No. 13-358

In the Supreme Court of the United States

RICHARD CLARK, AKA RICK CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a temporary caveat on petitioner's residence did not infringe his due process rights or his Sixth Amendment right to counsel of choice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-62) is reported at 717 F.3d 790.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2013. The petition for a writ of certiorari was filed on September 16, 2013. 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 Northern District of Oklahoma, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371; wire fraud, in violation of 18 U.S.C. 1343 and 18 U.S.C. 2(a); securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 18 U.S.C. 2(a); and money laundering, in violation of 18 U.S.C. 1957(a). Pet. App.

63-64. He was sentenced to 151 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay more than $6.1 million in restitution. *Id.* at 66-67, 74-89. In addition, the district court ordered petitioner to forfeit $225,214.81 in equity from his home and made petitioner and his co-defendant George Gordon jointly and severally liable for forfeiture of approximately $45 million.[1] *Id.* at 20, 74-89; 4:09-CR-00013-JHP Docket entry No. 313 (forfeiture order). The court of appeals affirmed. Pet. App. 2.

1. Petitioner helped orchestrate a series of "pump-and-dump" stock schemes that netted him and his co-conspirators tens of millions of dollars. Pet. App. 2-6 (cross-referencing to decision of court of appeals in co-defendant Gordon's case for "the relevant factual and procedural background related to the government's prosecution of the pump-and-dump scheme[s]"); see *United States* v. *Gordon*, 710 F.3d 1124, 1128-1134 (10th Cir.), cert. denied, No. 12-10741 (Nov. 12, 2013). Those schemes involved creation of the false appearance of an active market for a company's stock, promotion of that stock to unwitting investors, and sale of the conspirators' holdings of stock once the stock price was inflated. Pet. App. 3 n.1.

The fraud carried out with respect to National Storm, an Illinois roofing and siding company, was typical of the schemes. Petitioner helped arrange for a merger with a public shell company to take National

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[1] The decision of the court of appeals affirming the conviction and sentence of George Gordon, which contains factual discussion relevant to this case, is reported at 710 F.3d 1124. Mr. Gordon's petition for certiorari was denied on November 12, 2013 (No. 12-10741).

Storm public without an initial public offering. Pet. App. 4; see *Gordon*, 710 F.3d at 1129-1130. Instructing the lone shareholder of that shell company to "offer some friends a thousand dollars each to falsely claim that they were shareholders," one of petitioner's co-conspirators created and supplied backdated records showing the friends' purported stock purchases two years earlier. *Id.* at 1129 (citation omitted). Petitioner and his co-conspirators then created a blast fax campaign "touting strong market expectations for National Storm's future growth"—a representation that was "misleading in many ways." *Id.* at 1130. Using nominee accounts, the conspirators traded National Storm's stock to give the appearance of an active and increasing market. *Ibid.* As the price rose, they sold their shares, netting more than $5 million. *Ibid.*; see *id.* at 1131 (describing similar scheme with respect to Deep Rock, an Oklahoma oil company in which petitioner controlled nominee accounts, netting approximately $5 million); *id.* at 1131-1132 (describing similar scheme with respect to Global Beverages and Rudy Beverages, netting approximately $25 million); *id.* at 1132 (describing scheme involving false and backdated documents with respect to a reverse merger transaction for International Power Group (IPG)).

In the course of the government's investigation, petitioner testified falsely before the Securities and Exchange Commission. Although petitioner controlled the nominee accounts trading the shares of one of the companies that he and his co-conspirators "pumped," he told the Commission that he did not exercise any such control. Pet. App. 5-6.

2. In July 2007, more than a year before the criminal proceedings against petitioner began, the govern-

ment placed a "caveat" on his residence. Pet. App. 6; see *ibid.* (defining caveat as a "warning or proviso") (internal quotation marks omitted). Petitioner first became aware of the caveat a year later. *Ibid.*

On January 15, 2009, the grand jury returned an indictment against petitioner and other members of the conspiracy. In June 2009, the government temporarily lifted the caveat to permit petitioner to "renew an existing loan on his home." Pet. App. 6. The government then reimposed the caveat in July 2009, but permanently and "completely lifted" it in October 2009. *Ibid.*; see *id.* at 9 n.5 (explaining that caveat was lifted unconditionally); Docket entry No. 81, at 2; Docket entry No. 85, at 9.

3. Petitioner was represented by his counsel of choice throughout the pretrial period and the trial, which began on April 5, 2010. Pet. App. 7 n.3, 21. Counsel provided "thorough and vigorous" representation. *Id.* at 21. After the trial, the jury convicted petitioner of "fourteen of the twenty-one counts for which he was indicted." *Id.* at 7.

The district court sentenced petitioner to 151 months of imprisonment. Pet. App. 7. The court also ordered petitioner to forfeit (*inter alia*) $225,214.81 of the equity in his home, finding that amount directly forfeitable on the ground that "certain payments for remodeling and the mortgage were proceeds traceable . . . to the conspiracy." *Id.* at 20 (internal quotation marks omitted); see *id.* at 9 n.6 (explaining various bases for criminal forfeiture).

At no stage of the proceedings did petitioner ever seek a hearing on the propriety of the caveat. Pet. App. 13 & n.8, 16; see Docket entry No. 78. Two months before trial, petitioner did make a request

under the Criminal Justice Act of 1964 (CJA), 18 U.S.C. 3006A, for appointment of substitute or additional counsel with expertise in securities law. Pet. App. 33. The district court denied the motion. *Ibid.*

4. On appeal, petitioner challenged only his conviction; he did not contest his sentence (including the forfeiture order). Pet. App. 8. The court of appeals affirmed. *Id.* at 62.

First, the court of appeals rejected petitioner's argument that the district court violated his due process rights by "fail[ing] to afford him a post-restraint, pretrial hearing in order to contest the caveat." Pet. App. 17; see *id.* at 8, 10. The court "assume[d] without deciding that an Oklahoma caveat constitutes a pretrial restraint of assets sufficient to trigger a defendant's procedural due process rights." *Id.* at 12; see *id.* at 12 n.7 (explaining that caveat, like lis pendens, does not amount to seizure). As the court explained, however, petitioner did not "seek a hearing prior to trial to vindicate his interests related to the imposition of the caveat." *Id.* at 13 & n.8. Accordingly, the court held that petitioner could not prevail unless he demonstrated plain error. *Id.* at 15-16; see *ibid.* (explaining that petitioner's challenge may have been "waived" but that the court would "go[] to great lengths to ensure that [he] receives his full day in court" by engaging in plain-error review).

The court of appeals found no error at all, let alone error that was plain. Pet. App. 16-17. Applying the standard set forth in *United States* v. *Jones*, 160 F.3d 641 (10th Cir. 1998), the court stated that due process does not require a post-restraint hearing unless a defendant demonstrates that he "has no assets, other than those restrained, with which to retain private

counsel" and "make[s] a prima facie showing of a bona fide reason to believe" that the restrained asset is not in fact forfeitable. Pet. App. 11-12 (quoting *Jones*, 160 F.3d at 647); see *id.* at 13, 16-17. The court concluded that—having failed to request any hearing at all—petitioner had not made the required showing and therefore had given the district court "no reason to conclude that [his] interests were in jeopardy and required protection." *Id.* at 16.

Second, to the extent that petitioner raised "in passing" a "*separate*" argument that imposition of the caveat violated his Sixth Amendment right to counsel of choice, the court of appeals rejected that argument as well. Pet. App. 18-21. The court once again applied the plain-error standard (since petitioner "failed to raise this claim in a legally cognizable manner before the district court," *id.* at 18), and found no interference with any of petitioner's substantial rights. The court noted that petitioner did not "demonstrate[] that he was denied access to funds to pay for his defense in any substantial sense," since petitioner made no showing that "any remaining equity in his home—beyond the amount subject to forfeiture—would have materially assisted him in employing or paying counsel." *Id.* at 19-20. In addition, the court deemed petitioner's "claim of prejudice * * * nigh eviscerated * * * by his ongoing, active representation throughout his trial" by the counsel he had retained before his indictment, who provided a "thorough and vigorous" defense. *Id.* at 21.

Finally, the court of appeals held that petitioner was not denied a fair trial "when the district court rejected his request under provisions of the Criminal Justice Act * * * to appoint substitute or addi-

tional counsel with expertise in securities law." Pet. App. 32. Reviewing the district court's decision for abuse of discretion, *id.* at 34-35, the court of appeals concluded that denial of CJA funding for an additional attorney did not "undermine" presentation of a "constitutionally 'adequate' defense," *id.* at 37. The court deemed the attorney who began representing petitioner several years before the trial to be "highly experienced" and fully capable of handling the non-technical "fraud" charges in this case, particularly given the "ample time" he had "to become familiar with the facts and law." *Id.* at 38-39.

ARGUMENT

1. Petitioner appears to raise a variety of arguments relating to the government's use of the caveat, which he incorrectly characterizes (*e.g.*, Pet. 8-9) as a "seizure" of his residence.[2] See *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 58-59 (1993). But the court of appeals, having found that petitioner failed to raise any challenge at all to the caveat in district court, understood him to be raising only two caveat-related issues—whether the failure to afford him a pretrial hearing violated his due process rights, and whether the caveat deprived him of his Sixth Amendment right to counsel of choice—and did

[2] In the question presented, but not in the body of the argument section, petitioner alludes (Pet. ii) to a restraint on his "investment accounts" (in addition to the caveat on his house). Petitioner never raised this contention below. See Pet. C.A. Br. 6-12 (discussing only the caveat and making no claim that any accounts were restrained). And petitioner's accounts were not, in fact, restrained. See Docket entry No. 250 (Mot. for Crim. Forfeiture Order) (requesting forfeiture of all seized accounts and identifying only accounts belonging to co-defendant Gordon).

not pass on any others. See Pet. App. 8-21. Accordingly, this case is not an appropriate vehicle for considering any additional argument about the caveat that the petition might be read to include.[3] See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. As to the due process and Sixth Amendment issues addressed by the court of appeals, this Court's review is not warranted. The Tenth Circuit correctly concluded that no plain error was committed here, and

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[3] Those arguments are without merit in any event. Petitioner appears to contend (*e.g.*, Pet. 17) that the government did not comply with 21 U.S.C. 853 because it did not seek a hearing before imposing the caveat. But the procedures set forth in Section 853 apply only when the government asks the district court to issue a restraining order or a seizure warrant, see 21 U.S.C. 853(e) and (f), and the government never sought any such relief here; it simply employed a state-law procedure that is open to any litigant asserting an interest in real property. Petitioner also appears to claim some error (Pet. 20) arising from the fact that his residence was not listed in the indictment as a forfeitable asset. But assets are forfeitable whether or not the indictment specifically identifies them, so long as a defendant is put on general notice that forfeiture is at issue. See Fed. R. Crim. P. 32.2(a) ("The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks."). Finally, petitioner suggests (*e.g.*, Pet. 20) that the government impermissibly restrained "substitute" assets before his conviction. Even assuming (as the court of appeals did, Pet. App. 12 n.7) that the caveat can be characterized as a restraint, the home equity subject to the caveat in this case was directly forfeitable because petitioner paid his mortgage with proceeds traceable to the conspiracy. *Id.* at 20; see, *e.g.*, *United States* v. *Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998) (explaining that commingled assets are directly forfeitable if the commingling facilitated or concealed the relevant scheme).

its fact-bound rulings do not conflict with any decision of this Court or another court of appeals.

a. As the court of appeals explained, petitioner cannot establish plain error—or any error at all—with respect to his due process or Sixth Amendment rights given the way that his criminal proceedings unfolded. The caveat about which he complains did not deprive him of the use of his residence, was temporarily lifted to permit him to refinance his mortgage, and then was permanently lifted approximately sixth months before his trial began.[4] Pet. App. 6-9. Petitioner had the assistance of a highly experienced criminal defense lawyer who had a great deal of time to prepare for trial and who presented a "thorough and vigorous" defense to the "general allegations of fraud" the government made, *id.* at 21, 38-39—and that lawyer was the very counsel that petitioner himself had selected before he even knew of the existence of the caveat, *id.* at 6, 21, 33. Petitioner never asked for a hearing with respect to the caveat or otherwise indicated to the district court that it had interfered with his constitutional rights. *Id.* at 13-15 & n.8. And petitioner did not show that he had no resources to pay for additional counsel other than the equity that was affected by the caveat. *Id.* at 20; see *id.* at 16 (stating that petitioner "nowhere sought to demonstrate that he could" make that showing).

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[4] In addition, as the court of appeals suggested might be the case, a caveat is an insubstantial burden and is not equivalent for purposes of constitutional analysis to a restraint on assets pursuant to Section 853. Pet. App. 12 n.7. Even assuming that it were, however, see *ibid.*, petitioner still could not establish any plain error.

As the court of appeals ruled, under those circumstances no hearing was constitutionally required, and petitioner was not hampered in his exercise of the Sixth Amendment right to counsel of choice. Moreover, even if some error took place, petitioner's substantial rights were not affected. See *United State*s v. *Olano*, 507 U.S. 725, 733-735 (1993).

b. In addition, contrary to petitioner's contentions (Pet. 18-21), the rulings of the court of appeals with respect to the alleged "restraint" on his assets do not create any split in authority.

Without citing any allegedly conflicting cases, petitioner asserts (Pet. 21) a circuit split with respect to the holding in *United States* v. *Jones*, 160 F.3d 641, 649 (10th Cir. 1998), discussed with approval by the court below (Pet. App. 10-13, 16-17), that a pretrial hearing on a restraint of assets is warranted as a matter of due process only if the defendant can establish that he does not have sufficient assets independent of those that have been restrained to retain private counsel. See *Jones*, 160 F.3d at 647 ("As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family."). Far from creating a split in authority, however, *Jones* established the consensus rule. The circuits that have considered the issue have agreed with *Jones*'s conclusion that a prerequisite for such a hearing is a defendant's showing that he lacks sufficient unrestrained funds to mount a defense using his counsel of choice. See, *e.g.*, *United States* v. *Bonventre*, 720 F.3d 126, 128, 130-131 (2d Cir. 2013) (adopting the relevant prong of *Jones* and stating that a showing of a need for the restrained

assets to retain counsel of choice is a prerequisite to a hearing on whether "the contested funds are properly forfeitable"); *United States* v. *Jamieson*, 427 F.3d 394, 407 (6th Cir. 2005) ("We have no quarrel with the district court's decision to apply *Jones*."), cert. denied, 547 U.S. 1218 (2006); *United States* v. *Farmer*, 274 F.3d 800, 804-805 (4th Cir. 2001) (stating that a defendant has no interest in a post-restraint hearing unless he can show that he does not have "the means to hire an attorney independently of assets that were seized"); *United States* v. *Yusuf*, 199 Fed. Appx. 127, 132 (3d Cir. 2006) (instructing the district court to apply *Jones* on remand); see also *United States* v. *E-Gold, Ltd.*, 521 F.3d 411, 421 (D.C. Cir. 2008) (stating that defendants have a right to a hearing "at least where access to the assets is necessary for an effective exercise of the Sixth Amendment right to counsel"); *United States* v. *Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475 (5th Cir. 2007).

Petitioner also contends (Pet. 18) that the rule set forth in *Jones* conflicts with this Court's decision in *James Daniel Good Real Property*, *supra*. No such conflict exists. In *James Daniel Good Real Property*, the Court held that "in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." 510 U.S. at 46. But the Court specifically reserved the issue of which procedures are proper in a criminal case, and specifically contrasted a seizure with various less restrictive means "to protect [the government's] legitimate interests in forfeitable real property," including "a *lis pendens*, restraining order, or bond."

Id. at 58-59, 62 & n.3. Accordingly, the Court's decision does not speak to whether due process requires a hearing before or after a caveat—which simply provides notice that someone claims an interest in a piece of property—goes into effect under state law in connection with a criminal investigation or prosecution.

Finally, hinting at a conflict with this Court's decision in *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006), petitioner argues (Pet. 23) that the court of appeals should have found structural error here. But *Gonzalez-Lopez*, which held that a complete and "erroneous" deprivation of counsel of choice is structural error, see 548 U.S. at 150, does not conflict with the decision of the court below. As the court of appeals emphasized, petitioner was not, in fact, deprived of his counsel of choice: that counsel vigorously represented him at trial. And the contention that the quality of petitioner's representation was affected by the temporary caveat is closely akin to a *Strickland* claim of ineffective assistance of counsel, as to which prejudice is a necessary element. See *Strickland* v. *Washington*, 466 U.S. 668 (1984); see also *United States* v. *Rosen*, 487 F. Supp. 2d 721, 734 (E.D. Va. 2007) ("[T]his is not a case like *Gonzalez-Lopez* in which defendant was denied counsel of choice altogether; rather it is a case like *Strickland*, where the claim is that counsel's effectiveness was impaired.").[5]

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[5] The Second Circuit's decision in *United States* v. *Stein*, 541 F.3d 130 (2008), is not to the contrary (see Pet. 22-24); the court below correctly distinguished *Stein* on the ground that petitioner "has not demonstrated a magnitude of financial deprivation anywhere close to that experienced by the *Stein* defendants." Pet. App. 19 (quoting *United States* v. *Gordon*, 710 F.3d 1124, 1138

3. Despite petitioner's suggestions (*e.g.*, Pet. i, 9, 23) that this case is similar to *Kaley* v. *United States*, No. 12-464 (argued Oct. 16, 2013), no basis exists for holding this case for the Court's decision in *Kaley*. The issue presented in *Kaley* is whether a defendant who is entitled to a post-indictment, pretrial hearing addressing the restraint of potentially forfeitable assets must be permitted at that hearing to challenge the grand jury's determination that probable cause exists to believe that the defendant committed the charged crimes. See U.S. Br. at 5, *Kaley*, *supra*. That issue is not presented in this case. This Court's ruling about the proper scope of a hearing will have no bearing on the soundness of the decision here that the district court did not plainly err in failing to grant a hearing that petitioner never requested, let alone on the holding that petitioner enjoyed the right to counsel of choice and showed no harm to counsel's representation from the temporary existence of the caveat.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2013

(10th Cir. 2013), cert. denied, No. 12-10741 (Nov. 12, 2013)) (internal quotation marks omitted).