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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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P R O C E E D I N G S

(11:05 a.m.)

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

Mr. Srebnick?

ORAL ARGUMENT OF HOWARD SREBNICK

ON BEHALF OF THE PETITIONER

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

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

JUSTICE SCALIA: Well, I -- you know, I -- I find it hard to think that -- that the right of property is any more sacrosanct than the -- the right to freedom of the person. And we allow a grand jury indictment without -- without a separate mini-trial to justify the arrest and -- and holding of -- of the individual. And 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 the
19 way until trial, they would have a hearing, a hearing
20 which would include a right to challenge the weight of
21 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
15 use this money for something that I care more about.
16 It -- 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 moneys 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 in
20 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. Each

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE KENNEDY: No. I would think the
25 government has the burden of proof.

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

7 JUSTICE KENNEDY: What about -- what about a
8 detention hearing? Same rule?

9 MR. SREBNICK: Under the statute --

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

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

21 JUSTICE SCALIA: But a grand jury indictment
22 doesn't -- doesn't establish that there is probable
23 cause to believe that the person is a flight risk. That
24 doesn't contradict what the grand jury found. You're
25 asking the judge here to contradict what the grand jury

1 found.

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

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

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

22 JUSTICE ALITO: At these hearings when they
23 have been conducted, what do they look like? The rules
24 of evidence would not apply, I assume, so the government
25 could call, let's say, a case agent who would provide a

1 summary of some of the evidence, enough of the evidence
2 that was submitted to the grand jury to establish
3 probable cause in the opinion of the prosecution, and
4 then what would happen?

5 MR. SREBNICK: Justice Alito --

6 JUSTICE ALITO: You could call witnesses.
7 Could you subpoena witnesses? Could you require the
8 disclosure of the names of government witnesses?

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

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

21 MR. SREBNICK: In the more ordinary
22 situation the defense, if it chose to offer evidence, it
23 would be subject to the rules of the standard for
24 issuing subpoenas under Nixon only if there were
25 material exculpatory evidence that needed to be

1 presented. This would not be a discovery exercise.
2 This would not be an effort to simply learn identity of
3 witnesses. Indeed, the government could and does rely
4 upon hearsay witnesses, case agents, to summarize the
5 case.

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

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

18 To tell you the truth, I would prefer -- to
19 save your client, I would prefer a rule that says you
20 cannot, even with a grand jury indictment, prevent the
21 defendant from using funds that are in his possession to
22 hire counsel. Don't need a hearing. Just, just it's
23 unconstitutional for the rule to be any broader than
24 withholding money that the defendant does not need to
25 defend himself.

1 Would you like that? I really prefer it to
2 yours. I think yours leads us into really strange
3 territory.

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

12 JUSTICE KAGAN: Can I ask what the prospects
13 of success at a hearing like this are? You know,
14 there's an amicus brief which lists 25 cases in the
15 Second Circuit in which this kind of hearing was held.
16 My clerk went back and found that in 24 of those cases,
17 the motion was denied and in the 25th, the motion was
18 granted, but then reversed on appeal. So, then, you
19 know, it's not surprising really. I mean, probable
20 cause, it's a pretty low bar. So what are we going
21 through all this rigamarole for, for the prospect of,
22 you know, coming out the same way in the end?

23 MR. SREBNICK: Justice Kagan --

24 JUSTICE SOTOMAYOR: Just as a footnote, one
25 in a million, which might be your case. I think that's

1 the point.

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

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

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

20 JUSTICE GINSBURG: But you said something
21 about plainly tainted assets. I thought that the
22 hearing was given on the traceability of the assets to
23 the crime. So on that part, the defendant isn't allowed
24 to challenge the connection between the assets and the
25 offense, right?

1 MR. SREBNICK: Yes, Justice Ginsburg.

2 JUSTICE GINSBURG: Everybody agrees with
3 that. So there is a possibility to say you said we have
4 untainted assets, but the Defendant in this case said, I
5 concede that these assets are related to the charged
6 offense.

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

16 And we'd like the Court to hold a hearing
17 which would not bind the Court at trial. Again, no
18 different than courts hold in civil cases with Rule 65,
19 this interim decision is not a determination of whether
20 the grand jury got it right or wrong. It's a
21 determination of whether the government presented a
22 sufficient case on that day to satisfy its burden.

23 JUSTICE ALITO: There's been a suggestion
24 that if the judge were to find that there was a lack of
25 probable cause, the prosecutor would be under an ethical

1 obligation to dismiss the charges. Do you agree with
2 that?

3 MR. SREBNICK: Justice Alito, not
4 necessarily. It would depend on why there was no
5 so-called probable cause. If it was based on a --
6 something known to the prosecutor that would constrain
7 him or her ethically, perhaps. But if it was simply
8 because the prosecutor on the day of the hearing only
9 presented one witness instead of all five, that would
10 not constrain the prosecutor ethically in any way. The
11 prosecutor retains the discretion to decide how strong a
12 presentation to make at this hearing, no different than
13 the prosecutor would have to make that same decision at
14 a preliminary hearing, at a pretrial detention hearing
15 or plaintiffs have to make at a Rule 65 hearing.

16 JUSTICE ALITO: And what if it's the same
17 evidence, the same evidence is introduced before the
18 grand jury. Let's say it's a credibility determination.
19 The grand jury finds the prosecution witness credible,
20 the judge finds the prosecution witness not credible.
21 Is there, then, an ethical obligation to dismiss the
22 charges?

23 MR. SREBNICK: Justice Alito, again, not
24 necessarily. People can differ about credibility.
25 We're not talking here about knowingly presenting

1 perjured testimony or anything of that sort that might
2 raise ethical constraints.

3 JUSTICE SOTOMAYOR: We would, presumably,
4 if -- like here -- if there's a legal dispute and the
5 government thinks the judge is wrong, they would try the
6 case and go up on appeal and say to the appellate court
7 the judge below was wrong initially.

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

9 JUSTICE SOTOMAYOR: You would have lost the
10 money in that case, but --

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

16 JUSTICE SCALIA: Does this hearing include
17 an assessment of the reasonableness of attorneys' fees?
18 I mean, if you're only withholding the amount of money
19 necessary for the defense, what if this fellow wants to
20 hire Clarence Darrow? Does -- does that give him all
21 the money? How -- how do you decide that issue?

22 MR. SREBNICK: Justice Scalia, I think it's
23 decided the same way courts every day decide the
24 reasonableness of fees and the legitimacy of fees. So
25 long as the money is being used for bona fide legal

1 fees --

2 JUSTICE SCALIA: But does he know his
3 lawyer -- is his lawyer there saying, you know, this is
4 the lawyer I'm going to hire and here's the fee I'm
5 going to charge?

6 MR. SREBNICK: In this case, yes, because
7 counsel of choice had been retained two years before the
8 indictment. Had been working on the case for two years
9 when the indictment was returned and the restraining
10 order was entered. So counsel of choice had already
11 estimated fees, disclosed them to the Court, all a
12 matter of record. There was never a dispute about the
13 reasonableness of the fees, the bona fides of the fees,
14 the legitimacy of the fees.

15 JUSTICE SCALIA: But you -- you acknowledge
16 that that could be -- that could be an issue in the
17 hearing in other cases.

18 MR. SREBNICK: Yes, Justice Scalia. If the
19 fees were a sham, if the fees were unreasonable, if they
20 were not consistent with the locality, of course,
21 that could be --

22 JUSTICE SCALIA: I don't know what the fees
23 are. I don't even know who the lawyer's going to be.
24 This defendant just comes in and says, I want to hire a
25 lawyer. And the court says, you know, any particular

1 lawyer? No, I just want a lawyer. The court's going to
2 have to make up a fee, I assume, right?

3 MR. SREBNICK: Justice Scalia, we're talking
4 now about the right to counsel of choice. The lawyer
5 would have been chosen by the defendant. The lawyer's
6 fees would be disclosed to the court, and the court
7 would then have information upon which to make a
8 decision about whether the fees are reasonable and bona
9 fide.

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

12 MR. SREBNICK: If the defendant is seeking a
13 particular amount to be unfrozen at the time of the
14 transfer of funds, of course, the court would need to
15 know who the lawyer was and how much the fee was. And
16 so there's no problem with the court administering those
17 issues. Indeed, the courts on a daily basis supervise
18 the payment of appointed lawyers. And so all that the
19 defense here is asking for is an opportunity to be heard
20 in a meaningful manner, not simply about whether the
21 asset restrained is traceable to the conduct. This
22 Court's precedence has never limited due process to a
23 tracing inquiry as suggested by the courts below.

24 JUSTICE GINSBURG: Did you say that in this
25 case, because counsel had been retained two years

1 earlier, that the court was presented with how much the
2 lawyer was going to charge to represent the defendants
3 at trial?

4 MR. SREBNICK: Yes.

5 JUSTICE GINSBURG: The -- the dollar amount
6 was known so that the Court could then say, well, we'll
7 unfreeze assets to that extent but no more.

8 MR. SREBNICK: Yes, Justice Ginsburg.

9 So there is no mystery in this case. Who
10 counsel is, what the estimate of fees are, that's not
11 the issue in this case. The issue in this case is
12 whether the Petitioners have an opportunity to be heard
13 so as to challenge this restraining order that purports
14 to remain in effect, indeed, has remained in effect, for
15 six years.

16 JUSTICE GINSBURG: What was -- what was the
17 figure? Counsel was identified.

18 MR. SREBNICK: Yes.

19 JUSTICE GINSBURG: What was -- what was the
20 amount of money that the defendants wanted spared from
21 the seizure order?

22 MR. SREBNICK: The estimate was a fee of up
23 to \$500,000 for two lawyers and the entire investigation
24 costs, consultants, experts, et cetera. That was the
25 budget. There was no actual dollar figure set in stone.

1 It was a budget in order to allow the defense to have
2 their counsel of choice.

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

5 MR. SREBNICK: Yes, Justice Kennedy. And
6 there was never a question by the district court or,
7 indeed, by the government as to the reasonableness of
8 that budget if the case were to go all the way through
9 trial.

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

14 MR. SREBNICK: Justice Scalia, I believe
15 they can.

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

20 MR. SREBNICK: Justice Scalia, in this case,
21 if the hearing would go forward, the only way the
22 lawyers would be paid is if there would be a finding by
23 the court that the conduct at issue will not give rise
24 to forfeiture. And so the lawyers would, of course, try
25 to rely upon that judicial decision to establish the

1 bona fides of their accepting that fee in the event that
2 the defendants were convicted and the government sought
3 forfeiture. The defense lawyers might be at risk.

4 JUSTICE SCALIA: The -- the --

5 MR. SREBNICK: Mr. Chief Justice, I'd like
6 to reserve the balance of my time. Thank you.

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

9 ORAL ARGUMENT OF MICHAEL R. DREEBEN

10 ON BEHALF OF THE RESPONDENT

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

13 For over 200 years, the rule in this Court
14 and in all lower courts have been that the grand jury's
15 determination of probable cause is conclusive for
16 purposes of the criminal case. And that rule has been
17 extended not only to bringing the defendant to trial,
18 but also depriving the defendant of liberty, imposing
19 occupational restrictions on the defendant, imposing
20 firearms restrictions on the defendant.

21 CHIEF JUSTICE ROBERTS: But none of that
22 goes to his ability to hire his counsel of choice. I
23 mean, that seems to me to make this case quite
24 different. It's not that property is more valuable than
25 liberty or anything like that. It's that the property

1 can be used to hire a lawyer who can keep him out of
2 jail for the next 30 years. So the parallels don't
3 strike me as useful.

4 MR. DREEBEN: Well, the parallels I think,
5 Mr. Chief Justice, illustrate that the process for
6 determining probable cause by a grand jury has been
7 deemed sufficiently reliable so that further judicial
8 inquiry is not warranted. And that is borne out by two
9 features of the grand jury: One, the way it operates;
10 and the second, the empirical realities of what it has
11 produced.

12 The grand jury is set up as an independent
13 body to protect the defendant from unfounded
14 prosecutions. It is structurally independent from the
15 prosecution and the courts. And it's composed of --

16 CHIEF JUSTICE ROBERTS: I understand the
17 theory. In reality it's not terribly -- it's not great
18 insulation from the overweening power of the government.

19 MR. DREEBEN: Well, it is a protection in
20 the following sense, Mr. Chief Justice: If the court
21 is seriously considering departing from the universal
22 rule up till now in its cases and in other
23 English-speaking courts and allowing a review of whether
24 there is probable cause after the grand jury has found
25 it, it ought at least to have a good reason for doing

1 so, namely some reason to think that defendants will
2 prevail in a --

3 JUSTICE BREYER: They do that, fine, done.
4 What we interpret the statute as saying under
5 constitutional compulsion, it uses the word "may," and
6 if the magistrate concludes that there is -- after all,
7 the basic principle of hearings is you don't need a
8 hearing where there's nothing to have a hearing about.
9 So unless the defendant demonstrates that there is a
10 sound reason to believe that the grand jury was wrong,
11 they only heard one side of the story, and that there is
12 no probable cause, you don't have to give him a hearing.

13 But the word is "may." And so, like five
14 circuits, Mr. Magistrate, if you think that there is a
15 good chance -- - phrase that as you want -- that they
16 can show that the grand jury was wrong and they want the
17 money to pay a lawyer -- by the way, without a good
18 lawyer, they're never going to make their case -- and
19 then under those circumstances, the magistrate may.

20 Now, that's a narrow exception. It
21 preserves the lawyer. It's consistent with the words of
22 the statute. It respects the grand jury, at least to
23 the same extent that bail hearings -- and when you
24 have -- oh, yes, and probably I could think of a few
25 others or something. But the -- it's not undercutting

1 the grand jury. What's wrong with it?

2 MR. DREEBEN: Justice Breyer, just to start
3 with the last thing that you said, it is inconsistent
4 with the way this Court has analyzed the
5 constitutional --

6 JUSTICE BREYER: No, it leaves open -- it
7 leaves open the question in Monsanto explicitly. And
8 the only change that I've made with that explicit
9 leaving open the due process question in the footnote in
10 Monsanto is, instead of turning it on the Constitution,
11 I turned it on the principle of constitutional
12 avoidance.

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

15 JUSTICE BREYER: You say "never" is
16 consistently, and I think it is consistent with the
17 footnote.

18 MR. DREEBEN: Justice Breyer, I'm not
19 referring to Monsanto court's reservation of this issue.
20 I agree with you, Monsanto did not decide whether there
21 is a hearing.

22 But in the bail context, this Court has
23 determined that a grand jury indictment is sufficient to
24 hold the defendant. There is no further judicial review
25 of whether the defendant's liberty may be restrained.

1 And so that's --

2 JUSTICE KENNEDY: Is that how they interpret
3 weight of the evidence at this -- the Bail Reform Act
4 says that the trial judge must determine weight of the
5 evidence. And in practice, and perhaps in reported
6 decisions in the circuit, do the courts say we don't
7 need to talk about weight of the evidence once there's a
8 grand jury indictment --

9 MR. DREEBEN: No, Justice Kennedy --

10 JUSTICE KENNEDY: -- end of inquiry?

11 MR. DREEBEN: But Salerno was different
12 because Salerno was a specific statute in which Congress
13 enumerated the factors that the judge is going to
14 consider. There's never a reconsideration of whether
15 there was probable cause for the indictment, as my
16 brethren --

17 JUSTICE KENNEDY: I'm asking, perhaps not
18 too clearly, I'm asking what function, what weight, what
19 relevance do courts give in day-to-day hearings on
20 detention to the Bail Reform Act requirement that judges
21 must determine, as part of the bail determination, the
22 weight of the evidence?

23 MR. DREEBEN: In a certain class of cases,
24 Justice Kennedy, the indictment itself creates a
25 presumption that no conditions will assure the safety of

1 the community and the appearance of the defendant.

2 JUSTICE KENNEDY: But -- but that's two
3 different things. Is the only thing the judge considers
4 the risk of flight?

5 MR. DREEBEN: No. There's -- under
6 Salerno --

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

12 MR. DREEBEN: Justice Kennedy, when the
13 government seeks to detain the defendant, the court has
14 to make a determination under the Bail Reform Act, not
15 because of the Constitution, but under the Bail Reform
16 Act --

17 JUSTICE KENNEDY: I understand that.

18 MR. DREEBEN: -- that either the defendant
19 poses a danger to the community or a risk of flight. In
20 considering those issues, the court will consider a
21 proffer from the government on the nature of the
22 evidence of guilt. It's not a full-blown adversarial
23 hearing in which new transcripts are being presented,
24 new witnesses are being called, the government has a
25 burden to justify its entire case.

1 JUSTICE KENNEDY: But the court must
2 determine that under the Bail Reform Act.

3 MR. DREEBEN: The court will look at the
4 weight of the evidence under the Bail Reform Act. It's
5 not revisiting the question of probable cause. That's
6 what's at issue in this case.

7 JUSTICE KENNEDY: No --

8 JUSTICE SCALIA: Why? Why do we have
9 to decide it that way? I mean, I don't like casting
10 into doubt the judgment of the grand jury, but why
11 couldn't we say that when you're taking away funds that
12 are needed for hiring a lawyer for your defense, you
13 need something more than probable cause? Couldn't we
14 make that up?

15 MR. DREEBEN: That would --

16 JUSTICE SCALIA: And then say due process
17 requires something more than probable cause?

18 MR. DREEBEN: That's squarely contrary to
19 what this Court held in *United States v. Monsanto*.
20 *Monsanto* considered against the backdrop of *Caplin &*
21 *Drysdale*, which said forfeiture of funds that were
22 desired to be used for attorney fees is constitutional;
23 then turned to the question of can those funds be
24 restrained so they will be available for forfeiture at
25 the end of the day.

1 CHIEF JUSTICE ROBERTS: I don't see what
2 this case, frankly, has to do with the grand jury at
3 all, or review of the grand jury determination. You
4 don't have to put forward in this hearing what you put
5 forward before the grand jury at all. You could put
6 forth different stuff. You could put forth less of it.
7 Maybe you don't want to show your -- your whole hand.
8 Maybe the party on the other side, they don't want to
9 show their whole hand too, so they don't want to show
10 all this other evidence that's going to prove -- prove
11 their innocence.

12 It's an entirely separate proceeding. Now,
13 maybe the fact of the grand jury indictment should be
14 given some weight or not. But it's not reviewing a
15 particular determination. It's the judge making a
16 determination on what he or she has before him at that
17 particular hearing.

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

20 CHIEF JUSTICE ROBERTS: No. It's not, in
21 the sense that before the grand jury you say: Okay,
22 here, we showed the grand jury these six things and they
23 said yes. You look at those six things; there's the
24 probable cause.

25 At this other hearing, you say: I've got --

1 I'm going to show you these two things, and the other
2 side has these three things, and the judge at that point
3 says: Well, you don't have enough to restrain the
4 property.

5 It's not reviewing the other determination.
6 It's an entirely separate proceeding.

7 MR. DREEBEN: But it is seeking to
8 contradict the other determination because it's asking
9 the judge to find that there is no probable cause when
10 the grand jury has found that there is probable cause.
11 And the grand jury's determination not only allows the
12 government to bring the defendant to trial, which would
13 be very odd if the court had found that there is really
14 no probable cause for these charges, they are legally
15 invalid.

16 JUSTICE SOTOMAYOR: Do you have to go
17 that -- I mean, your adversary just said that there was
18 a judicial finding of no probable cause. I don't know
19 why that judicial finding has any legal effect other
20 than to release the money at issue. The judge is
21 basically saying, like he does in a bail hearing, this
22 evidence is not the strongest I've seen. In balancing
23 the government's desire for restraint and the
24 fundamental right to hire a lawyer of choice, it's not
25 strong enough in this situation with what I've been

1 presented to continue restraining the money.

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

6 MR. DREEBEN: I think United States v.
7 Monsanto essentially rejected the argument that there is
8 any discretion not to restrain the funds.

9 JUSTICE BREYER: It didn't actually. What
10 it says is, we reject the discretion in the context of
11 Judge Widener having said that even where there is
12 probable cause, we are going to balance a lot of
13 factors, and what it says at the -- wait, I had it a
14 second ago. I'll find it again. It says at the top of
15 the next page, it says that the "may" thing refers to
16 that. I'll get it for you later.

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

19 JUSTICE BREYER: Here it is. It says,
20 "Thus, it's plainly aimed at implementing the commands
21 at 853(a) and cannot sensibly be construed to give the
22 district court discretion to permit the dissipation of
23 the very property that 853(a) requires to be forfeited
24 upon conviction." Okay?

25 MR. DREEBEN: Exactly.

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

8 MR. DREEBEN: I don't think that there is
9 any serious question that Monsanto meant to preclude
10 free floating discretion. What it did was focus on the
11 question of probable cause, and the court squarely held
12 that assets in the defendant's possession may be
13 restrained in the way that they were here based on a
14 finding of probable cause to believe that the assets
15 were forfeitable.

16 JUSTICE BREYER: Okay. So far this is very
17 conceptual, which is absolutely fine. I just want to
18 leave that plain for a moment, and if I leave the
19 conceptual plain, what I find is that they have a pretty
20 complicated case. They are saying that this, the
21 defendant, took some medical devices with permission
22 from hospitals that were old and used, and he didn't
23 return them to the manufacturer, who didn't want them.
24 And what he did is he figured out this way of selling
25 them and making money.

1 Now, they are saying that's not that and
2 you're saying it is that, and so to make the arguments
3 is complicated. You can't do it without a good lawyer.
4 He has some money here to hire a lawyer and you say, oh,
5 but it will undercut the grand jury. You say, this has
6 been the law in five circuits and the government has not
7 come to the end of its prosecutions, it hasn't injured
8 prosecutions. So as a purely practical matter, First
9 Amendment, no real harm to the government that I can
10 see. And so let's impose some kind of statutory
11 limitation on use of this, but where there is a good
12 claim for it, let it be used.

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

24 There is no evidence to that effect in the
25 20 years since Monsanto. Petitioners can point to not a

1 single instance in which a court has concluded there is
2 no probable cause even though the grand jury found that
3 there is probable cause.

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

6 (Laughter.)

7 MR. DREEBEN: They do this, Mr. Chief
8 Justice, usually with the lawyers who want to get the
9 funds so they can be hired. And they try to get
10 hearings, and as Justice Kagan pointed out, we have 25
11 reported cases. I would amend Justice Kagan's statement
12 about those cases in only one respect: In 24 of them,
13 the defendants lost outright. In the 25th one, they won
14 and they were reversed on appeal. That is accurate.

15 But the district court did not actually find
16 that a grand jury had erred in finding probable cause,
17 because that case involved a civil complaint, not a
18 grand jury indictment. What we have is thousands of
19 indictments, hundreds of thousands of indictments over
20 the 10-year period that respondents have canvassed in
21 talking about Hyde amendment fee awards where courts
22 have found no probable cause for a prosecution. He has
23 pointed to four cases. There have been 660,000
24 indictments during that time period. The ratio between
25 the cases in which the system didn't work and the grand

1 jury malfunctioned, and the cases where it did and where
2 the defendant gets the opportunity for discovery,
3 fishing expeditions --

4 CHIEF JUSTICE ROBERTS: I'm sorry, are you
5 talking about cases in like the Second Circuit and the
6 D.C. Circuit where you do have these hearings?

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

14 CHIEF JUSTICE ROBERTS: I raised this point
15 earlier. It may be because the government, particularly
16 when it may have tenuous probable cause basis, decides
17 it's not worth it to go through this hearing to seize
18 and retain the assets. And it just seems that the
19 statistics are phony in the sense that where the impact
20 of this is going to be is not in reported cases; it's
21 going to be when the U.S. attorney says it's not worth
22 it, it would jeopardize the trial on the merits, and so
23 they don't even go through the process of restraining
24 the assets.

25 MR. DREEBEN: Well, Mr. Chief Justice, I

1 agree with you that those cases exist. Anecdotally,
2 they exist, where the government determines that the
3 cost of exposing its witnesses, the dangers to
4 witnesses, the potential undermining of the integrity of
5 the trial, makes it too high a price to go through this
6 hearing or --

7 CHIEF JUSTICE ROBERTS: More than the facts,
8 since the funds are traceable anyway and they'll have an
9 opportunity to get them at the end even if they don't
10 get their restraining order, makes it not worth it.

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

18 JUSTICE BREYER: Has that happened in the
19 circuits that have permitted this?

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

22 JUSTICE BREYER: You know, I think in the
23 circuit, you've now given us some statistics. So in how
24 many cases in the circuits that have permitted what they
25 want or my version of it, the circuits that have

1 permitted some form of allowing the magistrate to look
2 behind the grand jury indictment in appropriate cases
3 and find that it's there, there is no probable cause, so
4 you can use this to hire a lawyer. There are a bunch of
5 circuits that have had rules like that. In how many
6 cases in those circuits has the government faced the
7 serious risks that you're talking about?

8 MR. DREEBEN: We do face them. I cannot
9 quantify them --

10 JUSTICE BREYER: Can you give me a guess?
11 You are -- I mean, you make a huge point of how this
12 will put the government at a disadvantage, so someone in
13 your office, probably you, asked people in the Justice
14 Department, do you have any examples? Or how many cases
15 have there been where these serious problems arose? And
16 you probably got some kind of answer. So you probably
17 have some kind of idea.

18 MR. DREEBEN: You're correct, I did ask, and
19 I received anecdotal responses.

20 JUSTICE BREYER: How many anecdotes?
21 (Laughter.)

22 MR. DREEBEN: I received several specific
23 anecdotes of instances in which the government elected
24 not to proceed with a hearing.

25 JUSTICE BREYER: In a number of cases,

1 several specific. Is that more like four or is it more
2 like 24?

3 MR. DREEBEN: There are group numbers in
4 which offices reported, we have encountered this a
5 number of times.

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

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

16 CHIEF JUSTICE ROBERTS: Yeah, but they're --

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

23 CHIEF JUSTICE ROBERTS: Sure. But now
24 you've touched on something that I think is very
25 pertinent. They are used to pay restitution to the

1 victims. I mean, the whole point here, and presumably
2 it's something that your friends on the other side would
3 raise in one of these hearings is there are no victims.
4 Right? That's the theory, and maybe it will fall apart
5 and the judge will say, of course, there are victims,
6 but as I understand it, the hospitals, you know, gave
7 them to the people; the companies didn't want them back
8 because they would have to give a credit.

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

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

19 JUSTICE SOTOMAYOR: How often has that
20 happened in the five circuits?

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

25 JUSTICE SOTOMAYOR: And that's the whole

1 point, which is you talk about compulsion on the
2 government, but the compulsion of the defendant not to
3 have a hearing because they are required to say
4 something that could put them at greater risk, whether
5 it's because of the enhancements for obstruction of
6 justice or merely from losing the advantage of their
7 defense at trial, that's why these hearings are so rare.

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

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

16 JUSTICE BREYER: Can I ask you a related
17 question, since it came up. I was curious as to how
18 much of this forfeiture money gets to victims. So the
19 best we could do is looking up three years and on the
20 basis of the figures that I got out of the DOJ on that,
21 about 25, 20 to 25 percent goes to a category called
22 third-party interest. Now, the third-party interest
23 includes mortgagees, it includes other creditors, it
24 includes States, who want taxes, etcetera. And if you
25 subtract all those, a rough guess would be 5 or 10

1 percent goes to victims. Now do you have a better
2 estimate?

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

7 JUSTICE BREYER: That is what the -- if you
8 look at the actual amount in general. But the interests
9 at issue here are: One, this money goes to pay for a
10 lawyer so the person can prove that there is not even a
11 claim against him; and the risks, of course, sometimes
12 of depriving the recipients of the forfeiture moneys and
13 those would normally be, almost entirely, the DOJ for
14 the expenses of going to the forfeiture expense of the
15 trial. It would -- various criminal justice
16 organizations on the prosecution side, States, who want
17 taxes. Very little is being deprived of victims. Is
18 that a fair comment?

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

1 way the government is planning to proceed.

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

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

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

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

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

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

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

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

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

8 JUSTICE KENNEDY: Mr. Dreeben, one other
9 question. It's the question I asked before. I still
10 don't understand. Under the Bail Reform Act, the issue
11 is pretrial detention. The defendant says: Your Honor,
12 under the Bail Reform Act you must determine the weight
13 of the evidence and this is a skimpy case. The judge
14 says: The grand jury is all I need as probable cause.
15 Can and do judges say that? Does that suffice to comply
16 with the statute?

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

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

24 MR. DREEBEN: I do not think that typically
25 resting on the indictment alone will satisfy the weight

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

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

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

15 JUSTICE ALITO: But that's what it seems to
16 me this case is all about. All the talk about whether
17 -- about defendants being exonerated, that the judge is
18 going to find a lack of probable cause, that's, you
19 know, that's fantasy land for the most 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. The
24 defense bar hates grand jury proceedings. They would
25 like to have a preliminary hearing where they get some

1 discovery of the government's trial case, and that's
2 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 the
9 grand jury? How much further do they go? Is the
10 defense entitled to any discovery? Do they subpoena
11 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 recoup
13 the fee, but that would be difficult. Can you explain
14 what is the difficulty? We know how much the fee was.

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

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

1 uncertain project and as a result it doesn't happen very
2 often.

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

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

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

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

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

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

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

24 MR. DREEBEN: It's different in the bail
25 context, because the -- the judge at the bail hearing is

1 never questioning probable cause. He's only questioning
2 whether the evidence is sufficient to justify
3 restraining the defendant.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Dreeben.

7 Mr. Srebnick, you have three minutes
8 remaining.

9 REBUTTAL ARGUMENT OF HOWARD SREBNICK

10 ON BEHALF OF THE PETITIONER

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

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

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

20 MR. SREBNICK: The hearing looks very
21 similar to a pretrial detention hearing. And in 2008,
22 in front of the D.C. Circuit, the government was asked
23 the question that this Court asks today: What would be
24 the prejudice to the government or what has been the
25 prejudice to the government in holding these hearings?

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

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

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

17 MR. SREBNICK: I understand the hypothetical
18 concerns that the prosecution raises. I understood the
19 D.C. Circuit to say, is there any empirical evidence?
20 In *Matthews*, the case that we cite and that we believe
21 controls, this Court said, "Bare statistics rarely
22 provide a satisfactory measure of fairness of a
23 decision-making process."

24 And so rather than rely on statistics, we
25 rely on the Due Process Clause, guarantee that you have

1 an opportunity to be heard when the government wants to
2 freeze the equity in my client's home and say to her and
3 say to her husband they can't use the equity in their
4 home to retain counsel of choice when they've shown the
5 court that they can prevail.

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

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

23 If there are no further questions, I would
24 submit the case.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

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

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