No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LONNIE LILLARD, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

July 12, 2023

CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LONNIE LILLARD, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARLTON F. GUNN
Attorney at Law
1010 North Central Ave., #100
Glendale, California 91202

Attorney for the Petitioner

QUESTIONS PRESENTED

A. Whether a court may rule on a request for self-representation based solely on the existing record or whether it must hold a hearing and question the defendant before ruling on the request.

B. Whether a seizure of funds violates the right to counsel of choice as recognized in *Luis v. United States*, 578 U.S. 5 (2016), when the government's only property interest in the funds is an unperfected lien under 18 U.S.C. § 3613(c) which the court may decline to enforce.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

STATUTES

TABLE OF AUTHORITIES (cont'd)

STATUTES (cont'd)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lonnie Lillard petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I.
OPINIONS BELOW

The opinions of the court of appeals – which include a published opinion, also available at 57 F.4th 729, and an unpublished memorandum disposition, also available at 2023 WL 193679 – are included in the appendix as Appendix 1 and Appendix 2. The district court orders relevant to the questions presented are included as Appendix 3 and Appendix 4. An order denying a timely petition for rehearing en banc is included as Appendix 5.

II.
JURISDICTION

The judgment of the court of appeals was entered on January 17, 2023, *see* App. A001, and a timely petition for rehearing en banc was denied on

April 26, 2023, *see* App. A032-33. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

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

18 U.S.C. § 3613 provides, in pertinent part:

> . . .
>
> **(c) Lien.** A fine imposed pursuant to the provisions of subchapter C of chapter 227 of this title, an assessment imposed pursuant to section 2259A of this title, or an order of restitution made pursuant to sections 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b). section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.
>
> **(d) Effect of filing notice of lien.** Upon filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f) (1) and (2) of the Internal Revenue Code of 1986, the lien shall be valid against any purchaser, holder of a security interest, mechanic's lien or judgment lien creditor, except with respect to properties or transactions specified in subsection (b), (c), or (d) of section 6323 of the Internal Revenue Code of 1986 for which a notice of tax lien properly filed on the same date would not be valid. The notice of lien shall be considered a notice of lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of

> a notice of a tax lien. A notice of lien that is registered, recorded, docketed, or indexed in accordance with the rules and requirements relating to judgments of the courts of the State where the notice of lien is registered, recorded, docketed, or indexed shall be considered for all purposes as the filing prescribed by this section. The provisions of section 3201(e) of chapter 176 of title 28 shall apply to liens filed as prescribed by this section.
>
> . . .

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. Indictment and Seizure of Funds Needed to Retain Counsel.

Petitioner and several coconspirators were indicted for conspiracy to commit bank fraud, and Petitioner was detained without bail. App. A140. Several months later, the government discovered Petitioner had $6,671.81 in his inmate trust account. App. A035. Upon discovering this, the government moved for an order that the funds be applied to an outstanding restitution debt

from a 1998 case. *See* App. A034-40. The government based its motion on 18 U.S.C. § 3664(n), which requires a defendant subject to a restitution order to pay toward the restitution order any "substantial resources" received during "a period of incarceration." *See* App. A034, A036.

Petitioner opposed seizure of the funds on several grounds. One of those grounds was that seizure of the funds would deprive him of his right to counsel of choice because he needed the funds to retain counsel or hire a paralegal in his new case. *See* App. A041-84. He provided communications showing he was looking for lawyers and paralegals. *See* App. A056-58, A064-79. He reiterated his need for the funds in a later motion to stay proceedings in the new case, *see* App. A113-14, and in a habeas petition related to the new case, *see* App. A124, A125-26, A127, A131.[1] He also identified an attorney who had agreed to handle the new case for $5,500, and a relative who said he would pay additional attorney fees if they were needed. *See* App. A131, A135.

The government's motion to seize the funds was granted despite Petitioner's desire to use them to retain counsel. *See* App. A026-27. Petitioner appealed, and the court of appeals eventually vacated the seizure, because the statute on which the government had relied – § 3664(n) – does not apply to a defendant in pretrial detention. *See United States v. Lillard*, 935 F.3d 827 (9th Cir. 2019). The court of appeals did not rule until 2019, however, by which time Petitioner had already been sentenced in the new case. App. A141.

[1] The habeas petition was ultimately dismissed on the ground that its issues should be dealt with directly in the criminal case. App. A141 n.4.

2. Petitioner's Guilty Plea and Subsequent Self-Representation.

Petitioner had pled guilty in the new case. App. A142. Several months later, he moved to represent himself, pursuant to *Faretta v. California*, 422 U.S. 806 (1975). App. A142. After a magistrate judge denied the motion, the district judge held his own hearing. App. A142. The district judge advised Petitioner of the dangers of self-representation and had Petitioner's attorney explain the potential penalties. App. A142. The district judge granted the motion for self-representation when Petitioner did not change his mind. App. A142.

A sentencing evidentiary hearing was scheduled to commence several weeks later. Prior to the hearing, Petitioner filed a pro se motion entitled, "Defendant's Motion to Suppress Evidence to Be Introduced by Government at July 24, 2017 Evidentiary Hearing for Violation of Brady v. Maryland." App. A142. The motion sought to exclude credit card payment processor evidence on the ground the government had not disclosed the evidence until after Petitioner's guilty plea, and the only viable remedy after a plea was exclusion of the evidence. App. A143. The motion argued there was a scheme to defraud only the payment processors; there must be proof that federally insured banks were the target; and there was no bank fraud because Petitioner "only engaged in a scheme to defraud Green Dot Corporation and Chase Paymentech [two of the payment processors]." App. A143. The motion concluded that this made the evidence insufficient to establish the jurisdictional element of bank fraud. *See* App. A143.

The evidentiary hearing began the day after Petitioner filed his "motion

to suppress" and continued the next day and on two days in later months. App. A143. A week and a half before the third day of the evidentiary hearing, Petitioner changed his mind about representing himself. App. A145. His attorney, who had remained as standby counsel, filed a motion to resume representation, which the district court granted. App. A145. The attorney represented Petitioner during the third and fourth days of the hearing. App. A145.

Further conflicts arose, however. Petitioner wrote the court stating (1) that he had recently discovered there were false statements in a search warrant affidavit and asked his attorney to file a motion to withdraw the plea, but his attorney refused to file the motion; (2) that his attorney had threatened him; and (3) that he would like to either start representing himself again or get a new attorney. *See* App. A085-87. The letter concluded:

> In closing, I would like to represent myself once again so I can file my motion to withdraw my guilty plea. In the alternative, I would like the court to remove Mr. Gombiner as counsel, and appoint Emily Gouse (or whoever of the Court's choosing) to represent me whereas my TOTAL INTERESTS can be preserved for any potential appellate purposes. New Counsel, I believe, with their pair of fresh eyes, will in fact determine that "fair and just reasons" exist to withdraw my plea.

App. A087 (emphasis in original). In response to the letter, the attorney filed his own motion to withdraw. *See* App. A088.

The court granted the attorney's motion without holding a hearing. *See* App. A028. It told Petitioner when he appeared for argument on the evidentiary hearing:

> Mr. Lillard, as I'm sure you're aware by now, the Court allowed your counsel to withdraw, for the reasons that were stated in the moving document that's been sealed. No need

> to discuss those reasons why. But from now on, through the end phase of this case, you'll be representing yourself, all right?

App. A031. Petitioner then had to argue for himself at the hearing and file his own sentencing briefs. App. A145. He was ultimately sentenced to 196 months in prison. App. A147.

3. Appeal.

Petitioner appealed after being sentenced and raised several claims. One of his claims was that he was denied his Sixth Amendment right to counsel of choice when the government unlawfully seized funds he needed to retain counsel. He based this claim on the right to counsel of choice decision in *Luis v. United States*, 578 U.S. 5 (2016). *See* App. A152-58. *Luis* distinguished between "tainted" funds which are the proceeds of crime – and which the Court held were properly seized in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) – and "untainted" funds which are not the proceeds of crime. *See* App. A153-57 (discussing *Luis* and *Caplin & Drysdale*). *Luis* held pretrial seizure of "untainted" funds violated the right to counsel of choice when the seizure prevented the defendant from retaining counsel. *See* App. A153-57 (discussing *Luis*). Petitioner acknowledged there was a statute – 18 U.S.C. § 3613(c) – that gave the government a lien interest on his funds in the present case but argued that did not distinguish *Luis* because there had been a comparable statute allowing the seizure in *Luis*. *See* App. A155-56.

Petitioner also raised two claims that he was denied his right to counsel. First, he argued there was an insufficient *Faretta* colloquy when he was first

allowed to represent himself. App. A159-62.[2] Second, he argued the district court should have held a second *Faretta* hearing before allowing reappointed counsel to withdraw and requiring Petitioner to represent himself. *See* App. A162-65. He argued that (a) a second hearing was required because the return to representation by counsel was a changed circumstance that required a second *Faretta* hearing, *see* App. A163, and (b) the letter he had sent to the court was not the "unequivocal" request that *Faretta* and its progeny require, *see* App. A163-65.

The government contested these arguments, and the court of appeals agreed with the government. The court addressed some issues in a published opinion, *see* App. A001-18, and some issues in an unpublished memorandum, *see* App. A019-25. As to the right to counsel of choice claim, the court of appeals held that 18 U.S.C. § 3613(c) created a property interest comparable to the government property interest recognized in *Caplin & Drysdale* and that made *Caplin & Drysdale* rather than *Luis* controlling. *See* App. A010-13. As to the claim that the district court erred in granting the defense attorney's motion to withdraw without holding a second *Faretta* hearing, the court of appeals held a hearing was unnecessary because (1) Petitioner's letter was an unequivocal request to represent himself and (2) a second hearing was not required "because no 'intervening events substantially change[d] the circumstances existing at the time of the initial colloquy.'" App. A021

[2] This claim is not a subject of this petition.

(quoting *United States v. Hantzis*, 625 F.3d 575, 580-81 (9th Cir. 2010)).[3]

V.

REASONS FOR GRANTING THE PETITION

A. THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE LOWER COURTS ON THE QUESTION OF WHETHER A HEARING IS REQUIRED BEFORE A DEFENDANT'S REQUEST TO REPRESENT HIMSELF IS GRANTED.

1. The Lower Courts Are Divided on the Question of Whether a Hearing Is Mandatory When a Defendant Makes a Request to Represent Himself.

The federal circuits, as well as state courts, are badly split on whether a court must hold a hearing before granting a request for self-representation. At least four circuits – the D.C. Circuit and the Third, Fifth, and Sixth Circuits – hold there must be a hearing when there is a request for self-representation, at which there must be what the Third and Sixth Circuits describe as a "searching," *Piankhy v. Cuyler*, 703 F.2d 728, 731 (3d Cir. 1983); *United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982), or "formal," *United States v.*

[3] In a second, consolidated appeal of a supervised release violation sentence based on the new offense, the court of appeals agreed the sentence was illegal and remanded for resentencing on the supervised release violation. *See* App. A014-18.

Pryor, 842 F.3d 441, 449 (6th Cir. 2016) (quoting *Hill v. Curtin*, 792 F.3d 670, 677 (6th Cir. 2015) (en banc)), inquiry. *See also United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982); *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981). Some state courts have also held a hearing is mandatory. *See, e.g., State v. Young*, 626 So. 2d 657 (Fla. 1993); *People v. Hall*, 267 Cal. Rptr. 494, 497 (Cal. App. 1990); *People v. Sawyer*, 438 N.E.2d 1133, 1138 (N.Y. 1982).

Other federal circuits have rejected such a requirement, however. Some hold only that a hearing is not an "absolute" requirement even though it is normally required, *United States v. Tompkins*, 623 F.2d 824, 828 (2d Cir. 1980), and a hearing can be foregone in "unique circumstances," *United States v. Crawford*, 487 F.3d 1101, 1106 (8th Cir. 2007), or "certain limited situations," *United States v. Vann*, 776 F.3d 746, 763 (10th Cir. 2015) (quoting *United States v. Hughes*, 191 F.3d 1317, 1323 (10th Cir. 1999)). Others have more generally rejected the cases establishing a hearing requirement. The First Circuit, for example, after acknowledging the different view of the Third Circuit and D.C. Circuit, stated, "Although the practice of issuing specific warnings to defendants who wish to proceed pro se is a good way – perhaps the best way – to ensure that the requirements of *Faretta* are met, it is not the *only* way." *United States v. Hafen*, 726 F.2d 21, 26 (1st Cir. 1984) (emphasis in original). The Fourth Circuit, similarly, has "held that a 'searching or formal inquiry,' while required by some of our sister circuits, (footnote omitted) is not necessary." *United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015) (citing *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997)). The Seventh Circuit has stated, "Although we stress the need for a thorough and formal

inquiry as a matter of prudence and as a means of deterring unfounded claims on appeal, we shall not reverse the district court where the record as a whole demonstrates that the defendant knowingly and intelligently waived his right to counsel." *United States v. Moya-Gomez*, 860 F.2d 706, 733 (7th Cir. 1988). The Eleventh Circuit, after initially suggesting a hearing was required, *see United States v. Edwards*, 716 F.2d 822, 824 (11th Cir. 1983) (stating that trial judge "must" conduct hearing), soon abandoned that position and held other facts in the record could be sufficient, *see Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065-68 (11th Cir. 1986). *See also United States v. Amede*, 977 F.3d 1086, 1110 (11th Cir. 2020) (stating that "[i]deally," court should hold hearing, "[b]ut such a hearing is not required so long as the record as a whole shows that the waiver was knowing and voluntary" (citing *Fitzpatrick*)).

Both justices of this Court and lower courts have recognized there is a split. Justice White, joined by Justice Brennan, recognized the split more than 35 years ago in a dissent from the denial of certiorari in *McDowell v. United States*, 484 U.S. 980 (1987). Justice White first noted the split in the federal courts, citing *Bailey*, *Welty*, *Piankhy*, *Edwards*, and *Chaney* on one side and *Hafen*, *Tompkins*, *United States v. Kimmel*, 672 F.2d 720 (9th Cir. 1982), and *United States v. Trapnell*, 638 F.2d 1016 (7th Cir. 1980), on the other side. *See McDowell*, 484 U.S. at 980-81 (White, J., dissenting from denial of certiorari). Justice White then noted the conflict "has now gained the attention of, and been a source of confusion to, the state courts as well." *Id.* at 981 (White, J., dissenting from denial of certiorari).

Subsequent federal circuit court opinions and state court opinions have also recognized the split. The Third Circuit and Seventh Circuit recognized it

in *United States v. Bell*, 901 F.2d 574 (7th Cir. 1990), and *United States v. Jones*, 452 F.3d 223 (3d Cir. 2006). *See Jones*, 452 F.3d at 228 & n.2 (quoting statement in *United States v. Peppers*, 302 F.3d 120 (3d Cir. 2002), that "penetrating and comprehensive examination of all the circumstances" is required, but recognizing that "a 'penetrating and comprehensive examination' of the defendant's request to proceed *pro se* is not required in every court"); *Bell*, 901 F.2d at 577 n.2 (noting that "[f]ive circuits require either a 'searching inquiry' or special hearing," but "[f]our circuits, including this circuit, have no such requirement"). State courts recognized the split in *People v. Arguello*, 772 P.2d 87 (Colo. 1989), *In the Matter of Maricopa County Juvenile Action*, 798 P.2d 364 (Ariz. 1990), *State v. Cooley*, 608 N.W.2d 9 (Iowa 2000), and *State v. Jackson*, 97 P.3d 636 (Idaho 2004). *See Jackson*, 97 P.3d at 639-40; *Cooley*, 608 N.W.2d at 17; *Maricopa County Juvenile Action*, 798 P.2d at 367; *Arguello*, 772 P.2d at 95.

The split in the circuits is not going away, moreover. The cases cited by Justice White may be more than 35 years old – because his dissent is more than 35 years old – but they continue to represent the various circuits' views. *See, e.g., United States v. Balsiger*, 910 F.3d 942, 953 (7th Cir. 2018) (following *Moya-Gomez*); *Richardson v. Superintendent Cole Township SCI*, 905 F.3d 750, 763 (3d Cir. 2018) (following *Welty*); *United States v. Gooch*, 850 F.3d 285, 289 (6th Cir. 2017) (following Sixth Circuit *McDowell* case in which Justice White dissented from denial of certiorari); *United States v. O'Neal*, 844 F.3d 271, 279 (D.C. Cir. 2016) (following *Bailey*); *United States v. Brown*, 634 Fed. Appx. 806, 808 (2d Cir. 2015) (unpublished) (following *Tompkins*). There is therefore no reason to believe the split will be resolved

without intervention by this Court.

2. Petitioner's Case Is an Appropriate Vehicle for Resolving the Split in the Lower Courts.

The government might suggest Petitioner's case is not a good vehicle for resolving the split in the lower courts because the district court here held a hearing on Petitioner's first request to represent himself and the warnings given at that hearing carried over to Petitioner's second request. But this would conflate the requirement that the request be intelligent and voluntary with the requirement that it be unequivocal. What a defendant was told at a prior hearing may carry over to satisfy the requirement that a second request be intelligent and voluntary. But it does not satisfy the requirement that the request be unequivocal. And that is the threshold requirement for self-representation. *See* 3 Wayne R. LaFave, et al., *Criminal Procedure* § 11.5(d) (4th ed. 2015) (noting that "courts insist upon [an unequivocal] request for the exercise of the right of self-representation"). *See also Faretta*, 422 U.S. at 835 (noting defendant "clearly and unequivocally" declared that he wished to represent himself).

There was good reason to question whether Petitioner's second request was unequivocal, moreover. Petitioner's letter to the district court did state on the first page that "I'm requesting to represent myself," but this was only "since Mr. Gombiner [the attorney] refuses to file such a motion." App. A085. The letter similarly stated in the last paragraph that "I would like to represent myself once again," but only "so I can file my motion to withdraw my guilty

plea." App. A087. And the letter suggested an "alternative" to self-representation, to wit, "appoint Emily Gouse (or whoever of the Court's choosing) to represent me," with the hope that "their pair of fresh eyes, will in fact determine that 'fair and just reasons' exist to withdraw my plea." App. A087.

This required a hearing to (1) find out which of these was Petitioner's first choice; (2) consider the request for new counsel if that was the first choice; and (3) make sure Petitioner really wanted self-representation if new counsel was denied.

3. It Is Important to Resolve the Split in the Lower Courts.

It is important to resolve the split in the lower courts. Justice White recognized this long ago in his dissent from the denial of certiorari in *McDowell*. He was right then, and he is right now.

It is important because of the important rights at stake. One of the most fundamental of constitutional rights – the right to counsel – is both implicit in the right to represent oneself – and to some extent in conflict with it. It is often said that one who represents oneself has a fool for a client. And the question of how to make sure a defendant in a particular case has carefully evaluated his possible foolishness is an important question to resolve.

Further, as the Ninth Circuit itself has explained:

> The requirement [that the request be unequivocal] serves two purposes. First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation. Because the

> defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself.
>
> The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position. If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim he had been denied the right to counsel. The requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice.

Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989) (citations omitted). *See also* 3 LaFave, et al., *supra* p. 13, § 11.5(d) (quoting *Adams* and *State v. Henry*, 944 P.2d 57 (Ariz. 1997)).

4. The Court of Appeals Decision Here Was Wrong and the Court's Erroneous Reasoning Provides Another Reason Petitioner's Case Is a Good Vehicle.

The court of appeals decision also was wrong. What the court offered as justification for its view that no hearing was necessary was that "no 'intervening events substantially change[d] the circumstances existing at the time of the initial colloquy.'" App. A021 (quoting *United States v. Hantzis*, 625 F.3d 575, 580-81 (9th Cir. 2010)). But this is plainly wrong. One of the intervening events was Petitioner's return to representation by counsel. That most certainly qualifies as an event that "substantially change[d] the circumstances."

The court of appeals' erroneous reliance on this justification also provides another reason this case is a good vehicle for considering the circuit split. This Court might decide, as the Ninth Circuit's rationale implicitly assumes, that the need for a hearing on a second request for self-representation depends on whether there are sufficiently changed circumstances. If this is so, the case provides a vehicle for considering what sort of intervening events constitute "changed circumstances."

B. THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S RIGHT TO COUNSEL OF CHOICE DECISION IN *LUIS V. UNITED STATES*, 578 U.S. 5 (2016).

1. The Court of Appeals Decision Conflicts with *Luis*.

The right to counsel is one of the most fundamental, if not the most fundamental, of a criminal defendant's constitutional rights. *See Luis v. United States*, 578 U.S. 5, 10-11 (2016), *and cases cited therein*. And the right includes, as this Court recognized long ago in *Powell v. Alabama*, 287 U.S. 45 (1932), "a fair opportunity to secure counsel of [the defendant's] own choice." *Id*. at 53. The Court has recognized the right multiple times since then as well, albeit with some limitations. *See Luis*; *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989); *Wheat v. United States*, 486 U.S. 153 (1988).

In two of the foregoing cases, the Court considered the very

circumstance at issue in Petitioner's case here – whether the right is violated when the government seizes funds the defendant needs to retain counsel. In *Caplin & Drysdale*, the Court held post-conviction seizure of funds derived from the crime of conviction under a forfeiture statute did not violate the right to counsel of choice. *See id.*, 491 U.S. at 624-32. In *Luis*, the Court distinguished *Caplin & Drysdale* and held pretrial seizure of "untainted" funds not traceable to the defendant's crime did violate the right to counsel of choice. *See Luis*, 136 S. Ct. at 1096.

Luis explained the line to be drawn:

> The relevant difference consists of the fact that the property here is untainted; *i.e.*, it belongs to the defendant, pure and simple. In this respect it differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime. The Government may well be able to freeze, perhaps to seize, assets of the latter, "tainted" kind before trial. As a matter of property law the defendant's ownership interest is imperfect. The robber's loot belongs to the victim, not to the defendant. The cocaine is contraband, long considered forfeitable to the Government wherever found. And title to property used to commit a crime (or otherwise "traceable" to a crime) often passes to the Government at the instant the crime is planned or committed.

Id. at 1090 (citations omitted).

The funds in this case, like the funds in *Luis* and unlike the funds in *Caplin & Drysdale*, were untainted funds. The funds here, again like the funds in *Luis*, further differed from the funds in *Caplin & Drysdale*, in that title to the funds in *Caplin & Drysdale* vested in the government, as a matter of law, "upon the commission of the act giving rise to forfeiture." *Caplin & Drysdale*, 491 U.S. at 625 n.4, 627 (quoting 21 U.S.C. § 853(c)). *See also Luis*, 578 U.S. at 14 (quoting foregoing and adding emphasis). As explained in *Luis*, it is a

difference between "(1) what is primarily 'mine' (the defendant's) and (2) what is primarily 'yours' (the Government's)." *Luis*, 578 U.S. at 17.

The court below found *Luis* distinguishable and *Caplin & Drysdale* comparable because the government here had a lien interest under 18 U.S.C. § 3613(c). This is not enough to bring the case closer to *Caplin & Drysdale* than *Luis*, however.

On one side of the coin – the *Caplin & Drysdale* side – the lien interest created by § 3613(c) is very different from the property interest created by a statute like that in *Caplin & Drysdale* which "vests [title] in the United States upon commission of the [criminal] act," 21 U.S.C. § 853(c). First, the lien arises only upon judgment, not upon commission of the criminal act. *See* 18 U.S.C. § 3613(c). Second, such liens are "not self-executing," *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985),[4] but valid only if and when the government files a notice of lien in the same manner as notices of tax liens are filed, *see* 18 U.S.C. § 3613(d). Third, the lien does not create an absolute right in the government, because the court can override the lien if the government does try to enforce it. As recognized in Petitioner's first appeal, 18 U.S.C. § 3664(k) "grants the district court discretion in addressing a defendant's changed circumstances, allowing for potential '. . . relief.'" *United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019). *See also United States v. Betts*, 511 F.3d 872, 877 (9th Cir. 2007) (recognizing "room for judicial discretion" under § 3664(k)). The case law distinguishes between "extravagant living expenses" and "reasonable expenses," *United States v. Corbett*, 357

[4] The type of lien considered in *National Bank of Commerce* was a tax lien, but § 3613 incorporates tax lien procedures. *See* 18 U.S.C. § 3613(d).

F.3d 194, 196 (2d Cir. 2004), and the expense of retaining counsel would seem an eminently reasonable expense.

The government entirely failed to avail itself of this lien procedure, moreover. It sought to seize the funds under an entirely inapplicable statute – as the court of appeals recognized in Petitioner's first appeal. *See Lillard*, 935 F.3d at 835-36. *Cf. Krogmann v. State*, 914 N.W.2d 293 (Iowa 2018) (finding right to counsel of choice violated by seizure of funds that was unlawful because not authorized by statute). And it appears the government has not taken advantage of the lien procedure even now, as nothing in the docket suggests such alternative action. *See United States v. Lonnie Eugene Lillard*, No. 3:98-CR-05168-RJB-1 (W.D. Wash.), ECF Nos. 110-15 (docket entries reflecting spreading of mandate, new order vacating prior order, and no further filings regarding funds).

On the other side of the coin – the *Luis* side – there was a statute in *Luis* that was far more similar to the statute here. That is 18 U.S.C. § 1354(a)(2)(B)(i), which the government cited and the Court acknowledged in *Luis*. *See id.*, 578 U.S. at 18. That statute authorizes "a civil action in any Federal court" for a restraining order prohibiting a person from disposing of property obtained by fraud "or property of equivalent value." 18 U.S.C. § 1354(a)(2)(B)(i), *quoted in Luis*, 578 U.S. at 18. This requires affirmative action by the government, but so does the lien statute cited by the court of appeals here, as noted above. *See United States v. National Bank of Commerce*, 472 U.S. at 720 (explaining "[a]ffirmative action" required to enforce lien).

In sum, this case is more like *Luis* than *Caplin & Drysdale*. The funds

here are untainted funds like the untainted funds in *Luis*, not tainted funds like the tainted funds in *Caplin & Drysdale*, and the government's lien interest here falls far short of the government's property interest in *Caplin & Drysdale*.

2. It Is Important to Correct the Misapplication of *Luis*.

It is important to correct the court of appeals' misapplication of *Luis*. To begin, the court of appeals here – the Ninth Circuit – is not alone in its error. The Fifth Circuit also held a mere lien sufficient to distinguish *Luis* – in *United States v. Scully*, 882 F.3d 549 (5th Cir. 2018). *See id.* at 553. There is thus error in two different circuits and a dearth of case law to expose the error in the other circuits.

Further, the right at issue is one of the most fundamental of a criminal defendant's constitutional rights. First, the right to counsel is generally one of the most fundamental of a criminal defendant's constitutional rights. *See Luis*, 578 U.S. at 10-11, *and cases cited therein*. Second, the right to counsel of choice is the part of the right that goes back furthest in our traditions. As Justice Thomas put it after his historical analysis in a concurring opinion in *Luis*, "'[t]he right to select counsel of one's choice' is thus 'the root meaning' of the Sixth Amendment right to counsel." *Id.*, 578 U.S. at 25 (Thomas, J., concurring in judgment) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. at 147-48 (2006)). It is therefore the most fundamental aspect of one of the most fundamental rights that is at stake here.

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: July 12, 2023

CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LONNIE EUGENE LILLARD, *Defendant-Appellant.*	Nos. 18-30106 18-30114 20-30110 D.C. Nos. 2:16-cr-00007-RSM 2:16-cr-00007-RSM-1 2:15-cr-00270-RSM-1 OPINION

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief District Judge, Presiding

Argued and Submitted June 9, 2022
Portland, Oregon

Filed January 17, 2023

Before: Mary M. Schroeder and Jennifer Sung, Circuit Judges, and John Antoon II,* District Judge.

Opinion by Judge Sung

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

SUMMARY**

Criminal Law

In Lonnie Eugene Lillard's appeals arising from (1) a case in which Lillard pleaded guilty to conspiracy to commit bank fraud and (2) a case in which the district court revoked the supervised release that Lillard was serving for a prior federal conviction, the panel affirmed the district court in part, vacated the sentence imposed for the violation of supervised release, and remanded for re-sentencing on the supervised release violation.

Lillard was serving a sentence of supervised release for a 2006 federal conviction from Nevada when he was arrested and indicted on the conspiracy count. Soon after Lillard's arrest, the government obtained an order permitting it to seize the funds in his inmate trust account and apply them to a restitution obligation for a 1998 federal conviction from Washington. Lillard pleaded guilty in the conspiracy case, admitted a violation of supervised release in the Nevada case, and was sentenced in both cases.

Lillard claimed that the government's seizure of his inmate funds pursuant to the restitution order from his 1998 conviction violated (1) his Sixth Amendment right to counsel of choice by preventing him from hiring a lawyer, and (2) his Fifth Amendment due process right to a court-appointed expert and investigative assistance.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the government does not violate a defendant's Sixth Amendment right to counsel of choice when it seizes untainted funds pursuant to a valid restitution order and judgment from a prior case. The panel explained that under 18 U.S.C. § 3613(c), the restitution order issued pursuant to the Mandatory Victims Restitution Act gave the government a lien "on all property and rights to property of the person" against whom judgment is entered until the liability is satisfied or otherwise terminated, and the fact that Lillard's funds were untainted did not diminish the strength of the government's property interest. Because the restitution order and the § 3613(c) lien gave the government a substantial property interest in the funds in Lillard's inmate account, the government's seizure of those funds to satisfy Lillard's restitution obligation did not violate his Sixth Amendment right to counsel of choice.

The panel held that Lillard did not establish that the seizure of funds violated his Fifth Amendment due process rights, where Lillard did not demonstrate either that he needed the right to court-appointed expert and investigative assistance, or that he requested but was denied the appointment of any assistance.

It was undisputed on appeal that the 36-month sentence the district court imposed for Lillard's supervised release violation is illegal because it exceeds the applicable statutory maximum. It was also undisputed that Lillard did not object to the illegal sentence in the district court and that, consequently, this court reviews for plain error. The government conceded that the imposition of an illegal sentence was an error that was plain, but contended that the error did not affect Lillard's substantial rights because his 36-month illegal sentence is shorter than and concurrent with his 196-month valid sentence in the conspiracy case. The

panel held that an illegally excessive sentence violates a defendant's substantial rights even if it runs concurrent with an equal or longer, valid sentence. In so holding, the panel noted the possibility of collateral consequences. The panel also concluded that the illegally excessive sentence affects the fairness, integrity, or public reputation of judicial proceedings. The panel therefore vacated the 36-month sentence imposed for the violation of supervised release and remanded for re-sentencing in that case.

The panel addressed and rejected Lillard's other arguments in a concurrently filed memorandum disposition.

COUNSEL

Carlton F. Gunn (argued), Law Office of Carlton F. Gunn, Pasadena, California, for Defendant-Appellant.

Michael S. Morgan (argued), Rebecca Shapiro Cohen, and Michelle Jensen, Assistant United States Attorneys; Erin Becker; Teal Luthy Miller; Charlene Koski; Tessa M. Gorman, Acting United States Attorney; Office of the United States Attorney, Seattle, Washington; for Plaintiff-Appellee.

OPINION

SUNG, Circuit Judge:

Defendant-Appellant Lonnie Eugene Lillard was serving a sentence of supervised release for a prior federal conviction from Nevada when he was arrested and indicted on one count of Conspiracy to Commit Bank Fraud, 18 U.S.C. §§ 1344(2), 1349. Soon after Lillard's arrest, the government obtained an order permitting it to seize the funds in his inmate trust account and apply them to a restitution obligation for a prior federal conviction from Washington. Lillard pleaded guilty in the conspiracy case, admitted a violation of his supervised release in his Nevada case, and was sentenced in both cases.

Lillard urges that the seizure of his inmate funds violated his Sixth Amendment right to counsel of choice and his Fifth Amendment due process right. He also contends that the district court's imposition of an undisputedly illegal sentence for his supervised release violation is reversible error. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We conclude that the government's seizure of Lillard's inmate funds did not violate his right to either counsel of choice or due process. We also conclude that the district court's imposition of an illegally excessive sentence for Lillard's supervised release violation was plain error that requires vacatur of that sentence and remand for re-sentencing.[1]

[1] We address and reject Lillard's other arguments in a concurrently filed memorandum disposition, *United States v. Lillard*, No. 18-30106, --- F. App'x ---- (9th Cir. 2022).

FACTS AND PROCEDURAL BACKGROUND

In 2016, Lillard was arrested and indicted in the Western District of Washington for conspiracy to commit bank fraud. At the time of his arrest, Lillard was serving a term of supervised release for a 2006 conviction in the District of Nevada. He also had an outstanding restitution obligation of more than $79,000 from a 1998 conviction in the Western District of Washington.[2] Soon after his arrest, the government encumbered his inmate trust account, which contained about $6,500. The government then moved for, and obtained over Lillard's objection, an order directing that those funds be applied towards his restitution obligation.

Lillard pleaded guilty to the conspiracy charge without a plea agreement. At that time, he also admitted having violated the terms of his supervised release in his District of Nevada case. The district court sentenced Lillard to 196 months of incarceration, to be followed by 5 years of supervised release, in the conspiracy case. The court also sentenced Lillard to 36 months of incarceration for the supervised release violation, to run concurrent with the sentence in the conspiracy case.

DISCUSSION

I. Seizure of Funds

Lillard claims that the government's seizure of his inmate funds pursuant to the restitution order from his 1998 conviction violated his constitutional rights in the present case, in two ways: First, he claims the seizure violated his Sixth Amendment right to counsel of choice by preventing

[2] Lillard's unopposed motion to take judicial notice of documents in this case and related cases (Docket Entry 69) is granted.

him from hiring a lawyer. Second, he claims the seizure violated his Fifth Amendment due process right to a court-appointed expert and investigative assistance. We address each claim in turn.[3]

A. Sixth Amendment

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." That guarantee includes, among other things, the right to "be represented by an otherwise qualified attorney whom the defendant can afford to hire, or who is willing to represent the defendant even though he is without funds," which we commonly refer to as the right to counsel of choice.[4] *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989).

In this case, the government seized Lillard's inmate funds to satisfy his post-conviction restitution obligation

[3] The government contends these claims are unreviewable because Lillard waived them twice over—through an unconditional guilty plea, and by intentionally withholding them from the district court. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (explaining that waived rights are unreviewable). Lillard contends that the claims at issue survive a guilty plea, and that he preserved the issues by opposing the government's motion to seize the funds. We do not decide whether Lillard waived these claims, because even assuming he preserved them, he does not prevail on the merits.

[4] The government contends that, under *United States v. Stites*, 56 F.3d 1020, 1024 (9th Cir. 1995), Lillard is required to identify a private lawyer who was willing to represent him and to prove that the seizure of his inmate funds prevented him from hiring that lawyer. The government further urges that Lillard has failed to make that showing. Lillard disputes the government's reading of *Stites*. Because the success of Lillard's counsel-of-choice claim does not turn on this issue, we need not decide it and decline to do so.

from a prior case in which judgment had been entered. Lillard does not dispute the validity of the restitution order or the judgment in the prior case. Rather, citing *Luis v. United States*, 578 U.S. 5 (2016), Lillard contends that the seizure of funds violated his Sixth Amendment right to counsel of choice because the funds were "untainted," meaning that the funds were not traceable to his alleged crime.

In *Luis*, the Court held that the pretrial restraint of the defendant's untainted assets violated her Sixth Amendment right, but there, the pretrial restraint order had not been issued pursuant to a valid, existing restitution order. 578 U.S. at 23. Thus, *Luis* did not decide the issue presented here: whether the government violates a defendant's Sixth Amendment right to counsel of choice when it seizes untainted funds pursuant to a valid restitution order and judgment from a prior case. We hold that it does not.

The Court's discussion of the scope of the Sixth Amendment right to counsel in *Caplin & Drysdale* establishes the applicable principles. On the one hand, the Sixth Amendment guarantees a defendant in a criminal case "the right to be represented by an otherwise qualified attorney whom [they] can afford to hire." 491 U.S. at 624. On the other hand, a defendant has no constitutional right to representation by a particular attorney whom they cannot afford to hire. *Id.* Further, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way" that the defendant will be able to retain the attorney of their choice. *Id.* at 626.

Applying those principles, the Court concluded in *Caplin & Drysdale* that the Sixth Amendment did not give

the defendant the right to use forfeitable assets to pay counsel because, by operation of the forfeiture statute, 21 U.S.C. § 853, those assets belonged to the government, not the defendant, even though they remained in the defendant's possession. *Id.* at 627, 632. In so holding, the Court rejected the argument that the defendant's interest in the forfeitable assets outweighed the government's. *Id.* at 629. Because the forfeiture statute authorized the government to use forfeitable assets to fund law enforcement activities and return property to crime victims, the government had a "strong . . . interest in obtaining full recovery of all forfeitable assets" that outweighed "any Sixth Amendment interest" in permitting defendants "to use assets adjudged forfeitable to pay for their defense." *Id.* at 631.

In *United States v. Monsanto*, 491 U.S. 600 (1989), a case decided the same day as *Caplin & Drysdale*, the issue was whether the government could freeze a defendant's assets before he is convicted and before the assets are finally adjudged to be forfeitable, as authorized by 21 U.S.C. § 853. The Court acknowledged that such pre-trial freezing of assets "raises distinct constitutional concerns." 491 U.S. at 615. But, applying the principles set forth in *Caplin & Drysdale*, the Court concluded that the Sixth Amendment does not bar the government from freezing assets in a defendant's possession before trial if there has been a finding of probable cause to believe that the assets are forfeitable under the statute. *Id.* at 615–17.

Thus, we must first determine whether the government had a property right in the seized funds, even though they were in Lillard's inmate account. As noted above, Lillard acknowledges that the government seized those funds to satisfy the valid restitution order from Lillard's 1998 case—

after Lillard was convicted and judgment had been entered against him. That restitution order was issued pursuant to the Mandatory Victims Restitution Act. *See* 18 U.S.C. § 3663A. Under 18 U.S.C. § 3613(c), such a restitution order gives the government a lien "on all property and rights to property of the person" against whom judgment is entered until the liability is satisfied or otherwise terminated.

Because of the restitution order and § 3613(c) lien, the government's property interest in Lillard's funds was comparable to the government's property interest in the forfeitable assets considered in *Caplin & Drysdale*. *See Luis*, 578 U.S. at 16 (noting that application of § 853(c)'s relation-back provision made the government in *Caplin & Drysdale* "something like a secured creditor with a lien on the defendant's tainted assets superior to that of most any other party"). Because the seized funds effectively belonged to the government, Lillard did not have a Sixth Amendment right to use those funds to retain an attorney.[5] *See Caplin & Drysdale*, 491 U.S. at 631–32.

Lillard argues, however, that the holdings of *Caplin & Drysdale* and *Monsanto* are limited to "tainted" funds, meaning funds obtained as a result of, or traceable to, a crime. Lillard further contends that under *Luis*, the Sixth Amendment bars the government from seizing *untainted* funds when doing so prevents the defendant from retaining their counsel of choice. We disagree.

[5] In 2019, we held that the government's seizure of Lillard's funds was unlawful because the restitution statute authorizing seizure, 18 U.S.C. § 3664(n), did not apply to periods of pretrial detention. *United States v. Lillard*, 935 F.3d 827, 836 (9th Cir. 2019). Our earlier holding does not affect the status of the underlying restitution order or the government's lien pursuant to 18 U.S.C. § 3613(c).

The dispositive distinction between *Luis* on the one hand and *Caplin & Drysdale* and *Monsanto* on the other was not whether the assets were tainted, but instead whether the government had a substantial property interest in the assets. In *Caplin & Drysdale* and *Monsanto*, the tainted nature of the assets was relevant only because the government's property interest flowed from the forfeiture statute's relation-back provision, which applied only to tainted assets. *Caplin & Drysdale*, 491 U.S. at 627; *Monsanto*, 491 U.S. at 615–16.

In *Luis*, the government sought and obtained an order that froze the defendant's assets before trial pursuant to a different statute: 18 U.S.C. § 1345(a)(2). 578 U.S. at 9. That statute authorized the court to freeze before trial both property obtained as a result of, or traceable to, the crime (tainted assets) and property of equivalent value (untainted assets). *Id.* at 8–9. In Luis's case, the pretrial order froze property in the latter category, "namely, property that [was] untainted by the crime, and that belong[ed] fully to the defendant." *Id.* at 9. Unlike the forfeiture statute, § 1345 did not give the government a property right in Luis's untainted assets. *See id.* at 13. Because the government had no property right in Luis's untainted assets—rather, they "belonged to the defendant, pure and simple," *id.* at 12—Luis had a Sixth Amendment right to use those assets to retain her counsel of choice under the principles set forth in *Caplin & Drysdale*. As the *Luis* plurality explained, the material distinction between the assets in *Luis* and those in *Caplin & Drysdale* and *Monsanto* was "the difference

between what is yours and what is mine." [6] *Id.* at 16. In *Caplin & Drysdale* and *Monsanto*, although it could not be said "that the Government 'owned' the tainted property outright," because of the forfeiture statute's relation-back provision "the Government even before trial had a 'substantial' interest in the tainted property sufficient to justify the property's pretrial restraint." *Id.*

Here, Lillard's assets were untainted, but he had an existing—not merely potential—restitution obligation. Because of that restitution obligation, the government had a lien on Lillard's *untainted* funds. 18 U.S.C. § 3613(c). Thus, unlike in *Luis*, the fact that Lillard's funds were untainted did not diminish the strength of the government's property interest. Further, because the government had a substantial property interest in Lillard's untainted assets and seized them for the purpose of restitution, the seizure did not violate the Sixth Amendment, despite its impact on Lillard's ability to pay for counsel of his choice. *See Caplin & Drysdale*, 419 U.S. at 629–30 ("Where the Government pursues this restitutionary end, the Government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim.").

Lillard also argues that the government property right established by a restitution order and § 3613(c) lien is

[6] Because there was "no rationale common to a majority of the Justices," only the result of *Luis* is binding. *United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016) (en banc).

relatively weak, for two reasons. First, he notes that a § 3613(c) lien is not perfected without notice. *See* 18 U.S.C. § 3613(d). Second, he asserts that, because a district court has discretion to adjust the payment schedule specified in a restitution order upon notification of a material change in a defendant's economic circumstances under 18 U.S.C. § 3664(k), the court has the power to override a § 3613(c) lien.

Those asserted limits on the government's property right do not change our conclusion. The government's property right established by a § 3613(c) lien is substantially less contingent than the government's right to a defendant's forfeitable assets before conviction and judgment. The government is entitled to a § 3613(c) lien only after a conviction and entry of a restitution judgment against a defendant. And, while the district court has authority to modify a defendant's payment schedule under § 3664(k), it cannot override the Mandatory Victims Restitution Act's command that total restitution equal the value of damages to property or persons. *See* 18 U.S.C. § 3663A(b)(1) & (2).

In sum, because the existing restitution order and § 3613(c) lien gave the government a substantial property interest in the funds in Lillard's inmate account, the government's seizure of those funds to satisfy Lillard's restitution obligation did not violate Lillard's Sixth Amendment right to counsel of choice.

B. Fifth Amendment

Lillard next claims that the government's seizure of his inmate funds violated his due process rights. The Due Process Clause of the Fifth Amendment guarantees the right to court-appointed expert and investigative assistance when the defendant shows that they need such assistance. *See, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985); *Williams v.*

Stewart, 441 F.3d 1030, 1053–54 (9th Cir. 2006). Lillard has not demonstrated either that he needed such assistance, or that he requested but was denied the appointment of any assistance. Therefore, Lillard has not established that the seizure of funds violated his due process rights.

II. Illegal Sentence

Finally, Lillard contends the district court committed reversible error by imposing an illegally excessive sentence for his supervised release violation. For the reasons explained below, we conclude that the imposition of the illegally excessive sentence was plain error requiring vacatur and remand for re-sentencing.

The district court imposed a 196-month sentence of incarceration for Lillard's conspiracy conviction, to run concurrent with a 36-month sentence of incarceration for the supervised release violation in his District Court of Nevada case. In that District Court of Nevada case, the most serious offense of which Lillard was convicted was Class C felony wire fraud. *See* 18 U.S.C. §§ 1343, 3559(a)(3). His supervised release violation therefore carried a maximum penalty of 24 months' imprisonment. *See* 18 U.S.C. § 3583(e)(3). It is undisputed that the 36-month sentence the district court imposed is illegal because it exceeds the applicable statutory maximum. *See United States v. Grimaldo*, 993 F.3d 1077, 1083 (9th Cir. 2021).

It is also undisputed that Lillard did not object to the illegal sentence in the district court and that, consequently, we review for plain error. *Id.* at 1081. Under the plain error test, relief may be granted only when there was an error that was plain and both affected the defendant's substantial rights and seriously affected the fairness, integrity, or public

reputation of judicial proceedings. *United States v. Kirilyuk*, 29 F.4th 1128, 1140 (9th Cir. 2022).

The government concedes that the imposition of an illegal sentence was an error that was plain. *See Grimaldo*, 993 F.3d at 1084. But the government contends that the illegal sentence did not affect Lillard's substantial rights because his 36-month illegal sentence is shorter than and concurrent with his 196-month valid sentence in the conspiracy case. We disagree.

We join the First Circuit in holding that an illegally excessive sentence violates a defendant's substantial rights even if it runs concurrent with an equal or longer, valid sentence. As that court has recognized, "collateral consequences may arise as a result of an above-the-maximum sentence imposed on a particular count." *United States v. Almonte-Nuñez*, 771 F.3d 84, 92 (1st Cir. 2014). "The existence and extent of these collateral consequences are notoriously difficult to predict, but they have the potential to harm the defendant in a myriad of ways." *Id.* Indeed, we have noted elsewhere that "multiplicitous convictions and sentences affect [a defendant's] substantial rights because they have collateral consequences, including the possibility of an increased sentence under a recidivist statute for a future offense." *United States v. Zalapa*, 509 F.3d 1060, 1064–65 (9th Cir. 2007). As just one example, even sentences that run concurrently may sometimes be counted separately in determining a defendant's Criminal History Category under the Sentencing Guidelines. *See* U.S.S.G. § 4A1.2(a)(2). "Although neither we nor [Lillard] can identify a specific prejudice which may stem from his erroneous sentence, we are unwilling to place upon [him] the

risk that such a prejudice will manifest itself in the future." *United States v. Kincaid*, 898 F.2d 110, 112 (9th Cir. 1990).

The government's reliance on *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), is misplaced. In *Mitchell*, we reviewed for plain error several robbery sentences that may have been imposed in violation of *United States v. Booker*, 543 U.S. 220 (2005). *Mitchell*, 502 F.3d at 996–97. We held that the imposition of the robbery sentences did not affect the defendant's substantial rights even if it violated the Sixth Amendment because those sentences were shorter than, and ran concurrent with, multiple life sentences. *Id.* In *Mitchell* and our other *Booker* cases, however, the error was that the district court sentenced the defendant without knowledge that the Sentencing Guidelines are only advisory. *See id.* at 997. In such cases, the erroneous sentence was not necessarily excessive, and the district court would have been permitted to impose the same sentence on remand. But the same is not true here, where the error is the imposition of a sentence that exceeds the statutory maximum and therefore must be shortened on remand.

We also conclude that the imposition of an illegally excessive sentence affects the fairness, integrity, or public reputation of judicial proceedings. As we have recognized in cases where an illegal sentence increases a defendant's period of incarceration, "it is a miscarriage of justice to give a person an illegal sentence." *United States v. Schopp*, 938 F.3d 1053, 1069 (9th Cir. 2019) (quoting *United States v. Ameline*, 409 F.3d 1073, 1081 (9th Cir. 2005)). The same is true where an illegal sentence runs concurrent with a valid one of equal or longer length. As the First Circuit has noted, "leaving intact a sentence that exceeds a congressionally mandated limit may sully the public's perception of the

fairness of the proceeding," and "[t]hat perception, in turn, may threaten respect for the courts and may impair their reputation." *Almonte-Nuñez*, 771 F.3d at 92. And because re-sentencing is a "simple" task, "a failure to exercise our discretion in order to allow a district court to correct an obvious sentencing error that satisfies the three prongs of the plain error test would in itself undermine the 'fairness, integrity, and public reputation of judicial proceedings.'" *United States v. Castillo-Casiano*, 198 F.3d 787, 792 (9th Cir. 1999); *see also Almonte-Nuñez*, 771 F.3d at 92 (recognizing that "correcting such an error will rarely tax judicial resources").

We are aware that the Eighth Circuit has held that the imposition of an illegal sentence that does not increase a defendant's term of imprisonment does not affect his substantial rights. *See United States v. Bossany*, 678 F.3d 603, 607 (8th Cir. 2012). Although the *Bossany* court recognized "that the mere presence of an excessive sentence in a defendant's record has the potential of causing prejudice," it also noted that it had held in other contexts that "an illegal sentence alone does not establish the prejudice necessary for plain error relief." *Id.* at 606–07. Specifically, the court cited two of its pre-*Booker* cases holding "that a defendant's substantial rights are not affected by sentences that exceed the maximum authorized by jury findings (and thus violate the Sixth Amendment), if the district court 'could have' imposed legal sentences on those counts and used consecutive sentences (rather than concurrent) to achieve the same 'total punishment' under U.S.S.G. § 5G1.2(d)." *Id.* at 607. The court believed those cases "require [defendants] to show that, absent the error, the court could not have imposed [the same] total punishment, which, of course, [they] cannot do" when an illegal sentence runs

concurrent with a valid sentence of equal or longer length. *Id.*

But, as we have explained elsewhere, pre-*Booker* cases have "limited applicability" in contexts like this one precisely because of U.S.S.G. § 5G1.2(d). *Kirilyuk*, 29 F.4th at 1140. In particular, before *Booker*, U.S.S.G. § 5G1.2(d) "would have required the district court to impose consecutive sentences to reach the total proper punishment under the Guidelines if it exceeded the statutory maximum on a single count." *Id.* at 1141. Under *Booker*, however, the Federal Sentencing Guidelines are no longer mandatory. 543 U.S. at 246. We are thus unpersuaded by the Eighth Circuit's reasoning.

We vacate the 36-month sentence imposed for Lillard's violation of supervised release and remand to the district court for re-sentencing in that case.

AFFIRMED in part, VACATED in part, and REMANDED in part.

A P P E N D I X 2

NOT FOR PUBLICATION

FILED

JAN 17 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE EUGENE LILLARD, Defendant-Appellant.	Nos. 18-30106 18-30114 20-30110 D.C. Nos. 2:16-cr-00007-RSM 2:16-cr-00007-RSM-1 2:15-cr-00270-RSM-1 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief District Judge, Presiding

Argued and Submitted June 9, 2022
Portland, Oregon

Before: SCHROEDER and SUNG, Circuit Judges, and ANTOON,** District Judge.

Defendant-Appellant Lonnie Eugene Lillard pleaded guilty to one count of Conspiracy to Commit Bank Fraud, 18 U.S.C. §§ 1344(2) and 1349. He appeals

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

several of the district court's determinations affecting his conviction and sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm.[1][2]

1. The district court did not violate Lillard's right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975), either before or after the sentencing-stage evidentiary hearing. Lillard knowingly and voluntarily waived his right to counsel before the evidentiary hearing. In its *Faretta* colloquy, the district court advised Lillard of the penalties he faced and of the dangers and disadvantages of self-representation. *See United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987). The district court did not advise him of the nature of the charge against him, but the record as a whole reveals that his waiver was knowing and intelligent in that respect. *See id.* at 1487–88. In particular, he had been advised about the nature of the charge on at least five prior occasions, and he repeatedly stated either that he understood the factual bases for his pleas or that he understood the charge. Lillard, moreover, had already pleaded guilty when he first waived his right to counsel, and our waiver analysis must be "directed to 'the

[1] We hold in a separate opinion filed today that the government's seizure of Lillard's inmate funds did not violate his Sixth Amendment right to counsel of choice and that the district court's imposition of an illegal sentence for Lillard's supervised release violation was reversible error. *United States v. Lillard*, No. 18-30106 (9th Cir. 2022).

[2] To the extent that this memorandum reveals sealed information, the court unseals that information for purposes of this disposition only.

particular stage of the proceedings in question.'" *Lopez v. Thompson*, 202 F.3d 1110, 1119 (9th Cir. 2000) (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988)).

Lillard knowingly and voluntarily waived his right to counsel again after the evidentiary hearing. While Lillard did express a willingness to accept new counsel as an alternative, his request to represent himself was unequivocal. *See Adams v. Carroll*, 875 F.2d 1441, 1444–45 (9th Cir. 1989). Further, the district court was not required to conduct a second *Faretta* colloquy before allowing Lillard to return to pro se status because no "intervening events substantially change[d] the circumstances existing at the time of the initial colloquy." *United States v. Hantzis*, 625 F.3d 575, 580–81 (9th Cir. 2010).

2. The district court did not abuse its discretion when it denied Lillard's motion to withdraw his guilty plea. Federal Rule of Criminal Procedure 11 permits a defendant to withdraw a guilty plea "after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." Neither of the bases Lillard asserts constitutes such a reason. First, there is no "realistic possibility" that Lillard was entitled to a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). *United States v. McTiernan*, 546 F.3d 1160, 1168 (9th Cir. 2008). Neither of the statements in the search warrant affidavit that Lillard challenges was false or material to the court's finding that

probable cause existed to search his apartment. *See United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (requiring only "a reasonable nexus between the activities supporting probable cause and the locations to be searched" (quoting *United States v. Ocampo*, 937 F.3d 485, 490 (9th Cir. 1991))). Second, Lillard has not identified any evidence that he learned of after his guilty plea. He points to the government's "theory" of the case against him, but that is not evidence. And in any event, the government was not attempting to prove his guilt at the evidentiary hearing. For that same reason, Lillard is not entitled to a hearing to explore a possible claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Finally, he is not entitled to a hearing to explore a possible ineffective assistance of counsel claim; such claims are generally inappropriate on direct appeal, and no exception to that general rule applies here. *See United States v. Jeronimo*, 398 F.3d 1149, 1155–56 (9th Cir. 2005).

3. The district court did not abuse its discretion when it denied Lillard's request for an evidentiary hearing on limited remand. Under the Sentencing Guidelines, "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." U.S.S.G. § 6A1.3(a). Lillard offers no reasonable basis upon which to challenge the government's evidence about the attribution of losses between Vantiv and its merchants. Lillard also does not

explain why he could not have investigated any concerns he had about the government's evidence through other means, such as by contacting the merchants themselves.

4. The district court did not violate Lillard's due process right not to be sentenced based on unreliable information. To prove such a violation, a defendant "must establish the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence." *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009) (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)). Lillard's due process claim with respect to the government's evidence about the allocation of losses between Vantiv and its merchants on remand fails at the first prong. That evidence—including the Vantiv investigator's credible explanation for his inconsistent statements and the government's independent verification with two merchants that Vantiv did not reimburse their losses—has more than "some minimal indicium of reliability beyond mere allegation." *Id.* at 936 (quoting *Ibarra*, 737 F.2d at 827). And Lillard's claim that his sentence was impermissibly based on incorrect information about the allocation of losses between Chase Paymentech and its merchants fails at the second prong. The record demonstrates that the district court's sentence was not based on that information. *See United States v. McGowan*, 668 F.3d 601, 608 (9th Cir. 2012).

5. The district court correctly applied a preponderance of the evidence standard in making its loss amount enhancement determination because clear and convincing evidence is not required when an enhancement is based entirely on the extent of a conspiracy. *United States v. Lonich*, 23 F.4th 881, 914 (9th Cir. 2022). Further, the district court's restitution and loss estimations were reasonable. *See United States v. Ali*, 620 F.3d 1062, 1073 n.10 (9th Cir. 2010); *United States v. Zolp*, 479 F.3d 715, 719 (9th Cir. 2007). The district court did not clearly err in finding that the government had sufficiently tied the full restitution and loss amounts to the conspiracy through patterns across the fraudulent transactions. *See United States v. Annamalai*, 939 F.3d 1216, 1236-38 (11th Cir. 2019); *United States v. Sepulveda*, 115 F.3d 882, 889-92 (11th Cir. 1997).

6. Lillard preserved his objections to the restitution order because he raised them before the district court. *See United States v. Waknine*, 543 F.3d 546, 555 (9th Cir. 2008). The order, however, is not internally inconsistent because "'immediate payment' does not mean 'immediate payment in full;' rather it means 'payment to the extent that the defendant can make it in good faith, beginning immediately.'" *United States v. Jaroszenko*, 92 F.3d 486, 492 (7th Cir. 1996). Further, the order does not impermissibly supplement the court's oral sentencing pronouncement. Because the district court's oral sentencing pronouncement did not specify a payment plan that would apply during Lillard's sentence of

incarceration, the payment plan set out in the restitution order permissibly clarified that ambiguous pronouncement and controls here. *See Fenner v. U.S. Parole Comm'n*, 251 F.3d 782, 787 (9th Cir. 2001).

7. Reassignment to a different judge on remand is unwarranted. Our disposition of the other issues in this case demonstrates that none of the district court rulings Lillard identifies as warranting reassignment was erroneous, much less indicates that "reassignment is advisable to preserve the appearance of justice." *United States v. Atondo-Santos*, 385 F.3d 1199, 1201 (9th Cir. 2004) (quoting *United States v. Working*, 287 F.3d 801, 809 (9th Cir. 2002)).

AFFIRMED.

A P P E N D I X 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. LONNIE EUGENE LILLARD, Defendant.	CASE NO. CR98-5168-RJB ORDER GRANTING UNITED STATES' MOTION TO REQUIRE PAYMENT FROM INMATE TRUST ACCOUNT

This matter comes before the court on the above-referenced motion (Dkt. 77). The court is familiar with the records and files herein and has considered the documents filed *pro se* by the defendant entitled, "Mr. Lillard's Motion to Release Encumbrance of this Fund Bureau of Prisons is Holding" (Dkt. 79). The court has also considered all of the attachments to that motion, which the court has construed to be a response to the government's motion. The court has also considered the Memorandum From Attorney For Defendant Concerning Motion For Payment From Inmate Trust Account filed by defendant's attorney (Dkt. 86).

It appears to the court that the United States' motion is well-taken and is supported by the law, and that the defendant's objections made *pro se* and through counsel are without merit, for the reasons stated in the government's motion and the government's reply (Dkt. 87). Therefore, it is now

ORDERED that Bureau of Prisons shall turn over $6,671.81 from Mr. Lillard's Bureau of Prison's Inmate Trust Account to the Clerk of this Court by check payable to the United States District Court, Western District of Washington, referencing case number 3:98-CR-05168-RJB-1, delivered either personally or by First Class Mail to United States District Court, Western District of Washington, Attn: Financial Clerk–Lobby Level, 700 Stewart Street, Seattle WA 98101.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 3rd day of August, 2016.

ROBERT J. BRYAN
United States District Judge

A P P E N D I X 4

Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. LONNIE LILLARD, Defendant.	CASE NO. CR16-007RSM **ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANT**

The Court, having considered attorney Robert Gombiner's motion to withdraw as counsel for defendant (Dkt. # 184), hereby GRANTS the motion and allows the defendant to appear pro se in this matter.

DATED this 29th day of September, 2017.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff,	)	No. 2:16-cr-00007-RSM
vs.	)	Seattle, WA
LONNIE EUGENE LILLARD, NATHANIEL WELLS, Defendants.	)	Closing Arguments October 5, 2017

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE CHIEF JUDGE RICARDO S. MARTINEZ
UNITED STATES DISTRICT COURT

APPEARANCES:

FOR THE PLAINTIFF: ERIN BECKER
U.S. Attorney's Office
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271
erin.becker@usdoj.gov

BENJAMIN T. DIGGS
U.S. Attorney's Office
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271
benjamin.diggs@usdoj.gov

FOR MR. WELLS: GILBERT H. LEVY
Attorney at Law
2125 Western Avenue, Suite 330
Seattle, WA 98121
courts@glevylawyer.com

FOR MR. LILLARD: Pro Se

Andrea Ramirez, CRR, RPR
Official Court Reporter
United States District Court
Western District of Washington
700 Stewart Street, Suite 17205
Seattle, WA 98101
andrea_ramirez@wawd.uscourts.gov

Reported by stenotype, transcribed by computer

THE CLERK: This is closing argument in the case of United States vs. Lonnie Lillard and Nathaniel Wells, Cause Number CR16-7, assigned to the Court.

Will counsel please rise and make your appearances for the record?

MS. BECKER: Good morning, Your Honor. Erin Becker, for the United States, alongside Ben Diggs, Special Assistant United States Attorney.

THE COURT: Good morning.

MR. DIGGS: Good morning.

MR. LEVY: Gilbert Levy, for Mr. Wells, who's present and seated to my left.

THE COURT: Mr. Levy, Mr. Wells. Thank you.

Mr. Lillard, good morning.

MR. LILLARD: Good morning. Lonnie Lillard, pro se.

THE COURT: Mr. Lillard, as I'm sure you're aware by now, the Court allowed your counsel to withdraw, for the reasons that were stated in the moving document that's been sealed. No need to discuss those reasons why. But from now on, through the end phases of all of this, you'll be representing yourself, all right?

MR. LILLARD: Yes, Your Honor.

THE COURT: Mr. Lillard, when we get to your portion of the argument in this particular case, I want you also to list for me what motions you want to make at this point in

A P P E N D I X 5

FILED

APR 26 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE EUGENE LILLARD, Defendant-Appellant.	No. 18-30106 D.C. No. 2:16-cr-00007-RSM-1 ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE EUGENE LILLARD, Defendant-Appellant.	No. 18-30114 D.C. No. 2:15-cr-00270-RSM-1

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE EUGENE LILLARD, Defendant-Appellant.	No. 20-30110 D.C. Nos. 2:16-cr-00007-RSM-1 2:16-cr-00007-RSM

Before: SCHROEDER and SUNG, Circuit Judges, and ANTOON,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge Sung votes to deny the petition for rehearing en banc, and Judges Schroeder and Antoon so recommend. The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

A P P E N D I X 6

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. LONNIE EUGENE LILLARD, Defendant.	NO. 3:98-CR-05168-RJB-1 **United States' Motion to Require Payment from Inmate Trust Account** **Note for Motion Calendar: Friday, July 1, 2016**

Plaintiff, United States of America, moves under 18 U.S.C. § 3664(n), for entry of an Order requiring the Bureau of Prisons (BOP) to turn over to the Clerk of Court funds held in the inmate trust account for Defendant Lonnie Eugene Lillard (Mr. Lillard), to pay towards the criminal monetary penalties imposed in this case. As further explained below, this relief is statutorily required because Mr. Lillard has received "substantial resources" during his incarceration that must be applied to his outstanding restitution debt.

BACKGROUND

On September 22, 1998, the Court entered an Amended Criminal Judgment against Mr. Lillard for Conspiracy and Possession of Counterfeited

**UNITED STATES ATTORNEY'S OFFICE
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
PHONE: 206-553-7970**

Securities. Dkt. no. 26. The Court sentenced Mr. Lillard to thirty-four months in prison, followed by three years of supervised release. *Id.* at 2-3. The sentence also required Mr. Lillard to pay restitution in the amount of $79,130.55. *Id.* at 5. The remaining balance as of June 14, 2016, is $79,055.55. Declaration of Dawn Fernandez ¶ 3 (Fernandez Decl.). The Judgment made the entire restitution amount due "in full immediately." Dkt. no. 26 at 6.

Mr. Lillard is presently incarcerated at Federal Detention Center SeaTac in Seattle, Washington, a U.S. Bureau of Prisons (BOP) facility. According to BOP, Mr. Lillard's release date is unknown.[1] The U.S. Attorney's Office recently learned that Mr. Lillard currently has a balance of at least $6,671.81 in his inmate trust account maintained by the BOP. Fernandez Decl. ¶ 4. BOP establishes inmate trust accounts to maintain inmates' monies received from prison employment, friends and family, and other sources. 28 C.F.R. § 506.1. At the request of the U.S. Attorney's Office, the BOP has "encumbered" Mr. Lillard's inmate trust account to prevent him from making withdrawals that would reduce his balance below $6,671.81, pursuant to BOP Program Statement 4500.11, *Trust Fund/Deposit Fund Manual*, Section 8.8. *Available at* https://www.bop.gov/policy/progstat/4500_011.pdf (last visited Jun. 20, 2016). Fernandez Decl. ¶¶ 4-5. The United States now moves for an

[1] Mr. Lillard's location and release date may be confirmed at this BOP website: https://www.bop.gov/inmateloc/ (last visited Jun. 20, 2016).

**UNITED STATES ATTORNEY'S OFFICE
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
PHONE: 206-553-7970**

order authorizing the BOP to turn over funds from Mr. Lillard's inmate trust account to the Clerk of Court, to be applied towards his restitution balance.

ARGUMENT

When a federal defendant owes restitution and "receives substantial resources" during his incarceration, the law requires that those resources be used to pay the outstanding restitution. Specifically, 18 U.S.C. § 3664(n) provides:

> If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

United States v. Poff, No. 2:09-cr-00160-JLR, 2016 WL 3079001, at *2, 6, (W.D. Wash. Jun. 1, 2016), *appeal docketed*, No. 16-30141 (9th Cir. Jun. 9, 2016). *See also United States v. Kaczynski*, 416 F.3d 971, 975, n.7 (9th Cir. 2005) (*dictum* noting that 18 U.S.C. § 3664(n) prohibits returning to incarcerated defendant proceeds from sale of seized assets; proceeds must be paid towards restitution). Section 3664(n) applies squarely to Mr. Lillard, who is in federal custody, owes more than $79,000 in restitution, and has received funds in prison that bring his inmate trust account balance above $6,600.00. As such, Mr. Lillard must "be required to apply" funds from his inmate trust account toward his outstanding restitution debt. 18 U.S.C. § 3664(n).

Moreover, the terms of Mr. Lillard's Judgment provide a second, independently sufficient basis to order that his inmate trust account funds be

**UNITED STATES ATTORNEY'S OFFICE
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
PHONE: 206-553-7970**

used to pay restitution. Dkt. no. 26. The Judgment makes payment of the full amount of restitution due "in full immediately." *Id.* at 6. *See also* 18 U.S.C. § 3771(a)(6) (victim's right to "full and timely restitution as provided in law."); 18 U.S.C. § 3572(d)(2) (even when court orders restitution to be paid over time, payment schedule "shall be the shortest time in which full payment can reasonably be made.").

Finally, the money in Mr. Lillard's inmate trust account is not exempt from collection. The narrowly confined exemptions available to criminal restitution debtors are enumerated in 18 U.S.C. § 3613(a), and none applies to cash held in accounts.[2]

The United States will serve Mr. Lillard with this motion, and he may respond to the United States' intended application of the funds in his inmate trust account to pay restitution. The United States is not aware of any other party who may claim an interest in this property.

CONCLUSION

For all the foregoing reasons, the United States requests that the Court grant its motion and order that the BOP turn over $6,671.81from Mr. Lillard's inmate trust account to the Clerk of the U.S. District Court for the Western District of Washington, to pay towards his restitution obligation imposed in this case.

---

[2] Because of the mandatory relief available under 18 U.S.C. § 3664(n), the United States does not rely upon 18 U.S.C. § 3664(k), which authorizes (but does not require) the Court to "adjust the [restitution] payment schedule, or require immediate payment in full," upon receiving notice of a "material change in the defendant's economic circumstances."

**UNITED STATES ATTORNEY'S OFFICE
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
PHONE: 206-553-7970**

DATED this 20th day of June, 2016.

Respectfully submitted,

ANNETTE L. HAYES
United States Attorney

s/ Kyle A. Forsyth
KYLE A. FORSYTH, WSBA # 34609
Assistant United States Attorney
United States Attorney's Office
700 Steward Street, Suite 5220
Seattle, Washington 98101-1271
Phone: (206) 553-7970
Fax: (206) 553-4067
E-mail: Kyle.Forsyth@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I am a Paralegal Specialist in the office of the United States Attorney for the Western District of Washington, and am a person of such age and discretion as to be competent to serve papers;

That on June 20, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the parties;

That on June 20, 2016, I caused copies of the United States' Motion to Authorize Payment from BOP Inmate Trust Account, Declaration of Dawn Fernandez, and [Proposed] Order to Authorize Payment from Inmate Trust Account to be delivered to the Defendant/ Judgment Debtor, Lonnie Eugene Lillard, by placing an envelope marked "Legal Mail – Open in the Presence of the Inmate" containing said documents into the United States Mail, postage prepaid, by First Class Mail, addressed as follows:

Lonnie Eugene Lillard, Register No. 27612-086
FDC SeaTac
Federal Detention Center
P.O. Box 13900
Seattle, WA 98198

On the same date I sent copies to the Trust Fund Branch of the Federal Bureau of Prisons Central Office via e-mail.

//

//

//

//

**UNITED STATES ATTORNEY'S OFFICE
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
PHONE: 206-553-7970**

DATED this 20th day of June, 2016.

s/ Dawn H. Fernandez
Dawn H. Fernandez, Paralegal
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101
Telephone: (206) 553-4308/Facsimile: (206) 553-4073
E-mail: dawn.fernandez@usdoj.gov

A P P E N D I X 7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. LONNIE EUGENE LILLARD, Defendant.	Case No. CR98-5168RJB Mr. Lillard's motion to release encumbrance of his funds Bureau of Prisons is holding Evidentiary hearing requested

COMES Now, Lonnie Eugene Lillard, (hereinafter Mr. Lillard), pro se and without the assistance of counsel, for an order demanding that the Warden, Mr. Ingram, release the funds he, through the BOP, has encumbered in Mr. Lillard's trust fund

at the direction of the U.S. Attorney's office in Seattle, WA.

FACTS: For a complete recitation of the facts Mr. Lillard wants considered by this Court, please See Mr. Lillard's declaration attached to this motion.

DISCUSSION: On or about May 17, 2016 the Warden at FDC Sea-Tac, Mr. Ingram, encumbered Mr. Lillard's funds, totaling $6,671.81. These funds were in Mr. Lillard's trust account and the Warden said he did such pursuant to BOP program statement 4500.11 Section 8.8. The warden further informed Mr. Lillard he could challenge his actions through the BOP Administrative Remedy Program. See attachment B.

As a prudent matter, Mr. Lillard brings to this Court's attention that he has not utilized the Bureau's Administrative

Remedy Program because the Program Statement Mr. Ingram relies upon States in pertinent part:

> An encumbrance may be made for various reasons. Encumbrances are at the Warden's discretion. Funds the Warden encumbers may only be released upon his approval or upon inmate release.

As the Warden's decision is based upon official prison policy it would be futile for Mr. Lillard to go through an average 6 month lengthy appeal process in challenging the warden's actions. See Ward v. Chavez, 678 F.3d 1042, 1045 (9th Cir. 2012) (holding that the three tier Bureau of Prisons exhaustion requirement will be waived where futile due to official prison policy).

Additionally, Mr. Lillard's release date is in limbo as he has no definite

conclusion as to his pre-trial matters. Mr. Lillard is in the process of seeking to retain counsel as well as, in the alternative seeking to hire a paralegal should he go to trial pro se. Mr. Lilard's relative and friends have been assisting him in contacting attorney's and paralegals. See attachments C, D, and E. The warden encumbering Mr. Lilard's monies are affirmatively interfering with his right to pay for counsel of his choice once he settles on a lawyer of his own choosing or in the alternative, a paralegal he may choose.

The warden, it appears, may place such misconduct on the U.S. attorney's office that they are interfering with Mr. Lillard's Six Amendment right to counsel. Mr. Ingram may have a point and even be correct.

Mr. Lillard has been on federal supervised release since July 13,

2016 in Washington State. He has Completed, on three (3) separate instances Financial Disclosure forms as provided by his U.S. probation officers as part of his special condition. See attachment H. While on Federal Supervised release Mr. Lillard worked at Black Pearl Tech Inc. where he grossed a salary of $4,500.00 and thereafter worked at SneakerWarz. Attachment G is his W-2 form from the last company he worked for. Mr. Lillard provided the U.S. probation officer with all his check stubs and completed the monthly reports, wherein during one month Mr. Lillard reported that His casino winnings totaled over $50,000 (He believes it was approximately $78,000 but does not recall the exact amount as it was spread out throughout the month).

The U.S. attorney's office was in a clear position to know of Mr. Lillard's material economic change. This Court, too, was in such a position to

know of Mr. Lillard's material economic change in his financial circumstances, courtesy of the Probation office since such office is a branch of the federal judiciary and "an investigatory and supervisory arm of the sentencing court." U.S. v. Talbert, 501 F.3d 449, 453 (5th Cir. 2007); see also U.S. v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998).

Thus this Court could have then exercised its jurisdiction under 18 U.S.C. § 3664(k) in finding that circumstances have significantly changed since 1998 when Mr. Lillard was indigent and had $0.00 to his name.

Instead, the U.S. attorney's office arbitrarily through its subsidary, the Bureau of Prisons, unlawfully encumbered the full amount of Mr. Lillard's monies giving no notice to him, other than using the warden to tell him He did such action. The U.S. attorney's office should not be permitted to

encumber, at any given time, that their Government counsel would choose.

As it now stands, the restitution order the Government is seeking to collect all of mr. Lillard's monies on is on its face "unlawful." The Ninth Circuit held that under the Mandatory Victims Restitution Act ("MVRA"), when a defendant is ordered to but unable to pay restitution immediately, the Court is obligated to set a payment schedule. The Honorable Judge Robert J. Bryan failed to do this in 1998. See Ward v. Chavez, 678 F.3d 1042 (9th Cir. 2012). Mr. Lillard was indigent in 1998.

The Chavez court has held for a restitution order to be lawful 18 U.S.C. § 3664 requires that a district court set a schedule in consideration of the defendant's financial resources. As mentioned this was never done with Mr. Lillard. As clearly stated in Chavez

if the district court simply orders immediate payment of restitution and abdicates another agency to set the payment schedule that the statute obligates the court to determine, such order is unlawful.

The U.S. Government does not have judicial imprimatur to enforce collection of restitution from Mr. Lillard pursuant to an unlawfully issued court order. See U.S. v. Sawyer, 521 F.3d 792 (9th Cir. 2008).

CONCLUSION: Permitting the U.S. attorney's office to encumber at will Mr. Lillard's inmate trust account clearly contravenes Congress's evident intent for the Courts to oversee the timing of payments both in initially establishing the restitution payment schedule and in modifying it in response to changed circumstances. See 18 U.S.C. § 3664(f)(2),(k).

Mr. Lillard requests an evidentiary

hearing to set up an initial restitution payment schedule. He requests he be appointed counsel to represent him. He requests such whereas he may testify that his monies was to be utilized for counsel of his choice (the initial retainer fee), ~~attorney~~ alternatively his hiring of a paralegal as he is leaning towards representing himself. Additionally his monies was to be used for communication with his family and friends and periodically helping out his parents who are 91 and 80 years old. Lastly, his monies was to be used for items he can purchase off of the inmate commissary) i.e. batteries for his radio and booklight, hygiene products, etc. (legal materials).

Mr. Lillard Prays this Court immediately release the encumbrance of his funds.

Dated this 26 day of June 2016

Respectfully submitted

Lonnie Lillard

Lonnie Lillard #27612-086
P.O. Box 13900 FDC SeaTac
Seattle, WA 98198

PROOF OF SERVICE

I, Lonnie Lillard, deposited in the U.S. mail, in accordance with the Bureau of Prisons legal mail procedures a copy of the following:

MR LILLARD'S MOTION TO RELEASE ENCUMBRANCE OF HIS FUNDS BUREAU OF PRISONS IS HOIDING

on GOVERNMENT COUNSEL who represents the Bureau of Prisons at the Federal Detention Center at SeaTac, WA at the following address:

Annette L. Hayes
United States Attorney's office
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 27 day of June, 2016 in Seattle, WA

Lonnie Lillard
Lonnie Lillard

DECLARATION OF LONNIE EUGENE LILLARD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. LONNIE EUGENE LILLARD, Defendant.	Case No. CR98-5168RJB DECLARATION OF LONNIE EUGENE LILLARD

I, Lonnie Lillard, declare as follows:

1. On May 16, 2016, I received my mail in a clear package from correctional officer Ms. Brown. The contents in the clear plastic bag consited of a letter from the U.S. attorney's office in Seattle, WA dated May 12. The letter instructed me to

Complete the form "Financial Disclosure Statement to be completed by individual defendant."

2. Officer Brown could not explain to me why the contents of my mail came to me in a clear plastic bag/package. Additionally, I was not provided the envelope the contents were mailed in but instead was provided a photocopy of the face of the envelope.

3. On May 17, 2016, I noticed, when I checked my available blance it was $0.00. I immediately sent an electronic "Request to staff" inquiring as to such. I explained my previous balance was $ 6,671.81 but now pursuant to a Federal Court order, my funds have been encumbered. See Attachment A.

4. A couple of days later, the head of the Trust Fund, Mr. Watts, replying to my earlier request provided me an amended judgment from this case and explained the U.S. attorney contacted them (referring

(to his department).

5. On May 25, 2016, after I spoke with bureau staff, counselor Woods, I sent the Warden, Mr. Ingram, an electronic "request to staff." See attachment B to this motion.

6. On May 26, 2016, the Warden stated he encumbered my funds at his discretion pursuant to BOP Program Statement 4500.11 Section 8.8. He further advised me I could challenge his action through the Administrative Remedy Program, BOP Program Statement 1330.18. See attachment B to this motion.

7. After three weeks went by, I decided to send in the "financial disclosure statement to be completed by individual statement," I had filled out on May 18, 2016. I sent this completed form, I signed ~~Sincerely~~ under penalty of perjury to the U.S. attorney's office on or about June 1

13, 2016, in accordance with legal mail procedures as set out by the BOP.

8. I let the U.S. attorney's office know I have $100.00 in my savings account. This was disclosed to their office in the forms I filled out and sent to them. I also proposed to pay my debt in monthly installments of $40.00 per month beginning June 22, 2016, with an ~~fifty~~ immediate payment of $350.00. "This was contigent", I let their office know, "upon the release (the unfreezing) of my monies now held by the BOP.

9. Today is June 26, ~~2007~~ 2016, Sunday. My monies are still encumbered and I have not heard back from the U.S. attorney's office as to whether or not they accept my proposal of payment.

10. I am currently a pre-trial inmate at FDC Sea-Tac. I need my monies to retain counsel of my own choosing or in the alternative, since I'm leaning towards going pro se, I will be hiring a parlegal, which I figure will be much cheaper than the fees of an attorney.

11. A friend of mine has mailed several letters to attorney's in the Los Angeles, CA area. I have provided a copy of the envelope he mailed to me as well as his letter stating he did such as well as ~~some~~ the advertisments of the lawyers he said he contacted on my behalf. See attachment C to this motion.

12. Since March I have been corresponding with my Neph-ew as far as contacting parlegals and lawyers. April 15 he informed me he found himself running into

personal problems and he would notify me when he could help me once he was back on track. This prompted me to contact my woman friend once two weeks went by and my Nephew was still busy. She let me know she was assisting me and would call and e-mails a list of attorneys and paralegals she came up with. I gave her a paralegal and five attorneys to also contact. See attachment D.

13. A friend of mine in the bay area of California informed me he had contacted Five lawyers on my behalf. See attachment E. This response was in conjunction with a letter I wrote him asking to contact attorneys in the Bay area where he was located.

14. I have a paralegal on my approved contacts to correspond electronically with. I even asked her "what is her fee?" She sends me weekly case

law updates. See e.g. attachment F. She is out of the State of Ohio. I never heard back from her, as far as retaining her services.

15. I did receive word back from a friend of mine that a paralegal, J. R. Robinson, P.O. Box 88832, Seattle, WA 98138, #206-718-8203 Could ~~Rep~~ assist me in Court for a retainer of $1,000 and would ultimately charge a flat fee of $5,000 total.

16. I have had a balance in my trust account of at least $6,000 since January 31, 2016, I believe Government counsel read my e-mails and letters and randomly had the Warden encumber my funds so I couldnt choose counsel of my choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26 day of June, 2016, in Seattle, WA

Lonnie Lillard

Lonnie Lillard

ATTACHMENT A

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-F-A

FROM: 27612086
TO: Trust Fund
SUBJECT: ***Request to Staff*** LILLARD, LONNIE, Reg# 27612086, SET-D-B
DATE: 05/17/2016 07:50:20 PM

To: account balance
Inmate Work Assignment: unnasgn

Today May 17, my available balance was adjusted by (I am assuming) Trust Fund Staff. My available balance previously was $6,671.81. According to as why this was done, it states Federal Court Order, with a reference number of 466.

I am requesting a copy of the Federal Court Order that authorizes the Federal Bureau of Prisons to 'encumber' my monies consisting of $6,671.81.

Thank you for your time and assistance in this matter.

ATTACHMENT B

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-F-A

FROM: Warden
TO: 27612086
SUBJECT: RE:***Inmate to Staff Message***
DATE: 05/26/2016 08:12:01 AM

On or about May 17, 2016, I encumbered your inmate funds at my discretion pursuant to BOP Program Statement 4500.11, Section 8.8. You may challenge the Warden's action through the Administrative Remedy Program, BOP Program Statement 1330.18.">>> ~^!"LILLARD, ~^!LONNIE" <27612086@inmatemessage.com> 5/25/2016 3:16 PM >>>
To: Federal Court Order
Inmate Work Assignment: unasggn

Warden Ingram On May 17, 2016 my monies were frozen. The amount was $6,671.81. a couple of days later Mr. Watts, at my request (electronic request to staff) informed me the U.S. attorney contacted the business office. he also provided me a copy of the Court orders to why the Bureau (BOP) staff is freezing my monies.

The court order was from a criminal conviction I was sentenced for on August 28,1998 that was filed on September 22, 1998. In that court order the U.S. District Court at Tacoma ordered me to pay restitution "in full immediately."

I am requesting that you have the FDC SeaTac lawyer look into such issue and determine whether or not the BOP is violating my constitutional rights as to my interests in my monies that the business office is temporarily withholding from me.

Please consider the following additional information as to having the FDC's lawyer look into such issue:

It is well settled in the Western Region for the BOP that the Ninth Circuit Federal court of Appeals in United States versus Chavez, the Court has held for a restitution order to be lawful, 18 U.S. C. Section 3664 requires the district court set a schedule in consideration of the defendant's financial resources.
The Court went on to state that if the district court simply orders immediately payment of the restitution and leaves it to another agency, i.e. BOP, to actually set the payment schedule that the statute obligates the court to determine, that order is unlawful as the district Court has abdicated in its duty to set the schedule in consideration of the financial circumstances of the defendant.

The Government does not have imprimatur to enforce collection of restitution from me pursuant to an unlawful court order, but must instead move for sanctions when a defendant defaults by mailing to make immediately payment of the entire restitution amount. See U.S. versus Sawyer, 521 F.3d 792 (9th Cir. 2008).

In closing, when the 1998 judgment was ordered I fell into a time period when the District Courts ordered payment of fines and other criminal monetary penalties as being due "in full immediately" and the courts with regularity did not consider mine or others ability to pay or our financial resources.

Please look into this matter as the BOP may be violating my constitutional rights to my monies.

Thank you in advance for your assistance into this matter.

ATTACHMENT

C

What's Good 'Lo 5-26-16

I sent out the first of 10 letters and four letter "Print-out" to 5 lawyers and I'll do 5 more tomorrow.
I'm doing things the old fashion way "Pen & paper that way I know it's done the way it needs to be done.
I used Staged e-mail as the contact e-mail. I snap shot four people in Seattle the letter that you asked me to shoot him. I'll call Willie Bo today to see what's good with him and his progress.
I'll shoot you some more lawyer referals as soon as I get some more printed out I start school on the 31ST so you gotta let me know what you need done as soon as possible that way I can put your to do list in my

(1)

Plans O.K. Holla at me whenever you need me

Your Partna
&
Brother
JP

A064

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-F-A

I believe you can save a copy of my letter you type in your draft folder, and then lets say you want to send it to 10 people all at once, you just simply save their e-mails in your file folder and then just send it out to all ten.

Your acts will greatly increase my odds of me getting out next year or 2018.. you will be rewarded with your weight in Gold and Silver should such work in my favor due to your dedication and commitment in helping me secure my freedom. Make sure you take me up on my offer though

Love, Your dear friend always.

ATTACHMENT E

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-F-A

FROM: Millions, Willie
TO: 27612086
SUBJECT: RE: Mail???
DATE: 05/16/2016 06:06:09 PM

Good brother I got they email numbers scanned da letters and forward them to each lawyers office at fed ex but also I'm out of state right now as well

LONNIE LILLARD on 5/9/2016 1:19:46 PM wrote
Try to find more than five lawyers to send my info to though. Try to find some Paralegals, as they are cheaper than lawyers and all i need is a motion filed..

Did you actually e-mail them, how did you get them the contents of my letter.

Do you think you can try to meet any lawyers or paralegals this week?

One Love, pimp!
-----Millions, Willie III on 5/6/2016 12:51 PM wrote:

>

Ok good brother I had sent your info to five lawyers they said da earliest will be sometime next week

ATTATCHMENT F

Los Angeles Criminal Defense Lawyers, Attorneys and Law Firms - California

800-814-5727
Visit Website
Law Firm Profile
Contact us
Free Consultation
Learn More »

Law Offices of Daniel R. Perlman
Criminal Defense Lawyers in Los Angeles, CA
www.danielperlmanlaw.com/

800-413-3821
Visit Website
Law Firm Profile
Contact us
Free Consultation
Learn More »

Takakjian & Sitkoff LLP
Criminal Defense Lawyers Serving Los Angeles, CA (Serving Los Angeles County)
www.formerdistrictattorneys.com
Former prosecutors specializing in Criminal and DUI/DWI defense in the Los Angeles area.

310-312-8055
Visit Website
Law Firm Profile
Contact us
Free Consultation
Learn More »

Top rated former prosecutor specializing in criminal law, voted a top criminal lawyer in CA, available 24/7. Call Daniel now!

310-299-8224
Visit Website
Law Firm Profile
Contact us
Free Consultation

2
Recommendations

Learn More »

Weinrieb Law Firm Criminal Defense Attorneys
Criminal Defense Lawyers in Los Angeles, CA
www.vwattorneys.com
Over 80 years combined Criminal Defense experience. Available 24/7 Immediate response.

Eisner Gorin LLP
Criminal Defense Lawyers in Los Angeles, CA
www.keglawyers.com
Rated Top 5% U.S. Law Firm. Former Prosecutors and Professor with over 50 years collective experience. 24/7 Immediate Response.

877-781-1570
Visit Website
Law Firm Profile
Contact us
Free Consultation
Learn More »

Law Offices of Jonathan Franklin

Criminal Defense Lawyers Serving Los Angeles, CA (Los Angeles/California)

Aggressive Criminal & DUI Defense by former prosecutor. Handling matters in Southern California area. Complimentary Parking.

310-598-7474

Law Firm Website

Law Firm Profile

Free Consultation

Miranda Rights Law Firm

Criminal Defense Lawyers in Los Angeles, CA

Been Charged with a Crime? We can help. Se habla Espanol. Over 10 years of experience, expert sex crimes defense.

Law Offices of Justin E. Sterling

Criminal Defense Lawyers Serving Los Angeles, CA (Encino)

CRIMINAL ATTORNEY OF THE YEAR; NATIONAL TRIAL LAWYERS; ALL CRIMES.

747-233-5889

Law Firm Website

Law Firm Profile

Contact us

Free Consultation

The Law Offices of Brian Bezonsky, APLC

Criminal Defense Lawyers in Los Angeles, CA

Providing the Highest Caliber Criminal Defense Representation in Los Angeles County

877-764-9528

Law Firm Website

213-255-3049

Law Firm Website

Law Firm Profile

Contact us

Free Consultation

Law Offices of Orly Ahrony

Criminal Defense Lawyers Serving Los Angeles, CA (Westlake Village)

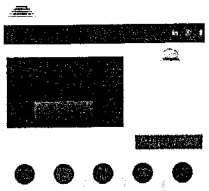
Criminal attorneys with success in appeals, habeas petitions, parole, and other post-conviction matters.

800-827-6917

Law Firm Website

Law Firm Profile

Free Consultation



Law Office of Errol H. Stambler

Criminal Defense Lawyers in Los Angeles, CA

Contact us for your Federal and Criminal Defense needs. Click here or call today.

310-694-5152

Law Firm Website

Law Firm Profile

Contact us

Free Consultation

The Taylor Law Firm DUI Attorneys

Criminal Defense Lawyers Serving Los Angeles, CA (Long Beach)

The Dean of DUI Attorneys". Highest-rated DUI defense firm. DUI defense exclusively for 34 years.

562-684-7781

Law Firm Website

Law Firm Profile

Contact us

Free Consultation

The Law Offices of Jacob Glucksman

Criminal Defense Lawyers in Los Angeles, CA

Former District Attorney and recognized SuperLawyer. Defending clients charges ranging from DUI to serious felonies.

310-954-8764

Law Firm Website

Law Firm Profile

Contact us

Free Consultation

Garber & Garber, A.P.L.C.

Criminal Defense Lawyers in Los Angeles, CA

www.garberlawfirm.com

Law Firm Website

Law Firm Profile

Free Consultation

Edward Y. Lee

Criminal Defense Lawyers in Los Angeles, CA

Law Firm Profile

Free Consultation

Anthony M. Solis, A Professional Law Corporation

Criminal Defense Lawyers in Los Angeles, CA

www.anthonysolis.com

Law Firm Website

Law Firm Profile

Free Consultation

Video

Werksman Jackson Hathaway & Quinn LLP

Criminal Defense Lawyers in Los Angeles, CA

www.werksmanjackson.com

Law Firm Website

Law Firm Profile

2

List

The Rodriguez Law Group

Criminal Defense Lawyers in Los Angeles, CA

Law Firm Profile

Free Consultation

Douglas Miranda

Criminal Defense Lawyers in Los Angeles, CA

Law Firm Profile

Free Consultation

Estelle & Kennedy APLC

Criminal Defense Lawyers in Los Angeles, CA

Law Firm Profile

LAW OFFICES OF
ANTHONY J. PULLARA
CRIMINAL DEFENSE ATTORNEY

Shouse Law Group

Criminal Defense Lawyers in Los Angeles, CA

Law Firm Profile

Free Consultation

Kevin T. Barnes

Law Offices of Kevin T. Barnes

Criminal Defense Lawyers in Los Angeles, CA

www.kbarneslaw.com

Law Offices of Anthony J. Pullara

Criminal Defense Lawyers in Los Angeles, CA

www.pullaralaw.com

Law Firm Website

Law Firm Profile

Free Consultation

Ali Ebrahimzadeh, Esq.

Criminal Defense Lawyers in Los Angeles, CA

Law Firm Profile

Free Consultation

Law Firm Website

Law Firm Profile

LAW OFFICES OF
C. W. BLAYLOCK

Video

Law Offices of C.W. Blaylock

Criminal Defense Lawyers in Los Angeles, CA

www.blaylocktrafficlaw.com

Law Firm Website

Law Firm Profile

Free Consultation

Law Offices of Daniel R. Perlman

Criminal Defense Lawyers in Los Angeles, CA

www.dpdefense.com

Law Firm Website

Law Firm Profile

Free Consultation

2

Recommendations

White Goldstein

Criminal Defense Lawyers in Los Angeles, CA

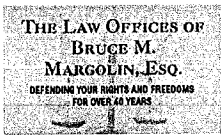
Law Firm Profile

www.thebestcriminaldefense.com

Law Firm Website

Law Firm Profile

Free Consultation



The Law Offices of Bruce M. Margolin, Esq.

Criminal Defense Lawyers Serving Los Angeles, CA (West Hollywood)

www.1800420laws.com

Law Firm Website

Law Firm Profile

Free Consultation

Free Consultation

Margolin | Lawrence

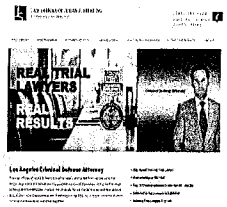
Criminal Defense Lawyers Serving Los Angeles, CA (Beverly Hills)

Law Firm Profile

Free Consultation

The Law Offices of Jacob Glucksman

Criminal Defense Lawyers Serving Los Angeles, CA (Beverly Hills)



Law Offices Of Justin E. Sterling

Criminal Defense Lawyers Serving Los Angeles, CA (Beverly Hills)

Law Firm Profile

Free Consultation

Bailey Law Corporation

Criminal Defense Lawyers Serving Los Angeles, CA (Beverly Hills)

Law Firm Profile

Free Consultation

Shouse Law Group

Criminal Defense Lawyers Serving Los Angeles, CA (Beverly Hills)

Law Firm Profile

Free Consultation

Showing 1-20 of 100 Results

« Previous

1

2

3

4

5

Next »

Legal Issue: Criminal La Location: los angeles

Facing Criminal charges?

You've come to the right place. Whether you were arrested for a crime against a person (like assault and battery or murder), a crime against property (like shoplifting, burglary, or arson), or any other criminal offense, a criminal defense attorney can help.

Use FindLaw to hire a local criminal law attorney to defend your rights at each stage of a misdemeanor or felony case -- from an arrest to an appeal after conviction.

Need an attorney in Los Angeles, California?

FindLaw's Lawyer Directory is the largest online directory of attorneys. Browse more than one million listings, covering everything from criminal defense to personal injury to estate planning.

Detailed law firm profiles have information like the firm's area of law, office location, office hours, and payment options. Attorney profiles include the biography, education and training, and client recommendations of an attorney to help you decide who to hire.

Use the contact form on the profiles to connect with a Los Angeles, California attorney for legal advice.

How do I choose a lawyer?

Consider the following:
Comfort Level - Are you comfortable telling the lawyer personal information? Does the lawyer seem interested in solving your problem?
Credentials - How long has the lawyer been in practice? Has the lawyer worked on other cases similar to yours?
Cost - How are the lawyer's fees structured - hourly or flat fee? Can the lawyer estimate the cost of your case?
City - Is the lawyer's office conveniently located?

Not sure what questions to ask a lawyer?

Here are a few to get you started:

- How long have you been in practice?
- How many cases like mine have you handled?
- How often do you settle cases out of court?
- What are your fees and costs?
- What are the next steps?

Want to check lawyer discipline?

Research Lawyer Discipline.

Learn More About

Legal Topics / State Laws / Bookshelf / Blogs / FindLaw RSS Feeds / Sitemap / Geography Sitemap / FindLaw En Español / LawBrain / FindLaw UK

Find a Lawyer

Browse by Location / Browse by Legal Issue / Browse by Law Firm & Lawyer Profile /

Find Answers

FindLaw Answers / Community Guidelines

Get Legal Forms

Visit our Legal Forms site

For Lawyers

Visit our professional site / Edit your legal profile / Website development / Advertise on our site

About Us

Company History / Media / Contact Us / Privacy / Terms / Disclaimer / Advertising / Jobs

Find Us On

Facebook Youtube Scribd Google Plus Twitter Pinterest

Are you a legal professional?

Online Marketing Solutions

Attorney Websites

Lawyer Advertising

Law Firm Marketing Resources

Marketing Playbooks

Marketing Success Stories

Law Firm Profile

Contact us

Free Consultation

Ambrosio E. Rodriguez

Criminal Defense Lawyers Serving Los Angeles, CA (Pasadena)

Former Senior DA who prosecuted over 1000 cases including Death Penalty trials. I will put my expertise to work for you.

800-461-2528

Law Firm Website

Law Firm Profile

Contact us

Free Consultation

ATTATCHMENT D

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-D-B

FROM: Lewis, Jessie
TO: 27612086
SUBJECT: RE: secretary
DATE: 04/15/2016 10:21:06 PM

Belived i am sorry to say that i have ran into some issues myself that's not up to discuss at this time. I really am on to correcting my problems right now and had no time to do anything for anyone calling. I had to even put my own daily task on hold because i found myself in a whole. I apologize for the inconvenience. And will be back on track and out of the dangers zone in the next day or two, god willing. I will up date you when i am back and on track. Love you dearly beloved.

LONNIE LILLARD on 4/14/2016 9:50:33 AM wrote
okay bet. Try to go over the last 13 DAYS of corrlink messages and please please please make a checklist. you can send me the checklist, that way we can both be on the same page

For instance you can let me know that you e-mailed 20 paralegals and 10 lawyers (YOU SHOULD KNOW WHO YOUR THREE PRIORITIES ARE THOUGH), and then just keep me updated with their responses (hopefully through copy and paste).

This may take about two to three weeks (at you snail pace, and I'm saying that fondly beloved - it seems like everyone is so damn sensitive nowadays that you actually have to really truly watch what we say to those who know us best, crazy isn't it) so i realize such.

i'll be waiting to hear from you. In the meantime ask Allah to have our minds join and meet together, so you can realize i can help you ease your burden and then you will really understand how important you can ease mine. I see, by the way, about 400 protestors got arrested about three days ago.

Love, your beloved Uncle
-----Lewis, Jessie Jr. on 4/13/2016 9:51 PM wrote:

>

Shit got bad for me the other day, im good but give me a day. Im on everything for you tonight.

LONNIE LILLARD on 4/13/2016 5:36:32 PM wrote
did you get those documents from the secretary who contacted you last friday. Maybe when you get some time you can contact him, if they did not arrive today. Additionally, don't bust a brain vessel while gathering your thoughts.

Thank you beloved for keeping me in and on your mind.

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-F-A

FROM: Gaines-poole, Stacy
TO: 27612086
SUBJECT: RE: RE:??????????
DATE: 05/23/2016 05:06:22 PM

I sent you the letter I typed I have it saved in my emails go over it make sure you like it I also printed out a list of attorneys and paralegals I will be calling and narrowing the list to send your letters by mail as well as email I will call and ask him to send you some money we talk often

LONNIE LILLARD on 5/23/2016 2:50:48 PM wrote
I was trying to figure out when did you last speak to my nephew. his number is 206-426-8322. Can you call him and ask him to send me a few dollars. he can go to www.bop.gov .
-----Gaines-poole, Stacy on 5/22/2016 7:51 PM wrote:

>

What does that mean

LONNIE LILLARD on 5/22/2016 4:06:44 PM wrote
Did somebody ask you to contact me?
-----Gaines-poole, Stacy on 5/21/2016 1:51 PM wrote:

>

I just want to stop and say I am doing all the above just haven't had a chance but first thing Monday I'm going to take the day to get this all out the way you always have been able to rely on me I got you my word I live and miss you and thank you for my card my door is open at all times for you I'll be sending you conformation Monday Nadia Nechole Favro

LONNIE LILLARD on 5/9/2016 12:50:21 PM wrote
Please please please make sure you hit the following people with my letter.

one of the e-mails is jessica@legalresearchconsultants.com

The other Five persons you will have to find out the e-mails on your own, however i hope the following info will be helpful in finding their e-mails (i am assuming it is on their websites)

Attorney Howard Srebnick who works at a law firm in Miami, Florida. It is called Black, Srebnick, Kornspan & Stumpf P.A.

Attorney Kent Russell
Russell & Russell Law Offices
2299 Stutter Street
San Francisco, CA 94115-3109

The last three attorneys that need to be e-mailed are out a law firm in New York called Patterson Belknap Webb & Tyler LLP. The first is Harry Sandick (He is a former assistant U.S. attorney for the Southern District of New York). The second is Daniel S. Ruzumna. The last one is a female, Cassye M. Cole.

Please please please make sure those persons get my request for the info that is contained in my letter.

Remember Ms. Nadia you have to give them your e-mail and then send me thier responses when they hit you (assuming they don't write me, which in this technological age will be the majority of paralegals and lawyers).

Since i heard that your are one of Prince's half sisters can you do me a huge favor and place a subscription to the "Prison Legal News." this is a periodical that comes out of our famous state and lists mainly new case law. They have many many advertisers that list their services in the Prison Legal News. So when you send out my letter to whomever you may find on the internet Maybe at least 100 (One Hundred) :) you can look at the website if there is one and definetly send e-mails containinf my letter to all of those.

Nephew was unfamilar with how to send e-mails (He has been locked up since he has been 17) so I hope you are more familar.

TRULINCS 27612086 - LILLARD, LONNIE - Unit: SET-F-A

FROM: Legal, Jessica
TO: 27612086
SUBJECT: 7th circuit says No-No to Judge who found drug quantities the jury didnt....
DATE: 06/16/2016 03:58:46 PM

Interesting Seventh Circuit ruling in US v. Saunders, No. 13-3910 (7th Cir. June 10, 2016). These passages from the partial dissent authored by Judge Manion provides a reasonable look into why this split panel's sentencing work is blog-worthy:

The jury in this case found beyond a reasonable doubt that the drug amount was between 100 grams and 1 kilogram. This necessarily implies that the jury found the offense did not involve 3.69 kilograms, but at sentencing, the district court found a 3.69-kilogram amount. These findings are irreconcilable. By its finding, the district court overrode the jury s decision. The Sixth Amendment does not allow this. I dissent from this aspect of the court s decision, but join in all other aspects....

A straightforward reading of the jury-verdict form does not allow this court to find an "effective acquittal." The jury does not in a single sentence, passing judgment on one count actually convict and effectively acquit. Here, the jury convicted Saunders and Bounds of a capped drug quantity, and its verdict should stand....

In its ruling today, the court affirms the district court s application of Watts to this case. It should not. Watts stands for the simple principle that a sentencing court may consider conduct underlying an acquitted charge if that underlying conduct is proven by a preponderance of the evidence. Watts, 519 U.S. at 157. Watts is therefore factually and legally distinguishable from this case. Instead of an acquittal, this case features an affirmative jury finding of fact. An acquittal is a legal conclusion, "not a finding of any fact," and it "can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt." See id. at 155 (internal quotation marks omitted)....

As the Supreme Court observed [in Watts], "That [acquittal] verdict does not preclude a finding by a preponderance of the evidence that the defendant did, in fact, use or carry such a weapon, much less that he simply possessed the weapon in connection with a drug offense." Id. at 157 (emphasis in original). In contrast, the two results in this case cannot square: the defendants cannot have (1) possessed less than 1 kilogram and (2) also possessed 3.69 kilograms. By flatly contradicting the jury s express factual finding, the sentencing judge in this case violated the Sixth Amendment rights of Saunders and Bounds. And if the jury system is to mean anything, this outcome is a problem.

ATTACHMENT

5

d Control number 0007168170	1 Wages, tips, other compensation 28,760.00	2 Federal income tax withheld 4,593.53
OMB No. 1545-0008	3 Social security wages 28,760.00	4 Social security tax withheld 1,783.12
	5 Medicare wages and tips 28,760.00	6 Medicare tax withheld 417.02

c Employer's name, address, and ZIP code

Sneaker Warz LLC
2605 SW Brandon St
Seatle, WA 98126

7 Social security tips .00	8 Allocated tips .00	9
10 Dependent care benefits .00	11 Nonqualified plans .00	12a Code See instructions for box 12
12b Code	12c Code	12d Code

b Employer identification number (EIN) 46-1047480

a Employee's social security number 539-90-7042

13 Statutory employee ☐ Retirement plan ☐ Third-party sick pay ☐

14 Other

e Employee's first name and initial Lonnie E Lillard Last name Register # 27612-086 Suff

~~11034 SE 240Th Place~~
~~B-204~~ Federal Detention Center-Seatac
~~Kent, WA 98030~~ P.O. Box 13900

f Employee's address and ZIP code Seattle WA 98198-1090

2015

Form W-2 Wage and Tax Statement

Copy B--To Be Filed With Employee's FEDERAL Tax Return

This information is being furnished to the Internal Revenue Service

15 State Employer's state ID number	16 State wages, tips, etc.
17 State income tax	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

Department of the Treasury - Internal Revenue Service

ATTATCHMENT

H

PROB 12C-WAR
(01/13)

UNITED STATES DISTRICT COURT

for

Western District of Washington

Petition for Warrant or Summons for Offender Under Supervision

Name of Offender: Lonnie Lillard **Case Number:** 2:15CR00270

Name of Judicial Officer: The Honorable Robert S. Lasnik, U.S. District Judge

Date of Original Sentence: 10/29/2008 **Date of Report:** January 5, 2016

Original Offense: Wire Fraud, Conspiracy to Committ Wire Fraud, Conspiracy to Produce, Traffic In and Use Counterfeit and Unauthorized Access Devices, and to Fraudulently Present Records of Access Device Transactions

Original Sentence: 105 months imprisonment; 3 years Supervised release

Type of Supervision: Supervised Release **Date Supervision Commenced:** 07/13/2015

Assistant U.S. Attorney: Timothy S. Vasquez **Defense Attorney:** G. Luke Ciciliano

Special Conditions Imposed:

☐ Substance Abuse ☒ Financial Disclosure ☒ Restitution: $79,055.55

☒ Mental Health ☐ Fine ☐ Community Service

☐ Other: Do not possess any firearms or dangerous weapons, submit to search, prohibited from incurring new credit charges, opening additional lines of credit without probation approval, prohibited from obtaining credit access devices without probation approval, you true name at all times and successfully complete an offender employment development program as directed by probation.

PETITIONING THE COURT

☒ To issue a warrant under seal

☐ To issue a summons

The probation officer believes that Lonnie Lillard has violated conditions of supervision by:

Violation Number	Nature of Noncompliance
1.	Committing the crime of Conspiracy to Commit Bank Fraud, on or before January 5, 2016, in violation of the standard condition to not commit a local, state, or federal crime.
2.	Leaving the Western District of Washington, on or before June 26, 2015, in violation of the standard condition to not leave the judicial district without permission of the court or probation officer.
3.	Associating with a known felon, on or before January 5, 2016, in violation of the standard condition of supervision to not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony.
4.	Obtaining a credit access device, on or before January 5, 2016, in violation of the special condition prohibiting obtaining a credit access device.

We incorporate by reference the information contained in the attached memorandum.

U.S. Probation Officer Recommendation:

☒ The term of supervision should be

☒ revoked.

☐ extended for ___ years, for a total term of ___ years.

☐ The conditions of supervision should be modified as follows:

☒ Detention pending final adjudication due to
☒ risk of flight.
☒ danger to community.

I swear under penalty of perjury that the foregoing is true and correct.
Executed on this 5th day of January, 2016.

Lisimba Jackson
U.S. Probation Officer

APPROVED:
Connie Smith
Chief U.S. Probation and
Pretrial Services Officer
BY:
Sarah R Johnson
Sarah R. Johnson
Supervising U.S. Probation Officer

THE COURT FINDS PROBABLE CAUSE AND ORDERS:

☐ No Action Approved
☒ The Issuance of a Warrant under seal
(conditions of supervision shall remain in effect pending final adjudication)
☐ The Issuance of a Summons
(conditions of supervision shall remain in effect pending final adjudication)
☐ Other

MR Slasnik
Signature of Judicial Officer
Jan. 5, 2016
Date

A P P E N D I X 8

Hon. Ricardo S. Martinez

United States District Court
Western District of Washington
At Seattle

UNITED STATES OF AMERICA Plaintiff V. Lonnie Lillard, Defendant.	No. CR16-07 RSM EX-PARTE LETTER CONCERNING INEFFICTIVE ASSISTANCE OF COUNSEL

Your honor I am requesting to withdraw my guilty plea. However my attorney Sombiner (Mr. Sombiner) refuses to file a motion to have the Court consider whether any "fair or just reason" exits as to my guilty plea being withdrawn.

Since Mr. Sombiner refuses to file such a motion, I'm requesting to represent myself. I know you have informed me I will not be

allowed to go pro se after Gombiner is re-appointed, However I do have valid reasons to withdraw my guilty plea and wholeheartedly believe I can meet the "fair and just reason" criteria.

After my guilty plea is withdrawn I'll be seeking to file a "motion to suppress" the evidence seized from my residence. I have learned in the past 45 days that my search warrant affidavit contains a false statement attributed to Joshua Means. Such statement supported the Magistrate's finding of probable cause. I could reasonably show that FBI agent Kevin Brennan's statement was made with a reckless disregard for the truth. A Franks issue.

In any event, Mr. Gombiner has intimidated me time and time again. On June 12, 2017 I sent him an email asking him ~~[illegible]~~ to withdraw off of my case due to his intimidation. On Sep. 11, 2017 I wrote the S.I.S. about Gombiner talking about putting his foot up my ass should I write you. I

requested the S.I.S. to have prison staff Sombiner no longer be allowed to visit me in the visiting room, but instead visit me from now on in the open day room. I Let the prison official know that I take Sombiner's statement as a direct threat since he said, when I asked him if was he, "serious", he replied as a "heartbeat."

In closing, I would like to represent myself once again so I can file my motion to withdrawl my guilty plea. In the alternative, I would like the Court to remove Mr. Sombiner as counsel and appoint Emily Gause (or whoever of the Courts choosing) to represent me whereas my TOTAL INTERESTS can be preserved for any potential appellate purposes. New Counsel, I believe, with their pair of fresh eyes, will in fact determine that "fair and just reasons" exist to withdraw my plea.

Very Truly Yours, Lonnie Lillard

Lonnie Lillard

A P P E N D I X 9

HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. LONNIE LILLARD, Defendant.	No. CR 16-007 RSM MOTION BY COUNSEL TO WITHDRAW

Robert Gombiner, attorney for Lonnie Lillard, moves to withdraw as Mr. Lillard's counsel and to have new counsel appointed.

I am moving to withdraw as counsel for Mr. Lillard because I believe I cannot continue to effectively represent Mr. Lillard and because Mr. Lillard no longer wants me to represent him. This motion is brought with much reluctance and I am well aware of the potential inconvenience, cost, and delay that granting will entail. However, Mr. Lillard's latest missive to the Court and the email he recently sent me convince me that I have no alternative but to move to withdraw.

During the time I have been representing Mr. Lillard, he has engaged in a variety of actions that have made representation challenging. Among other things, he, without my knowledge, communicated with the Stevens County prosecutor about aspects of the case, filed a motion to withdraw his guilty plea, filed objections to the presentence report (prompting the Government to argue that he should not receive any points for acceptance of responsibility), moved to represent himself, (and then subsequently asked that I resume representation), filed a bar complaint against me

Law Office of Robert Gombiner
705 2ND. Ave. S., Suite 1500
Seattle WA 98104
(206) 622-1604

(the complaint was dismissed without my having to respond), and filed other pro se pleadings with the Court. None of these actions caused me to request removal from the case.

However, in his most recent letter to the Court, Mr. Lillard explicitly alleges that I have threatened him in crude terms with physical violence and told him that my threat is as "serious as a heartbeat." In an email I received from Mr. Lillard last week, he informs me that he has written to the Bar Association about my alleged threat. In the email, he also reiterates that he does not want me to represent him and that he will not meet with me in any of the attorney visiting rooms at the Federal Detention Facility, apparently because of his concerns that I will intimidate or assault him.

I have no problem representing a client who does not agree with all of my legal assessments, or one who acts imprudently by communicating with the Court or the Probation Office, or even one who files a bar complaint against me (although I have never previously been the subject of a bar complaint). But it is not possible for me to represent someone who accuses me of threatening physical violence and insists that he will not meet with me in private. Accordingly, I am asking the Court to allow me to withdraw from Mr. Lillard's case.

DATED this 28th day of September, 2017.

Respectfully submitted,

/s Robert Gombiner

Law Office of Robert Gombiner
705 2ND. Ave. S., Suite 1500
Seattle WA 98104
(206) 622-1604

Law Office of Robert Gombiner
705 2ND. Ave. S., Suite 1500
Seattle WA 98104
(206) 622-1604

A P P E N D I X 10

HONORABLE JUDGE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LONNIE LILLARD Defendant.	CASE NO: CR16-07 RSM MOTION FOR STAY OF PROCEEDINGS

Lonnie Lillard, (hereinafter Mr. Lillard), unrepresented litigant, moves this Court for an order for a Preliminary Injunction or a Temporary Restraining Order (TRO). In the alternative Mr. Lillard seeks a stay of the proceedings in this Court pursuant to Landis v. North American Co., 299 U.S. 248 (1936), until the Ninth Circuit Federal Court of Appeals decides United States v. Lillard, No. 16-30194.

This motion is based on this District Court's broad inherent authority to grant equitable relief, and is supported by the following memorandum and Mr. Lillard's affidavit.

I. Summary of argument

This case involves Mr. Lillard being superseded on one Count of Conspiracy to Commit Bank Fraud. Mr. Lillard has since pled guilty and he is now awaiting sentencing. He currently has no sentencing date yet set due to several motions now pending before this Court that should be decided before such

Lonnie Lillard
FDC SeaTac Reg. #27612-086
P.O. BOX 13900
Seattle, WA 98198

sentencing hearing can take place.

On May 17, 2016, The Warden at the Federal Detention Center at SeaTac encumbered $6,671.81 in Mr. Lillard's inmate trust account. Mr. Lillard sent Warden Ingram an 'electronic request to staff' where he explained his monies was for retaining counsel. On May 26, 2016, Warden Ingram sent Mr. Lillard a reply and stated that he encumbered Mr. Lillard's funds at his discretion pursuant to Bureau of Prisons Program Statement 4500.11 § 8.8.

On June 31, 2016, The U.S. District Court in Washington at Tacoma received Mr. Lillard's motion wherein he requested that his funds be released by the BOP. On August 3, 2016, Mr. Lillard received the Government's opposition motion. Also on August 3, 2016, The District Judge at Tacoma, Judge Bryan, ordered the BOP to turn over the full amount of money in Mr. Lillard's inmate trust account (the amount was the same as was first encumbered) to the clerk of that Court by remittance of a check.

On December 14, 2017, Mr. Lillard filed his opening brief with the Ninth Circuit. The Ninth Circuit Court Clerk shortly thereafter filed Mr. Lillard's brief and currently the Government's brief is due on January 17, 2018. The pending decision in U.S. v. Lillard, No. 16-30194, will have a dispositive impact on this current case.

Mr. Lillard has presented his issues to the Ninth Circuit that encumbering his funds pursuant to an unlawful restitution order

needed to retain counsel of his own choosing violates the Fifth and Sixth Amendments. Mr. Lillard has also informed presented the Ninth Circuit with the issue that his monies were encumbered without due process of law.

As a result of the foregoing, the Court should stay Mr. Lillard's sentencing hearing until the Ninth Circuit decides U.S. v. Lillard, No. 16-30194.

II. Facts

For the Facts of this case see Mr. Lillard's attached affidavit. To the best of Mr. Lillard's knowledge these facts as outlined in his affidavit are 'undisputed.' As an initial matter, however, Mr. Lillard would ask this Court to take judicial notice pursuant to Federal Rules of Evidence 201 of the documents filed in the District Court at Tacoma in U.S. v. Lillard, No. C99-5163-RJB; U.S. v. Lillard, No. CR-98-5168-RJB (also at Tacoma); documents at the Ninth Circuit at U.S. v. Lillard, No. 16-30194; and documents at the U.S. District Court in Las Vegas Nevada U.S. v. Lillard, No. 2:06-cr-291-PMP-LRL; and documents in this Court at U.S. v. Lillard, No. CR15-270 RSL. These proceedings in these other Courts and cases have a direct relation to the matter (Mr. Lillard's requested stay) at issue, thus this court should take notice of such proceedings. See Reyn's Pasta Bella, LLC. v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

Furthermore, Mr. Lillard requests this Court to take judicial notice of the Bureau of Prisons Program statements

and Manuals, 2000.02 (Accounting Management Manual), 4500.11 (Trust Fund/Deposit Fund Manual), and 1330.18 (Administrative Remedy Program). See Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 742 n.4 (1976)(Court can take judicial notice of agency rules and regulations); U.S. v. Penn Foundry MFG. Co. Inc., 337 U.S. 198, 215 (1949)(Douglas J., concurring) (official communications which disclose policy, like reports, rules and regulations of agencies or other communications to Congress are equally reliable and authoritave and need no further proof).

III. Argument

The purpose of the preliminary injunction Mr. Lillard is seeking is to preserve the status quo pending the outcome of U.S. v. Lillard, No. 16-30194. See U.S. v. Philips Corp v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010). Since Mr. Lillard is seeking a preliminary injunction he must fullfill one of the two standards, the "traditional" or the "alternative". Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987). The traditional equitable criteria for granting a preliminary injunction is that Mr. Lillard must show that he is likely to to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Glossip v. Gross, 135 S. Ct. 2726, 2736-37 (2015)(citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). Under the alternative standard, Mr. Lillard may meet his burden by demonstrating either (1) a

combination of probable success and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Taylor v. Westly, 488 F.3d 1197, 1200 (9th Cir. 2007).

These two formulations of the alternative test represent " a continuum of equitable discretion, where by 'the greater the relative hardship to the moving party, the less probability of success must be shown.'" Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003)(quoting Nat'l Ctr. for Immigrants Rights, Inc. v. INS, 743 F.3d 1365, 1369 (9th Cir. 1984)).

The standards "are not discrete tests, but are instead 'outer reaches of a single continuum.'" Pratt v. Rowland, 65 F.3d 802, 805 (9th Cir. 1995)(citing Chalk v. United States Dist. Ct., 840 F.2d 701, 704 (9th Cir. 1988)). To obtain injunctive relief under either standard the moving part must demonstrate exposure to irreparable harm absent the requested judcial intervention . Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011).

If the balance of harm tips decidely toward Mr. Lillard, then he need not show as robust a liklihood of success on the merits as when the balnce tips less decidedly. Benda v. Grand Lodge of the International Association of Machinists, 584 F.2d 308, 315 (9th Cir. 1978). The threatened injury must be immediate. Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). Since the remedy is equitable in nature, there must be no adequate

Glendale, 518 F.3d 1090, 1093 (9th Cir. 2008)). This Court should further recognize that the Supreme Court has held that the Gonvernemnt must comport with the requirements of the Fifth Amendment's due process clause. In most cases "the constitution requires some kind of hearing **BEFORE** the state deprives a person of liberty or property." Shinault v. Hawks, 782 F.3d 1053, 1058 (9th Cir. 2015) (quoting Zinerman v. Burch, 494 U.S. 113, 127 (1990)). "[i]n situations where the state feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post deprivation tort remedy to compensate for the taking." Id. (Quoting Zinerman 494 U.S. at 132).

Of Course there was no post deprivation administrative remedy available to Mr. Lillard. He attempted to utilize the Administrative Remedy the BOP provides pursuant to P.S. 1330.18 but his administrative remedy was returned to him since he filed his motion to release the BOP encumbrance, in the U.S. District Court at Tacoma. See his motion at Docket No.79, in the District Court at Tacoma as well as his affidavit attached to this motion. It is undisputed Mr. Lillard did not receive prior notice to the taking of his funds nor did the District Court Judge Bryan grant him an evidentiary hearing. This resulted in Mr. Lillard not being allowed to present evidence and arguments which would have developed the record for the Ninth Circuit as well. See the record in U.S. v. Lillard 3:98-CR-05168-RJB-1. Mullane v. cent. hanover Bank & Trust Co.,

339 U.S. 306, 314 (1950) ("the fundamental requisuite of due process of law is the opportunity to be heard"). This was a case where the judicial machinery did not perform in the usual manner in its impartial task of adjudging Mr. Lillard's case. Gumport v. China Int'l & Inv. Corp. (In re Intermagnetics. Am. Inc.,) 926 F.2d 912, 916 (9th Cir. 1991).

Morover, the District Court Judge's decision will most likely be reversed since he denied Mr. Lillard's attorney, Thomas Cena, a 30 day continuance. Mr. Lillard's counsel's request for a continuance was not necessitated by his own lack of diligence. Mr. Cena was notified by the Court on July 1, 2016, that he was to represent Mr. Lillard and that he had until July 15, 2016, to decide what action he should take. He was granted a continuance until July 29, 2016. While Mr. Lillard does not know his counsel's exact reasoning for such (he never received counsel's motion or counsel's declaration in support of the continuance) it does appear that counsel did reach out to the government, only on occasion wherein government counsel had conducted only a cursory investigation and informed Mr. Lillard's lawyer he had no information to the effect of Mr. Lillard's monies were subject to such exemptions. Thus, it would not have been unreasonable for Mr. Cena to be granted adequate time to interview Mr. Lillard, acquire relevant evidence and be allowed to further research the matter. Thus, granting a continuance would have served a useful purpose and it is highly likely that

counsel would have been ready by August 28, 2016, had such continuance been granted. The Court nor the Government would have been inconvenienced by a hearing lasting for approximately 30 minutes. Mr. Lillard was prejudiced by Judge Bryan's denial of a 30 day continuance as requested by Mr. Lillard's lawyer. The result of the district court's denial of counsel's request for a continuance prevented Mr. Lillard from presenting any evidence and clear legal arguments in his behalf and deprived the District Court as well as the Ninth Circuit of an informed record upon which Mr. Lillard's rights could be weighed against the government's interests as well as the court analyzing its jurisdiction and relevant statutory authority.

Since Judge Bryan failed to create an adequate record to support his denial of the requested continuance and after the Ninth Circuit evaluates the four salient factors it is highly probable that Court will conclude that the denial was arbitrary or unreasonable and reverse the District Court's decision. See U.S. v. Nguyen, 262 F.3d 998, 1002(9th Cir. 2001); U.S. v. Rivera-Guerrero, 426 F.3d 1130, 1138 (9th Cir. 2005).

Mr. Lillard will most likely prevail on his claim that the Government's capricious self-execution of the restitution order was not reasonable.

//

//

//

//

//

The Government may enforce the order in the manner provided for in 18 U.S.C. §§ 3571-74 and 3611-15, and "by all available and reasonable means." Id. § 3664(m)(1)(A).

Additionally, the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. §§ 3001-3308 is one of the means available to the Government to enforce a restitution order. Under the FDCPA one of the authorized procedures is a writ of garnishment.

The Scheme Comgress has set up regarding the issuance and modification of criminal restitution order is detailed and extensice. Indeed, the MVRA under §3664(o) specifically addresses the finality of sentences that include a restitution order. 3664(o) provides that:

(o) A sentence that imposes an order of restitution is a Final Judgment notwithstanding the fact that --

1) such a sentence can subsequently be --
A) Corrected under Rule 35 of the Federal Rules of Criminal Procedure and §3742 of Chapter 235 of this title;
B) appealed and modified under § 3742;
C) amended under subsection § 3664(k), 3572, or 3613(A); or
C) amended under subsection (d)(5); or

2) the defendant may be resentenced under §3565 or 3614.

None of the above criteria allowed, however, the Government to collect restitution in the manner it did as related to Mr. Lillard.

After a District Court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for collecting restitution. 18 U.S.C. §3621(a). See also U.S. v. Wilson, 503 U.S. 329 (1992).

A federal restitution order is "a lien in favor of the United States on all property and rights to property" as if the liability were for "a tax assessed under the Internal Revenue Code of 1986." 18 U.S.C. 3613(c). The Ninth Circuit will therefore examine the statutes that govern tax liens. The Supreme Court has recognized that a federal tax lien is not self-executing. See U.S. v. Nat'l Bank of Commerce, 472 U.S. 713, 720 (1985). The Supreme Court held that affirmative action by the Government is required to enforce collection of unpaid taxes. Id. at 720. In Mr. Lillard's case, one course of action would have been for the Government to institute action in the District Court to enforce a lien "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest..." Id. This option by the Government obviously would have required judicial intervention before any encumbrance of Mr. Lillard's monies.

The second course of action available to the Government would not have required any action by the Court before such encumbrance. The Government simply would have had to provide notice to Mr. Lillard by way of certified or registered mail no less than 30 days before encumbering his monies in his trust account. See 28 U.S.C. §6331 (d)(1)(2).

In the Government's opposition motion they stated that the burden of the additional procedural safeguard - advance notice of the encumbrance - would greatly impair the Government's ability to

collect restitution. The Government went on to state, with advance notice, Mr. Lillard and similarly situated inmates could empty their accounts before they are frozen. This Court should take judicial notice that the Bureau of Prisons has a spending limit of $180.00 between the first and the 15th of each month and a total monthly spending limit of $360.00. Additionally, the only other way Mr. Lillard would have been able to deplete the thousands of dollars in his account is for him to have to complete a BP-199. However based upon the amount of money to be withdrawn, it would take more than the Trust Fund Manager's approval. The process could potentially take no less than 2 weeks after Mr. Lillard submitted his request. See Bureau of Prisons Program Statement s 2000.02 and 4500.11. In short, the Government would have been able to immediately seize Mr. Lillard's funds had, after he was provided with adequate notice, they '[reasonably]' believed collecting the restitution from his trust account was in jeopardy. See 26 U.S.C. §6303(b).

Needless to say the Government did not use any of the individualized statutory criteria to collect restitution. The only way Mr. Lillard can envision the Government enforced the unlawful restitution order was by alternative reasonable means. 18 U.S.C. § 3664(m)(1)(A).]

ENFORCING THE RESTITUTION ORDER BY REASONABLE MEANS

18 U.S.C. § 3664(m)(1)(A)(ii), if nothing else requires the Government to take prompt action to see that the victims are

awarded restitution in a commercially reasonable manner calculated to maximize monetary return. Anything less would be inadequate. U.S. v. Kaczynsk, 416 F.3d 971, 977 (9th Cir. 2005). Simply sitting on an order of restitution is not a reasonable means of enforcing it. Id. at 976.

As already mentioned the Government's collection of restitution is not self-enforcing or self-executing. It is safe to assume that the Ninth Circuit will hold that the Government's arbitrary seizure and encumbrance of Mr. Lillard's monies in his trust account was not enforced by reasonable means. It is even likely that since the restitution order was a final judgment and could not be re-opened without statutory authority and since the District Court at Tacoma did not rely on the proper statutes in ordering Mr. Lillard's monies to be applied towards restitution, then it is not a far cry that the Ninth Circuit may find that Judge Bryan acted without jurisdiction.

The due process clause requires a statute to be sufficiently clear so as not to cause "men of intelligence... [to] necessarily guess at its meaning and differ as to its application [.]..." Connally v. General Construction Co. 269 v.s. 385, 391 (1925), quoted in Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961).

It appears the Government relied on in their response, Doc. No. 87, that because Mr. Lillard is incarcerated, 18U.S.C.§3664 (n) allows all of his monies in his trust account to be applied to restitution because it is a substantial resource. However, Mr. Lillard is not under or serving a "period of incarceration." Mr.

Lillard is a pre-trial inmate and needed his monies to retain counsel to represent him on the current charge of conspirary to commit bank fraud. Mr Lillard was actively serching for counsel when his monies were encumbered.

The phrase "[P]eriod of incarceration is not defined in the staute. Other statutes do contain the phrase though. 18 U.S.C.§ 1101 (a) (48) (B); 42 U.S.C.§§ 416(i) and 423 see also 26 C.F.R. § 1,5000 A-3 that breaks down the term incarcerated as confined, after the disposition of charges in a prison or correctional.

While the phrase "period of incarceration" is not per se a technical phrase, it is essential in deciding how congress applied it to 18 U.S.C. §3664 (n). As a result the phrase should not be defined by some ordinary meaning isolated from the proper context Congress wished such term to be used in. Helvering v. San Joaquin Fruit & Inv. Co., 297 U.S. 496 (1936).

If congress did not mean for the statute to relate to, a period of incarceration after a lawful restitution order issued, it would simply have eliminated such phrase. Intelligent men can come to totally two different conclusions as to whether Mr. Lillard has to be incarcerated persuant to a conviction or simply be under pre-trial for the statute to apply to him. The statute clearly means Mr. Lillard has to be incarcerated pursuant to a duly noted conviction. Furthermore, if different wardens and U.S. Attorneys were able to sometimes apply the statute to only convicted inmates and others apply such to pre-trial inmates, this would allow subjective enforcement of the laws based on arbitrary or discriminatory

interpretations by government officers. Forbes v. Napolitano, 236 F.3d 1009, 1011 (citing City of Chicago v. Morales) 527 U.S. 41, 52 (1999). Just the mere arbitrary deprivation of Mr. Lillard's proprty is itself offensive to the constitutions due process guarantee. Smith v. Goguen, 415 U.S. 566, 575 (1972).

The statutes phrase period of incarceration is vague abd thereby offends due process. Moreover, §3664(n) is ambiguous relating to such phrase 'period of incarceration' and should be construed in Mr. Lillard's favor under the rule of lenity, that becausehe is a pre-trial inmate he is not under a 'period of incarceration'. The lenity doctrine encompasses the penalties imposed by criminal statutes.Hughey v. U.S., 495 U.U. 411, 110 S. Ct. 1979, 1985 (1990).

In closing, Congress did not intend to grant District Courts the general authority to bypass setting a proper payment schedule pursuant to §3664(f)(2) when a defendant has a restitution order against them and they are not under a 'period of incarceration' pursuant to §3664(n). Moreover, Congress did not intend for persons owing restitution that werepre-trial inmates to apply all of their substantial resources to owed restitution unless they were infact serving a 'period of incarceration' due to a lawful conviction. The District Court's failure to comply with the statutory scheme directive as set out by Congress, should render the Court's order requiring all of Mr.Lillard's monies to be turned over and applied to restitution null and void.

There is a high reasonable probability that Judge Bryant's reliance on §3664(n) will have left the Ninth Circuit with a definite and firm conviction that the district court committed a clear error of judgement. U.S. v. Hinkson, 585 F.3d 1247, 1260 (9th Cir. 2009)(en banc).

Lastly, it is undisputed that the district court at Tacoma simply ordered Mr. Lillard to immediately repay $79,130.55 in restitution without consideration of Mr. Lillard's financial circumstances or his ability to pay. See U.S. v. Lillard, cases No. CR99-5163-RJB sentencing transcripts and CR98-5168-RJB. See Doc No. 25 and 26 In doing so, restitution order is unlawful. See Ward v. Chavez, 678 F.3d 1042, 1050 (9th Cir. 2012).

It is anticipated the Government will argue that the district court's restitution order is unlawful because he did not appeal such order to the Ninth Circuit in 1998. However, since Mr. Lillard did not knowingly and voluntarity fail to exercise his statutory right to directly appeal the Court's restitution order, the Ninth Circuit may find that depriving Mr. Lillard's review of the lawfulness as to the restitution order will result in a miscarriage of justice. CF. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Additionally, several reported cases have even suggested a defendant cannot waive the right to appeal an unlawful sentence. See e.g., U.S. v. Cockerham, 237 F.3d 1179, 1182 (10th Cir. 2001); Deroo v. U.S., 223 F.3d 919, 923 (8th Cir. 2000); U.S. v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996).

Mr. Lillard has satisfied the first factor as set out in Nken that he has a likelihood of sucess on the merits. The

Ninth Circuit recognized courts use different formulation to describe such factor. Leiva-Perez v. Holder 640 F.3d 962, 966 (9th Cir. 2011)(per curiam). The Ninth Circuit has concluded that many of the formulations include "reasonable probability," "fair prospect," "substantial case on the merits," and "serious legal questions...raised," are largely interchangeable. Id. at 967-68. All of these formulations indicate that, "at a minimum" Mr. Lillard must show that there is a "substantial case for relief on the merits." Id. at 968. The standard does not require Mr. Lillard to show that "it is more likely than not that [he] will win on the merits." Id. at 966.

B. Irreparable Harm

The root meaning of the Constitution guarantee of the sixth Amendment is the right of Mr. Lillard to select counsel of his own choosing. See, U.S. v. Gonzalez-Lopez, 548 U.S. 140 147-148 (2006).

Mr. Lillard, prior to the unlawful encumbrance of his monies, did not require appointed counsel. Once the Government seized his monies in his trust account, they deprived him of being represented by the lawyer he wanted.Id. at 148-150. This forced Mr. Lillard to keep unwanted cousel, Mr. Robert Gombiner, and thereafter ultimately forced him to represent himself. Based upon such misconduct by the Government, this District Court's Judge Martinez, should indulge in every reasonable presumption against Mr. Lillard's waiver of right to counsel as he was placed in a Hobson's choice and such cannot be said to be voluntary, knowingly and intelligently made.

Brewer v. Williams, 430 U.S. 387, 384 (1977);Schell v. Witek, 218 F.3d 1017, 1024 (9th Cir.)

Mr. Lillard sought in good faith and was at the time his funds were seized, was bending over backwards to retain counsel of his own choosing. Mr. Gombiner knew this. See Mr. Lillard's attached affidavit. Mr Lillard conveyed such fact to Mr.Gombiner that his representation was contingent until he in fact hired new counsel. Thus such allocation of Mr.Gombiner staying on as Mr.Lillard's counsel cannot be justified as the Government's actions now turned Mr.Gombiner into "an unwanted counsel". Mr.Gombiner represented Mr.Lillard only through a tenous and unacceptable legal fiction and any defense presented by him was not the defense guaranteed to Mr.Lillard by the Constitution. See Faretta v. California, 422 U.S. 806, 821 (1975). Mr.Lillard violation of his right to counsel of choice is a structural error, Gonzalez-Lopez, 548 U.S.at 148-150; that is one of the very few kinds of errors that undermine the fairness of the criminal proceedings as a whole. U.S. v. Davila, 186 L.Ed.2d 139 151 (2013).

Furthermore, it cannot be said that Mr.Lillard had appropriate counsel at the critical stages of the proceedings that have occurred thus far in this Court. See U.S. v Hamilton, 391 F.3d 1066, 1070 (9th Cir. 2004); U.S. v. Yamashiro, 788 F.3d 1231, 1235-36 (9th cir.2015); see also U.S. v. Benford, 574 F.3d 1228, 1231-32 (9th cir. 2009); Musladin v. lamareque, 555 F.3d 830, 837-38 (9th cir. 2099).

the injury Mr.Lillard is continuously suffering is compounded every day he is detained based upon his unconstitutional conviction which is undeniably irreparable

C. Balance of Equities and the Public Interest

There is a public interest in a criminal conviction that is erroneous as it is abhorrent to justice. Christoffell v. U.S., 190 F.2d 585, 590 (1950). Of Course Mr. Lillard's wrongful conviction affects the integrity of this Court's proceeding and impugns the public reputation of judicial proceedings in general. See Harvey v. Horan, 285 f.3d 298, 316 (4th Cir. 2012); U.S. v. Pelullo, 14 F.3d 881, 894 (3rd Cir. 1994).

Furthermore the Government lacks an enforceable and defensible interest in an unconstitutional conviction. See U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993); Viereck v. U.S., 318 U.S. 236, 248 (1943)

Additionally, the Government cannot disavow liability for injury it caused to befallen upon Mr. Lillard. See Owen v. City of Independence, 445 U.S. 622, 650 (1980).

Finally, there is no substantive justification for placing an unconstitutional conviction on Mr. Lillard's record in the first place Gall v. Scroggy, 603 F.3d 346, 352 (6th Cir. 2010).

Thus granting an injunction or a TRO will not result in irreparable harm or substantial harm to the Government, especially taking into account that there conduct is unconstitutional, and they are the party that set the chain of events into effect.

D. In the Alternative of a Preliminary Injunction or TRO, this Court Should Issue a Stay

This Court has discretionary power to stay proceedings in its own Court. See Rhines v. Weber, 544 U.S. 269, 276 (2005). This Court should grant a discretionary stay pending the decision in U.S. v. Lillard, No. 16-30194 as such would simplify the proceedings in this Court and promote the efficient use of Mr. Lillard's, the Government's and this Court's limited resources.

See Leyva v. Certified Grocers of California, 593 F.2d 857, 863 (9th Cir. 1979). The interests Mr. Lillard has in both Courts substantially coincide, so much so that they outweigh any interest in this Court that the pending proceed not be subjected to interruption. Hartley Pen. Co. v. United States District Court, 287 F.2d 324 (9th Cir. 1961). It is highly probable that the Court of Appeals will dispose of the case controversy currently in this Court, in Mr. Lillard's favor.

CONCLUSION

In balancing all of the factors, this Court should conclude that the equities weigh in favor of Mr. Lillard. First, there is the high likelihood of success on the merits. Second, the potential for irreparable harm to Mr. Lillard far exceeds the potential for substantial injury to the Government. Finally, it serves the public good to grant an injunction, or TRO or otherwise for this Court to use its discretionary powers and stay the proceedings pending the outcome in the Ninth Circuit. The biggest factor in making the decision to stay Mr. Lillard's sentencing hearing or otherwise refrain from entering a judgment against him is the severity of the harm that would occur if the Government were to be found to have deprived him of his right to counsel of his own choice. This, coupled with the slight inconvenience to the Government, dictates that this Court should issue a stay. Accordingly, for the reasons mentioned in this memorandum of law the Court should grant Mr. Lillard's motion for a stay of the proceedings in this Court pending the resolution of Mr. Lillard's appeal to the Ninth Circuit. This Court shold issue the appropriate order.

Dated This 3rd day of January, 2018

Respectfully submitted

Lonnie Lillard

Lonnie Lillard - pro se defendant
FDC - SeaTac
P.O. Box 13900
Seattle, WA 98198

AFFIDAVIT OF LONNIE LILLARD IN SUPPORT OF MEMORANDUM OF LAW

AFFIDAVIT OF LONNIE LILLARD

The undersigned Movant being duly sworn states the following:

When I, Lonnie Lillard, (hereinafter Mr. Lillard), refer to 'Doc. No.' I am referring to the Docket sheet, denoting to the filed documents at U.S. v. Lillard, No. 3:98-CR-05168-RFB-1. When I refer to the Ninth Circuit I am referring to U.S. v. Lillard, No. 16-30194.

On May 16, 2016, I received my mail in a clear package from Correctional Officer Ms. Brown, of the Federal Detention Center in SeaTac, WA. The contents in the clear plastic bag consisted of a letter from the U.S. Attorney's Office in Seattle, WA dated May 12, 2016. The letter instructed the Appellant (hereinafter Mr. Lillard) to complete the form "Financial Disclosure Statement to be Completed by Individual Defendant." Mr. Lillard was not provided the envelope the contents were mailed in but instead was provided a photocopy of the face of the envelope. Mr. Lillard inquired as to Officer Brown as to why the contents of his came to him in a clear plastic bag but Officer Brown said she does not have an explanation. Doc. No. 79

On May 17, 2016, Mr. Lillard checked his available balance in his inmate trust account and noticed it was $0.00. Mr. Lillard immediately sent an "Electronic Request to Staff" inquiring as to why. Mr. Lillard explained that his previous balance was $6,671.81, but the notation on his account is stating that his funds have been encumbered pursuant to a Federal Court order. Mr. Lillard supplied a copy of the electronic request to staff to the District Court as an attachment to his motion to release encumbrance of his funds the Bureau of Prisons was holding. Doc. No. 79.

A couple of days later, the head of the Trust Fund Dept., Mr. Watts, replying to Mr. Lillard's earlier request provided him an amended judgment from District Court Case No. 3:98-cr-05168-RJB-1 and explained the U.S. Attorney had contacted his Dept. Doc. No. 79.

On May 25, 2016, after Mr. Lillard spoke with Bureau staff at the FDC, Counselor A.M. Woods, Mr. Lillard sent the FDC Warden Ingram an electronic request to staff informing him he took issue with the freezing of his monies. Mr. Lillard supplied the District Court with a copy of such as an attachment to his motion. Doc. No. 79.

On May 26, 2016, the Warden responded back to Mr. Lillard's eletronic request. The Warden stated that he encumbered Mr. Lillard's funds at his discretion pursuant to BOP Program Statement 4500.11 Section 8.8 The Warden advised Mr. Lillard he could challenge his action through the Administrative Remedy Program pursuant to BOP Program Statement 1330.18. Mr. Lillard attached a copy of the Warden's response to his Motion that was filed in the District Court. Doc. No. 79.

On or about June 13, 2016, Mr. Lillard sent the financial disclosure statement to the U.S. attorney's office. Mr. Lillard completed the form on May 18, 2016, and signed it

under penalty of perjury.Mr. Lillard proposed a payment plan to the U.S. attorney's office with an immediate payment of $350.00 and monthly installments thereafter of $40.00 per month, to begin on June 22, 2016. Doc. No. 79.

After receiving nothing officially from the U.S. Attorney's Office from the time his funds were frozen relating to their position, Mr. Lillard drew up a Motion requesting the District Court to order the Warden at the FDC to release his funds he had encumbered. This was done on June 26, 2016 and Mr. Lillard mailed the motion with the various attachments to the District Court on June 27, 2016. Doc. No. 79.

In the motion to release the BOP encumbrance, Mr. Lillard informed the District Court he was a pre-trial inmate at the FDC at SeaTac. He stated in his motion that he needed his monies to retain counsel of his own choosing. Doc. No. 79.

Mr. Lillard provided the Court with a copy of an envelope he received from a friend of his in Oakland, CA. Mr. Lillard also attached to his motion for the release of his funds, a copy of the letter wherein his friend stated he mailed several letters to attorneys in the Los Angeles, CA area that Mr. Lillard maybe interested in retaining for his criminal case No. CR16-07 RSM. Mr. Lillard provided the District Court with all the attorneys contact information his friend in California wrote to, by way of attachment to his motion to release his funds. Doc. No. 79.

Mr. Lillard informed the District Court his nephew had also been contacting paralegals and lawyers on Mr. Lillard's behalf since March 2016 as to Mr. Lillard's previously mentioned criminal case. Doc. No. 79.

Mr. Lillard provided the District Court, as an attachment to his motion, with correspondance visa Corrlinks.Com (a messaging service the BOP provides through the third party website) from a female friend of his that stated she was assisting him with obatining counsel of his choice. Doc. No. 79.

Mr. Lillard provided the Court, as an attachment to his motion, with another correspondance he received via Corrlinks where another friend of his had informed him he had contacted five lawyers on Mr. Lillard's behalf regarding Mr. Lillard's current criminal case. Doc. No. 79.

Mr. Lillard also provided the Court with correspondance via Corrlinks from a paralegal out of the State of Ohio. Mr. Lillard let the District Court know he inquired as to her fee for retaining her services but never heard back from her. Doc. no. 79.

Mr. Lillard informed the Court a paralegal out of Seattle, WA, J.R. Robinson, informed him, in response to Mr. Lillard's inquiry as to his services, that he could retain his services for $1,000 and ultimately he would charge a flat fee of $5,000.

Mr. Lillard informed the Court in his motion to release his funds, through his attached declaration, that he has had a balance in his inmate trust account of at least $6,000 since

January 31, 2016. Mr. Lillard let the District Court know that he believe Government counsel on his current criminal case read his e-mails and letters and randomly had the Warden at FDC SeaTac encumber his funds so he couldn't obtain his counsel of his own choosing. Doc. No. 79.

On July 7, 2016, Mr. Lillard received from Dawn H. Fernandez, a paralegal in the U.S. Attorney's Office in Seattle, WA, District Court Document No. 83. In that particular Document the Government stated they did not oppose the request for a continuance filed by Mr. Lillard's court appointed attorney, Thomas A. Cena Jr. Mr. Lillard never did receive Mr. Cena's request for a continuance and never received anything from the District Court that Mr. Cena had been appointed to represent Mr. Lillard in such action surrounding his frozen monies.

On August 3, 2016 Mr. Lillard received Doc. No. 86 from Mr. Cena. Mr. Cena had asked the District Court for no more than 30 days to conduct further research and investigate the applicability of the statutes and case law regarding the Government's authority to attach and confiscate Mr. Lillard's money in his trust account. That same date Mr. Lillard received Doc. No. 87 from Dawn H. Fernandez. This consisted of the Government's opposition to Mr. Lillard's motion at Doc. No. 79 as well as opposing Mr. Cena's request for a 30 day extension of time.

On August 3, 2016, 78 days after Warden Ingraham encumbered all of Mr. Lillard's funds in his trust account, the District

Court ordered the BOP to turn over the full amount of $6,671.81 to the Clerk of the Court by remittance of a check. Doc. No. 88.

After filing his Notice of Appeal, Mr. Lillard on October 24, 2016 mailed a Motion to Receive Free Copies of Documents that will Comprise the Excerpts of Records. Doc. No. 91. The Court held that under the Rule of Appellate Procedure 24(c), "[a] party allowed to proceed in forma pauperis may request that the appeal be heard on the record without reproducing any part." The Court denied providing Mr. Lillard the requested documents Mr. Lillard chose to comprise the excerpts of record on appeal pursuant to Federal Rules of Appellate Procedure 10(a) and Circuit Rule 10-2. Doc. No. 92.

On November 17, 2016 Mr. Lillard wrote Mr. Cena asking him to provide him with the documents that will make up the contents of the record on appeal that he had requested from the District Court. Mr. Lillard let Mr. Cena know he doesn't have any part of the record except the parts that the Orders the District Court had provided him, Mr. Cena's motion and the Government's reponse to Mr. Lillard's motion to release his encumbered funds. Mr. Lillard let Mr. Cena know he was provided with the Government's initial motion (Doc. No. 77). Mr. Cena refused Mr. Lillard's request. See motion mailed to Ninth Circuit on December 13, 2016.

On December 13, 2016 Mr. Lillard asked the Ninth Circuit to provide him with the documents he was requesting that would

comprise the excerpts of record. He explained to the Ninth Circuit that the District Court and his lawyer had both denied to supply him with such documents. Also in his motion to the Ninth Circuit he stated he needed to review the documents, comprising the excepts of the record , to perfect his appeal which would allow him to advance his position in guiding this court to make a proper and uniformed decision potentially favorable to him regarding the issue he will be presenting. Mr. Lillard pointed out to the Ninth Circuit that because he is currently a prisoner and not represented by counsel, appearing pro se, the District Court Clerk was required to forward him copies , upon the Court receiving his written request, within 21 days of the documents he requested that would comprise the excerpts of the record, pursuant to Circuit Rule 30-3.

However, on June 13, 2017 a two Judge Panel of the Ninth Circuit denied him an order requiring the District Court to provide him withthe requested excerpt of records.

As of to date, the filing of his opening brief, Mr. Lillard has a District Court Docket sheet and only has the following documents in his possession:

Document Nos. 80 (eighty), 83 (eighty-three), 86 (eighty-six) and 87 (eighty-seven), and 88(eighty-eight).

Other facts that are pertinent in resolving Mr.Lillard's claims on appeal is that Mr. Lillard was sentenced on August 28, 1998. At the time of sentencing, Mr. Lillard was an indigent

offender with no resources. At the sentencing hearing, the court determined Mr. Lillard was financially unable and was unlikely to become able to pay a fine and, accordingly waived the imposition of any fine. See sentencing transcripts which has been transcribed and is part of Lillard v. U.S., in the district court for the western district of Washington at Tacoma, case No. C99-5163-RJB. Mr. Lillard has also filed a "motion requesting the court to take Judicial notice" with the Ninth Circuit so the court will be aware of all facts relating to Mr. Lillard's issues he is presenting in his brief. See also Doc. No.25 and 26. However at sentencing, the court simply ordered restitution to be paid in full immediately. Again see sentencing transcripts and Doc. No. 25 and 26. Even though Mr. Lillard lacked any resources to pay in full on his restitution immediately, the district court's restitution order did not contain any type of payment schedule.

Mr. Lillard is currently a pre-trial inmate in connection with being charged with violating his supervised release. Mr. Lillard was an federal supervise release out of Washington state since the time of June 2014. During such time the government never informed Mr. Lillard they were seeking to collect a debt. See U.S. v. Lillard, Case No. CR15-270 RSL, U.S. District Court at Western District of Washington at Seattle.

Lastly, On May 21, 2017 I asked Mr. Gombiner, at the time my court appointed counsel, to withdraw from my case if he would not provide me with my discovery. On May 23, 2017 Mr. Gombiner only provided me with a discovery index consisting of 23 disks.

On May 24 2017 via CORRLINKS (a messaging system provided by the BOP) I again asked Mr. Gombiner to file a motion to terminate himself off of my case. On May 26, 2017, I sent the District Court in Seattle a motion to proceed to pro se and which I properly served. After the Magistrate denied my motion, on June 12, 2017 I asked Mr. Gombiner to again withdraw off of my case. July 6, 2017 I was allowed to proceed pro se. On August 11, 2017 after Mr. Gombiner told me I am doing a botcheed job to my defense and messing up mine as well as my co-defendant's Nathaniel Wells defenses and issues for sentencing and that Wells attorney is in agreement (referring to Mr. Levy), I gave Mr. Gombiner the Okay to resume control over my case as my counsel. On October 5, Judge Martinez once again granted my request to proceed pro se. It Should be noted that Mr. Gombiner told me he would inform this Court the Warden encumbered my monies I needed to retain counsel. He also said he would contact the Government.

Lonnie Lillard
Lonnie Lillard - Defendant

STATE OF WASHINGTON

COUNTY OF KING

In King County, on the 28 day of December, 2017, before me, a Notary Public in and for the above state and county, personally appeared Lonnie Lillard, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he executed said instrument for the purposes therin contained as his free and voluntary act and deed.

NOTARY PUBLIC A. M. Woods
My Commission Expires 10/29/20 AMW

CERTIFICATE OF SERVICE

Case Name: UNITED STATES v. LONNIE LILLARD
CASE NO. CR-16-07 RSM

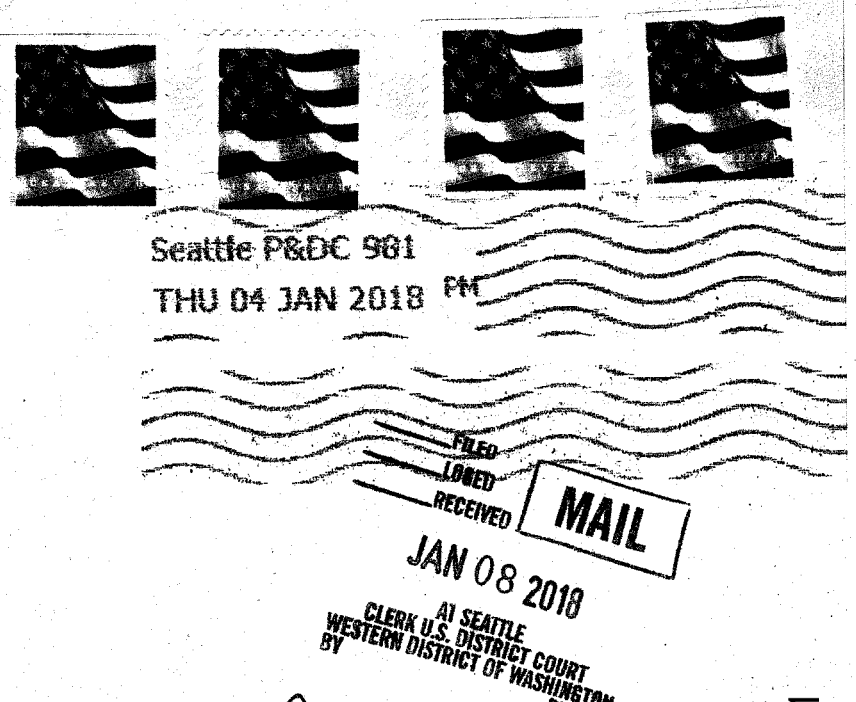
IMPORTANT: You must send a copy of ALL documents filed with the Court and any attachments to counsel for ALL parties in this case. You must attach a copy of the certificate of service to each of the copies and the original you file with the Court. Please fill in the title of the document you are filing. Please list the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below.

I certify that a copy of the MOTION TO STAY PROCEEDINGS
(title of document you are filing)
and any attachments was served, either in person or by mail, on the persons listed below.

Lonnie Lillard
Signature
Notary NOT required

Name	Address	Date Served
U.S. Attorney's office Erin H. Becker (AUSA)	700 Stewart Street Suite 5220 Seattle, WA 98101-1271	January 3, 2018

Lonnie Lillard
Reg. No. 27612-086
Federal Detention Center-SeaTac
P.O. Box 13900
Seattle, WA 98198-1090



Legal Mail

United States District Courthouse
Honorable Judge Ricardo S. Martinez
700 Stewart Street, Room 9121
Seattle, WA 98101-1271

A P P E N D I X 11

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT Seattle

LONNIE EUGENE LILLARD
Full name, address and prison number (if any)
Petitioner

v.

WARDEN, DAN SPROUL
Name of Respondent (person having custody of petitioner)
Respondent

18-CV-00077 JLR-BAT

Civil Case No. _____
(To be supplied by the Clerk of the District Court)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C., 2241.

INSTRUCTIONS - READ CAREFULLY

This petition must be legibly handwritten or typewritten, signed by the petitioner and verified under penalty of perjury before an authorized institutional officer. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question, insert an additional blank page and be sure to use the question number on the additional page.

No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order. When the form is completed, the original and two copies should be mailed to the Clerk of the U.S. District Court for the Western District of Washington, at Seattle or at Tacoma.

If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. You must also have an authorized officer at the institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your account exceeds $100.00, you must pay the filing fee.

1. Place of detention Federal Detention Center at SeaTac

2. Name and location of court and name of judge who imposed sentence: Western Washington U.S. District Court and Judge Martinez

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) No. CR16-07 RSM Conspiracy to Commit Bank Fraud

(b) _____

(c) _____

4. The date upon which sentence was imposed and the terms of the sentence:

(a) Sentencing is pending with No date as yet.

(b) _____.

(c) _____.

5. Check whether a finding of guilty was made:

(a) after a plea of guilty X.

(b) after a plea of not guilty _____.

(c) after a plea of nolo contendere _____.

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury _____.

(b) a judge without a jury X.

_____.

7. Did you appeal from the judgment of conviction or the imposition of sentence? NO.

8. If you answered "yes" to (7), list: N/A,

(a) the name of each court to which you appealed:

i. _____.

ii. _____.

iii. _____.

(b) the result in each such court to which you appealed:

i. _____.

ii. _____.

iii. _____.

(c) the date of each such result:

i. _____.

ii. _____.

iii. _____.

(d) if known, citations of any written opinions or orders entered pursuant to such results:

i. _____.

ii. _____.

iii. _____.

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

(a) The District Court acted outside the scope of its jurisdiction under the Mandatory Victim Restitution Act of 1996 statutory mandates when the Court ordered the Bureau of Prisons to forward all of the movant's (Mr. Lonnie Lillard) monies in his trust account to the Court Clerk at Tacoma to be applied towards restitution, which prevented movant from hiring counsel of his choice for his federal conspiracy bank fraud case, resulting in a violation of his Sixth and Fifth Amendment rights.

(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) For a complete list of facts in support of ground (a) as set out above, see pages 4-10.

(b)

(c)

11. Have you previously filed petitions for habeas corpus, motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction? NO

On August 3rd, 2016, The U.S. District Court for Western Washington, at Tacoma, in U.S. v. Lillard, case No. 3:98-cr-05168-RJB-1 ordered the Bureau of prisons to turn over all of my money in my trust account in the amount of $6,671.81.

The District Judge, the Honorable Robert J. Bryan, required the monies for a restitution order the Court signed off on in 1998.

The August 3rd, 2016 Court order was at the request of the United States. I never received from the United States, their motion Judge Bryan referenced in his Court order "Docket Number 77."

I did receive the Government's reply to my motion to release my funds the BOP encumbered. In their motion, the reply motion, "Dkt. 77" in case No. 3:98-cr-05168-RJB-1, the Government appeared to argue Judge Bryan can require me to pay the restitution from 1998 pursuant to 18 U.S.C. Section 3664(n).

In my motion to release my funds the BOP had encumbered, I explained to Judge Bryan that I needed my monies to retain Counsel of my own choice. I explained to Judge Bryan and provided him with

documentation from my family and friends that demonstrated they were actively contacting attorneys regarding potential representation of me, at the time my monies were encumbered.

At the time, May 17, 2016, is when the Warden at the Federal Detention Center at SeaTac encumbered my funds, I was a pre-trial inmate being detained for Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. §§ 1344 and 1349. Currently, I'm still being detained on such case which is the focus of this habeas action pursuant to 28 U.S.C. Section 2241.

On May 26, 2016, the Warden at FDC SeaTac responded back to a staff electronic request I sent on May 17, 2017 (upon learning of the BOP encumbrance of my monies). The Warden stated he encumbered my funds at his discretion pursuant to BOP program statement 4500.11 Section 8.8.

At the time of such encumbrance I was in default as to my restitution payments since I had been delinquent for more than 90 days, pursuant to

18 U.S.C. § 3572(i).

However, I did not know I was in default as to my restitution pursuant to 18 U.S.C. § 3612(e) as I never received any notification from the Attorney General or their authorized representative.

At the time when the warden encumbered my funds, I let the warden know I need my money to retain counsel in my active criminal case.

On May 16, 2016, I received a clear plastic bag from Ms. Brown, a Correctional officer at FDC Seatac. The contents of the bag consisted of a letter along with a "Financial Disclosure Statement to be completed by Individual Defendant" from the U.S. Attorney's office. The letter was dated May 12, 2016. I was not provided the envelope in which the contents were mailed but instead only a photocopy of the face of the envelope. Prison Staff did not open the envelope in front of me either.

On May 18, 2016 I completed the financial disclosure form ~~and~~ under penalty

of perjury, and on or about June 13, 2016, I mailed it back to the U.S. Attorney's office in Seattle. In the form, I proposed a payment plan to the United States of $40.00 of payments per month with an immediate payment of $350.00 to begin on June 22, 2016. When I heard nothing back from the United States is when on June 26, 2016, I drew up my motion asking Judge Bryan to order the warden at FDC SeaTac to release my funds he had encumbered. I mailed my motion to the U.S. District Court at Tacoma on June 27, 2016.

Prior to the warden encumbering my monies on May 17, 2016, I had a balance in my inmate trust account of at least $6,000 since January 31, 2016.

Pursuant to 18 U.S.C. § 3664(k) the United States never notified the District Court at Tacoma of the material change in my economic circumstances. From June 2014 until January 2016 I was on Federal Supervised Release. During such period of Supervised Release I filled out at least 3 (three) financial disclosure statements. Additionally, the

U.S. Attorney's office acquired my monthly reports I submitted to my probation officer.

When I was sentenced in 1998 before Judge Bryan, the Court determined I owed $79,130.55 and ordered "immediate payment" of the restitution. This was not done in accordance with the statutory scheme as set out by congress pursuant to 18 U.S.C. § 3664(f)(2). The District Judge did not consider my financial resources and other assets of mine, including whether any of such assets were jointly controlled; my projected earnings and other income of mine; and any financial obligations of mine, to include obligations to dependents.

At such time Judge Bryan imposed restitution against me, I was an unemployed indigent offender with financial obligations of over $25,000.

As to the statutory mandate pursuant to 18 U.S.C. § 3613A(a)(2) when Judge Bryan decided to order My monies be forwarded to the Court to be applied towards restitution, The Judge never considered my employment status, earning ability, financial resources,

my willfulness in failing to comply with the restitution order or any other circumstances that could have had a bearing on my ability or failure to comply with the order of restitution.

In closing, on May 21, 2017, I asked my court appointed counsel to withdraw off of my case. This is in this case which is the focus of this habeas action pursuant to §2241. On May 24, 2017, I again asked Mr Robert Gombiner (the Court appointed lawyer) to file a motion to terminate himself off of my case. On May 26, 2017, I sent this District Court a motion to proceed pro se which I properly served. After the Magistrate Theiler denied my motion, on June 12, 2017 I asked Mr. Gombiner to again withdraw off of my case. On July 6, 2017, Judge Martinez allowed me to proceed pro se.

After Mr. Gombiner told me I was doing a botched job, and informing me I was messing up my defense and my co-defendant's lawyer, Gilbert Levy, felt I was messing up his client, Nathaniel Wells issues for sentencing, on August 11, 2017 I allowed Mr. Gombiner to resume

control of my case. This would have been the third day of a four day evidentiary hearing. On October 5, 2017, after requesting to represent myself again due to a breakdown in communications with Mr. Gombiner, Judge Martinez allowed me to represent myself again. During Mr. Gombiner's representation of me, I informed him the Warden had encumbered my monies. Mr. Gombiner said he would contact the Government and have Ms. Becker, an AUSA, look into the matter. I let Mr. Gombiner know I needed my monies to retain counsel of my own choice, that I did not want to keep him on my case. Mr. Gombiner also said he would contact the Court and "maybe" file some type of motion before Judge Martinez. Mr. Gombiner ultimately told me he does not represent me on such matter in the U.S. Court at Tacoma and it has no bearing on the criminal case at hand as no attorney will allow me to retain their services for $6,000.

Finally, I have attached an affidavit to this motion, from my nephew, Lorenzo Sanders, showing I could have retained the services of Attorney Crowley for $5,500.

12. If you answered "yes" to (11), list with respect to each petition, motion or application: N/A.

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

(b) the name and location of the court in which each was filed:

i. _____

ii. _____

iii. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

13. If you did not file a motion under section 2255 of Title 28, United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

(a) "Pursuant to the judgment of a Federal Court," therefore my right to petition this Court arises from 28 U.S.C. § 2241(c)(3). See McNeely v. Blanas, 336 F.3d 822, 824 n.1 (9th Cir. 2003). Further more, the supporting facts show there are special circumstances warranting intervention in my ongoing federal criminal proceedings.

14. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under section 2255 of Title 28, United States Code, or any other petition, motion or application?

NO

15. If you answered "yes" to (14), identify: N/A.

(a) which grounds have been previously presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? N/A.

(c) your sentencing? Has not yet occurred

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

N/A.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you:

i. Robert Harris Gombiner 705 2nd Ave, Suite 1500, Seattle, WA 98104

ii. _____

_____

iii. _____

_____

(b) the proceedings at which each such attorney represented you:

i. the arraignment and guilty Plea

ii. the evidentiary hearing on Aug 11, 2017

iii. miscellaneous proceedings such as continuances dealing with Speedy trial.

18. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? YES

Lonnie E. Lilland
Signature of Petitioner

State of Washington)
) ss
County of King)

Lonnie Lilland, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Lonnie Lilland
Signature of Affiat

SUBSCRIBED and SWORN to before me this 11 day of JANUARY, 2018.
(month) (year)

A. M. WOODS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-29-20

A. M. Woods 10/29/20 AMW
Notary Public (or other official authorized by law to administer oaths)
Pierce

AFFIDAVIT OF LARENZO SANDERS

I, Larenzo Sander, the affiant, hereby depose and states:

1. This affidavit is completed for the purpose of assisting Mr. Lonnie Lillard in obtaining counsel of his choice.

2. I, Larenzo Sanders, am aware and acknowledging that Mr. Lonnie Lillard has been attempting to acquire mine and others assistance since March and April, in assisting him in contacting attorneys and researching their fee to retain them for counsel.

3. On numerous occasions I have made contact with, or attempted to make contact with law firms in the attempt to find out fees and retain counsel for Lonnie Lillard

4. On July 18th, 2016 I contact KNAUSS Law firm, Allen R. Bentlery, Christopher R. Black, and Jeffrey B. Coopersmith, all brief conversations in discussing retainer fees for Lonnie Lillard.
counsle
5. On July 18th, 2016 at 12:35 pm, I contacted Crowley Law firm out of Seattle Washington, speaking with Attorney Mr. John Crowley, himself. After approximately fifteen (15) minutes of speaking with Attorney Mr. Crowley on the phone, discussing the nature of Mr. Lillards case and answering his questions, Attorney Mr. Crowley agreed that fifty five hundred dollars ($5,500) would cover the cost to retain his services as counsel for Mr. Lonnie Lillard.

6. I, Larenzo Sanders, am a small business owner and have lawful income and means to pay any monthly payment of attorney fees, shall additional attorney fees arise. Furthermore, I am willing to make thosė monthly payments in covering the cost of additional attorney fees, solely for the counsel of Lonnie Lillards choice. I am only waiting on the decision of what attorney Mr. Lonnie Lillard chooses to represent him as counsel.

SUBSCRIBED and SWORN to before me this 26th day of AUGUST 2016

L. Sanders

Larenzo Sanders, the affiant

MATTHEW ENGELS
COMMISSION EXP.
NOTARY
PUBLIC
MAY 9, 2018
STATE OF WASHINGTON

NOTARY PUBLIC

Lonnie L. Hilyard
Reg. No. 27612-080
Federal Detention Center-SeaTac
P.O. Box 13900
SeaTac, WA 98198

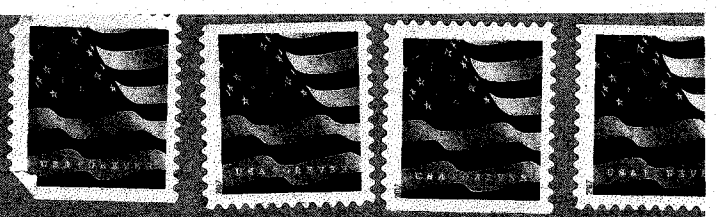
Seattle PSDC 981
TUE 16 JAN 2018

Clerk, United States District Court
United States Courthouse
700 Stewart Street, Room
Seattle, WA 98101-1271

Legal Mail

FILED
LODGED
RECEIVED
JAN 18 2018
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

Lonnie Lillard
Reg. No. 27612-086
Federal Detention Center-SeaTac
P.O. Box 13900
Seattle, WA 98198



Seattle PDC 981
TUE 16 JAN 2018 PM

Clerk, United States District Court
United States Courthouse
700 Stewart Street, Room
Seattle, WA 98101-1271

FILED
LODGED
RECEIVED
MAIL
JAN 18 2018
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
BY DEPUTY

A P P E N D I X 12

CA NO. 18-30106
CA NO. 18-30114
CA NO. 20-30110

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE EUGENE LILLARD, Defendant-Appellant.	D.C. Nos. 2:16-cr-00007-RSM-1 2:15-cr-00270-RSM-1

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE RICARDO S. MARTINEZ
United States District Judge

CARLTON F. GUNN
Attorney at Law
65 North Raymond Ave., Suite 320
Pasadena, California 91103
Telephone (626) 667-9580

Attorney for Defendant-Appellant

Pursuant to Circuit Rule 28-2.7, the pertinent statutory provisions are included in the Statutory Appendix.

III.
BAIL STATUS OF DEFENDANT

Mr. Lillard is presently serving his sentence. His projected release date is December 6, 2029.

IV.
STATEMENT OF THE CASE

A. THE FBI IS INFORMED OF CREDIT CARD FRAUD, AGENTS EXECUTE SEARCH WARRANTS, AND MR. LILLARD AND COCONSPIRATORS ARE CHARGED.

In late 2014, the FBI began an investigation after being contacted by a KeyBank investigator. RT(7/24/17) 45-46. The investigation revealed that multiple parties were reprogramming credit card point-of-sale terminals with merchant identification numbers and processing unauthorized transactions.[1] RT(7/24/17) 47-48. Five credit and debit card processing companies – Vantiv, Chase Paymentech, INCOMM, FirstData, and Green Dot Corporation – were identified as victims, and each provided spreadsheets of fraudulent credit and debit

[1] A point-of-sale terminal is the machine through which a merchant swipes a credit or debit card. *See* 4-ER-767–78, 775. A merchant identification number is a number assigned to a particular point-of-sale terminal. *See* 4-ER-770.

card transactions. *See* 3-ER-446, 462, 529, 534; 4-ER-623–24, 634, 642, 661, 751–52.

The investigation also identified Mr. Lillard and several others as conspirators. *See* RT(7/24/17) 50-52. The FBI obtained arrest warrants for several conspirators and search warrants for residences connected with the conspirators. RT(7/24/17) 59. Agents conducting the searches found large numbers of fraudulent cards, a point-of-sale terminal, and documents with card numbers, conspirator names, and other incriminating notes in the residences, including Mr. Lillard's apartment. *See* RT(7/24/17) 67-84. Agents also identified a storage locker rented by codefendant Melissa Sanders, obtained a search warrant for it, and found more fraudulent cards, point-of-sale terminals, and incriminating notes, as well as documents suggesting Mr. Lillard was the person using the storage locker. RT(7/24/17) 85.

The conspirators were indicted for conspiracy to commit bank fraud. *See* 5-ER-895-97. The banks named in the indictment were KeyBank, Green Dot Bank, Sunrise Bank, and JP Morgan Chase. *See* 5-ER-895.

B. MR. LILLARD PLANS TO RETAIN COUNSEL, BUT THE GOVERNMENT SEIZES FUNDS HE NEEDS.

Mr. Lillard was detained without bail. CR 19.[2] Several months later, the government discovered he had $6,671.81 in his inmate trust account. JNR-75.[3]

---

[2] "CR" refers to the docket entry for the main district court case in this appeal – No. 16-cr-00007.

[3] "JNR" refers to Bates numbered records from two related district court cases which are attached to an unopposed motion for judicial notice filed

Upon discovering this, the government moved for an order that the funds be applied to an outstanding restitution debt from a 1998 case. *See* JNR-74–80.

Mr. Lillard opposed the government's motion on several grounds, including that seizure of the funds would deprive him of his right to counsel of choice because he needed the funds to retain counsel or hire a paralegal in his new case. *See* JNR-30–73. He provided communications showing (1) he was looking for lawyers and paralegals and (2) one paralegal had agreed to assist for a retainer of $1,000 and an ultimate flat fee of $5,000. *See* JNR-45–47, 53–68. He reiterated his need for the funds in a later motion to stay proceedings in the new case, *see* 3-ER-357–58, and in a habeas petition related to the new case, *see* JNR-14, 15–16, 17, 21.[4] He also identified an attorney who had agreed to handle the new case for $5,500, and a relative who said he would pay additional attorney fees if they were needed. *See* JNR-21, 25. *See also* 2-ER-314.

The government's motion to seize the funds was granted despite Mr. Lillard's desire to retain counsel. *See* JNR-28–29. Mr. Lillard appealed, and this Court eventually vacated the seizure, but not until 2019, *see United States v. Lillard*, 935 F.3d 827 (9th Cir. 2019), by which time Mr. Lillard had already been sentenced in the new case, *see* 1-ER-19–50.

* * *

concurrently with this brief.

[4] The habeas petition was ultimately dismissed on the ground that its issues should be dealt with directly in the criminal case. *See* JNR-1–11.

C. MR. LILLARD PLEADS GUILTY, BUT SUBSEQUENTLY DISCOVERS THE GOVERNMENT'S EVIDENCE IS NOT WHAT HE THOUGHT, MOVES TO REPRESENT HIMSELF, AND FILES A "MOTION TO SUPPRESS."

Mr. Lillard eventually pled guilty, at first with a plea agreement, *see* 5-ER-870–94, and then without one, *see* 5-ER-848–69.[5] He also admitted violating his supervised release in another case, based mainly on the new offense. *See* 5-ER-865–67.

Several months later, Mr. Lillard moved to represent himself. *See* 6-ER-995–1000. After a magistrate judge denied the motion, the district judge held his own hearing. *See* 6-ER-973–91. The judge advised Mr. Lillard of the dangers of self-representation, *see* 6-ER-980–85, and had Mr. Lillard's attorney explain the potential penalties, *see* 6-ER-985–87. But there was no explanation of the nature of the charges, despite Mr. Lillard having indicated in a letter that he planned to file a motion to withdraw his guilty plea, *see* 6-ER-992–93. The judge granted the motion for self-representation when Mr. Lillard did not change his mind. *See* 5-ER-930 (07/06/2017 docket entry terminating attorney).

Mr. Lillard thereafter filed a pro se motion titled, "Defendant's Motion to Suppress Evidence to Be Introduced by Government at July 24, 2017 Evidentiary Hearing for Violation of Brady v. Maryland." 4-ER-778–846. He had discovered the victims who suffered loss were not the federally insured banks named in the indictment, but the payment processors and/or merchants. 4-ER-780–81. He had also discovered there was no evidence the merchants had accounts at the banks named in the indictment. 4-ER-792. His attorney had not given him a copy of the

[5] Mr. Lillard withdrew the first plea before it was accepted. *See* CR 96, 103.

discovery and shown him only a small portion of it, and the government had provided additional discovery just recently. 4-ER-834–36, 842–44.

The motion sought to exclude the payment processors' evidence on the ground the government had not disclosed the evidence until after Mr. Lillard's guilty plea, and the only viable remedy after a plea was exclusion of the evidence. *See* 4-ER-814–47. The motion argued there was a scheme to defraud only the payment processors, *see* 4-ER-781–82; there must be proof that federally insured banks were the target, *see* 4-ER-786; and there was no bank fraud because Mr. Lillard "only engaged in a scheme to defraud Green Dot Corporation and Chase Paymentech." 4-ER-791. This made the evidence insufficient to establish the jurisdictional element of bank fraud. 4-ER-786-88.

D. THE GOVERNMENT TRIES TO TIE LOSSES TO THE CONSPIRACY IN A MULTIDAY EVIDENTIARY HEARING.

An evidentiary hearing commenced the day after Mr. Lillard filed his "motion to suppress" and continued the next day and on two days in later months. *See* CR 165, 168, 178, 179. The government began with case agent testimony explaining how funds are transferred for credit and debit card transactions and the use of what are called "settlement accounts." *See* 4-ER-771–73. The banks named in the indictment were the banks at which "settlement accounts" were held. 4-ER-777. The government then presented testimony from two coconspirators. *See* RT(7/24/17) 127-266.

After this general testimony, the government presented evidence of amounts fraudulently "loaded" on credit and debit cards – through the spreadsheets provided by the payment processors. *See* 3-ER-445–81, 497–548; 4-ER-626–77,

752–62. The losses totaled $7,676,874.20. *See* CR 133, at 6-16 (government pre-hearing brief summarizing losses). Regarding who bore the losses, agents testified merchants had borne the Vantiv losses in 33 instances, *see* 4-ER-627, 637–38, 646–47, 664, 704; CR 133, at 6 (totaling victims); merchants had borne the Chase Paymentech losses in 31 instances, *see* 4-ER-757–58; and the INCOMM and Green Dot losses had been borne entirely by INCOMM and Green Dot, *see* 3-ER-533. FirstData provided no information. *See* CR 133, at 22; CR 206, at 8.

The government also sought to tie the transactions to the conspiracy. For some, it tied the transaction to a card, a point-of-sale terminal, or incriminating notes found in the searches. *See, e.g.*, 3-ER-499–500; 4-ER-653–54, 670, 761–62. For others, it tied the transaction to a hotel on a date when one of the conspirators had been a registered guest. *See, e.g.,* 3-ER-506–07, 516–19, 521–22. But for many of the transactions, the government relied on just an "assumption . . . that the frauds . . . were all perpetrated by the same group," based on "the similarity, the patterns, and then being able to locate transactions within the larger set of data that came back to our co-conspirators." 4-ER-731–32.[6]

The government also presented no evidence showing where the millions of dollars had gone. Mr. Lillard was tied to purchases of precious metals, but those totaled only about $25,000. RT(9/14/17) 736. And neither his bank statements nor the possessions in his apartment suggested wealth. *See* 4-ER-723 (nothing in Mr. Lillard's apartment "that looked super extravagant" and bank statements "in the ballpark of 2- or 3,000").

[6] The evidence is discussed in more detail in the argument *infra* pp. 44-46.

E. MR. LILLARD CHANGES HIS MIND ABOUT REPRESENTING HIMSELF AND THE COURT REAPPOINTS COUNSEL, BUT COUNSEL WITHDRAWS BEFORE PROCEEDINGS CONCLUDE AND MR. LILLARD IS REQUIRED TO REPRESENT HIMSELF AGAIN.

A week and a half before the third day of the evidentiary hearing, Mr. Lillard changed his mind about representing himself. His attorney, who had remained as standby counsel, filed a motion to resume representation, *see* 3-ER-600–04, which the district court granted, *see* 3-ER-599. The attorney represented Mr. Lillard during the third and fourth days of the hearing, *see* CR 178, 179.

Further conflicts arose, however. Mr. Lillard wrote the court stating that (1) he had recently discovered there were false statements in the search warrant affidavit and asked his attorney to file a motion to withdraw the plea, but his attorney refused; (2) his attorney had threatened him; and (3) he would like to either start representing himself again or get a new attorney. *See* 3-ER-441–43. The attorney then filed his own motion to withdraw, stating, "Mr. Lillard's latest missive to the Court and the email he recently sent me convince me that I have no alternative but to move to withdraw." 6-ER-970.

The court granted the attorney's motion without holding a hearing. *See* 1-ER-75. It told Mr. Lillard when he appeared for argument on the evidentiary hearing:

> Mr. Lillard, as I'm sure you're aware by now, the Court allowed your counsel to withdraw, for the reasons that were stated in the moving document that's been sealed. No need to discuss those reasons why. But from now on, through the end phase of this case, you'll be representing yourself, all right?

3-ER-368. Mr. Lillard then had to argue for himself at the hearing, *see* 3-ER-413–35, and file his own sentencing briefs, *see* CR 187, 196.

Several months later, the district court issued findings. It found a loss of $7,676,873, *see* 1-ER-67; found there were more than 10 victims, *see* 1-ER-68; and applied additional enhancements for "sophisticated means," possession of device making equipment, and role in the offense, *see* 1-ER-69–70. The court rejected a government argument Mr. Lillard should not receive a downward adjustment for acceptance of responsibility. *See* 1-ER-71. The resulting guideline range was 235-293 months. 1-ER-71.

F. MR. LILLARD MOVES TO WITHDRAW HIS PLEA BASED ON THE NEWLY DISCOVERED SUPPRESSION ARGUMENT AND HIS MISUNDERSTANDING OF THE LAW IN RELATION TO THE FACTS.

Mr. Lillard also filed the motion to withdraw his plea. *See* 2-ER-265–333. First, he argued he "did not 'possess an understanding of the law in relation to the facts' of the case," 2-ER-271 (quoting *United States v. Portillo-Cano*, 192 F.3d 1246, 1251 (9th Cir. 1999)), advancing arguments like he had made in his *Brady* "motion to suppress," *compare* 2-ER-270–78 *with* 4-ER-781–82, 785–89, 791. He had explained in an earlier motion for recusal that he would have filed a motion to withdraw the plea originally if he had known the district court would not consider the "motion to suppress." *See* CR 200 at 10 (explaining "had Judge Martinez told me, at the October 5 hearing, he was not going to consider my [motion to suppress], I would have filed a motion to withdraw my plea then"). He argued he should be allowed to withdraw his plea and the indictment should be dismissed. *See* 2-ER-265, 276, 278.

Second, Mr. Lillard argued for withdrawal of the plea so he could pursue a suppression motion. He had discovered the basis for the motion only after the

plea, when codefendant Nathaniel Wells gave him discovery showing the agent had made false statements in the search warrant affidavit.[7] 2-ER-280–82. He had not known this prior to the plea, and his attorney had told him there was no basis for a suppression motion. 2-ER-280–82.

The district court denied the motion to withdraw the plea at the sentencing hearing. *See* 1-ER-52.

G. THE COURT SENTENCES MR. LILLARD TO 196 MONTHS IN PRISON.

After denying Mr. Lillard's motion, the court heard sentencing arguments and sentenced Mr. Lillard. *See* 1-ER 19–50. The court varied downward from the 235-293 month guideline range, but only slightly – to a sentence of 196 months. *See* 1-ER-46–47. It also entered a restitution order of $5,816,938.82, to be distributed according to a government table of 69 victims. *See* 1-ER-11, 13–14, 44. Finally, it imposed a concurrent 36-month sentence for the supervised release violation. *See* 1-ER-39.

H. THE GOVERNMENT IS INFORMED IT WAS GIVEN INCORRECT INFORMATION ABOUT THE NUMBER OF VICTIMS AND THIS COURT GRANTS A LIMITED REMAND, BUT A PAYMENT PROCESSOR REPRESENTATIVE SAYS HE WAS MISTAKEN, AND THE DISTRICT COURT AFFIRMS ITS FINDING WITHOUT AN EVIDENTIARY HEARING.

Mr. Lillard appealed. While the appeal was pending, the government filed

[7] The agent's false statements are detailed in the argument *infra* pp. 31-32.

motions requesting a limited remand in both Mr. Lillard's appeal and Mr. Wells's appeal. *See* Docket #25, at 1, 4 n.2. It explained Chase Paymentech had informed the government it subsumed its merchants' losses, so those merchants were not victims, and it was "also investigating whether Vantiv subsumed more of its merchants' losses than initially believed." Docket #25, at 4. It sought a limited remand to recalculate the number of victims. Docket #25, at 5-6. This Court eventually granted the motion, *see* Docket #44, though the ruling was delayed by a pro se objection, a motion for substitute counsel, and further briefing by substitute counsel, *see* Docket ##28, 31, 35, 42.

After remand,[8] the government filed two status reports in the district court. In the first status report, the government indicated it "was advised by Vantiv that it had absorbed the loss of all of its victim-merchants except for Ovation Brands" in September 2018, and was advised at the beginning of January 2019 that "Chase Paymentech, too, had decided to absorb the losses of its victim-merchants." 2-ER-91. The government expressed some doubt about what Vantiv had told it, however. First, it described a lack of cooperation from Vantiv:

> [T]he government attempted several times to communicate with Vantiv. These efforts were largely unsuccessful; at most, it learned something to the effect that the department that had conducted the fraud investigation – or perhaps the department that made the decision to reimburse victim-merchants – had been disbanded. Further requests for information went unanswered.

2-ER-93. Second, it indicated two merchants claimed they were not reimbursed. *See* 2-ER-93.

A month and a half later, the Vantiv representative reversed his position. In a declaration accompanying a second status report, he stated:

---

[8] Mr. Wells did not oppose the remand, so his separate appeal was remanded first.

> The information I provided was incorrect. In the years between the fraud activity (in 2015) and the contact from the victim-witness coordinator (in mid-2018), other, similar fraud schemes targeting Vantiv/Worldpay and its clients have occurred, and some of those victim clients were reimbursed by Vantiv/Worldpay. I mistakenly confused the merchants in [Mr. Lillard's case] with other merchants who had been reimbursed in other, later fraud events.

2-ER-88–89.

The district court accepted the Vantiv representative's declaration, found the elimination of the Chase Paymentech merchants then made no difference, and reaffirmed the number of victims enhancement. *See* 1-ER-3–4. The court denied the defense request for an evidentiary hearing, *see* 1-ER-4, and did not hold a new sentencing hearing.

V.

SUMMARY OF ARGUMENT

There were two violations of Mr. Lillard's Sixth Amendment rights in this case. The first violation was allowing the government to seize the funds Mr. Lillard needed to retain counsel. This violated the right to counsel of choice under *Luis v. United States*, 136 S. Ct. 1083 (2016). *Luis* held that a governmental interest in the availability of untainted funds for restitution is outweighed by the defendant's interest in having the funds to retain counsel of choice. The seizure of funds also violated Mr. Lillard's due process right to present a defense by making the funds unavailable for other needed assistance, such as a paralegal.

The second violation of Mr. Lillard's Sixth Amendment rights took place when the district court allowed – and then required – Mr. Lillard to represent himself without satisfying the requirements of *Faretta v. California*, 422 U.S. 806 (1975). Allowing the initial self-representation was improper because the district

court's *Faretta* colloquy was deficient – when it failed to explain the nature of the charges. Allowing – or, really, requiring – the return to self-representation was improper because, first, the court did not hold a second *Faretta* hearing, and, second, Mr. Lillard did not unequivocally request the return to self-representation but made an alternative suggestion of substitute counsel.

The district court also erred in denying Mr. Lillard's motion to withdraw his guilty plea. First, the motion should have been granted based on Mr. Lillard's discovery of false statements in the search warrant affidavit, which could have justified a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). Post-plea discovery of grounds for a suppression motion is a basis for withdrawal of a plea. And the defendant need show only that the potential motion plausibly could have motivated a reasonable person not to plead guilty, not that the motion would have succeeded.

Second, the motion to withdraw the plea should have been granted because Mr. Lillard did not possess an understanding of the law in relation to the facts. Just as he discovered the grounds for a suppression motion after having entered his plea, he discovered facts that under his understanding of the law are critical to the question of guilt. While the government argued Mr. Lillard misunderstood the law, that is, first, debatable, and, second, not the critical question. The test for withdrawal of a guilty plea is whether it is plausible the defendant would not have entered the plea, and that depends on what the defendant's understanding of the law is, not whether his understanding is correct. Mr. Lillard's understanding of the law makes it plausible he would not have entered his plea because his understanding served as a basis for challenges to the sufficiency of the evidence and indictment that could be made effectively only during or before a trial.

The district court also erred in sentencing. First, the new and conflicting

information on the number of victims required an evidentiary hearing with cross-examination of the Vantiv investigator, or at least a new sentencing hearing. An evidentiary hearing was required because the Vantiv investigator's flip-flopping about whether the merchants subsumed the losses raised serious questions of reliability. And a new sentencing hearing was required even if an evidentiary hearing was not. The original sentence was based in part on other information that was indisputably false, namely, that Chase Paymentech merchants were victims. That false information was material even if it did not affect the guideline range, because the number and nature of victims is part of the nature and circumstances of the offense.

There was also error in the loss and restitution calculations. First, there was insufficient evidence to tie all of the losses to the conspiracy; particularly problematic is the government's reliance on an "assumption . . . that the frauds . . . were all perpetrated by the same group," based on "the similarity, the patterns, and then being able to locate transactions within the larger set of data that came back to our co-conspirators," *supra* p. 9. Second, the dramatic impact of the loss calculation on the offense level, which was 18 levels, means the district court should have used the more stringent clear and convincing evidence standard.

There were also other, secondary sentencing errors. First, there were two errors in the restitution order: (a) making restitution "due immediately" while at the same time setting a payment schedule; and (b) a provision in the written judgment that required payments during imprisonment when that was not in the oral pronouncement of sentence. Second, the three-year supervised release revocation sentence exceeds the statutory maximum, which is just two years.

Finally, the court should order reassignment on remand. Concerns the judge has become "fed up" with Mr. Lillard and is inclined to act precipitously are

suggested by (1) the district judge's order, without even holding a hearing, that Mr. Lillard return to representing himself and (2) a denial of Mr. Lillard's "motion to suppress" at sentencing when the judge appeared not even to remember the motion. And the district judge's summary action in the limited remand – accepting a declaration with no testing in any sort of hearing – suggests a desire to simply be done with the case.

VI.

ARGUMENT

A. MR. LILLARD WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE, IN VIOLATION OF *LUIS V. UNITED STATES*, 136 S. Ct. 1083 (2016), AND DENIED DUE PROCESS, WHEN THE GOVERNMENT UNLAWFULLY SEIZED FUNDS HE NEEDED TO RETAIN COUNSEL.

1. Reviewability and Standard of Review.

Mr. Lillard challenged the seizure of funds from his inmate account in multiple district court filings, as summarized *supra* p. 5, and continued that challenge in his other appeal to this Court, *see* Appellant's Informal Brief, at 10, 12-13, *United States v. Lonnie Lillard*, 935 F.3d 827 (9th Cir. 2019) (No. 16-30194), ECF No. 15. He indicated he needed the funds to retain counsel, identified at least one attorney who would take the case, and identified a relative who said he would pay additional attorney fees if more funds were needed.

The district courts rejected Mr. Lillard's argument. *See* 1-ER-53; JNR-29. The underlying question is a combination of statutory interpretation and

constitutional law, so it is reviewed de novo. *See United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019) (reviewing order in 1998 case de novo); *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc) (questions of constitutional law generally reviewed de novo).

2. The Seizure of Funds Violated Mr. Lillard's Sixth Amendment Right to Counsel of Choice.

The Sixth Amendment right to counsel includes a right to counsel of choice when the defendant can retain the counsel and it does not interfere with other court interests. This was first recognized almost a century ago, when the Supreme Court stated the Sixth Amendment grants a defendant "a fair opportunity to secure counsel *of his own choice*." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (emphasis added). The right has been recognized multiple times since then as well, albeit with some limitations. *See Luis v. United States*, 136 S. Ct. 1083 (2016); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989); *Wheat v. United States*, 486 U.S. 153 (1988).

In two of the cases, the Court considered whether the right is violated when the government seizes funds the defendant needs to retain counsel. In *Caplin & Drysdale*, the Court held post-conviction seizure under a forfeiture statute of funds derived from the crime of conviction did not violate the right to counsel of choice. *See id.*, 491 U.S. at 624-32. In *Luis*, the Court distinguished *Caplin & Drysdale* and held pretrial seizure of "untainted" funds not traceable to the defendant's crime did violate the right to counsel of choice. *See Luis*, 136 S. Ct. at 1096. The Court explained:

> The relevant difference consists of the fact that the property here is untainted; *i.e.*, it belongs to the defendant, pure and simple. In this respect it differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime. The Government may well be able to freeze, perhaps to seize, assets of the latter, "tainted" kind before trial. As a matter of property law the defendant's ownership interest is imperfect. The robber's loot belongs to the victim, not to the defendant. The cocaine is contraband, long considered forfeitable to the Government wherever found. And title to property used to commit a crime (or otherwise "traceable" to a crime) often passes to the Government at the instant the crime is planned or committed.

Id. at 1090 (citations omitted).

Luis was not based on a complete absence of statutory authority for the seizure, moreover. The Court acknowledged there was statutory authority and explained this required a balancing.

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

Luis, 136 S. Ct. at 1093. The Court then resolved the conflict – in favor of the defendant's Sixth Amendment interest. It based this resolution on three considerations.

First, the Court relied on a comparison of interests on the two sides of the conflict. On the defendant's side, there is "a Sixth Amendment right to assistance of counsel that is a fundamental constituent of due process of law." *Id.* On the government's side, there are the interests of obtaining payment of a criminal forfeiture or restitution order, which are "important," but not constitutional. *Id.* The Court opined that "compared to the right of counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal

justice system." *Id.*

Second, the Court looked to "relevant legal tradition." It acknowledged a general penalty of forfeiture of "goods and chattels" in old English common law, but noted even that took place only upon *conviction* of an offense. *See id.* at 1094. Third, the Court noted concern about the "steep" financial consequences of a criminal conviction "erod[ing]" the right to counsel. *Id.* It worried, "How are defendants whose innocent assets are frozen in cases like these supposed to pay for a lawyer – particularly if they lack 'tainted assets' because they are innocent, a class of defendants whom the right to counsel certainly seeks to protect?" *Id.* at 1095.

It is *Luis* that controls here. Initially, like *Luis* and unlike *Caplin & Drysdale*, the present case involves untainted funds. It is a difference between "(1) what is primarily 'mine' (the defendant's) and (2) what is primarily 'yours' (the Government's)." *Luis*, 136 S. Ct. at 1092.

Secondly, there is not a statute like the forfeiture statute in *Caplin & Drysdale* that makes the property legally the government's. The only statute here is 18 U.S.C. § 3613(c), which simply creates a lien on defendant property when there is a restitution order, *see id.*, and even then requires a notice to perfect the lien, *see* 18 U.S.C. § 3613(d). Further, the court can override the lien. As recognized in Mr. Lillard's other appeal, 18 U.S.C. § 3664(k) "grants the district court discretion in addressing a defendant's changed circumstances, allowing for potential '. . . relief.'" *United States v. Lillard*, 935 F.3d at 833. It is also highly debatable whether this discretion should – or could – be exercised to allow seizure of funds needed for retaining counsel.

This statutory interest is more like the one in *Luis*, which merely "authorizes

a court" to restrain the property. *Id.*, 136 S. Ct. at 1093. It falls well short of the forfeiture statute in *Caplin & Drysdale*. That forfeiture statute does not merely create a lien, is not merely permissive, and is not merely forward-looking. It provides, "All right, title, and interest in property [constituting or derived from any proceeds obtained from the crime] vests in the United States *upon the commission of the act* giving rise to [the] forfeiture." *Luis*, 136 S. Ct. at 1090 (quoting *Caplin & Drysdale*, 491 U.S. at 625 n.4, and 21 U.S.C. § 853(c), and adding emphasis).

Finally, the three considerations upon which *Luis* relied – or comparable considerations – extend. The comparison of conflicting interests is exactly the same. On Mr. Lillard's side was the fundamental Sixth Amendment right to counsel of choice. On the government's side was the same non-constitutional interest in restitution. That governmental interest is, per *Luis*, "somewhat further from the heart of a fair, effective criminal justice system." *Id.*, 136 S. Ct. at 1093.

The other two considerations are not exactly the same, but do favor Mr. Lillard's interests more than the government's. The underlying restitution order was imposed following a conviction, but it is not the mandatory and immediate forfeiture of all "goods and chattels" that old English common law required. While the court must order restitution, it has discretion – through 18 U.S.C. § 3664(k) – to preserve some "goods and chattels" for appropriate expenses. *See United States v. Betts*, 511 F.3d 872, 877 (9th Cir. 2007) (recognizing "room for judicial discretion" under § 3664(k)); *United States v. Corbett*, 357 F.3d 194, 196 (2d Cir. 2004) (distinguishing between "reasonable expenses" and "extravagant living expenses").

The concern about the financial consequences of a criminal conviction eroding the right to counsel also extends. *Luis* did express greater concern about

"innocent" defendants, *id.*, 136 S. Ct. at 1095, and Mr. Lillard was no longer innocent in the old 1998 case. But he was unconvicted and presumed innocent in the new case at the time the funds were seized. Further, even if he is not labeled "innocent," guilty defendants have the same Sixth Amendment rights as innocent defendants.

An out-of-circuit case the government cited in Mr. Lillard's other appeal – *United States v. Scully*, 882 F.3d 549 (5th Cir. 2018) – does appear to take a contrary view, but its reasoning is faulty. The funds at issue in *Scully* were, like Mr. Lillard's funds, untainted, and the defendant did want to use them to retain counsel – on appeal after having been convicted. *See id.*, 882 F.3d at 550-51. The court distinguished *Luis* because the seizure there was after a conviction and judgment of restitution, which created the lien provided for in § 3613(c). *See Scully*, 882 F.3d at 553. The court reasoned:

> The Government's lien on Scully's funds is superior to Scully's alleged Sixth Amendment interest in using them to pay appellate counsel. *Caplin & Drysdale*, *Luis*, and section 3613(c) dictate that Scully no longer has any equity interest in the untainted funds he wishes to use for appellate counsel. (Footnote omitted.)

Scully, 882 F.3d at 553.

This is unpersuasive for two reasons. First, the assertion that the defendant "no longer has any equity interest in the untainted funds" is not correct. The defendant did still have an interest in the property. All the government had was a lien – and one it had to file a notice to perfect. Further, the lien was subject to the court's discretion under § 3664(k) to preclude seizure of funds needed for reasonable expenses.

Second, the assertion that the government's lien was superior to the defendant's Sixth Amendment interest conflicts with *Luis*. *Luis* holds the Sixth

Amendment right to counsel of choice superior. It characterizes the right to counsel of choice as "a fundamental constituent of due process of law" and the government interest as "important," but "somewhat further from the heart of a fair, effective criminal justice system." *Id.*, 136 S. Ct. at 1093.

At least where a court has not expressly decided differently under § 3664(k), a governmental lien interest should not prevail over the constitutional right to counsel of choice. It was error for the district courts to rule otherwise – and structural error at that, *see United States v. Gonzalez-Lopez*, 548 U.S. at 150.

3. The Seizure of Funds Infringed on Mr. Lillard's Due Process Right to Present a Defense.

The seizure of Mr. Lillard's funds also infringed upon a broader right. In addition to the Sixth Amendment right to counsel, a defendant has a more general due process right "to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This includes not just the right to counsel, but the "basic tools of an adequate defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). Those tools include both experts such as psychiatrists, *Ake*, 470 U.S. at 83, and non-experts such as investigators, *United States v. Mikhel*, 552 F.3d 961, 964 (9th Cir. 2009).

The seizure of Mr. Lillard's funds infringed on this right in multiple ways. It prevented him from hiring counsel of choice instead of either settling for appointed counsel with whom he was not satisfied or going pro se. It prevented him from hiring a paralegal when he felt forced to go pro se. It prevented him from paying for other assistance. There was thus a violation of due process in

addition to the Sixth Amendment right to counsel of choice.

B. MR. LILLARD WAS DENIED HIS SIXTH AMENDMENT RIGHT TO APPOINTED COUNSEL BECAUSE THE DISTRICT COURT, FIRST, ALLOWED HIM TO REPRESENT HIMSELF WITHOUT A PROPER *FARETTA* COLLOQUY, AND, SECOND, ALLOWED REAPPOINTED COUNSEL TO WITHDRAW AND REQUIRED MR. LILLARD TO REPRESENT HIMSELF WITHOUT A SECOND *FARETTA* COLLOQUY AND BASED ON ONLY AN EQUIVOCAL REQUEST.

1. Reviewability and Standard of Review.

The validity of a waiver of counsel is a mixed question of law and fact subject to de novo review. *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004). Review is de novo even when there was no objection in the district court. *Id.*

2. Mr. Lillard Was Denied His Sixth Amendment Right to Appointed Counsel Because the Court Allowed Him to Represent Himself Without a Proper *Faretta* Colloquy.

While *Faretta v. California*, 422 U.S. 806 (1975), did recognize a right of self-representation, it did not suggest self-representation was desirable. "Rather, the reverse is true." *United States v. Hayes*, 231 F.3d 1132, 1136 (9th Cir. 2000). As the Supreme Court explained, "[e]ven the intelligent and educated layman" "is

incapable, generally, of determining for himself whether the indictment is good or bad," "is unfamiliar with the rules of evidence," and "lacks both the skill and knowledge adequately to prepare his defense." *Faretta*, 422 U.S. at 833 n.43 (quoting *Powell v. Alabama*, 287 U.S. at 69).

Because of these concerns, "a defendant who chooses to represent himself must "be fully informed of the ramifications of that decision." *Hayes*, 231 F.3d at 1136. This generally requires advice of "three elements": (1) "the nature of the charges against him"; (2) "the possible penalties"; and (3) "the dangers and disadvantages of self-representation." *Id.* (quoting *United States v. Hernandez*, 203 F.3d 614, 624 (9th Cir. 2000), and *United States v. Farhad*, 190 F.3d 1097, 1099 (9th Cir. 1999)). The court must "indulg[e] 'every reasonable presumption against waiver.'" *United States v. Arlt*, 41 F.3d 516, 520 (9th Cir. 1994) (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

The district court did engage in a partial colloquy with Mr. Lillard when it considered his motion to represent himself. It advised Mr. Lillard at some length of the dangers and disadvantages of self-representation. *See* 6-ER-980–85, 987–88. It had defense counsel explain the potential penalties. *See* 6-ER-985–87. But there was no explanation of the nature of the charges. *See* 6-ER-973–91.

There was an explanation of the nature of the charges when Mr. Lillard entered his guilty pleas six and nine months earlier. *See* 5-ER-853–54, 885–86. But this is insufficient for three reasons.

First, a reviewing court may look to the "record as a whole," *United States v. Forrester*, 512 F.3d 500, 508 (9th Cir. 2008), in only "rare" cases, *id.* (quoting *United States v. Harris*, 683 F.2d 322, 324 (9th Cir. 1982)). This is illustrated by *United States v. Cragg*, 807 Fed. Appx. 640 (9th Cir. 2020) (unpublished), in

which the Court held advice about potential penalties given to a defendant at a prior court proceeding – an arraignment – was not sufficient to satisfy the *Faretta* requirements. The Court explained the inquiry must be into "the defendant's understanding 'at the particular stage of the proceedings at which [the defendant] purportedly waived his right to counsel.'" *Id.* at 642 (quoting *United States v. Gerritsen*, 571 F.3d 1001, 1010 (9th Cir. 2009)).

Second, relying on prior proceedings in which standard advice is regularly given would allow the government and district courts to sidestep *Faretta* in almost any proceeding. If the prior proceedings are enough, there would never need to be advice about potential punishment, and never need to be advice about the nature of the charges when the self-representation request was made post-plea. Reliance on the record as a whole would be not "rare," but exceedingly common.

Third, in the present case, there are other parts of the record that raise doubt about Mr. Lillard's understanding of the charges. If the government's view is correct, it does not matter that the payment processor victims were not "financial institutions" as defined in the bank fraud statute. *See* 4-ER-612–13. *But cf. infra* pp. 34-35 (discussing other case law). Yet Mr. Lillard's understanding, reflected in the "motion to suppress" filed just three weeks after he was allowed to represent himself, was that this "goes to the court's jurisdiction," 4-ER-785, and the government established only ordinary conspiracy under 18 U.S.C. § 371, not conspiracy to commit bank fraud under 18 U.S.C. § 1344, *see* 4-ER-797–98. As articulated in the later motion to withdraw the plea, "any after-the-fact transactions, that while although foreseeable, were not incident to the scheme or otherwise in furtherance of the movement of the monies from the merchant's accounts," 2-ER-274, and "movement of the money from the merchant's accounts

can only be considered an after-the-fact transaction," 2-ER-276. *See also infra* pp. 33-34 (describing other arguments).

In sum, the deficient *Faretta* colloquy is not cured by the guilty plea colloquies. Even the initial self-representation was unsupported by an intelligent and voluntary waiver.

3. Mr. Lillard Was Denied His Sixth Amendment Right to Appointed Counsel When the Court Allowed Reappointed Counsel to Withdraw and Required Mr. Lillard to Represent Himself with No *Faretta* Colloquy and Based on Only an Equivocal Request.

Allowing – or, actually, requiring – the later self-representation was an even clearer violation of Mr. Lillard's right to counsel. Initially, Mr. Lillard did have a right to return to representation by counsel. *See United States v. Robinson*, 913 F.2d 712, 718 (9th Cir. 1990) (recognizing right to return to appointed counsel again after waiver). *See also Menefield v. Borg*, 881 F.2d 696, 700 (9th Cir. 1989) (recognizing initial decision to represent oneself not "choice cast in stone" and "strong presumption" request for counsel should be granted); *United States v. Kennard*, 799 F.2d 556, 557 (9th Cir. 1986) ("We reject the government's contention that, once a waiver of counsel has been given, a defendant is forever precluded from asking for an attorney in a later proceeding."). Such requests may be denied only "when the criminal justice system would be poorly served by allowing the defendant to reverse his course at the last minute and insist upon representation by counsel." *Menefield*, 881 F.2d at 700. The system was not "poorly served" here because this was not a trial, Mr. Lillard made his request a

week and a half before the next hearing date, and standby counsel was available to step in immediately.

Mr. Lillard had good faith reasons for changing his mind, moreover. As he explained later:

> Mr. Gombiner [the defense attorney] told me I am doing a botcheed [sic] job to my defense and messing up mine as well as my co-defendant's Nathaniel Wells defenses and issues for sentencing and that Wells attorney is in agreement.

3-ER-363. These reasons track what this Court recognized in *Menefield*:

> It is not surprising that a criminal defendant, having decided to represent himself and then having suffered a defeat at trial, would realize that he would be better served during the remainder of the case by the assistance of counsel. . . . The lure of self-representation may . . . exact a significant price; lost at trial, the defendant may miss important opportunities and even create gaping holes in his own case.

Id., 881 F.2d at 700.

Mr. Lillard's right to counsel therefore did reattach. And the district court erred in two ways when it took the right away.

First, a second *Faretta* hearing was required. A competent election to proceed pro se carries forward to later proceedings "unless appointment of counsel for subsequent proceedings is expressly requested by the defendant." *United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995). There was such an express request here – and it was granted. Any new waiver required a new *Faretta* hearing.

Second, Mr. Lillard's letter did not satisfy *Faretta*'s most important requirement. Because a request to represent oneself is disfavored, it must be "unequivocal." *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989). This "acts as a backstop for the defendant's right to counsel" and recognizes the need to "indulge in every reasonable presumption against waiver." *Id.*

The request here fell far short of being unequivocal. Mr. Lillard's letter did state on the first page that "I'm requesting to represent myself," but this was only "since Mr. Gombiner refuses to file such a motion." 3-ER-441. The letter similarly stated in the last paragraph that "I would like to represent myself once again," but, again, only "so I can file my motion to withdraw my guilty plea." 3-ER-443. And the letter suggested an alternative to self-representation:

> In the alternative, I would like the court to remove Mr. Gombiner as counsel, and appoint Emily Gouse (or whoever of the Court's choosing) to represent me whereas my TOTAL INTERESTS can be preserved for any potential appellate purposes. New Counsel, I believe, with their pair of fresh eyes, will in fact determine that "fair and just reasons" exist to withdraw my plea.

3-ER-443.

This approaches *United States v. Meeks*, 987 F.2d 575 (9th Cir. 1993). There also, the defendant's attorney filed a motion to withdraw. *Id.* at 576. There also, the defendant sent the court a letter asking the court to appoint an attorney who was "number one on Meeks' list," albeit without the alternative proposal of self-representation. *See id.* There also, the district court granted the motion to withdraw without holding a hearing and did not appoint new counsel. *Id.* This Court found error, explaining:

> The court had several options. It could have (1) denied both Meeks' and [the defense attorney's] motions leaving [the defense attorney] as Meeks' attorney, (2) granted both motions and appointed [the other attorney] or (3) given Meeks the opportunity to knowingly and intelligently waive his right to counsel and to proceed pro se. The court erred in employing none of these options.

Id. at 579.

The present case does differ in that Mr. Lillard proposed the alternative of self-representation. But proposing alternatives is not unequivocal. It is all the

more important to hold a *Faretta* hearing when a defendant proposes alternatives.

C. MR. LILLARD SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS GUILTY PLEA.

1. Reviewability and Standard of Review.

Mr. Lillard moved to withdraw his plea, as discussed *supra* pp. 11-12. The district court denied the motion. *See* 1-ER-20. Such rulings are reviewed for abuse of discretion, *United States v. McTiernan*, 546 F.3d 1160, 1166 (9th Cir. 2008), but abuse of discretion has been found in multiple cases, *see, e.g., McTiernan*, 546 F.3d at 1168; *United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005); *United States v. Garcia*, 401 F.3d 1008, 1011 (9th Cir. 2005); *United States v. Ortega-Ascanio*, 376 F.3d 879, 885 (9th Cir. 2004). Any "fair and just reason" will suffice, *Garcia*, 401 F.3d at 1011 (quoting Fed. R. Crim. Pro. 11(d)(2)(B)), and the standard "is generous and must be applied liberally," *McTiernan*, 546 F.3d at 1167.

2. Mr. Lillard Should Have Been Allowed to Withdraw His Plea Because He Subsequently Discovered Grounds for a Suppression Motion.

One reason Mr. Lillard should have been allowed to withdraw his plea is his discovery of grounds for a suppression motion. *McTiernan* expressly recognized this as a ground for withdrawal of a plea. The defendant there discovered grounds for a motion to suppress and alleged his attorney had never told him of the motion.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LONNIE LILLARD, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 12th day of July, 2023, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

July 12, 2023

CARLTON F. GUNN
Attorney at Law