And then, we confirmed in *Monsanto* what our "robbery suspect" hypothetical indicated: Even prior to conviction (or trial)—when the presumption of innocence still applies—the Government could constitutionally use §853(e) to freeze assets of an indicted defendant "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." 491 U. S., at 615. In *Monsanto*, too, the defendant wanted to use the property at issue to pay a lawyer, and maintained that the Fifth and Sixth Amendments entitled him to do so. We disagreed. We first noted that the Government may sometimes "restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." *Id.*, at 615–616. Given that power, we could find "no constitutional infirmity in §853(e)'s authorization of a similar restraint on [the defendant's] property" in order to protect "the community's interest" in recovering "ill-gotten gains." *Id.*, at 616. Nor did the defendant's interest in retaining a lawyer with the disputed assets change the equation. Relying on *Caplin & Drysdale*, we reasoned: "[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an

order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Ibid.* So again: With probable cause, a freeze is valid.

The Kaleys little dispute that proposition; their argument is instead about who should have the last word as to probable cause. A grand jury has already found probable cause to think that the Kaleys committed the offenses charged; that is why an indictment issued. No one doubts that those crimes are serious enough to trigger forfeiture. Similarly, no one contests that the assets in question derive from, or were used in committing, the offenses. See *supra,* at 5. The only question is whether the Kaleys are constitutionally entitled to a judicial re-determination of the conclusion the grand jury already reached: that probable cause supports this criminal prosecution (or alternatively put, that the prosecution is not "baseless," as the Kaleys believe, *supra*, at 5). And that question, we think, has a ready answer, because a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries.

This Court has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a serious crime. See, *e.g.*, *Costello* v. *United States*, 350 U. S. 359, 362 (1956). "[A]n indictment 'fair upon its face,' and returned by a 'properly constituted grand jury,'" we have explained, "conclusively determines the existence of probable cause" to believe the defendant perpetrated the offense alleged. *Gerstein* v. *Pugh*, 420 U. S. 103, 117, n. 19 (1975) (quoting *Ex parte United States*, 287 U. S. 241, 250 (1932)). And "conclusively" has meant, case in and case out, just that. We have found no "authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *Costello*, 350 U. S., at 362–363 (quoting *United States* v. *Reed*, 27 F. Cas. 727, 738 (No. 16,134) (CC

NDNY 1852) (Nelson, J.)). To the contrary, "the whole history of the grand jury institution" demonstrates that "a challenge to the reliability or competence of the evidence" supporting a grand jury's finding of probable cause "will not be heard." *United States* v. *Williams*, 504 U. S. 36, 54 (1992) (quoting *Costello*, 350 U. S., at 364, and *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 261 (1988)). The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime.

And that inviolable grand jury finding, we have decided, may do more than commence a criminal proceeding (with all the economic, reputational, and personal harm that entails); the determination may also serve the purpose of immediately depriving the accused of her freedom. If the person charged is not yet in custody, an indictment triggers "issuance of an arrest warrant without further inquiry" into the case's strength. *Gerstein*, 420 U. S., at 117, n. 19; see *Kalina* v. *Fletcher*, 522 U. S. 118, 129 (1997). Alternatively, if the person was arrested without a warrant, an indictment eliminates her Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention. See *Gerstein*, 420 U. S., at 114, 117, n. 19. In either situation, this Court—relying on the grand jury's "historical role of protecting individuals from unjust persecution"—has "let [that body's] judgment substitute for that of a neutral and detached magistrate." *Ibid.* The grand jury, all on its own, may effect a pre-trial restraint on a person's liberty by finding probable cause to support a criminal charge.[6]

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[6] The grand jury's unreviewed finding similarly may play a significant role in determining a defendant's eligibility for release before trial under the Bail Reform Act of 1984, 18 U. S. C. §3141 *et seq.* That statute creates a rebuttable presumption that a defendant is ineligible for bail if "there is probable cause to believe" she committed certain serious crimes. §§3142(e)(2)–(3), (f). The Courts of Appeal have uni-

The same result follows when, as here, an infringement on the defendant's property depends on a showing of probable cause that she committed a crime. If judicial review of the grand jury's probable cause determination is not warranted (as we have so often held) to put a defendant on trial or place her in custody, then neither is it needed to freeze her property. The grand jury that is good enough—reliable enough, protective enough—to inflict those other grave consequences through its probable cause findings must be adequate to impose this one too. Indeed, *Monsanto* already noted the absence of any reason to hold property seizures to different rules: As described earlier, the Court partly based its adoption of the probable cause standard on the incongruity of subjecting an asset freeze to any stricter requirements than apply to an arrest or ensuing detention. See *supra,* at 6; 491 U. S., at 615 ("[I]t

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formly held that presumption to operate whenever an indictment charges those offenses. Relying on our instruction that an indictment returned by a proper grand jury "conclusively determines the existence of probable cause," the courts have denied defendants' calls for any judicial reconsideration of that issue. *United States* v. *Contreras*, 776 F. 2d 51, 54 (CA2 1985) (quoting *Gerstein* v. *Pugh*, 420 U. S. 103, 117, n. 19 (1975)); see, *e.g., United States* v. *Suppa*, 799 F. 2d 115, 117–119 (CA3 1986); *United States* v. *Vargas*, 804 F. 2d 157, 162–163 (CA1 1986) (*per curiam*); *United States* v. *Hurtado*, 779 F. 2d 1467, 1477–1479 (CA11 1985).

The dissent, while conceding this point, notes that courts may consider the "weight of the evidence" in deciding whether a defendant has rebutted the presumption. See *post,* at 9–10, and n. 3 (opinion of ROBERTS, C. J.). And so they may, along with a host of other factors relating to the defendant's dangerousness or risk of flight. See §3142(g). But that is because the Bail Reform Act so allows—not because (as argued here) the Constitution compels the inquiry. And even that provision of the statute cuts *against* the dissent's position, because it enables courts to consider only an evidentiary issue different from the probable cause determination. When it comes to whether probable cause supports a charge—*i.e.,* the issue here—courts making bail determinations are stuck, as all agree, with the grand jury's finding.

would be odd to conclude that the Government may not restrain property" on the showing often sufficient to "restrain *persons*"). By similar token, the probable cause standard, once selected, should work no differently for the single purpose of freezing assets than for all others.[7] So the longstanding, unvarying rule of criminal procedure we have just described applies here as well: The grand jury's determination is conclusive.

And indeed, the alternative rule the Kaleys seek would have strange and destructive consequences. The Kaleys here demand a do-over, except with a different referee. They wish a judge to decide anew the exact question the grand jury has already answered—whether there is probable cause to think the Kaleys committed the crimes charged. But suppose the judge performed that task and came to the opposite conclusion. Two inconsistent findings would then govern different aspects of one criminal proceeding: Probable cause would exist to bring the Kaleys to trial (and, if otherwise appropriate, hold them in prison), but not to restrain their property. And assuming the prosecutor continued to press the charges,[8] the same judge who found probable cause lacking would preside over a

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[7]Contrary to the dissent's characterization, see *post,* at 11–12, nothing in our reasoning depends on viewing one consequence of a probable cause determination (say, detention) as "greater" than another (say, the asset freeze here). (We suspect that would vary from case to case, with some defendants seeing the loss of liberty as the more significant deprivation and others the loss of a chosen lawyer.) We simply see no reason to treat a grand jury's probable cause determination as conclusive for all other purposes (including, in some circumstances, locking up the defendant), but not for the one at issue here.

[8]A prosecutor, of course, might drop the case because of the court's ruling, especially if he thought that decision would bring into play an ethical standard barring any charge "that the prosecutor knows is not supported by probable cause." ABA Model Rule of Professional Conduct 3.8(a) (2013). But then the court would have effectively done what we have long held it cannot: overrule the grand jury on whether to bring a defendant to trial. See *supra*, at 7–8.

trial premised on its presence. That legal dissonance, if sustainable at all, could not but undermine the criminal justice system's integrity—and especially the grand jury's integral, constitutionally prescribed role. For in this new world, every prosecution involving a pre-trial asset freeze would potentially pit the judge against the grand jury as to the case's foundational issue.[9]

The Kaleys counter (as does the dissent, *post*, at 7) that apparently inconsistent findings are not really so, because the prosecutor could have presented scantier evidence to the judge than he previously offered the grand jury. Suppose, for example, that at the judicial hearing the prosecutor put on only "one witness instead of all five"; then, the Kaleys maintain, the judge's decision of no probable cause would mean only that "the Government did not satisfy its burden[ ] on that one day in time." Tr. of Oral Arg. 12, 18; see Reply Brief 11–12. But we do not think that hypothetical solves the problem. As an initial matter, it does not foreclose a different fact pattern: A judge could hear the exact same evidence as the grand jury, yet respond to it differently, thus rendering what even the Kaleys must concede is a contradictory finding. And when the Kaleys' hypothetical *is* true, just what does it show? Consider that the prosecutor in their example has left home some of the witnesses he took to the grand jury—presumably because, as we later discuss, he does not yet wish to reveal their identities or likely testimony. See *infra*, at 14–15. The

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[9]The dissent argues that the same is true when a judge hears evidence on whether frozen assets are traceable to a crime, because that allegation also appears in the indictment. See *post*, at 6–7; *supra*, at 3, and n. 3. But the tracing of assets is a technical matter far removed from the grand jury's core competence and traditional function—to determine whether there is probable cause to think the defendant committed a crime. And a judge's finding that assets are not traceable to the crime charged in no way casts doubt on the prosecution itself. So that determination does not similarly undermine the grand jury or create internal contradictions within the criminal justice system.

judge's ruling of no probable cause therefore would not mean that the grand jury was wrong: As the Kaleys concede, the grand jury could have heard more than enough evidence to find probable cause that they committed the crimes charged. The Kaleys would win at the later hearing despite, not because of, the case's true merits. And we would then see still less reason for a judge to topple the grand jury's (better supported) finding of probable cause.[10]

Our reasoning so far is straightforward. We held in *Monsanto* that the probable cause standard governs the pre-trial seizure of forfeitable assets, even when they are needed to hire a lawyer. And we have repeatedly affirmed a corollary of that standard: A defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime. In combination, those settled propositions signal defeat for the Kaleys because, in contesting the seizure of their property, they seek only to relitigate such a grand jury finding.

III

The Kaleys would have us undertake a different analysis, which they contend would lead to a different conclusion. They urge us to apply the balancing test of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), to assess whether they have received a constitutionally sufficient opportunity to challenge the seizure of their assets. See Brief for Petitioners 32–64. Under that three-pronged test (reordered

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[10] The dissent claims as well that the hearing the Kaleys seek "would not be mere relitigation" of the grand jury's decision because they could now "tell their side of the story." *Post*, at 8. But the same could be said of an adversarial hearing on an indictment's validity, which everyone agrees is impermissible because it "look[s] into and revise[s]" the grand jury's judgment. See *ibid.* (quoting *Costello* v. *United States,* 350 U. S. 359, 362 (1956)). The lesson of our precedents, as described above, is that a grand jury's finding is "conclusive"—and thus precludes subsequent proceedings on the same matter—even though not arising from adversarial testing. See *supra,* at 7–8; see also *infra*, at 17–18.

here for expositional purposes), a court must weigh (1) the burdens that a requested procedure would impose on the Government against (2) the private interest at stake, as viewed alongside (3) "the risk of an erroneous deprivation" of that interest without the procedure and "the probable value, if any, of [the] additional . . . procedural safeguard[ ]." *Mathews*, 424 U. S., at 335. Stressing the importance of their interest in retaining chosen counsel, the Kaleys argue that the *Mathews* balance tilts hard in their favor. It thus overrides—or so the Kaleys claim—all we have previously held about the finality of grand jury findings, entitling them to an evidentiary hearing before a judge to contest the probable cause underlying the indictment.

The Government battles with the Kaleys over whether *Mathews* has any application to this case. This Court devised the test, the Government notes, in an administrative setting—to decide whether a Social Security recipient was entitled to a hearing before her benefits were terminated. And although the Court has since employed the approach in other contexts, the Government reads *Medina* v. *California*, 505 U. S. 437 (1992), as foreclosing its use here. In that case, we held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process," reasoning that because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Due Process Clause "has limited operation" in the field. *Id.*, at 443. That settles that, asserts the Government. See Brief for United States 18. But the Kaleys argue that *Medina* addressed a *State's* procedural rule and relied on federalism principles not implicated here. Further, they claim that *Medina* concerned a criminal proceeding proper, not a collateral action seizing property. See Reply Brief 1–5. As to that sort of action, the Kaleys contend, *Mathews* should govern.

We decline to address those arguments, or to define the respective reach of *Mathews* and *Medina*, because we need not do so. Even if *Mathews* applied here—even if, that is, its balancing inquiry were capable of trumping this Court's repeated admonitions that the grand jury's word is conclusive—the Kaleys still would not be entitled to the hearing they seek. That is because the *Mathews* test tips against them, and so only reinforces what we have already said. As we will explain, the problem for the Kaleys comes from *Mathews*' prescribed inquiry into the requested procedure's usefulness in correcting erroneous deprivations of their private interest. In light of *Monsanto*'s holding that a seizure of the Kaleys' property is erroneous only if unsupported by probable cause, the added procedure demanded here is not sufficiently likely to make any difference.

To begin the *Mathews* analysis, the Government has a substantial interest in freezing potentially forfeitable assets without an evidentiary hearing about the probable cause underlying criminal charges. At the least, such an adversarial proceeding—think of it as a pre-trial mini-trial (or maybe a pre-trial not-so-mini-trial)—could consume significant prosecutorial time and resources. The hearing presumably would rehearse the case's merits, including the Government's theory and supporting evidence. And the Government also might have to litigate a range of ancillary questions relating to the conduct of the hearing itself (for example, could the Kaleys subpoena witnesses or exclude certain evidence?).

Still more seriously, requiring a proceeding of that kind could undermine the Government's ability either to obtain a conviction or to preserve forfeitable property. To ensure a favorable result at the hearing, the Government could choose to disclose all its witnesses and other evidence. But that would give the defendant knowledge of the Government's case and strategy well before the rules of crimi-

nal procedure—or principles of due process, see, *e.g.*, *Brady* v. *Maryland*, 373 U. S. 83 (1963)—would otherwise require. See Fed. Rules Crim. Proc. 26.2(a), 16(a)(2); *Weatherford* v. *Bursey*, 429 U. S. 545, 559–561 (1977) ("There is no general constitutional right to discovery in a criminal case"). And sometimes (particularly in organized crime and drug trafficking prosecutions, in which forfeiture questions often arise), that sneak preview might not just aid the defendant's preparations but also facilitate witness tampering or jeopardize witness safety. Alternatively, to ensure the success of its prosecution, the Government could hold back some of its evidence at the hearing or give up on the pre-trial seizure entirely. But if the Government took that tack, it would diminish the likelihood of ultimately recovering stolen assets to which the public is entitled.[11] So any defense counsel worth his salt—whatever the merits of his case—would put the prosecutor to a choice: "Protect your forfeiture by providing discovery" *or* "protect your conviction by surrendering the assets."[12] It is small wonder that the Government

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[11] The dissent says not to worry—the Government can obtain the assets after conviction by using 21 U. S. C. §853(c)'s "relation-back" provision. See *post,* at 15. That provision is intended to aid the Government in recovering funds transferred to a third party—here, the Kaleys' lawyer—subsequent to the crime. But forfeiture applies only to specific assets, so in the likely event that the third party has spent the money, the Government must resort to a State's equitable remedies—which may or may not even be available—to force him to disgorge an equivalent amount. See Tr. of Oral Arg. 48–49. And indeed, if the Government *could* easily recover such monies, then few lawyers would agree to represent defendants like the Kaleys, and the dissent's proposed holding would be for naught.

[12] Compare Cassella, Criminal Forfeiture Procedure, 32 Am. J. Crim. L. 55, 63 (2004) (explaining that "defendants tend to demand the hearing . . . to afford defense counsel an early opportunity to discover the nature of the Government's criminal case and to cross-examine some of the Government's witnesses") with May, Attorney Fees and Government Forfeiture, 34 Champion 20, 23 (Apr. 2010) (advising that

wants to avoid that lose-lose dilemma.

For their part, however, defendants like the Kaleys have a vital interest at stake: the constitutional right to retain counsel of their own choosing. See *Wheat* v. *United States*, 486 U. S. 153, 159 (1988) (describing the scope of, and various limits on, that right). This Court has recently described that right, separate and apart from the guarantee to effective representation, as "the root meaning" of the Sixth Amendment. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 147–148 (2006); cf. *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice").[13] Indeed, we have held that the wrongful deprivation of choice of counsel is "structural error," immune from review for harmlessness, because it "pervades the entire trial." *Gonzalez-Lopez*, 548 U. S., at 150. Different lawyers do all kinds of things differently, sometimes "affect[ing] whether and on what terms the defendant . . . plea bargains, or decides instead to go to trial"—and if the latter, possibly affecting whether she gets convicted or what sentence she receives. *Ibid.* So for defendants like the Kaleys, having

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"[e]ven if defense counsel cannot prevail on the facts or the law, he may be able to prevail anyway" because "[s]ometimes the government will decide to give up its restraint on a piece of property rather than engage in litigation that will result in early discovery").

[13] Still, a restraint on assets could not deprive the Kaleys of representation sufficient to ensure fair proceedings. The Sixth Amendment would require the appointment of effective counsel if the Kaleys were unable to hire a lawyer. See *Strickland* v. *Washington*, 466 U. S. 668 (1984); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). The vast majority of criminal defendants proceed with appointed counsel. And the Court has never thought, as the dissent suggests today, that doing so risks the "fundamental fairness of the actual trial." *Post*, at 12; see *post*, at 17–18. If it does, the right way to start correcting the problem is not by adopting the dissent's position, but by ensuring that the right to effective counsel is fully vindicated.

the ability to retain the "counsel [they] believe[ ] to be best"—and who might in fact be superior to any existing alternatives—matters profoundly. *Id.*, at 146.

And yet *Monsanto* held, crucially for the last part of our *Mathews* analysis, that an asset freeze depriving a defendant of that interest is *erroneous* only when unsupported by a finding of probable cause. Recall that *Monsanto* considered a case just like this one, where the defendant wanted to use his property to pay his preferred lawyer. He urged the Court to hold that the Government could seize assets needed for that purpose only after conviction. But we instead decided that the Government could act "after probable cause [that the assets are forfeitable] is adequately established." 491 U. S., at 616. And that means in a case like this one—where the assets' connection to the allegedly illegal conduct is not in dispute, see *supra*, at 5—that a pre-trial seizure is wrongful only when there is no probable cause to believe the defendants committed the crimes charged. Or to put the same point differently, such a freeze is erroneous—notwithstanding the weighty burden it imposes on the defendants' ability to hire a chosen lawyer—only when the grand jury should never have issued the indictment.

The *Mathews* test's remaining prong—critical when the governmental and private interests both have weight—thus boils down to the "probable value, if any," of a judicial hearing in uncovering mistaken grand jury findings of probable cause. 424 U. S., at 335. The Kaleys (and the dissent) contend that such proceedings will serve an important remedial function because grand juries hear only a "one-sided presentation[ ]" of evidence. Brief for Petitioners 57; see *post*, at 16. And that argument rests on a generally sound premise: that the adversarial process leads to better, more accurate decision-making. But in this context—when the legal standard is merely probable cause and the grand jury has already made that finding—

both our precedents and other courts' experience indicate that a full-dress hearing will provide little benefit.

This Court has repeatedly declined to require the use of adversarial procedures to make probable cause determinations. Probable cause, we have often told litigants, is not a high bar: It requires only the "kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Florida* v. *Harris*, 568 U. S. __, __ (2013) (slip op., at 5) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 231, 238 (1983)); see *Gerstein*, 420 U. S., at 121 (contrasting probable cause to reasonable-doubt and preponderance standards). That is why a grand jury's finding of probable cause to think that a person committed a crime "can be [made] reliably without an adversary hearing," *id.*, at 120; it is and "has always been thought sufficient to hear only the prosecutor's side," *United States* v. *Williams*, 504 U. S. 36, 51 (1992). So, for example, we have held the "confrontation and cross-examination" of witnesses unnecessary in a grand jury proceeding. *Gerstein*, 420 U. S., at 121–122. Similarly, we have declined to require the presentation of exculpatory evidence, see *Williams*, 504 U. S., at 51, and we have allowed the introduction of hearsay alone, see *Costello*, 350 U. S., at 362–364. On each occasion, we relied on the same reasoning, stemming from our recognition that probable cause served only a gateway function: Given the relatively undemanding "nature of the determination," the value of requiring any additional "formalities and safeguards" would "[i]n most cases . . . be too slight." *Gerstein*, 420 U. S., at 121–122.

We can come out no differently here. The probable cause determinations the Kaleys contest are simply those underlying the charges in the indictment. No doubt the Kaleys could seek to poke holes in the evidence the Government offered the grand jury to support those allegations. No doubt, too, the Kaleys could present evidence of their own, which might cast the Government's in a differ-

ent light. (Presumably, the Kaleys would try in those two ways to show that they did not steal, but instead lawfully obtained the medical devices they later resold. See *supra*, at 4.) Our criminal justice system of course relies on such contestation at trial when the question becomes whether a defendant is guilty beyond peradventure. But as we have held before, an adversarial process is far less useful to the threshold finding of probable cause, which determines only whether adequate grounds exist to proceed to trial and reach that question. The probable cause decision, by its nature, is hard to undermine, and still harder to reverse. So the likelihood that a judge holding an evidentiary hearing will repudiate the grand jury's decision strikes us, once more, as "too slight" to support a constitutional requirement. *Gerstein*, 420 U. S., at 122.

The evidence from other courts corroborates that view, over and over and over again. In the past two decades, the courts in several Circuits have routinely held the kind of hearing the Kaleys seek. See *supra*, at 3, and n. 4. Yet neither the Kaleys nor their *amici* (mostly lawyers' associations) have found a single case in which a judge found an absence of probable cause to believe that an indicted defendant committed the crime charged. One *amicus* cites 25 reported cases involving pre-trial hearings on asset freezes. See Brief for New York Council of Defense Lawyers 4, n. 2. In 24 of those, the defendant lost outright. The last involved a not-yet-indicted defendant (so no grand jury finding); there, the District Court's ruling for him was reversed on appeal. See Tr. of Oral Arg. 15, 36. To be sure, a kind of selection bias might affect those statistics: Perhaps a prosecutor with a very weak case would choose to abandon an asset freeze rather than face a difficult hearing. See *id.*, at 16, 37. But the Kaleys and their *amici* have also failed to offer any anecdotes of that kind; and we suspect that the far more common reason a prosecutor relinquishes a freeze is just to avoid premature

discovery. See *supra*, at 14–15. So experience, as far as anyone has discerned it, cuts against the Kaleys: It confirms that even under *Mathews*, they have no right to revisit the grand jury's finding.[14]

IV

When we decided *Monsanto*, we effectively resolved this case too. If the question in a pre-trial forfeiture case is whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides. And even if we test that proposition by applying *Mathews*, we arrive at the same place: In considering such findings of probable cause, we have never thought the value of enhanced evidentiary procedures worth their costs. Congress of course may strike its own balance and give defendants like the Kaleys the kind of hearing they want. Indeed, Congress could disapprove of *Monsanto* itself and hold pre-trial seizures of property to a higher standard than probable cause. But the Due Pro-

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[14] As against all this—all we have formerly held and all other courts have actually found—the dissent cites nothing: not a single decision of ours suggesting, nor a single decision of a lower court demonstrating, that formal, adversarial procedures are at all likely to correct any grand jury errors. The dissent argues only that a hearing will have "probable value" for the Kaleys because "the deprivation of [their] right" to chosen counsel, once accomplished, is "effectively permanent." *Post*, at 16. But that argument confuses two different parts of the *Mathews* inquiry. The dissent's point well underscores the importance of the Kaleys' interest: As we have readily acknowledged, if the grand jury made a mistake, the Kaleys have suffered a serious injury, which cannot later be corrected. See *supra*, at 16–17. (We note, though, that the dissent, in asserting that injury's uniqueness, understates the losses that always attend a mistaken indictment, which no ultimate verdict can erase.) But the dissent's argument about what is at stake for the Kaleys says nothing about the crucial, last prong of *Mathews*, which asks whether and to what extent the adversarial procedures they request will in fact correct any grand jury errors. That part of the analysis is what requires our decision, and the dissent's view that the Government overreached in this particular case cannot overcome it.

cess Clause, even when combined with a defendant's Sixth Amendment interests, does not command those results. Accordingly, the Kaleys cannot challenge the grand jury's conclusion that probable cause supports the charges against them. The grand jury gets the final word.

We therefore affirm the judgment of the Eleventh Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 12–464

KERRI L. KALEY, ET VIR, PETITIONERS *v.* UNITED STATES

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

[February 25, 2014]

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

An individual facing serious criminal charges brought by the United States has little but the Constitution and his attorney standing between him and prison. He might readily give all he owns to defend himself.

We have held, however, that the Government may effectively remove a defendant's primary weapon of defense—the attorney he selects and trusts—by freezing assets he needs to pay his lawyer. That ruling is not at issue. But today the Court goes further, holding that a defendant may be hobbled in this way without an opportunity to challenge the Government's decision to freeze those needed assets. I cannot subscribe to that holding and respectfully dissent.

I

The facts of this case are important. They highlight the significance to a defendant of being able to hire his counsel of choice, and the potential for unfairness inherent in giving the prosecutor the discretion to take that right away. Kerri Kaley worked as a sales representative for a Johnson & Johnson subsidiary, selling prescription medical devices. Kaley and other sales representatives occasionally obtained outmoded or surplus devices from staff

members at the medical facilities they served, when, for example, those devices were no longer needed because they had been superseded by newer models. Kaley sold the unwanted devices to a Florida company, dividing the proceeds among the sales representatives.

Kaley learned in January 2005 that a federal grand jury was investigating those activities as a conspiracy to sell stolen prescription medical devices. Kaley and her husband (who allegedly helped ship the products to Florida) retained counsel, who immediately set to work preparing their defense against any impending charges. Counsel regularly discussed the investigation with the Kaleys, helped review documents demanded by the grand jury, and met with prosecutors in an attempt to ward off an indictment. Nonetheless preparing for the worst, the Kaleys applied for a $500,000 equity line of credit on their home to pay estimated legal fees associated with a trial. They used that money to purchase a $500,000 certificate of deposit, which they set aside until it would be needed to pay their attorneys for the trial.

In February 2007, the grand jury returned a seven-count indictment charging the Kaleys and another sales representative, Jennifer Gruenstrass, with violations of federal law. The indictment alleged that a "money judgment" of over $2 million and the $500,000 certificate of deposit were subject to forfeiture under 18 U. S. C. §981(a)(1)(C) because those assets constituted "proceeds" of the alleged crimes. Armed with this indictment, the prosecution obtained an *ex parte* order pursuant to 21 U. S. C. §853(e), thereby freezing all of the Kaleys' assets listed in the indictment, including the certificate of deposit set aside for legal fees. The Government did not seek to freeze any of Gruenstrass's assets.

The Kaleys moved to vacate the order, requesting a hearing at which they could argue that there was no probable cause to believe their assets were forfeitable, because

their alleged conduct was not criminal. They argued they were entitled to such a hearing because the restraining order targeted funds they needed and had set aside to retain for trial the same counsel who had been preparing their defense for two years. And they contended that the prosecution was baseless because the Government could not identify anyone who claimed ownership of the medical devices alleged to have been "stolen." During a telephone conference with a Magistrate Judge on the motion, the prosecution conceded that it had been able to trace only $140,000 in allegedly criminal proceeds to the Kaleys, which led the Magistrate Judge to question the lawfulness of restraining the listed assets.

Just two business days after that conference, the Government obtained a superseding indictment that added a count of conspiracy to commit money laundering under 18 U. S. C. §1956(h). Adding that charge enabled the Government to proceed under a much broader forfeiture provision than the one in the original indictment. While the civil forfeiture provision in §981(a)(1)(C) authorized forfeiture of property that "constitutes or is derived from proceeds traceable to" a qualifying criminal violation, the criminal forfeiture provision now invoked by the Government—§982(a)(1)—authorizes forfeiture of property "involved in" a qualifying offense, or "any property traceable to such property." The superseding indictment alleged that a sum of more than $2 million, the certificate of deposit reserved to pay legal expenses, and now the Kaleys' home were subject to forfeiture. And again, the Government sought an order freezing substantially all those assets.

The Kaleys objected, repeating the arguments they had previously raised, and also contending that the prosecutors were being vindictive in adding the money laundering charge and seeking broader forfeiture. The District Court nonetheless entered the broader order requested by the

Government, and the restraint on the Kaleys' assets remains in place.

While the Kaleys' appeal from that denial was pending, the Government proceeded to trial separately against their codefendant Gruenstrass. As the Government had not sought to freeze Gruenstrass's assets, she was represented by her chosen counsel. Her counsel argued that the Government was pitching a fraud without a victim, because no Government witness took the stand to claim ownership of the allegedly stolen devices. The jury acquitted Gruenstrass on all charges in less than three hours—a good omen for the Kaleys and their counsel as they prepared for their own trial.

II

The issues at stake here implicate fundamental constitutional principles. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In many ways, this is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys. *United States* v. *Cronic*, 466 U. S. 648, 653–654 (1984). And more than 80 years ago, we found it "hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932).

Indeed, we recently called the "right to select counsel of one's choice . . . . the root meaning of the constitutional guarantee" of the Sixth Amendment. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 147–148 (2006). The Amendment requires "that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Id.,* at 146. An individual's right to counsel of choice is violated "*whenever* the defendant's choice is wrongfully denied," and such

error "pervades the entire trial." *Id.,* at 150. A violation of this right is therefore a "structural error," *ibid.*; that is, one of the very few kinds of errors that "undermine the fairness of a criminal proceeding as a whole." *United States* v. *Davila*, 569 U. S. ___, ___ (2013) (slip op., at 12).

It is of course true that the right to counsel of choice is (like most rights) not absolute. A defendant has no right to choose counsel he cannot afford, counsel who is not a member of the bar, or counsel with an impermissible conflict of interest. *Wheat* v. *United States*, 486 U. S. 153, 159 (1988). And a district court need not always shuffle its calendar to accommodate a defendant's preferred counsel if it has legitimate reasons not to do so. *Morris* v. *Slappy*, 461 U. S. 1, 11–12 (1983). But none of those limitations is imposed at the unreviewable discretion of a prosecutor—the party who wants the defendant to lose at trial.

This Court has held that the prosecution may freeze assets a defendant needs to retain his counsel of choice upon "a finding of probable cause to believe that the assets are forfeitable." *United States* v. *Monsanto*, 491 U. S. 600, 615 (1989). The Kaleys do not challenge that holding here. But the Court in *Monsanto* acknowledged and reserved the crucial question whether a defendant had the right to be heard before the Government could take such action. *Id.,* at 615, n. 10.[1]

There was good reason for that caution. The possibility that a prosecutor could elect to hamstring his target by preventing him from paying his counsel of choice raises substantial concerns about the fairness of the entire proceeding. "A fair trial in a fair tribunal is a basic require-

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[1] Because the District Court in *Monsanto* had imposed the restraining order after an "extensive, 4-day hearing on the question of probable cause," it was "pointless" for this Court to decide whether a hearing was required to "adequately establish[]" probable cause. 491 U. S., at 615, n. 10, 616.

ment of due process." *In re Murchison*, 349 U. S. 133, 136 (1955). Issues concerning the denial of counsel of choice implicate the overall fairness of the trial because they "bear[] directly on the 'framework within which the trial proceeds.'" *Gonzalez-Lopez*, *supra*, at 150 (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991)).

III

Notwithstanding the substantial constitutional issues at stake, the majority believes that syllogistic-type reasoning effectively resolves this case. *Ante*, at 12. The majority's reasoning goes like this: First, to freeze assets prior to trial, the Government must show probable cause to believe that a defendant has committed an offense giving rise to forfeiture. Second, grand jury determinations of probable cause are nonreviewable. Therefore, the Kaleys cannot "relitigate [the] grand jury finding" of probable cause to avoid a pretrial restraint of assets they need to retain their counsel of choice. *Ibid.* I do not view the matter as nearly so "straightforward," and neither did the multiple Courts of Appeals since *Monsanto* that have granted defendants the type of hearing the Kaleys request. See *ante*, at 3, n. 4.

To begin with, the majority's conclusion is wrong on its own terms. To freeze assets prior to trial, the Government must show probable cause to believe both that (1) a defendant has committed an offense giving rise to forfeiture and (2) the targeted assets have the requisite connection to the alleged criminal conduct. 21 U. S. C. §853(e)(1)(A). The Solicitor General concedes—and *all* Courts of Appeals to have considered the issue have held—that "defendants are entitled to show that the assets that are restrained are not actually the proceeds of the charged criminal offense," Tr. of Oral Arg. 45; that is, that the second prong of the required showing is not satisfied. But by listing property in the indictment and alleging that it is subject to

forfeiture—as required to restrain assets before trial under §853(e)(1)(A)—the grand jury found probable cause to believe those assets were linked to the charged offenses, just as it found probable cause to believe the Kaleys committed the underlying crimes. App. 60–61 (separate indictment section alleging criminal forfeiture, including of the certificate of deposit); see *United States* v. *Jones*, 160 F. 3d 641, 645 (CA10 1998); *United States* v. *Monsanto*, 924 F. 2d 1186, 1197 (CA2 1991) (en banc); Dept. of Justice, Asset Forfeiture Policy Manual 128 (2013) ("That the indictment alleges that property is subject to forfeiture indicates that the grand jury has made a probable cause determination."). Neither the Government nor the majority gives any reason why the District Court may reconsider the grand jury's probable cause finding as to traceability—and in fact constitutionally *must*, if asked—but may not do so as to the underlying charged offenses.[2]

In any event, the hearing the Kaleys seek would not be mere relitigation of the grand jury proceedings. At that hearing, the District Court would consider the merits of the prosecution to determine whether there is probable cause to believe the Kaleys' assets are forfeitable, not to determine whether the Kaleys may be tried at all. If the judge agrees with the Kaleys, he will merely hold that the Government has not met its burden at that hearing to justify freezing the assets the Kaleys need to pay their attorneys. The Government may proceed with the prose-

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[2]The majority's only response is to characterize the grand jury's finding of traceability as merely a "technical matter." *Ante,* at 11, n. 9. But the indictment draws no distinction between the grand jury's finding of probable cause to believe that the Kaleys committed a crime and its finding of probable cause to believe that certain assets are traceable to that crime. Both showings must be made to justify a pretrial asset restraint under *Monsanto*, and there is nothing in that case or the indictment that justifies treating one grand jury finding differently than the other.

cution, but the Kaleys will have their chosen counsel at their side.

Even though the probable cause standard applies at both the indictment stage and the pretrial asset restraint hearing, the judge's determination will be based on different evidence than that previously presented to the grand jury. For its part, the Government may choose to put on more or less evidence at the hearing than it did before the grand jury. And of course the Kaleys would have the opportunity to tell their side of the story—something the grand jury never hears. See *United States* v. *Williams*, 504 U. S. 36, 51–52 (1992). Here, much of what the Kaleys want to present comes from Gruenstrass's trial—evidence that the grand jury obviously could not have considered. So even if the judge determined that probable cause to justify the pretrial asset restraint had not been adequately established, that determination would not in any way amount to "looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *Ante,* at 7 (quoting *Costello* v. *United States*, 350 U. S. 359, 362–363 (1956) (internal quotation marks omitted)). The judge's decision based on the evidence presented at the hearing would have no necessary legal or logical consequence for the underlying prosecution because it would be based on different evidence and used for a different purpose.

The majority warns that allowing a judge to consider the underlying merits of the prosecution for purposes of determining whether a defendant's assets may be restrained pretrial could create "legal dissonance" with the grand jury's indictment, which "could not but undermine the criminal justice system's integrity." *Ante,* at 10–11. But as explained, such a judicial finding based on different evidence with both sides present would not contradict the grand jury's probable cause finding based on what was

before it. That finding would still suffice to accomplish *its* purpose—to call for a trial on the merits of the charges. Rather than creating "dissonance," the traditional roles of the principal actors in our justice system would remain respected: The grand jury decides whether a defendant should be required to stand trial, the judge decides pretrial matters and how the trial should proceed, and the jury decides whether the defendant is guilty of the crime.

Indeed, in the bail context—the pretrial determination that is perhaps the closest analogue to the pretrial restraint of assets at issue here—we allow judicial inquiries into the underlying merits of the indicted charges, without concern about intruding into the province of the grand jury. An indictment charging sufficiently serious crimes gives rise to a rebuttable presumption that a defendant is not eligible for pretrial release. See 18 U. S. C. §§3142(e)(3) and (f). Such a defendant is nonetheless entitled to an evidentiary hearing at which he may contest (among other things) "the weight of the evidence against" him, §3142(g)(2). Yet no one would say that the district court encroached on the grand jury's role if the court determined that it would not authorize pretrial detention because of the weakness of the prosecution's case. See, *e.g.*, *United States* v. *Hurtado*, 779 F. 2d 1467, 1479–1480 (CA11 1985) (recognizing that in considering the "weight of the evidence" to decide whether the presumption is rebutted, "it may well be necessary to open up the issue of probable cause since that too is a question of evidentiary weight"). That makes sense, because the district court has considered the underlying merits of the charges based on different information and for a different purpose than the grand jury did. Such a defendant would be granted pretrial release, but would still have to show up for trial.[3]

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[3]The majority cites cases in which courts have correctly rejected requests for a judicial redetermination of the grand jury's probable cause

In any event, few things could do more to "undermine the criminal justice system's integrity," *ante*, at 11, than to allow the Government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice—without even an opportunity to be heard. That is the result of the Court's decision in this case, and it is fundamentally at odds with our constitutional tradition and basic notions of fair play.

IV

The majority is no more persuasive in applying the due process balancing test set forth in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976).[4] As an initial matter, the majority

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finding for purposes of determining whether the *rebuttable presumption* of pretrial detention is triggered. See *ante,* at 8–9, n. 6. But those cases do not question the judge's authority to consider the underlying merits of the Government's case (including what the grand jury has alleged in the indictment) for purposes of determining whether that presumption has been rebutted. *E.g., United States* v. *Dominguez*, 783 F. 2d 702, 706 (CA7 1986) ("evidence probative of guilt is admitted at a detention hearing only to support or challenge the weight of the government's case against the defendant"); see also *United States* v. *Jones*, 583 F. Supp. 2d 513, 517 (SDNY 2008) (releasing a defendant pretrial after determining that "the weight of the evidence now overcomes the presumption of detention"). The majority notes that this inquiry in the bail context is authorized by statute, but that does not alter the crucial point: Where the prosecutor seeks to use the indictment to impose another significant pretrial consequence on a defendant, judges are allowed to inquire into the underlying merits of the prosecution (including the very same matters the grand jury has considered) as part of the inquiry into whether that consequence is justified, and that has not resulted in "dissonance" or the undermining of the grand jury's role.

[4] Under our due process precedents, it is clear that the *Mathews* test applies in this case, rather than the inquiry set forth in *Medina* v. *California*, 505 U. S. 437 (1992). We held in *Medina* that *Mathews* is inapplicable when "assessing the validity of state procedural rules" that "are part of the criminal process." *Id.,* at 443. We have therefore applied *Medina* rather than *Mathews* only when considering such due process challenges, including, for example, the allocation of burdens of proof or what type of evidence may be admitted. See, *e.g., id.,* at 443–

gives short shrift to the Kaleys' interests at stake. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976). Whatever serious crimes the grand jury alleges the Kaleys committed, they are presumptively innocent of those charges until final judgment. Their right to vindicate that presumption by choosing the advocate they believe will best defend them is, as explained, at the very core of the Sixth Amendment.

I suspect that, for the Kaleys, that right could hardly be more precious than it is now. In addition to potentially losing the property the Government has already frozen—including their home—the Kaleys face maximum prison terms of five years (18 U. S. C. §371), ten years (§2314), and 20 years (§1956(h)) for the charges in the superseding indictment. The indictment means they must stand trial on those charges. But the Kaleys plainly have an urgent interest in having their chosen counsel—who has worked with them since the grand jury's investigation began, two years before the indictment—mount their best possible defense at trial.

The majority alludes to our cases recognizing that indictments may result in the temporary deprivation of a defendant's liberty without judicial review, and suggests that indictments therefore must also be "good enough" to deprive a defendant of property without judicial review. *Ante*, at 9–10. Even if this greater-includes-the-lesser

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446 (burden of proving incompetence to stand trial); *Patterson* v. *New York*, 432 U. S. 197, 202 (1977) (burden of proving affirmative defense); *Dowling* v. *United States*, 493 U. S. 342, 352 (1990) (admissibility of testimony about a prior crime of which the defendant was acquitted). This case is not about such questions, but about the collateral issue of the pretrial deprivation of property a defendant needs to exercise his right to counsel of choice. *Mathews* therefore provides the relevant inquiry.

reasoning might be valid in other contexts, it is not when the property at issue is needed to hire chosen counsel. In the context of a prosecution for serious crimes, it is far from clear which interest is greater—the interest in temporary liberty pending trial, or the interest in using one's available means to avoid imprisonment for many years after trial. Retaining one's counsel of choice ensures the fundamental fairness of the actual trial, and thus may be far more valuable to a criminal defendant than pretrial release.

As for the Government's side, the Court echoes the Government's concerns that a hearing would place demands on its resources and interfere with its desire to keep its trial strategy close to the vest. These concerns are somewhat curious in light of the majority's emphasis on how easy it is to make a probable cause showing. And they are even more surprising in light of the extensive discovery obligations already imposed on the Government by Federal Rule of Criminal Procedure 16 and *Brady* v. *Maryland*, 373 U. S. 83 (1963). The emphasis the Government places on pretrial secrecy evokes an outdated conception of the criminal trial as "a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams* v. *Florida*, 399 U. S. 78, 82 (1970).

Moreover, recall that the Government concedes that due process guarantees defendants a hearing to contest the traceability of the restrained assets to the charged conduct. If a defendant requests such a hearing, the Government will likely be required to reveal something about its case to demonstrate that the assets have the requisite connection to the charged offenses.

In any event, these concerns are exaggerated. What the Government would be required to show in a pretrial restraint hearing is similar to pretrial showings prosecutors make in other contexts on a daily basis. As mentioned

above, when the Government seeks an order detaining a defendant pending trial, it routinely makes an extensive evidentiary showing—voluntarily disclosing much of its evidence and trial strategy—in support of that relief. See Brief for California Attorneys for Criminal Justice as *Amicus Curiae* 11–18. The Government makes similar showings in the context of other pretrial motions, such as motions to admit hearsay evidence under the co-conspirator exception, or to discover attorney-client communications made in furtherance of a future crime. *Id.,* at 19–28.

In those contexts, as in this one, the decision how much to "show its hand" rests fully within the Government's discretion. If it has a strong case and believes that pretrial restraint is necessary to preserve the assets for forfeiture, the Government may choose to make a strong evidentiary showing and have little concern about doing so. In a closer case, where the Government is more concerned about tipping its hand, it may elect to forgo a pretrial restraint of those assets the defendant needs to pay his counsel. I see no great burden on the Government in allowing it to strike this balance as it sees fit when considering a pretrial asset restraint that would deprive a defendant of his right to counsel of choice. In the end, it is a bit much to argue that the Government has discretion to deprive a defendant—without a hearing—of the counsel he has chosen to present his defense, simply to avoid the mere possibility of a premature peek at some aspect of what the Government intends to do at trial.

The majority also significantly underestimates the amount of control judges can exercise in these types of hearings. The Circuits that allow such hearings have afforded judges a great deal of flexibility in structuring them. Judges need not apply the Federal Rules of Evidence during the hearings, and they can take many steps, including *in camera* proceedings, to ensure that witness

safety and grand jury secrecy are fully preserved. See *Monsanto*, 924 F. 2d, at 1198; *United States* v. *E-Gold, Ltd.*, 521 F. 3d 411, 418–419 (CADC 2008).

Moreover, experience in the Second Circuit, where defendants have for more than 20 years been afforded the type of hearing the Kaleys seek, indicates that such hearings do not occur so often as to raise substantial concerns about taxing the resources of the Government and lower courts. See Brief for New York Council of Defense Lawyers as *Amicus Curiae* 4–9. As the majority notes, only 25 reported cases appear to have addressed such hearings. *Id.*, at 4. This relative rarity is unsurprising. To even be entitled to the hearing, defendants must first show a genuine need to use the assets to retain counsel of choice. See *United States* v. *Bonventre*, 720 F. 3d 126, 131 (CA2 2013). And defendants too have an incentive not to tip their hands as to trial strategy—perhaps to an even greater extent than the Government, given that defendants bear comparatively few discovery obligations at a criminal trial. In light of the low bar of the probable cause standard, many defendants likely conclude that the possible benefits of the hearing are not worth the candle.

For those hearings that do occur, they are by all appearances ably controlled by district judges to keep them manageable and to limit the potential for excess or abuse. See Brief for New York Council of Defense Lawyers as *Amicus Curiae* 6–8. In addition, where such hearings are allowed, prosecutors and defense counsel often reach agreements concerning the scope and conditions of any protective order that accommodate the interests of both sides. See *id.*, at 8–9. When the right at stake is as fundamental as hiring one's counsel of choice—the "root meaning" of the Sixth Amendment, *Gonzalez-Lopez*, 548 U. S., at 147–148—the Government's interest in saving the time and expense of a limited number of such proceedings is not particularly compelling.

The Government does have legitimate interests that are served by forfeiture of allegedly tainted assets. *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 629 (1989). And imposing a pretrial restraint on such assets does increase the likelihood that they will be available if the defendant is convicted.[5] But that interest is protected in other ways that mitigate the concern that defendants will successfully divert forfeitable assets from the Government's reach if afforded a hearing. The relation-back provision in 21 U. S. C. §853(c) provides that title to forfeitable assets, once adjudged forfeitable, vests in the Government as of the time the offense was committed. Section 853(c) then provides that the Government may seek a "special verdict of forfeiture" as to any forfeited property that was subsequently transferred to a third party. The Government protests that recovery of such assets will often be complicated and subject to the vagaries of state law. Tr. of Oral Arg. 49–50. But such complaints of administrative inconvenience carry little weight in this particular context, when the Government knows exactly where the money has gone: to an attorney who is, after all, an officer of the court, and on notice that the Government claims title to the assets.

And we are not talking about all of a defendant's assets that are subject to forfeiture—only those that the defendant can show are necessary to secure his counsel of choice.

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[5] The Government and the majority place particular emphasis on the use of forfeited assets to provide restitution to victims of crime. See Brief for United States 41–42, and n. 14; *ante,* at 2, n. 1. It is worth noting in this respect that in prosecuting the other sales representatives that participated with the Kaleys in the allegedly fraudulent conduct, the Government's position as to who exactly is the "victim" has shifted frequently. See Brief for Petitioners 9–11 (hospitals); *id.,* at 18, 21–23 (their employers); Tr. of Oral Arg. 43–44 (hospitals). As one prosecutor forthrightly acknowledged at the sentencing hearing of an alleged co-conspirator, "we can't make restitution." Brief for Petitioners 11.

Here, for example, the Kaleys have identified as needed to pay counsel only a discrete portion of the assets the Government seeks. The statistics cited by the Court on the total amount of assets recovered by the Government and provided as restitution for victims, *ante,* at 2, n. 1, are completely beside the point.

The majority ultimately concludes that a pretrial hearing of the sort the Kaleys seek would be a waste of time. *Ante*, at 17–20. No. It takes little imagination to see that seizures based entirely on *ex parte* proceedings create a heightened risk of error. Common sense tells us that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides. We have thus consistently recognized that the "fundamental instrument for judicial judgment" is "an adversary proceeding in which both parties may participate." *Carroll* v. *President and Comm'rs of Princess Anne*, 393 U. S. 175, 183 (1968). In the present context, some defendants (like the Kaleys) may be able to show that the theory of prosecution is legally defective through an argument that almost certainly was not presented to the grand jury. And as discussed above, *supra,* at 13–15, prosecutors in some cases elect not to freeze needed assets, or they negotiate tailored protective orders to serve the interests of both sides—something they would be unlikely to do if the hearings were rote exercises.

Given the risk of an erroneous restraint of assets needed to retain chosen counsel, the "probable value" of the "additional safeguard" a pretrial hearing would provide is significant. That is because the right to counsel of choice is inherently transient, and the deprivation of that right effectively permanent. In our cases suggesting that little would be gained by requiring an adversary hearing on probable cause or imposing stricter evidentiary requirements in grand jury proceedings, we have noted that the grand jury is not where the ultimate question of "the guilt

or innocence of the accused is adjudicated." *United States* v. *Calandra*, 414 U. S. 338, 343 (1974); see *United States* v. *Williams*, 504 U. S. 36, 51 (1992) (explaining that the grand jury hears only from the prosecutor because "'the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined'" (quoting 4 W. Blackstone, Commentaries 300 (1769)). If the grand jury considers incomplete or incompetent evidence in deciding to return an indictment, the defendant still has the full trial on the merits, with all its "formalities and safeguards," *Gerstein* v. *Pugh*, 420 U. S. 103, 122 (1975), to prove his innocence.

Here, by contrast, the Government seeks to use the grand jury's probable cause determination to strip the Kaleys of their counsel of choice. The Kaleys can take no comfort that they will be able to vindicate that right in a future adversarial proceeding. Once trial begins with someone other than chosen counsel, the right is lost, and it cannot be restored based on what happens at trial. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U. S., at 333 (quoting *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965)). If the Kaleys are to have any opportunity to meaningfully challenge that deprivation, they must have it before the trial begins.

* * *

The issues presented here implicate some of the most fundamental precepts underlying the American criminal justice system. A person accused by the United States of committing a crime is presumed innocent until proven guilty beyond a reasonable doubt. But he faces a foe of powerful might and vast resources, intent on seeing him behind bars. That individual has the right to choose the advocate he believes will most ably defend his liberty at trial.

The trial is governed by rules designed to ensure that, whatever the ultimate verdict, we can be confident to the extent possible that justice was done, within the bounds of the Constitution. That confidence is grounded in our belief in the adversary system. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). Today's decision erodes that confidence by permitting the Government to deprive a criminal defendant of his right to counsel of choice, without so much as a chance to be heard on why such a significant pretrial deprivation is unwarranted.

The majority wraps up its analysis by blandly noting that Congress is of course free to extend broader protection to criminal defendants. *Ante*, at 20. Not very likely. In this area it is to the courts that those charged with crime must turn.

Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers—one at a time. In my view, the Court's opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of that significant role. I would not do it, and so respectfully dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LUIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 14–419. Argued November 10, 2015—Decided March 30, 2016

A federal statute provides that a court may freeze before trial certain assets belonging to a defendant accused of violations of federal health care or banking laws. Those assets include (1) property "obtained as a result of" the crime, (2) property "traceable" to the crime, and (3), as relevant here, other "property of equivalent value." 18 U. S. C. §1345(a)(2). The Government has charged petitioner Luis with fraudulently obtaining nearly $45 million through crimes related to health care. In order to preserve the $2 million remaining in Luis' possession for payment of restitution and other criminal penalties, the Government secured a pretrial order prohibiting Luis from dissipating her assets, including assets unrelated to her alleged crimes. Though the District Court recognized that the order might prevent Luis from obtaining counsel of her choice, it held that the Sixth Amendment did not give her the right to use her own untainted funds for that purpose. The Eleventh Circuit affirmed.

Held: The judgment is vacated, and the case is remanded.

564 Fed. Appx. 493, vacated and remanded.

JUSTICE BREYER, joined by THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR, concluded that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The nature and importance of the constitutional right taken together with the nature of the assets lead to this conclusion. Pp. 3–16.

(a) The Sixth Amendment right to counsel grants a defendant "a fair opportunity to secure counsel of his own choice," *Powell* v. *Alabama*, 287 U. S. 45, 53, that he "can afford to hire," *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624. This Court has

consistently referred to the right to counsel of choice as "fundamental." Pp. 3–5.

(b) While the Government does not deny Luis' fundamental right to be represented by a qualified attorney whom she chooses and can afford to hire, it would nonetheless undermine the value of that right by taking from Luis the ability to use funds she needs to pay for her chosen attorney. The Government attempts to justify this consequence by pointing out that there are important interests on the other side of the legal equation. It wishes to guarantee that funds will be available later to help pay for statutory penalties and restitution, for example. The Government further argues that two previous cases from this Court, *Caplin & Drysdale*, *supra*, at 619, and *United States* v. *Monsanto*, 491 U. S. 600, 615, support the issuance of a restraining order in this case. However, the nature of the assets at issue here differs from the assets at issue in those earlier cases. And that distinction makes a difference. Pp. 5–16.

(1) Here, the property is untainted, *i.e.*, it belongs to Luis. As described in *Caplin & Drysdale* and *Monsanto*, the Government may well be able to freeze before trial "tainted" assets—*e.g.*, loot, contraband, or property otherwise associated with the planning, implementing, or concealing of a crime. As a matter of property law, the defendant's ownership interest in such property is imperfect. For example, a different federal statute provides that title to property used to commit a crime (or otherwise "traceable" to a crime) passes to the Government at the instant the crime is planned or committed. See 21 U. S. C. §853(c). But here, the Government seeks to impose restrictions upon Luis' untainted property without any showing of any equivalent governmental interest in that property. Pp. 5–10.

(2) This distinction does not by itself answer the constitutional question because the law of property may allow a person without a present interest in a piece of property to impose restrictions upon a current owner, say, to prevent waste. However, insofar as innocent funds are needed to obtain counsel of choice, the Sixth Amendment prohibits the court order sought here.

Three basic considerations lead to this conclusion. First, the nature of the competing interests argues against this kind of court order. On the one side is a fundamental Sixth Amendment right to assistance of counsel. On the other side is the Government's interest in securing its punishment of choice, as well as the victim's interest in securing restitution. These latter interests are important, but—compared to the right to counsel—they seem to lie somewhat further from the heart of a fair, effective criminal justice system. Second, relevant, common-law legal tradition offers virtually no significant support for the Government's position and in fact argues to the con-

trary. Indeed, there appears to be no decision of this Court authorizing unfettered, pretrial forfeiture of the defendant's own "innocent" property. Third, as a practical matter, accepting the Government's position could erode the right to counsel considerably. It would, in fact, unleash a principle of constitutional law with no obvious stopping place, as Congress could write more statutes authorizing restraints in other cases involving illegal behavior that come with steep financial consequences. These defendants, often rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. The upshot is a substantial risk that accepting the Government's views would render less effective the basic right the Sixth Amendment seeks to protect. Pp. 11–15.

(3) The constitutional line between a criminal defendant's tainted funds and innocent funds needed to pay for counsel should prove workable. Money may be fungible, but courts, which use tracing rules in cases of, *e.g.*, fraud and pension rights, have experience separating tainted assets from untainted assets, just as they have experience determining how much money is needed to cover the costs of a lawyer. Pp. 15–16.

JUSTICE THOMAS concluded that the rule that a pretrial freeze of untainted assets violates a defendant's Sixth Amendment right to counsel of choice rests strictly on the Sixth Amendment's text and common-law backdrop. Pp. 1–12.

(a) The Sixth Amendment abolished the common-law rule that generally prohibited representation in felony cases. "The right to select counsel of one's choice" is thus "the root meaning" of the Sixth Amendment right to counsel. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 147–148. Constitutional rights protect the necessary prerequisites for their exercise. As a result, the Sixth Amendment denies the Government unchecked power to freeze a defendant's assets before trial simply to secure potential forfeiture upon conviction. Unless the right to counsel protects the right to use lawfully owned property to pay for an attorney, the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless. Without pretrial protection for at least *some* of a defendant's assets, the Government could nullify the right to counsel of choice, eviscerating the Sixth Amendment's original meaning and purpose. The modern, judicially created right to government-appointed counsel does not obviate these concerns. Pp. 1–5.

(b) History confirms this textual understanding. The common-law forfeiture tradition provides an administrable rule for the Sixth Amendment's protection: A criminal defendant's untainted assets are protected from government interference before trial and judgment, but his tainted assets may be seized before trial as contraband or

Syllabus

through a separate *in rem* proceeding. Reading the Sixth Amendment to track the historical line between tainted and untainted assets avoids case-by-case adjudication and ensures that the original meaning of the right to counsel does real work. Here, the incursion of the pretrial asset freeze into untainted assets, for which there is no historical tradition, violates the Sixth Amendment. Pp. 5–9.

(c) This conclusion leaves no room for an atextual balancing analysis. Pp. 9–12.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and GINSBURG and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which ALITO, J., joined. KAGAN, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 14–419

SILA LUIS, PETITIONER *v.* UNITED STATES

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

[March 30, 2016]

JUSTICE BREYER announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join.

A federal statute provides that a court may freeze before trial certain assets belonging to a criminal defendant accused of violations of federal health care or banking laws. See 18 U. S. C. §1345. Those assets include: (1) property "obtained as a result of" the crime, (2) property "traceable" to the crime, and (3) other "property of equivalent value." §1345(a)(2). In this case, the Government has obtained a court order that freezes assets belonging to the third category of property, namely, property that is untainted by the crime, and that belongs fully to the defendant. That order, the defendant says, prevents her from paying her lawyer. She claims that insofar as it does so, it violates her Sixth Amendment "right . . . to have the Assistance of Counsel for [her] defence." We agree.

I

In October 2012, a federal grand jury charged the petitioner, Sila Luis, with paying kickbacks, conspiring to commit fraud, and engaging in other crimes all related to health care. See §1349; §371; 42 U. S. C. §1320a–

7b(b)(2)(A). The Government claimed that Luis had fraudulently obtained close to $45 million, almost all of which she had already spent. Believing it would convict Luis of the crimes charged, and hoping to preserve the $2 million remaining in Luis' possession for payment of restitution and other criminal penalties (often referred to as criminal forfeitures, which can include innocent—not just tainted—assets, a point of critical importance here), the Government sought a pretrial order prohibiting Luis from dissipating her assets. See 18 U. S. C. §1345(a)(2). And the District Court ultimately issued an order prohibiting her from "dissipating, or otherwise disposing of . . . assets, real or personal . . . up to the equivalent value of the proceeds of the Federal health care fraud ($45 million)." App. to Pet. for Cert. A–6.

The Government and Luis agree that this court order will prevent Luis from using her own untainted funds, *i.e.*, funds not connected with the crime, to hire counsel to defend her in her criminal case. See App. 161 (stipulating "that an unquantified amount of revenue not connected to the indictment [had] flowed into some of the accounts" subject to the restraining order); *ibid.* (similarly stipulating that Luis used "revenue not connected to the indictment" to pay for real property that she possessed). Although the District Court recognized that the order might prevent Luis from obtaining counsel of her choice, it held "that there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." 966 F. Supp. 2d 1321, 1334 (SD Fla. 2013).

The Eleventh Circuit upheld the District Court. See 564 Fed. Appx. 493, 494 (2014) (*per curiam*) (referring to, *e.g.*, *Kaley* v. *United States*, 571 U. S. ___ (2014); *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 631 (1989); *United States* v. *Monsanto*, 491 U. S. 600, 616 (1989)). We granted Luis' petition for certiorari.

II

The question presented is "[w]hether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments." Pet. for Cert. ii. We see no reasonable way to interpret the relevant statutes to avoid answering this constitutional question. Cf. *Monsanto*, *supra*, at 614. Hence, we answer it, and our answer is that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The nature and importance of the constitutional right taken together with the nature of the assets lead us to this conclusion.

A

No one doubts the fundamental character of a criminal defendant's Sixth Amendment right to the "Assistance of Counsel." In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the Court explained:

> "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not

know how to establish his innocence.'" *Id.*, at 344–345 (quoting *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932)).

It is consequently not surprising: *first*, that this Court's opinions often refer to the right to counsel as "fundamental," *id.*, at 68; see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243–244 (1936) (similar); *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938) (similar); *second*, that commentators describe the right as a "great engin[e] by which an innocent man can make the truth of his innocence visible," Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 643 (1996); see *Herring* v. *New York*, 422 U. S. 853, 862 (1975); *third*, that we have understood the right to require that the Government provide counsel for an indigent defendant accused of all but the least serious crimes, see *Gideon*, *supra*, at 344; and *fourth*, that we have considered the wrongful deprivation of the right to counsel a "structural" error that so "affec[ts] the framework within which the trial proceeds" that courts may not even ask whether the error harmed the defendant. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 148 (2006) (internal quotation marks omitted); see *id.*, at 150.

Given the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust, neither is it surprising that the Court has held that the Sixth Amendment grants a defendant "a fair opportunity to secure counsel of his own choice." *Powell*, *supra*, at 53; see *Gonzalez-Lopez*, *supra*, at 150 (describing "these myriad aspects of representation"). This "fair opportunity" for the defendant to secure counsel of choice has limits. A defendant has no right, for example, to an attorney who is not a member of the bar, or who has a conflict of interest due to a relationship with an opposing party. See *Wheat* v. *United States*, 486 U. S. 153, 159 (1988). And an indigent defendant, while entitled to

adequate representation, has no right to have the Government pay for his preferred representational choice. See *Caplin & Drysdale*, 491 U. S., at 624.

We nonetheless emphasize that the constitutional right at issue here is fundamental: "[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Ibid.*

B

The Government cannot, and does not, deny Luis' right to be represented by a qualified attorney whom she chooses and can afford. But the Government would undermine the value of that right by taking from Luis the ability to use the funds she needs to pay for her chosen attorney. The Government points out that, while freezing the funds may have this consequence, there are important interests on the other side of the legal equation: It wishes to guarantee that those funds will be available later to help pay for statutory penalties (including forfeiture of untainted assets) and restitution, should it secure convictions. And it points to two cases from this Court, *Caplin & Drysdale*, *supra*, at 619, and *Monsanto*, 491 U. S., at 615, which, in the Government's view, hold that the Sixth Amendment does not pose an obstacle to its doing so here. In our view, however, the nature of the assets at issue here differs from the assets at issue in those earlier cases. And that distinction makes a difference.

1

The relevant difference consists of the fact that the property here is untainted; *i.e.*, it belongs to the defendant, pure and simple. In this respect it differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime. The Government may well

be able to freeze, perhaps to seize, assets of the latter, "tainted" kind before trial. As a matter of property law the defendant's ownership interest is imperfect. The robber's loot belongs to the victim, not to the defendant. See *Telegraph Co.* v. *Davenport*, 97 U. S. 369, 372 (1878) ("The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires . . . that the property wrongfully transferred or stolen should be restored to its rightful owner"). The cocaine is contraband, long considered forfeitable to the Government wherever found. See, *e.g.*, 21 U. S. C. §881(a) ("[Controlled substances] shall be subject to forfeiture to the United States and no property right shall exist in them"); *Carroll* v. *United States*, 267 U. S. 132, 159 (1925) (describing the seizure of "contraband forfeitable property"). And title to property used to commit a crime (or otherwise "traceable" to a crime) often passes to the Government at the instant the crime is planned or committed. See, *e.g.*, §853(c) (providing that the Government's ownership interest in such property relates back to the time of the crime).

The property at issue here, however, is not loot, contraband, or otherwise "tainted." It belongs to the defendant. That fact undermines the Government's reliance upon precedent, for both *Caplin & Drysdale* and *Monsanto* relied critically upon the fact that the property at issue was "tainted," and that title to the property therefore had passed from the defendant to the Government before the court issued its order freezing (or otherwise disposing of) the assets.

In *Caplin & Drysdale*, the Court considered a post-conviction forfeiture that took from a convicted defendant funds he would have used to pay his lawyer. The Court held that the forfeiture was constitutional. In doing so, however, it emphasized that the forfeiture statute at issue provided that "'[a]ll right, title, and interest in property

[constituting or derived from any proceeds obtained from the crime] vests in the United States *upon the commission of the act* giving rise to [the] forfeiture.'" 491 U. S., at 625, n. 4 (quoting §853(c)) (emphasis added). It added that the law had "long-recognized" as "lawful" the "practice of vesting title to any forfeitable asset[s] in the United State[s] at the time of the crim[e]." *Id.*, at 627. It pointed out that the defendant did not "claim, as a general proposition, that the [vesting] provision is unconstitutional, or that Congress cannot, as a general matter, vest title to assets derived from the crime in the Government, as of the date of the criminal act in question." *Id.*, at 627–628. And, given the vesting language, the Court explained that the defendant "did not hold good title" to the property. *Id.*, at 627. The Court therefore concluded that "[t]here is no constitutional principle that gives one person [namely, the defendant] the right to give another's [namely, the Government's] property to a third party," namely, the lawyer. *Id.*, at 628.

In *Monsanto*, the Court considered a pretrial restraining order that prevented a not-yet-convicted defendant from using certain assets to pay for his lawyer. The defendant argued that, given this difference, *Caplin & Drysdale*'s conclusion should not apply. The Court noted, however, that the property at issue was forfeitable under the same statute that was at issue in *Caplin & Drysdale*. See *Monsanto*, *supra*, at 614. And, as in *Caplin & Drysdale*, the application of that statute to Monsanto's case concerned only the pretrial restraint of assets *that were traceable to the crime*, see 491 U. S., at 602–603; thus, the statute passed title to those funds at the time the crime was committed (*i.e.*, before the trial), see §853(c). The Court said that *Caplin & Drysdale* had already "weigh[ed] . . . th[e] very interests" at issue. *Monsanto*, *supra*, at 616. And it "rel[ied] on" its "conclusion" in *Caplin & Drysdale* to dispose of, and to reject, the defendant's "similar constitu-

tional claims." 491 U. S., at 614.

JUSTICE KENNEDY prefers to read *Caplin & Drysdale* and *Monsanto* broadly, as holding that "the Government, having established probable cause to believe that Luis' substitute [*i.e.*, innocent] assets will be forfeitable upon conviction, should be permitted to obtain a restraining order barring her from spending those funds prior to trial." *Post*, at 6–7 (dissenting opinion). In other words, he believes that those cases stand for the proposition that property—whether tainted or untainted—is subject to pretrial restraint, so long as the property might someday be subject to forfeiture. But this reading asks too much of our precedents. For one thing, as discussed, *Caplin & Drysdale* and *Monsanto* involved the restraint only of tainted assets, and thus we had no occasion to opine in those cases about the constitutionality of pretrial restraints of other, untainted assets.

For another thing, JUSTICE KENNEDY's broad rule ignores the statutory background against which *Caplin & Drysdale* and *Monsanto* were decided. The Court in those cases referenced §853(c) more than a dozen times. And it acknowledged that whether property is "forfeitable" or subject to pretrial restraint under Congress' scheme is a nuanced inquiry that very much depends on who has the superior interest in the property at issue. See *Caplin & Drysdale*, *supra*, at 626–628; *Monsanto*, 491 U. S., at 616. We see this in, for example, §853(e)(1), which explicitly authorizes restraining orders or injunctions against "property described in subsection (a) of this section" (*i.e.*, *tainted* assets). We see this too in §853(e)(1)(B), which requires the Government—in certain circumstances—to give "notice to persons appearing to have an interest in the property and opportunity for hearing" before obtaining a restraining order against such property. We see this in §853(c), which allows "bona fide purchaser[s] for value" to keep property that would otherwise be subject to forfei-

ture. And we see this in §853(n)(6)(A), which exempts certain property from forfeiture when a third party can show a vested interest in the property that is "superior" to that of the Government.

The distinction that we have discussed is thus an important one, not a technicality. It is the difference between what is yours and what is mine. In *Caplin & Drysdale* and *Monsanto*, the Government wanted to impose restrictions upon (or seize) property that the Government had probable cause to believe was the proceeds of, or traceable to, a crime. See *Monsanto*, *supra*, at 615. The relevant statute said that the Government took title to those tainted assets as of the time of the crime. See §853(c). And the defendants in those cases consequently had to concede that the disputed property was in an important sense the Government's at the time the court imposed the restrictions. See *Caplin & Drysdale*, *supra*, at 619–620; *Monsanto*, *supra*, at 602–603.

This is not to say that the Government "owned" the tainted property outright (in the sense that it could take possession of the property even before obtaining a conviction). See *post*, at 7–10 (KENNEDY, J., dissenting). Rather, it is to say that the Government even before trial had a "substantial" interest in the tainted property sufficient to justify the property's pretrial restraint. See *Caplin & Drysdale*, *supra*, at 627 ("[T]he property rights given the Government by virtue of [§853(c)'s relation-back provision] are more substantial than petitioner acknowledges"); *United States* v. *Stowell*, 133 U. S. 1, 19 (1890) ("As soon as [the possessor of the forfeitable asset committed the violation] . . . , the forfeiture . . . *took effect*, and (though needing judicial condemnation to perfect it) operated *from that time* as a statutory conveyance to the United States of all right, title and interest then remaining in the [possessor]; and was as valid and effectual, against all the world, as a recorded deed" (emphasis added)).

If we analogize to bankruptcy law, the Government, by application of §853(c)'s relation-back provision, became something like a secured creditor with a lien on the defendant's tainted assets superior to that of most any other party. See 4 Collier on Bankruptcy ¶506.03[1] (16th ed. 2015). For this reason, §853(c) has operated in our cases as a significant limitation on criminal defendants' property rights in such assets—even before conviction. See *Monsanto*, *supra*, at 613 ("Permitting a defendant to use [tainted] assets for his private purposes that, under this [relation-back] provision, will become the property of the United States if a conviction occurs cannot be sanctioned"); cf. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 326 (1999) (noting that the Court had previously authorized injunctions against the further dissipation of property where, among other things, "the creditor (the Government) asserted an equitable lien on the property").

Here, by contrast, the Government seeks to impose restrictions upon Luis' *un*tainted property without any showing of any equivalent governmental interest in that property. Again, if this were a bankruptcy case, the Government would be at most an unsecured creditor. Although such creditors someday might collect from a debtor's general assets, they cannot be said to have any present claim to, or interest in, the debtor's property. See *id.*, at 330 ("[B]efore judgment . . . an unsecured creditor has no rights at law or in equity in the property of his debtor"); see also 5 Collier on Bankruptcy ¶541.05[1][b] ("[G]eneral unsecured creditor[s]" have "no specific property interest in the goods held or sold by the debtor"). The competing property interests in the tainted- and untainted-asset contexts therefore are not "exactly the same." *Post*, at 2 (KAGAN, J., dissenting). At least regarding her untainted assets, Luis can at this point reasonably claim that the property is still "mine," free and clear.

This distinction between (1) what is primarily "mine" (the defendant's) and (2) what is primarily "yours" (the Government's) does not by itself answer the constitutional question posed, for the law of property sometimes allows a person without a present interest in a piece of property to impose restrictions upon a current owner, say, to prevent waste. A holder of a reversionary interest, for example, can prevent the owner of a life estate from wasting the property. See, *e.g.*, *Peterson* v. *Ferrell*, 127 N. C. 169, 170, 37 S. E. 189, 190 (1900). Those who later may become beneficiaries of a trust are sometimes able to prevent the trustee from dissipating the trust's assets. See, *e.g.*, *Kollock* v. *Webb*, 113 Ga. 762, 769, 39 S. E. 339, 343 (1901). And holders of a contingent, future executory interest in property (an interest that might become possessory at some point down the road) can, in limited circumstances, enjoin the activities of the current owner. See, *e.g.*, *Dees* v. *Cheuvronts*, 240 Ill. 486, 491, 88 N. E. 1011, 1012 (1909) ("[E]quity w[ill] interfere . . . only when it is made to appear that the contingency . . . is reasonably certain to happen, and the waste is . . . wanton and conscienceless"). The Government here seeks a somewhat analogous order, *i.e.*, an order that will preserve Luis' untainted assets so that they will be available to cover the costs of forfeiture and restitution if she is convicted, and if the court later determines that her tainted assets are insufficient or otherwise unavailable.

The Government finds statutory authority for its request in language authorizing a court to enjoin a criminal defendant from, for example, disposing of innocent "property of equivalent value" to that of tainted property. 18 U. S. C. §1345(a)(2)(B)(i). But Luis needs some portion of those same funds to pay for the lawyer of her choice. Thus, the legal conflict arises. And, in our view, insofar as innocent (*i.e.*, untainted) funds are needed to obtain coun-

sel of choice, we believe that the Sixth Amendment prohibits the court order that the Government seeks.

Three basic considerations lead us to this conclusion. First, the nature of the competing interests argues against this kind of court order. On the one side we find, as we have previously explained, *supra*, at 3–5, a Sixth Amendment right to assistance of counsel that is a fundamental constituent of due process of law, see *Powell*, 287 U. S., at 68–69. And that right includes "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Caplin & Drysdale*, 491 U. S., at 624. The order at issue in this case would seriously undermine that constitutional right.

On the other side we find interests that include the Government's contingent interest in securing its punishment of choice (namely, criminal forfeiture) as well as the victims' interest in securing restitution (notably, from funds belonging to the defendant, not the victims). While these interests are important, to deny the Government the order it requests will not inevitably undermine them, for, at least sometimes, the defendant may possess other assets—say, "tainted" property—that might be used for forfeitures and restitution. Cf. *Gonzalez-Lopez*, 548 U. S., at 148 ("Deprivation of the right" to counsel of the defendant's choice "is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants"). Nor do the interests in obtaining payment of a criminal forfeiture or restitution order enjoy constitutional protection. Rather, despite their importance, compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.

Second, relevant legal tradition offers virtually no significant support for the Government's position. Rather, tradition argues to the contrary. Describing the 18th-century English legal world (which recognized only a

limited right to counsel), Blackstone wrote that "only" those "goods and chattels" that "a man has *at the time of conviction* shall be forfeited." 4 W. Blackstone, Commentaries on the Laws of England 388 (1765) (emphasis added); see 1 J. Chitty, Practical Treatise on the Criminal Law 737 (1816) ("[T]he party indicted may sell any of [his property] . . . to assist him in preparing for his defense on the trial").

Describing the common law as understood in 19th-century America (which recognized a broader right to counsel), Justice Story wrote:

> "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture . . . was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. . . . In the contemplation of the common law, the offender's right was not divested until the conviction." *The Palmyra*, 12 Wheat. 1, 14 (1827).

See generally *Powell*, *supra*, at 60–61 (describing the scope of the right to counsel in 18th-century Britain and colonial America).

As we have explained, *supra*, at 6–10, cases such as *Caplin & Drysdale* and *Monsanto* permit the Government to freeze a defendant's assets pretrial, but the opinions in those cases highlight the fact that the property at issue was "tainted," *i.e.*, it did not belong entirely to the defendant. We have found no decision of this Court authorizing unfettered, pretrial forfeiture of the defendant's own "innocent" property—property with no connection to the charged crime. Nor do we see any grounds for distinguishing the historic preference against preconviction *forfei-*

tures from the preconviction *restraint* at issue here. As far as Luis' Sixth Amendment right to counsel of choice is concerned, a restraining order might as well be a forfeiture; that is, the restraint itself suffices to completely deny this constitutional right. See *Gonzalez-Lopez*, *supra*, at 148.

Third, as a practical matter, to accept the Government's position could well erode the right to counsel to a considerably greater extent than we have so far indicated. To permit the Government to freeze Luis' untainted assets would unleash a principle of constitutional law that would have no obvious stopping place. The statutory provision before us authorizing the present restraining order refers only to "banking law violation[s]" and "Federal health care offense[s]." 18 U. S. C. §1345(a)(2). But, in the Government's view, Congress could write more statutes authorizing pretrial restraints in cases involving other illegal behavior—after all, a broad range of such behavior can lead to postconviction forfeiture of untainted assets. See, *e.g.*, §1963(m) (providing for forfeiture of innocent, substitute assets for any violation of the Racketeer Influenced and Corrupt Organizations Act).

Moreover, the financial consequences of a criminal conviction are steep. Even beyond the forfeiture itself, criminal fines can be high, and restitution orders expensive. See, *e.g.*, §1344 ($1 million fine for bank fraud); §3571 (mail and wire fraud fines of up to $250,000 for individuals and $500,000 for organizations); *United States* v. *Gushlak*, 728 F. 3d 184, 187, 203 (CA2 2013) ($17.5 million restitution award against an individual defendant in a fraud-on-the-market case); *FTC* v. *Trudeau*, 662 F. 3d 947, 949 (CA7 2011) ($37.6 million remedial sanction for fraud). How are defendants whose innocent assets are frozen in cases like these supposed to pay for a lawyer—particularly if they lack "tainted assets" because they are innocent, a class of defendants whom the right to counsel

certainly seeks to protect? See *Powell*, 287 U. S., at 69; Amar, 84 Geo. L. J., at 643 ("[T]he Sixth Amendment is generally designed to elicit truth and protect innocence").

These defendants, rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders. As the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards. Dept. of Justice, Bureau of Justice Statistics, D. Farole & L. Langton, Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices, 2007, p. 10 (Sept. 2010). And as one *amicus* points out, "[m]any federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources." Brief for New York Council of Defense Lawyers 11. The upshot is a substantial risk that accepting the Government's views would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect.

3

We add that the constitutional line we have drawn should prove workable. That line distinguishes between a criminal defendant's (1) tainted funds and (2) innocent funds needed to pay for counsel. We concede, as JUSTICE KENNEDY points out, *post*, at 12–13, that money is fungible; and sometimes it will be difficult to say whether a particular bank account contains tainted or untainted funds. But the law has tracing rules that help courts implement the kind of distinction we require in this case. With the help of those rules, the victim of a robbery, for example, will likely obtain the car that the robber used stolen money to buy. See, *e.g.*, 1 G. Palmer, Law of Restitution §2.14, p. 175 (1978) ("tracing" permits a claim against "an asset which is traceable to or the product of"

tainted funds); 4 A. Scott, Law of Trusts §518, pp. 3309–3314 (1956) (describing the tracing rules governing commingled accounts). And those rules will likely also prevent Luis from benefiting from many of the money transfers and purchases JUSTICE KENNEDY describes. See *post*, at 12–13.

Courts use tracing rules in cases involving fraud, pension rights, bankruptcy, trusts, etc. See, *e.g.*, *Montanile* v. *Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 577 U. S. ___, ___–___ (2016) (slip op., at 8–9). They consequently have experience separating tainted assets from untainted assets, just as they have experience determining how much money is needed to cover the costs of a lawyer. See, *e.g.*, 18 U. S. C. §1345(b) ("The court shall proceed as soon as practicable to the hearing and determination of [actions to freeze a defendant's tainted or untainted assets]"); 28 U. S. C. §2412(d) (courts must determine reasonable attorneys' fees under the Equal Access to Justice Act); see also *Kaley*, 571 U. S., at ___, and n. 3 (slip op., at 3, and n. 3) ("Since *Monsanto*, the lower courts have generally provided a hearing. . . . [to determine] whether probable cause exists to believe that the assets in dispute are traceable . . . to the crime charged in the indictment"). We therefore see little reason to worry, as JUSTICE KENNEDY seems to, that defendants will "be allowed to circumvent [the usual forfeiture rules] by using . . . funds to pay for a high, or even the highest, priced defense team [they] can find." *Post*, at 7.

* * *

For the reasons stated, we conclude that the defendant in this case has a Sixth Amendment right to use her own "innocent" property to pay a reasonable fee for the assistance of counsel. On the assumptions made here, the District Court's order prevents Luis from exercising that right. We consequently vacate the judgment of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

APPENDIX

Title 18 U. S. C. §1345 provides:

"(a)(1) If a person is—

"(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;

"(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

"(C) committing or about to commit a Federal health care offense;

"the Attorney General may commence a civil action in any Federal court to enjoin such violation.

"(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—

"(A) to enjoin such alienation or disposition of property; or

"(B) for a restraining order to—

"(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

"(ii) appoint a temporary receiver to administer such restraining order.

"(3) A permanent or temporary injunction or restraining order shall be granted without bond.

"(b) The court shall proceed as soon as practicable to the

hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure."

SUPREME COURT OF THE UNITED STATES

No. 14–419

SILA LUIS, PETITIONER *v.* UNITED STATES

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

[March 30, 2016]

JUSTICE THOMAS, concurring in the judgment.

I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. But I do not agree with the plurality's balancing approach. Rather, my reasoning rests strictly on the Sixth Amendment's text and common-law backdrop.

The Sixth Amendment provides important limits on the Government's power to freeze a criminal defendant's forfeitable assets before trial. And, constitutional rights necessarily protect the prerequisites for their exercise. The right "to have the Assistance of Counsel," U. S. Const., Amdt. 6, thus implies the right to use lawfully owned property to pay for an attorney. Otherwise the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless. History confirms this textual understanding. The common law limited pretrial asset restraints to tainted assets. Both this textual understanding and history establish that the Sixth Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture. The freeze here accordingly violates the Constitution.

I

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the

Assistance of Counsel for his defence." As originally understood, this right guaranteed a defendant the right "to employ a lawyer to assist in his defense." *Scott* v. *Illinois*, 440 U. S. 367, 370 (1979). The common law permitted counsel to represent defendants charged with misdemeanors, but not felonies other than treason. W. Beaney, The Right to Counsel in American Courts 8–9 (1955). The Sixth Amendment abolished the rule prohibiting representation in felony cases, but was "not aimed to compel the State to provide counsel for a defendant." *Betts* v. *Brady*, 316 U. S. 455, 466 (1942), overruled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); see Beaney, *supra,* at 27–36. "The right to select counsel of one's choice" is thus "the root meaning" of the Sixth Amendment right to counsel. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 147–148 (2006).

The Sixth Amendment denies the Government unchecked power to freeze a defendant's assets before trial simply to secure potential forfeiture upon conviction. If that bare expectancy of criminal punishment gave the Government such power, then a defendant's right to counsel of choice would be meaningless, because retaining an attorney requires resources. The law has long recognized that the "[a]uthorization of an act also authorizes a necessary predicate act." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 192 (2012) (discussing the "predicate-act canon"). As Thomas Cooley put it with respect to Government powers, "where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred." Constitutional Limitations 63 (1868); see 1 J. Kent, Commentaries on American Law 464 (13th ed. 1884) ("[W]henever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied"). This logic equally applies to individual rights. After all, many rights are

powers reserved to the People rather than delegated to the Government. Cf. U. S. Const., Amdt. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

Constitutional rights thus implicitly protect those closely related acts necessary to their exercise. "There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Hill* v. *Colorado*, 530 U. S. 703, 745 (2000) (Scalia, J., dissenting). The right to keep and bear arms, for example, "implies a corresponding right to obtain the bullets necessary to use them," *Jackson* v. *City and County of San Francisco*, 746 F. 3d 953, 967 (CA9 2014) (internal quotation marks omitted), and "to acquire and maintain proficiency in their use," *Ezell* v. *Chicago*, 651 F. 3d 684, 704 (CA7 2011). See *District of Columbia* v. *Heller*, 554 U. S. 570, 617–618 (2008) (citing T. Cooley, General Principles of Constitutional Law 271 (2d ed. 1891) (discussing the implicit right to train with weapons)); *United States* v. *Miller*, 307 U. S. 174, 180 (1939) (citing 1 H. Osgood, The American Colonies in the 17th Century 499 (1904) (discussing the implicit right to possess ammunition)); *Andrews* v. *State*, 50 Tenn. 165, 178 (1871) (discussing both rights). Without protection for these closely related rights, the Second Amendment would be toothless. Likewise, the First Amendment "right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise." *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 252 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part).

The same goes for the Sixth Amendment and the financial resources required to obtain a lawyer. Without constitutional protection for at least *some* of a defendant's assets, the Government could nullify the right to counsel of

choice. As the plurality says, an unlimited power to freeze assets before trial "would unleash a principle of constitutional law that would have no obvious stopping place." *Ante*, at 14; cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 431 (1819) ("[T]he power to tax involves the power to destroy" and that "power to destroy may defeat and render useless the power to create"). Unless the right to counsel also protects the prerequisite right to use one's financial resources for an attorney, I doubt that the Framers would have gone through the trouble of adopting such a flimsy "parchment barrie[r]." The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison).

An unlimited power to freeze a defendant's potentially forfeitable assets in advance of trial would eviscerate the Sixth Amendment's original meaning and purpose. At English common law, forfeiture of all real and personal property was a standard punishment for felonies. See 4 W. Blackstone, Commentaries on the Laws of England 95 (1769) (Blackstone). That harsh penalty never caught on in America. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 682–683 (1974). The First Congress banned it. See Crimes Act of 1790, §24, 1 Stat. 117 ("[N]o conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate"). But the Constitution did not. See Art. III, §3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted"). If the Government's mere expectancy of a total forfeiture upon conviction were sufficient to justify a complete pretrial asset freeze, then Congress could render the right to counsel a nullity in felony cases. That would have shocked the Framers. As discussed, before adoption of the Sixth Amendment, felony cases (not misdemeanors) were *precisely* when the common law denied defendants the right to counsel. See *supra,* at ___. With an unlimited power to freeze assets before trial, the Government could well

revive the common-law felony rule that the Sixth Amendment was designed to abolish.

The modern, judicially created right to Government-appointed counsel does not obviate these concerns. As understood in 1791, the Sixth Amendment protected a defendant's right to retain an attorney he could afford. It is thus no answer, as the principal dissent replies, that defendants rendered indigent by a pretrial asset freeze can resort to public defenders. *Post*, at 14 (opinion of KENNEDY, J.). The dissent's approach nullifies the *original understanding* of the right to counsel. To ensure that the right to counsel has meaning, the Sixth Amendment limits the assets the Government may freeze before trial to secure eventual forfeiture.

II

The longstanding rule against restraining a criminal defendant's untainted property before conviction guarantees a meaningful right to counsel. The common-law forfeiture tradition provides the limits of this Sixth Amendment guarantee. That tradition draws a clear line between tainted and untainted assets. The only alternative to this common-law reading is case-by-case adjudication to determine which freezes are "legitimate" and which are an "abuse of . . . power." *McCulloch*, 4 Wheat., at 430. This piecemeal approach seems woefully inadequate. Such questions of degree are "unfit for the judicial department." *Ibid.* But see *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 635 (1989) (stating in dicta that "[c]ases involving particular abuses can be dealt with individually . . . when (and if) any such cases arise"). Fortunately the common law drew a clear line between tainted and untainted assets.

Pretrial freezes of untainted forfeitable assets did not emerge until the late 20th century. "'[T]he lack of historical precedent'" for the asset freeze here is "'[p]erhaps the

most telling indication of a severe constitutional problem.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505–506 (2010) (quoting *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.,* 537 F. 3d 667, 699 (CADC 2008) (Kavanaugh, J., dissenting)). Indeed, blanket asset freezes are so tempting that the Government's "prolonged reticence would be amazing if [they] were not understood to be constitutionally proscribed." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 230 (1995); see *Printz* v. *United States*, 521 U. S. 898, 907–908 (1997) (reasoning that the lack of early federal statutes commandeering state executive officers "suggests an assumed *absence* of such power" given "the attractiveness of that course to Congress").

The common law prohibited pretrial freezes of criminal defendants' untainted assets. As the plurality notes, *ante*, at 13, for *in personam* criminal forfeitures like that at issue here, any interference with a defendant's property traditionally required a conviction. Forfeiture was "a part, or at least a consequence, of the judgment of conviction." *The Palmyra*, 12 Wheat. 1, 14 (1827) (Story, J.). The defendant's "property cannot be touched before . . . the forfeiture is completed." 1 J. Chitty, A Practical Treatise on the Criminal Law 737 (5th ed. 1847). This rule applied equally "to money as well as specific chattels." *Id.,* at 736. And it was not limited to full-blown physical seizures. Although the defendant's goods could be appraised and inventoried before trial, he remained free to "sell any of them for his own support in prison, or that of his family, *or to assist him in preparing for his defence on the trial*." *Id.*, at 737 (emphasis added). Blackstone likewise agreed that a defendant "may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the [offense] and conviction." 4 Blackstone 380; see *Fleetwood's Case*, 8 Co. Rep. 171a, 171b, 77 Eng. Rep. 731, 732 (K. B. 1611) (endorsing this rule). At most, a court could

unwind prejudgment fraudulent transfers after conviction. 4 Blackstone 381; see *Jones* v. *Ashurt*, Skin. 357, 357–358, 90 Eng. Rep. 159 (K. B. 1693) (unwinding a fraudulent sale after conviction because it was designed to defeat forfeiture). Numerous English authorities confirm these common-law principles. Chitty, *supra,* at 736–737 (collecting sources).

The common law did permit the Government, however, to seize tainted assets before trial. For example, "seizure of the *res* has long been considered a *prerequisite* to the initiation of *in rem* forfeiture proceedings." *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 57 (1993) (emphasis added); see *The Brig Ann*, 9 Cranch 289, 291 (1815) (Story, J.). But such forfeitures were traditionally "fixed . . . by determining what property has been 'tainted' by unlawful use." *Austin* v. *United States*, 509 U. S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in judgment). So the civil *in rem* forfeiture tradition tracks the tainted-untainted line. It provides no support for the asset freeze here.

There is a similarly well-established Fourth Amendment tradition of seizing contraband and stolen goods before trial based only on probable cause. See *Carroll* v. *United States*, 267 U. S. 132, 149–152 (1925) (discussing this history); *Boyd* v. *United States*, 116 U. S. 616, 623–624 (1886) (same). Tainted assets fall within this tradition because they are the fruits or instrumentalities of crime. So the Government may freeze tainted assets before trial based on probable cause to believe that they are forfeitable. See *United States* v. *Monsanto*, 491 U. S. 600, 602–603, 615–616 (1989). Nevertheless, our precedents require "a nexus . . . between the item to be seized and criminal behavior." *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 307 (1967). Untainted assets almost never have such a nexus. The only exception is that some property that is evidence of crime might techni-

cally qualify as "untainted" but nevertheless has a nexus to criminal behavior. See *ibid.* Thus, untainted assets do not fall within the Fourth Amendment tradition either.

It is certainly the case that some early American statutes did provide for civil forfeiture of untainted substitute property. See Registry Act, §12, 1 Stat. 293 (providing for forfeiture of a ship or "the value thereof"); Collection Act of July 31, 1789, §22, 1 Stat. 42 (similar for goods); *United States* v. *Bajakajian*, 524 U. S. 321, 341 (1998) (collecting statutes). These statutes grew out of a broader "six-century-long tradition of *in personam* customs fines equal to one, two, three, or even four times the value of the goods at issue." *Id.*, at 345–346 (KENNEDY, J., dissenting).

But this long tradition of *in personam* customs fines does not contradict the general rule against *pretrial* seizures of untainted property. These fines' *in personam* status strongly suggests that the Government did not collect them by seizing property at the outset of litigation. As described, that process was traditionally required for *in rem* forfeiture of tainted assets. See *supra,* at ___. There appears to be scant historical evidence, however, that forfeiture ever involved seizure of untainted assets before trial and judgment, except in limited circumstances not relevant here. Such summary procedures were reserved for collecting taxes and seizures during war. See *Phillips* v. *Commissioner*, 283 U. S. 589, 595 (1931); *Miller* v. *United States*, 11 Wall. 268, 304–306 (1871). The Government's right of action in tax and custom-fine cases may have been the same—"a civil action of debt." *Bajakajian*, *supra*, at 343, n. 18; *Stockwell* v. *United States*, 13 Wall. 531, 543 (1871); *Adams* v. *Woods*, 2 Cranch 336, 341 (1805). Even so, nothing suggests trial and judgment were expendable. See *Miller*, *supra*, at 304–305 (stating in dicta that confiscating Confederate property through *in rem* proceedings would have raised Fifth and Sixth Amendment concerns had they not been a war measure).

The common law thus offers an administrable line: A criminal defendant's untainted assets are protected from Government interference before trial and judgment. His tainted assets, by contrast, may be seized before trial as contraband or through a separate *in rem* proceeding. Reading the Sixth Amendment to track the historical line between tainted and untainted assets makes good sense. It avoids case-by-case adjudication, and ensures that the original meaning of the right to counsel does real work. The asset freeze here infringes the right to counsel because it "is so broad that it differs not only in degree, but in kind, from its historical antecedents." *James Daniel Good*, *supra,* at 82 (THOMAS, J., concurring in part and dissenting in part).

The dissenters object that, before trial, a defendant has an identical property interest in tainted and untainted assets. See *post*, at 8–9 (opinion of KENNEDY, J.); *post*, at 2 (opinion of KAGAN, J.). Perhaps so. I need not take a position on the matter. Either way, that fact is irrelevant. Because the pretrial asset freeze here crosses into untainted assets, for which there is no historical tradition, it is unconstitutional. Any such incursion violates the Sixth Amendment.

III

Since the asset freeze here violates the Sixth Amendment, the plurality correctly concludes that the judgment below must be reversed. But I cannot go further and endorse the plurality's atextual balancing analysis. The Sixth Amendment guarantees the right to counsel of choice. As discussed, a pretrial freeze of untainted assets infringes that right. This conclusion leaves no room for balancing. Moreover, I have no idea whether, "compared to the right to counsel of choice," the Government's interests in securing forfeiture and restitution lie "further from the heart of a fair, effective criminal justice system." *Ante*,

at 12. Judges are not well suited to strike the right "balance" between those incommensurable interests. Nor do I think it is our role to do so. The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail. See *Heller*, 554 U. S., at 634–635. Those tradeoffs are thus not for us to reevaluate. "The very enumeration of the right" to counsel of choice denies us "the power to decide . . . whether the right is *really worth* insisting upon." *Id.*, at 634. Such judicial balancing "do[es] violence" to the constitutional design. *Crawford* v. *Washington*, 541 U. S. 36, 67–68 (2004). And it is out of step with our interpretive tradition. See Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L. J. 943, 949–952 (1987) (noting that balancing did not appear in the Court's constitutional analysis until the mid-20th century).

The plurality's balancing analysis also casts doubt on the constitutionality of incidental burdens on the right to counsel. For the most part, the Court's precedents hold that a generally applicable law placing only an incidental burden on a constitutional right does not violate that right. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 389–390 (1992) (explaining that content-neutral laws do not violate the First Amendment simply because they incidentally burden expressive conduct); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–882 (1990) (likewise for religion-neutral laws that burden religious exercise).

Criminal-procedure rights tend to follow the normal incidental-burden rule. The Constitution does not "forbi[d] every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30 (1973). The threat of more severe charges if a defendant refuses to plead guilty does not violate his right to trial. See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 365

(1978). And, in my view, prosecutorial arguments that raise the "cost" of remaining silent do not violate a defendant's right against self-incrimination (at least as a matter of original meaning). See *Mitchell* v. *United States*, 526 U. S. 314, 342–343 (1999) (THOMAS, J., dissenting); *id.,* at 331–336 (Scalia, J., dissenting).

The Sixth Amendment arguably works the same way. "[A] defendant may not insist on representation by an attorney he cannot afford." *Wheat* v. *United States*, 486 U. S. 153, 159 (1988). The Constitution perhaps guarantees only a "freedom of counsel" akin to the First Amendment freedoms of speech and religion that also "depen[d] in part on one's financial wherewithal." *Caplin & Drysdale*, 491 U. S., at 628. Numerous laws make it more difficult for defendants to retain a lawyer. But that fact alone does not create a Sixth Amendment problem. For instance, criminal defendants must still pay taxes even though "these financial levies may deprive them of resources that could be used to hire an attorney." *Id.,* at 631–632. So I lean toward the principal dissent's view that incidental burdens on the right to counsel of choice would not violate the Sixth Amendment. See *post*, at 5–6, 11–12 (opinion of KENNEDY, J.).

On the other hand, the Court has said that the right to counsel guarantees defendants "a *fair opportunity* to secure counsel of [their] choice." *Powell* v. *Alabama*, 287 U. S. 45, 52–53 (1932) (emphasis added). The state court in *Powell* denied the defendants such an opportunity, the Court held, by moving to trial so quickly (six days after indictment) that the defendants had no chance to communicate with family or otherwise arrange for representation. *Ibid.* The schedule in *Powell* was not designed to block counsel, which suggests the usual incidental-burden rule might be inapt in the Sixth Amendment context. I leave the question open because this case does not require an answer.

The asset freeze here is not merely an incidental burden on the right to counsel of choice; it targets a defendant's assets, which are necessary to exercise that right, simply to secure forfeiture upon conviction. The prospect of that criminal punishment, however, is precisely why the Constitution guarantees a right to counsel. The Sixth Amendment does not permit the Government's bare expectancy of forfeiture to void that right. When the potential of a conviction is the only basis for interfering with a defendant's assets before trial, the Constitution requires the Government to respect the longstanding common-law protection for a defendant's untainted property.

For these reasons, I concur only in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 14–419

SILA LUIS, PETITIONER *v.* UNITED STATES

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

[March 30, 2016]

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, dissenting.

The plurality and JUSTICE THOMAS find in the Sixth Amendment a right of criminal defendants to pay for an attorney with funds that are forfeitable upon conviction so long as those funds are not derived from the crime alleged. That unprecedented holding rewards criminals who hurry to spend, conceal, or launder stolen property by assuring them that they may use their own funds to pay for an attorney after they have dissipated the proceeds of their crime. It matters not, under today's ruling, that the defendant's remaining assets must be preserved if the victim or the Government is to recover for the property wrongfully taken. By granting a defendant a constitutional right to hire an attorney with assets needed to make a property-crime victim whole, the plurality and JUSTICE THOMAS ignore this Court's precedents and distort the Sixth Amendment right to counsel.

The result reached today makes little sense in cases that involve fungible assets preceded by fraud, embezzlement, or other theft. An example illustrates the point. Assume a thief steals $1 million and then wins another $1 million in a lottery. After putting the sums in separate accounts, he or she spends $1 million. If the thief spends his or her lottery winnings, the Government can restrain the stolen funds in their entirety. The thief has no right to

use those funds to pay for an attorney. Yet if the thief heeds today's decision, he or she will spend the stolen money first; for if the thief is apprehended, the $1 million won in the lottery can be used for an attorney. This result is not required by the Constitution.

The plurality reaches its conclusion by weighing a defendant's Sixth Amendment right to counsel of choice against the Government's interest in preventing the dissipation of assets forfeitable upon conviction. In so doing, it—like JUSTICE THOMAS—sweeps aside the decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617 (1989), and *United States* v. *Monsanto*, 491 U. S. 600 (1989), both of which make clear that a defendant has no Sixth Amendment right to spend forfeitable assets (or assets that will be forfeitable) on an attorney. The principle the Court adopted in those cases applies with equal force here. Rather than apply that principle, however, the plurality and concurrence adopt a rule found nowhere in the Constitution or this Court's precedents—that the Sixth Amendment protects a person's right to spend otherwise forfeitable assets on an attorney so long as those assets are not related to or the direct proceeds of the charged crime. *Ante,* at 1 (plurality opinion); *ante,* at 1 (THOMAS, J., concurring in judgment). The reasoning in these separate opinions is incorrect, and requires this respectful dissent.

I

This case arises from petitioner Sila Luis' indictment for conspiring to commit health care fraud against the United States. The Government alleges that, as part of her illegal scheme, Luis used her health care companies to defraud Medicare by billing for services that were not medically necessary or actually provided. The charged crimes, the Government maintains, resulted in the payment of $45 million in improper Medicare benefits to Luis' companies.

The same day Luis was indicted, the Government initiated a civil action under 18 U. S. C. §1345 to restrain Luis' assets before her criminal trial, including substitute property of an amount equivalent to the value of the proceeds of her alleged crimes. To establish its entitlement to a restraining order, the Government showed that Luis and her co-conspirators were dissipating the illegally obtained assets. In particular, they were transferring money involved in the scheme to various individuals and entities, including shell corporations owned by Luis' family members. As part of this process, Luis opened and closed well over 40 bank accounts and withdrew large amounts of cash to hide the conspiracy's proceeds. Luis personally received almost $4.5 million in funds and used at least some of that money to purchase luxury items, real estate, and automobiles, and to travel. Based on this and other evidence, the District Court entered an order prohibiting Luis from spending up to $45 million of her assets.

Before the Court of Appeals for the Eleventh Circuit, Luis argued that the Sixth Amendment required that she be allowed to spend the restrained substitute assets on an attorney. The Court of Appeals disagreed, concluding that "[t]he arguments made by Luis . . . are foreclosed by the United States Supreme Court decisions in . . . *Caplin & Drysdale* [and] *Monsanto*." 564 Fed. Appx. 493, 494 (2014) (*per curiam*). In my view the Court of Appeals was correct, and its judgment should be affirmed.

II

A

In *Caplin & Drysdale*, a law firm had represented a defendant charged with running a massive drug-distribution scheme. The defendant pleaded guilty and agreed to forfeit his assets. The law firm then sought to recover a portion of the forfeited assets for its legal fees. The firm argued that, when a defendant needs forfeitable

assets to pay for an attorney, the forfeiture of those assets violates the defendant's Sixth Amendment right to be represented by his counsel of choice.

The Court rejected the firm's argument. The Sixth Amendment, the Court explained, "guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale*, 491 U. S., at 624. As for the right to choose one's own attorney, the Court observed that "nothing in [the forfeiture statute] prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel." *Id.*, at 625. Even defendants who possess "nothing but assets the Government seeks to have forfeited . . . may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Ibid.* The burden imposed by forfeiture law, the Court concluded, is thus "a limited one." *Ibid.*

Caplin & Drysdale also repudiated the firm's contention that the Government has only a modest interest in forfeitable assets that may be used to retain an attorney. In light of the importance of separating criminals from their ill-gotten gains and providing restitution to victims of crime, the Court found "a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.*, at 631.

The same day the Court decided *Caplin & Drysdale* it decided *Monsanto*, which addressed the pretrial restraint of a defendant's assets "where the defendant seeks to use those assets to pay an attorney." 491 U. S., at 602. The Court rejected the notion that there is a meaningful dis-

tinction, for Sixth Amendment purposes, between the restraint of assets before trial and the forfeiture of assets after trial: "[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Id.*, at 616. The Court noted, moreover, that "it would be odd to conclude that the Government may not restrain property . . . in [a defendant's] possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause." *Id.*, at 615–616. When a defendant himself can be restrained pretrial, there is "no constitutional infirmity" in a similar pretrial restraint of a defendant's property "to protect its 'appearance' at trial and protect the community's interest in full recovery of any ill-gotten gains." *Id.,* at 616.

B

The principle the Court announced in *Caplin & Drysdale* and *Monsanto* controls the result here. Those cases establish that a pretrial restraint of assets forfeitable upon conviction does not contravene the Sixth Amendment even when the defendant possesses no other funds with which to pay for an attorney. The restraint itself does not prevent a defendant from seeking to convince his or her counsel of choice to take on the representation without advance payment. See *Caplin & Drysdale*, 491 U. S.*,* at 625. It does not disqualify any attorney the defendant might want. *Ibid.* And it does not prevent a defendant from borrowing funds to pay for an attorney who is otherwise too expensive. To be sure, a pretrial restraint may make it difficult for a defendant to secure counsel who insists that high defense costs be paid in advance. That

difficulty, however, does not result in a Sixth Amendment violation any more than high taxes or other government exactions that impose a similar burden. See, *e.g., id.*, at 631–632 ("Criminal defendants . . . are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney").

The pretrial restraint in *Monsanto* was no more burdensome than the pretrial restraint at issue here. Luis, like the defendant in *Monsanto*, was not barred from obtaining the assistance of any particular attorney. She was free to seek lawyers willing to represent her in the hopes that their fees would be paid at some future point. In short, §1345's authorization of a pretrial restraint of substitute assets places no greater burden on a defendant like Luis than the forfeiture and pretrial restraint statute placed on the defendant in *Monsanto*.

In addition, the Government has the same "strong . . . interest in obtaining full recovery of all forfeitable assets" here as it did in *Caplin & Drysdale* and *Monsanto*. See *Caplin & Drysdale*, *supra,* at 631. If Luis is convicted, the Government has a right to recover Luis' substitute assets—the money she kept for herself while spending the taxpayer dollars she is accused of stealing. Just as the Government has an interest in ensuring Luis' presence at trial—an interest that can justify a defendant's pretrial detention—so too does the Government have an interest in ensuring the availability of her substitute assets after trial, an interest that can justify pretrial restraint.

One need look no further than the Court's concluding words in *Monsanto* to know the proper result here: "[N]o constitutional violation occurs when, after probable cause [to believe that a defendant's assets will be forfeitable] is adequately established, the Government obtains an order barring a defendant from . . . dissipating his assets prior to trial." 491 U. S., at 616. The Government, having estab-

lished probable cause to believe that Luis' substitute assets will be forfeitable upon conviction, should be permitted to obtain a restraining order barring her from spending those funds prior to trial. Luis should not be allowed to circumvent that restraint by using the funds to pay for a high, or even the highest, priced defense team she can find.

III

The plurality maintains that *Caplin & Drysdale* and *Monsanto* do not apply because "the nature of the assets at issue here differs from the assets at issue in those earlier cases." *Ante,* at 5. According to the plurality, the property here "belongs to the defendant, pure and simple." *Ibid.* It states that, while "title to property used to commit a crime . . . often passes to the Government at the instant the crime is planned or committed," title to Luis' untainted property has not passed to the Government. *Ante,* at 6. "That fact," the plurality concludes, "undermines the Government's reliance upon precedent, for both *Caplin & Drysdale* and *Monsanto* relied critically upon the fact that the property at issue was 'tainted,' and that title to the property therefore had passed from the defendant to the Government before the court issued its order freezing (or otherwise disposing of) the assets." *Ibid.*

These conclusions depend upon a key premise: The Government owns tainted assets before a defendant is convicted. That premise is quite incorrect, for the common law and this Court's precedents establish that the opposite is true. The Government does not own property subject to forfeiture, whether tainted or untainted, until the Government wins a judgment of forfeiture or the defendant is convicted. As Blackstone noted with emphasis, "goods and chattels are forfeited by *conviction*." 4 W. Blackstone, Commentaries on the Laws of England 380 (1769) (Blackstone). Justice Story likewise observed that "no right to

the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender." *The Palmyra*, 12 Wheat. 1, 14 (1827); *ibid.* ("In the contemplation of the common law, the offender's right was not devested until the conviction").

These authorities demonstrate that *Caplin & Drysdale* and *Monsanto* cannot be distinguished based on "the nature of the assets at issue." Title to the assets in those cases did not pass from the defendant to the Government until conviction. As a result, the assets restrained before conviction in *Monsanto* were on the same footing as the assets restrained here: There was probable cause to believe that the assets would belong to the Government upon conviction. But when the court issued its restraining order, they did not. The Government had no greater ownership interest in Monsanto's tainted assets than it has in Luis' substitute assets.

The plurality seeks to avoid this conclusion by relying on the relation-back doctrine. In its view the doctrine gives the Government title to tainted assets upon the commission of a crime rather than upon conviction or judgment of forfeiture. Even assuming, as this reasoning does, that the relation-back doctrine applies only to tainted assets—but see *United States* v. *McHan*, 345 F. 3d 262, 270–272 (CA4 2003)—the doctrine does not do the work the plurality's analysis requires.

The relation-back doctrine, which is incorporated in some forfeiture statutes, see, *e.g.*, 21 U. S. C. §853(c), has its origins in the common law. Under this legal construct, the Government's title to certain types of forfeitable property relates back to the time at which the defendant committed the crime giving rise to the forfeiture. See 4 Blackstone 375 ("forfeiture [of real estates] relates backwards to the time of the treason committed; so as to avoid all intermediate sales and incumbrances"); *United States* v.

Parcel of Rumson, N. J., Land, 507 U. S. 111, 125 (1993) (plurality opinion). The doctrine's purpose is to prevent defendants from avoiding forfeiture by transferring their property to third parties. The doctrine, however, does not alter the time at which title to forfeitable property passes to the Government. Title is transferred only when a conviction is obtained or the assets are otherwise forfeited; it is only once this precondition is met that relation back to the time of the offense is permitted. See *ibid.* (The relation-back doctrine's "fictional and retroactive vesting" is "not self-executing"); *id.*, at 132 (Scalia, J., concurring in judgment) ("The relation-back rule applies only in cases where the Government's title has been consummated by seizure, suit, and judgment, or decree of condemnation, whereupon the doctrine of relation *carries back* the title to the commission of the offense" (internal quotation marks, brackets, and citations omitted)); *United States* v. *Grundy*, 3 Cranch 337, 350–351 (1806) (Marshall, C. J., opinion for the Court) (a forfeitable asset does not "ves[t] in the government until some legal step shall be taken for the assertion of its right"); 4 Blackstone 375 ("But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had"). In short, forfeitable property does not belong to the Government in any sense before judgment or conviction. Cf. *ante,* at 9 (plurality opinion). Until the Government wins a judgment or conviction, "someone else owns the property." *Parcel of Rumson*, *supra*, at 127.

The plurality is correct to note that *Caplin & Drysdale* discussed the relation-back provision in the forfeiture statute at issue. The *Caplin & Drysdale* Court did not do so, however, to suggest that forfeitable assets can be restrained only when the assets are tainted. Rather, the Court referred to the provision to rebut the law firm's argument that the United States has less of an interest in forfeitable property than robbery victims have in their

stolen property. 491 U. S., at 627–628. More to the point, central to the Court's decision was its observation that, because the Government obtained "title to [the defendant's] assets upon conviction," it would be "peculiar" to hold that the Sixth Amendment still gave the defendant the right to pay his attorney with those assets. *Id.,* at 628. *Monsanto* reinforced that view, holding that the pretrial restraint of assets—money to which the Government does not yet have title—is permissible even when the defendant wants to use those assets to pay for counsel. 491 U. S., at 616. True, the assets in *Caplin & Drysdale* and *Monsanto* happened to be derived from the criminal activity alleged; but the Court's reasoning in those cases was based on the Government's entitlement to recoup money from criminals who have profited from their crimes, not on tracing or identifying the actual assets connected to the crime. For this reason, the principle the Court announced in those cases applies whenever the Government obtains (or will obtain) title to assets upon conviction. Nothing in either case depended on the assets being tainted or justifies refusing to apply the rule from those cases here.

The plurality makes much of various statutory provisions that, in its view, give the United States a superior interest before trial in tainted assets but not untainted ones. See *ante,* at 8–9. That view, however, turns not on any reasoning specific to the Sixth Amendment but rather on Congress' differential treatment of tainted versus untainted assets. The plurality makes no attempt to explain why Congress' decision in §1345 to permit the pretrial restraint of substitute assets is not also relevant to its analysis. More to the point, Congress' statutory treatment of property is irrelevant to a Sixth Amendment analysis. The protections afforded by the Sixth Amendment should not turn on congressional whims.

The plurality's concern over the implications of the Government's position appears animated by a hypothetical

future case where a defendant's assets are restrained not to return stolen funds but, for example, to pay a fine. That case, however, is not the case before the Court. Section 1345 authorizes pretrial restraints to preserve substitute assets, not to provide for fines greater than the amounts stolen. The holdings in *Caplin & Drysdale* and *Monsanto*, and what should be the holding today, thus, do not address the result in a case involving a fine. The governmental interests at stake when a fine is at issue are quite separate and distinct from the interests implicated here. This case implicates the Government's interest in preventing the dissipation, transfer, and concealment of stolen funds, as well as its interest in preserving for victims any funds that remain. Those interests justify, in cases like this one, the pretrial restraint of substitute assets.

IV

The principle the plurality and JUSTICE THOMAS announce today—that a defendant has a right to pay for an attorney with forfeitable assets so long as those assets are not related to or the direct proceeds of the crime alleged—has far-reaching implications. There is no clear explanation why this principle does not extend to the exercise of other constitutional rights. "If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel?" *Caplin & Drysdale*, 491 U. S., at 628. Nor does either opinion provide any way to distinguish between the restraint at issue here and other governmental interferences with a defendant's assets. If the restraint of Luis' assets violates the Sixth Amendment, could the same be said of any imposition on a criminal defendant's assets? Cf. *id.*, at 631 ("[S]eizures of assets to secure potential tax liabilities . . . may impair a defendant's ability to retain counsel . . . [y]et these assessments have been upheld against constitutional attack"). If a defendant is fined in a

prior matter, is the Government barred from collecting the fine if it will leave the defendant unable to afford a particular attorney in a current case? No explanation is provided for what, if any, limits there are on the invented exemption for attorney's fees.

The result today also creates arbitrary distinctions between defendants. Money, after all, is fungible. There is no difference between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead. Yet the plurality and concurrence—for different reasons—find in the Sixth Amendment the rule that greater protection is given to the defendant who, by spending, laundering, exporting, or concealing stolen money first, preserves his or her remaining funds for use on an attorney.

The true winners today are sophisticated criminals who know how to make criminal proceeds look untainted. They do so every day. They "buy cashier's checks, money orders, nonbank wire transfers, prepaid debit cards, and traveler's checks to use instead of cash for purchases or bank deposits." Dept. of Treasury, National Money Laundering Risk Assessment 2015, p. 3. They structure their transactions to avoid triggering recordkeeping and reporting requirements. *Ibid.* And they open bank accounts in other people's names and through shell companies, all to disguise the origins of their funds. *Ibid.*

The facts of this case illustrate the measures one might take to conceal or dispose of ill-gotten gains. In declarations relied on by the District Court, the Federal Bureau of Investigation (FBI) Special Agent investigating the case explained that "Luis transferred monies or caused the transfer of monies received from Medicare to . . . family members and companies owned by family members," including $1,471,000 to her husband, and over a million dollars to her children and former daughter-in-law. App.

72–73. She also "used Medicare monies for foreign travel," including approximately 31 trips to Mexico, "where she owns several properties and has numerous bank accounts." *Id.,* at 73. She "transferred Medicare monies overseas through international wire transfers to Mexico." *Ibid.* And the Government was "able to trace Medicare proceeds going into [all but one of the] bank account[s] owned by Defendant Luis and/or her companies listed in the Court's" temporary restraining order. *Id.,* at 74. No doubt Luis would have enjoyed her travel and expenditures even more had she known that, were her alleged wrongs discovered, a majority of the Justices would insist that she be allowed to pay her chosen legal team at the price they set rather than repay her victim.

Notwithstanding that the Government established probable cause to believe that Luis committed numerous crimes and used the proceeds of those crimes to line her and her family's pockets, the plurality and JUSTICE THOMAS reward Luis' decision to spend the money she is accused of stealing rather than her own. They allow Luis to bankroll her private attorneys as well as "the best and most industrious investigators, experts, paralegals, and law clerks" money can buy—a legal defense team Luis claims she cannot otherwise afford. See Corrected Motion to Modify the Restraining Order in No. 12–Civ–23588, p. 13 (SD Fla., Nov. 16, 2012). The Sixth Amendment does not provide such an unfettered right to counsel of choice.

It is well settled that the right to counsel of choice is limited in important respects. A defendant cannot demand a lawyer who is not a member of the bar. *Wheat* v. *United States*, 486 U. S. 153, 159 (1988). Nor may a defendant insist on an attorney who has a conflict of interest. *Id.,* at 159, 164. And, as quite relevant here, "a defendant may not insist on representation by an attorney he cannot afford." *Id.,* at 159. As noted earlier, "those who do not have the means to hire their own lawyers have

no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale*, 491 U. S., at 624. As a result of the District Court's order, Luis simply cannot afford the legal team she desires unless they are willing to represent her without advance payment. For Sixth Amendment purposes, the only question here is whether Luis' right to adequate representation is protected. That question is not before the Court. Neither Luis nor the plurality nor JUSTICE THOMAS suggests that Luis will receive inadequate representation if she is not able to use the restrained funds. And this is for good reason. Given the large volume of defendants in the criminal justice system who rely on public representation, it would be troubling to suggest that a defendant who might be represented by a public defender will receive inadequate representation. See generally T. Giovanni & R. Patel, *Gideon* at 50: Three Reforms to Revive the Right to Counsel 1 (2013), online at http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf (as last visited Mar. 28, 2016). Since Luis cannot afford the legal team she desires, and because there is no indication that she will receive inadequate representation as a result, she does not have a cognizable Sixth Amendment complaint.

The plurality does warn that accepting the Government's position "would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect." *Ante,* at 15. Public-defender offices, the plurality suggests, already lack sufficient attorneys to meet nationally recommended caseload standards. *Ibid.* But concerns about the caseloads of public-defender offices do not justify a constitutional command to treat a defendant accused of committing a lucrative crime differently than a defendant who is indigent from the outset. The Constitution does not require victims of property crimes to fund subsidies for

members of the private defense bar.

Because the rule announced today is anchored in the Sixth Amendment, moreover, it will frustrate not only the Federal Government's use of §1345 but also the States' administration of their forfeiture schemes. Like the Federal Government, States also face criminals who engage in money laundering through extensive enterprises that extend to other States and beyond. Where a defendant has put stolen money beyond a State's reach, a State should not be precluded from freezing the assets the defendant has in hand. The obstacle that now stands in the States' way is not found in the Constitution. It is of the Court's making.

Finally, the plurality posits that its decision "should prove workable" because courts "have experience separating tainted assets from untainted assets, just as they have experience determining how much money is needed to cover the costs of a lawyer." *Ante*, at 15–16. Neither of these assurances is adequate.

As to the first, the plurality cites a number of sources for the proposition that courts have rules that allow them to implement the distinction it adopts. *Ibid.* Those rules, however, demonstrate the illogic of the conclusion that there is a meaningful difference between the actual dollars stolen and the dollars of equivalent value in a defendant's bank account. The plurality appears to agree that, if a defendant is indicted for stealing $1 million, the Government can obtain an order preventing the defendant from spending the $1 million he or she is believed to have stolen. The situation gets more complicated, however, when the defendant deposits the stolen $1 million into an account that already has $1 million. If the defendant then spends $1 million from the account, it cannot be determined with certainty whether the money spent was stolen money rather than money the defendant already had. The question arises, then, whether the Government can re-

strain the remaining million.

One of the treatises on which the plurality relies answers that question. The opinion cites A. Scott's Law of Trusts to support the claim that "the law has tracing rules that help courts implement the kind of distinction . . . require[d] in this case." *Ante,* at 15–16. The treatise says that, if a "wrongdoer has mingled misappropriated money with his own money and later makes withdrawals from the mingled fund," assuming the withdrawals do not result in a zero balance, a person who has an interest in the misappropriated money can recover it from the amount remaining in the account. 4 A. Scott, Law of Trusts §518, pp. 3309–3310 (1956). Based on this rule, one would expect the plurality to agree that, in the above hypothetical, the Government could restrain up to the full amount of the stolen funds—that is, the full $1 million—without having to establish whether the $1 million the defendant spent was stolen money or not. If that is so, it is hard to see why its opinion treats as different a situation where the defendant has two bank accounts—one with the $1 million from before the crime and one with the stolen $1 million. If the defendant spends the money in the latter account, the Government should be allowed to freeze the money in the former account in the same way it could if the defendant spent the money out of a single, commingled account. The Sixth Amendment provides no justification for the decision to mandate different treatment in these all-but-identical situations.

The plurality sees "little reason to worry" about defendants circumventing forfeiture because courts can use rules like the tracing rule discussed above. *Ante,* at 16. It also asserts that these rules "will likely . . . prevent Luis from benefiting from many of [her] money transfers and purchases." *Ibid.* That proposition is doubtful where, as here, "a lot of money was taken out in cash from the defendant's bank accounts" because "[y]ou can't trace cash." App. 155.

Even were that not the case, this assertion fails to appreciate that it takes time to trace tainted assets. As the FBI agent testified, at the time of the hearing both the tracing and the FBI's analysis were "still ongoing." *Ibid.* The whole purpose of a pretrial restraint under §1345 is to maintain the status quo in cases, like this one, where a defendant is accused of committing crimes that involve fungible property, *e.g.,* a banking law violation or a federal health care offense. The plurality's approach serves to benefit the most sophisticated of criminals whose web of transfers and concealment will take the longest to unravel. For if the Government cannot establish at the outset that every dollar subject to restraint is derived from the crime alleged, the defendant can spend that money on whatever defense team he or she desires.

Of equal concern is the assertion that a defendant's right to counsel of choice is limited to only those attorneys who charge a "reasonable fee." *Ante,* at 16. If Luis has a right to use the restrained substitute assets to pay for the counsel of her choice, then why can she not hire the most expensive legal team she can afford? In the plurality's view, the reason Luis can use the restrained funds for an attorney is because they are still hers. But if that is so, then she should be able to use all $2 million of her remaining assets to pay for a lawyer. The plurality's willingness to curtail the very right it recognizes reflects the need to preserve substitute assets from further dissipation.

* * *

Today's ruling abandons the principle established in *Caplin & Drysdale* and *Monsanto.* In its place is an approach that creates perverse incentives and provides protection for defendants who spend stolen money rather than their own.

In my respectful view this is incorrect, and the judgment of the Court of Appeals should be affirmed.

SUPREME COURT OF THE UNITED STATES

No. 14–419

SILA LUIS, PETITIONER *v.* UNITED STATES

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

[March 30, 2016]

JUSTICE KAGAN, dissenting.

I find *United States* v. *Monsanto*, 491 U. S. 600 (1989), a troubling decision. It is one thing to hold, as this Court did in *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617 (1989), that a convicted felon has no Sixth Amendment right to pay his lawyer with funds adjudged forfeitable. Following conviction, such assets belong to the Government, and "[t]here is no constitutional principle that gives one person the right to give another's property to a third party." *Id.,* at 628. But it is quite another thing to say that the Government may, prior to trial, freeze assets that a defendant needs to hire an attorney, based on nothing more than "probable cause to believe that the property will ultimately be proved forfeitable." *Monsanto*, 491 U. S., at 615. At that time, "the presumption of innocence still applies," and the Government's interest in the assets is wholly contingent on future judgments of conviction and forfeiture. *Kaley* v. *United States*, 571 U. S. ___, ___ (2014) (slip op., at 6). I am not altogether convinced that, in this decidedly different circumstance, the Government's interest in recovering the proceeds of crime ought to trump the defendant's (often highly consequential) right to retain counsel of choice.

But the correctness of *Monsanto* is not at issue today. Petitioner Sila Luis has not asked this Court either to overrule or to modify that decision; she argues only that it

does not answer the question presented here. And because Luis takes *Monsanto* as a given, the Court must do so as well.

On that basis, I agree with the principal dissent that *Monsanto* controls this case. See *ante,* at 5–7 (opinion of KENNEDY, J.). Because the Government has established probable cause to believe that it will eventually recover Luis's assets, she has no right to use them to pay an attorney. See *Monsanto*, 491 U. S., at 616 ("[N]o constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from . . . dissipating his assets prior to trial").

The plurality reaches a contrary result only by differentiating between the direct fruits of criminal activity and substitute assets that become subject to forfeiture when the defendant has run through those proceeds. See *ante,* at 5–6. But as the principal dissent shows, the Government's and the defendant's respective legal interests in those two kinds of property, prior to a judgment of guilt, are exactly the same: The defendant maintains ownership of either type, with the Government holding only a contingent interest. See *ante,* at 7–10. Indeed, the plurality's use of the word "tainted," to describe assets at the preconviction stage, makes an unwarranted assumption about the defendant's guilt. See *ante,* at 5 (characterizing such assets as, for example, "robber's loot"). Because the Government has not yet shown that the defendant committed the crime charged, it also has not shown that allegedly tainted assets are actually so.

And given that money is fungible, the plurality's approach leads to utterly arbitrary distinctions as among criminal defendants who are in fact guilty. See *ante*, at 12 (opinion of KENNEDY, J.). The thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets is no more deserving of chosen counsel than

the one who spends those two pots of money in reverse order. Yet the plurality would enable only the first defendant, and not the second, to hire the lawyer he wants. I cannot believe the Sixth Amendment draws that irrational line, much as I sympathize with the plurality's effort to cabin *Monsanto*. Accordingly, I would affirm the judgment below.