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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

BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.................................... 1

ARGUMENT 6

I. SECTION 853(E)(1)(A) SHOULD BE READ TO AFFORD A MEANINGFUL POST-DEPRIVATION HEARING 6

II. DUE PROCESS REQUIRES A MEANINGFUL AND TIMELY ADVERSARY POST-DEPRIVATION HEARING AT WHICH THE PARTY BEING DEPRIVED OF PROPERTY MAY CHALLENGE ALL ASPECTS OF THE *EX PARTE* SEIZURE ORDER 11

A. The *Mathews v. Eldridge* Test Provides The Appropriate Due Process Analysis In This Context... 11

B. The Private Interest Is Weighty, Encompassing Not Only Defendants' Interest In The Restrained Assets, But Also Their Liberty Interests In Counsel Of Choice And Avoiding Incarceration 13

C. The Risk Of Erroneous Deprivation Weighs Heavily In Favor Of A Meaningful And Timely Post-Deprivation Hearing 18

1. The Grand Jury Procedure Is Not An Effective Safeguard Against Erroneous Pretrial Restraints 18

2. Rubber Stamp Grand Juries Are Improperly Being Used In Attempt To Insulate Seizure Orders From Review... 20

3. The Government's Growing Dependency On And Direct Pecuniary Interest In Forfeiture Strongly Support The Need For Meaningful Post-Deprivation Review 21

4. The Opportunity To Contest Probable Cause As To The Underlying Charges Is Imperative Given The Government's Incentive To Maximize The Assets It Can Restrain By Over-Charging Criminal Cases.............. 28

5. The Complexity Of The Factual And Legal Issues Militates In Favor Of An Adversary Hearing............................ 31

6. A Pretrial Adversary Hearing Would Reduce Erroneous Deprivations Of Choice Of Counsel By Minimizing Uncertainty About The Legitimacy Of The Defendant's Assets...................... 33

D. The Government's Interests Are Outweighed By The Other Mathews Factors And Can Be Adequately Protected In The Few Cases In Which They Are Significantly Threatened 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Armstrong v. Manzo,
380 U.S. 545 (1965)...7

Ashwander v. TVA,
297 U.S. 288 (1936)...6

In re Assets of Martin,
1 F.3d 1351 (3d Cir. 1993) 28, 31

Baldwin v. Hale,
68 Wall. 223 (1863) 7

Barker v. Wingo,
407 U.S. 514 (1972)..3, 11

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989).......................................15, 16

City of Los Angeles v. David,
538 U.S. 715 (2003)..12

Connecticut v. Doehr,
501 U.S. 1 (1991)...14

Crowell v. Benson,
285 U.S. 22 (1932)...6

Franks v. Delaware,
438 U.S. 154 (1978)..19

Fuentes v. Shevin,
407 U.S. 67 (1972)....................................7, 13, 18

Gilbert v. Homar,
520 U.S. 924 (1997)..8

Goldberg v. Kelly,
397 U.S. 254 (1970)..14

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951)..18

Lassiter v. Dep't of Soc. Servs. of Durham Cnty.,
452 U.S. 18 (1981)..14

Mathews v. Eldridge,
424 U.S. 319 (1976)....................................*passim*

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009)..17

Mitchell v. W. T. Grant Co.,
416 U.S. 600 (1974)..31

One 1958 Plymouth Sedan v. Pennsylvania,
380 U.S. 693 (1965)..19

Pearson v. Callahan,
129 S. Ct. 808 (2009)...6

In re Rothstein, Rosenfeldt, Adler, P.A.,
No. 11-10676, 2013 WL 2494980 (11th Cir. June
12, 2013)...32

Rust v. Sullivan,
500 U.S. 173 (1991)..10

Scott v. Harris,
550 U.S. 372 (2007)..6

Spector Motor Serv., Inc. v. McLaughlin,
323 U.S. 101 (1944)..6

Turner v. Rogers,
131 S. Ct. 2507 (2011)...12

United States v. Bailey,
419 F.3d 1208 (11th Cir. 2005)...........................33

United States v. Bajakajian,
524 U.S. 321 (1998)..32

United States v. Bollin,
264 F.3d 391 (4th Cir. 2001)...............................29

United States v. Contorinis,
692 F.3d 136 (2d Cir. 2012) 1

United States v. Davila,
No. 12-167, slip op. (U.S. June 13, 2013)...........15

United States v. DBB, Inc.,
180 F.3d 1277 (11th Cir. 1999)...........................36

United States v. Dionisio,
410 U.S. 1 (1973)..21

United States v. E-Gold, Ltd.,
521 F.3d 411 (D.C. Cir. 2008).......................13, 37

United States v. Eight Thousand Eight Hundred and Fifty Dollars,
461 U.S. 555 (1983)..11

United States v. Field,
62 F.3d 246 (8th Cir. 1995)................................29

United States v. Floyd,
992 F.2d 498 (5th Cir. 1993)..............................29

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006)..3, 15

United States v. Gotti,
155 F.3d 144 (2d Cir. 1998) 28

United States v. Holy Land Found. for Relief & Dev.,
493 F.3d 469 (5th Cir. 2007)..............................13

United States v. Huber,
404 F.3d 1047 (8th Cir. 2005)............................29

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

United States v. Jin Fuey Moy,
241 U.S. 394 (1916) 6

United States v. Kaley,
No. 07-80021-CR-MARRA/Seltser. Dkt. No. 70-1
(Apr. 27, 2007)..28

United States v. Kaley,
579 F.3d 1246 (11th Cir. 2009).....................19, 30

United States v. Kaley,
677 F.3d 1316 (11th Cir. 2012)...........................18

United States v. Mahaffy,
693 F.3d 113 (2d Cir. 2012) 31

United States v. McCorkle,
321 F.3d 1292 (11th Cir. 2003)............................33

United States v. McGauley,
279 F.3d 62 (1st Cir. 2002)..................................29

United States v. Moffitt, Zwerling & Kemler,
83 F.3d 660 (4th Cir. 1996)..................................33

United States v. Monsanto,
924 F.2d 1186 (2d Cir. 1991).......................*passim*

United States v. Parrett,
530 F.3d 422 (6th Cir. 2008)................................29

United States v. Property at 4492 S. Livonia Rd., Livonia,
889 F.2d 1258 (2d Cir. 1989)..................................7

United States v. Ripinsky,
20 F.3d 359 (9th Cir. 1994)..................................29

United States v. Saccocia,
354 F.3d 9 (1st Cir. 2003)....................................33

United States v. Swiss Am. Bank,
191 F.3d 30 (1st Cir. 1999)..................................33

United States v. Tencer,
107 F.3d 1120 (5th Cir. 1997)..............................32

United States v. Velez,
586 F.3d 875 (11th Cir. 2009)..............................33

United States v. Von Neumann,
474 U.S. 242 (1986)..11

United States v. Williams,
504 U.S. 36 (1992) 19

Walters v. Nat'l Assoc. of Radiation Survivors,
473 U.S. 305 (1985) 14

Zadvydas v. Davis,
533 U.S. 678 (2001) 6, 7

State Cases

Public Defender v. Florida,
Nos. SC09–1181, SC10–1349, 2013 WL 2248965
(Fla. May 23, 2013) 16

Federal Statutes

12 U.S.C. § 1818(i)(4) 36

18 U.S.C. § 981(a)(1)(A) 29

18 U.S.C. § 981(a)(1)(C) 29

18 U.S.C. § 982(a)(1) 29

18 U.S.C. § 982(a)(2) 29

18 U.S.C. § 983(c)(3) 32

18 U.S.C. § 1345(a)(2) 35

21 U.S.C. § 853 .... 9, 13, 21, 35

21 U.S.C. § 853(e) 2, 8, 9, 15

21 U.S.C. § 853(e)(1)(A) 1, 6, 19, 20

21 U.S.C. § 853(e)(3) 2, 5, 9, 37

28 U.S.C. § 524(c) 28

31 U.S.C. § 9703 28

Rules

Fed. R. Civ. P. 65..36

11th Circuit Rule 46-10(a) 34

S.D. Fla Local Rule 88.7 34

Constitutional Provisions

Fourth Amendment...19

Fifth Amendment..1, 7, 11

Sixth Amendment ....*passim*

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H. Rep. No. 98-845 (1984)..10

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Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. Mich. J. L. Reform 657 (2012) 17

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INTEREST OF *AMICUS CURIAE*[1]

The Florida Association of Criminal Defense Lawyers ("FACDL"), an independent affiliate of the National Association of Criminal Defense Lawyers, is a nonprofit corporation with a membership of over 1,500 attorneys and 28 chapters throughout the state of Florida. FACDL's members are all practicing criminal defense attorneys committed to preserving fairness within Florida's criminal justice system and ensuring due process for the accused.

SUMMARY OF ARGUMENT

I. The Due Process Clause of the Fifth Amendment generally requires notice and an opportunity to be heard *prior* to the deprivation of a property interest. Only in extraordinary situations may notice and a hearing be postponed until after the deprivation. Even then, constitutional due process requires a prompt and meaningful post-deprivation hearing.

In the present case, petitioners' property was seized without their having any opportunity to present evidence or to be heard. When petitioners were indicted, the government sought and obtained an *ex parte* order, under the authority of 21 U.S.C. § 853(e)(1)(A), restraining all "the property listed for

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[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief.

forfeiture in the indictment," valued at more than $2.6 million. J.A. 44-47.

The question presented here is whether a defendant subject to such an *ex parte* seizure order has a right to a post-deprivation hearing providing a meaningful opportunity to contest the seizure of his property. Because the denial of such a fundamental post-deprivation hearing in this context raises serious constitutional issues, Section 853(e) is properly read to afford such a hearing. The statute expressly speaks to a "hearing held pursuant to this subsection," where the court would receive and consider "evidence and information," even such evidence "that would be inadmissible under the Federal Rules of Evidence." 21 U.S.C. § 853(e)(3). The nature of such hearings and the full scope of when they are required are undefined. In order to avoid serious constitutional concerns, the statute is properly read to mandate a meaningful post-deprivation hearing, challenging all aspects of the *ex parte* order.

II. Thus, this Court need not reach the constitutional issue presented here. If, however, the Court does reach the due process issue, it should hold that due process mandates an opportunity to challenge all aspects of the *ex parte* order. As this Court held in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. Post-deprivation hearing rights must be at least as rigorous.

In addressing the due process issue, the panels of the Eleventh Circuit that decided *Kaley I* and *Kaley II* looked to the four-part test this Court set out in *Barker v. Wingo*, 407 U.S. 514 (1972). *Barker* addressed Sixth Amendment speedy trial concerns, and does not provide a suitable framework to evaluate and weigh the competing considerations in this context. Rather, the better vehicle for analyzing the due process issue here is the three-factor test established by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that test, petitioners are entitled to a prompt post-deprivation adversary hearing at which they may challenge all facets of the *ex parte* restraining order.

The first *Mathews* factor analyzes the private interests at stake. Here, Brian and Kerri Kaley are being deprived of their ability to use their own money. Importantly, this deprivation impairs their ability to secure a lawyer of their choosing and defend themselves against serious federal criminal charges. Those interests are weightier than the interests implicated in *James Daniel Good*, where there was no claim that the deprivation of the use of the property impaired the Sixth Amendment right to secure qualified counsel of choice. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (ranking "deprivation of the right to counsel of choice" as "structural error").

The risk of erroneous deprivation—the second *Mathews* factor—similarly supports petitioners here. Fairness can rarely be achieved by a secret, one-sided determination of facts decisive of rights. Both of the procedures the government used here were *ex parte*. One involved the presentation of evidence to the

grand jury in a secret proceeding. A second involved the *ex parte* presentation of an affidavit of a law enforcement agent. These one-sided pro-government proceedings give no reason for confidence in their correctness. Without the crucible of an adversary proceeding—where the person being deprived of property has a chance to present evidence and challenge the validity of the evidence relied upon by the government—the danger of erroneous deprivation is plain.

The risk of error is enhanced in this context where the government has a direct pecuniary interest in the outcome of those *ex parte* proceedings. The government is addicted to forfeiture funds. In order to feed that addiction, the government, as here, pushes the envelope on its theories of prosecution with the aim of reaching all of the defendants' assets (and by doing so crippling their ability to pay counsel for their defense). In 1990, a Justice Department memo established a goal of raking in $470 million in asset forfeitures that year. That large figure, which raised eyebrows in *James Daniel Good*, is dwarfed by the level of dependence on forfeiture funds today. The Justice Department's Asset Forfeiture Fund received *$4.2 billion* in net forfeiture deposits in fiscal year 2012. That financial dependency renders reliance on the findings of a completely *ex parte* proceeding, seeking more funds to fuel the government's addiction, unreliable.

The third *Mathews* factor addresses the governmental interest, including the burdens that additional process would impose. The government's only burden would be having to participate in a post-dep-

rivation hearing where the party subject to the seizure is allowed to present evidence and to contest the findings of the prior *ex parte* determinations that supported the seizure. But in other contexts where the government restrains and seizes property based on allegations of illegal conduct, adversarial hearings are the norm. It is true that pretrial hearings in criminal prosecutions can in some cases raise special concerns, such as a fear of witness intimidation, but when such circumstances and concerns arise, they can be managed here as they are in other contexts. For example, the government can seek reasonable limitations on the scope of the adversarial hearing and its ability to use hearsay at the hearing, 21 U.S.C. § 853(e)(3), gives it some flexibility in the witnesses it selects when seeking to meet its burden.

While there may be some minor burden upon the government, it plainly does not outweigh or justify the seizure of property without any meaningful post-deprivation hearing and the harm to the Sixth Amendment right to counsel that results from that deprivation of due process. Not having any real identifiable harm, the government has instead argued that such a hearing would trample upon the province of the grand jury to render a probable cause determination. This argument is nothing but sleight of hand. The government is seeking to use this check on a prosecutor's authority to initiate criminal proceedings as a license to seize property (and impair the defendant's ability to retain counsel of choice), without any meaningful adversarial proceeding to challenge that deprivation. Such arguments cannot be squared with basic principles of due process.

ARGUMENT

I. SECTION 853(E)(1)(A) SHOULD BE READ TO AFFORD A MEANINGFUL POST-DEPRIVATION HEARING

This Court has repeatedly held that "it is a cardinal principle" of statutory interpretation that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). As explained in *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009), it is "older, wiser judicial counsel 'not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.'" (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944))). *See also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *United States v. Jin Fuey Moy*, 241 U. S. 394, 401 (1916) (Holmes, J.).

In *Zadvydas,* for example, this Court read an implicit limitation into an immigration statute authorizing indefinite detention in order to avoid unconstitutionality under the Due Process Clause. *See* 533 U.S. at 688-99. Likewise, here there is a serious doubt about the constitutionality of the statute

at issue, unless it is properly read to conform to the requirements of due process.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (quoting *Baldwin v. Hale*, 68 Wall. 223, 233 (1863)). The right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Thus, the Due Process Clause of the Fifth Amendment generally requires "notice and an opportunity to be heard prior to the deprivation of a property interest." *United States v. Property at 4492 S. Livonia Rd., Livonia*, 889 F.2d 1258, 1263 (2d Cir. 1989). *See also Fuentes*, 407 U.S. at 82 ("the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect"); *James Daniel Good*, 510 U.S. at 48, ("[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property").

Only in "extraordinary situations" may notice and a hearing be postponed until after the deprivation. *Fuentes*, 407 U.S. at 90. "[W]here a State must act quickly, or where it would be impractical to provide predeprivation process," the government can be excused from providing a meaningful pre-deprivation hearing. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). In such cases, however, the fundamental principles of due process demand a post-deprivation hearing that

must be both timely and meaningful. Whether pre- or post-deprivation, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).

In the present case, the government seized property of petitioners pursuant to an *ex parte* proceeding and *ex parte* order issued under 21 U.S.C. § 853(e). The government used the grand jury's *ex parte* probable cause determination in issuing an indictment to then seek an *ex parte* order seizing almost all of petitioners' property. The seizure deprives them of assets they need in order to pay counsel to defend them from the criminal charges they face in this case.

Petitioners are not challenging the power of the government to seek and obtain such a seizure order without any notice or opportunity to be heard by the parties being deprived of their property. Rather, the only question is whether petitioners have a due process right to a timely and meaningful post-deprivation hearing. There can be little doubt that if the statute is construed to deprive petitioners of a timely and meaningful post-deprivation hearing there would be, at a minimum, a very serious doubt as to whether the statute was unconstitutional. Thus, if it is possible to give the statute a fair reading providing such a meaningful post-deprivation hearing, then such a reading is required.

Given the serious constitutional concerns raised by a contrary reading, Section 853(e) is properly con-

strued to afford such a right to a meaningful post-deprivation hearing. The statute expressly speaks to a "hearing held pursuant to this subsection," where the court would receive and consider "evidence and information," even such evidence "that would be inadmissible under the Federal Rules of Evidence." 21 U.S.C. § 853(e)(3). The nature of such hearings and the full scope of when they are required are undefined by the statute. *United States v. Monsanto*, 924 F.2d 1186, 1199 (2d Cir. 1991) (en banc). Thus, the plain language of the statute can and, given the serious constitutional concerns, should be read to afford a meaningful post-deprivation hearing, challenging all aspects of the *ex parte* order, including the critical finding, underlying the order, of probable cause. *Id.* at 1199-1200 ("In light of the statutory silence and the ambiguous legislative history, we do no violence to congressional intent by ruling that grand jury determinations of probable cause may be reconsidered by district courts in ruling upon the continuation of post-indictment restraining orders").

It is true that a Senate Report in Section 853's legislative history suggests that any post-indictment hearing should not "look behind" the grand jury's determination of probable cause to indict the defendant on the offenses as to which forfeiture is sought. *See* S. Rep. No. 98-225 at 203, 213 (1983). The Senate Report, however, "gave no consideration to the constitutional issue that we are required to decide in connection with its assertion that grand jury determinations of probable cause are not to be reconsidered." *Monsanto*, 924 F.2d at 1199. The legislative history is not a sufficient ground to adopt a construction of the statute that would render it unconstitutional—

and no doubt raises very serious constitutional concerns. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("Congress * * * we assume legislates in the light of constitutional limitations").

Moreover, as the Second Circuit recognized in *Monsanto*, "[t]he Senate Report * * * is not the sole legislative history that bears upon this question." 924 F.2d at 1199. A House of Representatives report accompanying an earlier version of the 1984 amendments stated: "Nothing in [the forfeiture] section is intended to interfere with a person's Sixth Amendment right to counsel." H. Rep. No. 98-845, pt. 1, at 19 n.1 (1984).

And as detailed below, the notion that a grand jury determination—which is intended to serve as a check on the power of the prosecutor—can be used as a license to deprive a person of property (and the funding necessary to exercise the right to select their counsel of choice), without any meaningful post-deprivation process, is misguided and without any constitutional foundation.

II. DUE PROCESS REQUIRES A MEANINGFUL AND TIMELY ADVERSARY POST-DEPRIVATION HEARING AT WHICH THE PARTY BEING DEPRIVED OF PROPERTY MAY CHALLENGE ALL ASPECTS OF THE *EX PARTE* SEIZURE ORDER

A. The *Mathews v. Eldridge* Test Provides The Appropriate Due Process Analysis In This Context

The court of appeals erroneously looked to the four-factor test set out in *Barker v. Wingo,* 407 U.S. 514 (1972), when evaluating the due process challenge here. That test, however, sets out factors for analyzing "speedy trial cases on an ad hoc basis." *Id.* at 530. That context and the factors deemed relevant to that context, *see id.* ("[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"), are wholly inapposite to the context here where the question is what post-deprivation process is due.[2]

This Court applied the *Wingo* factors in *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 562 (1983), a seizure case. The issue there, however, was not the right to or the nature of the due process hearing. Rather, the issue was, as in *Wingo*, a challenge to delays by the government. *Id.* at 564 ("the Fifth Amendment claim here *

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[2] *United States v. Von Neumann*, 474 U.S. 242 (1986), applying *Barker,* likewise focused on the reasonableness of delay.

* * challenges only the length of time between the seizure and the initiation of the forfeiture trial").

Rather than the *Wingo* factors, which address timeliness issues, the appropriate analytical framework in this case—which concerns the right and nature of process due—is set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* framework examines three factors: the "private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *James Daniel Good*, 510 U.S. at 53. These are the factors to which the Court has repeatedly looked in measuring the "specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair." *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011).

Notably, this Court, in *James Daniel Good*, analyzed the constitutionality of an *ex parte* seizure of real property using the guidance set forth in *Mathews*.[3] There as here, the issue was not delay, but the right to a meaningful hearing to address the propriety of a seizure. 510 U.S. at 53-54. That *James Daniel Good* involved an interest in real property is not a meaningful distinction. *See City of Los Angeles v. David*, 538 U.S. 715 (2003) (per curiam) (applying

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[3] In a concurring and dissenting opinion, Justice O'Connor agreed that *Mathews* provided the appropriate analytical framework for evaluating whether the seizure violated the Due Process Clause. 510 U.S. at 513.

Mathews to evaluate a deprivation of money used to secure release of a seized vehicle).

As in *James Daniel Good*, the challenge here is not based on delay in instituting an action. To the contrary, it was the initiation of the action by indictment that provided the basis for the *ex parte* protective order. The question here is whether the Kaleys have a right to a post-restraint hearing to challenge the restraints and, if so, what procedural safeguards should be built into the hearing. Thus, as in *James Daniel Good*, *Mathews* provides the appropriate framework for evaluating what process is due. *See, e.g.*, *United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991) (en banc) (applying *Mathews* in addressing hearing rights under Section 853); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008) (same); *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475 (5th Cir. 2007) (en banc) (collecting cases).

B. The Private Interest Is Weighty, Encompassing Not Only Defendants' Interest In The Restrained Assets, But Also Their Liberty Interests In Counsel Of Choice And Avoiding Incarceration

1. The first factor analyzed under *Mathews* is the private interest. Here, the most immediate interest at stake is the individual's property interest in "enjoy[ing] what is his, free of governmental interference." *Fuentes*, 407 U.S. at 81. The Constitution places a "high value" on this private interest. *Id.*; *see also James Daniel Good*, 510 U.S. at 61 ("Individual freedom finds tangible expression in property

rights."). That the deprivation is temporary is inconsequential. "[E]ven * * * temporary or partial impairments to property rights * * * merit due process protection." *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991). How the defendant wishes to exploit the economic value of his property usually makes little difference in the calculus. It is the defendant's property to do with as he wishes in the absence of a valid restraint or seizure.

2. The import of a property interest is enhanced where, as here, the party has a vital, time-sensitive need for the property. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (without a meaningful hearing the welfare recipient lacks the "means by which to live while he waits"); *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 332-33 (1985) (distinguishing *Goldberg* as a case that implicated benefits conferred on the basis of need). This Court has recognized, moreover, that one important due process interest may supplement another. *See Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31 (1981) ("To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings) * * * ").

Here, not only has almost all of petitioners' property been restrained by an *ex parte* order, that restraint now prevents them from being able to hire counsel to represent them in facing serious criminal charges. The restraint here implicates and significantly impairs petitioners' Sixth Amendment right to counsel. In the context of a federal criminal trial the

erroneous deprivation of the right to a person's counsel of choice introduces "structural" error, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), because it "undermine[s] the fairness of [the] criminal proceeding as a whole," *United States v. Davila*, No. 12-167, slip op. at 12 (U.S. June 13, 2013). In fact, this Court has recognized the "reality" that one's choice of attorney can profoundly affect not just the course, but also the outcome, of a criminal case: "[T]he quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (internal quotation marks omitted). Plainly, a criminal defendant has a "strong and legitimate interest in ensuring that probable cause is adequately established at a pretrial hearing before he is effectively deprived of counsel of choice as a result of a pretrial restraint of his assets." *Monsanto*, 924 F.2d at 1194 (internal quotation marks omitted).

In the government's view, the defendant's trial is his only opportunity to fully contest the *ex parte* restraint. *See* Br. in Opp. 15-16. By that time, the deprivation of the right to counsel of choice will have been complete and irreparable. To prevent that harm, there needs to be a meaningful hearing under Section 853(e), where the deprived party can present evidence and challenge the validity and basis of the *ex parte* seizure order.

3. Where an erroneous restraining order precludes a defendant from retaining counsel of choice, the risk of error at trial also increases. This follows inexorably from "the harsh reality that the quality of

a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Caplin & Drysdale*, 491 U.S. at 630 (internal quotation marks omitted). Both anecdotal and empirical evidence show that poor legal representation is a leading cause of wrongful convictions. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 114-16 (2008); John B. Gould, et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice* 81-82, 97 (2012) (report to the U.S. DOJ), *available at* https://ncjrs.gov/pdffiles1/nij/grants/241389.pdf.

Not only do erroneous restraints deprive defendants of their preferred counsel, but in many cases they shift the defense burden to already overworked and underfunded public defenders and court-appointed counsel. While federal prosecutors and investigators are amply funded through seized property, public defenders at both the federal and state level face crushing caseloads and woefully inadequate resources. *E.g.*, Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense 14-19* (ABA 2011) (describing excessive caseloads as "a pervasive national problem"). The Florida Supreme Court recently held that the Miami public defender's office had established cause to withdraw from numerous felony cases because it had more clients than it could adequately represent. *Public Defender v. Florida*, Nos. SC09–1181, SC10–1349, 2013 WL 2248965 (Fla. May 23, 2013). Courts in other states have reached similar conclusions. *See* Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 Harv. L. Rev. 1731 (2005)

(discussing cases). When public defenders' offices already lack the resources to effectively represent their current clients, increasing their caseloads—with cases that are often complex—inevitably increases the risk of wrongful convictions. Erroneous restraints also increase the risk of convicting the innocent where the frozen assets are needed to hire forensic experts or to pay for other investigative or legal defense costs. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) ("One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."); *see also* Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. Mich. J. L. Reform 657, 657-60 (2012).

In sum, the deprivation of property here impairs fundamental constitutional rights and may cause two innocent defendants to be sent to prison for years. As Judge Edmondson explained in this case:

> By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen * * * is subjected to severe hardship. The hardship includes in this case the inability to employ counsel of Defendants' choice to defend them in court from the mighty power of the federal government in a criminal proceeding. In the criminal proceeding ultimately, both their liberty and their property will be at stake. The chips are down.

United States v. Kaley, 677 F.3d 1316, 1330 (11th Cir. 2012) (*Kaley II*) (Edmondson, J., concurring in the result).

C. The Risk Of Erroneous Deprivation Weighs Heavily In Favor Of A Meaningful And Timely Post-Deprivation Hearing

1. The Grand Jury Procedure Is Not An Effective Safeguard Against Erroneous Pretrial Restraints

A high risk of error inheres in *ex parte* proceedings of the kind used by the government below to secure the assets for forfeiture pending trial. Because "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights," *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring), this Court has long recognized the considerable value of adversarial testing in preventing "substantively unfair and simply mistaken deprivations." *Fuentes*, 407 U.S. at 81.

This Court's analysis in *James Daniel Good* is instructive. In holding that due process requires an adversarial hearing before the government may seize real property it claims is forfeitable, this Court determined that "[t]he practice of *ex parte* seizure * * * creates an unacceptable risk of error." *James Daniel Good*, 510 U.S. at 55. There, as here, the government proceeded *ex parte*. The Court noted that the government was not required to present through the affidavit of an agent any potential defenses at the seizure

proceeding and emphasized that even if it were, the missing element of adverseness by itself would render the *ex parte* proceeding constitutionally deficient. *Id.*

The same shortcomings beset grand jury proceedings. In fact, in the present context there is even a greater need for meaningful post-deprivation review than in the context of the seizure warrant in *James Daniel Good*. In the seizure warrant context, the affiant has an obligation to conform his or presentation of the facts to the requirements of the Fourth Amendment, *see One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), including the requirement to make a truthful factual showing to the magistrate, *see Franks v. Delaware*, 438 U.S. 154, 164-65 (1978). In grand jury proceedings, in contrast, the government is not constitutionally obligated to present exculpatory evidence. *United States v. Williams*, 504 U.S. 36, 51-52 (1992). If anything, a seizure based only on the strength of a grand jury's indictment presents an even greater risk of error than the seizure pursuant to a law enforcement agent's affidavit in *James Daniel Good*.[4]

Given the defining features of the federal grand jury, it is "not a mechanism well designed to protect a defendant against an erroneous deprivation." *United States v. Kaley*, 579 F.3d 1246, 1267 (11th Cir. 2009) (*Kaley I*) (Tjoflat, J., specially concurring). Experience bears this out. Grand juries indict in 99 percent

[4] The government here also submitted an agent's *ex parte* affidavit to support the Section 853(e)(1)(A) protective order. But that merely raises the same kinds of risks as did the affidavit in *James Daniel Good*.

of the cases presented to them. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171, 1176 (2008).

2. Rubber Stamp Grand Juries Are Improperly Being Used In An Attempt To Insulate Seizure Orders From Review

The government not only uses the rubber stamp of the grand jury to initiate criminal proceedings at the discretion of the prosecutor, but also as a mechanism for maximizing the assets that can be seized, while seeking to minimize the rights of the party subject to a seizure order. The government's view is that it has no constitutional or statutory obligation to present forfeiture allegations to the grand jury. *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* at 120-123 (2012). Nonetheless, it regularly does so. The government's forfeiture policies encourage prosecutors to ask the grand jury to return an indictment on both the substantive charges and the nexus determination underlying the forfeiture allegation. *See id.* at 123-125.

This is done in an attempt to limit or eliminate the defendant's ability to challenge the subsequent seizure order. The government presents the indictment to the district court in its *ex parte* Section 853(e)(1)(A) application to show probable cause as to the alleged crime *and* the nexus to the claimed assets. *See id.* at 128. In essence, the government seeks to

use the grand jury finding to relieve itself of the burden of presenting evidence or information subject to adversarial testing.

The grand jury was originally intended to be a check on the power of the prosecutor. Its historic role was to be the "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Ironically, here it is being used to expand the power of the prosecutor and to insulate seizures of property (and the resultant harm to a defendant's Sixth Amendment rights) from any meaningful post-deprivation review. Only through a meaningful post-deprivation Section 853 hearing will such abuses be checked.

3. The Government's Growing Dependency On And Direct Pecuniary Interest In Forfeiture Strongly Support The Need For Meaningful Post-Deprivation Review

In *James Daniel Good*, this Court emphasized that an adversary deprivation hearing was particularly important in a seizure case because of the government's "direct pecuniary interest" in the proceeding. 510 U.S. at 55-56. As evidence of that interest, the Court cited a 1990 memo in which the Attorney General urged United States Attorneys to make "'[e]very effort * * * to increase forfeiture income'" in order to meet the Department of Justice's annual budget projection of *$470 million*. *Id.* at 56

n.2 (quoting Executive Office for United States Attorneys, U.S. Dept. of Justice, 38 *United States Attorney's Bulletin* 180 (1990)).

At that time, the government's desire to use its forfeiture power to raise the sum of $470 million seemed shocking. It raised the prospect that the government's focus upon core values of justice and fairness were being skewed by its appetite for revenue. When *James Daniel Good* was decided, there were good grounds for concern that the siren song of non-appropriated revenues from seizures of property could warp our criminal justice system. Today, that concern of a potential dependency on forfeiture funds has been fully realized. What was a potential danger of dependency has turned into a full-blown addiction.

Describing the growth of the government's forfeiture program, one of the Department of Justice's leading forfeiture experts has written:

> Asset forfeiture came into prominence as a law enforcement tool in the United States during the 1990s. At the beginning of that decade, the Department of Justice—the principal federal law enforcement agency—was forfeiting approximately $200 million per year in criminal assets, mostly from drug cases. By the end of the decade it was forfeiting more than $600 million per year in assets involved in an enormous variety of serious crimes.

Stefan D. Cassella, *Asset Forfeiture Law In the United States*, § 2.1 (2d ed. 2013) (citing statistics provided by the Asset Forfeiture Management Staff of the U.S. Department of Justice).[5]

If the growth in the government's asset forfeiture program in the 1990s marked forfeiture's emergence into prominence, what has happened since then marks forfeiture's institutionalization "as an essential weapon in the arsenal that the federal law enforcement agencies in the United States could bring to bear on the perpetrators of crime." *Id.* In fiscal year 2012, the DOJ Assets Forfeiture Fund received *$4.165 billion* in net forfeiture revenue—nearly ten times the $470 million target the Court quoted in *James Daniel Good*.[6] This represents a significant increase from the $1.732 billion in net forfeiture revenue in FY 2011 and reflects a recent upward trend.

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[5] By the end of the 1990s, the DOJ Assets Forfeiture Fund had not yet reached $600 million in annual forfeitures. *See* Table 1 below. The $600 million figure stated in Mr. Cassella's treatise may reflect the combined receipts of the Justice and Treasury forfeiture funds.

[6] U.S. Dep't of Justice, Audit Report 13-07, Assets Forfeiture Fund Annual Financial Statements Fiscal Year 2012, at 9 (2013). The DOJ's Assets Forfeiture Fund has a sister fund called the Treasury Forfeiture Fund. *See* United States Government Accountability Office, GAO-12-972, *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs and Benefits of Potential Consolidation*, (September 2012) (describing the two funds and urging study of whether to consolidate them). In 2011, the Treasury Forfeiture Fund recovered an additional $868 million in forfeited assets beyond what the DOJ Assets Forfeiture Fund recovered. In 2012, it recovered an additional $516 million.

As shown in Table 1 below, in the late 1990s and early 2000s, the DOJ's annual forfeiture revenues were in the same ballpark as the $470 million projection referenced in *James Daniel Good*, reaching a high of $494.2 million in FY 1999. Beginning in FY 2006, however, net forfeiture revenues climb upward and have not slid back.

Table 1[7]

Fiscal Year	Net Forfeiture Revenue – AFF
1996	$309,000,000
1997	$374,900,000
1998	$366,800,000
1999	$494,200,000
2000	$378,600,000
2001	$381,700,000
2002	$398,600,000
2003	$466,000,000
2004	$443,500,000
2005	$585,400,000
2006	~ $1,100,000,000[8]
2007	~ $1,500,000,000
2008	$1,221,000,000

[7] The revenue figures in this table are taken from the annual financial statements for the DOJ's Assets Forfeiture Fund and Seized Asset Deposit Fund, *available at* http://www.justice.gov/jmd/afp/01programaudit/.

[8] Because the forfeiture revenue figures for 2006 and 2007 are depicted in a bar graph in the annual financial statements, the figures in Table 1 represent conservative estimates. *See* U.S. Dep't of Justice, Audit Report 08-14, Assets Forfeiture Fund Annual Financial Statements Fiscal Year 2007, at 10 (2008).

2009	$1,402,000,000
2010	$1,542,000,000
2011	$1,732,000,000
2012	$4,165,000,000

The growth in forfeiture recoveries beginning in 2006 coincides with the Justice Department's increased use of asset forfeiture in fraud and financial crime cases. United States Government Accountability Office, GAO-12-736, *Justice Assets Forfeiture Fund, Transparency of Balances and Controls over Equitable Sharing Should Be Improved*, at 11 (July 2012) ("Since 2006, an increase in the prosecution of fraud and financial crime cases has led to substantial increases in AFF revenue").

The sophistication of the government's forfeiture program has grown commensurate with the increase in forfeiture revenues. Gone are the days when the Justice Department set forfeiture objectives by jotting off internal memoranda. Today, the Justice Department maintains a policy manual devoted to asset forfeiture.[9] It sets asset forfeiture goals and objectives through a 78-page National Asset Forfeiture Strategic Plan.[10] That strategic plan includes traditional forfeiture objectives, such as taking the profit out of crime, but it also emphasizes spending forfeiture revenues to expand the government's forfeiture program.

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[9] *See* DOJ, Asset Forfeiture Policy Manual (2012), *available at* http://www.justice.gov/criminal/afmls/pubs/pdf/pm-2012.pdf.

[10] *See* DOJ, National Asset Forfeiture Strategic Plan 2008-2012, *available at* http://www.justice.gov/criminal/afmls/pubs/pdf/strategicplan.pdf.

See Nat'l Asset Forfeiture Strategic Plan, at 25 (stating that a "critical cornerstone" of the plan is to "[o]btain the funding and tools required to sustain and enhance asset forfeiture investigations, prosecutions, and Program operations"); *see also id.* at 39 (stating the Department's objective to "[i]ntegrate asset forfeiture in all appropriate investigations and cases").

While today some of the seized assets ultimately find their way to victims as restitution, that is not the case with the seizure at issue here.[11] Nor does it negate the reality of the government's growing dependency on seized funds. Virtually every federal investigative agency and prosecuting authority has a significant financial stake in the success of the government's two forfeiture funds. For example, the DOJ forfeiture fund makes annual allocations to supplement the investigatory and prosecutorial budgets of the following agencies: the FBI; DEA; Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); Organized Crime Drug Enforcement Task Force (OCDETF); Executive Office for United States Attorneys (EOUSA); the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS); and

[11] *See United States v. Kaley*, No. 07-80021-CR-MARRA/Seltser, Dkt. No. 70-1, at 11 (Apr. 27, 2007) (where the government indicates it cannot make restitution because of poor recordkeeping by medical facilities).

the U.S. Marshals Service.[12] Table 2 shows the generous allocations several of these agencies received in fiscal year 2012:

Table 2[13]

Agency	**Forfeiture Operation Expenses**	**General Investigative Expenses**
DEA	$161,038,000	$50,232,000
FBI	$43,538,000	$41,305,000
ATF	$33,070,000	$11,600,000
OCDETF	$23,697,000	$28,729,000

In that same fiscal year, $30,279,000 from the DOJ forfeiture fund was allocated to EOUSA, and

[12] The Treasury forfeiture fund makes annual appropriations to its member agencies, which include the Secret Service, IRS Criminal Investigation, and various law enforcement agencies within the Department of Homeland Security. *See* Treasury Forfeiture Fund Accountability Report, Fiscal Year 2012, at 1, *available at* http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/FY%202012%20Annual%20Report.pdf.

[13] Assets Forfeiture Fund, Total Expenses Paid from Fund by Category of Expense and Recipient Agency: Expenses of Federal Agencies – FY 2012, *available at* http://www.justice.gov/jmd/afp/02fundreport/2012affr/report2a.html.

$37,583,000 to AFMLS, for prosecutorial and investigative expenses.[14]

These expenditures occur outside of the regular legislative appropriations process. The only limit on the amount of money the government can spend on forfeiture-related operations and investigative costs is the amount it can recover from criminal defendants and other alleged wrongdoers. *See* 28 U.S.C. § 524(c) (setting forth the statutory limits on expenditures of money from the DOJ Assets Forfeiture Fund); 31 U.S.C. § 9703 (same for Treasury Forfeiture Fund).[15]

In summary, today, the government not only has "a direct pecuniary interest in the outcome of the proceeding," *James Daniel Good,* 510 U.S. at 56, it has a growing addiction to the type of funds that are subject to the *ex parte* restraining order at issue here. In this context, a timely adversary hearing is necessary to provide the requisite neutrality and due process that is missing from a prosecution-driven *ex parte* process.

4. The Opportunity To Contest Probable Cause As To The Underlying Charges Is Imperative Given The Government's Incentive To Maximize The Assets It Can Restrain By Over-Charging Criminal Cases

In a criminal case like the Kaleys', prior to conviction the government ordinarily may seize or restrain

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[14] *See id.*

[15] Congress mistakenly codified two Section 9703s.

only directly forfeitable assets.[16] An asset is directly forfeitable if it bears the requisite statutory nexus to the offense conduct giving rise to forfeiture.[17]

Because the government's restraint authority is tied directly to the predicate offense, the temptation exists for the government to include charges that support expansive forfeiture theories. This temptation to over-charge is particularly great with regard to money laundering. The money laundering forfeiture statutes authorize the forfeiture of any property "involved in" a money laundering transaction, 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1), and courts have broadly construed this language. *See, e.g., United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005); *United States v. McGauley*, 279 F.3d 62, 71 (1st Cir. 2002) (transfer of $99,000, of which only $155 is fraud proceeds, is a money laundering offense, rendering the entire $99,000 forfeitable); *see also* Cassella, *supra*, §

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[16] *See United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998); *In re Assets of Martin*, 1 F.3d 1351, 1357-58 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 501-02 (5th Cir. 1993); *United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *but see United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001).

[17] The requisite nexus varies by crime. For example, the general forfeiture statute for crime proceeds authorizes the forfeiture of property that "constitutes or is derived from proceeds traceable to a violation of" numerous federal offenses. 18 U.S.C. § 981(a)(1)(C), § 982(a)(2). For money laundering offenses, any property "involved in" the transaction, or traceable thereto, is directly forfeitable. 18 U.S.C. § 981(a)(1)(A), § 982(a)(1).

1-3 at 8 ("[P]rosecutors like to use the money laundering forfeiture statute because it eliminates the need, in most cases, to distinguish between the portion of the property traceable to the underlying offense and the portion derived from other sources.").

This case exemplifies the breadth of the government's money laundering forfeiture authority, and perhaps also the strength of its temptation to bring questionable money laundering charges to maximize the assets it can seize and eventually forfeit. After the magistrate judge reduced the initial protective order from $500,000 to $140,000—the amount he found to be traceable to the charged offenses—the government sought and obtained a superseding indictment that added a money laundering charge. Pet. App. 51-52. The government then sought and obtained a second restraining order that again froze the entire $500,000, this time on the theory that the full amount was "involved in" the alleged money laundering. Pet. App. 53-54. The Kaleys moved to strike this new forfeiture allegation as "vindictive," in retaliation for their having successfully challenged the breadth of the initial restraining order. Pet. App. 52-53 n.9. The court denied the motion. *Id.*

Especially given the government's incentive to over-charge, an adversary hearing at which the defendant can contest *all* aspects of the restraining order—including probable cause to support the underlying charges—is imperative.[18]

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[18] The government may also be tempted to over-charge and over-restrain in order to face a weaker defense at trial. *See Kaley*

5. The Complexity Of The Factual And Legal Issues Militates In Favor Of An Adversary Hearing

Complex issues of fact and law are "ill-suited" for *ex parte* adjudication and "inherently subject to * * * adversarial input." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617-18 (1974). Pretrial seizures and restraints of assets for forfeiture routinely give rise to complicated and contestable matters.

Complex issues abound, for instance, with regard to whether the government can establish the required nexus between the charged offenses and the property it seeks to restrain. One recurring issue is whether the government may restrain and forfeit gross, or only net, proceeds of certain unlawful transactions. *E.g.*, *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012). Another is whether and under what legal standard the Government can trace crime proceeds once they become commingled with lawfully derived funds. *See In re Rothstein, Rosenfeldt, Adler, P.A.*, No. 11-10676, 2013 WL 2494980, at *3-5 (11th Cir. June 12, 2013). Similarly, the question of what property qualifies as "proceeds" continues to generate litigation, as does the related question of what it means to obtain proceeds as a result of the charged criminal activity. *See, e.g., United States v. Contorinis*, 692 F.3d 136, 145-

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I, 579 F.3d at 1266 (Tjoflat, J., specially concurring) ("A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel.").

148 (2d Cir. 2012).[19]

Moreover, facilitating property forfeitures—such as the government's "involved in" money laundering theory in this case[20]—frequently raise fact-intensive issues. To restrain and forfeit facilitating property, the government must establish a "substantial connection" between the property and the offense. 18 U.S.C. § 983(c)(3). Even where the government proves this statutory nexus, its theory may raise difficult factual and legal issues under the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that the forfeiture of $357,144 for a currency reporting offense was grossly disproportionate to the gravity of the offense under the Excessive Fines Clause); *see also James Daniel Good*, 510 U.S. at 81 n.2 (Thomas, J., concurring in part and dissenting in part) (explaining that "like the majority, I am disturbed by the breadth of" the statute authorizing facilitating property forfeitures and pointing to the Excessive Fines Clause as an important substantive limit).

Without adversary presentation, the risk of an erroneous determination of these complex issues is clamant.

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[19] And forfeiture law is "ever-evolving" and "a moving target," with federal courts issuing new forfeiture decisions at a rate of 10-15 per week. Cassella, *supra*, at xxxiii-xxxiv.

[20] *See United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997).

6. A Pretrial Adversary Hearing Would Reduce Erroneous Deprivations Of Choice Of Counsel By Minimizing Uncertainty About The Legitimacy Of The Defendant's Assets

The Department of Justice's own guidelines recognize how directly seeking forfeiture of the payment of an attorney's fee is destructive to the constitutional right to counsel. U.S. Attorney's Manual 9-120.111 (added May 2010) ("Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice"). Nonetheless, the government can and does seek to seize funds paid as attorney fees. *Compare United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996); *United States v. McCorkle*, 321 F.3d 1292, 1294 (11th Cir. 2003); *United States v. Saccocia*, 354 F.3d 9, 14-15 (1st Cir. 2003); *United States v. Swiss Am. Bank*, 191 F.3d 30, 37 (1st Cir. 1999) *with United States v. Bailey*, 419 F.3d 1208 (11th Cir. 2005). In one high-profile case in South Florida, an attorney was criminally prosecuted for advising another attorney concerning the source of funds used to retain counsel. *United States v. Velez*, 586 F.3d 875 (11th Cir. 2009) (reversing money laundering convictions of attorney retained by a criminal defense lawyer to vet the source of client funds used to pay defense fees).

Unless there can be meaningful post-deprivation review of an *ex parte* seizure order, counsel will be deterred in accepting payments from clients who are

likely to be charged with federal offenses that can be linked by the government to broad forfeiture claims. The concerns are even greater in Florida. There, counsel are subject to rules of practice, such as Southern District of Florida's Local Rule 88.7, that have the effect of encouraging retained counsel to secure their entire fee up front.[21] The attorney who fails at the front end to secure those fees "sufficient to provide for representation" through trial, will not, after arraignment, be permitted to withdraw if he or she is not getting paid. *Id.*

The effect of these rules, and the uncertainty that hangs over the question of fee forfeitures, all point to the need for a robust post-deprivation/pre-trial hearing process to air challenges to asset restraints or seizures for criminal forfeiture. The ability to raise such challenges at or near the time the criminal prosecution is initiated promotes certainty in the controversial area of fee forfeitures. It also enables retained counsel to make satisfactory arrangements to secure the funds needed to see a case through trial, particularly in those jurisdictions with rules that encourage early resolution of fees.

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[21] *See* S.D. Fla. Local Rule 88.7 ("Retained criminal defense attorneys are expected to make financial arrangements satisfactory to themselves and sufficient to provide for representation of each defendant until the conclusion of the defendant's case at the trial level"); *see also* 11th Cir. Rule 46-10(a).

D. The Government's Interests Are Outweighed By The Other *Mathews* Factors And Can Be Adequately Protected In The Few Cases In Which They Are Significantly Threatened

1. Requiring a meaningful post-deprivation hearing under Section 853 will not present any significant burden upon the government. It would, of course, impose the requirement of participating in an adversarial hearing, if the government wishes to continue to deprive the person of his assets and the right to select his counsel of choice. Given that the government has already marshaled its evidence for the grand jury and believes that it has adequate documentation and testimony to support a finding of probable cause, the burden of such participation will not be great.

Indeed, in other contexts, such adversarial hearings regarding restrained assets are routine. For example, 18 U.S.C. § 1345(a)(2) empowers the Attorney General to commence a civil action to enjoin a person from "alienating or disposing of property" obtained as a result of a banking law violation or federal health care offense. The statute contemplates that if the Attorney General seeks to enjoin such activity he or she may seek a "restraining order" consistent with the requirements of the Federal Rules of Civil Procedure.[22] Recognizing that there will be instances when the Government seeks relief under Section 1345 and

[22] Though awkwardly phrased, the statute has been construed to refer to injunctive relief of the kind contemplated by Rule 65. *United States v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999).

charges a wrongdoer criminally, the statute makes accommodation. "A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure."

Similarly, federal regulatory agencies like the Securities and Exchange Commission, the Federal Trade Commission and the Commodities Futures Trading Commission, frequently bring civil actions that seek to restrain or seize the assets of a wrongdoer, including those who have been indicted. Not uncommonly, lawyers for those agencies have access to many of the same kinds of sensitive information as do criminal prosecutors. Yet when the SEC, FTC and the CFTC seek to restrain or seize assets, they proceed according to the same rules as any other civil litigant.[23] Those rules include the requirements of Rule 65, including the requirement of a preliminary injunction hearing at which the court may hear from witnesses and receive evidence.

Of course, pretrial hearings in criminal prosecutions can in some cases raise special concerns, such as a fear of witness intimidation. Such concerns do not, however, arise in most cases. And when they do arise, they can be managed just as they are in other contexts cited above. For example, the government can seek reasonable limitations on the scope of the adversarial hearing and its ability to use hearsay at the hearing (21 U.S.C. § 853(e)(3)) gives it some flexibility in the

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[23] *See, e.g.*, 12 U.S.C. § 1818(i)(4) (authorizing banking regulators to restrain assets under Rule 65 standards).

witnesses it selects when seeking to meet its burden. *See E-Gold*, 521 F.3d at 419 (explaining that affording a post-deprivation adversary hearing need not "entail[] an invasion of grand jury secrecy or an evisceration of the important goals of that secrecy", given that "the court could use limitations on the disclosure of evidence, such as in camera hearings and appropriate application of the normal rules of evidence to protect the grand jury proceedings against unwarranted invasion"). In any event, such concerns do not justify wholly insulating the *ex parte* seizure order from meaningful post-deprivation review.

2. Contrary to the government's assertion, Br. in Opp. 15-16, permitting a hearing to examine all of the key aspects of the *ex parte* seizure order, including the finding of probable cause, would not trample upon the province of the grand jury. The fact that the prosecutor chooses to use the indictment to establish a predicate of the seizure order is not a grounds for denying the party being deprived (of both property and the Sixth Amendment right to counsel) a meaningful hearing, which is the essence of due process. *See Monsanto*, 924 F.2d at 1196-98.

As the Second Circuit recognized in *Monsanto,* "well established jurisprudence concerning due process protections against deprivations of property," 924 F.2d at 1196, mandates a meaningful opportunity to challenge the basis for the seizure of property. That here includes the "probable cause" finding that was the premise of the *ex parte* restraining order. Those established due process requirements, taken together with "additional sixth amendment considerations at-

tendant upon the deprivation of assets needed to retain counsel of choice," mandate that the defendant have such a right to such a timely post-deprivation hearing *Id.* at 1196-97.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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