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 THE AMERICAN BAR ASSOCIATION *AS AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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?

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") submits this brief in support of petitioners Kerri L. Kaley and Brian P. Kaley. Although the ABA takes no position on the merits of their case, the ABA respectfully asserts that, in any criminal case in which an ex parte restraining order has been entered that freezes assets needed by defendants to retain counsel, an adversarial pretrial hearing that provides a meaningful opportunity to challenge the evidentiary support and underlying probable cause for such an order is essential to protect the defendants' Fifth Amendment Due Process rights and their Sixth Amendment right to retain their counsel of choice.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include attorneys in law firms, corporations, non-profit organizations, and government agencies, and in the offices of prosecutors, public defenders and private defense counsel. Members also include judges,

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

legislators, law professors, law students, and nonlawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including the rights of criminal defendants to Due Process and to retain counsel. An integral part of this work has been the promotion of the competence, ethical conduct and professionalism of lawyers – whether they are defense counsel or prosecutors – as they balance their responsibilities to their clients, to the legal system, and to their own interests in making a living.

Of particular relevance to the importance of a trial court's early determination of the appropriateness of an ex parte restraining order are considerations of a lawyer's ethical responsibilities when representing a defendant whose assets needed to pay the lawyer have been frozen. These considerations are embodied in the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA Model Rules").[3] Although authority for lawyer regulation is

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[3] The ABA Model Rules are *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

vested primarily in the courts of a lawyer's licensing jurisdiction, the ABA Model Rules provide a national framework for professional competence and ethical conduct.[4] As discussed in the ABA's Argument, *infra*, ABA Model Rules 1.5(d)[5] and 1.7[6] address a

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First adopted as ABA policy in 1908 as the CANONS OF PROFESSIONAL ETHICS, they have been continuously amended and updated through the efforts of ABA members, national, state and local bar organizations, academicians, practicing lawyers, and the judiciary. A Model Rule becomes ABA policy only after it is approved by the ABA House of Delegates, which is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html,

[4] Except for California, each State and the District of Columbia has adopted a version of the ABA Model Rules and its numbering system. California is in the process of amending its Rules of Professional Conduct but its proposed Rules do not follow the ABA Model Rules format. In addition, the highest courts of the United States Virgin Islands and American Samoa have stated that lawyer conduct in their territories is governed by the ABA Model Rules. The state rules of professional conduct are *available at*: http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html.
A comparison of individual ABA Model Rules with each of the state rules can be found at:http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html.

[5] ABA Model Rule 1.5(d) states, in pertinent part: "A lawyer shall not enter into an arrangement for, charge, or collect: . . . (2) a contingent fee for representing a defendant in a criminal case."

[6] ABA Model Rule 1.7 states, in pertinent part: "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest [which] exists if: . . .(2) there is a

lawyer's conduct when such an ex parte order creates a conflict of interest by converting the lawyer's representation to a contingency fee matter, in which payment is dependent on whether the defendant is found not guilty at trial or the frozen assets are otherwise returned to the defendant. The principles on which these rules are based provided guidance for lawyer conduct well before they were incorporated into the ABA's 1908 CANONS OF PROFESSIONAL ETHICS.[7]

These same considerations are reflected in the ABA STANDARDS FOR CRIMINAL JUSTICE ("Criminal Justice Standards"),[8] and specifically, in Standard 4-

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significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."

[7] *See, e.g.,* Lawrence J. Fox, Susan R. Martyn, Andrew S. Pollis, eds., A CENTURY OF LEGAL ETHICS 20 (ABA 2009) (chart tracing lawyer conflicts of interest principles from 1824 case law through 2008 ABA Model Rules).

[8] The ABA CRIMINAL JUSTICE STANDARDS and a history of their development are *available at* http://www.americanbar.org/groups/criminal_justice/policy/standards.html. *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated). They have been developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public and other groups with a special interest in the subject. Like the ABA Model Rules, they must be approved by vote of the ABA House of Delegates before they become ABA policy.

3.3.[9] Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, the Criminal Justice Standards do not purport to establish a constitutional baseline for effective assistance of counsel, *see Rompilla v. Beard,* 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting), but have been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010). *See also Strickland v. Washington,* 466 U.S. 668, 688 (1984)) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable").

These concerns also led the ABA to adopt policies in 1985 and 1986,[10] which then provided the

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[9] Standard 4-3.3(f) states: "Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

[10] In ABA Policy #108A (adopted August 1985), the ABA objected to the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 to issue subpoenas to attorneys representing criminal defendants, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or sham to protect the illegal activity of a client. In ABA Policy # 125A (adopted August 1986), the ABA objected to the use of statutory forfeiture provisions in pretrial and other orders to prevent a defendant from paying counsel of choice or other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe the payments constitute a sham, fraud, or criminal conduct. Both policies are available on request from the ABA.

basis for its amicus brief in *Caplin & Drysdale v. United States,* 491 U.S. 617 (1989), and *United States v. Monsanto,* 491 U.S. 600 (1989).[11] In that amicus brief, the ABA stated (at *4-5): "Besides the risk of non-payment, defense counsel would confront ethical rules against accepting representation in which payment is contingent upon the outcome of trial. The government can demonstrate no countervailing interest sufficiently compelling to justify this substantial infringement on the defendant's constitutional right to choose counsel."[12]

Finally, in June 2013, having concluded that the question now before the Court goes directly to a defendant's right to retain counsel of choice and the preservation of an adversarial criminal justice system through the availability and effectiveness of counsel, the ABA adopted a policy specifically urging that courts provide a pretrial adversarial hearing where a criminal defendant can challenge the evidentiary support and underlying probable cause for a restraining order that freezes assets needed to

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[11] The ABA amicus brief is available at 1989 WL1127836 (U.S.).

[12] *See also,* ABA Policy #133A (adopted February 1996) (adopting thirteen general principles developed by the ABA's Criminal Justice Section, based on its study of federal and state forfeiture laws, of which Principle 5 provides that, to protect the due process interests of defendant property owners, a court should require that the government prove by a preponderance of admissible evidence that the target property qualifies as forfeitable under the applicable federal or state statute), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1996_my_113a.authcheckdam.pdf.

retain counsel.[13] As noted in the report that accompanied the 2013 policy, a restraint of assets intended for payment of counsel by a defendant who remains presumed innocent at the pretrial stage, should "trigger extra and significant procedural safeguards for the citizen and his property." Report at 7, quoting *United States v. Kaley,* 579 F.3d 1316, 1331 (11th Cir. 2012) (Edmondson, J., concurring).

Based on this long and considered examination of the relationship between the legal profession's obligations to defendants accused of crime and the federal and state forfeiture statutes, the ABA offers this amicus brief to assist the Court in considering the issues of due process and the right to retain counsel of choice that are presented in the case now before the Court.

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[13] This 2013 policy, because of its recent adoption, is available only on request from the ABA. In time-sensitive situations where action is needed before the House of Delegates meets, the ABA's Board of Governors is empowered to adopt policy that is consistent with prior policy. *See* ABA General Information, *supra* at n.3. As stated in its supporting report, the 2013 policy builds on ABA Policy #108A (adopted August 1985) and ABA Policy #125A (adopted August 1986).

SUMMARY OF ARGUMENT

When prosecutors seek an ex parte pretrial restraining order freezing assets that a defendant needs to pay counsel of choice, the restraining order is a concern not only for the defendant, but for counsel, the courts and the criminal justice system. If there is no pretrial adversarial hearing at which the defendant can contest the evidentiary support and probable cause determination for the restraining order, the defendant's counsel must continue the representation pro bono or must withdraw, because the freezing of assets will have caused the attorney-client relationship to be converted into a contingency fee arrangement prohibited by the attorney ethical rules of every jurisdiction in the United States. Because the right to retain counsel of choice is a "structural" right, a pretrial hearing is essential to protect against the erroneous deprivation of the defendant's constitutional rights; and it is also essential to protect the criminal justice system against the effects of an erroneously created contingent fee representation.

An erroneous deprivation of a defendant's Sixth Amendment right to select and be represented by counsel of choice is a constitutional violation that requires no additional showing of prejudice to make the violation complete. Although such a violation may be avoided by providing the defendant with a pretrial hearing at which the defendant may contest the evidentiary support and probable cause determination for the restraining order, there is no longer a way to restore the structural right once the

trial has been held. Further, where property rights are concerned, even when unaccompanied by a Sixth Amendment right to retain counsel of choice, this Court's due process precedents require an opportunity to be heard at a meaningful time and manner. When protecting a defendant's Sixth Amendment right to retain counsel of choice is involved, the need for a timely, meaningful adversarial pretrial hearing is even more compelling. That is, defendants are presumed innocent until convicted and the prosecution has no justification for punishing a defendant prior to conviction. The federal forfeiture laws confer title on the government only at final judgment, and a pretrial adversarial hearing provides an appropriate balance for the prosecution's otherwise unfettered ability to decide when to request an ex parte order freezing assets. At the pretrial adversarial hearing, the focus will be on whether the government can provide evidentiary justification for its request that assets be frozen and not on the grand jury's determination of probable cause to bring the underlying indictment. And the prosecution and defense will have symmetrical concerns about what pretrial disclosures to make. Whatever the outcome of the hearing, the prosecution will remain free to press the charges in the indictment.

Finally, courts are familiar with the calculus for decision provided by Rule 65 of the Federal Rules of Civil Procedure. This calculus can provide a framework both where property rights are not accompanied by a Sixth Amendment right to retain counsel of choice, and where they are. As this Court

has explained, limitations on ex parte restraining orders involving property rights reflect the fact that our jurisprudence runs counter to the notion of court action taken without affording both sides reasonable notice and the opportunity to be heard. When a defendant's Fifth and Sixth Amendment rights to retain counsel of choice are involved, those rights should be entitled to no less protection.

ARGUMENT

DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO OPPOSE A RESTRAINING ORDER THAT IMPEDES EXERCISE OF A DEFENDANT'S SIXTH AMENDMENT RIGHT TO RETAIN COUNSEL OF CHOICE.

A. An adversarial hearing to challenge an ex parte restraining order is essential to protect a defendant's constitutional rights and to safeguard our adversarial system of criminal justice.

When an indictment charges an offense for which a defendant's assets may be subject to forfeiture upon conviction, it is now routine for the government to seek a pretrial ex parte order restraining those assets. *See* Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case,* 32 AM. J. CRIM. L. 55, 56 (2004).

Although a defendant is presumed innocent and retains title to presumptively legitimate assets, a pretrial order that restrains assets needed to pay counsel of choice will preclude the defendant from retaining and paying that counsel at a critical time. Indeed, selection of counsel may be the most important contribution a defendant makes to her defense. *United States v. Laura,* 607 F.2d 52, 56 (3d Cir. 1979) (citing *Faretta v. California,* 422 U.S. 806 (1975); *Brooks v. Tennessee,* 406 U.S. 605 (1972)).

The pretrial freezing of assets is a concern not only for the defendant, but for counsel, the courts and the criminal justice system. Without an adversarial pretrial hearing at which the defendant can contest the evidentiary support for the restraining order, the assets needed by the defendant to retain counsel of choice may be restored only on acquittal. After the assets are frozen, the defendant's counsel must agree to continue the representation pro bono or must withdraw. Otherwise, the attorney-client relationship would be transformed into a contingency fee arrangement that is dependent on the outcome at trial, in violation of the attorney ethics rules in every State.[14] As ABA Model Rule 1.5(d)(2) states, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a

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[14] *See* note 4, *supra* (listing website for state rules of professional conduct and website with comparison of individual ABA Model Rules to each of the state rules). *See also* Geoffrey C. Hazard, Jr., & Susan P. Koniak, *The Law and Ethics of Lawyering,* 508 (1990) ("All states prohibit contingent fees for the defense of a criminal case").

criminal case"). *See also* ABA Model Rule 1.7(b) (representation barred by conflict where lawyer representation limited by material personal interest); ABA Criminal Justice Standard 4-3.3(f) ("Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case").

This Court concluded in *Caplin & Drysdale,* 491 U.S. at 634, that the forfeiture statute was not unconstitutional in the context of a post-conviction forfeiture; and in *United States v. Monsanto,* 491 U.S. at 615, that assets could be frozen before conviction. But, the Court expressly left unresolved whether the Constitution requires an adversarial hearing – and the scope of such a hearing – for a defendant to contest a pretrial restraining order that freezes assets needed to pay counsel of choice. *Monsanto,* 491 U.S. at 615 n.10. Moreover, this Court has also concluded more recently that the erroneous deprivation of counsel of choice is a "structural" violation of a defendant's Sixth Amendment right to be "defended by the counsel he believes to be best," for which "[n]o additional showing of prejudice is required to make the violation 'complete.'" *United States v. Gonzalez-Lopez,* 548 U.S. 140, 146 (2006). Indeed, the denial of this "structural right" is among "'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila,* 133 S. Ct. 2139, 2149 (2013) (quoting *United States v. Marcus,* 560 U.S. 258 (2010)).

Because the right to retain counsel of choice is a "structural" right, the ABA asserts, a pretrial adversarial hearing at which a defendant can contest the government's evidentiary support for the restraining order is essential to protect both against an erroneous deprivation of the defendant's Sixth Amendment right, and against the effects of an erroneously created contingent fee representation on the vitality of the criminal justice system.

That is, if the government succeeds in establishing to the trial court's satisfaction that there is an appropriate evidentiary foundation for the restraining order, this will also establish that the defendant's attorney must consider the effects of the restraining order on the attorney's ethical obligations. And, in fact, courts have held that contingent fee arrangements create an actual conflict of interest. *E.g., Winkler v. Keane,* 7 F.3d 304, 307-08 (2d Cir. 1993) (noting that contingent fee created a disincentive for counsel to seek a plea agreement or to pursue mitigating defenses that would have resulted in conviction for a lesser offense); *Ibn-Tamas v. United States,* 407 A.2d 626 (D.C. 1979) (vacating murder conviction where contingent fee arrangement and actions of counsel had "completely ruptured and torn asunder" the attorney-client relationship). *See also* ABA Criminal Justice Standard 4-4.3 Commentary ("In the administration of justice the stakes are high, and thus the danger of abuse resulting from a contingent fee is especially great").

Even in preliminary stages of a case, the potential that the attorney-client relationship will become a contingent fee arrangement can impede the development of the trust needed for effective assistance by defense counsel. In plea bargain negotiations, further, the attorney's potential conflict of interest becomes actual when a defendant is offered the opportunity to plead guilty to a lesser offense that would result in forfeiture of funds to pay counsel. *E.g., Winkler v. Keane,* 7 F.3d at 307-08. *See also* Pamela Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel,* 105 HARV. L. REV. 670, 715-17 (1991) (discussing additional ways contingency arrangements undermine the attorney-client relationship); Lindsey N. Godfrey, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture,* 79 TEX. L. REV. 1699, 1700 (2001) (arguing that, "in light of the excessive burdens placed on criminal defendants by the Comprehensive Forfeiture Act, the ethical ban against criminal contingent fees should be lifted," and that "defendants whose assets have been frozen should, with proper supervision and protections, be permitted to contract with attorneys for contingent representation").

Perhaps a defendant's most valuable resource at all stages of the criminal justice process is the guidance and independent judgment of counsel who is intimately familiar with the case. With potential forfeiture, conflicts of interest and perhaps a basis for disqualification, an untested restraining order

can increase the chances that counsel may have to be replaced on the eve of trial, thus posing the risk that substitute counsel may have too little time to prepare for trial. If, on the other hand, the evidence presented at trial establishes that the assets should not have been frozen, it will be too late for the attorney to step back in. Indeed, the importance of unimpeded access to counsel intimately familiar with the nuances of a case multiplies with the complexity of a government investigation and resulting allegations.

Without an adversarial pretrial hearing, compliance with the attorney's ethical obligations may otherwise require that the representation can continue only on a pro bono basis, which will not be financially possible for many attorneys. As a result, attorneys may decline representation even in the early stages of investigation if the allegedly criminal activity could make assets vulnerable to a later restraining order.

When defendants whose assets have been frozen must rely on court-appointed counsel, an additional strain is placed on the already limited resources available for representing the indigent, to the further detriment of the criminal justice system.[15] *See* Dawn Cartwright, *Constitutionality*

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[15] Although a likely consequence of freezing assets that otherwise would be available to pay retained counsel is that courts will have to appoint attorneys at government expense, a particular defendant who is both restrained from using assets to pay an attorney and – because he retains title to the frozen assets – may be deemed not indigent, and thus ineligible for

Without Wisdom: Caplin & Drysdale *and* Monsanto *Examined,* 17 HASTINGS CONST. L.Q . 659, 693 (1990) ("burden on the system will affect all defendants").

These harms to both the reality and the appearance of fairness of the criminal justice system are all the more striking because, absent a meaningful pretrial adversarial hearing, the full power to decide whether to intrude into a defendant's choice of counsel – and when to do so – is controlled by the prosecution.

The ABA submits that, in addition to a defendant's constitutional rights that are at stake, the negative consequences for defendants, their counsel and the criminal justice system provide compelling reasons to require that a criminal defendant be provided a meaningful pretrial opportunity to test the evidentiary support and probable cause determination on which such a restraining order is based.

B. When a defendant challenges a pretrial restraining order that precludes her from retaining counsel of her choice, the trial court should ensure that any deprivation of her Sixth Amendment right to counsel of choice satisfies substantive and procedural constitutional standards.

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appointed counsel, may fall into a counsel-deprived limbo that poses even greater constitutional problems.

The Court has long held that the Sixth Amendment guarantees a criminal defendant with the resources the right "to select and be represented by one's preferred attorney." *Wheat v. United States,* 486 U.S. 153, 159 (1988); *United States v. Gonzalez-Lopez, supra; see also Powell v. Alabama,* 287 U.S. 45, 53 (1932). Thus, in *Gonzalez-Lopez,* this Court held that the erroneous deprivation of counsel of the defendant's choice establishes a constitutional violation that necessitates a new trial. 548 U.S. at 146-50.

In describing the contours of the Sixth Amendment protection, the Court observed that the right to counsel "commands … that the accused be defended by the counsel he believes to be best." *Id.* at 146. But, "[t]he right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. Because this aspect of the Sixth Amendment protects the fairness of the adjudicative process, its wrongful denial during that process establishes a constitutional violation for which "[n]o additional showing of prejudice is required to make the violation complete." *Id.* at 146.

Further, this deprivation 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," *id.* at 148, because the "violation occurs *whenever* the

defendant's choice is wrongfully denied." *Id.* at 150 (emphasis in original). Thus, when the deprivation results from an improper pretrial order that freezes assets a defendant needs to retain counsel of choice, it is essential that the Sixth Amendment violation be remedied through a pretrial adversarial hearing at which the defendant is permitted to challenge the evidentiary support and probable cause basis for the order.

Both the defendant whose right is in peril, and the court responsible for protecting that right, have critical interests in preventing – pretrial – an erroneous deprivation. Once the trial has been held, there is no longer any way to restore the structural right that was lost. Even in cases where the defendant receives effective representation from substitute counsel, is acquitted, defeats permanent forfeiture, and has the property restored, the constitutionally-infirm deprivation of choice of counsel cannot be remedied. Where trials culminate in negative outcomes for the defendants, the injury resulting from the constitutional violation may be more obvious, but even a reversal on appeal and a new trial with preferred counsel is not a remedy for the original violation, which could have been avoided altogether. Prevention of avoidable errors also benefits the courts by reducing the number of cases in which retrials are ordered (especially since retrials result in even further delay as newly retained counsel will require sufficient time to prepare for effective representation).

Our system of appellate review encourages the prevention of error at trial through rules for issue preservation that require parties to give trial judges a fair opportunity, in the first instance, to decide issues correctly. A pretrial evidentiary hearing to determine the propriety of a restraining order that may erroneously deprive a defendant of assets needed to retain counsel of choice would serve the added function of protecting the defendant's constitutional rights while assisting the courts in avoiding constitutional violations.

C. Due Process precedent requires that defendants be afforded the opportunity for a pretrial adversarial hearing.

As this Court stated in *United States v. James Daniel Good Real Prop.,* 510 U.S. 43 (1993) ("*James Good"),* the process that is due before a government deprivation of property may be effected is provided in *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976), and includes the fundamental requirement of "the opportunity to be heard at a meaningful time and in a meaningful manner."[16] As *Mathews* set out, this requires the balancing of (i) the private interest affected by official action, (ii) the risk of erroneous deprivation from the procedures used and the probable value of additional procedures, and (iii) the

[16] In fact, the Eleventh Circuit, in the opinion below, acknowledged: "If we were to apply *Mathews* in this case, the Kaleys would be entitled to a pretrial hearing on the merits of the protective order." Pet. App. 74a.

government's interest, including the administrative burden of additional procedures. *James Good*, 510 U.S. at 53, citing *Mathews,* 424 U.S. at 321. In *James Good,* the procedures employed for the seizure of a home alleged to have been used to facilitate federal drug offenses were found to have been inadequate because they were limited to an ex parte probable cause hearing before a federal magistrate. *Id*. Specifically, this Court held:

> The ex parte preseizure hearing affords little or no protection to the innocent owner. In issuing a warrant of seizure, the magistrate judge need determine only whether there is probable cause to believe that the real property was [used to violate a drug law]. The Government is not required to offer any evidence on the question of innocent ownership or other potential defenses that a claimant might have. Nor would that inquiry, in the ex parte stage, suffice to protect the innocent owner's interests.

510 U.S. at 55 (citations omitted). Nor did the fact that the pretrial seizure of the claimant's real estate was temporary, lasting only until trial, alter this Court's conclusion that the Constitution required an earlier hearing to prevent the temporary deprivation of property. *Id*. at 56 (citing *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991) (pre-judgment attachment statute violates due process absent hearing, bond, and extraordinary circumstances)). As this Court concluded, "'fairness can rarely be obtained by secret, one-sided determination of facts decisive of

rights. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *Id.* at 55, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring).

The right at issue in *James Good* was solely a property right of an owner — the right of possession prior to a civil forfeiture trial — unaccompanied by a Sixth Amendment right to retain criminal defense counsel. This Court concluded nonetheless that the risk of error from ex parte proceedings warranted a pretrial adversarial hearing. In the criminal pretrial context, the ABA asserts, the need for a timely, meaningful adversarial hearing is even more compelling, as illustrated by the following:

First, pretrial, defendants are presumed innocent. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (describing presumption of innocence as the "'undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law'") (quoting *Coffin v. United States* 156 U.S. 432, 453 (1895)); *Powell,* 287 U.S. at 52 ("However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial"). This presumption of innocence carries through trial, as juries are routinely instructed that

a grand jury indictment is neither evidence nor proof of guilt. *See, e.g., United States v. Dortch*, 696 F.3d 1104, 1109 (11th Cir. 2012); Sand, et al., Modern Federal Jury Instructions, Criminal ¶ 3.01[1] ("I remind you that and indictment itself is not evidence. . . It may not be considered by you as any evidence of the guilt of the defendant").

Second, this Court has held that the government has no justification to punish a defendant prior to trial. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with the due process of law") (citing cases). Nevertheless, the pretrial imposition of criminal forfeiture constitutes punishment within the meaning of the Constitution. *Libretti v. United States,* 516 U.S. 29, 39 (1995) (Congress intended forfeiture to be punishment).

Third, federal forfeiture laws confer title on the government only at final judgment, not before. *See, e.g.*, *United States v. Parcel of Land, Building, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Rumson, New Jersey*, 507 U.S. 111 (1993) ("*Buena Vista")* (holding that common law and statutory relation back doctrine did not operate to divest owner of title prior to final forfeiture judgment).[17] Under this Court's holding in *Buena*

[17] Both the plurality and concurring opinions in *Buena Vista* affirm the principle that prior to trial the property owner has

Vista, the government's claim to forfeiture is wholly contingent on obtaining a judgment of conviction and forfeiture under the relation back doctrine embodied in common law and statute. Conversely, in the pretrial context the defendant's title is both vested and subject to the constitutional procedural protections against governmental deprivation.

Fourth, a pretrial adversarial hearing provides an appropriate balance to the government's otherwise unfettered ability to decide when to request an ex parte order freezing assets. Without appropriate review, the government may erroneously deprive a defendant of her counsel of choice and necessitate the designation of court-appointed counsel who likely will be unfamiliar with the facts and may lack experience with the particular criminal statutes at issue. The risk of erroneous deprivation is elevated further in the forfeiture setting because "the Government has a direct pecuniary interest in the outcome of the proceeding" and, therefore, the "purpose of an adversarial hearing is to ensure the requisite neutrality that must inform all government decisionmaking." *James Good,* 510 U.S. at 55-56. Lack of a pretrial adversarial hearing thus disrupts the "balance of forces between the accused and his accuser" upon which due process depends. *Wardius v. Oregon,* 412 U.S. 470, 474 (1973).

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title and the government does not. *See* 507 U.S. at 124 (plurality); *id.* at 134 (Scalia, J., concurring).

Fifth, a pretrial adversarial hearing that tests the evidentiary basis and probable cause for issuing a restraining order will not undo or undermine a grand jury determination of probable cause for issuing an indictment. Rather, the focus will be on whether the government can provide evidentiary justification for freezing the assets, and not on the grand jury's determination of probable cause to bring the underlying indictment. And decisions about whether, and how much, evidence to disclose at such a pretrial hearing are already made in plea bargain negotiations.[18] Prosecutors make similar decisions in seeking pretrial detention under 18 U.S.C. § 3142(f)(2)(B), under which clear and convincing proof is required to obtain a pretrial detention. In any event, the defense will have its own symmetrical concerns about the pretrial disclosures it decides to make and, whatever the outcome of the hearing, the prosecution will remain free to continue with the same charges pending.

Finally, the calculus for decision at such a pretrial adversarial hearing will be familiar to trial courts. Judge Tjoflat stated in his special concurrence below that this Court's balancing test in *Mathews* contains "constitutional principles [which] are mirrored in the framework of Rule 65 of the Rules of Civil Procedure." Pet. App. 83a. As this

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[18] As noted by the District of Columbia Circuit, government counsel, during oral argument in 2007, could not identify any harm suffered by the prosecution since the Second Circuit's 1991 *Monsanto* decision requiring adversarial hearings on such restraining orders. *United States v. E-Gold*, 521 F.3d 411, 419 n.1 (D.C. Cir. 2008).

Court has explained, Rule 65's procedural limitations on ex parte restraining orders "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted to both sides of a dispute." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974). When the government has obtained a pretrial ex parte restraining order that would freeze a defendant's assets needed to retain counsel of choice, the ABA asserts, the defendant's rights guaranteed by the Fifth and Sixth Amendments are entitled to no less protection.

CONCLUSION

For the reasons set forth herein, the American Bar Association respectfully requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted.

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