No. 23-5115

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

STATUTES

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

I.
ARGUMENT

A. PETITIONER'S RIGHT TO APPOINTED COUNSEL CLAIM MERITS REVIEW.

The government devotes the vast bulk of its discussion of Petitioner's right to appointed counsel claim to a question Petitioner is not raising. That is whether there must be a readmonition or repetition of warnings about the dangers of self-representation when a defendant seeks to return to self-representation status. Making that argument would be difficult, because a court might reasonably assume, at least in most cases, that the defendant will remember warnings the court previously gave.

The question Petitioner *is* raising – to which the government devotes relatively little argument – is whether the court must make a second inquiry about the unequivocality of the request to return to self-representation. As to that, there is no basis for making an assumption based on prior proceedings. That a first request was unequivocal says nothing about whether a second request is unequivocal. Quite the contrary when the second request is made

after a change of heart about the first request. Such back and forth – from representation by counsel to self-representation to representation by counsel again to self-representation again – suggests a real possibility of equivocality. As to *that* question – of equivocality – there must be an in-person hearing with, in the words of the Third Circuit, 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, in the words of the Sixth Circuit, "formal," *United States v. Pryor*, 842 F.3d 441, 449 (6th Cir. 2016) (quoting *Hill v. Curtin*, 792 F.3d 670, 677 (6th Cir. 2015) (en banc)), inquiry.

This case is also not about "a defendant [being able to] 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," Brief in Opposition, at 15. Assuming arguendo that this was clear to Petitioner,[1] it begs the question of whether he was unequivocally "rejecting his court-appointed counsel" in favor of representing himself. It is that threshold question of unequivocality into which there must be an inquiry.

The government's suggestion that the split in the circuits is not implicated because the cases cited in the Petition are about first requests for self-representation assumes there is some difference between a first request and a second request. That may be true when the question is the defendant's understanding of the dangers of self-representation. But it is not true when the

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[1] The portion of the court of appeals excerpts of record that the government cites for its assertion that "the district court repeatedly warned petitioner that dismissing his appointed counsel would mean representing himself," Brief in Opposition, at 15-16, were simply about the dangers of self-representation.

question is the equivocality or unequivocality of the request. As to that question, the government offers neither case authority nor a rationale for treating a second request differently from an initial request.[2] And there is no authority or rationale for treating the two differently. There is actually *more* reason to be concerned about the unequivocality of a second request, as noted above.

Petitioner's claim is also not "factbound," Brief in Opposition, at 16. Petitioner's claim is not that a hearing was required in his particular case because his particular letter to the court was not sufficiently unequivocal. The claim is that a determination of unequivocality – regarding a right that is the threshold right in our criminal justice system, *see United States v. Cronic*, 466 U.S. 648, 653-54 (1984) (describing right to counsel as "a fundamental component of our criminal justice system" that is "the means through which the other rights . . . are secured" and "affects [the accused's] ability to assert any other rights he may have") – requires a hearing, *see generally Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (noting that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" (cleaned up)). Some circuits – and state courts – say a hearing is not required, but other

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[2] A string of cases the government cites in a footnote and one of the cases the government cites in the text – *United States v. Turner*, 897 F.3d 1084 (9th Cir. 2018) – were about waivers by conduct, not about the equivocality or unequivocality of an actual request for self-representation. In the one case the government cites that was about the equivocality or unequivocality of an actual request for self-representation – *United States v. Modena*, 302 F.3d 626 (6th Cir. 2002) – the defendant reiterated his desire to proceed pro se at a final pretrial conference, so there was a hearing. *See id.* at 631. The defendant there also had never actually returned to representation by counsel. *See id.*

circuits – and state courts – say a hearing is required. Whichever courts this Court may ultimately agree with, there is certainly a question that merits the Court's consideration and resolution.

B. PETITIONER'S RIGHT TO COUNSEL OF CHOICE CLAIM MERITS REVIEW.

1. It Is Important to Decide the Question.

The government relies before this Court, as it did below, on the lien interest created by 18 U.S.C. § 3613(c). That lien interest does make the government's interest in the funds stronger than the government's interest in *Luis v. United States*, 578 U.S. 5 (2016). But it falls well short of the government's interest in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989), where a right to the property 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 Monsanto* (companion case also considering property subject to forfeiture under § 853(c)).

First, the government's interest here did not vest upon commission of the criminal act. Second, a district court can exempt funds from the § 3613(c) lien where they are necessary to cover reasonable living and/or other expenses. *See United States v. Lillard*, 935 F.3d 827, 833 (9th Cir. 2019); *United States v. Betts*, 511 F.3d 872, 877 (9th Cir. 2007); *United States v. Corbett*, 357 F.3d 194, 196 (2d Cir. 2004). Third, because a § 3613(c) lien is governed by tax

lien procedure, it is "not self-executing," *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985), but must be perfected. *See also United States v. Kollintzas*, 501 F.3d 796, 802-03 (7th Cir. 2007) (looking to *National Bank of Commerce* for rules governing § 3613(c) liens), *cited with approval in United States v. Miller*, 39 F.4th 844, 846 (7th Cir. 2022).

This case presents a middle ground between *Luis*, on the one hand, and *Caplin & Drysdale* and *Monsanto*, on the other. And it is a middle ground that will be implicated by all federal restitution orders in light of § 3613(c)'s general scope. The Court therefore should decide whether this middle ground lies on the *Luis* side of the line or the *Caplin & Drysdale* and *Monsanto* side of the line.

2. Petitioner's Case Is an Excellent Vehicle for Resolving the Question.

Petitioner's case is not made a poor vehicle by a failure to raise the claim in the district court. Petitioner raised the claim in three different courts in three different ways.[3]

Initially, Petitioner raised the claim in the district court with jurisdiction over the restitution order, in his opposition to the government's motion to seize the funds. When that district court ruled against Petitioner, Petitioner

[3] This distinguishes the one case the government cites – *United States v. Marshall*, 754 Fed. Appx. 157 (4th Cir. 2018) (unpublished). The defendant there never raised the claim in any way in any court before raising it on appeal. *See id*.

took the proper next step of appealing the district's order – and eventually succeeded in that appeal.

This ruling and the immediately taken appeal arguably made it unnecessary to take any further action at all, because the first court's ruling would have controlled under the doctrines of collateral estoppel, res judicata, and/or law of the case. *See generally Arizona v. California*, 460 U.S. 605 (1983) (discussing doctrines of res judicata and law of the case); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (recognizing doctrine of collateral estoppel as meaning "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit"). Petitioner renewed the claim nonetheless – in two different ways. First, he raised the issue in the petition for writ of habeas corpus included in the Appendix. *See* App. A132-37. Second, he raised the issue in the motion to stay proceedings included in the Appendix. In this latter motion – filed in the new case with that case's case number – Petitioner described the order allowing seizure of the funds, described the then pending appeal of that order, stated the funds were "needed to retain counsel of his own choosing," and asserted that the seizure therefore "violates the Fifth and Sixth Amendments." App. A092-093.[4]

In sum, Petitioner did not fail to raise the claim below, but raised it

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[4] The government characterizes these efforts as merely "allud[ing] to his counsel-of-choice claim" and complains that Petitioner did not assert the claim "as a substantive basis for relief" until remand for resentencing. Brief in Opposition, at 23 n.4. As to the latter point, there was no judgment from which to seek relief until Petitioner was sentenced. As to the first point, Petitioner respectfully suggests that the motion to stay proceedings did more than merely "allude" to the claim. It rather expressly described it.

repeatedly. Review will not be limited to plain error, and this case is an excellent vehicle for addressing the question.

II.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: November 21, 2023

s/ Carlton F. Gunn
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No. 23-5115

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CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 21st day of November, 2023, a copy of the Petitioner's Reply Brief of Petitioner was 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,

November 21, 2023

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