

# LUIS V. UNITED STATES: ASSET FORFEITURE BUTTS HEADS WITH THE SIXTH AMENDMENT

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## INTRODUCTION

Asset forfeiture, or the government's seizure of property connected to illegal activities, has vastly increased in recent years, both in scope and in the public's consciousness.<sup>1</sup> Criminal forfeiture, as opposed to civil, "allows the government to take property from defendants when they are convicted for particular substantive crimes."<sup>2</sup> Though forfeiture has existed since early civilizations,<sup>3</sup> historically it has been disfavored in the United States.<sup>4</sup> The federal government only began asserting forfeiture powers in 1970 as part of an effort to combat serious drug crimes.<sup>5</sup>

The debate over asset forfeiture can be heated: proponents assert its usefulness just as loudly as critics declare its harms. The Justice Department emphasizes that forfeiture is a proper tool of law enforcement because it "removes the tools of crime from criminal organizations, deprives wrongdoers of the proceeds of crimes,

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1. See generally John Burnett, *Seized Drug Assets Pad Police Budgets*, NATIONAL PUBLIC RADIO (July 15, 2008), <http://www.npr.org/templates/story/story.php?storyId=91490480>; *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014), <https://youtu.be/3kEpZWGgJks>.

2. SARAH N. WELLING, ET AL., *FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO* 560 (1998).

3. See Brief Amicus Curiae of United States Justice Foundation et. al. in Support of Petitioner at 18, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015) (discussing asset forfeiture in ancient Asia and in early English common law); see also Michael Todd King, Note, *Expanding the Courts' Power to Preserve Forfeitable Assets: The Pretrial Restraint of Substitute Assets Under RICO and CCE*, 29 GA. L. REV. 245, 247 (1994) (tracing forfeiture back to ancient Western civilizations).

4. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682–86 (1974) (discussing the history of American forfeiture).

5. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2012); see generally Welling, *supra* note 2, at 562 (describing the beginnings of federal asset forfeiture).

recovers property that may be used to compensate victims, and deters crime.”<sup>6</sup> On the other hand, forfeiture has been criticized for extracting guilty pleas from defendants fearful of losing their property,<sup>7</sup> and as a method used to pad the government’s own budget.<sup>8</sup>

Adding to the debate is the implementation of pretrial restraint of assets, which is the government’s ability to freeze, prior to trial, any assets the government believes will ultimately be found forfeitable. Such pretrial restraint is authorized under federal law.<sup>9</sup> The exercise of this government power potentially implicates the constitutional rights of defendants wishing to utilize those restrained assets to hire an attorney for an impending criminal trial. Specifically, the Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>10</sup> This right has been interpreted to require that a defendant be able to secure counsel of his own choice,<sup>11</sup> a choice that has been described as “the root meaning of the constitutional guarantee.”<sup>12</sup>

The Supreme Court has already determined that a defendant does not have the right to pay counsel with tainted assets that are directly traceable to a crime.<sup>13</sup> But *Luis v. United States*,<sup>14</sup> a case recently taken by the Supreme Court, provides a new wrinkle to this problem. In *Luis*, the government was unable to locate the defendant’s tainted assets, and so sought to restrain other assets of the defendant’s, so-

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6. RICHARD WEBER, UNITED STATES DEP’T OF JUSTICE EXEC. OFFICE FOR UNITED STATES ATTORNEYS, *Introduction*, 55 UNITED STATES ATTORNEYS’ BULL. 6, Nov. 2007, at 1; see also Kaley v. United States, 134 S. Ct. 1090, 1094 (2014) (“Forfeitures help to ensure that crime does not pay . . .”); Gerald E. McDowell, Letter to the Editor, *Why Prosecutors Choose Civil Forfeiture*, N.Y. TIMES (July 5, 1996), <http://www.nytimes.com/1996/07/05/opinion/1-why-prosecutors-choose-civil-forfeiture-063487.html> (providing a Department of Justice perspective on why forfeiture is pursued).

7. See, e.g., Brief Amicus Curiae of United States Justice Foundation, et al. in Support of Petitioner at 24, *Luis v. United States*, No. 14-419 (U.S. Nov. 26, 2014) [hereinafter Brief Amicus Curiae of United States Justice Foundation].

8. See Stewart Powell, *U.S. Asset Forfeitures Skyrocket*, TIMES UNION (New York City) (May 25, 2013), <http://www.timesunion.com/news/article/U-S-asset-forfeitures-skyrocket-4549149.php> (describing asset forfeiture as “a slush fund for the federal government” (quoting Senator Charles Grassley)).

9. Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1345 (2012).

10. U.S. CONST. amend. VI.

11. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

12. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (citation omitted).

13. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 618 (1989) discussed *infra* Part II.

14. *Luis v. United States*, 135 S. Ct. 2798 (June 8, 2015).

called “substitute assets,” under 18 U.S.C. § 1345.<sup>15</sup> Thus, *Luis* presents the novel of whether the government may restrain a defendant’s substitute assets when any tainted assets cannot be located, even if doing so deprives the defendant of the ability to hire an attorney of the defendant’s own choosing.<sup>16</sup>

This Commentary will first explore the factual and legal background that will influence the Court’s analysis, as well as the arguments presented by each side. Though many amici briefs have been filed asserting the consequences of allowing restraint of substitute assets, the Court should still allow the government this power. Although courts continue to debate the statutory interpretation question of whether the language in federal forfeiture statutes permits pretrial restraining of substitute assets,<sup>17</sup> this Commentary will concentrate on the constitutional and policy-based questions that the Court will face.

## II. FACTUAL BACKGROUND

Sila Luis, an owner of a health-care business, was indicted on October 2, 2012 and charged with “paying and conspiring to pay illegal kickbacks for patient referrals, and conspiring to defraud Medicare by billing for unnecessary or underperformed services.”<sup>18</sup> The indictment sought forfeiture of \$45 million in Medicare reimbursements, the same amount that Luis’s companies are alleged to have fraudulently received.<sup>19</sup> Luis’s assets were restrained under 18 U.S.C. § 982, a statute that orders forfeiture for Medicare fraud.<sup>20</sup> Section 982 states that any forfeiture it authorizes “shall be governed by the provisions of . . . 21 U.S.C. § 853.”<sup>21</sup> Section 853, in turn, allows for forfeiture of substitute property.<sup>22</sup> This means that if any tainted

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15. Brief for the United States at 6–8, *Luis v. United States*, No. 14-419 (U.S. Sept. 30, 2015) [hereinafter Brief for the United States].

16. Petition for Writ of Certiorari at ii, *Luis v. United States*, No. 14-419 (U.S. Oct. 7, 2014) [hereinafter Petition for Writ of Certiorari].

17. Compare *United States v. Gotti*, 155 F.3d 144, 147 (2d Cir. 1998) (holding that the RICO statute does not authorize pretrial restraint of substitute assets) and *United States v. Ripinsky*, 20 F.3d 359, 360 (9th Cir. 1994) (same) with *United States v. Patel*, 949 F. Supp. 2d 642, 654 (W.D. Va. 2013) (holding that § 982 covers substitute assets).

18. Brief for the Petitioner at 5, *Luis v. United States*, No. 14-419 (U.S. Aug. 18, 2015) [hereinafter Brief for the Petitioner].

19. *Id.*

20. Anti-Drug Abuse Act of 1986, 18 U.S.C. § 982(a) (2012).

21. *Id.* § 982(b)(1).

22. Comprehensive Crime Control Act of 1984, 21 U.S.C. § 853(p)(2) (2012).

assets cannot be located or have been transferred, “the court shall order the forfeiture of any other property of the defendant, up to the value of [the tainted] property.”<sup>23</sup> Based on information that Luis’s fraudulently-obtained proceeds had already been transferred to various properties and bank accounts, the government pursued forfeiture of Luis’s substitute assets.<sup>24</sup>

The government simultaneously brought an action to temporarily restrain the same substitute assets under 18 U.S.C. § 1345.<sup>25</sup> The district court entered a temporary restraining order on October 3, 2012.<sup>26</sup> Luis argued that restraining her personal untainted assets prevented her from mounting a defense, as her case would require reviewing “records of . . . more than 1,900 Medicare patients and 1,000 other patients,” and thereby violated her Fifth and Sixth Amendment rights.<sup>27</sup>

The government subsequently sought to convert its restraining order into a preliminary injunction.<sup>28</sup> A hearing was held on February 6, 2013, at which an FBI agent testified as to the information leading to Luis’s charges and provided declarations that Luis was transferring money gained from her fraudulent activities to shell corporations, luxury items, real estate, and travel.<sup>29</sup> The parties subsequently stipulated that some of the accounts and real estate subject to the restraining order contained assets not directly connected to the indictment.<sup>30</sup>

## II. LEGAL BACKGROUND

Although the right to choose one’s counsel has been held to be the basis of the Sixth Amendment,<sup>31</sup> this right is circumscribed in numerous ways.<sup>32</sup> One limit is that “a defendant may not insist on

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23. *Id.*

24. Brief for the United States, *supra* note 15, at 6–8.

25. *Id.* at 6; *see also* Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1345(a)(2) (2012) (allowing for a restraining order from using or disposing of property derived from certain federal crimes, including healthcare offenses).

26. Brief for the United States in Opposition at 6, *Luis v. United States*, No. 14-419 (U.S. Mar. 30, 2015) [hereinafter Brief for the United States in Opposition].

27. Brief for the Petitioner, *supra* note 18, at 7.

28. *Id.* at 6.

29. *United States v. Luis*, 966 F. Supp. 2d 1321, 1326–27 (S.D. Fla. 2013) *aff’d per curiam*, 564 F. App’x 493 (11th Cir. 2014) *cert. granted*, 135 S. Ct. 2798 (June 8, 2015).

30. Brief for the United States, *supra* note 15, at 10.

31. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (citation omitted).

32. *See Wheat v. United States*, 486 U.S. 153, 159 (1988).

representation by an attorney he cannot afford.”<sup>33</sup> In 1989, the Supreme Court confronted two cases questioning whether the federal government could restrain assets that were directly attributed to a crime even if the defendant wanted to use those assets to pay for a private attorney.<sup>34</sup> Decided on the same day, *United States v. Monsanto* and *Caplin & Drysdale, Chartered v. United States* together stand for the proposition that “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.”<sup>35</sup> *Monsanto* found the statutory language of 21 U.S.C. § 853 to be unambiguous: there was no exception providing for assets that may be necessary to pay an attorney.<sup>36</sup>

*Caplin* considered the constitutional dimensions of this question,<sup>37</sup> and rejected “any notion of a constitutional right to use the proceeds of crime to finance an expensive defense.”<sup>38</sup> The Court concluded that a pretrial restraint of tainted assets was legitimate given the “strong governmental interest in obtaining full recovery of the assets . . . [and] to lessen the economic power of organized crime and drug enterprises.”<sup>39</sup> The Court asserted that pursuing forfeiture also “supports law-enforcement efforts in a variety of important and useful ways.”<sup>40</sup> Although the defendant desired to hire private counsel, the Court ruled that he had adequate alternatives such as finding an attorney willing to represent him for a lower price or relying on representation by appointed counsel.<sup>41</sup> *Caplin*, therefore, found the burden placed on a defendant to be only limited,<sup>42</sup> and that the governmental interests overrode this limited burden.<sup>43</sup> The Court likewise dismissed the argument that this practice could lead to

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33. *Id.*

34. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

35. *Caplin*, 491 U.S. at 626 (emphasis added).

36. *Monsanto*, 491 U.S. at 606.

37. *Caplin*, 491 U.S. at 623.

38. *Id.* at 630 (citation omitted); see also *United States v. Patel*, 949 F. Supp. 2d 642, 656–57 (W.D. Va. 2013) (summarizing *Caplin*’s rationale).

39. *Caplin*, 491 U.S. at 625; see also *Monsanto*, 491 U.S. at 614 (“In enacting § 853, Congress decided to give force to the old adage that ‘crime does not pay.’”).

40. *Caplin*, 491 U.S. at 629.

41. *Id.* at 624–25.

42. *Id.* at 625.

43. See *id.* at 631.

prosecutorial abuse.<sup>44</sup> The Court stated that there exists no claim when a prosecutorial tool merely *could* lead to abuse, because “[e]very criminal law carries with it the potential for abuse.”<sup>45</sup>

Four Justices provided a joint dissent to *Monsanto* and *Caplin*.<sup>46</sup> Written by Justice Blackmun, the dissent expressed concern that the majority trivialized the burden that forfeiture placed on a defendant and enforced a system in which prosecutors could “beggar those it prosecutes in order to disable their defense at trial.”<sup>47</sup> The dissent also reweighed the interests of both parties, concluding that the government’s interest in forfeiture was only hypothetical until the end of trial while the defendant’s interest was real and immediate.<sup>48</sup> Not permitting a defendant to hire his own counsel threatened “the trust between attorney and client that is necessary for the attorney to be a truly effective advocate,”<sup>49</sup> and the “truly equal and adversarial presentation of the case.”<sup>50</sup> Instead, the dissent argued that section 853 violated the Sixth Amendment.<sup>51</sup>

Since *Caplin*, some circuit courts have confronted the specific issue in *Luis*, i.e., whether substitute assets may also be restrained pretrial. The Second, Third, Fifth, Eighth, and Ninth Circuits have concluded that pretrial restraint of substitute assets is not allowed, primarily based on the language of the statute.<sup>52</sup> The courts that have held that it should be allowed, most notably the Fourth Circuit and the Eastern District of Wisconsin, have based their determination mainly on the rationale behind forfeiture.<sup>53</sup> Relying largely on *Caplin*, *In re Assets of Billman* explained that substitute assets may be

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44. *Id.* at 634.

45. *Id.* (quoting *In re Forfeiture Hearing* as to *Caplin & Drysdale*, Chartered, 837 F.2d 637, 648 (4th Cir. 1988)).

46. *Id.* at 635–56 (Blackmun, J., dissenting).

47. *Id.* at 635.

48. *See id.* at 645–49, 653 (discussing interests for both the federal government and the defendants).

49. *Id.* at 645.

50. *Id.* at 648.

51. *See id.* at 651 (“[A]ttorney’s-fee forfeiture substantially undermines every interest served by the Sixth Amendment right to chosen counsel . . .”).

52. *United States v. Gotti*, 155 F.3d 144, 147 (2d Cir. 1998); *United States v. Riley*, 78 F.3d 367, 370–71 (8th Cir. 1996); *United States v. Ripinsky*, 20 F.3d 359, 362–63 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993).

53. *In re Assets of Billman*, 915 F.2d 916, 917 (4th Cir. 1990); *United States v. Schmitz*, 153 F.R.D. 136, 141 (E.D. Wis. 1994); *see also* Welling, *supra* note 2, at 610 (“These courts cite the purpose of forfeiture law as a whole to prevent dissipation of assets . . .”).

untainted, in that they are not directly attributed to a crime, but they are still forfeitable, as they are expressly allowed to be forfeited by statute.<sup>54</sup> Because *Caplin* already affirmed that the government's pretrial seizure of assets does not disturb the Sixth Amendment, the *Billman* court stated that there was no distinction between tainted and substitute assets.<sup>55</sup> It held that both may be similarly restrained.<sup>56</sup>

### III. HOLDING

The District Court for the Southern District of Florida converted the government's temporary restraining order into a preliminary injunction<sup>57</sup> based on a finding of probable cause that health care offenses had been committed<sup>58</sup> and that the associated assets had been transferred or destroyed.<sup>59</sup> The court rejected Luis's Sixth Amendment argument and held that the language of section 1345 allows that "when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead."<sup>60</sup> The court specifically noted that the Sixth Amendment right to choose counsel is limited.<sup>61</sup> It then expanded on an analogy previously described in *United States v. Bissell*<sup>62</sup>: if a bank robber is prohibited from paying an attorney with \$100,000 that he stole, would it make sense for him to be allowed to dispose of those assets, and then use another \$100,000 he happened to have lying around instead?<sup>63</sup> The court determined that "the reasonable answer is no. The bank has the right to have those substitute, untainted assets kept available for return as well."<sup>64</sup> Just as with any defendant whose

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54. *Billman*, 915 F.2d at 922; *see also* *United States v. Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005) ("[T]he key distinction for determining whether pretrial restraint of property violates a defendant's Sixth Amendment right is not whether the property is *tainted* or *untainted*, but rather whether it is *forfeitable* or *nonforfeitable*.").

55. *See Billman*, 915 F.2d at 922 ("The funds in issue are not nonforfeitable assets. They are *Billman's* substitute assets, which [are] subject[] to forfeiture.").

56. *Id.*

57. *United States v. Luis*, 966 F. Supp. 2d 1321, 1325 (S.D. Fla. 2013).

58. *Id.* at 1327.

59. *Id.* at 1327–28.

60. *Id.* at 1325 (citation omitted).

61. *Id.* at 1333–34.

62. *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989) (quoting *In re Forfeiture Hearing As to Caplin & Drysdale, Chartered*, 837 F.2d 637, 645 (4th Cir. 1988)).

63. *Luis*, 966 F. Supp. 2d at 1334 (quoting *Bissell*, 866 F.2d at 1351).

64. *Id.*

tainted assets had been restrained, the Court held that Luis would have to settle for appointed counsel.<sup>65</sup>

The Eleventh Circuit issued a per curiam opinion affirming the district court.<sup>66</sup> The circuit court considered Luis's Sixth Amendment arguments to be foreclosed by cases like *United States v. Monsanto* and *Caplin & Drysdale, Chartered v. United States*.<sup>67</sup> Therefore, the court held that section 1345 "includes the authority to restrain 'property of equivalent value' to that actually traceable to the alleged fraud."<sup>68</sup>

#### IV. ARGUMENTS

##### A. *Luis's Arguments*

Luis's arguments focus on the harm that would come to criminal defendants should their substitute assets be restrained pretrial. The United States' historical disdain for forfeiture also plays heavily in Luis's arguments.<sup>69</sup> Luis first contends that *Monsanto* and *Caplin* are not dispositive.<sup>70</sup> She argues that those cases only decided the question of what may be done to *tainted* assets; therefore, the Court is presented with an entirely new question regarding substitute assets.<sup>71</sup> This distinction is critical for Luis's success.

Luis argues that the integrity of the criminal justice system relies on a defendant being able to choose and pay for his or her attorney.<sup>72</sup> She states that "[d]isplacing a defendant's chosen advocate in a criminal case undermines the fairness of the proceeding and implicates protected expression."<sup>73</sup> The government's asserted power would therefore "undermin[e] the adversarial system of justice."<sup>74</sup>

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65. *Id.* at 1335.

66. *United States v. Luis*, 564 F. App'x 493, 494 (11th Cir. 2014).

67. *Id.*

68. *Id.* (quoting Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1345 (2012)).

69. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 16, at 21 ("The Founding Fathers so disdained *in personam* 'forfeiture of estate' penalties that they banned them in the Constitution . . . ." (citation omitted)); *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682–86 (1974) (discussing the history of American forfeiture).

70. Reply Brief for Petitioner at 1–3, *Luis v. United States*, No. 14-419 (U.S. Apr. 16, 2015) [hereinafter Reply Brief for Petitioner].

71. *See id.* at 3 ("But when this Court used the term 'forfeitable' in *Monsanto* and *Caplin*, this Court was referring exclusively to tainted assets.").

72. Brief for the Petitioner, *supra* note 18, at 15.

73. *Id.*

74. *Id.* at 18.



Implicit in this argument is a belief that public defenders cannot do the same level of work as private counsel, especially concerning complex federal charges.<sup>75</sup> She argues that private attorneys ensure a level of trust and confidence needed between an attorney and client that is not as attainable by public defenders.<sup>76</sup>

Luis then argues that the Court should fear what the government might do with this new power, for it could possibly lead to prosecutorial abuse.<sup>77</sup> Luis describes that there must be some limit to what the government is able to do with a defendant's legitimate funds.<sup>78</sup> Although the Supreme Court has steadily increased prosecutors' forfeiture power, her case presents the opportunity to establish some limit to that power.<sup>79</sup> This limit would be that the government cannot reach its hand into a defendant's own personal money and cripple her before her criminal trial has even begun.<sup>80</sup> Without this limit, Luis argues, the government has the ability to impoverish any defendant by accusation alone.<sup>81</sup>

She finally presents an equity argument: although the government may have a speculative future interest in Luis's substitute assets, these interests are outweighed by a defendant's interest in securing his or her choice of counsel.<sup>82</sup> She argues that the government's desire for future restitution in the event of conviction just cannot stand up to "[a] criminal defendant's present interest in her untainted assets for

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75. See Petition for Writ of Certiorari, *supra* note 16, at 10 ("[Pretrial restraint] takes from [the defendant] the funds she would otherwise invest in her defense for the best and most industrious investigators, experts, paralegals, and law clerks . . . ." (citation omitted)).

76. Brief for the Petitioner, *supra* note 18, at 26–27.

77. See Petition for Writ of Certiorari, *supra* note 16, at 15 ("There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally . . ." (quoting *United States v. Bissell*, 866 F.2d 1343, 1355 (11th Cir. 1989)); see also *Kaley v. United States*, 134 S. Ct. 1090, 1110 (2014) (Roberts, C.J., dissenting) ("[F]ew things could do more to undermine the criminal justice system's integrity . . . than to allow the Government to . . . disarm its presumptively innocent opponent by depriving him of his counsel of choice . . .").

78. Reply Brief for the Petitioner, *supra* note 70, at 13.

79. *Id.*

80. See Oral Argument at 36:03, *Luis v. United States*, No. 14-419 (U.S. Nov. 10, 2015), [https://apps.oyez.org/player/#/roberts6/oral\\_argument\\_audio/24016](https://apps.oyez.org/player/#/roberts6/oral_argument_audio/24016) ("And you might be right that it just doesn't make sense to draw a line here, but it leaves you with a situation in which more and more and more we're depriving people of the ability to hire counsel of choice in complicated cases.").

81. See *id.* at 28:29 ("[I]t's pretty hard for me to think in a country which says before he's convicted, you have to release him on bail except in unusual circumstances, that nevertheless, you can take all his money away so he can't hire a lawyer.").

82. Brief for the Petitioner, *supra* note 18, at 30; see also *id.* at 14–15 ("The lower courts improperly elevated the Government's speculative interest in collecting a potential criminal money judgment over Ms. Luis's constitutional rights.").

the purpose of retaining counsel.”<sup>83</sup> At the very least, she argues the Court should be able to use its equitable powers to require that the prosecution release only those funds necessary to hire an attorney.<sup>84</sup>

### B. *The Government’s Arguments*

The government bases its arguments on the reasons behind forfeiture and a reading of *Caplin* and *Monsanto* which would foreclose Luis’s arguments. According to the government, *Monsanto* and *Caplin* were not decided as they were because the assets were tainted (i.e., the proceeds from a crime) but rather because the assets were forfeitable by statute.<sup>85</sup> It is that they were forfeitable, and not that they were tainted, that made them immune from Sixth Amendment concerns.<sup>86</sup> Similarly, Luis’s assets are not being seized because they are tainted, but as substitute assets, which section 853 specifically condones.<sup>87</sup> Read in this light, the Court has been presented nothing in this case that *Caplin* and *Monsanto* have not already decided.<sup>88</sup> Additionally, the government, like the Eleventh Circuit, reads the various circuit holdings to show that the courts that have considered only the constitutional question (as opposed to statutory interpretation) have all agreed that substitute assets are restrainable.<sup>89</sup>

The government next emphasizes the strong interests it has in pursuing forfeiture. It insists that it must restrain assets, whether substitute or not, to “preven[t] a continuing and substantial injury to the United States.”<sup>90</sup> Therefore, it is not Luis’s desire for counsel that

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83. Petition for Writ of Certiorari, *supra* note 16, at 22.

84. Oral Argument, *supra* note 80, at 11:04 (Luis’s counsel arguing that at the very least Luis is requesting the assets necessary to retain her counsel of choice); *id.* at 37:33 (Roberts, C.J., questioning why the Government cannot at least release the small portion of assets for an attorney).

85. Brief for the United States in Opposition, *supra* note 26, at 9–11.

86. *Id.*

87. *Id.* at 10–11.

88. See Brief for the United States, *supra* note 15, at 30 (“And the reasoning underlying *Monsanto’s* approval of a pretrial freeze of assets determined likely to be forfeitable applies fully to substitute assets.”).

89. See Brief for the United States in Opposition, *supra* note 26, at 14–16 (describing that no case has recognized a constitutional right to use assets forfeitable by statute to hire counsel); see also discussion *supra* Part III (explaining the Eleventh Circuit’s holding). But see *supra* note 52 and accompanying text (listing the courts that have held otherwise, based primarily on statutory interpretation).

90. Brief for the United States in Opposition, *supra* note 26, at 4 (quoting 18 U.S.C. § 1345 (2012)).

trumps the government's interests, as Luis suggests, but rather the strong governmental interests that trump Luis's.<sup>91</sup>

Lastly, the government cautions that deciding this case in Luis's favor would set a troubling precedent. It would signal to savvy defendants that they could escape from asset forfeiture by quickly disposing of their assets, thereby shielding themselves from forfeiture and allowing them to hire any attorney that they desire.<sup>92</sup> This specifically, the government alleges, is why courts must allow restraint of substitute assets: it ensures that the government can pursue forfeiture regardless of whether a defendant has already spent his ill-gotten gains.<sup>93</sup> Otherwise, it would "give rise to absurd results, if a defendant could dissipate her proceeds of crime, while retaining other assets, and then immunize herself from a properly substantiated asset freeze."<sup>94</sup>

## V. ANALYSIS

The Court should hold for the government and rule that substitute assets may be restrained pretrial. Ruling for the government would be in line with precedent, would respect the reasons behind forfeiture, and would not be unduly influenced by the hypothetical effects that Luis claims such a ruling would have.

### A. *The Bank Robber Hypothetical Expanded*

As previously described, the Southern District of Florida in *United States v. Luis* relied on an analogy of a bank robber who spends the money that he has stolen and then asserts that he should be free to use his other assets to attain his choice of counsel.<sup>95</sup> The Southern District asserted that this should not be allowed.<sup>96</sup> Luis's argument cannot succeed against the loophole it would create. Criminal defendants would be encouraged to conceal, transfer, or destroy their tainted assets as swiftly as possible and thereby circumvent possible

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91. See *id.* at 8–9 (summarizing past holdings to make this point).

92. See *id.* at 11–12 ("But if petitioner's position were adopted, then a defendant could effectively deprive her victims of any opportunity for compensation simply by dissipating her ill-gotten gains.").

93. See *id.* ("It is precisely to avoid that result that Congress provided for the pretrial restraint of substitute assets in cases like this one . . .").

94. Brief for the United States, *supra* note 15, at 15.

95. See *supra* notes 62–65 and accompanying text.

96. See *supra* text accompanying note 64.

future forfeiture.<sup>97</sup> Congress specifically granted forfeiture of substitute assets, and in order for it to have any real effect, it must necessarily include pretrial restraint.<sup>98</sup>

Part of the rationale of criminal forfeiture is to punish a defendant by depriving him of his ill-gotten gains.<sup>99</sup> Ruling in favor of Luis would ignore and prevent this goal. Instead, it would allow Luis to “wiel[d] undeserved economic power” by profiting both from her crime and from her decision to transfer those ill-gotten gains.<sup>100</sup>

### *B. The Right to Choice of Counsel is Not Absolute*

The Court should also consider that the Sixth Amendment right to choice of counsel is limited: a defendant cannot insist on counsel that he or she cannot afford.<sup>101</sup> Even Luis and various supporting amici acknowledge this.<sup>102</sup> As *Monsanto* and *Caplin* have held, the Sixth Amendment does not include the right to spend another’s money to retain an attorney, even when doing so is the only available means of retaining that attorney.<sup>103</sup> This ruling establishes that when a defendant’s assets are subject to pretrial restraint, his or her right to choice of counsel is not infringed. The government’s position in *Luis* is an extension of this rationale. Forfeiture is premised upon the understanding that defendants facing forfeiture do not truly own the money they wish to use, for that money is rightfully the government’s from the moment the crime occurs.<sup>104</sup> Luis, then, is no different from

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97. See *United States v. McHan*, 345 F.3d 262, 272 (4th Cir. 2003) (“To conclude otherwise would invite defendants who anticipate conviction for their unlawful drug-trafficking activities to undertake the obvious step of transferring their assets . . . thereby circumventing the important economic impact of forfeiture”); see also *King*, *supra* note 3, at 272–74 (making the same argument).

98. See *King*, *supra* note 3, at 267 (“[T]he courts that have allowed pretrial restraint on substitute assets . . . have reasoned that the prior restraint must be construed broadly if their true purpose is to be fulfilled.”).

99. See Brief for the United States, *supra* note 15, at 36–38.

100. *Id.* at 36 (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989)).

101. See *supra* text accompanying note 33. *But see* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (recognizing the right to select counsel of one’s choice as “the root meaning of the constitutional guarantee”).

102. See, e.g., Brief of Amici Curiae Associations of Criminal Defense Attorneys in Support of Petition for Writ of Certiorari at 8–9, *Luis v. United States*, No. 14-419 (U.S. Nov. 28, 2014) [hereinafter Brief of Amici Curiae Associations of Criminal Defense Attorneys] (recognizing a client may not choose an attorney who is not a member of the bar, an attorney who declines representation, or an attorney with a conflict of interest).

103. See *supra* Part II for explanation.

104. *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989).

any other indigent defendant who must be appointed counsel—no right has been taken away.

Luis’s argument next turns to what would happen should she be left without choice of counsel: she would be forced to take a public defender.<sup>105</sup> Luis and amici assert that this would be unfair because public defenders are overworked and have limited resources.<sup>106</sup> This argument fails to acknowledge that federal public defenders, who would be appointed to this case, are known for much better representation and better funding than the local public defenders who are often the subject of public ridicule.<sup>107</sup> Additionally, should Luis instead be represented by a court-appointed private attorney, this attorney would be paid at \$125 an hour.<sup>108</sup> Furthermore, Luis’s arguments that private attorneys would undoubtedly do a better job than court-appointed alternatives is unsupported by the evidence.<sup>109</sup> And regardless, as long as Luis has been appointed competent counsel, then no Sixth Amendment right has been deprived.<sup>110</sup>

### *C. Potential for Abuse is Not Enough*

Luis’s next argument, that prosecutors will exercise this new power in unjust ways,<sup>111</sup> also does not provide enough to warrant a ruling in her favor. Amici argue that “funding law enforcement through forfeiture creates perverse and dangerous governmental incentives at the local, state, and federal level,”<sup>112</sup> and that this power may be used as a “questionable litigation tactic meant . . . to pressure [defendants] into a plea-bargain.”<sup>113</sup>

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105. See *supra* note 75 and accompanying text for more on this argument.

106. See, e.g., Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 10–11, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015) (discussing limited resources of public defenders); Brief Amicus Curiae of United States Justice Foundation, *supra* note 7, at 22–23 (same).

107. See David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 *LAW & INEQ.* 371, 376 (2014) (asserting that federal public defenders provide a “good model” for local public defenders because they “have generally been at a level sufficient to support high quality representation of indigent defendants in federal criminal cases.”).

108. *Id.* at 381.

109. See Brief for the United States, *supra* note 15, at 40–41 and citations within (presenting evidence that court-appointed lawyers perform just as well as private counsel).

110. *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989).

111. See, e.g., Brief of Amici Curiae Associations of Criminal Defense Attorneys, *supra* note 102, at 12–13 (discussing possible prosecutorial behavior with this change).

112. Brief of Amici Curiae National Association of Criminal Defense Lawyers, et. al. at 4–5, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015).

113. Brief of Amici Curiae Cato Institute and the DKT Liberty Project in Support of Petitioner at 35, *Luis v. United States*, No. 14-419, (U.S. Aug. 25, 2015).

There are two reasons to discount this argument. First, there are already many tools in a prosecutor's arsenal that could potentially be used in an abusive manner.<sup>114</sup> But "[t]he fact that [an] . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it . . . invalid."<sup>115</sup> As stated in *Caplin*, the federal forfeiture statutes are not made unconstitutional "merely because in some cases prosecutors may abuse the processes available to them."<sup>116</sup> Instead, trial courts can deal with specific allegations of abuse and misconduct on a case-by-case basis.<sup>117</sup> Consequently, everything Luis asserts here has already been determined against her.

Second, the Department of Justice specifically recognizes the possibility for abuse in asset forfeiture and has written guidelines to counteract it.<sup>118</sup> For instance, seeking forfeiture requires approval from Department of Justice headquarters, and Department of Justice guidelines list various aspects to consider in determining when to exempt assets from forfeiture.<sup>119</sup> These guidelines admittedly cannot resolve every concern, but they "substantially reduce the number of potential ethical issues that inject ambiguities into the attorney's role as advocate."<sup>120</sup> They should therefore be considered "checks on the exercise of prosecutorial discretion"<sup>121</sup> and should calm the fears that Luis asserts.

Prosecutors wield power in the criminal justice system, but they also acknowledge this power and take steps to govern it. The Court should not use the mere potential for abuse of this power as a reason to hold for Luis.

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114. *Bissell*, 866 F.2d at 1354–55.

115. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

116. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 618 (1989); *see also* *United States v. Nichols*, 841 F.2d 1485, 1508 (10th Cir. 1988) ("We do not agree, however, that the possibility of abuse renders the criminal forfeiture statute unconstitutional . . . . We do not assume that the government will abuse its discretion.").

117. *Caplin*, 491 U.S. at 635.

118. *Nichols*, 841 F.2d at 1508, n.14; *see generally* Asset Forfeiture Policy Manual, 2013, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2014/05/23/policy-manual-2013rev.pdf> (describing the Department of Justice's asset forfeiture policies).

119. *Welling*, *supra* note 2, at 600.

120. Kathleen F. Brickley, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 541–42 (1986).

121. *Id.*

#### D. A Reweighing of Interests

The Court must also consider the policy arguments underlying asset forfeiture. Holding for Luis would allow defendants to profit off of their crimes, but allowing the government to restrain substitute assets would be consistent with Congress's goals in creating asset forfeiture laws.<sup>122</sup> The government has a legitimate pecuniary interest in forfeiture "that extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways."<sup>123</sup> The Court should consider why the United States pursues forfeiture at all: to deter crime and return property to its rightful owners.<sup>124</sup>

Luis argues that these governmental interests are future and speculative,<sup>125</sup> and not comparable to her current interest in securing an attorney.<sup>126</sup> Therefore, she states that a balancing of interests should favor judgment in her favor.<sup>127</sup> This argument incorrectly values the interests at play. A ruling for the government would not abandon Luis's interest in counsel, but only alter it to require that she retain appointed counsel. In the eyes of the law, she will still receive a competent attorney and a fair trial. Conversely, allowing Luis to use her assets would entirely destroy the government's interests. The government will not be able to compensate any victims (the assets will have already been depleted), use the assets to improve communities, provide for police training, deter crime, nor send a message that crime does not pay. Even a limited release of the funds needed to pay for counsel would necessarily lessen the compensation of victims, and the Government may reasonably fear that a defendant would blow through assets unnecessarily solely to keep it out of the government's hands. At the very least, *Luis* would become a message that crime pays. It pays by providing the best criminal attorney

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122. King, *supra* note 3, at 271–72.

123. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989).

124. See Kaley v. United States, 134 S. Ct. 1090, 1094 (2014) ("The Government also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training."); United States v. Schmitz, 153 F.R.D. 136, 140–41 (E.D. Wis. 1994) (discussing the rationale behind pretrial restraint of substitute assets.); see also *supra* note 6 and accompanying text for more rationale behind forfeiture.

125. See Brief of Amici Curiae Associations of Criminal Defense, *supra* note 102, at 16.

126. See *id.* at 17.

127. See *supra* notes 82–83 and accompanying text.

available. A proper weighing of interests, therefore, favors upholding the government's ability to restrain Luis's assets.

### CONCLUSION

The issues presented in *Luis v. United States* serve as a useful springboard for considering the pros and cons of asset forfeiture and how the practice affects criminal defendants. Although Luis presents strong arguments on bounds of governmental power and the rights to which a defendant should be entitled, the Court cannot alter what has already been established: a defendant does not have an unlimited opportunity to use personal funds for his choice of counsel.<sup>128</sup> Instead, the result Luis desires would require legislative change.<sup>129</sup>

Luis and certain amici rely largely on a frightening vision of what the criminal justice system would turn into should prosecutors be able to restrain substitute assets.<sup>130</sup> But the Court should not be swayed by this speculative dystopian prediction. It should instead focus its analysis on the reasons for asset forfeiture, on preventing Luis from profiting off of her crime, on the Department of Justice's existing policies to reduce potential abuse, and, most importantly, on the limitations on the right to counsel—a right which would be adequately preserved by appointed counsel. Therefore, the Court should affirm the Eleventh Circuit and allow the federal government to restrain Luis's substitute assets.

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128. Kathleen F. Brickley, *Attorneys' Fee Forfeitures: On Defining "What" and "When" and Distinguishing "Ought" from "Is,"* 36 EMORY L.J. 761, 778–79 (1987).

129. See Brief for the United States, *supra* note 15, at 41 ("If Congress believed that a defendant like petitioner should always have access to some or all of the property in her hands to pay for an attorney of her choice, it could change the law."); see also Todd Barnett & Ivan Fox, *Trampling On the Sixth Amendment: The Continued Threat of Attorney Fee Forfeiture*, 22 OHIO N.U. L. REV. 1, 80 (1995) (making the same argument).

130. See, e.g., Brief Amicus Curiae of United States Justice Foundation, *supra* note 3, at 17.