STATE OF SOUTH CAROLINA COUNTY OF HAMPTON	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Renee S. Beach, as Personal Representative of the Estate of Mallory Beach, Plaintiffs, v. Gregory M. Parker, Inc. a/k/a Parker's Corporation, Richard Alexander Murdaugh, Richard Alexander Murdaugh, Jr.; John Marvin Murdaugh, as Personal Representative of the Estate of Margaret Kennedy Branstetter Murdaugh, and Randolph Murdaugh, IV, as Personal Representative of the Estate of Paul Terry Murdaugh, Defendants.	C/A No. 2019-CP-25-00111 **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

Defendant Richard Alexander "Alex" Murdaugh, through undersigned counsel hereby submits this memorandum in support of his motion for reconsideration of the Court's order dated May 12, 2023 denying his motion for an order directing the Co-Receivers to transfer $160,000.00 of Mr. Murdaugh's untainted funds to pay attorneys' fees and costs to appeal his recent murder convictions. The Court should reconsider its prior ruling and enter an order releasing the funds because, as explained below, under controlling U.S. Supreme Court precedent, Mr. Murdaugh has a right to use his own funds, untainted by any criminal activity, to pay for his criminal defense, and because the Co-Receivers' arguments in opposition lack merit.

I. Background

On November 4, 2021, Mr. Murdaugh's assets were, in their entirety, placed into the custody of Court-appointed Co-Receivers to protect the future contingent interests of civil litigants suing Mr. Murdaugh by preventing him "from hiding, concealing, misappropriating, selling,

encumbering, transferring, impairing the value of and otherwise disposing of any of" his assets. Order Appointing Co-Receivers 3. One of Mr. Murdaugh's assets was his 401(k) retirement account. This account was funded directly by Mr. Murdaugh's former law firm and so the funds are an asset "untainted" by any funds connected to any criminal activity. The Court previously entered an Order permitting Mr. Murdaugh to liquidate the 401(k) account with $600,000 of the funds to be used for the cost of defending his criminal charges, while the balance of funds - $424,941.24 would be deposited with the Co-Receivers. That Order was the result of a negotiated agreement between Mr. Murdaugh and the Co-Receivers. The Co-Receivers were prohibited by law from accessing Mr. Murdaugh's retirement account. But Mr. Murdaugh could not withdraw funds from the account without those funds immediately becoming subject to the control of the Co-Receivers. To avoid this impasse, it was agreed that Mr. Murdaugh could liquidate the account (though the tax penalty would significantly reduce the value of the account) and use the funds to pay for his criminal defense, with the balance going into the receivership estate.

On March 3, 2023, Mr. Murdaugh was sentenced to two consecutive life sentences without parole following a six-week trial that began on January 23, 2023in the Colleton County Court of General Sessions. He filed a notice of appeal from his convictions and sentence on March 9, 2023. Mr. Murdaugh's counsel exhausted the funds received from the Defendant's retirement account in defense of the murder and related charges at trial, paying $518,722.50 in out-of-pocket litigation expenses and receiving attorneys' fees of only $81,277.50 for preparing for and conducting a six-week trial. On March 21, 2023, Mr. Murdaugh moved for an order directing the Co-Receivers to release $160,000 to pay estimated fees of $117,500.00 and expenses of $41,392.40 to represent the Defendant on appeal. The Court heard the motion on May 3, 2023. The Co-Receivers opposed the motion in a memorandum in opposition filed the day before the hearing. After a hearing, the

Court denied the motion by Form 4 order on May 12, 2023. Mr. Murdaugh timely moved to reconsider seven days later, on May 19, 2023.

II. Argument

A. The Co-Receivers misapprehend the controlling case law on a criminal defendant's right to use his funds for his appellate defense.

The Co-Receivers' principal argument in opposition to Mr. Murdaugh's motion is "[t]here simply is no constitutional right to use tainted or even untainted funds to pay for appellate counsel of his choice." Mem. Opp'n 3. This argument misapprehends the controlling case law and fails even to identify the relevant issue. The issue is not whether Mr. Murdaugh has a constitutional right to appellate counsel of his choice. The issue is whether he may use funds that he presently owns to pay reasonable fees and costs of his counsel of choice for any stage of his criminal defense.

Controlling case law unequivocally holds he may: "if the defendant owns the property, he is entitled to use it for his defense; if he does not own the property, he may not." *United States v. Marshall*, 872 F.3d 213, 220 (4th Cir. 2017) (relying on *Luis v. United States*, 578 U.S. 5 (2016) and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)). The issue of "tainted" versus "untainted" assets is relevant only as to the timing of when the defendant forfeits ownership of the assets. This is important in federal criminal procedure because while forfeiture of tainted funds occurs when the crime is committed, forfeiture of untainted funds occurs only after a criminal conviction with an order of forfeiture for substitute assets, so untainted funds are available to pay trial counsel but not necessarily appellate counsel. *See* 21 U.S.C. § 853(c) ("All right, title, and interest in property [subject to criminal forfeiture] vests in the United States upon the commission of the act giving rise to forfeiture under this section."); *United States v. Chamberlain*, 868 F.3d 290, 297 (4th Cir. 2017) (en banc) (stating "that a forfeiture order covering substitute

property may issue only upon a showing, after conviction, that directly forfeitable assets have been rendered unavailable").

The controlling U.S. Supreme Court decisions on this issue were explained in depth by the U.S. Court of Appeals for the Fourth Circuit in *Marshall*. 872 F.3d 213. In *Marshall*, after conviction for drug, conspiracy, and money laundering offenses, and after the trial court's order for forfeiture of $51.3 million, the defendant moved for release of $59,000 in a credit union account to pay for his appeal. *Id.* at 216. At that time, the forfeiture order did not specifically mention the $59,000 credit union assets. About a month later, the government filed, and the district court granted, a motion for a second order of forfeiture specifically requesting the forfeiture of the funds in the credit union account as substitute assets. *Id.* at 216–17. The defendant then moved the court of appeals for an order releasing the funds to hire appellate counsel. *Id.* The defendant made two arguments in support of his appellate motion: (1) the U.S. Constitution requires the release of *substitute assets* forfeited by a defendant after conviction if the funds are needed for appellate representation, and (2) the Government violated Rule 32.2 of the Federal Rules of Criminal Procedure by waiting too long after the verdict before seeking forfeiture of the credit union funds as substitute assets. *Id.* at 217. Only the first argument is germane here.

In addressing the first argument, the Fourth Circuit noted that while there is no constitutional right to appeal, when a statute provides a right of appeal, the criminal appellant enjoys a constitutional right to appellate counsel, including the right of effective assistance of appellate counsel, but there is no right to counsel of one's choice on appeal. *Id.* The Co-Receivers attempt to make much of this point, but it is irrelevant to the present case. The Fourth Circuit's point was that if forfeiture of a defendant's untainted funds as substitute assets leaves him too poor to pay appellate counsel of his choice, his constitutional rights are not violated because there is no

right to appellate counsel of choice and public defenders provide the constitutionally required appellate defense for indigent defendants. *Id.* That is not relevant here because there has been no forfeiture of Mr. Murdaugh's untainted funds. He is not indigent. He has ample untainted funds to pay appellate counsel of choice, but the court-appointed custodians of those funds refuse to allow him to do so out of a desire to protect civil litigants' contingent future interest in those funds.

The Fourth Circuit went on to discuss two U.S. Supreme Court decisions that are controlling here. First, in *Caplin & Drysdale*, the Supreme Court held that a defendant does not have a Sixth Amendment right to use forfeited "tainted" assets - meaning assets connected to the crimes charged - to pay trial counsel's fees because title to the forfeited property vested in the Government "at the time of the criminal act giving rise to forfeiture." *Marshall*, 872 F.3d at 218 (quoting 491 U.S. at 627). The court noted the Supreme Court "held that the Sixth Amendment does not require the release of forfeited funds to pay for trial counsel postconviction because '[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.'" *Id.* (quoting *Caplin & Drysdale*, 491 U.S. at 626).

Second, in *Luis v. United States*, the Supreme Court held the Government may not prevent a defendant from using untainted assets needed to hire counsel of choice pretrial. Unlike the Government's interest in tainted assets, which vested at the time of the offense, "[i]n *Luis*, the Government's interest in the property at issue was a contingent future interest, which could vest only postconviction." *Id.* at 219. "Thus, in the pretrial context, Luis' Sixth Amendment right to counsel of choice outweighed 'the Government's contingent interest in securing its punishment of choice (namely, criminal forfeiture) as well as the victims' interest in securing restitution (notably,

from funds belonging to the defendant, not the victims).'" *Id.* at 219–20 (quoting *Luis*, 136 S. Ct. at 1093) (emphases added).

The Fourth Circuit then read *Caplin & Drysdale* and *Luis* together to discern the rule that governs Mr. Murdaugh's motion in this case: "*Caplin & Drysdale* and *Luis* firmly establish that the right to use forfeited funds to pay for counsel hinges upon ownership of the property at issue . . . if the defendant owns the property, he is entitled to use it for his defense; if he does not own the property, he may not." *Id.* at 220 (emphasis added). Applying that rule to the facts in *Marshall*, the Fourth Circuit observed that title to the $59,000 in substitute property the movant sought vested in the Government when the district court issued its order of forfeiture following conviction, and the movant simply did not own the property he sought to use to pay appellate counsel. *Id.* at 221.

Marshall sets forth and explains the rule controlling the instant motion: a defendant always has a right to use his own property to fund his criminal defense whether at trial or on appeal. A defendant never has a right to use property that does not belong to him to fund his criminal defense. The question is when the property at issue no longer belongs to the defendant. "Tainted" assets do not belong to the defendant the moment the crime is committed (if he ever did). "Untainted" assets belong to the defendant unless and until they are adjudicated to be forfeited. The forfeiture of untainted assets occurs only when a court orders it.

In this case, there has been no criminal forfeiture. There are not even any civil judgments, other than a confessed judgment in the *Satterfield* matter that has no monetary value because it expressly provides for offsets exceeding the amount of the confessed judgment. There are no judgment creditors. Recognizing this, the Co-Receivers argue that Mr. Murdaugh no longer has a "remaining interest" in his assets because "the magnitude of [the anticipated future] judgments

against and other debts owed by Murdaugh" make it "impossible that Murdaugh actually retains an ownership interest in any funds in the receivership estate." Mem. Opp'n 4.

The Co-Receivers' apparent reasoning is that the certainty that judgments will be entered against Mr. Murdaugh in the future, and that the assets available will be insufficient to satisfy those future judgments, deprives him of any present ownership right in his own property. Under such reasoning, a criminal defendant would not be entitled to use untainted funds to fund his defense at trial, much less on appeal, if the evidence against him were, in a judge's opinion, sufficient to guarantee his conviction and eventual forfeiture of the untainted funds. But that is not the law. The U.S. Supreme Court addressed this argument in *Luis*, observing that the "distinction between (1) what is primarily 'mine' (the defendant's) and (2) what is primarily 'yours' (the Government's) does not by itself answer the constitutional question posed, for the law of property sometimes allows a person without a present interest in a piece of property to impose restrictions upon a current owner, say, to prevent waste." 578 U.S. at 17–18. The Court noted however that while "holders of a contingent, future executory interest in property (an interest that might become possessory at some point down the road) can, in limited circumstances, enjoin the activities of the current owner," "'equity w[ill] interfere . . . only when it is made to appear that the contingency . . . is reasonably certain to happen, and the waste is . . . wanton and conscienceless.'" 578 U.S. at 18 (quoting *Dees v. Cheuvronts*, 88 N.E. 1011, 1012 (1909)). Here, the contingency is indeed "reasonably certain to happen" but no "wanton and conscienceless" "waste" is suggested. Mr. Murdaugh simply proposes to use part of the proceeds of his untainted retirement account to pay fees and costs necessary to his criminal defense. The Co-Receivers have not argued (and being attorneys themselves, presumably would not argue) that allowing attorneys to be paid a fraction of

the reasonable and customary rate for their services, or to be reimbursed for costs they have paid out of pocket, is a wanton or conscienceless waste of funds.

Of course, it is questionable whether the Co-Receivers' reliance on legal principles governing federal criminal asset forfeiture can support what is really pre-judgment attachment in South Carolina civil litigation at all. Federal criminal forfeiture requires a conviction, and the forfeiture is part of the defendant's sentence. The Co-Receivers are not seizing forfeit funds. There is no forfeiture in civil litigation. The Co-Receivers are simply marshalling Mr. Murdaugh's assets to prevent their dissipation before civil claims against him can be adjudicated. Order Appointing Co-Receivers 4. They are custodians, not owners. Mr. Murdaugh is the owner until a court rules otherwise.

But the federal criminal forfeiture cases upon which the Co-Receivers rely, however, do have one instructive parallel with the receivership in this case. In many criminal forfeiture cases, the government has custody of the assets before forfeiture occurs, e.g., when the asset is seized as evidence or seized pursuant to a seizure warrant. *E.g.*, 18 U.S.C. § 981(b) (civil seizure warrants); 21 U.S.C. § 853(e) & (f) (criminal restraining orders and seizure warrants, respectively). Seizure warrants or similar court orders are used to prevent dissipation of assets pending the outcome of criminal proceedings likely to result in forfeiture of the assets.[1] *See* Money Laundering and Asset

[1] The Co-Receivers cite *United States v. Monsanto* to erroneously state the Supreme Court has held "the government may freeze assets that a defendant needs to hire an attorney if probable cause exists to "believe that the property will ultimately be proved forfeitable." Mem. Opp'n 5. The full sentence from which quotation was taken states: "We have previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable," referring to seizure, not forfeiture. *Monsanto*, 491 U.S. at 615. In *Monsanto*, the defendant was prohibited from using the seized funds to pay counsel, but, as explained in *Luis*, in *Monsanto* "the property at issue was forfeitable under the same statute that was at issue in *Caplin & Drysdale*" "[a]nd, as in *Caplin & Drysdale*, the application of that statute to Monsanto's case concerned only the pretrial restraint of assets *that were traceable to the crime*;

Recovery Section, Criminal Div., U.S Dep't Justice, Asset Forfeiture Policy Manual 2-4 (2023). Likewise, here the Co-Receivers have court-ordered custody of Mr. Murdaugh's assets to prevent dissipation pending the outcome of civil proceedings likely to produce judgments against him. But, as the Court correctly stated on the record at the hearing on May 3, 2023, for the moment the receivership assets do belong to Mr. Murdaugh.

B. Mr. Murdaugh did not waive his ability to ask the Court to release an additional portion of his own funds to pay for his criminal defense.

As noted above, the controlling legal issue is whether Mr. Murdaugh owns the funds he seeks to access. The criminal forfeiture cases discussed above regard tainted assets and substitute assets. Of course, another reason assets might no longer belong to the defendant could be that he voluntarily parted with them. The Co-Receivers appear to argue that Mr. Murdaugh did this when he purportedly agreed to give retirement account proceeds, net of $600,000 for attorneys' fees and costs, to the receivership. But Mr. Murdaugh never agreed not to seek to access more of his own money to pay for his own legal defense and he never agreed to surrender ownership of anything to the Co-Receivers. Mr. Murdaugh remains the owner of the funds.

The agreement the Co-Receivers reference was necessary to avoid a legal issue arising from statutory protections for retirement accounts. The Co-Receivers (and any future judgment creditors) had no legal ability to access Mr. Murdaugh's retirement accounts. Mr. Murdaugh had no easy ability to liquidate his retirement account to pay legal costs because the disbursed funds would immediately fall under the receivership. It was agreed that the retirement account would be liquidated, $600,000 would be transferred to Mr. Murdaugh's legal team, and that the balance would go to the receivership, which in any event was required under the order appointing the Co-

---

thus, the statute passed title to those funds at the time the crime was committed (i.e., before the trial)." *Luis*, 578 U.S. at 14 (citations omitted and emphasis in original).

Receivers. It was further agreed that any funds not used for Mr. Murdaugh's legal defense would go back into the receivership—again, a requirement of the receivership order.

None of that has anything to do with the fact that all the untainted assets in the receivership estate belong to Mr. Murdaugh and are available for his criminal defense.[2] Nor does any of that in any way constitute a promise not to seek additional further funds for his criminal defense or a waiver of his ability to do so. Even if it did (and it does not), the Co-Receivers have not identified any detrimental reliance that would render the promise enforceable—which is why they couch their arguments in terms of "waiver" and "judicial estoppel" instead of simply asking to enforce a promise. *See Bishop v. City of Columbia*, 401 S.C. 651, 664, 738 S.E.2d 255, 261 (Ct. App. 2013) (providing that detrimental reliance is an element of promissory estoppel and of equitable estoppel). For the receivership estate, the only consequence of the agreement to liquidate Mr. Murdaugh's retirement account was that it received funds that otherwise would have remained outside the receivership.

C. The Co-Receivers' judicial estoppel argument is meritless makeweight.

The Co-Receivers' "judicial estoppel" argument is mere repetition of its waiver argument—the argument that Mr. Murdaugh "agreed" to "give" money to the Co-Receivers and that he "waived" his ownership of his property since there was no reliance that would make any such agreement enforceable. As explained above, Mr. Murdaugh never agreed to give the Co-Receivers anything. Under the receivership order, any funds not paid to his attorneys when his

[2] Without conceding any argument about the appropriateness of the appointment of the Co-Receivers or the scope of assets subject to the receivership, Mr. Murdaugh agrees for purposes of the present motion that it is appropriate for the Co-Receivers and the Court to ensure that requested disbursements for legal fees and costs are reasonable and appropriate and not a device to dissipate funds held in receivership. Mr. Murdaugh's counsel have offered to provide the Co-Receivers and the Court with a detailed explanation of expenditures to date or anticipated future expenditures.

retirement account was liquidated were required to go into the receivership estate, regardless of any agreement. Ownership, however, never transferred. The Co-Receivers are custodians of assets that still, as of now, belong to Mr. Murdaugh. There was never any representation that Mr. Murdaugh would never seek to use any more of his own money to pay for his legal defense, nor was there any detrimental reliance on any such purported representation.

The elements of judicial estoppel are "(1) whether one's later position with respect to the facts is clearly inconsistent with his earlier position; (2) whether that party has succeeded in persuading one court to accept the earlier position, such that judicial acceptance of the later inconsistent position would create the perception that either the first or the second court had been misled; and (3) whether the party seeking to assert the inconsistent position would, if not estopped, derive an unfair advantage or impose an unfair detriment upon the opposing party." *Cothran v. Brown*, 350 S.C. 352, 566 S.E.2d 548 (Ct. App. 2002). There is no colorable argument that any element is satisfied here. Mr. Murdaugh's position is not inconsistent with any earlier position. No reasonable person, and certainly not the learned and seasoned lawyers serving as Co-Receivers, can believe that Mr. Murdaugh asking for access to $600,000 of his own money to pay for his trial defense is somehow "clearly inconsistent" with him later asking for access to $160,000 of his own money to pay for his appellate defense. Nor could a reasonable person believe that somehow would make it appear the Court was misled. And as explained above, placing funds into the receivership estate that otherwise would have been inaccessible to the Co-Receivers or judgment creditors in no way creates an unfair detriment.

* * *

The Co-Receivers' opposition to Mr. Murdaugh's request to use his own money to pay reasonable costs of his legal defense makes it clear they believe they own Mr. Murdaugh's assets,

not personally but as *de facto* trustees governing a trust that owns the assets for the benefit of the persons suing Mr. Murdaugh. That is not the case. A receiver is merely a "disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims." RECEIVER, Black's Law Dictionary (11th ed. 2019). As the Court stated on May 3, 2023, Mr. Murdaugh owns the receivership assets until ownership is, by court order, transferred to other persons, presumably the persons suing him. The Co-Receivers' job is to protect the interests of potential judgment creditors by identifying Mr. Murdaugh's assets and preventing waste and dissipation, not to take ownership of his assets for the benefit of persons yet to obtain a judgment against him, and certainly not to contest Mr. Murdaugh's legitimate use of his own funds for his own legal defense.

III. Conclusion

For the foregoing reasons and for other reasons stated in these proceedings, the Court should reconsider its Form 4 order of May 12, 2023, and grant Mr. Murdaugh's motion for an order directing the Co-Receivers to transfer $160,000.00 of Mr. Murdaugh's untainted funds to pay attorneys' fees and costs to appeal his recent murder convictions.

Respectfully submitted,

s/ Richard A. Harpootlian
Richard A. Harpootlian, SC Bar No. 2725
Phillip D. Barber, SC Bar No. 103421
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
rah@harpootlianlaw.com
pdb@harpootlianlaw.com

James M. Griffin, SC Bar No. 9995
Margaret N. Fox, SC Bar No. 76228
GRIFFIN DAVIS LLC

4408 Forest Drive (29206)
Post Office Box 999
Columbia, South Carolina 29202
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

Attorneys for Richard Alexander Murdaugh

June 1, 2023
Columbia, South Carolina.