No. 23-5115

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE EUGENE LILLARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

Nicole M. Argentieri
Acting Assistant Attorney General

JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Sixth Amendment required the district court, after petitioner validly waived his right to counsel during sentencing, to re-admonish petitioner of his right to counsel later in that same sentencing proceeding.

2. Whether the restraint of assets subject to a valid post-conviction restitution order violates the Sixth Amendment when those assets are allegedly needed to retain counsel of choice in another case.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

United States v. Lillard, No. 98-cr-5168 (Sept. 22, 1998)

United States v. Lillard, No. 16-cr-7 (May 4, 2018)

United States v. Lillard, No. 15-cr-270 (May 4, 2018)

United States District Court (D. Nev.):

United States v. Lillard, No. 06-cr-291 (Oct. 29, 2008)

United States Court of Appeals (9th Cir.):

United States v. Lillard, No. 16-30194 (Aug. 28, 2019)

United States v. Lillard, Nos. 18-30106, 18-30114, 20-30110 (Jan. 17, 2023)

United States v. Lillard, No. 22-30175 (June 28, 2023)

United States Supreme Court:

Lillard v. United States, No. 18-8370 (Dec. 12, 2018)

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 23-5115

LONNIE EUGENE LILLARD, PETITIONER

v.

UNITED STATES OF AMERICA

_____

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

_____

BRIEF FOR THE UNITED STATES IN OPPOSITION

_____

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A18, A19-A25) are published and unpublished and are available at 57 F.4th 729 and 2023 WL 193679.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2023. A petition for rehearing was denied on April 26, 2023. The petition for a writ of certiorari was filed on July 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Washington, petitioner was convicted of conspiring to commit bank fraud, in violation of 18 U.S.C. 1344 and 1349. Pet. App. A5; C.A. E.R. 6. The district court sentenced petitioner to 196 months of imprisonment, to be followed by five years of supervised release. Pet. App. A6-A8. The court of appeals affirmed in relevant part, but vacated and remanded for resentencing on other grounds. Id. at A5-A25.

1. a. Petitioner and his co-conspirators participated in a scheme involving point-of-sale terminals, which are used to process payments and refunds to merchant accounts. Presentence Investigation Report (PSR) ¶¶ 8-11. The conspirators programmed point-of-sale terminals to load fraudulent refunds onto credit cards, debit cards, and gift cards. PSR ¶¶ 8, 11-12. They then used the cards to purchase money orders and other items and to make ATM withdrawals. PSR ¶ 8. Through this scheme, the conspirators successfully obtained over $5.8 million and attempted to obtain over $7.6 million. C.A. E.R. 11; PSR ¶ 21. Eventually, after a bank reported the use of debit cards loaded with fraudulent refunds, police officers arrested petitioner and his co-conspirators. C.A. E.R. 143-162; PSR ¶ 3.

b. At the time of his 2016 arrest, petitioner owed more than $79,000 in restitution for a 1998 federal conviction in the

Western District of Washington (in addition to more than $600,000 in restitution for a 2006 federal conviction in the District of Nevada). Pet. App. A6. Soon after his arrest, the Bureau of Prisons encumbered petitioner's inmate trust account, which contained $6,671.81. Id. at A6, A26-A27. The government then moved in petitioner's 1998 case to seize those funds to satisfy petitioner's outstanding restitution obligation. Id. at A34-A40. The government relied on 18 U.S.C. 3664(n), which provides that "[i]f a person obligated to provide restitution * * * receives substantial resources from any source * * * during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed."

Petitioner objected and moved to release the encumbrance, claiming that the Bureau was "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." Pet. App. A44. Petitioner submitted a declaration stating that a friend had informed him that a paralegal would assist him for a $1000 retainer and a $5000 "flat fee." Id. at A58.

In August 2016, the district court presiding over the 1998 case granted the government's motion for seizure, ordering that the funds be remitted to the court and applied toward petitioner's restitution obligation. Pet. App. A26-A27. On appeal, the court of appeals reversed the seizure order, holding that 18 U.S.C.

3664(n) "does not apply to periods of pretrial detention." United States v. Lillard, 935 F.3d 827, 834 (9th Cir. 2019).

2. a. In September 2016, petitioner pleaded guilty in this case pursuant to a plea agreement. C.A. E.R. 891; D. Ct. Docs. 89-92 (Sept. 1, 2016). Later that month, petitioner moved to withdraw his guilty plea, and the district court granted petitioner's motion. D. Ct. Doc. 96, 103 (Sept. 30, 2016). In January 2017, petitioner again pleaded guilty, this time without a plea agreement, to conspiring to commit bank fraud, in violation of 18 U.S.C. 1344 and 1349. C.A. E.R. 849, 864; D. Ct. Doc. 112 (Jan. 6, 2017). Petitioner also admitted to violating the supervised-release conditions imposed in his prior federal cases. C.A. E.R. 865-867.

b. During the sentencing phase, the district court scheduled an evidentiary hearing to determine, among other things, the loss amount attributable to the conspiracy. See D. Ct. Doc. 130 (June 9, 2017); C.A. E.R. 2. Before the hearing, petitioner moved to represent himself. C.A. E.R. 995-999. A magistrate judge held a hearing and recommended that the motion be denied because it was made for the purpose of delay. C.A. S.E.R. 551-552.

Petitioner renewed his request to represent himself in district court, stating that he would move to withdraw his guilty plea if his motion were granted. D. Ct. Doc. 149 (June 16, 2017); C.A. E.R. 992-993. The district court continued the evidentiary

hearing, D. Ct. Doc. 149, and held an ex parte hearing on petitioner's request to represent himself, C.A. E.R. 973-991.

During the hearing, the district court explored petitioner's familiarity with court proceedings and thoroughly advised him of the dangers of self-representation. C.A. E.R. 980-985. When the court asked if petitioner had ever represented himself, petitioner replied that he had represented himself twice before, once in state court and once in federal court. Id. at 981. The court informed petitioner that the main subject of the evidentiary hearing -- the "intended loss amount[]" attributable to the conspiracy -- could have a "huge" impact on petitioner's Guidelines range and result in "years * * * added on" to his sentence. Ibid. The court warned petitioner that "[t]he amount of paperwork in this case is staggering * * * and challenging for counsel," and that it would be, in the court's opinion, "impossible for any pro se defendant to handle." Ibid.

The district court also solicited the opinion of petitioner's appointed counsel, Robert Gombiner, about petitioner's potential sentence. C.A. E.R. 985. Gombiner explained that a "very substantial sentence" was possible, especially if certain "important" enhancements applied. Id. at 985-986. He also noted that because the Guidelines are advisory, the district court could impose "whatever sentence [it] wanted," up to "a 30-year maximum." Id. at 987. The court informed petitioner that Gombiner's representa-

tions were "absolutely correct" and the relevant enhancements "will impact the ultimate sentence of what the Court looks at. And we're talking about a swing of years." Id. at 987-988.

The district court gave petitioner several days to consider whether he still wanted to represent himself. C.A. E.R. 988-990. Petitioner ultimately decided to represent himself, see D. Ct. Doc. 165 (July 24, 2017); C.A. E.R. 599-600; C.A. S.E.R. 115, and the court appointed Gombiner as standby counsel, C.A. E.R. 491.

c. Before the evidentiary hearing began, the district court informed petitioner that if he no longer wanted to represent himself, he could request Gombiner's reappointment. C.A. S.E.R. 115. After the second day of the evidentiary hearing, Gombiner moved for reappointment at petitioner's request. C.A. E.R. 600-602. The court granted the motion but informed petitioner that "we're not going to go back and forth. If you decide to have Mr. Gombiner represent you, that's the final word." Id. at 491; see id. at 491-492. Gombiner represented petitioner through the remainder of the evidentiary hearing.

At the end of the hearing, petitioner sent the district court a letter asking to again represent himself. C.A. E.R. 441-443. Petitioner stated that "Gombiner * * * refuses to file a motion" to withdraw the guilty plea, so "I'm requesting to represent myself." Id. at 441. Petitioner also accused Gombiner of intimidating him physically. Id. at 442-443. Petitioner thus requested

to "represent myself once again" or, "[i]n the alternative," for the court to appoint new counsel. Id. at 443.

The district court granted Gombiner's motion to withdraw and allowed petitioner to appear pro se. C.A. E.R. 75, 368. Petitioner remained pro se for the rest of the sentencing proceedings. The court sentenced petitioner to 196 months of imprisonment, to be followed by five years of supervised release, on the conspiracy charge. Pet. App. A6-A8. The court also sentenced petitioner to 36 months of imprisonment for his supervised-release violation, to run concurrently with his conspiracy sentence. Id. at A6.

3. After hearing briefing and argument (including from counsel for petitioner, Pet. App. A4, A138-A209), the court of appeals affirmed in relevant part, issuing one published opinion (id. at A1-A18) and one unpublished memorandum disposition (id. at A19-A25).

a. The court of appeals first held, in the published opinion, that the government's seizure of petitioner's inmate funds to satisfy his restitution obligation in a prior case did not violate his Sixth Amendment right to counsel of choice. Pet. App. A13. The court explained that the relevant question, under this Court's precedents, is "whether the government had a property right in the seized funds, even though they were in [petitioner's] inmate account." Id. at A9; see also id. at A8-A10 (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-626, 631-632

(1989), and Luis v. United States, 578 U.S. 5, 16, 23 (2016) (plurality opinion)). The court of appeals determined that the government had a property right given "the valid restitution order from [petitioner's] 1998 case," which "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." Id. at A9-A10 (quoting 18 U.S.C. 3613(c)). Thus, "[b]ecause the seized funds effectively belonged to the government, [petitioner] did not have a Sixth Amendment right to use those funds to retain an attorney." Id. at A10.

b. The court of appeals further held, in the unpublished memorandum disposition, that the district court did not violate petitioner's right to self-representation when it did not hold a second hearing upon petitioner's request to re-assume pro se status. Pet. App. A20-A21. The court of appeals determined that petitioner "knowingly and voluntarily waived his right to counsel before the evidentiary hearing" and had done so after the district court had "advised [petitioner] of the penalties he faced and of the dangers and disadvantages of self-representation." Id. at A20. The court of appeals further concluded that, after the evidentiary hearing, petitioner's second "request to represent himself was unequivocal," and "the district court was not required to conduct a second * * * colloquy before allowing [petitioner] to return to pro se status because no 'intervening events substan-

tially change[d] the circumstances existing at the time of the initial colloquy.'" Id. at A21 (quoting and adding second pair of brackets to United States v. Hantzis, 625 F.3d 575, 580-581 (9th Cir. 2010), cert. denied, 563 U.S. 952 (2011)).[1]

ARGUMENT

Petitioner renews his argument (Pet. 9-16) that the Sixth Amendment required the district court to hold a second hearing to re-admonish him of his right to counsel before allowing him to again represent himself for the remainder of the sentencing proceedings. The court of appeals correctly rejected that contention, and petitioner identifies no decision of this Court or another court of appeals that has reached a contrary conclusion on analogous facts. Petitioner also renews his argument (Pet. 16-20) that the government's seizure of his inmate-trust-account funds pursuant to a valid post-conviction restitution order violated his Sixth Amendment right to retain counsel of his choice. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 9-16) that even though he validly waived his right to counsel after a thorough hearing advising

[1] The court of appeals agreed with petitioner that the concurrent 36-month sentence for his supervised-release violation exceeded the applicable statutory maximum. Pet. App. A14-A18. The court vacated that sentence and remanded to the district court for resentencing for the supervised-release violation. Id. at A18.

him of the dangers of self-representation, the district court was required to hold a second hearing before allowing him to again proceed pro se later in the same sentencing proceedings. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or another court of appeals.

a. 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." U.S. Const. Amend. VI. If the defendant cannot afford an attorney, the government must provide one to represent him. Gideon v. Wainwright, 372 U.S. 335 (1963). An indigent defendant, however, has no right to counsel of his choosing. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989); see Wheat v. United States, 486 U.S. 153, 159 (1988) (noting that "a defendant may not insist on representation by an attorney he cannot afford"); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (similar).

A defendant may waive the Sixth Amendment right to counsel, provided that the waiver is knowing and voluntary. See, e.g., Patterson v. Illinois, 487 U.S. 285, 292-293 (1988). Although the "defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation," he should "be made aware of the dangers and disadvantages of self-representation, so that the record will establish

that he knows what he is doing and his choice is made with eyes open." Faretta v. California, 422 U.S. 806, 835 (1975) (citation and internal quotation marks omitted).

A defendant who is competent to execute a knowing and voluntary waiver and has the capacity to conduct the necessary proceedings must be permitted to waive the right to counsel if he wishes to do so. Indiana v. Edwards, 554 U.S. 164, 169-174 (2008). Thus, if a defendant is provided with competent, conflict-free counsel and cannot obtain another attorney more to his liking, the defendant may either accept the government-provided lawyer or waive the right to counsel and proceed pro se.

The court of appeals correctly applied those principles to the facts of this case. As the record reflects, the district court thoroughly informed petitioner of the dangers of self-representation before the sentencing-stage evidentiary hearing. C.A. E.R. 979-991. The court noted the "staggering" amount of "paperwork in this case," warning that the amount would be "challenging" even for "trained counsel." Id. at 981. The court opined that the sentencing proceedings would be "impossible for any pro se defendant to handle," and that in his "37 years" in the criminal-justice field, he had "never seen a pro se defendant get a better deal than when he was represented by counsel." Id. at 980-982. The court warned petitioner that a "foolish decision to represent [him]self" could mean the difference between "going to prison for

three years with counsel or ten years without counsel." Id. at 982; see also, e.g., id. at 982-983 ("It's like trying to play a game when you don't know the rules * * * you are doing away with [counsel] and all of that knowledge, all of that ability, all of those years of experience, and stumbling around in the dark"); id. at 989 ("I think it's a terrible idea. I think you're only going to end up hurting yourself, your family. But * * * [y]ou have every right to make that decision."). The court also explored petitioner's familiarity with court proceedings, including his two previous experiences representing himself. Id. at 980-985. And the court gave petitioner ample time to consider and discuss his choice with his appointed counsel. Id. at 987-988. The court of appeals thus correctly determined that petitioner "knowingly and voluntarily waived his right to counsel" following the colloquy, Pet. App. A20, and petitioner does not contend otherwise, see Pet. 8 n.2 & 13.

Petitioner instead contends (Pet. 13, 15-16) that his second waiver of his right to counsel -- after he had returned, at his own request, to being represented by counsel for some of the sentencing-stage evidentiary hearing -- was invalid because the district court did not then hold a second hearing before granting that new request. That claim lacks merit.

To start, petitioner does not dispute that, given the district court's thorough hearing on his first request, his second waiver

was knowing and voluntary; he disputes only that it was unequivocal. See Pet. 13 ("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."). But this Court has never suggested that a hearing is necessary to ensure that a waiver of representation is unequivocal. And here, petitioner repeatedly and unambiguously asserted his choice to represent himself, rather than continue being represented by appointed counsel, in his letter to the court. See C.A. E.R. 441 ("I'm requesting to represent myself."); id. at 443 ("I would like to represent myself once again."). At the next hearing, moreover, petitioner confirmed that he would be "representing [him]self." Id. at 368. Although petitioner's letter suggested that the court could, "[i]n the alternative," appoint new counsel, id. at 443, an indigent defendant has no right to counsel of his choosing, see p. 10, supra, and that expression of his willingness to accept an unavailable option -- i.e., different appointed counsel -- does not make petitioner's otherwise valid waiver equivocal.

Petitioner asserts that a re-admonition was nonetheless required because his "return to representation by counsel" "substantially changed the circumstances existing at the time of the initial colloquy." Pet. 15 (brackets, citation, and internal quotation marks omitted); see id. at 15-16. But no court has held that

an intervening return to representation by counsel automatically requires re-admonition when the defendant asks again to represent himself. To the contrary, a re-admonition will generally be unnecessary because a proper Faretta inquiry will already typically ensure that continued or renewed self-representation in subsequent proceedings will be valid. Here, the court of appeals reasonably determined that a re-admonition was not constitutionally required before the district court allowed petitioner to resume representing himself. Pet. App. A21. Petitioner was an experienced pro se litigant who had represented himself in both state and federal court. C.A. E.R. 980-981. Moreover, petitioner first waived his right to counsel during sentencing proceedings, after the district court had warned him of the dangers of representing himself at sentencing and of the importance of having counsel at that stage of proceedings. C.A. E.R. 973-991; see pp. 11-12, supra. The court of appeals thus reasonably concluded that a second Faretta hearing was unnecessary to ensure that petitioner's subsequent waiver in the same sentencing proceedings was valid. Pet. App. A20-A21 ("[O]ur waiver analysis must be directed to the particular stage of the proceedings in question.") (quoting Patterson v. Illinois, 487 U.S. 285, 298 (1988)) (internal quotation marks omitted)); see United States v. Modena, 302 F.3d 626, 631 (6th Cir. 2002) (finding that re-admonition was not required "solely because

the defendant at one point had second thoughts about representing himself"), cert. denied, 537 U.S. 1145 (2003).

Indeed, petitioner's return to representation by appointed counsel and subsequent decision to again reject that counsel only reinforce the validity of his waiver. The courts of appeals broadly agree that a defendant can waive his right to counsel by rejecting his court-appointed counsel when it is clear to the defendant that the alternative is to proceed pro se.[2] Here, the

---

[2] See, e.g., United States v. Kneeland, 148 F.3d 6, 11-12 (1st Cir. 1998) (defendant validly waived his right to counsel by dismissing his third court-appointed attorney after being cautioned that the court would not appoint a fourth, even though defendant also said that he did not want to proceed pro se); McKee v. Harris, 649 F.2d 927, 929-931 (2d Cir. 1981) (same, when defendant insisted on dismissing his appointed attorney), cert. denied, 456 U.S. 917 (1982); United States v. Kosow, 400 Fed. Appx. 698, 702 (3d Cir. 2010) (defendant validly waived the right to counsel by conduct when defendant "fired or alienated" multiple attorneys after being warned that unreasonable demands of his attorneys would constitute waiver); United States v. Fields, 483 F.3d 313, 350 (5th Cir. 2007) ("[A] defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of that right.") (citation omitted), cert. denied, 552 U.S. 1144 (2008); United States v. Green, 388 F.3d 918, 922 (6th Cir. 2004) (unreasonable insistence on hybrid representation "functioned as a valid waiver of the right to counsel"); United States v. Oreye, 263 F.3d 669, 670 (7th Cir. 2001) ("Oreye never said he wanted to proceed pro se, but a defendant can waive his right to counsel through conduct as well as words."), cert. denied, 535 U.S. 933 (2002); Meyer v. Sargent, 854 F.2d 1110, 1111, 1114 (8th Cir. 1988) (decision to seek removal of counsel during trial "cannot be termed anything other than a voluntary waiver of his right to have counsel represent him" even though defendant insisted "I don't wish to represent myself"); Kates v. Nelson, 435 F.2d 1085, 1085-1087, 1089 (9th Cir. 1970) (defendant waived his right to counsel by discharging counsel on the first day of trial and then refusing to represent himself); United States v. Garey, 540 F.3d 1253, 1266 (11th Cir. 2008) (en banc) ("[A] defendant may

district court repeatedly warned petitioner that dismissing his appointed counsel would mean representing himself, with no "trained lawyer" who "knows the rules" to guide him. C.A. E.R. 984; see id. at 981-989. By deciding nonetheless to reject his appointed counsel mid-way through the sentencing proceedings, petitioner unequivocally waived his Sixth Amendment right to counsel. See United States v. Turner, 897 F.3d 1084, 1104 (9th Cir. 2018) (determining that the defendant "waived his right to counsel through his conduct * * * by vacillating between asserting his right to self representation and his right to counsel"), cert. denied, 139 S. Ct. 1234 (2019). Petitioner's factbound disagreement with that conclusion does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

b. Petitioner contends (Pet. 9-13) that this Court's review is warranted to address a conflict among the courts of appeals

---

waive counsel by his uncooperative conduct as well as by his express request."), cert. denied, 555 U.S. 1144 (2009); see also United States v. Sayan, 968 F.2d 55, 65 (D.C. Cir. 1992) ("[W]hile her case was pending, Sayan dismissed at different times two court appointed lawyers who were prepared to try the case. In dismissing these lawyers, she may have waived by implication her right to counsel.") (footnote omitted) (citing United States v. Moore, 706 F.2d 538, 540 (5th Cir.), cert. denied, 464 U.S. 859 (1983)).

regarding whether a district court must hold a formal hearing before permitting a defendant to waive his right to counsel. Any such conflict is not implicated here. As petitioner agrees (Pet. 13), "the district court here held a hearing on [p]etitioner's first request to represent himself." And at that hearing, as the court of appeals observed, "the district court advised [petitioner] of the penalties he faced and of the dangers and disadvantages of self-representation." Pet. App. A20. The only question presented here, accordingly, is not whether an initial hearing is necessary, but whether a second such hearing is necessary once the petitioner has already validly waived his right to counsel during the same stage of proceedings. Petitioner has failed to identify any conflict among the court of appeals on that question, and none exists.

2. Petitioner further contends (Pet. 16-20) that the government violated his Sixth Amendment right to retain counsel of his choice in this case by seizing his inmate-trust-account funds to satisfy the outstanding restitution obligation from his 1998 conviction. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals.

a. The Sixth Amendment guarantees a criminal defendant "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." Caplin & Drysdale, 491 U.S.

at 624. But 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 that defendant will be able to retain the attorney of his choice." Id. at 626. In Caplin & Drysdale, the Court thus held that the district court's refusal to authorize payment of attorney's fees out of assets forfeitable as a result of the defendant's conviction did not violate the Sixth Amendment. See id. at 624-633. Applying the same principles, the Court held in United States v. Monsanto, 491 U.S. 600 (1989), that assets in the defendant's possession may be restrained before conviction based on a finding of probable cause to believe that they are forfeitable. Id. at 602, 614-616. Although the government did not "'own[]'" the assets "outright," "the Government even before trial had a 'substantial' interest in the tainted property sufficient to justify the property's pretrial restraint." Luis v. United States, 578 U.S. 5, 16 (2016) (plurality opinion).

The court of appeals, accordingly, did not err in holding that petitioner's Sixth Amendment right was not violated by the restraint of his inmate funds to satisfy a valid, pre-existing restitution order. Pet. App. A6-A13. Unlike the property in Luis, the funds in petitioner's account did not "belong[] to the defendant, pure and simple," Luis, 578 U.S. 12 (plurality opinion); rather, as with the criminal-proceeds at issue in Caplin & Drysdale, the government "had a 'substantial' interest in the * * *

property sufficient to justify the property's pretrial restraint." Id. at 16 (quoting Caplin & Drysdale, 491 U.S. at 627). The post-conviction restitution order in petitioner's 1998 case, pursuant to which the government restrained petitioner's inmate funds in 2016, was issued under the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, §§ 201-211, 110 Stat. 1227. See Pet. App. A10. Under the Act, the restitution order 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. 18 U.S.C. 3613(c) (mandating that "[t]he 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)").[3] "Because the seized funds effectively belonged to the government," the court of appeals explained, petitioner "did not have a Sixth Amendment right to use those funds to retain an attorney." Pet. App. A10; see United States v. Scully, 882 F.3d 549, 553 (5th Cir. 2018) ("The Government's lien on [the defendant's] funds is superior to [his] alleged Sixth Amendment interest in using them to pay appellate counsel" because "section 3613(c) dictate[s] that [the defendant] no longer

[3] As the court of appeals noted (Pet. App. A10 n.5), its earlier decision holding that the seizure of petitioner's funds was not authorized by the statute on which the government relied did not affect the status of the underlying restitution order or the existence of the government lien created by 18 U.S.C. 3613(c).

has any equity interest in the untainted funds he wishes to use for appellate counsel.").

b. Petitioner contends (Pet. 16-20) that the decision below conflicts with this Court's decision in Luis. That is incorrect.

In Luis, the government sought to prevent the defendant "from using her own untainted funds, i.e., funds not connected with the crime, to hire counsel to defend her in her criminal case," in order to preserve those funds for payment of restitution and other criminal penalties upon conviction. 578 U.S at 9 (plurality opinion) 9. The Court held that the Sixth Amendment prohibits the "pretrial restraint of legitimate, untainted assets needed to retain counsel of choice." Id. at 11; id. at 24-35 (Thomas, J., concurring in the judgment). Those funds, the Court explained, "belong[ed] fully to the defendant," and she thus had a Sixth Amendment right to use those funds to pay for the assistance of counsel. Id. at 8-9, 23.

By contrast, as in Caplin & Drysdale, the funds in petitioner's inmate account were "in an important sense the Government's at the time the court imposed the restrictions." Luis, 578 U.S. at 16 (plurality opinion). The government restrained the funds "to satisfy the valid restitution order from [petitioner]'s 1998 case -- after [petitioner] was convicted and judgment had been entered against him." Pet. App. A9-A10 (emphasis added). The post-conviction restitution order and the lien that arose under

18 U.S.C. 3613(c), as the court of appeals explained, "gave the government a substantial property interest in the funds in [petitioner]'s inmate account." Pet. App. A13. The government's interest was therefore "comparable to the government's property interest in the forfeitable assets considered in Caplin & Drysdale." Id. at A10; see Luis, 578 U.S. at 16 (noting that the government in Caplin & Drysdale was "something like a secured creditor with a lien on the defendant's tainted assets superior to that of most any other party").

Petitioner contends (Pet. 18) that the government lacked a sufficient interest in the funds because the government did not file a notice of lien under 18 U.S.C. 3613(d). But "an order of restitution made pursuant to [18 U.S.C. 3613(c)], is a lien in favor of the United States on all property and rights to property of the person fined," and that "lien arises on the entry of judgment" creating the restitution obligation. 18 U.S.C. 3613(c); see United States v. Meux, 597 F.3d 835, 837 (7th Cir. 2010) ("Under 18 U.S.C. § 3613(c) * * * , once the restitution was ordered in this case, all of [the defendant's] property became subject to a lien."). Thus, even if the United States did not perfect its lien against third parties by filing a notice of lien, petitioner's property became subject to the lien upon entry of the restitution order. See United States v. Miller, 39 F.4th 844, 846 (7th Cir. 2022) ("Upon entry of judgment, the order for payment of restitu-

tion became a lien in favor of the government on all of Miller's property and rights to property. Such a lien is perfected against purchasers and other third parties when the government files a notice of the lien."). Petitioner further contends (Pet. 18) that the lien did not create an "absolute right" for the government. But as the court of appeals noted, "[t]he government's property right established by a § 3613(c) lien" -- which is established "only after a conviction and entry of a restitution judgment against a defendant" -- is "substantially less contingent" than other property rights that allow the government to seize a defendant's assets, including "the government's right to a defendant's forfeitable assets before conviction and judgment." Pet. App. A13.

c. Petitioner tacitly concedes that the decision below does not conflict with a decision of any other court of appeals. While he suggests that there is "a dearth of case law" in most circuits, he notes that the Fifth Circuit has also held that a lien is "sufficient to distinguish Luis." Pet. 20 (citing Scully, 882 F.3d at 553).

d. In any event, this case would be a poor vehicle to address the question presented because it is not clear that petitioner properly preserved this argument in this proceeding. Petitioner raised his Sixth Amendment objection before the district court responsible for his 1998 conviction, when he moved to release

the encumbrance on his inmate-trust-account funds. See Pet. App. A41-A84. But he failed to timely raise that claim before the district court in this case.[4] See Fed. R. Crim. P. 51(b); Gov't C.A. Br. 25-28. Thus, petitioner's claim may be subject to review only for plain error. See United States v. Marshall, 754 Fed. Appx. 157, 160 (4th Cir. 2018) (per curiam) (because the defendant "did not at any time in the district court * * * state that he did not wish to be represented by [current counsel] or that he was unable to pay for other counsel," "the district court did not have the opportunity to address the issue of whether the pretrial seizure of his bank account violated his right to counsel of choice, and thus, plain error is the appropriate standard of review"), cert. denied, 139 S. Ct. 1365 (2019).

[4] Although petitioner alluded to his counsel-of-choice claim at various points in this case, petitioner did not assert that claim as a substantive basis for relief until the limited remand for resentencing for his supervised-release violation. See C.A. S.E.R. 2-21; p. 9, n.1, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

Nicole M. Argentieri
Acting Assistant Attorney General

JAVIER A. SINHA
Attorney

NOVEMBER 2023