No. 12-464

In The
Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' MERITS BRIEF

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QUESTION PRESENTED

When a post-indictment, ex parte restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

LIST OF PARTIES

The United States of America brought this criminal case against Kerri L. Kaley, her husband Brian P. Kaley, and Jennifer Gruenstrass.

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OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court for the Southern District of Florida denying Petitioners' motion to vacate a pretrial restraining order. The Eleventh Circuit's decision is reported at 677 F.3d 1316 (11th Cir. 2012), and is reprinted in the Certiorari Petition Appendix ("Pet. App.") 1-37. The Eleventh Circuit's opinion from the first interlocutory appeal is reported at 579 F.3d 1246 (11th Cir. 2009). Pet. App. 48-93. Orders of the district court are unreported. Pet. App. 38-47, 94-117. A list of relevant docket entries of the district court ("DE") is provided in the Joint Appendix ("JA") at 1-28.

JURISDICTION

The Eleventh Circuit issued its opinion on April 26, 2012, Pet. App. 1-37, and denied rehearing on July 17, 2012. Pet. App. 113-14. A petition for a writ of certiorari was filed on October 11, 2012, and granted on March 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V.

No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

18 U.S.C. § 982 – Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

* * *

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853).

18 U.S.C. § 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . –

Shall be fined under this title or imprisoned not more than ten years, or both.

21 U.S.C. § 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . . .

* * *

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

STATEMENT OF THE CASE

This case involves a challenge to an ex parte protective order entered in a criminal case "upon the filing of an indictment." 21 U.S.C. § 853(e)(1)(A). The protective order restrains Petitioners' assets, which the government alleges are subject to forfeiture upon conviction.

Petitioners moved to vacate the protective order so that they could use the restrained assets to retain counsel of choice and pay related legal expenses. Because the statute does not provide for any hearing, Petitioners argued that the Fifth Amendment guarantee of due process and the Sixth Amendment right to counsel of choice entitled them to a pretrial, adversarial hearing to challenge the government's legal theory and evidentiary support for the underlying charges that purportedly justified the restraint.

The courts below ruled that Petitioners were not entitled to the hearing requested; rather, Petitioners could only challenge traceability – whether the assets restrained are traceable to the conduct charged in the indictment supporting the forfeiture count. Petitioners were not permitted to challenge the grand jury's finding of probable cause.

Petitioners submit that the Fifth and Sixth Amendments require a pretrial hearing at which the government must establish a substantial probability of succeeding in obtaining forfeiture of the restrained assets, failing which, the assets needed for counsel of choice and legal expenses must be unfrozen.

A. The Grand Jury Investigation and Retention of Counsel of Choice

Petitioner Kerri Kaley was a sales representative for Ethicon Endo-Surgery, Inc. ("EES"), a subsidiary of Johnson & Johnson, Inc. ("J&J"), selling prescription medical devices ("devices" or "PMDs") to hospitals in the New York area.[1] JA 30 (DE 1); Pet. App. 3. In January 2005, an agent of the Food and Drug Administration informed her that she and other sales representatives were under investigation for "stealing" and thereafter selling PMDs to a company in Florida, F&S Medical, Inc., that was involved in the "black" or "gray" market. Pet. App. 3; DE 184:49, 51.

Kerri retained defense counsel in Miami, Florida, to represent her. Pet. App. 3. Kerri's husband, Petitioner Brian Kaley, retained his own counsel when it appeared that he, too, was targeted for shipping the PMDs from New York to Florida and depositing checks into his business account reflecting payment for the PMDs. *Id.* Over the next two years, the attorneys represented Kerri and Brian[2] in an effort to stave off an indictment. *Id.* The Kaleys regularly discussed the case with their attorneys by telephone and made several trips to Florida to meet face-to-face

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[1] The PMDs sold by EES consisted of "laparoscopic and mechanical devices, anything from trocars, clips, bags, harmonic scalpels, endo-cutters, ligation devices, basically anything related to surgery in the cardiac/thoracic/GYN arena." DE 184:89.

[2] To avoid confusion, the Kaleys will be referred to by their first names, Kerri and Brian.

and review documents demanded by the grand jury. DE 17:4-6. Defense counsel met with the prosecutor to understand the government's theory and to present a defense to the allegations. *Id.*

Anticipating an indictment and a multi-week trial, the Kaleys applied for a $500,000 equity line of credit on their home to pay legal fees and expenses estimated by counsel. Pet. App. 3. The Kaleys drew on that line of credit to purchase a $500,000 certificate of deposit ("CD") that would earn interest until the Kaleys liquidated the CD to pay for the projected legal expenses. *Id.*

No indictment was returned in 2006. In early 2007, the Kaleys rolled over the CD into a new one, adding to it approximately $60,000 earned from other sources. *Id.*; DE 99:74; Pet. App. 95 n.2.

B. The Guilty Pleas of Other Sales Representatives

As the investigation progressed, the government secured plea agreements from other sales representatives, including Frank Tarsia and Alan Schmidt, who had obtained PMDs from hospitals and given them to Kerri for resale.

At Tarsia's sentencing on September 20, 2006, the prosecutor explained to the Honorable Kenneth Ryskamp of the U.S. District Court for the Southern District of Florida how the gray market developed. Sales representatives obtained the PMDs from staff

members at hospitals that had excess inventory of a particular device because, for example, the model of the device had been superseded by a new one. DE 105-1:16. As the prosecutor indicated, the staff would tell the sale representatives: "'I have got too much, I don't need it, take it away, I don't want it.'" DE 105-1:15. Judge Ryskamp wondered aloud "[w]ho is the victim" of this practice? The prosecutor claimed that the sales representatives should have returned the unwanted PMDs to their employer "[f]or credit" but conceded that "[t]he company doesn't like to do it, of course." DE 105-1:17.

Judge Ryskamp saw the implications: "The company might not be a victim then, because if [the sales representatives] turned [the PMDs] into the company, [the company] would have to pay credit [to the hospitals]. If the unit went elsewhere where nobody knew, they would be ahead of the game, right?" *Id.* The prosecutor then denied that the sales representatives' employers were the victims:

[AUSA]: So the company, once it gets in the hands of a medical facility, the company doesn't own it anymore.

THE COURT: So the company isn't a victim here.

[AUSA]: No.

DE 105-1:17.

Judge Ryskamp then questioned whether the hospitals were victims either, given that the hospitals

apparently "don't want this stuff" and were "willing to give it to whoever will take it off their hands." DE 105-1:17-18. The parties were nonetheless willing to proceed, so Judge Ryskamp obliged and sentenced Tarsia to 5 months in prison and $247,916.63 in restitution to a hospital in Brooklyn that had never complained about thefts and had produced "no records" to prove that anything was missing. DE 105-1:19, 33, 36.

On January 8, 2007, another former sales representative, Alan Schmidt, was sentenced by the Honorable William Zloch of the U.S. District Court for the Southern District of Florida. DE 70-1. Schmidt explained that EES sales representatives would obtain obsolete or unwanted PMDs from hospitals. He admitted giving the devices to Kerri, who sold them and gave Schmidt a share of the proceeds. DE 70-1:8. As Schmidt explained, if the hospitals "had something old on the shelf . . . you know, product A was superseded by product B, which was newer, lighter, faster, better, whatever, then product A sat on the shelf. . . ." DE 70-1:10.

Judge Zloch questioned how the gray market could have existed for so long without the hospitals noticing that "these items were all of a sudden missing." DE 70-1:11. The prosecutor had no answer, confessing that although the government had looked at "hundreds of medical facilities . . . we can't make restitution because their records are so bad and these items are not individually serialized. I have better accounting with my kids' allowance than some of

these places did." *Id.* Judge Zloch sentenced Schmidt to 6 months in prison, but this time the prosecutor did not seek a restitution order, admitting that "we can't make restitution. There is no readily identifiable [victim]." DE 70-1:12.

C. The Indictment and Protective Order

On February 6, 2007, the Kaleys and another sales representative, Jennifer Gruenstrass, were charged in a 7-count indictment. JA 29-43 (DE 1). Count 1 alleged that they conspired between 1995-2005 to: (A) transport PMDs that were "stolen, converted, or taken by fraud" in violation of 18 U.S.C. § 2314; and (B) to defraud the Food and Drug Administration. JA 31-32. Counts 2-6 charged five substantive offenses under § 2314, each based on a specific check reflecting payment for allegedly stolen PMDs. JA 38. Count 7 charged the defendants with obstructing an "official proceeding" in violation of 18 U.S.C. § 1512(b)(3). JA 39 (DE 1:9). The indictment did not charge money laundering.

The indictment alleged that the Kaleys, Gruenstrass and others acquired PMDs, packed them at the Kaleys' residence in New York, and shipped them to F&S Medical, Inc. in Florida in return for payment by way of checks payable to Kerri or a company owned by her husband Brian. JA 33. The checks were deposited into bank accounts associated with the Kaleys. *Id*. Kerri would thereafter issue

checks to Gruenstrass and other sales representatives for their share. *Id.*

The indictment concluded with a demand for criminal forfeiture of all property constituting "proceeds" of the § 2314 charges "and all property traceable to such property, including but not limited to a money judgment in the amount of $2,195,635.28 and the CD."[3] JA 40.

Along with the indictment, the government obtained an ex parte Protective Order, under the authority of 21 U.S.C. § 853(e)(1)(A) and 28 U.S.C. § 2461(c), restraining all "the property listed for forfeiture in the indictment," including the CD. JA 44-47 (DE 6).

D. The First Motion to Vacate

At their first appearances in Florida on February 26, 2007, the Kaleys were represented by their pre-indictment counsel. Because the Protective Order prevented the Kaleys from using any of their funds to retain counsel for trial, neither counsel entered a "permanent appearance" as trial counsel. Rather, counsel entered temporary appearances, limited to

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[3] Because § 2314 is not a crime for which forfeitures are authorized under any *criminal* forfeiture statute, the indictment sought forfeiture indirectly under 18 U.S.C. § 981(a)(1)(C), a provision of the *civil* forfeiture statute that only applies to criminal cases through 28 U.S.C. § 2461(c).

the representation necessary to challenge the Protective Order. DE 13, 18.[4]

On March 5, 2007, the Kaleys moved to vacate the Protective Order, so that they could access the remaining equity in their residence (approximately $500,000) and/or the CD to retain counsel-of-choice. DE 17. Because 21 U.S.C. § 853 authorizes an ex parte restraining order merely "upon the filing of an indictment," the Kaleys argued that the Fifth and Sixth Amendments entitled them to a prompt, pretrial adversarial hearing, at which they could challenge whether the PMDs were stolen. *Id.*[5] Pointing to the sentencing transcripts of Tarsia and Schmidt, counsel argued that the government was unlikely to convict the Kaleys at a trial because the government had no hospital-victim claiming an ownership interest in the PMDs. *Id.*

The prosecutors opposed the motion. DE 27. Citing *United States v. Bissell*, 866 F.2d 1343 (11th Cir.), *cert. denied*, 493 U.S. 876 (1989), they objected to any hearing that would require the government to reveal its evidence before trial. Alternatively, the government argued that at most the Kaleys could contest the *tracing* of assets to the alleged crimes but

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[4] *See* Rule 88.7, Local Rules of the United States District Court for the Southern District of Florida ("Retained Criminal Defense Attorneys").

[5] The Kaleys also argued that the indictment was invalid because it was not signed by the foreperson of the grand jury. *See* Fed. R. Crim. P. 6(c) and 6(f). DE 17.

that the Kaleys were not entitled to even that limited hearing unless they first proved that they could not retain counsel by liquidating every asset worth over $500 (including Kerri's 401K retirement account and their childrens' college savings account). DE 27:9-10.

On April 6, 2007, Magistrate Judge James Hopkins convened a telephonic conference on the Kaleys' motion. DE 42, 43.[6] The prosecutors conceded that the government had traced only $140,000 in proceeds to the Kaleys' residence, a sum far short of the $2,195,635.28 demanded in the indictment. Pet. App. 107 (DE 82:2). The conference ended with Magistrate Judge Hopkins questioning the prosecutors' claim that they could restrain all of the Kaleys' assets in order to secure a potential $140,000 forfeiture. A hearing was then set for April 16, 2007.

E. The Superseding Indictment and a Second Round of Motions

On April 10, 2007, only two business days after the telephonic conference, the prosecutors obtained a superseding indictment, JA 48-65 (DE 44), which added a count of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). JA 58. The superseding indictment demanded forfeiture under 18

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[6] Due to an equipment malfunction, no transcript of this hearing could be produced by the court reporter. However, the representations made in the text were not challenged during the district court litigation.

U.S.C. § 982, a criminal forfeiture statute based on the new money laundering count. The new forfeiture allegation was not limited to traceable proceeds; it included a "facilitation" theory that listed the Kaleys' home and CD as forfeitable property, insofar as the home had been "involved in" the money laundering. JA 60-61.

The Kaleys renewed their challenge to the Protective Order, DE 53, and moved to bar the government's use of the new facilitation theory, arguing that it was vindictive. DE 52. The motion emphasized that the prosecutors had not sought restraining orders against co-defendant Gruenstrass or any of the sales representatives who had entered guilty pleas to the activities alleged in the indictment. DE 52:12, n.7.

F. The Evidentiary Hearing

On April 27, 2007, Magistrate Judge Hopkins convened a hearing limited to (1) an examination of the Kaleys' available assets and (2) whether they could establish that any of their assets were not traceable to the charged crimes. DE 99. The Kaleys established that $63,057.65 of the CD was from a source independent of the allegations in the indictment. The Kaleys demonstrated that liquidating all their unrestrained assets – primarily Kerri's 401K retirement account and their children's college funds – would cause the Kaleys to incur unrecoverable taxes and penalties of $183,500, Pet. App. 71, and net them $353,145.02 for living and legal expenses, of

which $75,000 was earmarked for the attorney working exclusively on drafting the pleadings challenging the Protective Order. DE 74:3-5; DE 99:17-18. Counsel gave a detailed estimate that fees for a trial of several weeks would total $400,000; out-of-pocket expenses were projected to be an additional $100,000. DE 99:20-24.[7]

When the Kaleys attempted to prove that the PMDs were not stolen, DE 99:94-96, Magistrate Judge Hopkins barred the testimony and denied the Kaleys' motions, finding "probable cause" based on the superseding indictment, as supplemented by an ex parte affidavit from an agent. Pet. App. 109.

Magistrate Judge Hopkins entered an Amended Protective Order explicitly listing the Kaleys' home and the CD as properties under restraint. JA 66-68 (DE 81). He found the restraint caused no unjust impingement on the Kaleys' Sixth Amendment right to counsel of choice, noting that "many competent attorneys work on the Criminal Justice Act panel where they charge $90 per hour." *Id.* at 110. Magistrate Judge Hopkins found that the Kaleys could retain other counsel for a lesser fee by liquidating their children's college savings plans and Kerri's 401K retirement account. *Id.*

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[7] Neither the government nor the district court challenged the reasonableness of the estimated fees and expenses.

Magistrate Judge Hopkins also rejected the Kaleys' vindictiveness claim, holding that the prosecutors added the money laundering charges and a "facilitation" theory of forfeiture "to correct their mistakes pretrial in order to protect their legitimate interests." Pet. App. 109.

G. The District Court's Ruling

The district court adopted most of Magistrate Judge Hopkins's rulings, holding that the Kaleys were not entitled to any kind of post-seizure hearing under the Eleventh Circuit's decision in *Bissell*, which applied a "speedy trial" test from *Barker v. Wingo*, 407 U.S. 514 (1972). Pet. App. 94-104. The four-part test requires courts to consider: (1) the length of the delay between seizure and adjudication; (2) the reason for the delay; (3) whether the defendant has asserted his right; and (4) the prejudice to the defendant that the delay has caused. *Barker*, 407 U.S. at 530.

The district court released $63,057.65 because it was not traceable to the charges. Pet. App. 97. The district court stayed the arraignment and trial pending the Kaleys' interlocutory appeal. DE 140.

H. The Gruenstrass Trial

While the Kaleys were taking an interlocutory appeal, co-defendant Gruenstrass – whose assets were not frozen and who had retained counsel of choice – moved to continue her trial pending the

Kaleys' interlocutory appeal so all defendants could be tried together. DE 131. Despite its prior objection to having to reveal its case before the Kaleys' trial, the government insisted that Gruenstrass be severed and tried first without waiting for a decision on the Kaleys' appeal. JA 69-73 (DE 135). The district court granted the government's request and set Gruenstrass for trial.

In response to Gruenstrass's motion for a bill of particulars, the district court directed the government to "identify the owners of the prescription medical devices stolen, converted and taken by fraud as alleged in Counts 2-6" – the five substantive counts under § 2314, each based on a specific check reflecting payment for allegedly stolen PMDs. DE 157. Apparently still unable to find any hospitals that claimed their property had been stolen, the government reverted to the theory that it had disavowed before Judge Ryskamp during the Tarsia sentencing, announcing that for counts 2-6 the *sole* owner and "victim" was Gruenstrass's employer, "Ethicon, Inc." JA 74-7 (DE 159).[8] The government, however, did not identify how or under what legal theory Ethicon, Inc., could have owned products that had already been sold *unconditionally* to distributors and hospitals. Gruenstrass's counsel did not pursue the issue.

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[8] Kerri was a sales representative for EES, while Gruenstrass was a sales representative for EES's sister entity, Ethicon, Inc.

Gruenstrass was tried between November 5-8, 2007. Most of the testimony was about the Kaleys.

Trial testimony established that EES was in the business of manufacturing and selling PMDs, particularly endosurgery products. DE 184:89. EES maintained an elaborate system for discouraging "returns" and "refunds" of PMDs previously sold by EES. Because the hospitals were not in the business of reselling their excess inventory of PMDs, the hospitals routinely *gave* unwanted PMDs to the EES sales representatives, who were at-will employees with no written contracts with EES. DE 185:377-78; DE 220-2:114; DE 196-3:10. Although EES did not expressly "authorize" the practice, "the company" and "everyone" knew about these arrangements but EES simply "would turn a blind eye" to it. DE 184:186-87, 210.

Admittedly, it was against company policy for sales representatives to take products out of the hospitals. DE 185:364, 369, 376, 393-98. But the policies in the company manuals were for "informational" purposes only and were not part of any employment contract. DE 185:370, 377-79, 403. The only document Ethicon made a sales representative sign was a non-compete agreement, *i.e.,* nothing about returning unwanted (and non-returnable) products. DE 185:377, 382.

The government relied on the testimony of several sales representatives, including Tarsia and Schmidt, who testified that the hospitals routinely gave the

excess PMDs to them; in turn, they gave the PMDs to Kerri for resale. DE 184:177, 180-82, 191, 197-98.[9]

John Keith Danks, another cooperating government witness who testified, was the "fence" for the alleged conspiracy. A former J&J employee himself, Danks set up shop in Florida under the corporate name F&S Medical, Inc., DE 184:250, and began buying the PMDs from sales representatives, especially Kerri, and reselling them to other wholesalers. DE 184:230-33.

All of Danks's records, including those of his company F&S Medical reflecting purchases from Kerri, were introduced against Gruenstrass to prove the conspiracy charge. Danks recorded the financial transactions using the Quickbooks accounting software and made no effort to conceal the payments to the Kaleys. DE 184:256.

FDA Special Agent Puhutsky testified that Danks's financial records were copious and clear – "from the records we saw, everything that he had dealt in was properly identified." DE 184:57. FDA consultant Thomas McGovern gave similar testimony and opined that the Kaleys' financial records were equally transparent. DE 185: 350-57. The Kaleys' accountant, called by the government, provided

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[9] *See also* DE 184:138-75 (testimony of sales representative Roni Keskinyan); DE 186:720-52 (testimony of sales representative Maria McCaul).

similar testimony. DE 185: 299, 309, 314-15, 325-26, 328, 331-32.

The government rested its case without putting on testimony from a single "victim" claiming "ownership" of the PMDs. Even Agent Puhutsky had to admit that she did not "have any idea" who owned the PMDs or even whether they were stolen. DE 184:68. As Gruenstrass's counsel put it when he moved for a judgment of acquittal: "In effect, the Government is trying to sell a fraud case without a victim. . . . The problem with this case in a nutshell is the Government theorizes [Gruenstrass] cheated somebody some way, but they don't know who, and they're not too sure how. . . ." DE 185:438. Nor did the trial testimony establish any "money laundering" scheme designed to conceal the source or origin of the funds.

Consistent with its bill of particulars (but contrary to its representations to Judge Ryskamp and Judge Zloch), the government argued that the employers, not the hospitals, were the owner/victims. According to the government, the sales representatives' employers reacquired ownership through an "agency" principle at the moment the sales representatives accepted the PMDs from the hospital staff. DE 187:778.

The prosecutor produced no legal authority that this agency theory of acquiring property (*i.e.*, "constructive trust") is cognizable under § 2314. Indeed, under binding case law in the Eleventh Circuit, it is not. *See United States v. Goodrich*, 871 F.2d 1011,

1014-15 (11th Cir. 1989).[10] But Gruenstrass's counsel voiced no objections to the flawed theory of prosecution, and the district court denied Gruenstrass's motion for judgment of acquittal. DE 187:778.

Without the benefit of any legal briefing on the point, the district court accepted the government's theory that "ownership" automatically reverted back to the J&J companies when the hospitals relinquished their rights to excess inventory of PMDs. The court reasoned that because a sales representative was "in the position of a representative of the distributor," he or she "is holding the property for the benefit of the distributor, not for her own benefit. . . ." DE 185:435, 443-44.

In closing argument to the jury, the prosecutor eschewed any claim that the hospitals were the owners/victims. Although not a single witness testified that Ethicon was asserting any property interest in the PMDs, the prosecutor nevertheless pressed his flawed "constructive trust" theory: "Well, in point of fact, in Counts 1 to 6 the superior interest that was

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[10] The majority of circuits are in accord. *See United States v. Miller*, 997 F.2d 1010 (2d Cir. 1993); *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989); *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989); *United States v. Slay*, 858 F.2d 1310 (8th Cir. 1988); *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); *United States v. Stack*, 853 F.2d 436 (6th Cir. 1988); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988). *Contra United States v. Little*, 889 F.2d 1367 (5th Cir. 1989).

defeated from which the Defendant converted and took by fraud was *from her employer*. *We're not saying it was the hospital*." DE 187:842-43 (emphasis added).

On November 8, 2007, the jury acquitted Gruenstrass of all counts in less than three hours. DE 187:875.

I. The Eleventh Circuit's Decision in *Kaley I*

The Kaleys filed a supplemental brief in the Eleventh Circuit concerning the implications of Gruenstrass's trial on the Kaleys' pending interlocutory appeal. The brief cited the Eleventh Circuit's *Goodrich* decision rejecting the government's flawed theory of prosecution. *See Kaley I*, 07-13010-HH (11th Cir. filed 1/15/08). The Kaleys argued that the Gruenstrass trial demonstrated that there was no conspiracy to commit money laundering, given the transparency of the financial transactions. The government did not respond to the supplemental brief.

In May 2009, the Eleventh Circuit issued its decision reversing the district court. Pet. App. 49-53. The majority opinion in *Kaley I* recognized that no other circuit had followed *Bissell* and openly acknowledged that "[i]f we were writing on a blank slate today we would be inclined, as Judge Tjoflat suggests in his special concurrence, to apply the test announced by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). . . ." Pet. App. 72. The majority nonetheless found that *Bissell* (which applied the four-part speedy trial test from *Barker v.*

Wingo) was still the law in the Eleventh Circuit. Pet. App. 57-58, 72. However, the majority remanded the case to the district court for a hearing to "re-weigh the *Barker* factors in order to calculate whether the Kaleys [were] entitled to a post-indictment pretrial evidentiary hearing." Pet. App. 72, 75.

Although the Kaleys had already had a hearing on "tracing" (resulting in the release of $63,057.65), the majority stated that the "purpose" of such a hearing "would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure." Pet. App. 68. The burden of proof would be on the Kaleys, thus "sav[ing]" the government "from having to preview its entire case." *Id.* The majority did not address whether the district court could consider the evidence adduced during Gruenstrass's trial in "determining the propriety of the seizure." The majority did suggest that the hearing could mirror the "approach" approved by this Court in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), a prejudgment attachment civil case. Pet. App. 68.

In a concurring opinion, Judge Tjoflat expressed his view that *Bissell*'s reliance on the *Barker* test to define a defendant's due process rights was dicta. In his view, *Mathews* prescribed the proper test: (1) the private interest affected by the restraint, (2) the risk of erroneous deprivation through the procedures used, and (3) the probable value of additional procedural safeguards. Pet. App. 75-93. Judge Tjoflat found that the Kaleys' interests were enormous: "Delaying the due process hearing until trial will only temporarily

deprive the Kaleys of their property rights, but it will completely eviscerate their right to counsel of choice." Pet. App. 88-89. The risk of an erroneous deprivation likewise weighed in the Kaleys' favor, because a prosecutor's judgment, a grand jury's ex parte finding of probable cause, and an agent's ex parte affidavit were unlikely to protect a defendant "against an erroneous deprivation." Pet. App. 89-91. Judge Tjoflat also cited *Mitchell* as a guide to what type of hearing would be required in this setting. Pet. App. 91. At this hearing, the Kaleys could challenge "the merits," meaning that the burden would be on the Kaleys to "show that the Government did not have probable cause to restrain their assets." Pet. App. 93.

J. The District Court's Rulings on Remand

On remand, the district court re-weighed the *Barker/Bissell* factors and this time held that "the equities" favored the Kaleys. Pet. App. 47. At a hearing on July 29, 2010, the Kaleys advised the district court that they would not contest the nexus or "traceability" of the CD and house to the conduct which was the subject of the indictment. JA 107 (DE 233:10). Instead, they argued that the district court should modify the Amended Protective Order because it was now clear from the Gruenstrass trial that there was no probable cause, much less a substantial likelihood, to believe that any crimes were committed under either a hospital-as-owner or employer-as-owner theory. JA 106-22 (DE 233:15-31). To avert any claim of premature discovery, the Kaleys proposed to rely

exclusively on the Gruenstrass proceedings, Tarsia's sentencing transcript, EES's policy manuals and product brochures that precluded most product returns, and an affidavit from EES confirming that EES had never asserted any claim to the excess PMDs, much less sued or sought restitution from any sales representative for the purported thefts.[11] JA 102; *see also* DE 220.

The prosecutors continued to argue that the Kaleys had no right to contest any issue other than the nexus or "traceability" of the assets to the alleged criminal activity, regardless of the court's assessment of the viability of the government's theory of prosecution in light of the Gruenstrass trial. JA 130-43 (DE 233). In response to the evidence proffered by the Kaleys (including transcripts of the 4-day trial of Gruenstrass), the prosecutor relied exclusively on a non-compete agreement signed by Kerri. JA 103-04; DE 220-2:93-94. The district court then inquired:

> THE COURT: Let me ask you, assuming that I agree with the Defense's position . . . that you have to come forward with some

[11] The Kaleys' Hearing Memorandum, DE 196:43, demonstrated that, under the law of New York (where they took custody of the PMDs), a constructive trust cannot be recognized unless the employer formally asserts a superior interest in the proceeds. Moreover, the employer's failure to do so evinces the employer's consent to the employee's conduct. *See Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 206 n.6 (S.D.N.Y. 2008) (citations omitted); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 385-87, 122 N.E. 378 (1919) (Cardozo, J.).

> showing to convince me that you have a likelihood of success on the merits, is there anything in the record for me to be able to do that? Is there anything that satisfies that burden, assuming that I ultimately agree that that is what's required?
>
> [AUSA]: For these Defendants, because the other case [the Gruenstrass trial] was not focused on them, we would have to come [42] forward with more.

JA 138-39.

On October 25, 2010, the district court denied the Kaleys' motion to vacate, adopting the government's construction of *Kaley I* and *Bissell* that the *only* "relevant inquiry for this hearing is whether the seized assets are traceable to or involved in the alleged criminal conduct." Pet. App. 38-43. The order did not comment on any aspect of the Kaleys' factual or legal arguments. The district court stayed the case to allow the Kaleys to take a second interlocutory appeal.

K. The Eleventh Circuit's Decision in *Kaley II*

The Eleventh Circuit affirmed: "To the extent that *Kaley I* did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges." Pet. App. 15. The majority further held that even though the Kaleys had prevailed under the *Bissell*/

Barker test on remand from *Kaley I*, the *only* hearing that *Bissell* permitted was about traceability. Pet. App. 24. According to the *Kaley II* majority, the Kaleys' Sixth Amendment concerns could be satisfied through court-appointed counsel. Pet. App. 25.

Judge Edmondson wrote a concurring opinion in *Kaley II* that reads like a dissent. Expressing "deep doubts," he wrote: "If I were deciding the case alone, I expect I would reach a different result and write something largely in line with *United States v. Monsanto,* 924 F.2d 1186 (2d Cir. 1991) (en banc), and *United States v. E-Gold, Ltd.,* 521 F.3d 411 (D.C. Cir. 2008)." According to those cases, when the government seeks to impose a restraining order "add on to ordinary prosecution," due process requires an evidentiary hearing "about probable cause on both the predicate criminal offense and the forfeitability (traceability of assets to supposed crime) of the specified property." Pet. App. 33-34. The government would be free to "decide for itself what cards to show before the actual trial; the worst that will happen is that the pretrial restraint on property will not continue. . . ." Pet. App. 34. Judge Edmondson ended his opinion by emphasizing that

> the potential for the dominating power of the Executive Branch to be misused by the arbitrary acts of prosecutors is real. The courts must be alert. To hear from the other side at a time when it matters (in this instance, before the criminal trial: a trial without counsel of the defendant's choice) is the basic and

> traditional way that American judges assure things are fair.

Pet. App. 36-37.

The Kaleys' petition for rehearing en banc was denied on July 17, 2012. Pet. App. 113-14. The district court then stayed the proceedings to permit the Kaleys to petition this Court for review. Pet. App. 116-17. The Kaleys timely filed their petition for a writ of certiorari on October 11, 2012, which this Court granted on March 18, 2013.

SUMMARY OF THE ARGUMENT

In *Caplin & Drysdale*, *Chtd. v. United States*, 491 U.S. 617 (1989), this Court rejected a Fifth and Sixth Amendment challenge to 21 U.S.C. § 853, the federal statute that allows for the forfeiture of tainted funds used to pay counsel of choice. In a companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), this Court approved the pretrial restraint of allegedly tainted funds needed to pay counsel of choice "based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615. This Court explicitly left open the question – by then already dividing the circuits – "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Id.* at 615 n.10.

In the ensuing twenty-four years since this Court decided *Caplin & Drysdale* and *Monsanto*, the Courts

of Appeals have largely agreed that a criminal defendant is entitled to some type of pretrial adversarial hearing to challenge a restraint that effectively prevents the defendant from retaining counsel of choice. However, the Courts of Appeals have disagreed on the scope of such a pretrial hearing. Most courts have permitted a defendant to challenge the factual and legal bases for the restraint – *i.e.,* the grand jury's probable cause determination. *See* Certiorari Petition at 18-29. Other courts, including the Eleventh Circuit, have required the trial courts to assume the validity of the grand jury's finding and limited the inquiry to whether the restrained asset is traceable to the charged conduct. *Id.*

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner' " upon the deprivation of liberty or property. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This Court's precedents under the *Mathews* rubric permit the party affected by the deprivation to challenge its factual and legal bases, either before the deprivation or at a hearing set promptly thereafter.

Eschewing the *Mathews* line of cases, the Eleventh Circuit held that the Kaleys were not entitled to challenge pretrial the grand jury's finding of probable cause, no matter how demonstrably flawed, even though the restraint of their assets would deprive them of their counsel of choice at trial. Instead, the Eleventh Circuit permitted the Kaleys to challenge

only the traceability of the restrained assets to the charged conduct. Pet. App. 15; *Kaley II*, 677 F.3d 1316 (11th Cir. 2012).

None of this Court's precedents limits the scope of such hearings to traceability. To the contrary,

> where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which ***some showing of the probable validity of the deprivation must be made***.

C.I.R. v. Shapiro, 424 U.S. 614, 629 (1976) (emphasis added).

The rule thus applied by the Eleventh Circuit allows a grand jury's ex parte and untested finding of "probable cause" to financially handicap a criminal defendant's ability to mount a defense to the charges that threaten the defendant's liberty. That harsh result cannot be correct.

ARGUMENT

Due Process Requires a Pretrial, Adversarial Hearing When an Ex Parte Protective Order Restrains the Assets a Criminal Defendant Needs to Retain Counsel of Choice

When the government seeks a pre-indictment protective order under 21 U.S.C. § 853, the statute provides for a hearing at which the court must determine whether "there is a substantial probability that the United States will prevail on the issue of forfeiture." 21 U.S.C. § 853(e)(1)(B)(i). However, if the government first obtains an indictment, a restraining order may be entered ex parte, and no hearing is prescribed by the statute. 21 U.S.C. § 853(e)(1)(A).

The absence of a prompt, post-restraint, adversarial hearing violates the Due Process Clause of the Fifth Amendment when the restraint effectively prevents a criminal defendant from retaining counsel of choice under the Sixth Amendment. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Petitioners submit that the Fifth and Sixth Amendments require a hearing at which the government must establish a substantial probability that it will prevail on the issue of forfeiture.

To establish a procedural due process violation, the Kaleys must show that: (1) the government has deprived them of a protected property interest, and (2) the deprivation occurred without adequate procedural safeguards. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). The first

element is undisputed. A protective order is prohibiting the Kaleys from using their money and the equity in their home for legal expenses. While the protective order "does not divest definitively the ownership rights" of the Kaleys, "it certainly does remove those assets from [their] immediate control and therefore divests [them] of a significant property interest." *United States v. Moya-Gomez*, 860 F.2d 706, 725-26 (7th Cir. 1988). A protective order that deprives citizens of their "interest in continued possession and use" of their property triggers due process protections. *Fuentes v. Shevin*, 407 U.S. 67, 84, 86 (1972) (citations omitted).

A. *Mathews v. Eldridge*, 424 U.S. 319 (1976), Provides the Correct Framework to Determine Whether Procedural Safeguards are Adequate

This Court has, with rare exceptions, relied upon the "general approach" of *Mathews* "for testing challenged [government] procedures under a due process claim." *Parham v. J.R.*, 442 U.S. 584, 599 (1979). *See, e.g.*, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (right to counsel in civil contempt proceeding); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (punitive damage awards); *Wilkinson v. Austin*, 545 U.S. 209 (2005) (transfers to supermax prisons); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (hearings for an alleged "enemy combatant"); *City of Los Angeles v. David,* 538 U.S. 715 (2003) (seizure of a car for parking violations); *Zinermon v. Burch*, 494 U.S. 113 (1990) (involuntary

commitment to mental health facility); *F.D.I.C. v. Mallen,* 486 U.S. 230 (1988) (a banker's right to a post-suspension hearing); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (statutory limitations on attorneys' fees); *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985) (termination of a public employee with a for-cause employment right); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1978) (termination of public utility service); *Gilbert v. Homar*, 520 U.S. 924 (1977) (suspension of state employee); *Fusari v. Steinberg,* 419 U.S. 379 (1975) (termination of unemployment benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (license suspension proceedings); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (corporal punishment in schools); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (termination of public assistance benefits).[12]

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[12] There are cases in which the Court has declined to apply *Mathews*, but they did not involve the timing and scope of the hearings required when the government interferes with property rights. *See, e.g., Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49 (2005) (challenge to adequacy of a public education program); *Dusenbery v. United States,* 534 U.S. 161 (2002) (challenge to adequacy of notice of a cash seizure); *Weiss v. United States,* 510 U.S. 163 (1994) (challenge to lack of fixed terms for military judges in a court martial proceeding); *Medina v. California,* 505 U.S. 437 (1992) (challenge to the procedures of a competency hearing); *Atkins v. Parker,* 472 U.S. 115 (1985) (challenge to adequacy of notice given for change in welfare benefits); *Black v. Romano,* 471 U.S. 606 (1985) (challenge to the procedures in a probation revocation hearing).

To determine the process due in any particular setting, the *Mathews* test considers three factors:

> First, ***the private interest*** that will be affected by the official action; second, ***the risk of an erroneous deprivation*** of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, ***the Government's interest***, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335 (emphasis added); *accord United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

While this Court has not previously addressed what interim procedural safeguards are required when *the government* seeks a pre-judgment order restraining a defendant's assets until trial, the Court has on several occasions addressed the parallel issue of what safeguards satisfy due process when *a private civil litigant* seeks a pre-judgment attachment or garnishment order pending the final outcome of a civil dispute. On each occasion, the Court has used *Mathews* or a *Mathews*-like balancing test, not *Barker v. Wingo*, 407 U.S. 514 (1972), to evaluate whether the deprivation violates due process. The Court has consistently required either a pre-deprivation or prompt post-deprivation hearing for the aggrieved party. In none of these cases has the contemplated hearing been limited to an inquiry regarding traceability.

1. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969)

In a case predating *Mathews*, this Court in *Sniadach* invalidated a Wisconsin pre-judgment garnishment statute that allowed an employer to freeze up to half of an employee's income without prior notice or hearing. 395 U.S. at 338 n.1. Until trial on the merits, the employee was "deprived of his enjoyment of earned wages without any opportunity to be heard ***and to tender any defense he may have***, whether it be fraud or otherwise." *Id.* at 339 (emphasis added). Finding that the "taking" of a wage earner's important source of income was "obvious, it needs no extended argument to conclude that absent notice and a prior hearing [citation omitted] this prejudgment garnishment procedure violates the fundamental principles of due process." *Id.* at 342.

2. *Fuentes v. Shevin,* 407 U.S. 67 (1972)

Three years later, in *Fuentes* this Court found Florida's and Pennsylvania's replevin statutes unconstitutional for similar reasons. The Florida case involved the purchase of a stove and stereo on an installment contract under which the vendor retained title to the goods until payments were completed. *Fuentes*, 407 U.S. at 70. After making payments for more than a year, and with only $200 owed to the vendor, the consumer (Ms. Fuentes) stopped making payments. *Id.* The vendor filed suit and obtained a writ of replevin ordering the sheriff to seize the stove

and stereo, which he did. *Id.* at 71. The Pennsylvania case involved consumers who likewise purchased household goods on installment, but the goods were replevied when the consumers fell behind on their payments. *Id.* at 71-72.

Neither replevin statute required notice or opportunity for hearing before permitting ex parte seizures. Under the Florida statute, the creditor "had only to fill in the blanks on the appropriate form document and submit them to the clerk of the small-claims court." *Id.* at 70-71. The clerk would issue the writ based on nothing but the "bare assertion" of the creditor. *Id.* at 71-74. The only procedural protection was that the party post a security bond and file a complaint for repossession. *Id.* at 74. After the property was seized, the only hearing provided the consumer/debtor was the ultimate trial on the vendor/creditor's complaint. Pennsylvania's statute was similar but did not require the filing of a complaint. *Id.* at 77. To obtain a hearing, the debtor had to file a complaint himself. *Id.* at 78. This Court found that both statutory schemes violated due process, expressing skepticism over "secret, one-sided determination of facts decisive of rights." *Id.* at 81 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

Significantly, the consumers "lacked full legal title to the replevied goods." *Id.* at 86.

> But even assuming that the appellants had fallen behind in their installment payments,

> and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit.' It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

Id. at 87 (citation omitted). The Court left open the "nature and form" of the interim hearing but cautioned that "to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test." *Id.* at 96-97.

The hearing contemplated by the Court was not limited to tracing – *i.e.,* whether the Florida sheriff had mistakenly seized from Ms. Fuentes the wrong stove and stereo. Rather, the Court emphasized that the "only" type of hearings that would satisfy due process are those "'aimed at establishing the validity, or at least ***the probable validity, of the underlying claim*** against the alleged debtor. . . .'" *Id.* at 97 (emphasis added) (quoting *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring)); *see also id.* at 97 n.32 (reiterating that at the hearing "the applicant for a writ

must establish the probable validity of his claim for repossession").

3. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)

In *Mitchell*, a buyer defaulted in paying the balance of the purchase price of various appliances. The creditor obtained ex parte a "writ of sequestration" for the recovery of the goods under a Louisiana statute that required only a sworn affidavit and the posting of a bond but no pre-deprivation hearing. After the appliances were seized, the buyer/debtor moved to dissolve the writ, arguing that he had a due process right to a pre-seizure hearing. 416 U.S. at 602-03.

In upholding the statute, the Court emphasized four points. First, *Mitchell* was "not a case where the property sequestered by the court is exclusively the property of the defendant debtor . . . both the seller and buyer had current, real interests in the property." 416 U.S. at 604. Second, the verified petition was submitted to a judge, not just a clerk. *Id.* at 605-06, 616.[13] Third, the Louisiana statute entitled the debtor to an interim hearing at which he could "put the

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[13] Implicit in the importance of requiring the involvement of a neutral judicial officer is that the officer has discretion to deny the writ. *See Johnson v. American Credit Co.*, 581 F.2d 526, 534 (5th Cir. 1978) (finding that a neutral magistrate with discretion to deny the writ of attachment is an essential constitutional safeguard).

creditor to his proof" by requiring the creditor "***to establish . . . the probability that his case will succeed***. . . ." *Id.* at 609 (emphasis added).[14] Fourth, if the creditor failed to meet his burden of proof, the judge could "assess damages in favor of the debtor, including attorney's fees." *Id.* at 606, 617.

The Court thus approved the pre-hearing seizure authorized by the Louisiana statute because the procedural safeguards in place – including a prompt, post-deprivation hearing not limited to a tracing inquiry – provided a "constitutional accommodation of the conflicting interests of the parties." *Id.* at 607.

4. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)

Di-Chem involved a suit to recover the purchase price for goods sold and delivered to a buyer. As permitted under Georgia law, the creditor filed an affidavit for garnishment of the debtor's bank account along with its complaint in the underlying action. 419 U.S. at 601-04. The Court had little trouble finding the Georgia statute invalid "for the same reasons" as the statutes in *Fuentes*. *Id.* at 606. The Court added that the Georgia statute also contained "none of the saving characteristics" of the statute in *Mitchell*, like

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[14] *Mitchell* was mis-cited by both the majority and concurring opinions in *Kaley I* for the proposition that the Kaleys should bear the burden of proof. *See* Certiorari Petition at 32-33 & n.8.

"an immediate hearing after seizure and to dissolution of the writ absent ***proof by the creditor of the grounds on which the writ was issued.***" *Id.* (emphasis added). The Court was troubled by the absence of "an early hearing at which the creditor would be required to demonstrate ***at least probable cause for the garnishment.***" *Id.* at 607 (emphasis added).

5. *Connecticut v. Doehr*, 501 U.S. 1 (1991)

The Court synthesized this series of precedents in *Doehr*. Plaintiff sought a $75,000 attachment on the defendant Doehr's home as security for a tort suit alleging assault and battery. 501 U.S. at 5. Connecticut allowed attachment of real property without notice or prior hearing or bond "upon verification by oath of the plaintiff . . . that there is probable cause to sustain the validity of the plaintiff's claim." *Id.* (citation omitted). Based solely on the affidavit, the state court judge could find "probable cause" and order the attachment. *Id.* at 7. Defendant received neither service of the complaint in the underlying action nor notice of attachment until after the sheriff attached the property. *Id.*

Like the Louisiana statute in *Mitchell*, the Connecticut statute granted the defendant the right to an expeditious post-attachment adversary hearing before a judge "to claim that no probable cause existed to sustain the claim" and granted double damages for actions started without probable cause. *Id.* at 7, 15. Instead of pursuing that remedy, the defendant

filed suit in federal court, claiming that the statute violated due process. After reviewing its prior attachment and garnishment cases in light of *Mathews*, the Court found that the statute violated due process, focusing most of its attention on the "risk of erroneous deprivation" factor, which the Court found was "substantial." *Id.* at 12.[15]

Although the statute used the term "probable cause," the statute later defined the plaintiff's burden as proving the "likelihood that judgment will be rendered in the matter in favor of the plaintiff." *Id.* at 13 (quotations omitted). The parties presented three potential interpretations of this burden of proof: (1) "the objective likelihood of the suit's success"; (2) the plaintiff had "a subjective good faith belief that the suit will succeed"; or (3) stating enough facts in the complaint "to survive a motion to dismiss." *Id.* at 13. The Court found that the risk of error under the second and third potential definitions would be too great to satisfy due process: "It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions." *Id.* at 13-14.

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[15] The Court found that the defendant had a sufficient interest in the assets to warrant due process protection even though the impairment was only partial, comparing the attachment to a lien. *Doehr*, 501 U.S. at 12.

Although the statute in *Mitchell* had been salvaged largely because it included a post-deprivation hearing, the Court in *Doehr* believed that the risk of error in *Mitchell* was minimized by the fact that the statute applied to "uncomplicated matters that lent themselves to documentary proof." *Id.* at 15 (citation omitted). In addition, the Court noted that unlike the debtor-creditor paradigm, the plaintiff in *Doehr* "had no existing interest in [defendant]'s real estate when he sought the attachment" and that his only interest was "to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action." *Id.* at 16. Finding that the State's interest in protecting the rights of tort victims was "*de minimis*," at least absent exigent circumstances, a unanimous Court found the statute unconstitutional. *Id.*

6. *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993)

This Court applied the *Mathews* test in *Good* to address the timing and scope of a property owner's due process rights when the government seized the owner's home pending the outcome of a civil forfeiture proceeding. The Court in *Good* began by emphasizing that the amendments to the Constitution are distinct and that "the applicability of one" does not "preempt[ ] the guarantees of another." 510 U.S. at 49 (citation omitted). The Court then rejected the government's reliance on *Gerstein v. Pugh*, 420 U.S. 103 (1975), for the assertion "that when property is seized for forfeiture, the Fourth Amendment provides

the full measure of process due under the Fifth [Amendment].” *Id*. at 50. Nor did the Court use (or even mention) the Sixth Amendment-based *Barker* test.[16]

Because the issue in *Good* involved interim procedural requirements, the Court deemed the Fifth Amendment the most applicable constitutional provision. *Good*, 510 U.S. at 48, 53. The Court compared the seizure of a home to the attachment claims in *Fuentes* and *Doehr*, holding that the claimant was entitled to a hearing in advance of trial (and in advance of the seizure as well). *Good*, 510 U.S. at 54.

Significantly, the claimant had already pled guilty to a drug offense based on the seizure of marijuana and other contraband from his home. *Id*. at 46. Thereafter, the government, operating ex parte, seized and sought to forfeit the home civilly. *Id.* Despite the claimant’s criminal conviction, the Court still held that he was entitled to a *pre*-seizure adversarial hearing, finding that the ex parte proceeding used to seize the home “affords little or no protection to the innocent owner” because in such a proceeding the magistrate judge “need determine only that there is probable cause to believe” that the property was

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[16] The remedies for Fourth and Sixth Amendment violations – suppression of evidence and dismissal of indictments, respectively – have a direct impact on the final outcome of the underlying controversies. *See generally Barker*, 407 U.S. at 522 (noting the “unsatisfactorily severe remedy of dismissal of the indictment when the speedy trial right has been deprived”).

used to facilitate the underlying drug crimes. *Id*. at 55.

The Court was also critical of the fact that at the ex parte proceeding, the government was "not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have." *Id.* Indeed, the Court found the use of ex parte proceedings to be inherently unreliable, harking back to the oft-quoted criticism of "secret, one-sided determination of facts." *Id.* (quoting *McGrath*, 341 U.S. at 170-72 (Frankfurter, J., concurring)). *See also Fuentes,* 407 U.S. at 81. The Court also found "an adversary hearing" to be particularly important because the government had "a direct pecuniary interest in the outcome of the proceeding." *Good*, 510 U.S. at 56.

Finally, the Court expressed concern over the time it would take for a final adjudication of the case, recognizing that a claimant might

> not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented."

Id. (quoting *Doehr*, 501 U.S. at 15).

B. *Barker v. Wingo*, 407 U.S. 514 (1972), Provides the Appropriate Framework Only When a Party Seeks Dismissal of the Government's Case

Rather than apply this line of Fifth Amendment cases to evaluate the adequacy of the procedural safeguards following an ex parte restraint of property, the Eleventh Circuit instead applied the Sixth Amendment framework announced in *Barker*. Neither of the forfeiture cases in which this Court has employed the *Barker* test involved the question of whether a claimant or defendant is entitled to some *interim* relief pending a final adjudication. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983); *United States v. Von Neumann,* 474 U.S. 242 (1986). Rather, those cases involved challenges to the delay between the seizure and the ultimate trial on the merits. In both cases, the claimants sought the outright dismissal of forfeiture actions due to delays – in *$8,850*, the delay between a seizure and the filing of a forfeiture complaint, and in *Von Neumann,* the delay between the filing of a petition for remission and a final ruling on that petition. *See $8,850*, 461 U.S. at 556; *Von Neumann*, 474 U.S. at 243.

In the course of litigating *$8,850* before this Court, the government itself recognized that whether interim relief is required posed a distinct issue from whether the length of the delay from the restraint or seizure until a final adjudication on ownership was too long to permit the forfeiture at all. Thus, in its

Brief in *$8,850*, the government acknowledged that the civil forfeiture process involves "three stages of potentially improper deprivation of an individual's property interest: (1) the actual seizure of the property by the government; (2) the retention of the property until legal title thereto is finally established by the forfeiture action or other means; and (3) the judgment declaring the property forfeited and perfecting title in the United States." Brief for the United States, *United States v. $8,850*, No. 81-1062 (June 28, 1982), 1982 U.S. S.Ct. Briefs LEXIS 530 at 38-39. Addressing the third stage, the government argued that the delay between the initial deprivation and the final adjudication would only require "the extreme remedy of dismissal" if the property owner could satisfy the rigorous speedy trial test in *Barker*. *Id.* at 36.

The government also recognized, however, that the forfeiture trial did not fully protect the claimant's rights because "if the original taking was wrongful, then during the period prior to the [final forfeiture trial] and eventual return of the property, the claimant has been improperly denied the rightful use of his property." *Id.* at 39. The government nonetheless argued that the claimant's property rights during the "retention" phase did not justify creating a "constitutional requirement for prompt post-seizure filing of civil forfeiture actions" because a claimant had "other remedies that fully suffice to reduce to an acceptable level the risk of an erroneous deprivation of property arising from a seizure." *Id.* at 40-41, 58-59.

In particular, the government argued that "[a] person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property" under then-Rule 41(e) of the Federal Rules of Criminal Procedure (now Rule 41(g)).[17] *Id.* at 59. Under then-Rule 41(e), the government assured the Court, "a party challenging the seizure of his property for forfeiture can ordinarily obtain a judicial determination of the existence of probable cause for its seizure." *Id.*; *see also id.* at 60 (arguing that "the availability of the Rule 41(e) remedy clearly affords adequate process to guard against unjustified seizures and to root out most instances in which seized property cannot ultimately be shown to be forfeitable"); *id.* at 65 (arguing that "[s]ince other post-seizure process is available to test the initial lawfulness of the seizure . . . , decisions like *Fuentes* provide little support for" the creation of a prompt post-deprivation hearing under the Due Process Clause).[18]

The government also emphasized in *$8,850* that the creation of a due process-based interim hearing

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[17] Fed. R. Crim. P. 41(e) was re-numbered Fed. R. Crim. P. 41(g) in 2002.

[18] In an *amicus* brief filed in *Alvarez v. Smith*, 558 U.S. 87 (2009) (dismissed as moot), the Solicitor General likewise wrote: "When, on the facts of a particular case, an individual claimant faces genuine hardship from delay, she may be entitled, under *$8,850*, to additional redress." Brief for the United States as Amicus Curiae Supporting Petitioner, *Alvarez v. Smith*, 558 U.S. 87 (2009) (No. 08-351), 2009 WL 1397196 at *7. *See also* Certiorari Petition at 36-37.

was unnecessary because the claimant did *not* contend that the "ability to defend" the forfeiture action was affected by the interim loss of resources. *Id.* at 55; *see also id.* at 53 ("It is clear beyond dispute that [the claimant] was in no way prejudiced by the government's delay in filing its civil forfeiture action . . . ."). This Court made the same point in both *Von Neumann* and *$8,850*. *See Von Neumann*, 474 U.S. at 250-51; *$8,850*, 461 U.S. at 569.

Criminal forfeitures involve the same three stages: (1) the initial imposition of a restraining order, (2) the retention of the restraints until trial, and (3) the criminal trial and final forfeiture adjudication. Once the government obtains an indictment and an asset freeze, there is no vehicle equivalent to a Rule 41 motion for return of property through which a defendant may obtain "a judicial determination of the existence of probable cause," 1982 U.S. S.Ct. Briefs LEXIS 530 at 59, for the restraints prior to trial. Hence, unless the Court requires an interim hearing as a matter of due process, there will be no alternative remedy available at the retention phase "to reduce to an acceptable level the risk of an erroneous deprivation of property." *See id*.

The guiding principle that emerges from this Court's precedents is that the due process analysis changes depending on the nature of the relief sought. Where the issue is entirely procedural, *Mathews* provides the proper framework. Only where the property owner attempts to avoid a judgment on the merits by demanding dismissal of the government's

claim is the speedy trial framework the more appropriate one. Because the Kaleys are seeking modification of the protective order, not outright dismissal of the underlying charges, their due process claim should be governed by *Mathews*. Moreover, unlike the claimants in *$8,850* and *Von Neumann*, the Kaleys' "ability to defend" the underlying criminal and forfeiture proceedings is adversely affected by the denial of interim relief. Thus, *Mathews* is the appropriate test to apply in this instance.

Every circuit, save the Eleventh, has used *Mathews* to address the procedural due process question.[19] Similarly, even without the Sixth Amendment gloss, most courts have applied *Mathews*, not *Barker*, in the civil forfeiture context. *See, e.g., Krimstock v. Kelly,* 306 F.3d 40, 68 (2d Cir. 2002) (Sotomayor, J.) (distinguishing *$8,850* and *Von Neumann*, recognizing that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other"); *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008) (applying *Mathews*, not *$8,850*, to conclude that due process required some sort of

[19] The Kaleys' Certiorari Petition at 18-29 sets forth the various positions taken by the circuit courts.

pre-forfeiture mechanism to test the validity of retaining an owner's property).[20]

C. When the Right to Counsel of Choice is at Stake, the *Mathews* Test Requires a Hearing at Which Defendants May Challenge Probable Cause

The factors that weighed so heavily in requiring at least prompt post-deprivation adversarial hearings in civil attachment and forfeiture proceedings are present here. But unlike those precedents, in this case, the impact of the restraints implicates other constitutional rights.

1. The Kaleys' Private Interests

As the review of the Court's civil attachment cases underscores, an examination of the parties' competing interests begins with property law principles. The Kaleys have had long-standing title to their home and CD. The "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance" and includes "the right to

[20] In 2009, the Court granted a petition for writ of certiorari in *Smith* "to determine whether Illinois law provides a sufficiently speedy opportunity for an individual, whose car or cash police have seized without a warrant, to contest the lawfulness of the seizure." *Alvarez v. Smith*, 558 U.S. 87, 89 (2009). After full briefing and oral argument, the Court held that the issue had become moot. *Id*.

unrestricted use and enjoyment" of that property. *Good*, 510 U.S. at 53-54 (citations omitted).

The government's regulatory interest in ensuring the availability of funds to satisfy a future forfeiture judgment does not rise to the level of a competing *property* right. Unlike the claimant in *Good*, who had already been convicted of the crimes upon which the forfeiture case and seizure were predicated, the Kaleys have not been convicted of anything. Unless and until they are, the CD and home are their property and no one else's. *See United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 123-24, 127 (1993); *see also id.* at 134 (Scalia, J., concurring in the judgment) (stating that a person holding legal title to an asset is "genuinely the 'owner' . . . prior to the decree of forfeiture. . . .").[21]

Therefore, this is not a case, like *Mitchell*, where *both* the debtor and creditor "had current, real interests in the property." *Mitchell*, 416 U.S. at 604. Rather, like the plaintiff in *Doehr*, the government has "no existing interest" in the Kaleys' property. *Doehr*, 501 U.S. at 16.

In *Good* and the Court's attachment cases, the deprivations did not prejudice the property owners' abilities to litigate the underlying controversies. In

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[21] In *Caplin & Drysdale*, the attorneys also did not seek access to the defendant's funds until *after* conviction, which vested the government with title to the property by that point in time. 491 U.S. at 627, 628.

contrast, here the collateral consequences are enormous. The Kaleys will not be spending the unfrozen funds "on wine, women, and song." *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985). The money is needed to retain counsel of choice and pay related litigation expenses to defend this case.

The Sixth Amendment right to counsel encompasses more than the right to effective representation. It also includes the right to counsel of one's choice. *Gonzalez-Lopez*, 548 U.S. at 148; *Wheat v. United States*, 486 U.S. 153, 159 (1988). "Lawyers are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues." *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979).

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez-Lopez, 548 U.S. at 148.

Delaying the due process hearing until trial, although only temporarily depriving the Kaleys of their property rights, "will completely eviscerate their

right to counsel of choice." *Kaley I*, 579 F.3d at 1266 (Tjoflat, J., concurring). "While the [Sixth Amendment] deprivation is nominally temporary, it is in that respect effectively a permanent one. The defendant needs the attorney *now* if the attorney is to do him any good." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-18 (D.C. Cir. 2008) (citations and quotations omitted). *Cf. Shapiro*, 424 U.S. at 629 ("Our conclusion . . . is fortified by the fact that construing the Act to permit the Government to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious constitutional problems in cases, such as this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury [by restraining funds defendant needs to post bail]").

The prejudice to the Kaleys is exacerbated because "[t]he restraint of assets . . . prohibits the Kaleys not only from retaining their counsel of choice, but also from retaining the experienced attorneys who have represented them since the grand jury investigation began in January, 2005." *Kaley I*, Pet. App. 71. The resources the Kaleys have *already* expended on counsel during the two-year grand jury investigation will have been largely wasted. New counsel would be forced to learn the case from scratch, giving the prosecutors an additional advantage.

The restraint also limits how much of their own money the Kaleys have available to retain investigators, experts, consultants and other para-professionals,

thus interfering with "the guarantee afforded by the Fifth Amendment Due Process Clause of a 'balance of forces' between the accused and the Government." *Monsanto*, 491 U.S. at 614. Toward that end, the Kaleys had set aside $100,000 for such litigation-related expenses.

The Kaleys' interest in the restrained assets is more compelling than the interests of the civil defendants in the Court's civil attachment and forfeiture cases. Here the money is earmarked for legal expenses to defend not only against the money laundering charge that purports to justify the restraint, but also against other charges joined in the same indictment that do not permit such a broad restraint.[22] A conviction may result not only in the forfeiture of the Kaleys' property but the forfeiture of their liberty as well. Freedom from the "loss of personal liberty through imprisonment . . . lies 'at the core of the liberty protected by the Due Process Clause.'" *Turner*, 131 S. Ct. at 2518. The stakes could not be much higher.

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[22] The transportation of stolen goods charges (counts 2-6), 18 U.S.C. § 2314, would only support a restraint of $140,000. Pet. App. 50-51 n.3. The obstruction of justice charge (count 8), 18 U.S.C. § 1512(b)(3) and 2, does not authorize any restraint at all. JA 59.

2. The Risk of Erroneous Deprivation

Where "the Government has a direct pecuniary interest in the outcome of the proceeding," the risk of erroneous deprivation is significant. *Good*, 510 U.S. at 56 (citing *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of Scalia, J.) ("It makes sense to scrutinize government action more closely when the State stands to benefit.")). As this Court noted in *Good*, in 1990 the Attorney General distributed a memorandum to all U.S. Attorneys encouraging them "'to significantly increase production'" – *i.e.*, "the volume of forfeitures in order to meet the Department of Justice's annual budget target." *Id.* at 56 n.2 (citation omitted). The result of the Department's efforts has been staggering. *See* Certiorari Petition at 31; Brief of the Cato Institute as Amicus Curiae at 11 and nn.3 & 4.

Procedures are necessary, therefore, "to ensure the requisite neutrality that must inform all government decision-making." *Good*, 510 U.S. at 55. *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (Due process would be violated if, in a civil enforcement scheme, there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."); *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (noting the "potential for abuse" and "corrupting incentives" of a system where the Department of Justice "conceives the jurisdiction and ground for seizures,

and executes them, [and] also absorbs their proceeds. . . .").

In both *Fuentes* and *Doehr*, this Court found the risk of error to be intolerable when decisions about property rights are made based on one-sided presentations and ex parte proceedings. *See Doehr*, 501 U.S. at 14; *Fuentes*, 401 U.S. at 81. Indeed, the Court in *Doehr* found it "self-evident" that the use of such proceedings would not comport with due process. "The value of a judicial proceeding . . . is substantially diluted" where a court proceeds ex parte because the court "does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties participate." *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968).

Thus, the government's contention below that a grand jury's finding of "probable cause" is a sufficient procedural safeguard strains credulity. Historically, the Court has viewed the grand jury "as a barrier to reckless or unfounded charges," *United States v. Mandujano,* 425 U.S. 564, 571 (1976), and the "primary security to the innocent against hasty, malicious and oppressive persecution." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). But the federal grand jury's potency "as a check on prosecutorial power," *United States v. Cotton*, 535 U.S. 625, 634 (2002), has been systematically diluted to the point where "[m]ost knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty; to quote the classic vignette, the grand jury is little more than a

rubber stamp that would 'indict a ham sandwich' if the prosecutor asked." Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1, 2 (Winter 2004) (citation omitted). Today, "[t]he grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything. . . ." William J. Campbell, *Eliminate the Grand Jury,* 64 J. Crim. L. & Criminology 174, 174 (1973).

Grand jury proceedings are run entirely by prosecutors, who author the indictments, decide what witnesses to call and what evidence to introduce. *See generally United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983). All of this is, of course, done in proceedings that are held ex parte with no evidentiary limitations and no judge to guide the grand jurors. A grand jury may lawfully indict based on double or even triple hearsay, *Costello v. United States*, 350 U.S. 359, 363 (1956), on "tips, rumors, evidence offered by the prosecutor, or their own personal knowledge," *United States v. Dionisio*, 410 U.S. 1, 15 (1973), and on illegally seized and unconstitutionally obtained evidence. *United States v. Calandra*, 414 U.S. 338, 349-52 (1974).

Conversely, the target of a grand jury investigation has no right to testify or even appear. *See* Fed. R. Crim. P. 6(d)(1). The government is under no duty to bring exculpatory evidence to the attention of the grand jury, *United States v. Williams*, 504 U.S. 36 (1992), or allow counsel for the target of the investigation to be present, much less cross-examine witnesses.

Mandujano, 425 U.S. at 581; *Conn v. Gabbert*, 526 U.S. 286, 292 (1999). And, if for some reason the prosecutor cannot convince one grand jury to return an indictment, the prosecutor can start over before another and another until one is finally convinced to indict. *See United States v. Thompson*, 251 U.S. 407, 413 (1920). Claims of prosecutorial misconduct in the grand jury are not reviewable prior to conviction. *See Midland Asphalt Corp. v. United States,* 489 U.S. 794, 802 (1989).

The mistake in trying to transform the grand jury's Constitutional role as a shield against "reckless or unfounded charges" into a sword to cripple a defendant's ability to fight the indicted charges is underscored by the history of this case. Without a single victim claiming ownership of the allegedly stolen PMDs, the Kaleys were indicted on multiple counts alleging interstate transportation of stolen property. The initial indictment sought a forfeiture judgment of $2.2 million on a "proceeds" theory, when as the prosecutors later acknowledged, they could only trace $140,000 to the Kaleys. After the Magistrate Judge questioned the prosecutors' right to freeze all of the Kaleys' assets when only $140,000 was traceable to the assets restrained, it took the prosecutors only two business days to convince a grand jury to re-indict the Kaleys. Despite the transparency of all of the financial transactions, the superseding indictment added a money laundering charge with an amended demand for forfeiture under a facilitation

theory. That process can hardly be described as meaningful or reliable.

Supplementing the grand jury's ex parte finding of probable cause with an ex parte affidavit from an agent, as was done here, did little to lower the risk of error. Both the Georgia statute in *Di-Chem* and the Connecticut statute in *Doehr* included judicial review of the moving party's affidavits but that feature was not even enough in *Doehr* to excuse the failure to provide a pre-deprivation adversarial hearing.

The Court in *Good* also rejected as insufficient the use of a judge's ex parte review of an agent's affidavit without an opportunity to contest or to provide additional information. Such an "ex parte . . . proceeding affords little or no protection" when a magistrate judge or district court "need determine only that there is probable cause to believe" that the defendants will be convicted and the property forfeited. *Good*, 510 U.S. at 55-56. The Court in *Good* found a judge's ex parte review of an agent's affidavit to be inadequate in part because the government is "not required to offer any evidence on the questions of innocent ownership or other potential defenses a claimant might have." *Id.* at 55. *See also Doehr*, 501 U.S. at 14 ("Even if the provision requires the plaintiff to demonstrate, and the judge to find, probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case.").

Finally, a mere tracing inquiry – even in the context of an adversarial hearing – does not adequately guard against an erroneous deprivation. It provides no test "'aimed at establishing the validity, or at least the probable validity, of the [government's] underlying claim.'" *Fuentes*, 407 U.S. at 97 (quoting *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring)).

3. The Government's Interests

The government's interests are minor when compared to the Kaleys' interests. The government has no property interest in the Kaleys' CD at this time. *See 92 Buena Vista Avenue*, 507 U.S. at 123-24, 127 (government is not the owner of property purchased with proceeds of illegal activity until forfeiture has been decreed). Rather, the government's interest is punitive – preserving the asset for forfeiture upon conviction. *See Libretti v. United States*, 516 U.S. 29, 39 (1995) (criminal forfeiture is punishment).

The other interest identified by the government is avoiding the "damaging premature disclosure of the government's case and trial strategy" associated with a pretrial hearing. *Bissell*, 866 F.2d at 1353. The government's objection overlooks that its right to maintain "'poker game' secrecy of its own witnesses," *Wardius v. Oregon*, 412 U.S. 470, 473 (1973), is only temporary in federal criminal cases. Once the Kaleys are arraigned, the government will have substantial discovery obligations under Fed. R. Crim. P. 16 that

must be completed well before trial. So the government's definable interest is not in altogether preventing, but delaying, disclosure long enough so that it denies defendants a meaningful opportunity to challenge the government's case against them. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) ("A State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.").

When the government seeks to use an indictment as the vehicle for freezing the Kaleys' assets, the government should expect to have to carry an additional burden. Placing such a burden on the government is no different in principle than the additional burdens the government must satisfy in order to detain a defendant until trial. The Court in *United States v. Salerno* held that the preventive detention provisions of the Bail Reform Act were constitutional, in part, because of the procedural safeguards contained in the statute, including a requirement that district courts consider "the weight of the evidence." 481 U.S. 739, 751-52 (1987) (citing 18 U.S.C. § 3142(g)). Therefore, at a detention hearing, a defendant is constitutionally permitted to challenge the government's evidence. *See, e.g., United States v. Lopez-De La Cruz*, 431 F. Supp. 2d 200, 203 (D.P.R. 2006) (granting defendant's release because "[e]ven though a grand jury has found probable cause to believe Mr. Lopez-De La Cruz guilty of a crime of violence," the "scant" evidence adduced at the detention hearing

through "the government's own witness, Agent Cosme, confirms that Lopez-De La Cruz did not assault or threaten" the informant).

The same principle applies here. Once the government seeks to wield the ex parte "probable cause" finding of a grand jury as a sword rather than as a shield, courts should be free to consider the weaknesses of the government's case in deciding whether to allow the government to cripple the defendant by freezing assets. To be sure, the government is not obligated to show all its cards, only as many as will "establish[ ] the validity, or at least the probable validity" of its claim that the restrained asset is forfeitable. *Fuentes*, 407 U.S. at 97 (quoting *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring). If the government does not wish to reveal that quantum of evidence, then it can elect to forgo interim remedies, like the restraint of a defendant's property earmarked for the exercise of the Sixth Amendment right to counsel of choice.

In the Kaleys' case, in particular, the government's concern over premature disclosure of its evidence was overstated, indeed waived, because the government chose to try Gruenstrass alone while the Kaleys were on appeal in *Kaley I*. The four-day trial revealed far more than would normally emerge from the interim hearing requested by the Kaleys. It revealed the government's shifting theory of prosecution that struggled to identify even a single victim and resulted in an acquittal.

Ironically, the interim hearing proposed can actually serve the government's interest by exposing a misguided theory of prosecution early in the process. The prosecutor can then reassess whether to devote precious government resources to a case of questionable vitality.

* * *

A balance of the *Mathews* factors weighs decidedly in favor of a pretrial hearing at which the Kaleys can challenge more than just traceability.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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