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IN THE SUPREME COURT OF THE UNITED STATES

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KERRI L. KALEY, ET VIR., :

Petitioner : No. 12-464

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Wednesday, October 16, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

HOWARD SREBNICK, ESQ., Miami, Florida; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 12-464, Kaley v. United  
5 States.

6 Mr. Srebnick.

7 ORAL ARGUMENT OF HOWARD SREBNICK

8 ON BEHALF OF THE PETITIONER

9 MR. SREBNICK: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 When the government restrains private  
12 property, the owner of that property has the right to be  
13 heard at a meaningful time and in a meaningful manner.  
14 For a criminal defendant who's facing a criminal trial,  
15 whose property has been restrained, that time is now,  
16 before the criminal trial, so that he or she can use  
17 those assets, that property, to retain and exercise  
18 counsel of choice.

19 JUSTICE SCALIA: Well, I -- you know, I -- I  
20 find it hard to think that -- that the right of property  
21 is any more sacrosanct than the -- the right to freedom  
22 of the person, and we allow a grand jury indictment  
23 without -- without a separate mini-trial to justify the  
24 arrest and -- and holding of -- of the individual. And  
25 if he -- if he doesn't have bail, he's permanently in

1 jail until the trial is over. And we allow all of that  
2 just on the basis of a grand jury indictment. And  
3 you're telling us it's okay for that -- maybe you think  
4 it's not okay for that.

5 But I think you're saying it's okay for  
6 that, but it's not okay for distraining his property.  
7 I -- I find it hard to -- to think that it's okay for  
8 the one and not okay for the other.

9 MR. SREBNICK: Justice Scalia, it's not okay  
10 for either.

11 JUSTICE SCALIA: Ah, okay. This is a bigger  
12 case than I thought.

13 (Laughter.)

14 MR. SREBNICK: The right to be released on  
15 bail, that is, the right not to be detained all the way  
16 until trial, under this Court's precedent in United  
17 States v. Salerno, the Court provided procedural  
18 safeguards to ensure that, before someone is held all  
19 the way until trial, they would have a hearing, a  
20 hearing which would include a right to challenge the  
21 weight of the evidence and other factors.

22 We ask for something no different. Indeed,  
23 the indictment itself can justify the detention of the  
24 body and the detention of the asset until such time --

25 JUSTICE ALITO: Well, that's -- I'm sorry.

1 That's pretrial detention without bail. I thought  
2 Justice Scalia's question had to do with detaining  
3 someone who was indicted, but couldn't make bail.

4 MR. SREBNICK: Every person is limited by  
5 their own financial wherewithal, and so long as bail is  
6 set not as an excessive bail, he or she must rely on the  
7 assets that he or she owns.

8 JUSTICE ALITO: But why, in that situation,  
9 would the defendant not have the constitutional right to  
10 have a determination by a judge as to whether there was  
11 probable cause?

12 MR. SREBNICK: In the context of a bail  
13 hearing, a judge does make that determination.

14 JUSTICE GINSBURG: Does it? There are  
15 several factors that are taken into account. One of  
16 them is weight of the evidence. Are you equating those  
17 two things, probable cause to believe that the defendant  
18 committed the offense and weight of the evidence as one  
19 of several factors, to take account over the bail  
20 determination?

21 MR. SREBNICK: Yes, we are, Justice  
22 Ginsburg. In the United States v. Salerno, this Court  
23 upheld pretrial detention because there were procedural  
24 safeguards, a right to be heard, shortly after the  
25 arrest. In the context of the restraint of assets, as

1 it stands now in the Eleventh Circuit, there is no right  
2 to be heard at any time until --

3 JUSTICE GINSBURG: Right to be heard --

4 CHIEF JUSTICE ROBERTS: I thought your  
5 answer might have been that, yes, in fact, the property  
6 is entitled to greater protection because it's going to  
7 be used to hire counsel that will keep the person out of  
8 jail long term, even if he can be put in jail pending  
9 the trial.

10 MR. SREBNICK: Mr. Chief Justice, we've  
11 certainly made that argument in our brief. Some might  
12 find it more important to have those assets to retain  
13 counsel of choice than having their liberty deprived  
14 temporarily. In either case, the right to be heard  
15 should include the right to be heard by a judge, a judge  
16 who would have the authority to provide relief.

17 JUSTICE SCALIA: Is this only in the case  
18 where the person has no other assets, where all of his  
19 assets are seized, so that he can't -- he can't hire  
20 counsel? Suppose only half of his assets are determined  
21 to -- or asserted by the government to have been the  
22 product of criminal activity, and he has a lot of other  
23 money with which he can hire an attorney. Is that a  
24 different case? And we're not -- that's not before us  
25 here.

1 MR. SREBNICK: That's not this case. So  
2 long as --

3 JUSTICE SCALIA: So you have a hearing on  
4 whether he has other money, right?

5 MR. SREBNICK: Such -- such a hearing took  
6 place in this case, indeed. But nevertheless, the  
7 Petitioners, the Kaleys, did not have sufficient other  
8 funds to retain counsel of choice.

9 JUSTICE GINSBURG: If your -- if your  
10 position prevails, there would be nothing to stop the  
11 defendant from using those assets for something other  
12 than paying an attorney. If the assets are unfrozen,  
13 freely available to the defendant, the defendant might  
14 say, I will settle for a legal aid lawyer, I want to use  
15 this money for something that I care more about. It --  
16 there would be no control on that, would there?

17 MR. SREBNICK: Justice Ginsburg, I believe  
18 there could be and should be. Indeed, if the court were  
19 to modify the restraining order to allow funds to be  
20 paid to counsel, the court would supervise the release  
21 of those funds to ensure that, indeed, the funds were be  
22 using -- were being used for the exercise of the right  
23 to counsel of choice.

24 We are not asking for a vacation of the  
25 restraining order, so that the monies can be used for

1 other purposes.

2 JUSTICE SOTOMAYOR: I see the government's  
3 strongest argument as being that the grand jury finding  
4 of probable cause is sacrosanct, and a hearing like the  
5 one that you are proposing would call the validity of  
6 that finding into question.

7 Why don't you address that because we -- you  
8 were talking about, in bail, the validity of the charges  
9 are not at issue, just one factor in the court's  
10 determination of whether to restrain him or her is the  
11 strength of the government's case. Are you trying to  
12 draw a similar analogy here?

13 MR. SREBNICK: Justice Sotomayor, what we  
14 are proposing -- and indeed it's been a hearing that's  
15 taken place in several of the circuits for some 25 years  
16 now --

17 JUSTICE SOTOMAYOR: There is at least five  
18 who are ruling similarly to yours.

19 MR. SREBNICK: So for 25 years, the courts  
20 in those circuits have been holding these hearings. And  
21 what these hearings look like are similar to a pretrial  
22 detention hearings, they are similar to suppression  
23 hearings, they are similar, indeed, to what Rule 5.1  
24 preliminary hearings might look like. And all these  
25 hearings require is a presentation by both sides.

1           Each side makes its presentation. Of  
2 course, the grand jury is a one-sided presentation. Of  
3 course, the grand jury does not give the defendant an  
4 opportunity to be heard. Indeed, the grand jury doesn't  
5 give the defendant an opportunity to have his adversary  
6 present exculpatory evidence to the grand jury based on  
7 this --

8           JUSTICE GINSBURG: And how do you get at --

9           JUSTICE SCALIA: Well, that's terrible. We  
10 shouldn't allow that. We shouldn't even hold the  
11 fellow. We've been doing it for a thousand years,  
12 though, and it's hard to say that it violates what our  
13 concept of fundamental fairness is.

14           MR. SREBNICK: Justice Scalia, we are not  
15 quarrelling with the power of the grand jury to initiate  
16 the charge. We are simply saying the grand jury doesn't  
17 have the power to initiate and hold for the period  
18 between indictment and trial, the --

19           JUSTICE GINSBURG: But then there -- then  
20 there is the anomaly that the grand jury has said there  
21 is probable cause, this defendant can be prosecuted, and  
22 then you would have the judge make a determination that  
23 there isn't probable cause to believe. You are asking a  
24 judge who has determined there is no probable cause to  
25 preside at a trial because the grand jury has found that

1 there is probable cause.

2           And how -- how could a judge allow a trial  
3 to go on? If the judge concludes there is no probable  
4 cause to arrest this defendant for this crime, how could  
5 the judge then conduct a trial? The judge would be  
6 overriding the grand jury's determination, right?

7           MR. SREBNICK: Justice Ginsburg, I don't  
8 believe so. What's at issue at the hearing is what the  
9 government presents at that hearing as compared to what  
10 the defense presents at that hearing, no different, I  
11 submit, than in civil cases, under Rule 65, where a  
12 judge holds an interim hearing on the entry or nonentry  
13 of an injunction, that doesn't define the outcome of the  
14 case.

15           JUSTICE KENNEDY: In your view, what weight  
16 does the court -- the trial court in this hearing, give  
17 to the fact of the indictment?

18           MR. SREBNICK: I believe the indictment  
19 authorizes the initiation of the restraint and not more.  
20 The government --

21           JUSTICE KENNEDY: So no weight. We've now  
22 had a hearing, I ignore the indictment, and let's have a  
23 trial. That's your position?

24           MR. SREBNICK: Justice Kennedy, if the  
25 defendant makes a presentation at the hearing --

1 JUSTICE KENNEDY: No. I would think the  
2 government has the burden of proof.

3 MR. SREBNICK: If the defendant is entitled  
4 to the hearing because the defendant needs assets to  
5 retain counsel of choice, and the government rests on  
6 the indictment and the defense presents nothing more, I  
7 submit the government would prevail at that hearing if  
8 nothing is --

9 JUSTICE KENNEDY: What about -- what about a  
10 detention hearing? Same rule?

11 MR. SREBNICK: Under the statute --

12 JUSTICE KENNEDY: It would be the government  
13 under a detention hearing -- pardon me. The trial court  
14 under the detention hearing ignores the fact of the  
15 indictment?

16 MR. SREBNICK: Under the Bail Reform Act,  
17 there is a rebuttable presumption in certain offenses  
18 where an indictment has been returned that the person is  
19 a flight risk, but it is a rebuttal presumption. We are  
20 asking for the same opportunity to rebut the entry of  
21 the restraint. So we, in no way, are submitting that  
22 the prosecution is prevented from proceeding to trial.

23 JUSTICE SCALIA: But a grand jury indictment  
24 doesn't -- doesn't establish that there is probable  
25 cause to believe that the person is a flight risk. That

1 doesn't contradict what the grand jury found. You're  
2 asking the judge here to contradict what the grand jury  
3 found.

4 MR. SREBNICK: We are asking the judge to  
5 make an independent finding based on what's presented to  
6 that judge at the hearing, the very hearings that have  
7 been occurring for 25 years.

8 JUSTICE GINSBURG: Wouldn't the next step be  
9 that the judge would then dismiss the indictment? The  
10 judge has found there is no probable cause to charge  
11 this man with this offense. And yet, you're going to  
12 ask that same judge to try the case that -- it would  
13 seem to me that the logic of your position is, if there  
14 is to be this hearing on probable cause and the judge  
15 finds that there is no probable cause, then the judge  
16 dismisses the indictment.

17 How could you ask a judge who thinks there  
18 is no probable cause to then conduct a trial.

19 MR. SREBNICK: Justice Ginsburg, what the  
20 judge might conclude is, at that hearing, at that moment  
21 in time, the government did not satisfy its burden, on  
22 that one day in time. It doesn't mean that the judge  
23 has gone back to look at what occurred before the grand  
24 jury.

25 JUSTICE ALITO: At these hearings, when they

1 have been conducted, what do they look like? The rules  
2 of evidence would not apply, I assume, so the government  
3 could call, let's say, a case agent who would provide a  
4 summary of some of the evidence -- enough of the  
5 evidence that was submitted to the grand jury to  
6 establish probable cause in the opinion of the  
7 prosecution, and then what would happen?

8 MR. SREBNICK: Justice Alito --

9 JUSTICE ALITO: You could call witnesses.  
10 Could you subpoena witnesses? Could you require the  
11 disclosure of the names of government witnesses?

12 MR. SREBNICK: Justice Alito, what we are  
13 proposing and what, indeed, happened in this case -- in  
14 the case of the Kaleys, the defense presented  
15 transcripts of testimony. All we asked the judge to do  
16 is to consider it. Indeed, the judge had presided over  
17 a trial of a co-defendant, who was acquitted.

18 JUSTICE ALITO: Well, this was an unusual --  
19 that's a somewhat unusual situation where you had  
20 been -- there had already been a trial of someone else  
21 who was allegedly involved in the scheme. But what if  
22 that was not the case? In the more ordinary situation,  
23 what would happen?

24 MR. SREBNICK: In the more ordinary  
25 situation, the defense -- if it chose to offer evidence,

1 it would be subject to the rules of the standard for  
2 issuing subpoenas under Nixon, only if there were  
3 material exculpatory evidence that needed to be  
4 presented. This would not be a discovery exercise.

5 This would not be an effort to simply learn  
6 identity of witnesses. Indeed, the government could and  
7 does rely upon hearsay witnesses, case agents, to  
8 summarize the case.

9 But where the defense, as here, offers the  
10 judge evidence of innocence, where the judge himself has  
11 presided over the trial of a co-defendant and sees the  
12 defect in the indictment, sees the defect in the theory  
13 of prosecution, we believe due process does not allow  
14 the judge to close his eyes to that --

15 JUSTICE SCALIA: And in the next case we  
16 have, if we agree with you, will be somebody saying due  
17 process does not allow you to proceed with a trial when  
18 it has been found by an impartial judge that there is no  
19 probable cause. That will be our next case, right? And  
20 you may well argue it.

21 To tell you the truth, I would prefer -- to  
22 save your client, I would prefer a rule that says you  
23 cannot, even with a grand jury indictment, prevent the  
24 defendant from using funds that are in his possession to  
25 hire counsel, don't need a hearing, just -- just it's

1 unconstitutional for the rule to be any broader than  
2 withholding money that the defendant does not need to  
3 defend himself.

4           Would you like that? I really prefer it to  
5 yours. I think yours leads us into really strange  
6 territory.

7           MR. SREBNICK: Justice Scalia, I believe  
8 that was the issue in Monsanto and Caplin & Drysdale,  
9 where this Court held a 5-to-4 decision that assets that  
10 are demonstrably tainted can be restrained over the  
11 objection of the defendant who needs those assets to  
12 retain counsel of choice. Today, I'm asking the Court  
13 not to allow the restraint of those assets that are  
14 demonstrably not tainted.

15           JUSTICE KAGAN: Can I ask what the prospects  
16 of success at a hearing like this are? You know,  
17 there's an amicus brief which lists 25 cases in the  
18 Second Circuit, in which this kind of hearing was held.  
19 My clerk went back and found that, in 24 of those cases,  
20 the motion was denied, and in the 25th, the motion was  
21 granted, but then reversed on appeal.

22           So, then -- you know, it's not surprising  
23 really. I mean, probable cause, it's a pretty low bar.  
24 So what are we going through all this rigamarole for,  
25 for the prospect of -- you know, coming out the same way

1 in the end?

2 MR. SREBNICK: Justice Kagan --

3 JUSTICE SOTOMAYOR: Just as a footnote, one  
4 in a million, which might be your case. I think that's  
5 the point.

6 MR. SREBNICK: Actually, I believe that the  
7 brief of the New York Council of Defense Lawyers that  
8 Justice Kagan refers to points out that there are many  
9 other cases where, at the courthouse steps, the parties  
10 resolve the question of the restraint of those assets.

11 CHIEF JUSTICE ROBERTS: And I suppose, if  
12 the government knows it's got to go through a hearing  
13 where it has to lay out part of its case, it may well  
14 decide at that point it's not worth it, so it's not 24  
15 or 25. Who knows how many hundreds of times the  
16 government would have sought to seize the assets, but  
17 didn't because they knew they would have to justify it  
18 at a hearing.

19 MR. SREBNICK: Mr. Chief Justice, that may  
20 be so, but it appears that the government does exactly  
21 that, every day, in Federal court during pretrial  
22 detention hearings, when it proffers its case in order  
23 to convince a judge to detain a defendant, and we're  
24 asking for something no different.

25 JUSTICE GINSBURG: But you said something

1 about plainly tainted assets. I thought that the  
2 hearing was given on the traceability of the assets to  
3 the crime. So on that part, the defendant isn't allowed  
4 to challenge the connection between the assets and the  
5 offense, right?

6 MR. SREBNICK: Yes, Justice Ginsburg.

7 JUSTICE GINSBURG: Everybody agrees with  
8 that. So there is a possibility to say, you said we  
9 have untainted assets, but the defendant in this case  
10 said, I concede that these assets are related to the  
11 charged offense.

12 MR. SREBNICK: Yes, Justice Ginsburg. We  
13 distinguish between tainted and traceable to. The court  
14 below granted us a hearing to determine whether the  
15 assets restrained were traceable to the conduct in the  
16 indictment. What we would like to show at a hearing --  
17 indeed, I think we have shown it on the record before  
18 district court, is that, even though the assets that are  
19 under restraint are traceable to the conduct, the  
20 conduct is simply not criminal.

21 And we'd like the court to hold a hearing  
22 which would not bind the court at trial. Again, no  
23 different than courts hold in civil cases with Rule 65,  
24 this interim decision is not a determination of whether  
25 the grand jury got it right or wrong. It's a

1 determination of whether the government presented a  
2 sufficient case on that day to satisfy its burden.

3 JUSTICE ALITO: There's been a suggestion  
4 that, if the judge were to find that there was a lack of  
5 probable cause, the prosecutor would be under an ethical  
6 obligation to dismiss the charges. Do you agree with  
7 that?

8 MR. SREBNICK: Justice Alito, not  
9 necessarily. It would depend on why there was no  
10 so-called probable cause. If it was based on a --  
11 something known to the prosecutor that would constrain  
12 him or her ethically, perhaps.

13 But if it was simply because the prosecutor,  
14 on the day of the hearing, only presented one witness  
15 instead of all five, that would not constrain the  
16 prosecutor ethically in any way.

17 The prosecutor retains the discretion to  
18 decide how strong a presentation to make at this  
19 hearing, no different than the prosecutor would have to  
20 make that same decision at a preliminary hearing, at a  
21 pretrial detention hearing or plaintiffs have to make at  
22 a Rule 65 hearing.

23 JUSTICE ALITO: And what if it's the same  
24 evidence -- the same evidence is introduced before the  
25 grand jury? Let's say it's a credibility determination.

1 The grand jury finds the prosecution witness credible,  
2 the judge finds the prosecution witness not credible.  
3 Is there, then, an ethical obligation to dismiss the  
4 charges?

5 MR. SREBNICK: Justice Alito, again, not  
6 necessarily. People can differ about credibility.  
7 We're not talking here about knowingly presenting  
8 perjured testimony or anything of that sort, that might  
9 raise ethical constraints.

10 JUSTICE SOTOMAYOR: We would, presumably,  
11 if -- like here -- if there's a legal dispute and the  
12 government thinks the judge is wrong, they would try the  
13 case and go up on appeal and say to the appellate court  
14 the judge below was wrong initially.

15 MR. SREBNICK: I believe, yes, Justice --

16 JUSTICE SOTOMAYOR: You would have lost the  
17 money in that case, but --

18 MR. SREBNICK: Justice Sotomayor, forgive  
19 me. Justice Sotomayor, I believe the government could  
20 have -- and I haven't studied whether they would have a  
21 right to an interlocutory appeal from that unfreezing of  
22 the assets. I -- I suppose they would just like we did.

23 JUSTICE SCALIA: Does this hearing include  
24 an assessment of the reasonableness of attorneys' fees?  
25 I mean, if you're only withholding the amount of money

1 necessary for the defense, what if this fellow wants to  
2 hire Clarence Darrow? Does -- does that give him all  
3 the money? How -- how do you decide that issue?

4 MR. SREBNICK: Justice Scalia, I think it's  
5 decided the same way courts every day decide the  
6 reasonableness of fees and the legitimacy of fees. So  
7 long as the money is being used for bona fide legal  
8 fees --

9 JUSTICE SCALIA: But does he know his  
10 lawyer -- is his lawyer there saying -- you know, this  
11 is the lawyer I'm going to hire and here's the fee I'm  
12 going to charge?

13 MR. SREBNICK: In this case, yes, because  
14 counsel of choice had been retained two years before the  
15 indictment, had been working on the case for two years,  
16 when the indictment was returned and the restraining  
17 order was entered. So counsel of choice had already  
18 estimated fees, disclosed them to the Court, all a  
19 matter of record.

20 There was never a dispute about the  
21 reasonableness of the fees, the bona fides of the fees,  
22 the legitimacy of the fees.

23 JUSTICE SCALIA: But you -- you acknowledge  
24 that that could be -- that could be an issue in the  
25 hearing in other cases.

1 MR. SREBNICK: Yes, Justice Scalia. If the  
2 fees were a sham, if the fees were unreasonable, if they  
3 were not consistent with the locality, of course,  
4 that could be --

5 JUSTICE SCALIA: I don't know what the fees  
6 are. I don't even know who the lawyer's going to be.  
7 This defendant just comes in and says, I want to hire a  
8 lawyer. And the court says -- you know, any particular  
9 lawyer? No, I just want a lawyer. The court's going to  
10 have to make up a fee, I assume, right?

11 MR. SREBNICK: Justice Scalia, we're talking  
12 now about the right to counsel of choice. The lawyer  
13 would have been chosen by the defendant. The lawyer's  
14 fees would be disclosed to the court, and the court  
15 would then have information upon which to make a  
16 decision about whether the fees are reasonable and bona  
17 fide.

18 JUSTICE SCALIA: Okay. He has to choose a  
19 lawyer before this hearing, right?

20 MR. SREBNICK: If the defendant is seeking a  
21 particular amount to be unfrozen at the time of the  
22 transfer of funds, of course, the court would need to  
23 know who the lawyer was and how much the fee was. And  
24 so there's no problem with the court administering those  
25 issues.

1           Indeed, the courts, on a daily basis,  
2 supervise the payment of appointed lawyers. And so all  
3 that the defense here is asking for is an opportunity to  
4 be heard in a meaningful manner, not simply about  
5 whether the asset restrained is traceable to the  
6 conduct. This Court's precedence has never limited due  
7 process to a tracing inquiry as suggested by the courts  
8 below.

9           JUSTICE GINSBURG: Did you say that, in this  
10 case, because counsel had been retained two years  
11 earlier, that the court was presented with how much the  
12 lawyer was going to charge to represent the defendants  
13 at trial?

14           MR. SREBNICK: Yes.

15           JUSTICE GINSBURG: The -- the dollar amount  
16 was known, so that the court could then say, well, we'll  
17 unfreeze assets to that extent but no more.

18           MR. SREBNICK: Yes, Justice Ginsburg.

19           So there is no mystery in this case. Who  
20 counsel is, what the estimate of fees are, that's not  
21 the issue in this case. The issue in this case is  
22 whether the Petitioners have an opportunity to be heard,  
23 so as to challenge this restraining order that purports  
24 to remain in effect -- indeed, has remained in effect  
25 for six years.

1 JUSTICE GINSBURG: What was -- what was the  
2 figure? Counsel was identified.

3 MR. SREBNICK: Yes.

4 JUSTICE GINSBURG: What was -- what was the  
5 amount of money that the defendants wanted spared from  
6 the seizure order?

7 MR. SREBNICK: The estimate was a fee of up  
8 to \$500,000 for two lawyers and the entire investigation  
9 costs, consultants, experts, et cetera. That was the  
10 budget. There was no actual dollar figure set in stone.  
11 It was a budget in order to allow the defense to have  
12 their counsel of choice.

13 JUSTICE KENNEDY: And it was a case with  
14 very substantial documents, et cetera?

15 MR. SREBNICK: Yes, Justice Kennedy. And  
16 there was never a question by the district court or,  
17 indeed, by the government as to the reasonableness of  
18 that budget, if the case were to go all the way through  
19 trial.

20 JUSTICE SCALIA: Tell me something because I  
21 don't know the answer. Can -- can the government track  
22 tainted funds that -- that have been given to other  
23 people, including lawyers?

24 MR. SREBNICK: Justice Scalia, I believe  
25 they can.

1 JUSTICE SCALIA: I think they can, too. So  
2 what happens if this lawyer gets his \$500,000 and you've  
3 had the traceability hearings, so these are tainted  
4 funds? If he is convicted, he gives the money back?

5 MR. SREBNICK: Justice Scalia, in this case,  
6 if the hearing would go forward, the only way the  
7 lawyers would be paid is if there would be a finding by  
8 the court that the conduct at issue will not give rise  
9 to forfeiture.

10 And so the lawyers would, of course, try to  
11 rely upon that judicial decision to establish the bona  
12 fides of their accepting that fee in the event that the  
13 defendants were convicted and the government sought  
14 forfeiture. The defense lawyers might be at risk.

15 JUSTICE SCALIA: The -- the --

16 MR. SREBNICK: Mr. Chief Justice, I'd like  
17 to reserve the balance of my time.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Dreeben.

21 ORAL ARGUMENT OF MICHAEL R. DREEBEN

22 ON BEHALF OF THE RESPONDENT

23 MR. DREEBEN: Thank you, Mr. Chief Justice,  
24 and may it please the Court:

25 For over 200 years, the rule in this Court

1 and in all lower courts have been that the grand jury's  
2 determination of probable cause is conclusive for  
3 purposes of the criminal case, and that rule has been  
4 extended, not only to bringing the defendant to trial,  
5 but also depriving the defendant of liberty, imposing  
6 occupational restrictions on the defendant, imposing  
7 firearms restrictions on the defendant.

8 CHIEF JUSTICE ROBERTS: But none of that  
9 goes to his ability to hire his counsel of choice. I  
10 mean, that seems to me to make this case quite  
11 different. It's not that property is more valuable than  
12 liberty or anything like that. It's that the property  
13 can be used to hire a lawyer who can keep him out of  
14 jail for the next 30 years, so the parallels don't  
15 strike me as useful.

16 MR. DREEBEN: Well, the parallels, I think,  
17 Mr. Chief Justice, illustrate that the process for  
18 determining probable cause by a grand jury has been  
19 deemed sufficiently reliable, so that further judicial  
20 inquiry is not warranted. And that is borne out by two  
21 features of the grand jury: One, the way it operates;  
22 and, the second, the empirical realities of what it has  
23 produced.

24 The grand jury is set up as an independent  
25 body to protect the defendant from unfounded

1 prosecutions. It is structurally independent from the  
2 prosecution and the courts. And it's composed of --

3 CHIEF JUSTICE ROBERTS: I understand the  
4 theory. In reality, it's not terribly -- it's not great  
5 insulation from the overweening power of the government.

6 MR. DREEBEN: Well, it is a protection in  
7 the following sense, Mr. Chief Justice: If the court is  
8 seriously considering departing from the universal rule  
9 up till now in its cases and in other English-speaking  
10 courts and allowing a review of whether there is  
11 probable cause after the grand jury has found it, it  
12 ought at least to have a good reason for doing so,  
13 namely some reason to think that defendants will prevail  
14 in a --

15 JUSTICE BREYER: They do that, fine, done.  
16 What we interpret the statute as saying, under  
17 constitutional compulsion, it uses the word "may," and  
18 if the magistrate concludes that there is -- after all,  
19 the basic principle of hearings is you don't need a  
20 hearing where there's nothing to have a hearing about.

21 So unless the defendant demonstrates that  
22 there is a sound reason to believe that the grand jury  
23 was wrong, they only heard one side of the story, and  
24 that there is no probable cause, you don't have to give  
25 him a hearing.

1                   But the word is "may." And so, like five  
2 circuits, Mr. Magistrate, if you think that there is a  
3 good chance -- phrase that as you want -- that they can  
4 show that the grand jury was wrong and they want the  
5 money to pay a lawyer -- by the way, without a good  
6 lawyer, they're never going to make their case -- and  
7 then, under those circumstances, the magistrate may.

8                   Now, that's a narrow exception. It  
9 preserves the lawyer. It's consistent with the words of  
10 the statute. It respects the grand jury, at least to  
11 the same extent that bail hearings -- and when you  
12 have -- oh, yes, and probably, I could think of a few  
13 others or something. But the -- it's not undercutting  
14 the grand jury.

15                   What's wrong with it?

16                   MR. DREEBEN: Justice Breyer, just to start  
17 with the last thing that you said, it is inconsistent  
18 with the way this Court has analyzed the  
19 constitutional --

20                   JUSTICE BREYER: No, it leaves open -- it  
21 leaves open the question in Monsanto explicitly, and the  
22 only change that I've made with that explicit leaving  
23 open the due process question in the footnote in  
24 Monsanto is, instead of turning it on the Constitution,  
25 I turned it on the principle of constitutional

1 avoidance.

2 MR. DREEBEN: I wasn't referring to  
3 Monsanto, Justice Breyer. I was referring --

4 JUSTICE BREYER: You say "never" is  
5 consistently, and I think it is consistent with the  
6 footnote.

7 MR. DREEBEN: Justice Breyer, I'm not  
8 referring to Monsanto court's reservation of this issue.  
9 I agree with you, Monsanto did not decide whether there  
10 is a hearing.

11 But in the bail context, this Court has  
12 determined that a grand jury indictment is sufficient to  
13 hold the defendant. There is no further judicial review  
14 of whether the defendant's liberty may be restrained.  
15 And so that's --

16 JUSTICE KENNEDY: Is that how they interpret  
17 weight of the evidence at this -- the Bail Reform Act  
18 says that the trial judge must determine weight of the  
19 evidence. And in practice, and perhaps in reported  
20 decisions in the circuit, do the courts say we don't  
21 need to talk about weight of the evidence once there's a  
22 grand jury indictment --

23 MR. DREEBEN: No, Justice Kennedy --

24 JUSTICE KENNEDY: -- end of inquiry?

25 MR. DREEBEN: But Salerno was different

1 because Salerno was a specific statute in which Congress  
2 enumerated the factors that the judge is going to  
3 consider. There's never a reconsideration of whether  
4 there was probable cause for the indictment, as my  
5 brethren --

6 JUSTICE KENNEDY: I'm asking, perhaps not  
7 too clearly, I'm asking what function, what weight, what  
8 relevance do courts give in day-to-day hearings on  
9 detention to the Bail Reform Act requirement that judges  
10 must determine, as part of the bail determination, the  
11 weight of the evidence?

12 MR. DREEBEN: In a certain class of cases,  
13 Justice Kennedy, the indictment itself creates a  
14 presumption that no conditions will assure the safety of  
15 the community and the appearance of the defendant.

16 JUSTICE KENNEDY: But -- but that's two  
17 different things. Is the only thing the judge considers  
18 the risk of flight?

19 MR. DREEBEN: No. There's -- under  
20 Salerno --

21 JUSTICE KENNEDY: So then don't talk about  
22 risk of flight. What weight does the judge give in  
23 determining whether or not the charges have merit to the  
24 Bail Reform Act's direction that he must determine the  
25 weight of the evidence?

1 MR. DREEBEN: Justice Kennedy, when the  
2 government seeks to detain the defendant, the court has  
3 to make a determination under the Bail Reform Act, not  
4 because of the Constitution, but under the Bail Reform  
5 Act --

6 JUSTICE KENNEDY: I understand that.

7 MR. DREEBEN: -- that either the defendant  
8 poses a danger to the community or a risk of flight. In  
9 considering those issues, the court will consider a  
10 proffer from the government on the nature of the  
11 evidence of guilt. It's not a full-blown adversarial  
12 hearing in which new transcripts are being presented,  
13 new witnesses are being called, the government has a  
14 burden to justify its entire case.

15 JUSTICE KENNEDY: But the court must  
16 determine that under the Bail Reform Act.

17 MR. DREEBEN: The court will look at the  
18 weight of the evidence under the Bail Reform Act. It's  
19 not revisiting the question of probable cause. That's  
20 what's at issue in this case.

21 JUSTICE KENNEDY: No --

22 JUSTICE SCALIA: Why? Why do we have  
23 to decide it that way? I mean, I don't like casting  
24 into doubt the judgment of the grand jury, but why  
25 couldn't we say that, when you're taking away funds that

1 are needed for hiring a lawyer for your defense, you  
2 need something more than probable cause? Couldn't we  
3 make that up?

4 MR. DREEBEN: That would --

5 JUSTICE SCALIA: And then say due process  
6 requires something more than probable cause?

7 MR. DREEBEN: That's squarely contrary to  
8 what this Court held in *United States v. Monsanto*.  
9 *Monsanto*, considered against the backdrop of *Caplin &*  
10 *Drysdale*, which said forfeiture of funds that were  
11 desired to be used for attorney fees is constitutional,  
12 then turned to the question of can those funds be  
13 restrained, so they will be available for forfeiture at  
14 the end of the day.

15 CHIEF JUSTICE ROBERTS: I don't see what  
16 this case, frankly, has to do with the grand jury at  
17 all -- or review of the grand jury determination. You  
18 don't have to put forward, in this hearing, what you put  
19 forward before the grand jury at all. You could put  
20 forth different stuff. You could put forth less of it.

21 Maybe you don't want to show your -- your  
22 whole hand. Maybe the party, on the other side, they  
23 don't want to show their whole hand, too, so they don't  
24 want to show all this other evidence that's going to  
25 prove -- prove their innocence.

1                   It's an entirely separate proceeding. Now,  
2 maybe the fact of the grand jury indictment should be  
3 given some weight or not, but it's not reviewing a  
4 particular determination. It's the judge making a  
5 determination on what he or she has before him at that  
6 particular hearing.

7                   MR. DREEBEN: It's seeking to contradict the  
8 determination of probable cause --

9                   CHIEF JUSTICE ROBERTS: No. It's not, in  
10 the sense that, before the grand jury, you say, okay,  
11 here, we showed the grand jury these six things, and  
12 they said yes. You look at those six things; there's  
13 the probable cause.

14                   At this other hearing, you say, I've got --  
15 I'm going to show you these two things, and the other  
16 side has these three things. And the judge, at that  
17 point, says, well, you don't have enough to restrain the  
18 property.

19                   It's not reviewing the other determination.  
20 It's an entirely separate proceeding.

21                   MR. DREEBEN: But it is seeking to  
22 contradict the other determination because it's asking  
23 the judge to find that there is no probable cause when  
24 the grand jury has found that there is probable cause.  
25 And the grand jury's determination not only allows the

1 government to bring the defendant to trial, which would  
2 be very odd if the court had found that there is really  
3 no probable cause for these charges, they are legally  
4 invalid.

5 JUSTICE SOTOMAYOR: Do you have to go  
6 that -- I mean, your adversary just said that there was  
7 a judicial finding of no probable cause. I don't know  
8 why that judicial finding has any legal effect, other  
9 than to release the money at issue. The judge is  
10 basically saying, like he does in a bail hearing, this  
11 evidence is not the strongest I've seen.

12 In balancing the government's desire for  
13 restraint and the fundamental right to hire a lawyer of  
14 choice, it's not strong enough in this situation with  
15 what I've been presented to continue restraining the  
16 money.

17 I don't see it, as a legal determination, no  
18 probable cause. I see it as defining the word "may" in  
19 the statute. If the judge has discretion, that  
20 discretion has to be informed by something.

21 MR. DREEBEN: I think United States v.  
22 Monsanto essentially rejected the argument that there is  
23 any discretion not to restrain the funds.

24 JUSTICE BREYER: It didn't actually. What  
25 it says is, we reject the discretion in the context of

1 Judge Widener having said that, even where there is  
2 probable cause, we are going to balance a lot of  
3 factors, and what it says at the -- wait, I had it a  
4 second ago. I'll find it again.

5 It says, at the top of the next page, it  
6 says that the "may" thing refers to that. I'll get it  
7 for you later.

8 MR. DREEBEN: I understand that, Justice  
9 Breyer. There was analysis of the statute --

10 JUSTICE BREYER: Here it is. It says,  
11 "Thus, it's plainly aimed at implementing the commands  
12 at 853(a) and cannot sensibly be construed to give the  
13 district court discretion to permit the dissipation of  
14 the very property that 853(a) requires to be forfeited  
15 upon conviction." Okay?

16 MR. DREEBEN: Exactly.

17 JUSTICE BREYER: Exactly. That's what it  
18 says. So the claim here is this is property that  
19 850(a)(3)(A) does not require the defendant to forfeit  
20 upon conviction, for there can be no conviction because  
21 there is no evidence, and, therefore, I don't find that  
22 that sentence in Monsanto destroys the use of the word  
23 which Congress put in, "may."

24 MR. DREEBEN: I don't think that there is  
25 any serious question that Monsanto meant to preclude

1 free floating discretion. What it did was focus on the  
2 question of probable cause, and the Court squarely held  
3 that assets in the defendant's possession may be  
4 restrained in the way that they were here, based on a  
5 finding of probable cause to believe that the assets  
6 were forfeitable.

7 JUSTICE BREYER: Okay. So far, this is very  
8 conceptual, which is absolutely fine. I just want to  
9 leave that plain for a moment, and if I leave the  
10 conceptual plain, what I find is that they have a pretty  
11 complicated case.

12 They are saying that this -- the defendant  
13 took some medical devices with permission from hospitals  
14 that were old and used, and he didn't return them to the  
15 manufacturer, who didn't want them. And what he did is  
16 he figured out this way of selling them and making  
17 money.

18 Now, they are saying that's not that, and  
19 you're saying it is that, and so to make the arguments  
20 is complicated. You can't do it without a good lawyer.  
21 He has some money here to hire a lawyer, and you say,  
22 oh, but it will undercut the grand jury. You say, this  
23 has been the law in five circuits, and the government  
24 has not come to the end of its prosecutions, it hasn't  
25 injured prosecutions.

1           So as a purely practical matter, First  
2 Amendment, no real harm to the government that I can  
3 see. And so let's impose some kind of statutory  
4 limitation on use of this, but where there is a good  
5 claim for it, let it be used.

6           MR. DREEBEN: Let me start with the fact  
7 that I think that there is harm, and there is very  
8 little benefit, and I want to turn to both sides of that  
9 empirical equation. Before the Court concludes that,  
10 for the first time, a grand jury indictment can be  
11 contradicted by a judicial finding that there is no  
12 probable cause, albeit on different evidence, the Court  
13 should have a good reason to think that grand juries go  
14 awry in a sufficient number of cases, so that this  
15 hearing which will have costs, as I'll describe, is  
16 worth doing.

17           There is no evidence to that effect in the  
18 20 years since Monsanto. Petitioners can point to not a  
19 single instance in which a court has concluded there is  
20 no probable cause, even though the grand jury found that  
21 there is probable cause.

22           CHIEF JUSTICE ROBERTS: That's because they  
23 didn't have the good lawyers they wanted to hire.

24           (Laughter.)

25           MR. DREEBEN: They do this, Mr. Chief

1 Justice, usually with the lawyers who want to get the  
2 funds, so they can be hired. And they try to get  
3 hearings, and as Justice Kagan pointed out, we have 25  
4 reported cases. I would amend Justice Kagan's statement  
5 about those cases in only one respect. In 24 of them,  
6 the defendants lost outright. In the 25th one, they  
7 won, and they were reversed on appeal. That is  
8 accurate.

9 But the district court did not actually find  
10 that a grand jury had erred in finding probable cause  
11 because that case involved a civil complaint, not a  
12 grand jury indictment. What we have is thousands of  
13 indictments -- hundreds of thousands of indictments over  
14 the 10-year period that Respondents have canvassed in  
15 talking about Hyde amendment fee awards where courts  
16 have found no probable cause for a prosecution.

17 He has pointed to four cases. There have  
18 been 660,000 indictments during that time period. The  
19 ratio between the cases in which the system didn't work  
20 and the grand jury malfunctioned and the cases where it  
21 did and where the defendant gets the opportunity for  
22 discovery, fishing expeditions --

23 CHIEF JUSTICE ROBERTS: I'm sorry. Are you  
24 talking about cases in like the Second Circuit and the  
25 D.C. Circuit, where you do have these hearings?

1                   MR. DREEBEN: I'm talking about two things,  
2 Mr. Chief Justice. First of all, in the D.C. Circuit,  
3 Second Circuit, Seventh Circuit, and elsewhere in the  
4 country, where the law is not established, defendants  
5 can seek these hearings. In the 20 years that they have  
6 been available to be sought, not one has produced a  
7 finding of no probable cause.

8                   CHIEF JUSTICE ROBERTS: I raised this point  
9 earlier. It may be because the government, particularly  
10 when it may have tenuous probable cause basis, decides  
11 it's not worth it to go through this hearing to seize  
12 and retain the assets.

13                   And it just seems that the statistics are  
14 phony, in the sense that, where the impact of this is  
15 going to be is not in reported cases; it's going to be  
16 when the U.S. attorney says it's not worth it, it would  
17 jeopardize the trial on the merits, and so they don't  
18 even go through the process of restraining the assets.

19                   MR. DREEBEN: Well, Mr. Chief Justice, I  
20 agree with you that those cases exist. Anecdotally,  
21 they exist, where the government determines that the  
22 cost of exposing its witnesses, the dangers to  
23 witnesses, the potential undermining of the integrity of  
24 the trial, makes it too high a price to go through this  
25 hearing or --

1 CHIEF JUSTICE ROBERTS: More that the facts,  
2 since the funds are traceable, anyway and they'll have  
3 an opportunity to get them at the end, even if they  
4 don't get their restraining order, makes it not worth  
5 it.

6 MR. DREEBEN: No. That doesn't always work,  
7 Mr. Chief Justice. Let's keep in mind that this statute  
8 operates, in its core, in drug trafficking cases, in  
9 serious organized criminal cases, where the exposure of  
10 the identities of the government's witnesses can lead to  
11 serious problems of obstruction of justice. This is the  
12 real cost of these kinds of hearings.

13 JUSTICE BREYER: Has that happened in the  
14 circuits that have permitted this?

15 MR. DREEBEN: The government is unlikely to  
16 jeopardize the safety of its witnesses --

17 JUSTICE BREYER: You know, I think, in the  
18 circuit, you've now given us some statistics. So in how  
19 many cases in the circuits that have permitted what they  
20 want or my version of it, the circuits that have  
21 permitted some form of allowing the magistrate to look  
22 behind the grand jury indictment in appropriate cases  
23 and find that it's there, there is no probable cause, so  
24 you can use this to hire a lawyer.

25 There are a bunch of circuits that have had

1 rules like that. In how many cases in those circuits  
2 has the government faced the serious risks that you're  
3 talking about?

4 MR. DREEBEN: We do face them. I cannot  
5 quantify them --

6 JUSTICE BREYER: Can you give me a guess?  
7 You are -- I mean, you make a huge point of how this  
8 will put the government at a disadvantage, so someone in  
9 your office, probably you, asked people in the Justice  
10 Department, do you have any examples? Or how many cases  
11 have there been where these serious problems arose?

12 And you probably got some kind of answer, so  
13 you probably have some kind of idea.

14 MR. DREEBEN: You're correct; I did ask, and  
15 I received anecdotal responses.

16 JUSTICE BREYER: How many anecdotes?

17 (Laughter.)

18 MR. DREEBEN: I received several specific  
19 anecdotes of instances in which the government elected  
20 not to proceed with a hearing.

21 JUSTICE BREYER: In a number of cases,  
22 several specific. Is that more like four? Or is it  
23 more like 24?

24 MR. DREEBEN: There are group numbers, in  
25 which offices reported, we have encountered this a

1 number of times.

2 CHIEF JUSTICE ROBERTS: You're making it  
3 sound like you would lose the whole case. This, to some  
4 extent, is a little bit of a side show. You want to  
5 send the Kaleys to jail, and you want the assets that  
6 you think are traceable to it, and that's all well and  
7 good. But it's not like the whole case falls apart  
8 depending on whether or not you can restrain the assets  
9 or not.

10 MR. DREEBEN: No, it's not just that,  
11 Mr. Chief Justice. These assets are generally used to  
12 pay restitution to victims of crime.

13 CHIEF JUSTICE ROBERTS: Yes, but they're --

14 MR. DREEBEN: And if the assets are paid out  
15 to attorneys, although in theory, as Justice Scalia  
16 explained, it is possible, under the relation back  
17 principle, to go into the attorneys' files and into  
18 their assets and recover them, in practice, it is not so  
19 easy to do because --

20 CHIEF JUSTICE ROBERTS: Sure. But now,  
21 you've touched on something that I think is very  
22 pertinent. They are used to pay restitution to the  
23 victims. I mean, the whole point here -- and  
24 presumably, it's something that your friends on the  
25 other side would raise in one of these hearings, is

1 there are no victims, right? That's the theory.

2 And maybe it will fall apart, and the judge  
3 will say, of course, there are victims, but as I  
4 understand it, the hospitals -- you know, gave them to  
5 the people; the companies didn't want them back because  
6 they would have to give a credit.

7 You know, I'm sure the government has a  
8 different view of the facts, but that's a good example.  
9 Okay, this is going to be used to pay restitution to the  
10 victims. They come in and say, well, just give me five  
11 minutes, Your Honor, you'll see there are no victims.

12 What's wrong with that.

13 MR. DREEBEN: What's wrong with it is that  
14 it basically compels the government to try the entire  
15 case in a preliminary hearing before the case has even  
16 resulted in a --

17 JUSTICE SOTOMAYOR: How often has that  
18 happened in the five circuits?

19 MR. DREEBEN: The frequency of these  
20 hearings is limited, in part, because it's rare that  
21 defendants are able to show that they have no other  
22 assets --

23 JUSTICE SOTOMAYOR: And that's the whole  
24 point, which is you talk about compulsion on the  
25 government, but the compulsion of the defendant not to

1 have a hearing because they are required to say  
2 something that could put them at greater risk, whether  
3 it's because of the enhancements for obstruction of  
4 justice or merely from losing the advantage of their  
5 defense at trial, that's why these hearings are so rare.

6 I think it's less about the government not  
7 wanting to disclose its case and more about the  
8 inducements against the defense wanting to preview its  
9 case.

10 MR. DREEBEN: And also, the stark  
11 unlikelihood that the defense will prevail, unless the  
12 government is forced not to go through with the hearing  
13 because of concerns about which --

14 JUSTICE BREYER: Can I ask you a related  
15 question, since it came up? I was curious as to how  
16 much of this forfeiture money gets to victims. So the  
17 best we could do is looking up three years, and on the  
18 basis of the figures that I got out of the DOJ on that,  
19 about 25 -- 20 to 25 percent goes to a category called  
20 third-party interest.

21 Now, the third-party interest includes  
22 mortgagees, it includes other creditors, it includes  
23 States, who want taxes, et cetera. And if you subtract  
24 all those, a rough guess would be 5 or 10 percent goes  
25 to victims. Now, do you have a better estimate?

1                   MR. DREEBEN: I don't, Justice Breyer. I do  
2 know that one of the main purposes in seeking funds for  
3 forfeiture, particularly in white collar cases like  
4 this, is to pay restitution.

5                   JUSTICE BREYER: That is what the -- if you  
6 look at the actual amount in general, but the interests  
7 at issue here are, one, this money goes to pay for a  
8 lawyer, so the person can prove that there is not even a  
9 claim against him; and the risks, of course, sometimes  
10 of depriving the recipients of the forfeiture monies,  
11 and those would normally be, almost entirely, the DOJ  
12 for the expenses of going to the forfeiture expense of  
13 the trial.

14                   It would -- various criminal justice  
15 organizations on the prosecution side, States, who want  
16 taxes, very little is being deprived of victims. Is  
17 that a fair comment?

18                   MR. DREEBEN: No, I'm not sure that it is a  
19 fair comment. In this case, for example, the government  
20 does believe that the medical providers from which these  
21 medical supplies were obtained and then sold into the  
22 black market by agents of a company are victims of the  
23 crime. They received restitution in the prosecution of  
24 one of the co-conspirators in this case, and that is the  
25 way the government is planning to proceed.

1           If the defense is able to come up and, based  
2 on case law that really has very little to do with any  
3 situation like this, has to do with the idea that public  
4 officials who receive bribes haven't deprived the State  
5 of its entitlement to that bribe money -- that's the  
6 lead case that the defendants argue.

7           JUSTICE KENNEDY: Do you concede that there  
8 must be a traceability hearing?

9           MR. DREEBEN: If the defendant seeks one,  
10 yes. And there was the opportunity in this case for a  
11 hearing and the defendants --

12           JUSTICE KENNEDY: I mean, in the general run  
13 case, so you agree that due process does require a  
14 traceability hearing?

15           MR. DREEBEN: Yes. The defendants are  
16 entitled to show that the assets that are restrained are  
17 not actually the proceeds of the charged criminal  
18 offense or another way --

19           JUSTICE KENNEDY: And the defendants have  
20 the burden of proof in that hearing?

21           MR. DREEBEN: That would be up to this  
22 Court's decision.

23           JUSTICE KENNEDY: What is your view as to  
24 what the Constitution requires in that respect?

25           MR. DREEBEN: I'd be happy to have the

1 defendants bear the burden of proof, but I think the  
2 courts, typically, have placed the burden of proof on  
3 the government to show traceability, and the government,  
4 therefore, presents limited evidence, but it's all  
5 against the background of the crime not being called  
6 into question.

7 JUSTICE KENNEDY: Mr. Dreeben, one other  
8 question. It's the question I asked before. I still  
9 don't understand. Under the Bail Reform Act, the issue  
10 is pretrial detention. The defendant says, Your Honor,  
11 under the Bail Reform Act, you must determine the weight  
12 of the evidence, and this is a skimpy case. The judge  
13 says, the grand jury is all I need as probable cause.

14 Can and do judges say that? Does that  
15 suffice to comply with the statute?

16 MR. DREEBEN: I think typically, Justice  
17 Kennedy, the government makes a proffer of the evidence  
18 that it intends to use. The proffer is very limited,  
19 it's hearsay, it's a description of the crime, rather  
20 than a detailed evidentiary presentation of the kind  
21 that Petitioners want here.

22 JUSTICE ALITO: I think that -- I'm sorry.

23 MR. DREEBEN: I do not think that --  
24 typically resting on the indictment alone will satisfy  
25 the weight of the evidence factor. But the hearing that

1 is provided for in Salerno is not a hearing that this  
2 Court has said, you must do as a matter of due process.  
3 It is what Congress has established as a requirement in  
4 the Bail Reform Act. When it comes to due process --

5 JUSTICE KENNEDY: Well, if it's required  
6 anyway, then certainly the due process argument that you  
7 make is much less weighty. If we have to go through  
8 this anyway for detention, why not do it for distraint  
9 of property?

10 MR. DREEBEN: It's not the same inquiry.  
11 The Bail Act hearings are usually very summary. They do  
12 not involve calling witnesses. They do not involve  
13 sworn testimony.

14 JUSTICE ALITO: But that's what it seems to  
15 me this case is all about. All the talk about  
16 whether -- about defendants being exonerated, that the  
17 judge is going to find a lack of probable cause,  
18 that's -- you know, that's fantasy land for the most  
19 part.

20 But what it's really about is about  
21 discovery. Prosecutors hate preliminary examinations.  
22 When do they ever occur in Federal felony cases? They  
23 are always -- almost always eliminated by indictment.  
24 The defense bar hates grand jury proceedings. They  
25 would like to have a preliminary hearing, where they get

1 some discovery of the government's trial case, and  
2 that's what this is all about.

3 So it seems to me that what's important is  
4 the nature. If there is going to be any kind of a  
5 hearing, what is going to take place at this hearing?  
6 And what typically happens beyond what I mentioned  
7 before, a case agent taking the stand and providing some  
8 summary of the -- of the evidence that was provided to  
9 the grand jury?

10 How much further do they go? Is the defense  
11 entitled to any discovery? Do they subpoena witnesses?

12 MR. DREEBEN: They can do both of those  
13 things. This is largely within the discretion of  
14 district courts. The Second Circuit, which probably has  
15 the most experience with these hearings under Monsanto,  
16 has held that hearsay evidence is sufficient to meet the  
17 government's burden of probable cause.

18 What happens, then, are frequently  
19 excruciating fishing expedition, cross-examinations of  
20 the government agent in the defense efforts to attempt  
21 to find out more about the government's case, to ask for  
22 additional documents, to make later claims that Brady  
23 evidence wasn't produced in connection with the Monsanto  
24 hearing and various sanctions should fall on the  
25 government.

1           And the hearings do generally take the form  
2 of efforts by defense to obtain some strategic  
3 advantage. They have never resulted in the finding of  
4 no probable cause. And the court's question, I think,  
5 here is, really, is there anything on the defendant's  
6 side of the scale, other than the abstract desire to use  
7 money that the government says is forfeitable to pay for  
8 attorneys?

9           JUSTICE GINSBURG: On that point,  
10 Mr. Dreeben, would you clarify what happens at the end  
11 of the road, if the defendant is convicted? I think you  
12 said, in theory, you could go after the lawyers to  
13 recoup the fee, but that would be difficult.

14           Can you explain what is the difficulty? We  
15 know how much the fee was.

16           MR. DREEBEN: The difficulty is that we have  
17 to actually trace the specific assets into the  
18 defendant's own account, and if the defendant's lawyer  
19 has spent that money and has used -- you know, paid it  
20 out in salary, paid it out in expenses, it's gone, the  
21 government can't make that tracing argument.

22           It can't forfeit substitute assets from the  
23 attorney, so it has to go under some State law theory  
24 and then sue the lawyers and then argue that the funds  
25 were held in constructive trust for the government.

1 State law varies widely on this. It's a big, messy,  
2 uncertain project, and as a result, it doesn't happen  
3 very often.

4 Typically, if the funds are released to the  
5 attorneys, they will be gone. And if the defendant is,  
6 at the end of the day, convicted of a serious financial  
7 crime and the government wants those assets available to  
8 compensate investors, to compensate victims of Food and  
9 Drug violations, the funds are not there. They have  
10 been spent on an attorney.

11 And under this Court's decision in *Caplin &*  
12 *Drysdale*, those funds were never the defendant's funds  
13 at all. What happens is that they may have been  
14 released because the government chose, at a hearing, not  
15 to contest probable cause because it would suffer the  
16 kinds of ill effects that Justice Alito referred to, and  
17 that kind of -- "blackmail" may be too strong of a word,  
18 but it does put the government in a very --

19 JUSTICE BREYER: We could deal with that,  
20 couldn't we, by imposing conditions surrounding the use  
21 of the word "may" with conditions that would reject --  
22 you would say they rejected it. The magistrate thought  
23 this was just a fishing expedition for evidence. That's  
24 not a ground. He has to believe it's not a fishing  
25 expedition for evidence and that there is good cause to

1 think that the defendant will succeed.

2 MR. DREEBEN: Well, that would be --

3 JUSTICE BREYER: Under those  
4 circumstances -- under -- which is pretty limited, under  
5 those circumstances, then he has discretionary authority  
6 to grant a hearing at which the defendant will be able  
7 to show -- you know, that there is not probable cause to  
8 believe a crime was committed by his client.

9 MR. DREEBEN: Those high bars would be  
10 helpful. But once the defendant clears them, the  
11 government faces the same pressures. And at the end of  
12 the day, the same consequence is going to occur, that if  
13 the judge does find in that one in a million case, which  
14 has not yet been encountered, that there was no probable  
15 cause for the indictment, you will have the defendant  
16 proceeding on to trial in a judicial system that is  
17 honoring the finding of the grand jury after the judge  
18 has concluded to the contrary.

19 And --

20 JUSTICE BREYER: Well, it's about a  
21 different subject. It's not we work through osmosis  
22 here. It's about the subject of quashing a warrant, or  
23 it's about the subject of injunction. Now, grant you, a  
24 grand jury thinks it's there, but it's also there, when  
25 you're talking about certain bail hearings.

1 MR. DREEBEN: It's different in the bail  
2 context because the -- the judge at the bail hearing is  
3 never questioning probable cause. He's only questioning  
4 whether the evidence is sufficient to justify  
5 restraining the defendant.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 Mr. Dreeben.

9 Mr. Srebnick, you have three minutes  
10 remaining.

11 REBUTTAL ARGUMENT OF HOWARD SREBNICK  
12 ON BEHALF OF THE PETITIONER

13 MR. SREBNICK: The government is asking for  
14 an extraordinary remedy. We're asking for limited  
15 relief.

16 Justice Alito, we're asking for the kind of  
17 hearing that Federal courts do every day. This is not a  
18 fishing expedition. This is not a discovery exercise.

19 JUSTICE ALITO: What do you mean this is the  
20 kind of hearing that's held every day? I thought  
21 these -- in some circuits, it is. But it's held  
22 occasionally.

23 MR. SREBNICK: The hearing looks very  
24 similar to a pretrial detention hearing. And in 2008,  
25 in front of the D.C. Circuit, the government was asked

1 the question that this Court asks today, what would be  
2 the prejudice to the government -- or what has been the  
3 prejudice to the government in holding these hearings?

4 And I quote from the D.C. Circuit, "The  
5 government could not identify any harm to its law  
6 enforcement efforts in the Second Circuit that has  
7 resulted from the Monsanto standard." 521 Fed 3d at  
8 419, footnote 1.

9 Today, we hear fears of lawyers abusing the  
10 process. We have a record. All we ask is the judge to  
11 read the trial record that he presided over and come to  
12 a conclusion that will not bind the court at trial. It  
13 will not bind the government at trial.

14 CHIEF JUSTICE ROBERTS: Counsel, I think  
15 your quotation from the D.C. Circuit was -- was not  
16 quite on point. My understanding is the court was  
17 asking for empirical evidence that this has caused a  
18 particular problem, not whether they could point to any  
19 concerns. I think we've seen the concerns laid out  
20 today.

21 MR. SREBNICK: I understand the hypothetical  
22 concerns that the prosecution raises. I understood the  
23 D.C. Circuit to say, is there any empirical evidence?  
24 In Matthews, the case that we cite and that we believe  
25 controls, this Court said, "Bare statistics rarely

1 provide a satisfactory measure of fairness of a  
2 decision-making process."

3           And so, rather than rely on statistics, we  
4 rely on the Due Process Clause, guarantee that you have  
5 an opportunity to be heard when the government wants to  
6 freeze the equity in my client's home and say to her and  
7 say to her husband they can't use the equity in their  
8 home to retain counsel of choice, when they've shown the  
9 court that they can prevail.

10           The government says the judge must close his  
11 eyes. The judge can't consider the trial that he  
12 presided over. Instead, he must be constrained by a  
13 one-sided proceeding that the judge never observed, the  
14 grand jury. We say the grand jury is enough to make my  
15 client go to trial. We'll be there, if we have to be  
16 there. But we say she and he should have the right to  
17 use their assets to retain their counsel of choice.

18           After all, this Court has held that the  
19 right to counsel of choice is a structural right. It is  
20 per se reversible to deny someone their counsel of  
21 choice. I ask that this Court not rule that the  
22 government can beggar a defendant into submission. I  
23 ask this Court not to rule that the government -- that  
24 the government can impoverish someone without giving  
25 them a chance to be heard through their counsel of

1 choice.

2 If there are no further questions, I would  
3 submit the case.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 The case is submitted.

6 (Whereupon, at 12:04 p.m., the case in the  
7 above-entitled matter was submitted.)

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