No. 16-1483

In the Supreme Court of the United States

ABRAHAM MOSES FISCH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the filing of a pretrial *lis pendens* on petitioner's house, without a hearing to determine whether the house was traceable to criminal proceeds, violated petitioner's right to due process under the Fifth Amendment or his right to counsel under the Sixth Amendment, when petitioner declined to make any financial showing that he needed the property to retain counsel of choice.

2. Whether the court of appeals correctly construed the mens rea element of obstruction of justice under 18 U.S.C. 1503 and correctly rejected forfeited claims relating to an affirmative defense to that crime.

3. Whether the court of appeals permissibly declined to address petitioner's ineffective assistance of counsel claims on direct appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 851 F.3d 402. The relevant opinions and orders of the district court are not published.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2017. The petition for a writ of certiorari was filed on June 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 371; four counts of obstruction of justice, in violation of 18 U.S.C. 1503 and 18 U.S.C. 2; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); seven counts of money

laundering, in violation of 18 U.S.C. 1957 (2006 & Supp. III 2009) and 18 U.S.C. 2; and five counts of failure to file a tax return, in violation of 26 U.S.C. 7203. Am. Judgment 1-3. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at 4. The court of appeals affirmed, except with respect to the district court's denial of petitioner's claims of ineffective assistance of counsel, stating that petitioner could raise those claims in a timely proceeding under 28 U.S.C. 2255. Pet. App. A1-A28.

1. From August 2006 to October 2011, petitioner, a criminal-defense lawyer, and Lloyd Williams, a used-car dealer and former government informant, sought to enrich themselves by soliciting clients accused of criminal offenses for "large sums of money as purported legal fees." Pet. App. A3; Gov't C.A. Br. 6-7. Petitioner and Williams falsely promised their prospective criminal-defendant clients that petitioner and Williams would use the money to bribe or otherwise influence government officials to act favorably in the prospective clients' cases. *Ibid.*

Petitioner's scheme targeted six criminal defendants who were promised that petitioner and Williams would either get their cases dismissed or their sentences substantially reduced. Gov't C.A. Br. 7-8; see Pet. App. A7. Petitioner and Williams instructed the criminal defendants to fire their current attorneys, to keep their arrangements secret, to refuse favorable plea offers, and to provide fictitious information about drug dealers in order to have their cases dismissed. Gov't C.A. Br. 63. As a result, most of the defendants were sentenced to substantial prison terms without receiving a benefit for assisting the government or for entering a timely guilty plea. *Id.* at 7-8.

2. a. In 2011, a grand jury in the Southern District of Texas returned an indictment charging petitioner, Williams, and petitioner's wife with multiple counts in connection with the scheme. D. Ct. Doc. 1, at 3-19 (Oct. 19, 2011). The indictment contained a notice of forfeiture stating that petitioner's house at 9202 Wickford Drive, Houston, Texas was forfeitable as property derived from criminal proceeds and property involved in money laundering, pursuant to 18 U.S.C. 981(a)(1)(A) and (C) (2006) and 28 U.S.C. 2461(c), and pursuant to 18 U.S.C. 982(a)(1). D. Ct. Doc. 1, at 19-23. The notice also provided for a forfeiture money judgment and the forfeiture of substitute assets if the identified property was not recoverable. *Ibid.*; see Pet. App. A4; Gov't. C.A. Br. 5.[1]

b. The government thereafter filed a *lis pendens* (*i.e.*, a notice of a pending legal action) on petitioner's house. Pet. App. A4; Gov't. C.A. Br. 94. In 2013, after petitioner's retained counsel withdrew, petitioner filed a pro se motion to release the *lis pendens* on his house so that he could sell it and use the equity to hire new counsel. C.A. ROA 13-14, 180, 187-188. The government opposed the motion on the ground that petitioner had not made a preliminary showing that he lacked other assets sufficient to hire counsel. *Id.* at 190-195. At a hearing in June 2013, the district court ordered petitioner to make a preliminary showing that he had no assets other than his house with which to retain counsel. *Id.* at 2343-2347; see 11-cr-722 Docket entry (Docket entry) No. 82 (June 26, 2013).

Petitioner urged the district court to hold a hearing on lifting the *lis pendens* without a threshold showing of

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[1] A superseding indictment, which contained a similar notice of forfeiture, was returned in 2013. D. Ct. Doc. 66, at 21-25 (Apr. 3, 2013).

financial need. C.A. ROA 205-207. The district court requested that petitioner submit detailed financial information so that the court could determine whether petitioner had assets other than forfeitable assets with which to hire new counsel and to pay his living expenses. *Id.* at 229, 2368-2371, 2375-2376. The court advised that petitioner's financial information would be kept under seal except for its disclosure to the government. *Id.* at 2370. Petitioner opposed that request, and the court gave petitioner 45 days to produce the requested financial information. *Id.* at 2376-2377. After the court further extended that deadline, *id.* at 2383-2387, 2397, petitioner submitted a financial affidavit for *in camera* review, *id.* at 16.

After reviewing petitioner's submission, the district court determined that petitioner was not entitled to a hearing because he had failed to make a prima facie case that he did not have sufficient alternative assets to retain counsel. D. Ct. Doc. 105, at 8-13 (Oct. 24, 2013). The court explained that petitioner's financial affidavit was "a very brief statement with no supporting documents," that he had "provide[d] only a bare-bones and conclusory description" of the estimated cost of his defense, and that his listing of assets was "woefully incomplete." *Id.* at 10. The court also observed that petitioner had not indicated whether his law practice continued to generate income, had not disclosed his net worth, and had not described his current living expenses or how he was paying for them. *Ibid.* Although petitioner had "provided a short list of accounts, assets, and cash," he "ha[d] not stated whether he has any other financial accounts or assets." *Ibid.* Petitioner moved for reconsideration on the ground that requiring him to prove that he lacked other assets to retain counsel as a prerequisite for a hearing

violated due process. C.A. ROA 258-263, 267. The district court denied the motion. D. Ct. Doc. 110, at 6 (Jan. 28, 2014).

Petitioner subsequently filed an amended motion to lift the *lis pendens* and for a traceability hearing accompanied by a new financial affidavit. C.A. ROA 313-318. The district court reviewed the new documents and found them illegible. *Id.* at 2432. The court directed petitioner to file a legible copy, which would be disclosed to the government. Docket entry No. 115 (Feb. 25, 2014). Petitioner declined to file new, legible versions of the documents, and instead filed an "'Advisory' in which he object[ed] to his financial information being disclosed even limited to the [prosecutor] responsible for this case" and argued that he should not be required to make a threshold showing of financial need. D. Ct. Doc. 119, at 2 (Mar. 18, 2014). Petitioner filed a notice of interlocutory appeal from the court's denial of a traceability hearing, D. Ct. Doc. 120 (Mar. 26, 2014), but he later voluntarily dismissed that appeal, Pet. App. A14 n.2.

c. Petitioner obtained new private counsel to represent him at trial. C.A. ROA 877-878, 2739. In May 2015, after a jury trial, he was convicted on 18 counts including conspiracy to obstruct justice, obstruction of justice, conspiracy to commit money laundering, money laundering, and failure to file tax returns. Am. Judgment 1-3; D. Ct. Doc. 395, at 1-6 (May 27, 2015). After the jury returned its verdict, the government announced its intention to pursue a forfeiture money judgment, rather than retain the jury (after a month-long trial) for a bifurcated forfeiture hearing concerning the traceability of petitioner's house. C.A. ROA 6498. The government explained that it had been unable to trace all of

the criminal proceeds, but that some of them went into the house. *Id.* at 6499. Petitioner did not object to that procedure or request that the jury be retained. *Id.* at 6494-6495, 6498.

Petitioner again secured new counsel to represent him at sentencing. C.A. ROA 41; Docket entry No. 408 (July 6, 2015). The government moved for a $1,150,000 forfeiture money judgment based on the trial evidence that petitioner had received that amount of criminal proceeds from the conspiracy to obstruct justice. C.A. ROA 1409-1411. The government also had previously advised the court that it would seek to forfeit substitute property to satisfy the forfeiture money judgment and listed petitioner's house, subject to any third-party claims (such as a mortgage or property taxes), as substitute property. Gov't C.A. Br. 190.

The district court imposed a $1,150,000 forfeiture money judgment against petitioner. D. Ct. Doc. 470, at 1-2 (Oct. 27, 2015); see C.A. ROA 1790-1791, 6543-6544, 6552. The government moved to forfeit the house to satisfy that judgment, explaining that the proceeds petitioner and Williams obtained had been dissipated or commingled into various assets, including the house. C.A. ROA 2200-2204, 6539, 6547. The government's motion was accompanied by an affidavit from an Internal Revenue Service agent detailing the financial investigation of the case. *Id.* at 2203-2204. The court determined that the government had met the legal requirements for forfeiting substitute property under 21 U.S.C. 853(p) and issued an amended forfeiture order directing forfeiture of the house. D. Ct. Doc. 471, at 1-2 (Oct. 27, 2015); Pet. App. A4-A5.

d. On the day of sentencing, petitioner filed a motion alleging that his trial counsel rendered ineffective assistance at trial. Pet. App. A5. The district court orally ruled that petitioner's trial counsel was not ineffective. *Ibid.*; Docket entry No. 467 (July 27, 2015). Petitioner also was sentenced to 180 months of imprisonment. Am. Judgment 4; Pet. App. A5.

3. The court of appeals affirmed, except with respect to petitioner's claim of ineffective assistance of counsel. Pet. App. A1-A28.

a. As relevant here, the court of appeals upheld petitioner's conviction for obstruction of justice under 18 U.S.C. 1503. Pet. App. A8-A12. The court rejected petitioner's contention that the evidence was insufficient to establish his specific intent to obstruct judicial proceedings. *Id.* at A9-A10. The court explained that, under *United States* v. *Aguilar*, 515 U.S. 593 (1995), specific intent can be demonstrated by showing that the defendant's conduct had the "natural and probable effect of interfering with the due administration of justice." Pet. App. A9 (quoting *United States* v. *Coppin*, 569 Fed. Appx. 326, 337 (5th Cir.) (per curiam), cert. denied, 135 S. Ct. 408, and 135 S. Ct. 506 (2014), in turn quoting *Aguilar*, 515 U.S. at 599). The court found that the evidence satisfied that standard because petitioner "implored criminal defendants not to accept plea agreements in return for false promises to favorably influence the outcome of their cases." *Ibid.*; see *id.* at A9-A10 (discussing examples).

The court of appeals did not reach the merits of petitioner's argument that the government failed to disprove the applicability of an affirmative defense under 18 U.S.C. 1515(c) for "the providing of lawful, bona fide,

legal representation services," concluding that petitioner forfeited that argument by failing to raise it in the district court. Pet. App. A11-A12. The court of appeals reviewed only for plain error petitioner's related contention, also raised for the first time on appeal, that the district court erred by not instructing the jury on that Section 1515(c) defense. *Id.* at A18-A19. The court concluded that petitioner's "perfunctory argument" did not satisfy the plain-error standard, and that in any event the instruction the district court had given—which "tracked" the Fifth Circuit's pattern instruction—"provided the essence of [petitioner's] requested charge." *Id.* at A19.

b. The court of appeals also rejected petitioner's various challenges to the pretrial *lis pendens* on his house. Pet. App. A12-A17, A22-A25.

First, reserving judgment on whether a *lis pendens* constitutes a "restraint of property triggering due process protection," the court rejected petitioner's contention that the Due Process Clause entitled him to a hearing about whether his house was traceable to the proceeds of his criminal venture. Pet. App. A15-A16. The court of appeals noted "broad agreement that due process requires the district court to hold a prompt hearing at which the property owner can contest a restraining order . . . at least when the restrained assets are needed to pay for an attorney to defend him on associated criminal charges." *Id.* at A14 (brackets and citation omitted). The court of appeals emphasized, however, that the district court had given petitioner "numerous opportunities to present evidence of his financial inability to pay for counsel of choice without an order lifting the lis pendens," but petitioner had failed to do so. *Id.* at A13; see *id.* at A13-A15. The court of

appeals observed that his initial submission regarding his other assets had been "scant, conclusory, and insufficient"; that his next submission had been "illegible"; and that, when the district court had given him a final opportunity to present legible financial information, he had "declined." *Id.* at A13-A14. Because petitioner "ultimately elected not to file *any* evidence that would demonstrate his financial need," the court found it unnecessary "to elaborate the precise details of the circumstances and showings necessary to trigger a due process hearing." *Id.* at A14-A15 (emphasis added) (citation and internal quotation marks omitted).

Second, the court of appeals rejected petitioner's contention that the *lis pendens* violated his Sixth Amendment right to retain counsel. Pet. App. A16-A17. The court again emphasized that petitioner's "decision not to make an evidentiary showing of financial need meant that the district court was not required to hold a traceability hearing." *Id.* at A16. The court of appeals further noted that "ultimately the government did not have to establish traceability because it instead asked the district court to order the home forfeitable as substitute property." *Ibid.*

Third, the court of appeals rejected petitioner's contention that the government, having provided notice before trial of its intent to forfeit the house as an asset traceable to criminal proceeds under 18 U.S.C. 981 (2006 & Supp. III 2009), could not seek forfeiture of the house after trial as substitute property under 21 U.S.C. 853(p). Pet. App. A16-A17, A24-A25. The court explained that that argument "w[as] not properly raised below" and was reviewable only for plain error. *Id.* at A24. The court observed that petitioner "ma[de] no attempt to satisfy plain error review," and the court "d[id] not find

it satisfied." *Id.* at A25. The court accordingly reasoned that it "need not opine here on the propriety of the government's recording a lis pendens" on the house as traceable assets but ultimately seeking forfeiture as substitute property. *Id.* at A17.[2]

c. The court of appeals "declined to address [petitioner's] ineffective assistance claims on direct appeal." Pet. App. A27. The court explained that those claims "cannot be determined on the current record," and that this Court has "noted that such factual issues are best resolved by the district court" in a proceeding under 28 U.S.C. 2255. Pet. App. A27 (citing *Massaro* v. *United States*, 538 U.S. 500, 505 (2003)). The court of appeals stated that "[n]othing about [its] affirmance of [petitioner's] convictions affects [his] right to bring ineffective assistance of counsel claims—including those that were stated in [his] motion below—in a timely [Section] 2255 proceeding." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-22) that the recording of a *lis pendens* on his house before trial, in the absence of a hearing to determine whether the house was traceable to criminal proceeds, violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel; renews (Pet. 22-33) his challenges to his conviction for obstruction of justice under 18 U.S.C. 1503; and contends (Pet. 33-36) that the court of appeals was required to address in the first instance on direct appeal his claim of ineffective assistance of counsel. The court

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[2] The court of appeals similarly determined that petitioner had not preserved his argument that the government failed to satisfy the requirements for forfeiting the house as substitute property under 21 U.S.C. 853(p) and that he failed to show that such forfeiture constituted plain error. Pet. App. A24-A25.

of appeals correctly rejected all of those claims, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 10-22) that his Fifth and Sixth Amendment rights were violated by the government's recording of a *lis pendens* on his house before trial without a hearing to determine whether the house was traceable to criminal proceeds. His contentions are incorrect, and in any event this case is not a suitable vehicle to address the questions he presents.

a. Petitioner argues (Pet. 10-15) that the Fifth Amendment's Due Process Clause entitled him to a pretrial traceability hearing to challenge the *lis pendens* that the government recorded on his house. The court of appeals correctly determined that no hearing was necessary in these circumstances because petitioner declined to make any threshold showing of financial need indicating that the house was necessary to retain counsel of choice.

i. This Court has left open whether and in what circumstances due process requires a pretrial hearing to determine whether assets to be forfeited as criminal proceeds are in fact traceable to a crime. See *Kaley* v. *United States*, 134 S. Ct. 1090, 1095 n.3 (2014); *United States* v. *Monsanto*, 491 U.S. 600, 615 n.10 (1989). As the court of appeals explained, however, there is "broad agreement" that a pretrial traceability hearing is required only if the defendant makes a preliminary showing that he needs the disputed assets to retain counsel of choice. Pet. App. A14 (citation omitted); see, *e.g.*, *United States* v. *Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013); *United States* v. *Jamieson*, 427 F.3d 394, 406-407 (6th Cir. 2005), cert. denied, 547 U.S. 1218 (2006); *United States* v. *Farmer*, 274 F.3d 800, 805-806 (4th Cir. 2001);

United States v. *Jones*, 160 F.3d 641, 647-648 (10th Cir. 1998); *United States* v. *Yusuf*, 199 Fed. Appx. 127, 132-133 (3d Cir. 2006). That approach makes sense. The interest that defendants typically assert—and that petitioner asserted here, Pet. App. A4—in retaining the ability to use their assets before trial is the need to pay for counsel of choice to represent the defendant at trial. If a defendant makes no showing that the assets sought to be restrained are needed to pay for counsel of choice, that interest is not implicated. And a defendant's interest in preventing forfeiture after trial is fully addressed by the trial and sentencing proceedings themselves.

Petitioner principally argues that, in *Kaley*, *supra*, the government conceded that indicted defendants are categorically entitled to a traceability hearing on assets restrained before trial. Pet. 11-12 (citing 10/16/13 Tr. of Oral Arg. at 45, *Kaley*, *supra* (No. 12-464)). That is incorrect. In *Kaley*, this Court held that, when an indicted defendant challenges the legality of a pretrial seizure of assets under 21 U.S.C. 853(e)(1) in order to obtain the assets to retain counsel, he has no constitutional right to challenge the grand jury's determination of probable cause that he committed the crimes charged. See 134 S. Ct. at 1096-1105. As petitioner acknowledges (Pet. i), the Court "d[id] not opine" on whether a defendant has a right to a hearing on whether there is probable cause to believe that the assets are traceable or otherwise connected to the charged crime. 134 S. Ct. at 1095 n.3. Nor did the Court address existing law requiring the defendant to make a threshold financial showing to obtain a pretrial hearing to contest the restraint of the property.

Contrary to petitioner's assertion (Pet. 11-12), the government did not concede in *Kaley* that a defendant is

automatically entitled to a probable-cause hearing on the traceability of assets, regardless of whether the defendant makes a threshold showing of financial need. The colloquy petitioner quotes addressed the procedures for a probable-cause hearing *assuming* that a threshold showing of financial need had already been made. As the government explained, "[t]he frequency of these hearings" to address traceability "is limited, in part, because it's rare that defendants are able to show that they have no other assets." 10/16/13 Tr. of Oral Arg. at 42, *Kaley*, *supra* (No. 12-464). Neither this Court's decision in *Kaley* nor the government's position in that case supports petitioner's contention.

ii. Petitioner errs in suggesting (Pet. 13-15) that review is warranted to resolve disagreement among the courts of appeals about when due process requires a traceability hearing. Although the courts of appeals have employed varying terms to describe the showing a defendant must make, they generally agree that some showing is required that the funds are needed for the defendant's defense. See pp. 11-12, *supra*.

Petitioner does not identify any case that squarely addresses the issue and that rejected that consensus. Petitioner cites (Pet. 13) decisions of the Second, Fourth, and Fifth Circuits. But as he acknowledges (Pet. 14), each of those courts has subsequently concluded that due process does not require a hearing absent some threshold showing of financial need to hire counsel of choice. See *Bonventre*, 720 F.3d at 130-131; *Farmer*, 274 F.3d at 805-806; Pet. App. A14-A15. Petitioner also cites (Pet. 13) decisions from the Third, Seventh, Eighth, Ninth, and D.C. Circuits. But those cases—most of which predated this Court's salient decisions, such as *Monsanto*, indicating that the issue

was not settled by this Court's jurisprudence—either held that a hearing was required where the defendant in fact had made a threshold showing of financial need, or otherwise did not directly address whether such a showing is required.[3] In the absence of any actual reasoned conflict, this Court's review is not warranted.

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[3] See *United States* v. *E–Gold, Ltd.*, 521 F.3d 411, 415, 417 (D.C. Cir. 2008) (holding that due process requires a hearing "at least in a case in which [defendants] have demonstrated the inability to retain counsel of their choice without access to the seized assets," and finding that "need" was "clearly established in the case before [the court] where a magistrate judge has found that the defendants [were] not financially capable of retaining counsel of choice without the seized property"), abrogated on other grounds by *Kaley*, *supra*; *United States* v. *Moya-Gomez*, 860 F.2d 706, 729-730 (7th Cir. 1988) (holding that denial of hearing violates due process "when it results in preventing the defendant from using the restrained funds to secure the services of counsel of choice," and noting that decision "deal[t] only with a situation where the defendant presents a bona fide need to utilize assets subject to the restraining order to conduct his defense"), cert. denied, 492 U.S. 908 (1989); *United States* v. *Michelle's Lounge*, 39 F.3d 684, 697-698 (7th Cir. 1994) (applying *Moya-Gomez* to civil forfeitures), abrogated on other grounds by *Kaley*, *supra*; *United States* v. *Crozier*, 777 F.2d 1376, 1382-1384 (9th Cir. 1985) (denial of a hearing violated due process where pretrial restraining order prevented defendant "from selling, transferring or encumbering almost all of his real and personal property"); *United States* v. *Roth*, 912 F.2d 1131, 1133-1134 (9th Cir. 1990) (explaining that *Crozier* remains Ninth Circuit precedent after *Monsanto*, *supra*, and upholding restraint imposed after a hearing); *United States* v. *Lewis*, 759 F.2d 1316, 1324-1327 (8th Cir.) (rejecting claim that pretrial order restraining assets violated Sixth Amendment right to counsel), cert. denied, 474 U.S. 994 (1985); *United States* v. *Long*, 654 F.2d 911, 915-916 (3d Cir. 1981) (rejecting due-process challenge where restraining order was issued after a hearing); see also *Yusuf*, 199 Fed. Appx. at 132-133 (holding that due process requires a hearing only if defendant first makes a showing of financial need).

b. Petitioner also contends (Pet. 15-19) that the government's pretrial recording of a *lis pendens* on his house in anticipation of a forfeiture violated his Sixth Amendment right to retain counsel. That contention fails for similar reasons. The Sixth Amendment right to counsel includes the right to retain counsel of choice. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). But the Sixth Amendment does not entitle a defendant to use assets adjudged to be forfeitable to pay his legal fees. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989). In *Caplin & Drysdale*, the Court held that the refusal to authorize payment of attorney's fees out of assets forfeitable as a result of a defendant's conviction did not violate the defendant's right to counsel under the Sixth Amendment. See *id.* at 624-633. Applying the same principles, the Court held in *Monsanto* that assets in the defendant's possession may be restrained before conviction based on a finding of probable cause to believe that they are forfeitable. 491 U.S. at 602, 614-616; see *Kaley*, 134 S. Ct. at 1096-1097.

In *Luis* v. *United States*, 136 S. Ct. 1083 (2016), the Court concluded that the Sixth Amendment does prohibit the "pretrial restraint of legitimate untainted assets needed to retain counsel of choice." *Id.* at 1088 (opinion of Breyer, J.); see *id.* 1088-1096; *id.* at 1096-1103 (Thomas, J., concurring in the judgment). The premise that the property at issue was "needed to retain counsel of choice" was critical to the plurality's analysis. *Id.* at 1088; see, *e.g.*, *id.* at 1089 (pretrial restraint would "tak[e] from [defendant] the ability to use the funds she needs to pay for her chosen attorney"); *id.* at 1093 (defendant "needs some portion of those same funds to pay for the lawyer of her choice"). The plurality did not suggest that the Sixth Amendment

is violated by a pretrial restraint of property when the defendant has not first shown that the property is needed to retain counsel of choice.

The court of appeals accordingly did not err in concluding that, even if the *lis pendens* were a restraint on petitioner's house (an issue the court did not reach), it did not violate the Sixth Amendment because petitioner failed to demonstrate that it impaired his ability to retain his chosen counsel. Pet. App. A16-A17. Although petitioner "assert[ed] that the government's conduct limited his ability to pay for counsel of choice," the court found that his "decision not to make an evidentiary showing of financial need meant that the district court was not required to hold a traceability hearing." *Id.* at A16. Indeed, petitioner ultimately was represented by private counsel, both at trial and at sentencing. See pp. 5-6, *supra.*

c. Even if the Fifth and Sixth Amendment questions petitioner raises otherwise warranted review, this case would be a poor vehicle for resolving them.

First, both versions of petitioner's challenge (Pet. 16-17) rest on the premise that a *lis pendens* constitutes a pretrial restraint that triggers the government's obligation to make a showing of probable cause that the property is traceable to criminal proceeds. As the government explained below, however, petitioner's premise is incorrect, and at a minimum it is far from certain. In Texas, where the *lis pendens* was recorded in this case, a *lis pendens* is merely a notice that property is subject to litigation. Gov't C.A. Br. 109. It "is not an independent claim" on the property, and it "is not itself a lien." *In re Miller*, 433 S.W.3d 82, 85 (Tex. App. 2014) (citation omitted). A *lis pendens* "does not prevent conveyance," but merely "places a prospective purchaser on notice

about the suit and the disputed title to the land." *Ibid.* The recording of such a *lis pendens* does not constitute a sufficient restraint to implicate due-process concerns. See *United States* v. *Register*, 182 F.3d 820, 835-837 (11th Cir. 1999), cert. denied, 530 U.S. 1250, and 531 U.S. 849 (2000); *Aronson* v. *City of Akron*, 116 F.3d 804, 811-812 (6th Cir. 1997); cf. *United States* v. *Clark*, 717 F.3d 790, 800 n.7 (10th Cir. 2013) ("[I]t is not clear that common law, public impediments like caveats (or *lis pendens*) are functionally equivalent to the type of restraints triggering our inquiry in" *Jones*, *supra*, regarding the need for a traceability hearing), cert. denied, 134 S. Ct. 903 (2014).

At a minimum, a substantial threshold question exists whether the alleged restraint at issue here triggered any Fifth or Sixth Amendment requirements. And to the extent those concerns are implicated, they may be substantially lessened by the limited effect a *lis pendens* would have on petitioner's property interests. The court of appeals had no need to reach this issue, see Pet. App. A15, but the extent of petitioner's asserted constitutional right depends on it. And it turns on issues of state property law and procedure that are not well suited to initial review in this Court and that could limit the relevance nationwide of any decision this Court might issue.

Second, the posture of this case would further complicate the Court's consideration of the questions petitioner presents. Unlike this Court's recent cases addressing challenges to pretrial restraints and forfeitures of property, see *Luis*, 136 S. Ct. at 1087-1088 (opinion of Breyer, J.) (appeal from pretrial restraint under 18 U.S.C. 1345(a)(2)); *Kaley*, 134 S. Ct. at 1095-1096 (interlocutory appeal from pretrial restraining order under 21 U.S.C. 853(e)(1)), petitioner is not seeking direct review of the

district court's decision declining to hold a traceability hearing on the *lis pendens*. Petitioner commenced an interlocutory appeal of that ruling, but he abandoned that appeal. Pet. App. A14 n.2. Instead, petitioner seeks review after he was convicted at trial and after his house was ordered forfeited as a substitute asset under 21 U.S.C. 853(p)(2) following his convictions.[4]

Petitioner's constitutional challenges to the district court's failure to hold a traceability hearing thus no longer bear on the proper disposition of his property. As the court of appeals explained, the government had no need to establish traceability post-trial because the house was forfeited as a substitute asset, not as criminal proceeds. Pet. App. A16. That post-trial forfeiture would remain valid even if petitioner were correct that the Fifth or Sixth Amendments prohibited pretrial restraint of the house without a traceability hearing. See *United States* v. *Voigt*, 89 F.3d 1050, 1088 (3d Cir.) (holding that, although order forfeiting property as traceable assets was erroneous because property was not traceable, "all that is at issue is the process by which the government may seize property in satisfaction of the [money] to which it is lawfully entitled," and thus "on remand the government should be permitted to move to amend the judgment to reflect that the [property] is forfeitable as a substitute asset"), cert. denied,

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[4] Petitioner argues (Pet. 19-22) that the government, having initially filed a *lis pendens* on petitioner's house as traceable assets, was not permitted by statute ultimately to seek forfeiture on a different, substitute-assets basis. The court of appeals held that petitioner failed to preserve this statutory argument and that petitioner "ma[de] no attempt to satisfy plain error review." Pet. App. A25. That ruling is correct, see Gov't C.A. Br. 189-203, and in any event does not warrant this Court's review.

519 U.S. 1047 (1996). And having failed to make any showing of financial need of the house to hire counsel of choice, petitioner cannot demonstrate that the pretrial *lis pendens* casts any doubt on his conviction.

2. Petitioner's challenges to his conviction for obstruction of justice under 18 U.S.C. 1503 (Pet. 22-33) do not warrant further review.

a. Petitioner argues (Pet. 23) that the court of appeals erred in its review of the sufficiency of the mens rea evidence by construing Section 1503 to require only that petitioner's "endeavors had the natural and probable effect of interfering with a judicial proceeding." See Pet. 23-25. As the court explained, Pet. App. A9, that construction derives directly from this Court's decision in *United States* v. *Aguilar*, 515 U.S. 593 (1995). *Aguilar* explained that lower courts had interpreted Section 1503 as imposing "a 'nexus' requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings." *Id.* at 599 (citation omitted). "In other words, the endeavor must have the natural and probable effect of interfering with the due administration of justice." *Ibid.* (citations and internal quotation marks omitted). The Court approved of that interpretation, stating that this "'nexus' requirement developed in the decisions of the [c]ourts of [a]ppeals is a correct construction of [Section] 1503." *Id.* at 600; see *id.* at 601 (applying the "natural and probable effect" test). As petitioner acknowledges, other courts of appeals have applied the "natural and probable effect" test in Section 1503 cases. Pet. 23-24; see, *e.g.*, *United States* v. *Smith*, 831 F.3d 1207, 1216 (9th Cir.), cert. denied, 137 S. Ct. 605 (2016), 137 S. Ct. 1235, and 137 S. Ct. 2193 (2017); *United States* v. *Vaghela*, 169 F.3d 729, 732-735 (11th Cir. 1999).

Petitioner argues that the court of appeals and other circuits have all "misapplied *Aguilar*" (Pet. 23) because this Court further observed that, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." 515 U.S. at 599. But the Court made clear that a defendant has knowledge that his actions are "likely to affect" a proceeding when he knows that to be their "natural and probable effect," *ibid.* (citations omitted); the deficiency it found in the mens rea evidence in *Aguilar* itself was that such an effect was lacking, see *id.* at 601.

To the extent petitioner is suggesting that proof of such knowledge requires direct evidence of the defendant's mindset, that suggestion is misplaced. Nothing in *Aguilar* displaces the bedrock principle that, "[i]n any criminal case * * * , the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission." *Rosemond* v. *United States*, 134 S. Ct. 1240, 1250 n.9 (2014).

Petitioner further argues (Pet. 25-27) that the evidence in this particular case was insufficient under Section 1503. The court of appeals correctly determined that petitioner's false representations to his clients, in context, demonstrated specific intent to obstruct justice under the *Aguilar* standard. Pet. App. A9-A10. Petitioner's factbound challenge to that determination does not merit review. See *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the [c]ourt of [a]ppeals, which in this case held that the Government had satisfied its burden."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.) ("We do not grant a certiorari to review evidence and discuss specific facts.").

b. Petitioner also contends (Pet. 27-33) that the government failed to disprove a legal-representation defense under 18 U.S.C. 1515(c) and that the district court erred in failing to instruct the jury on that defense. Section 1515(c) provides that the obstruction-of-justice statutes in Sections 1503-1515 do "not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." *Ibid.*

The court of appeals explained that petitioner "did not argue below that the government failed to meet its burden under Section 1515(c)." Pet. App. A11. It accordingly "d[id] not reach this new argument," deeming it forfeited. *Ibid.* The court's forfeiture determination is correct and does not merit review. See *Musacchio* v. *United States*, 136 S. Ct. 709, 718 (2016) (upholding court of appeals' refusal to consider defendant's statute-of-limitations defense on appeal where defendant did not raise it at trial).

The court of appeals similarly concluded that petitioner did not properly preserve his challenge to the district court's failure to instruct the jury on a Section 1515(c) defense. Pet. App. A18-A19. It thus appropriately reviewed petitioner's challenge only for plain error. *Id.* at A19; see *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (applying plain-error review to unpreserved claim of error in jury instructions); Fed. R. Civ. P. 52(b). Petitioner contends (Pet. 29-30) that his jury-instruction argument is subject to harmless-error review, not plain-error review, because his legal-representation defense negates an element of the underlying offense. That is incorrect. Even accepting arguendo petitioner's premise that the alleged instructional error resulted in a necessary element not being submitted to the jury, it still

was appropriate for the court of appeals to review petitioner's unpreserved challenge to the jury instructions only for plain error. See *Johnson* v. *United States*, 520 U.S. 461, 465-470 (1997) (applying plain-error review to contention that district court erroneously instructed jury that an essential element was a question for the court rather than the jury).

In any event, petitioner's challenge to the jury instructions fails under either standard and does not warrant review. As the court of appeals concluded, the instruction given by the district court "tracked" the Fifth Circuit's pattern instruction and "provided the essence of [petitioner's] requested charge." Pet. App. A19. That instruction required the jury to find that petitioner acted corruptly, that is, knowingly and dishonestly, with the specific intent to subvert the due administration of justice. See C.A. ROA 1352-1353, 1356; Gov't C.A. Br. 170. The instruction excluded the possibility that the jury would find bona fide legal representation by a lawyer to be criminal conduct. See, *e.g.*, *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam) (good-faith instruction unnecessary where jury properly instructed on willfulness); *United States* v. *Tarwater*, 308 F.3d 494, 510 (6th Cir. 2002) (omission of good-faith defense instruction not error where given instructions adequately encompassed good faith defense).

3. Petitioner finally contends (Pet. 33-37) that the court of appeals erred by deferring consideration of his contention that his trial counsel was ineffective to collateral review. That contention does not merit review.

As the court of appeals observed, Pet. App. A27, this Court has recognized that "in most cases a motion brought under [28 U.S.C.] 2255 is preferable to direct appeal for deciding claims of ineffective assistance."

Massaro v. *United States*, 538 U.S. 500, 504 (2003). "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 504-505. A timely Section 2255 proceeding in district court thus "ordinarily" provides "the forum best suited to developing the facts necessary to determine the adequacy of representation during an entire trial." *Id.* at 505.

Consistent with this Court's guidance, the court of appeals appropriately "conclude[d] that the factual issues underlying [petitioner's] claims of ineffective assistance cannot be determined on the current record." Pet. App. A27. That factbound determination regarding the adequacy of the record is correct and does not merit further review.[5]

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[5] Petitioner's reliance (Pet. 34) on *Hinton* v. *Alabama*, 134 S. Ct. 1081 (2014) (per curiam), is misplaced. *Hinton* held, on state post-conviction review, that an attorney was ineffective for failing to request funds to replace an inadequate expert and that the defendant was prejudiced. *Id.* at 1086-1090. It did not address in what circumstances a federal court of appeals may appropriately decline to address ineffective-assistance claims in the first instance on direct appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2017