No. 17-38

In the Supreme Court of the United States

CARMEN JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in determining that petitioner had failed to make a prima facie showing sufficient to warrant an evidentiary hearing on her motion for the return of assets seized in an investigation separate from the one underlying her criminal case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is not published in the Federal Reporter but is reprinted at 683 Fed. Appx. 241. The order of the district court (Pet. App. 25a-45a) is unreported but is available at 2014 WL 2215854.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2017. The petition for a writ of certiorari was filed on July 3, 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 District of Maryland, petitioner was convicted on two counts of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; 12 counts of wire fraud, in violation of 18 U.S.C. 1343; and ten counts of making

false statements on loan applications, in violation of 18 U.S.C. 1014. C.A. App. 2093. She was sentenced to 57 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2094-2095. The court of appeals affirmed. Pet. App. 1a-24a.

1. Between 2003 and 2011, petitioner operated a so-called credit-repair business, known as Able Estate & Company LLC (Able Estate). Pet. App. 3a. In that role, petitioner had the ability to submit information about loans or lines of credit—known as tradelines—to an international credit-reporting agency, Experian. *Ibid.* Petitioner fraudulently reported to Experian that Able Estate had extended credit or loans to Able Estate clients; the credit or loans, in fact, were fictional. *Ibid.* Petitioner backdated the fictitious tradelines to create the appearance that the clients had significantly repaid the purported credit or loans, which in turn would improve the clients' credit profiles. *Ibid.* In exchange, the clients paid petitioner a fee—typically between $1200 and $2400. *Ibid.*

In 2006, suspecting Able Estate of fraud, Experian suppressed all Able Estate tradelines and reported the activity to the United States Secret Service. Pet. App. 3a. Petitioner began using two other companies—Restoration One, and CJ Lending—to submit tradelines to Experian on behalf of Able Estate clients. *Id.* at 3a-4a. Experian came to suspect both Restoration One and CJ Lending of fraud and suspended tradelines from both. *Id.* at 4a.

2. In March 2011, as part of its investigation of Able Estate's and CJ Lending's interactions with Experian, the government invoked 21 U.S.C. 853(p) in applying for a warrant to seize up to $2 million from Able Estate's accounts at specified financial institutions. Pet. App. 5a.

In support of the application, the government submitted an affidavit explaining that witness statements, documents from CJ Lending and Able Estate, and bank records all indicated that customers typically paid fees of $1200 to $2400, which were deposited into accounts of CJ Lending and Able Estate in exchange for fraudulent credit enhancements. *Id.* at 16a. The affidavit stated that "[t]he government intends to seek a money judgment in the forthcoming indictment for at least $2,000,000.00 in U.S. currency, which is an amount that represents the proceeds of criminal activity." *Ibid.* The affidavit further stated that the "investigation has revealed no evidence that CJ Lending and Able Estate & Company have generated any legitimate earnings by lawfully extending loans or credit." *Ibid.* (citation omitted). Based on those allegations, the affidavit asserted that "there is probable cause to believe that any and all funds up to $2,000,000.00 in U.S. currency from the aforementioned bank accounts[] is forfeitable as substitute assets pursuant to 21 U.S.C. § 853(p)." *Id.* at 27a (brackets in original). Section 853(p) permits forfeiture of property that is not itself tainted by criminal activity in certain circumstances in which the tainted property itself is not readily available or identifiable. 21 U.S.C. 853(p).

A magistrate judge issued the seizure warrant. Pet. App. 5a. The government seized $515,967.64 from certain bank accounts of Able Estate and CJ Lending. *Id.* at 6a.

3. Days later, pursuant to a separate warrant, agents searched the premises of petitioner's companies and located evidence of petitioner's involvement in mortgage and real-estate fraud schemes. Pet. App. 6a. Between

March 2007 and November 2008, petitioner had conspired with two licensed real-estate agents to enhance the value of fraudulent real-estate transactions. *Id.* at 4a. Petitioner helped to fashion false statements on loan applications and sales contracts regarding purchasers' creditworthiness. *Ibid.* The conspiracies collectively involved at least ten different real-estate transactions. *Ibid.*

In June 2013, a grand jury returned an indictment charging petitioner and others with conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349, based on their involvement in a mortgage and real-estate fraud scheme involving eight of the real-estate transactions. Pet. App. 6a, 28a. Petitioner was subsequently indicted in a second case involving substantially identical allegations that covered the other two real-estate transactions. *Id.* at 6a n.1.

4. a. In December 2013, petitioner filed a motion in the district court for release of the funds that the government had seized from the bank accounts of Able Estate and CJ Lending in March 2011. Pet. App. 7a. She also requested an evidentiary hearing on the motion. *Id.* at 30a. In support of that request, petitioner stated that "most circuit courts"—including the court of appeals below—have adopted "the '*Jones-Farmer* rule,'" which petitioner explained as entitling a defendant to a hearing on a motion for the return of seized assets when the defendant makes "two threshold showings": (1) that the defendant has no other assets with which to pay for defense counsel and living expenses, and (2) that "there is a bona fide reason to believe that the grand jury (or court, in cases of seizure warrants) erred in finding probable cause to believe that the restrained property should be subject to forfeiture if the defendant

is convicted." C.A. App. 42 (citing *United States* v. *Jones*, 160 F.3d 641, 647-648 (10th Cir. 1998), and *United States* v. *Farmer*, 274 F.3d 800, 804-805 (4th Cir. 2001)). Petitioner did not argue that the district court should apply a different standard here. See *id.* at 42-48. Instead, petitioner argued that the court should order an evidentiary hearing under *Jones* and *Farmer* because (1) the seizure of the assets had "impoverished" her, leaving her unable to retain counsel, and (2) the seized assets were "untainted" and not subject to forfeiture. *Id.* at 35; see *id.* at 47-48.

In support of her motion, petitioner filed a declaration stating that, since the seizure of her property in 2011, she had "been forced to liquidate [her] personal retirement account * * * and to incur large amounts of debt just to cover ordinary living expenses." C.A. App. 67-68. Petitioner further stated that she owed $140,000 to BB&T Bank; owed $10,000 to the Internal Revenue Service; had "exhausted all personal savings"; had not paid her mortgage in more than two years; and had "past due" credit-card bills. *Id.* at 68. Petitioner stated that she worked for the Maryland chapter of the National Association for the Advancement of Colored People (NAACP) "largely on a volunteer basis" and, after paying "monthly living expenses," had "insufficient funds * * * to pay for legal counsel and related services needed to defend against the pending criminal charges." *Ibid.* Petitioner further stated that the representation of her current attorneys was "critical" to her defense and that she could not pay them because her "only unexhausted assets" were the seized funds. *Ibid.* Petitioner did not disclose her net worth, provide a comprehensive list of her assets, explain how she was paying her living expenses, describe how much income

she was receiving from the NAACP, or indicate whether she had access to any accounts other than those seized by the government. See *id.* at 67-68.

b. The government argued that petitioner could challenge the seizure and retention of her assets only through a motion under Federal Rule of Criminal Procedure 41(g), because the assets were seized pursuant to an investigation that was separate and legally distinct from that underlying petitioner's June 2013 indictment. Pet. App. 7a. Rule 41(g) provides a mechanism whereby a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g).

The government also argued that, although the March 2011 affidavit characterized the funds in the targeted accounts as "substitute assets" under 21 U.S.C. 853(p), that representation was mistaken. Pet. App. 7a. The government explained that the seized funds were not "substitute assets," but were instead proceeds "directly traceable to criminal activity"—*i.e.*, the fees paid by clients of Able Estate and CJ Lending as compensation for the fraudulently enhanced credit profiles —and were therefore themselves tainted assets. *Ibid.*

In February 2014, the district court held a nonevidentiary hearing on petitioner's motion. C.A. App. 89-155. After colloquies with counsel, the court stated, "I think we have gotten to a Rule 41" and asked for the parties' positions on "the proper procedure and standard under Rule 41(g)." *Id.* at 108-109; see *id.* at 108-120, 131-133. Petitioner argued in a subsequent brief that the parties "agreed that [her] request for relief is appropriately considered under the *Jones-Farmer* line

of cases" and asked for an evidentiary hearing "required by [*Farmer*, *supra*] and its progeny." *Id.* at 157 & n.3.

In May 2014, the district court denied petitioner's motion for an evidentiary hearing and for the release of funds. Pet. App. 25a-45a. The court held that Rule 41(g) provides the appropriate procedural mechanism for petitioner to assert her claim for a return of the funds because the seizure was effected pursuant to an investigation that was separate from that which led to the June 2013 indictment. *Id.* at 35a-39a. Under the Rule 41(g) framework, the court explained, a district court should consider four factors in deciding whether to entertain a motion for return of property filed before the initiation of criminal proceedings:

> (1) whether the government displayed a callous disregard for the constitutional rights of the movant; (2) whether the movant has an individual interest in and need for the property she wants returned; (3) whether the movant would be irreparably injured by denying return of the property; and (4) whether the movant has an adequate remedy at law for the redress of her grievance.

Id. at 39a-40a (citations omitted). The court concluded that none of those factors supported petitioner's motion here. *Id.* at 40a-45a.

5. a. Petitioner appealed and, as relevant here, challenged the denial of her request for an evidentiary hearing on her motion for the return of the seized assets. Pet. C.A. Br. 37-43. In pressing that challenge, petitioner asserted that she had "made the threshold showings required" by the court of appeals' previous decision in *Farmer*—including making "a 'prima facie showing of a bona fide reason to believe the [magistrate judge]

erred in determining that the restrained assets constitute or are derived, directly or indirectly, from gross proceeds traceable to the commission of the . . . offense.'" *Id.* at 40-41 (quoting *Jones*, 160 F.3d at 647) (brackets in original); see *id.* at 35, 39-41; Pet. App. 10a. Petitioner argued that she had made that specific showing by pointing to alleged deficiencies in the seizure affidavit, which in her view established that the seized assets were "not 'gross proceeds traceable to the commission of the . . . offense.'" Pet. C.A. Br. 41 (quoting *Jones*, 160 F.3d at 647). "It follows," petitioner stated, that she had "made a sufficient showing * * * to trigger an evidentiary hearing." *Id.* at 42.

Petitioner did not argue in her briefing below that the court of appeals should apply a standard different from *Farmer* to determine her entitlement to an evidentiary hearing. See Pet. C.A. Br. 34-35, 37-43; Pet. C.A. Reply Br. 1-8. To the contrary, in her reply brief, petitioner sought to refute the government's contention that the *Jones-Farmer* rule was inapplicable. Pet. C.A. Reply Br. 1, 8.

b. The court of appeals affirmed. Pet. App. 1a-24a. The court observed that "[d]istrict courts apply a different legal analysis to a motion for a return of property depending, in part, on whether prosecution has begun." *Id.* at 11a. The court of appeals explained that, "[i]f the restraint of property occurs pre-indictment, a defendant's relief can come only under Federal Rule of Criminal Procedure 41(g)" and requires the application of the four-factor test set forth in *Richey* v. *Smith*, 515 F.2d 1239 (5th Cir. 1975). Pet. App. 11a; see *id.* at 11a-12a. The court of appeals further explained that if, instead, "the continued restraint of untainted assets occurs post-indictment, courts in this Circuit apply the '*Jones*-

Farmer' rule, derived from the Tenth Circuit's approach in [*Jones*, *supra*] and the Fourth Circuit in [*Farmer*, *supra*]." *Id.* at 12a. The court stated that, under *Farmer*, "due process requires a pretrial adversary hearing when a defendant makes a threshold showing that the Government may have seized untainted assets and that the defendant needs those assets to hire counsel." *Id.* at 12a-13a. And the court observed that petitioner "insist[ed] that *Farmer*'s reasoning controls in the circumstances presented here." *Id.* at 13a; see *id.* at 14a ("Johnson further argues that *Farmer* should apply even if the investigations are separate.").

The court of appeals determined that the district court did not clearly err in finding that the March 2011 seizure grew out of an investigation that was separate from the investigation that led to the June 2013 indictment. Pet. App. 14a. The court of appeals noted that it "has not yet determined which standard" of the two the parties advocated—Rule 41(g) as construed in *Richey*, or *Farmer*—"applies when a defendant is under indictment and needs to pay for counsel using allegedly untainted funds seized in a separate investigation." *Id.* at 15a.

The court of appeals found it unnecessary to resolve that question here, however, because it determined that petitioner was not entitled to a hearing under either standard. Pet. App. 15a. The court determined that petitioner would not be entitled to a hearing under Rule 41(g) and that "the district court did not clearly err in finding that Johnson was not entitled to a hearing under *Richey*." *Ibid.* And the court determined that, because "[a] hearing under *Farmer* is limited to a defendant's challenge to an 'erroneous deprivation' of funds," petitioner was not entitled to an evidentiary hearing under

the *Farmer* standard, as she had "failed to sufficiently show that her deprivation was erroneous, or that her assets were untainted." *Id.* at 16a-17a (citation omitted).

The court of appeals explained that petitioner was not entitled to a hearing under *Farmer* because she had "failed to make a prima facie showing that her assets were untainted." Pet. App. 15a. The district court had found that petitioner "failed to provide any evidence, other than her assertion, that any of her assets were untainted," and the court of appeals determined that "[t]he district court did not clearly err in so finding." *Ibid.* To the contrary, the court of appeals observed that "this is far from a case in which the affidavit lacked a showing of probable cause to believe that the assets (or any of them) were in fact tainted." *Id.* at 16a.

The court of appeals therefore concluded that the district court did not err in denying petitioner's motion seeking the return of the seized assets or in declining to hold an evidentiary hearing on that motion. Pet. App. 17a. In light of that conclusion, the court did not address petitioner's assertion that she needed the seized funds to pay for her legal representation. *Id.* at 17a n.2.

ARGUMENT

Petitioner contends (Pet. 20-25) that she was entitled to an evidentiary hearing on her motion for the return of seized assets and that the court of appeals applied an erroneous legal standard in determining otherwise. The court of appeals, however, applied the legal standard petitioner advocated below. Its determination that petitioner was not entitled to an evidentiary hearing does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that petitioner was not entitled to an evidentiary hearing on her motion for the return of the seized assets. Pet. App. 10a-17a. As the court explained, it had not previously addressed which of the two legal standards advocated by the parties —the four-factor test under Federal Rule of Criminal Procedure 41(g) described in *Richey* v. *Smith*, 515 F.2d 1239 (5th Cir. 1975), or the standard in *United States* v. *Farmer*, 274 F.3d 800 (4th Cir. 2001)—applies where, as here, a defendant is under indictment and asserts that she needs allegedly untainted funds seized in a separate investigation to pay for counsel. Pet. App. 15a. The court of appeals did not decide that question in this case because it determined that petitioner's claim failed under either standard. *Ibid.* That determination is correct.

Under Rule 41(g) and *Richey*, courts consider four factors when deciding whether to entertain a motion filed before the initiation of criminal proceedings that seeks the return of property: (1) "whether the Government displayed a callous disregard for the constitutional rights of the movant"; (2) "whether the movant has an individual interest in and need for the property he wants returned"; (3) "whether the movant would be irreparably injured by denying return of the property"; and (4) "whether the movant has an adequate remedy at law for the redress of his grievance." *Ramsden* v. *United States*, 2 F.3d 322, 325 (9th Cir. 1993) (citing *Richey*, 515 F.2d at 1243-1244), cert. denied, 511 U.S. 1058 (1994). Here, the district court found that petitioner was not entitled to a hearing under that standard because each of the factors weighed against her. Pet. App. 40a-45a. The court of appeals determined that the district court did not clearly err in so finding, *id.* at 15a,

and petitioner does not challenge this aspect of the court of appeals' decision.

The court of appeals also correctly determined that petitioner was not entitled to an evidentiary hearing under the *Farmer* standard. In *Farmer*, the court of appeals stated that "due process requires a pretrial adversary hearing when a defendant claims that a portion of the assets restrained pursuant to criminal forfeiture statutes are untainted and that he has no other funds from which to secure the counsel of his choice." 274 F.3d at 803. But *Farmer* also explained that "'[d]ue process does not automatically require a hearing and a defendant may not simply ask for one.'" *Id.* at 805 (quoting *United States* v. *Jones*, 160 F.3d 641, 647 (10th Cir. 1998)). Rather, a defendant must make a "threshold showing" that (1) at least some of the seized assets are untainted, and (2) she cannot pay for counsel. *Ibid.*

The court of appeals determined that, to the extent *Farmer* is applicable, petitioner did not make the required threshold showing here. Pet. App. 15a. Specifically, it concluded based on its review of the record that petitioner had "failed to make a prima facie showing that her assets were untainted." *Ibid.*; see *id.* at 15a-16a. Petitioner does not dispute that she failed to make that prima facie showing.

2. Petitioner contends (Pet. 20-21) for the first time in this Court that the court of appeals erred by applying the *Farmer* standard in determining whether she was entitled to an evidentiary hearing. That contention, however, is not open to petitioner because she affirmatively advocated that standard below. In the courts below, petitioner "insist[ed] that *Farmer*'s reasoning controls in the circumstances presented here." Pet. App. 13a; see *id.* at 14a; C.A. App. 157 & n.3. Petitioner

thus affirmatively invited the alleged error of which she now complains. She therefore has waived any argument that the court of appeals erred by applying *Farmer*. See *Johnson* v. *United States*, 318 U.S. 189, 200-201 (1943); see also *Shields* v. *United States*, 273 U.S. 583, 586 (1927) ("[A] court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such a request."). Any claim that the *Farmer* standard does not apply is therefore not subject to review at all. See *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993).

At a minimum, petitioner forfeited any objection to application of the *Farmer* standard by failing to raise it on direct appeal. See Pet. C.A. Br. 37-43; Pet. C.A. Reply Br. 1-8. That forfeiture would make this case an unsuitable vehicle to address the question petitioner presents for two reasons. First, the court of appeals declined to decide whether the *Farmer* standard applied because it concluded that petitioner had failed to satisfy either of the standards advocated by the parties. Pet. App. 15a; see Pet. C.A. Br. 37-43; Gov't C.A. Br. 41-47; Pet. C.A. Reply Br. 1-8. This Court generally does not consider questions not pressed or passed upon below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Second, petitioner's argument would be reviewable, if at all, only for plain error. See *Puckett* v. *United* States, 556 U.S. 129, 135 (2009); Fed. R. Crim. P. 52(b). Petitioner does not attempt to show that the plain-error standard is satisfied.

3. Even if petitioner had not waived or forfeited her challenge to the *Farmer* standard, this case would not warrant this Court's review. Petitioner contends (Pet.

20-23) that the courts of appeals have adopted different approaches to determining when a defendant is entitled to an evidentiary hearing on a motion for the return of seized assets. But petitioner has identified no court of appeals that would have concluded that she was entitled to a hearing in these circumstances.

As petitioner acknowledges, "[m]ost courts" require a defendant who seeks such a hearing to show both that (1) a "portion of the assets restrained" were "untainted" and (2) the defendant "has no other funds from which to secure the counsel of choice." Pet. 20 (citation omitted). The courts below determined that petitioner failed to make the first showing that a portion of the assets seized were untainted, Pet. App. 15a, and petitioner does not dispute that determination.

Petitioner argues that the Second Circuit does not require the first showing. Pet. 21 (citing *United States* v. *Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013)). But any inconsistency between the Second Circuit's articulation of the standard in *Bonventre* and other courts of appeals' decisions is not implicated here because petitioner also failed to satisfy the *Bonventre* standard.

In *Bonventre*, the Second Circuit held that a defendant is entitled to a hearing on a motion for the return of seized assets only if she "make[s] a sufficient evidentiary showing that there are no sufficient alternative, unrestrained assets to fund counsel of choice." 720 F.3d at 131. The Second Circuit concluded that the defendant in *Bonventre* had failed to meet that threshold requirement because the two declarations he filed in the district court "provided insufficient information for a court to evaluate the extent of his unrestrained funds." *Id.* at 133. Specifically, the declarations "did not disclose his net worth, provide a comprehensive list of his

assets, or explain how he ha[d] been paying his significant living expenses." *Ibid.* "While the affidavits describe[d] the aggregate balances of bank accounts enumerated in the government's submissions, they d[id] not clarify whether Bonventre ha[d] access to other accounts and, if so, their value." *Ibid.*

Petitioner's declaration in support of her motion suffers from the same deficiencies as the declaration in *Bonventre*. See C.A. App. 67-69. Petitioner did not disclose her net worth, provide a comprehensive list of her assets, explain how she was paying her living expenses, describe how much income she was receiving from the NAACP, or indicate whether she had access to any accounts other than those seized by the government. See *id.* at 67-68. Thus, even under the Second Circuit's approach in *Bonventre*, petitioner thus would not be entitled to a hearing.

Petitioner suggests (Pet. 21-22) that the threshold showing required by *Bonventre* is too stringent and should be relaxed in a manner that would allow her to prevail here. But petitioner identifies no court of appeals that would require an evidentiary hearing in these circumstances based solely on a minimal assertion of financial need. Petitioner cites (Pet. 22) *United States* v. *Roth*, 912 F.2d 1131 (9th Cir. 1990), but nothing in that decision indicates that the Ninth Circuit would require an evidentiary hearing without any threshold showing that the assets are untainted and that they are needed to retain counsel.

Petitioner finally contends in passing (Pet. 22) that the lower courts disagree on "who carries the burden during the course of an evidentiary hearing." But petitioner does not and cannot contend that her case implicates that question. No evidentiary hearing was held

because petitioner did not make the requisite threshold showing necessary to warrant a hearing under either standard the parties advocated below. The question of which party would bear the burden of proof at such a hearing thus is not presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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