

Defense Lawyers Will Fight All the Way to the Supreme Court to Protect Their Clients' Right to Pay Them

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Most citizens would assume that, if they are ever charged by the federal or state government for a crime, they could use their own legitimately earned money to hire an attorney to defend themselves in court. That assumption was recently disputed by the federal government, which maintained that it had the statutory authority to deprive a criminal defendant of the pretrial use of their legitimate, untainted assets—that is, a defendant's assets unconnected to any illegal activity—to retain criminal defense counsel. The Supreme Court intervened, and in *Luis v. United States*, a divided Court held that the Sixth Amendment prohibits the government from seeking pretrial court restraining orders that would block defendants from using their legitimate, untainted assets, to hire criminal defense counsel.

Even though asset-forfeiture laws date back beyond the Founding of this nation, it was not until the 2015–2016 term that the Supreme Court squarely confronted the issue of whether the government can block criminal defendants from using their *legitimate* assets to retain their counsel of choice. In *Luis*, the Court held that there is a clear constitutional barrier to the expanding use of forfeiture laws that impair a defendant's ability to mount a criminal defense.¹

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¹ *Luis v. United States*, 136 S. Ct. 1083 (2016).

The *Luis* opinion represents the first effort by the Court to reassess and limit the government's authority to impose the consequences of forfeiture allegations prior to a criminal trial. The Court's initial foray into the question was in 1989, in companion cases addressing the restraint and forfeiture of *tainted* assets—those allegedly obtained from criminal activities. *United States v. Monsanto* and *Caplin & Drysdale, Chartered v. United States*—decided on the same day, with the same justices in the majority—were 5–4 decisions in which the Sixth Amendment right to counsel failed to be vindicated, by one vote.² The dissenting justices—the justices who thought the Court had gone too far in allowing assets to be seized—did not mince words, declaring that “it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial.”³ Justice Anthony Kennedy, who sided with the majority, is the only voting member from those cases still on the Court.

Similar fissures were equally present in *Luis*, with five justices voting in favor of the Sixth Amendment's primacy over the government's forfeiture claims. In dissent, Justice Kennedy, writing for himself and Justice Samuel Alito, adhered to his view that the Sixth Amendment offered no protection from asset forfeiture and questioned the validity of the distinction between tainted and untainted assets. To be sure, Justice Kennedy equated the two to offer support for his conclusion that untainted assets should be subject to pretrial restraints without constitutional scrutiny. But Kennedy's certainty about the unviability of the tainted/untainted distinction now poses the opposite question: if the two are equivalent, is there any logical basis to reach a different Sixth Amendment conclusion as to *tainted* assets? In her dissent, Justice Elena Kagan openly questions whether the upshot of the Court's ruling is to overrule *Monsanto*. After all, “given that money is fungible, the plurality's approach leads to utterly arbitrary distinctions as among criminal defendants who are in fact guilty.”⁴

While recognizing a narrow constitutional shield to exercise Sixth Amendment rights with legitimate, “untainted,” assets, *Luis* should promote the robust protection of an entire array of constitutional

² See *United States v. Monsanto*, 491 U.S. 600, 616 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631 (1989).

³ *Caplin & Drysdale*, 491 U.S. at 635 (1989) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

⁴ *Luis*, 136 S. Ct. at 1113 (Kagan, J., dissenting).

rights. Whether you love them or hate them, criminal defense attorneys are the primary instrument charged by our adversary system with the protection of constitutional rights against encroachment by the government. “[T]he right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.”⁵

I. Leading up to *Luis*: *Monsanto*, *Caplin & Drysdale*, and *Kaley*

Only two terms ago, the Court reaffirmed that tainted assets (those traceable to a crime, such as criminal proceeds) may be restrained pretrial and forfeited upon conviction, even when those assets are needed to retain counsel of choice in a criminal case.⁶ In rejecting constitutional challenges to pretrial restraints under a criminal forfeiture statute, 21 U.S.C. § 853, the Court in *Kaley v. United States* relied upon a pair of companion cases decided 25 years earlier—*United States v. Monsanto* and *Caplin & Drysdale, Chartered v. United States*—that upheld the use of a pretrial restraining order to prevent defendants from using alleged drug proceeds to pay for defense counsel (*Monsanto*) or from property forfeited to the government (*Caplin & Drysdale*).⁷ While *Kaley* largely addressed the issue of what hearing rights apply pretrial, it summarized the Court’s precedents as holding that:

a pretrial asset restraint [is] constitutionally permissible whenever there is probable cause to believe that the property is forfeitable. That determination has two parts, reflecting the requirements for forfeiture under federal law: There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime.⁸

In *Luis*, the Court granted a writ of certiorari to confront a pretrial restraint issued pursuant to a different statute, 18 U.S.C. § 1345, which was used to reach so-called “substitute assets”—untainted assets that

⁵ *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (citing *Powell v. Alabama*, 287 U.S. 45, 68 (1938)); cf. *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968) (White, J.) (“Those who wrote our constitutions knew from history and experience that [the jury] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.”).

⁶ *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014).

⁷ *Monsanto*, 491 U.S. at 616; *Caplin & Drysdale*, 491 U.S. at 631.

⁸ *Kaley*, 134 S. Ct. at 1095.

had no connection to criminal activity. At issue was a civil injunction barring the defendant from using funds in bank accounts, real estate, and other personal property—unconnected to any crime—to pay her lawyers to defend her against the very charges that threatened to deprive her permanently of that property and her freedom.

In upholding the injunction, the U.S. Court of Appeals for the Eleventh Circuit interpreted *Kaley*, *Monsanto*, and *Caplin & Drysdale* to “foreclose” defendant’s constitutional challenge to the pretrial restraint of legitimate, untainted funds needed to retain private counsel.⁹ In an unpublished opinion, the court rejected the defendant’s arguments that (i) the Due Process and Right-to-Counsel Clauses disallow the government’s restraint of untainted assets needed to retain chosen counsel, and (ii) probable cause is a “constitutionally inadequate” standard to restrain assets needed to pay defense counsel.¹⁰ In other words, paying a lawyer with legitimate assets was no different than paying a lawyer with drug money, at least according to the Eleventh Circuit.

Remarkably, the Eleventh Circuit declined to publish its own opinion, even though it was the first circuit court to address the constitutionality of the statute in question, and even though it had previously expressed concerns about the very practice of restraining untainted assets.¹¹ Other courts had expressed such concerns as well.¹²

⁹ *United States v. Luis*, 564 F. App’x. 493, 494 (11th Cir. 2014).

¹⁰ Brief of Appellant at 36, 41–42, 44, *United States v. Luis*, 564 Fed. Appx. 493 (11th Cir. 2014) (No. 13-13719).

¹¹ *United States v. Bissell*, 866 F.2d 1343, 1355 (11th Cir. 1989) (“There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets. The loss of such legitimate assets would improperly cripple a defendant’s ability to retain counsel.”).

¹² See *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001) (“While . . . there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [the defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice.”); *United States v. Noriega*, 746 F. Supp. 1541, 1544 (1990) (“[W]here a criminal defendant’s only assets available for payment of attorneys’ fees have been placed out of reach by government action, due process mandates that the government be required to demonstrate the likelihood that the restrained assets are connected to illegal activity.”); *SEC v. Coates*, No. 94 Civ. 5361 (KMW), 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994) (“[I]n light of the fact that my order freezing [the criminal defendant’s] personal assets may hinder his ability to obtain counsel of choice in the related criminal case, I conclude that that order may not be continued through trial in the absence of . . . a showing that the frozen assets are traceable to fraud.”); accord *SEC v. McGinn*, No. 10-CV-457, 2012 WL 1142516 (N.D.N.Y. Apr. 12, 2012) (same).

For his part, the solicitor general opposed certiorari, arguing that the Court had already decided the constitutional issue in the 1989 decisions in *Monsanto* and *Caplin & Drysdale*.¹³ That proclamation came as a surprise to the criminal defense bar, which, for the last 25-plus years, had understood those cases as having addressed exclusively the constitutionality of restraining criminal proceeds, that is, *tainted* assets.¹⁴ Even the district court in *Luis* thought it was an open question “whether a criminal defendant has a Sixth Amendment right to use untainted, substitute assets to retain counsel of choice.”¹⁵

Indeed, in *Caplin & Drysdale*, Justice Byron White’s majority opinion framed the issue in terms that made it clear that the Court’s Sixth Amendment analysis differentiated between spending one’s own money to retain counsel and spending drug proceeds or bank loot:

Whatever the full extent of the Sixth Amendment’s protection of one’s right to retain counsel of his choosing, that protection does not go beyond the individual’s right to spend his own money to obtain the advice and assistance of counsel. 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.¹⁶

While rejecting any right of a defendant to spend other people’s money to retain counsel, the Court in *Caplin & Drysdale* appeared to acknowledge a defendant’s constitutional right to spend his own, untainted funds to retain counsel.

In its brief in *Caplin & Drysdale*, the government admitted that “[t]he Constitution requires . . . that a court afford a defendant a ‘fair

¹³ Government’s Brief in Opposition at 8–10, *Luis v. United States*, 136 S. Ct. 1083 (2016) (No. 14-419), 2015 WL 1432646.

¹⁴ See Amicus Brief of the Associations of Criminal Defense Attorneys in support of Petition for Writ of Certiorari at 3, 15, *Luis v. United States*, 136 S. Ct. 1083 (2016) (No. 14-419); Accord Amicus Brief of the U.S. Justice Foundation at 17–19, *Luis v. United States*, 136 S. Ct. 1083 (2016) (No. 14-419).

¹⁵ *United States v. Luis*, 996 F. Supp. 2d 1321, 1334 (S.D. Fla. 2013) (“[T]he answer to this question is far from clear.”).

¹⁶ *Caplin & Drysdale*, 491 U.S. at 626 (citations omitted).

opportunity to secure counsel of [his] choice' using whatever *assets he has at his lawful disposal*.¹⁷ Although candidly acknowledging in *Luis* that the facts of *Monsanto* and *Caplin & Drysdale* involved only the restraint of tainted assets, the government asserted in opposition to the grant of certiorari that the Court had implicitly addressed the restraint of substitute assets in those earlier cases:

In both cases, however, the Court repeatedly recognized that the relevant characteristic of the assets was not that they were "tainted" by the crime, but simply that they were forfeitable by statute. *Monsanto's* holding about the constitutionality of pretrial asset restraint has nothing to do with the specific statutory basis for deeming particular assets to be forfeitable. Rather, the Court held that a pretrial restraint is permissible, even in the face of a claim that the restrained assets are needed to pay for counsel, so long as there is "probable cause to believe that the assets are forfeitable."¹⁸

Insofar as untainted assets are potentially "forfeitable" as substitute assets (that is, assets that substitute for the tainted assets that have been dissipated or are otherwise unavailable for seizure/forfeiture upon final judgment), the government contended that the Court had implicitly upheld the constitutionality of restraining untainted assets pretrial needed to retain counsel.

In seeking certiorari, Ms. Luis argued that, when the Court used the term "forfeitable" in *Monsanto* and *Caplin & Drysdale*, it was referring exclusively to tainted assets. In *Caplin & Drysdale*, the Court cited 21 U.S.C. § 853(a) ("Property subject to criminal forfeiture") as the source statute "that authorizes forfeiture to the Government of 'property constituting, or derived from . . . proceeds . . . obtained' from" criminal activity.¹⁹ The Court never once cited 21 U.S.C. § 853(p) ("Forfeiture of substitute property"), the specific statutory provision for the post-judgment substitution of assets for forfeited assets that a defendant made unavailable for actual forfeiture.

¹⁷ Brief for the United States at *42, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (No. 87-1729), 1988 WL 1026332 (emphasis added, citation omitted).

¹⁸ Government's Brief in Opposition, *supra* note 13, at 9–10 (citations omitted).

¹⁹ *Caplin & Drysdale*, 491 U.S. at 619–20.

Instead, invoking the now ubiquitous bank robber hypothetical, the Court in *Caplin & Drysdale* had posited that

A robbery suspect, for example, has no Sixth Amendment right to use *funds he has stolen from a bank* to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the *robbery proceeds* and refuses to permit the defendant to use them to pay for his defense. [N]o lawyer, in any case . . . has the right to . . . accept stolen property, or . . . ransom money, in payment of a fee. . . . The privilege to practice law is not a license to steal.²⁰

In focusing upon the title rights to the property in dispute, *Caplin & Drysdale* cited the “relation-back” provision, 21 U.S.C. § 853(c), a codification of the common law “taint theory” that lies at the foundation of civil forfeiture laws, as “dictat[ing] that ‘all right, title and interest in *property*’ obtained by criminals via the illicit means . . . ‘vests in the United States upon the commission of the act giving rise to forfeiture.’”²¹ That is, the government’s title to forfeited property relates back to the time at which the property was unlawfully used or created, giving the government priority over subsequent transferees.²²

By describing the “the long-recognized and lawful practice of vesting title to any *forfeitable assets*,” however, *Caplin & Drysdale* made clear that it was addressing specified “*assets derived from the crime*.”²³ The references in those cases to “forfeitable” assets were, therefore, shorthand for tainted assets.²⁴

Moreover, in the briefs it had filed 25 years earlier in *Monsanto* and *Caplin & Drysdale*, the government had invited the Court to use the terms “forfeitable” to exclusively describe “tainted” assets,

²⁰ *Id.* at 626 (emphasis added) (citation and quotation omitted).

²¹ *Id.* at 627 (emphasis added).

²² See, e.g., *United States v. A Parcel of Land (92 Buena Vista Ave.)*, 507 U.S. 111, 126 (1993) (relation back doctrine applies only post-forfeiture judgment, and gives no title to the government pre-judgment).

²³ *Caplin & Drysdale*, 491 U.S. at 627–28 (emphasis added).

²⁴ See also *id.* at 630 (“We reject . . . any notion of a constitutional right to use the *proceeds of crime* to finance an expensive defense.”).

not just any asset that might be subject to forfeiture for any reason (e.g., substitute assets):

The property that Section 853 declares *forfeited* is . . . all the defendant's *property that has been used in, or constitutes the proceeds of, his narcotics transactions*. . . . The statute forfeits the defendant's *drug-tainted property* without regard to the uses the defendant wishes to make of that property.²⁵

In light of the intense congressional concern with avoiding the dissipation of *forfeited assets* prior to conviction, and the absence of any exception, express or implied, to the prohibition against a defendant's transfer of *tainted assets* to third parties, there is no force to respondent's suggestion that Congress must have intended to permit defendants to use "*tainted*" assets to purchase legal services.²⁶

Nor is there any basis for a special exception . . . for situations in which it is an attorney who accepts the assets from the defendant with knowledge or cause to believe that they are *tainted by illegality*. . . . [T]here is an important public interest in assuring public confidence in the integrity of the defense bar and the criminal justice system that particularly warrants a rule barring attorneys from receiving *the illicit proceeds and instruments of drug trafficking in payment of their fees*.²⁷

Although the Court adopted the government's nomenclature in *Monsanto* and *Caplin & Drysdale*, in neither of those two cases was the government seeking to restrain or forfeit untainted assets.²⁸ The constitutionality of the restraint of untainted, 'substitute' assets needed for counsel of choice was not before the Court, and the majority's

²⁵ Brief for the United States at *21, *United States v. Monsanto*, 491 U.S. 600 (1989) (No. 88-454), 1989 WL 1115135 (emphasis added).

²⁶ *Id.* at *28–29 (emphasis added); accord *id.* at *20, *29.

²⁷ Brief for the United States, *supra* note 17, at *29 (emphasis added); *id.* at *13 ("[I]t is only tainted assets that are subject to forfeiture.").

²⁸ Transcript of Oral Arg., *United States v. Monsanto*, 91 U.S. 600 (1989) (No. 88-454) (Solicitor General: "But assuming that he has other assets, and assuming that those assets are untainted, it's our position that it will very often be the case that he will be able to hire a lawyer, and he simply won't be able to use the tainted assets."), available at <https://www.oyez.org/cases/1988/88-454>.

language relied heavily on the tainted nature of property in addressing the Sixth Amendment issue.²⁹

Nor were untainted assets at issue in *Kaley*, in which the issue was whether a defendant was entitled to a hearing to challenge the *ex parte* restraint of tainted assets needed for counsel of choice.³⁰ The only question before the Court there was whether the defendant could challenge “whether there was probable cause to think the defendant committed the crime alleged” in the indictment.³¹ The Court, in an opinion by Justice Kagan, held that a grand jury’s *ex parte* finding of probable cause that the defendant committed a crime is sufficient to justify the restraint of assets traceable to the charged crime. Specifically, the majority held that neither the Fifth nor Sixth Amendment entitle a defendant to a pretrial hearing to challenge a grand jury finding on probable guilt. Justice Kagan concluded, in other words, that the grand jury provides all the process that is due a defendant, even though it does not include *any* opportunity to be heard—a proposition of law that drew a dissent from Chief Justice John Roberts (joined by Justices Stephen Breyer and Sonia Sotomayor). It also sparked a debate by commentators.³²

²⁹ See *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (“Judicial decisions do not stand as binding ‘precedent’ for points that were not raised, not argued, and hence not analyzed.”) (Scalia, J., dissenting).

³⁰ *Kaley*, 134 S. Ct. 1090.

³¹ *Id.* at 1105.

³² E.g., Chanakya Sethi, *The Big, Bad Freeze*, *Slate* (Feb. 26, 2014) (“But I would have hoped the court would have seen fit to limit the damage . . . by giving criminal defendants, who are up against the awesome power of the state, a fair hearing before stripping them of their primary means of defending themselves. The Constitution should demand no less.”); Radley Balko, *Astonishingly Awful Supreme Court Decision Lets the Government Seize All Your Assets before Trial*, *Wash. Post* (Feb. 27, 2014) (quoting a commentator: “what about due process, the opportunity for full and fair litigation of a disputed issue? Silly rabbit, tricks are for kids. Once the grand jury issued an indictment, there is nothing left to litigate.”); Lauren-Brooke Eisen, *Kaley v. United States: A “Frightening” Ruling*, *Brennan Center for Justice* (Mar. 4, 2014) (“This could greatly impact the ability of defendants to exercise their sixth amendment right to counsel, and can cause undue hardship to those who have yet to be found guilty of a crime.”); *Leading Case: Kaley v. United States*, 128 *Harv. L. Rev.* 261 (Nov. 10, 2014) (“[T]he opinion may cause harm by reducing the perceived legitimacy of the criminal justice system and eliminating a check on prosecutorial discretion.”).

Because the Kaleys did not dispute the nexus between the restrained assets and the crime charged, the Court expressly reserved ruling on whether a hearing would be required to evaluate whether “probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment.”³³ In particular, Justice Kagan’s opinion distinguished between the traditional pretrial role of the grand jury in making probable guilt findings from a judge’s role in making pretrial tracing findings, stating:

But the tracing of assets is a technical matter far removed from the grand jury’s core competence and traditional function—to determine whether there is probable cause to think the defendant committed a crime. And a judge’s finding that assets are not traceable to the crime charged in no way casts doubt on the prosecution itself. So that determination does not similarly undermine the grand jury or create internal contradictions within the criminal justice system.³⁴

Long before *Kaley*, federal appellate courts had held that forfeiture allegations—while they must by rule be listed in the indictment—are nonetheless not required to be found by the grand jury.³⁵ *Kaley* confirmed this rule by indicating that a judge’s pretrial determinations about the scope of potential forfeiture (“traceability”) do not conflict with the role of the grand jury. The *Kaley* majority thus left the door open to pretrial judicial hearings on the traceability of property that could otherwise be subject to pretrial restraints based upon forfeiture allegations, notwithstanding a grand jury’s indictment.

Chief Justice Roberts’s dissenting opinion in *Kaley*, joined by Justices Breyer and Sotomayor, understood that traceability is a “constitutional[] *must*”:

[T]he indictment draws no distinction between the grand jury’s finding of probable cause to believe that the Kaleys committed a crime and its finding of probable cause to believe that certain assets are traceable to that crime. Both

³³ *Kaley*, 134 S. Ct. at 1095 & n.3.

³⁴ *Id.* at 1099 n.9.

³⁵ *United States v. Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980).

showings must be made to justify a pretrial asset restraint under *Monsanto*. . .³⁶

Nothing in either the majority or dissenting opinions in *Kaley* suggested that the Court had already “foreclosed” a constitutional challenge to the restraint of untainted assets needed for counsel of choice, as the Eleventh Circuit later held, and as the solicitor general then argued.

At oral argument in *Kaley*, the government appeared to have conceded that point in response to questions by Justice Kennedy: “At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question . . . whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment.”³⁷ Surely, that concession was understood to mean that if “the assets that are restrained are not actually the proceeds of the charged criminal offense,”³⁸ then *the Constitution* would forbid the continued restraint of those assets insofar as they are needed to retain counsel of choice. After all, if the constitutionality of such restraints had already been upheld in *Monsanto* and *Caplin*, why would the government concede 25 years later that the *Constitution* would ever require a pretrial hearing on traceability—particularly when, “by listing property in the indictment and alleging that it is subject to forfeiture . . . the grand jury found probable cause to believe those assets were linked to the charged offenses?”³⁹

Ultimately, in *Kaley* the Court held that neither the Fifth Amendment’s Due Process Clause nor the Sixth Amendment’s Right-to-Counsel Clause entitle a defendant to a pretrial hearing to challenge the grand jury’s conclusion that probable cause supports the charges, even if it means that assets traceable to that crime may be restrained and thus not available to fund the defense. The only additional contribution made by *Kaley* to the jurisprudence on the pretrial restraint of untainted assets was to confirm that judicial pretrial hearings to address traceability did not conflict with the pretrial function and traditional role of grand juries.

³⁶ *Kaley*, 134 S. Ct. at 1108 & n.2 (Roberts, C.J., dissenting).

³⁷ *Id.* at 1095 n.3 (majority op.).

³⁸ *Id.* at 1108 (Roberts, C.J., dissenting).

³⁹ *Id.*

II. The Debate over Taint

In *Luis*, the distinction between tainted and untainted assets prior to a criminal trial thus took center stage for the first time. In *Caplin & Drysdale* the defendant proposed to pay his lawyer with drug money, “ill-gotten gains” and “profits of crime”; in *Monsanto* the indictment alleged that the assets subject to forfeiture “had been accumulated by respondent as a result of his narcotics trafficking”; and in *Kaley* “no one contested that the assets in question derive from, or were used in committing, the offenses.” Those circumstances animated the Court’s decisions in those cases.⁴⁰ No aspect of the Court’s holdings in *Caplin & Drysdale*, *Monsanto*, or *Kaley* suggested that the pretrial restraint of *untainted* assets would necessarily meet a similar fate.

In those earlier cases, the Court had held that the restraint of tainted assets does not offend the Sixth Amendment because, under the relation-back doctrine, proceeds traceable to the offense do not genuinely belong to the defendant.⁴¹ The government’s right to property traceable to the crime vests upon the commission of the crime, even if title is not perfected until judgment.⁴²

By contrast, the relation-back doctrine does not apply to untainted assets, either as a matter of statutory construction or at common law.⁴³ Unlike assets traceable to a crime, which are not lawfully owned by a defendant who commits the crime, untainted assets are owned or earned by the defendant irrespective of the crime and, by definition, are not criminal proceeds.

As far as the government was concerned, because there was probable cause to believe that Ms. Luis is guilty, it was fair to say that her

⁴⁰ See *Caplin & Drysdale*, 491 U.S. at 626 (using a bank-robbery-proceeds hypothetical to explain that a defendant “has no Sixth Amendment right to spend another person’s money for services rendered by an attorney”); *Kaley*, 134 S. Ct. at 1096–97 (recalling the bank-robbery-proceeds hypothetical to hold that *Caplin & Drysdale*, “cast the die” on the *Kaleys’* constitutional challenge).

⁴¹ *Caplin & Drysdale*, 491 U.S. at 627.

⁴² *United States v. A Parcel of Land* (92 Buena Vista Avenue), 507 U.S. at 126.

⁴³ See, e.g., *United States v. Erpenbeck*, 682 F.3d 472, 477–78 (6th Cir. 2012); *United States v. Jarvis*, 499 F.3d 1196, 1204 (10th Cir. 2007); *United States v. McManigal*, 708 F.2d 276, 290 (7th Cir.) (relation back limited to in rem forfeitures, not extended by Congress to criminal forfeitures as reintroduced in 1970), vacated and remanded on other grounds, 464 U.S. 979 (1983). But see *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003).

untainted assets today would soon be the government's in the not-too-distant future. So a court could, consistent with the expected outcome of the criminal prosecution, enjoin her from spending even legitimately earned "clean" funds on legal fees because those funds would later be needed to satisfy the criminal judgment. In the government's view, Ms. Luis was already indigent—even if she owned untainted assets sufficient to retain counsel—because in the future the government would succeed in convicting her, at which time the court will enter a forfeiture judgment against her, order restitution (perhaps impose a fine, as well), and then seek to collect against her untainted assets to satisfy those financial penalties. And, like any other indigent defendant, Ms. Luis would receive effective assistance of counsel from an attorney selected by and paid for by the court.

Ms. Luis, joined by the defense bar, took no comfort in the offer of an appointed attorney.⁴⁴ They argued that, from its inception, the right to counsel contemplated that a citizen accused of a federal crime could use her own, legitimate assets to retain private counsel to represent her in court. After all, when the Sixth Amendment was ratified, the constitutional right to appointed counsel was centuries away from recognition:

At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited, that is how the right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure.⁴⁵

As it was originally envisioned by the Framers, the "[t]he Sixth Amendment . . . encompass[ed] a non-indigent defendant's right

⁴⁴ See Amicus Brief of the Associations of Criminal Defense Attorneys, *supra* note 14, at 7 ("In fact, the right to counsel of choice is more absolute than the right to competent counsel.").

⁴⁵ *Gonzalez-Lopez v. United States*, 548 U.S. 140, 154 (2006) (Alito, J., dissenting); accord *Bute v. People of State of Ill.*, 333 U.S. 640, 660–61 (1948) ("until the decision of this Court . . . in *Johnson v. Zerbst*, 304 U.S. 458 [(1938)], there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist the accused in his defense, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired.").

to select counsel who [would] represent him in a criminal prosecution."⁴⁶ It was understood that, in the main, the exercise of this constitutional right depended largely on a defendant's access to legitimate funds with which to retain private counsel. For this constitutional right to mean something, a court could not, consistent with the Sixth Amendment, interfere with a "non-indigent defendant's" expenditure of her own funds on legal fees. As the American Bar Association explained to the Court:

A system that grants one party the discretion to restrict and control the lawfully obtained resources available to its opponent is not the adversarial system that has existed throughout our history. The Constitution and the traditions of our criminal justice system demand that the government prevail by proving its allegations, not by impeding an accused's ability to mount a defense.⁴⁷

It would have been inconceivable to the Founding Fathers, that a court, merely upon request of the government, would enjoin a presumptively innocent accused from using her own legitimately-earned assets to retain counsel—to make those untainted assets unavailable as an *in personam* penalty upon conviction. In the words of one amicus in *Luis*, "The idea that a court could prevent a defendant from using his own untainted assets to retain counsel is belied by the historical development of the Sixth Amendment."⁴⁸

It is well settled that the Sixth Amendment right to counsel of choice is a "structural right," and the erroneous deprivation of the right to "be defended by the counsel he believes to be the best" is *per se* reversible, because it affects "the framework within which the trial proceeds."⁴⁹ The adversary system of justice depends upon confidence in "an independent bar as a check on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of

⁴⁶ Gonzalez-Lopez, 548 U.S. at 154 (Alito, J., dissenting).

⁴⁷ Brief of the American Bar Association as Amicus Curiae at 25, *Luis v. United States*, 136 S. Ct 1083 (2016) (No. 14-419).

⁴⁸ Amicus Curiae Brief of Rutherford Institute at 9, *Luis v. United States*, 136 S. Ct 1083 (2016) (No. 14-419).

⁴⁹ Gonzalez-Lopez, 548 U.S. at 146, 148–50.

that significant role.”⁵⁰ It is through counsel that all other rights of the accused are protected: “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”⁵¹

As an accused makes her way through the criminal legal process, her confidence in the independence of her counsel is paramount. Her ability to choose that counsel is the first step. An accused’s choice is not merely a matter of identifying an attorney with technical skills. The accused wants an attorney whom she trusts and who will consider her views in the handling of the case.⁵² The attorney exercises authority to manage most aspects of the defense without obtaining the client’s approval.⁵³ Indeed, our justice system entrusts to counsel strategy decisions that can determine the accused’s fate, sometimes a matter of life or death.⁵⁴

Thus, “the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence,” which nurtures “the intimacy and confidentiality which are important to an effective attorney-client relationship.”⁵⁵ Indeed, “[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information

⁵⁰ Kaley, 134 S.Ct. at 1114–15 (Roberts, J. dissenting).

⁵¹ Warren V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956); see also Kimmelman v. Morrison, 477 U.S. 365, 377 (1986); *United States v. Cronin*, 466 U.S. 648, 654 (1984).

⁵² *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (“An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant’s consent to every tactical decision.”) (citations and quotations omitted); Amicus Brief of the Associations of Criminal Defense Attorneys, *supra* note 14, at 7 (“While in a criminal proceeding the accused retains ultimate authority in conducting his defense, in practice a lawyer necessarily assumes responsibility for making numerous decisions crucial to protecting a defendant’s rights.”).

⁵³ *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988).

⁵⁴ See *Nixon*, 543 U.S. at 181 (affirming death sentence of a defendant whose appointed counsel conceded guilt at trial without the defendant’s express consent); *Haynes v. Cain*, 298 F.3d 375, 382–83 (5th Cir. 2002) (en banc) (affirming life sentence of a defendant whose appointed counsel conceded guilt at trial, over client’s objection).

⁵⁵ *United States v. Laura*, 607 F.2d 52, 57 (3d Cir. 1979).

from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution.⁵⁶ The Court has held, however, that the Sixth Amendment right to counsel of choice is “the root meaning” of the constitutional guarantee, distinct from a guarantee of trial fairness.⁵⁷ In *Gonzalez-Lopez*, therefore, the Court rejected the Government’s suggestion that appointment of counsel satisfies the Sixth Amendment because the assistance of counsel, by itself, is all the Constitution guarantees.

When the court or prosecution intervenes to deny counsel of choice, the accused may understandably doubt the allegiance of the attorney appointed to replace her chosen counsel. The offer of a public lawyer under the circumstances may breed suspicion in the mind of the accused—not a healthy start to a relationship that necessarily depends upon collaboration and trust to make life-altering decisions. If that appointed attorney urges a course of action, say “a ‘fast track’ plea bargain . . . in exchange for a reduced sentence recommendation,” the accused may question the attorney’s motives for urging that she take the deal, even though counsel is faithfully discharging his constitutional duty.⁵⁸

Preventing the accused from retaining a private attorney with her untainted assets also has broader institutional implications, for it erodes the public’s confidence in the justice system. The public has an interest in the availability of legal services independent of the sovereign that prosecutes. The private criminal defense bar provides a significant check on the power of the prosecutor and judge and serves a unique role in the adversarial system of justice: “Both before and after the return of an indictment, a defendant has no more essential or important resource than the guidance and independent judgment of counsel who is intimately familiar with the case.”⁵⁹

Simply put, the Constitution treats the activities of criminal defense attorneys differently precisely because they are different, from an institutional perspective, from other

⁵⁶ ABA Standard 4–3.1, commentary, 149–50.

⁵⁷ *United States v. Gonzales-Lopez*, 548 U.S. 140, 147–148 (2006) (Scalia, J.).

⁵⁸ *United States v. Ruiz*, 536 U.S. 622, 622 (2002). See also *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (“[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused”).

⁵⁹ Brief of the American Bar Association as Amicus Curiae, *supra* note 47, at 7–8.

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members of the profession. . . . In the context of the criminal justice system, the defendant's attorney must utilize the adversary system to accomplish an additional function—to exercise the systemic restraints placed upon the power of government in our society of liberties.⁶⁰

Complex criminal prosecutions require a lot of time, energy, and resources to properly prepare for litigation against the government. “[T]he quality of a criminal defendant’s representation frequently may turn on his ability to retain the best counsel money can buy.”⁶¹ Only a cynic would expect private counsel to undertake the representation *gratis*.

Against this backdrop, the Court heard argument in *Luis*. Right out of the box, the Court pressed Ms. Luis for a distinction between spending tainted versus untainted assets for counsel of choice. Chief Justice Roberts asked, “What do you do about *Monsanto*? . . . So what is the logic that says it doesn’t violate the Sixth Amendment if it’s tainted funds, but it does if it’s untainted funds?”⁶² Justice Antonin Scalia posited:

That seems to me not a very . . . persuasive line. You’re relying on property law. What you’re saying is the government can take away all your money if it’s tainted, if there is probable cause to believe that it’s tainted, right? It can take away all of your money if there is a judgment. But it can’t take away all of your money if there’s simply probable cause to believe that you’re going to owe this money.⁶³

Reviving the well-worn bank robber hypothetical, Justice Kagan proposed two parallel scenarios:

One is the one that *Monsanto* talked about where, yeah, a bank robber goes in and he has a pile of money now. And *Monsanto* says, you know, even though he wants to use that money to pay for an attorney, too bad.

⁶⁰ Morgan Cloud, *Forfeiting Defense Attorneys’ Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 1–4, 8–9.

⁶¹ *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in result).

⁶² Transcript of Oral Arg. at 3–4, *Luis v. United States*, 136 S. Ct 1083 (2016) (No. 14-419).

⁶³ *Id.* at 20.

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Now a bank robber goes in, he has a pile of money, he puts it into a separate bank account, he uses that bank account to pay his rent, to pay other expenses, and he uses the money that would have gone for the rent and other expenses to pay a lawyer.

Why should the two cases be treated any differently for Sixth Amendment purposes?⁶⁴

Apparently unpersuaded that the tainted-versus-untainted distinction makes a constitutional difference, Justice Kagan asked the deputy solicitor general:

[S]uppose the Court is just uncomfortable with the path we started down the road on in *Monsanto*? 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*. And so what should we do with that intuition that *Monsanto* sent us down the wrong path?⁶⁵

Justice Kennedy tested the limit of the government's argument, noting that, although the statute at issue only authorizes pretrial restraint in banking and health care fraud cases:

the necessary consequence of your position is that any State in the union can provide for forfeiture or . . . a freeze of assets pending trial in any assault and battery case, spousal abuse case, criminal negligence, date rape cases in order to make the victim whole, to pay for medical costs, to pay for pain and suffering, and can freeze those assets even if the consequences of that is that in most of those cases most people cannot afford counsel.⁶⁶

To which the deputy solicitor general said "yes."

III. The Decision

The decision was issued on March 30, 2016, one month after the passing of Justice Scalia. Five justices voted to reverse the court of appeals on Sixth Amendment grounds. Justice Breyer announced

⁶⁴ *Id.* at 3–4.

⁶⁵ *Id.* at 35–36 (emphasis added).

⁶⁶ *Id.* at 48.

the judgment of the Court for a four-justice plurality including Chief Justice Roberts, Justice Ruth Bader Ginsburg, and Justice Sotomayor. Justice Clarence Thomas concurred in the judgment. Justice Kennedy filed a dissenting opinion, in which Justice Alito joined, concluding that the government's interest in potentially forfeiting tainted and untainted assets is the same, so, under *Monsanto* and *Caplin & Drysdale*, the restraint of either class of assets is constitutional. And Justice Kagan filed a dissenting opinion of her own, agreeing with the premise of Justice Kennedy's dissenting opinion, but suggesting that she might favor overruling *Monsanto*, which she characterized as a "troubling decision."

A. Justice Breyer's Plurality Opinion

Justice Breyer's opinion led off with the clear proclamation that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The nature and importance of the constitutional right taken together with the nature of the assets lead us to this conclusion."⁶⁷ Emphasizing that the right to counsel of choice is "fundamental," Justice Breyer recalled a passage from *Caplin & Drysdale*: "The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire."⁶⁸

The plurality applied a balancing test to resolve the constitutional question. Acknowledging the government's interest in "statutory penalties (including forfeiture of untainted assets) and restitution, should it secure convictions," Justice Breyer nevertheless saw a difference between the restraint of tainted assets in the earlier cases and the proposed restraint of untainted assets in *Luis*, concluding "that distinction makes a difference. . . it belongs to the defendant, pure and simple. . . . It is the difference between what is yours and what is mine."⁶⁹ In other words, where the government seeks to restrain a "robber's loot, a drug seller's cocaine, [or] a burglar's tools . . . [a]s a matter of property law the defendant's ownership interest is imperfect";⁷⁰ "the Government even before trial ha[s] a 'substantial'

⁶⁷ *Luis*, 136 S. Ct. at 1088.

⁶⁸ *Id.* at 1089 (quoting *Caplin & Drysdale*, 491 U.S. at 624).

⁶⁹ *Id.* at 1090, 1091.

⁷⁰ *Id.* at 1090.

interest in [] tainted property sufficient to justify the property's pretrial restraint."⁷¹

Analogizing to bankruptcy law, Justice Breyer equated the government's interest in tainted assets to the interests of "a secured creditor with a lien on the defendant's tainted assets superior to that of most any other party." By contrast, when the government restrains untainted assets, there is no "equivalent governmental interest in that property." Justice Breyer again analogized to bankruptcy law, equating the government's interest in untainted assets to the interest of unsecured creditors: "Although such creditors someday might collect from a debtor's general assets, they cannot be said to have any present claim to, or interest in, the debtor's property."⁷²

Justice Breyer then proceeded to weigh the government's contingent "unsecured" interest in "innocent (untainted) funds [] needed [by the defendant] to obtain counsel of choice," against the defendant's Sixth Amendment rights. He focused on three considerations. First, he concluded that the defendant's Sixth Amendment right outweighs the rights of victims (restitution) and the need to impose financial punishment (forfeiture), which he described as "important," but which "lie somewhat further from the heart of a fair, effective criminal justice system."⁷³ Second the "relevant legal tradition" of post-conviction forfeiture of tainted assets reflects a "historic preference against pre-conviction forfeitures. . . . As far as Luis' Sixth Amendment right to counsel of choice is concerned, a restraining order might as well be a forfeiture; that is, the restraint itself suffices to completely deny this constitutional right."⁷⁴ And third, given how steep the financial consequences of a criminal conviction can be, permitting the pretrial restraint of "untainted assets would unleash a principle of constitutional law that would have no obvious stopping place."⁷⁵

Recall that at oral argument, in response to Justice Kennedy's question, the deputy solicitor general acknowledged that there was no principle that could limit the Court's holding to pretrial restraint of

⁷¹ *Id.* at 1092.

⁷² All quotes in this paragraph are to Luis, 136 S. Ct. at 1092.

⁷³ *Id.* at 1093.

⁷⁴ *Id.* at 1094.

⁷⁵ *Id.*

untainted assets earmarked for forfeiture: in the government's view, the Constitution would pose no impediment to pretrial restraints in amounts equivalent to the maximum potential fine or restitution order. Justice Breyer's opinion cited statutes and cases exposing defendants to million-dollar fines and multi-million dollar restitution awards (e.g., under a "fraud-on-the-market" theory).⁷⁶ Justice Breyer asked rhetorically, "How are defendants whose innocent assets are frozen in cases like these supposed to pay for a lawyer—particularly if they lack 'tainted assets' because they are innocent, a class of defendants whom the right to counsel certainly seeks to protect?"⁷⁷ Justice Breyer expressed concern that these defendants would be "rendered indigent" by mere indictment, placing additional burdens on already "overworked and underpaid public defenders."⁷⁸

In response to concerns expressed by Justice Kennedy in dissent, Justice Breyer was satisfied that the "constitutional line" between tainted assets and untainted assets needed for counsel of choice "should prove workable."⁷⁹ Acknowledging that "money is fungible," Breyer reminded that "the law has tracing rules that help courts implement the kind of distinction we require in this case,"⁸⁰ citing a case decided earlier the same term resolving a tracing dilemma under insurance law.⁸¹ In the end, Breyer's opinion held that a defendant has "a Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel."⁸²

B. Justice Thomas's Concurring Opinion

Justice Thomas's concurring opinion likewise proclaimed "that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice."⁸³ This is a critical

⁷⁶ *Id.* at 1094–95.

⁷⁷ *Id.* at 1095.

⁷⁸ *Id.* (citing Brief of New York Council of Defense Lawyers as Amicus Curiae at 11, *Luis v. United States*, 136 S. Ct. 1083 (2016) (No. 14-419)).

⁷⁹ *Id.* at 1095.

⁸⁰ *Id.*

⁸¹ See *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 659–60 (2016).

⁸² *Luis*, 136 S. Ct. at 1096.

⁸³ *Id.*

constitutional commitment, because it makes clear that five justices endorsed the proposition that the Sixth Amendment bars restraints upon legitimate assets being used to retain criminal defense counsel.

But Thomas would have gone further because, in his view, the decision did not permit any balancing of the interests of the government and crime victims against the interest of the defendant in retaining private counsel: “The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail. Those tradeoffs are thus not for us to reevaluate.”⁸⁴

In general terms, Justice Thomas observed that “[c]onstitutional rights . . . implicitly protect those closely related acts necessary to their exercise,” which “include the right to engage in financial transactions that are the incidents of its exercise.”⁸⁵ Recognizing that “retaining an attorney requires resources,”⁸⁶ he dispelled the formalistic view that a restraint on assets does not necessarily interfere with choosing counsel because a lawyer might work for free or on a contingency basis:

[C]onstitutional rights necessarily protect the prerequisites for their exercise. The right “to have the Assistance of Counsel,” U.S. Const., Amdt. 6, thus implies the right to use lawfully owned property to pay for an attorney. Otherwise the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless. . . . Unless the right to counsel also protects the prerequisite right to use one’s financial resources for an attorney, I doubt that the Framers would have gone through the trouble of adopting such a flimsy “parchment barrie[r].”⁸⁷

Placing the Sixth Amendment within its historical context, Justice Thomas agreed with Ms. Luis and the defense bar that “it would

⁸⁴ *Id.* at 1101 (Thomas, J., concurring). Justice Thomas’s constitutional conclusion that balancing of competing interests is inappropriate to measure the dictates of the Sixth Amendment would soon be enlisted by Justice Sotomayor in her dissenting Fourth Amendment opinion in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2197 (2016) (Sotomayor, J. & Ginsburg, J., dissenting).

⁸⁵ *Id.* at 1098 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part)).

⁸⁶ *Id.* at 1097.

⁸⁷ *Id.* at 1096–98 (quoting *The Federalist No. 48*, at 308 (C. Rossiter ed., 1961) (J. Madison)).

have shocked the Framers” to learn that “the Government’s mere expectancy of a total forfeiture upon conviction [could] justify a complete pretrial asset freeze,” rendering the defendant indigent and thus unable to retain private counsel.⁸⁸ Continuing with his historical analysis of the Sixth Amendment, Justice Thomas noted that the availability of “[t]he modern, judicially created right to Government-appointed counsel was “no answer,” in his view, because “[a]s understood in 1791, the Sixth Amendment protected a defendant’s right to retain an attorney he could afford.”⁸⁹ And whereas “[t]he common law did permit the Government . . . to seize tainted assets before trial,”⁹⁰ it “prohibited pretrial freezes of criminal defendants’ untainted assets.”⁹¹

More broadly, Justice Thomas observed that “any interference with a defendant’s property traditionally required a conviction. . . . Although the Defendant’s goods could be appraised and inventoried before trial, he remained free to ‘sell any of them for his own support in prison, or that of his family, or to assist him in preparing for his defence on the trial.’”⁹² Thus, beyond “unwind[ing] prejudgment fraudulent transfers,” Justice Thomas seemingly agreed that a defendant “may bona fide sell any of his chattels, real or personal, for the sustenance of himself and family between the [offense] and conviction.”⁹³ Although Justice Thomas cited those authorities for the proposition that “[t]he common law prohibited pretrial freezes of criminal defendants’ *untainted* assets,”⁹⁴ in fact those authorities would seemingly prohibit the restraint of even *tainted* assets:

Therefore, a traitor or felon may bona fide sale *any* of his chattels, real or personal, for the sustenance of himself and his family between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through

⁸⁸ *Id.* at 1098.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1100.

⁹¹ *Id.* at 1099.

⁹² *Id.* at 1099 (quoting J. Chitty, *A Practical Treatise on the Criminal Law* 737 (5th ed. 1847)).

⁹³ *Id.* (quoting 2 William Blackstone, *Commentaries* *380 and citing *Fleetwood’s Case*, 8 Co. Rep. 171a, 171b, 77 Eng. Rep. 731, 732 (K.B. 1611) (endorsing this rule).

⁹⁴ *Id.* (emphasis added).

many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony.⁹⁵

Justice Thomas grounded his analysis of the forfeiture laws in the long history of both civil, *in rem* forfeiture statutes, and the more recent statutory enactments making forfeiture a criminal, *in personam* penalty.⁹⁶ While Thomas's characterization of some early civil forfeiture statutes as potentially encompassing untainted assets is debatable, his conclusion that these statutes were actually more like fines than forfeitures is not.

C. Justice Kennedy's Dissenting Opinion

Justice Kennedy's dissenting opinion, joined by Justice Alito, recognized no constitutional difference between tainted and untainted assets: "*Caplin & Drysdale* and *Monsanto* cannot be distinguished based on 'the nature of the assets at issue'. . . . The Government had no greater ownership interest in *Monsanto's* tainted assets than it has in *Luis's* substitute assets."⁹⁷ In arriving at this conclusion, Justice Kennedy rejected the suggestion that the "relation-back doctrine"—even if it applies only to tainted assets—confers upon the government some greater interest in tainted assets than in untainted assets. Thus, in Justice Kennedy's view, "[t]he principle the Court announced in *Caplin & Drysdale* and *Monsanto* controls the result here."⁹⁸

Although acknowledging that "a pretrial restraint may make it difficult for a defendant to secure counsel who insists that high defense costs be paid in advance[, t]hat difficulty, however, does not result in a Sixth Amendment violation any more than high taxes or other government exactions that impose a similar burden."⁹⁹ Justice Kennedy saw no constitutional problem, because restraining untainted assets "does not prevent a defendant from seeking to convince his or her

⁹⁵ 4 William Blackstone, Commentaries *388.

⁹⁶ See generally, Reed & Gill, RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process, 62 N.C. L. Rev. 57, 60–67 (1983) (tracing different histories of civil and criminal forfeitures).

⁹⁷ *Luis*, 136 S. Ct. at 1106–07 (Kennedy, J., dissenting).

⁹⁸ *Id.* at 1105.

⁹⁹ *Id.*

counsel of choice to take on the representation without advance payment.”¹⁰⁰ Despite the cries of the private defense bar suggesting otherwise, Justice Kennedy was satisfied that indicted defendants could retain, for no money down, private lawyers willing “to take on the representation without advance payment . . . in the hopes that their fees would be paid at some future point.”¹⁰¹ Or, for a lawyer confident enough in his own trial skills and/or the client’s innocence, he could enter into what the American Bar Association equated to “a contingency fee arrangement that depends on the outcome at trial, in violation of bedrock attorney ethics rules in every State.”¹⁰² And even if no private attorney would enter into such an arrangement, Justice Kennedy was satisfied that the defendant would be “adequately represented by attorneys appointed by the court.”¹⁰³

Once there is probable cause to believe a defendant committed a crime, in Justice Kennedy’s view, a defendant should not be permitted to use her legitimate life’s savings “to bankroll her private attorneys as well as ‘the best and most industrious investigators, experts, paralegals, and law clerks’ money can buy.”¹⁰⁴ With her freedom and livelihood at stake, and the presumption of innocence notwithstanding, Ms. “Luis should not be allowed to . . . to pay for a high, or even the highest, priced defense team she can find” with money that is hers and no one else’s.¹⁰⁵

Also driving Justice Kennedy’s dissent was his disapproval of “sophisticated criminals who know how to make criminal proceeds look untainted.”¹⁰⁶ Of course, such conduct is the subject of elaborate money laundering statutes, which expose sophisticated criminals to even more charges and longer prison sentences for engaging in financial transactions with tainted funds, or for concealing them. At the point defense counsel are retained, this should be less of a concern. Justice Kennedy nonetheless feared that a ruling allowing defendants to spend untainted funds on their defense would “reward[]

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Brief of the American Bar Association as Amicus Curiae, *supra* note 47, at 8.

¹⁰³ Luis, 136 S. Ct. at 1110 (quoting Caplin & Drysdale, 491 U.S. at 624).

¹⁰⁴ *Id.* at 1109.

¹⁰⁵ *Id.* at 1106.

¹⁰⁶ *Id.* at 1109.

criminals who hurry to spend, conceal, or launder stolen property by assuring them that they may use their own funds to pay for an attorney after they have dissipated the proceeds of their crime.”¹⁰⁷ And with a not-so-subtle touch of sarcasm, he commented that “the Constitution does not require victims of property crimes to fund subsidies for members of the private defense bar.”¹⁰⁸

D. Justice Kagan’s Dissenting Opinion

Justice Kagan filed a dissenting opinion of her own, in which she echoed Justice Kennedy’s rejection of any constitutionally meaningful distinction between tainted and untainted assets, bringing this position to three votes.¹⁰⁹ But she wrote separately to note her misgivings about the implications engendered by the Court’s prior precedent, including her own recent opinion for the Court in *Kaley*. Repeating the concerns she expressed at oral argument, Justice Kagan professed her discomfort “with the path we started down the road on in *Monsanto*” regarding pretrial restraints that prevent defendants from retaining counsel of choice.¹¹⁰ Justice Kagan questioned the premise of *Monsanto* that the government had a sufficient property interest pretrial over tainted assets to justify a freezing order that impinges on the exercise of Sixth Amendment rights, stating:

I find *Monsanto* a troubling decision. It is one thing to hold, as this Court did in *Caplin & Drysdale*, that a convicted felon has no Sixth Amendment right to pay his lawyer with funds adjudged forfeitable. Following conviction, such assets belong to the Government, and “[t]here is no constitutional principle that gives one person the right to give another’s property to a third party.” But it is quite another thing to say that the Government may, prior to trial, freeze assets that a defendant needs to hire an attorney, based on nothing more than “probable cause to believe that the property will ultimately

¹⁰⁷ *Id.* at 1103.

¹⁰⁸ *Id.* at 1110.

¹⁰⁹ *Luis*, 136 S. Ct. at 1112 (Kagan, J., dissenting) (“[A]s the principal dissent shows, the Government’s and the defendant’s respective legal interests in those two kinds of property, prior to a judgment of guilt, are exactly the same: The defendant maintains ownership of either type, with the Government holding only a contingent interest.”).

¹¹⁰ Transcript of Oral Arg., *supra* note 62, at 35–36.

be proved forfeitable." At that time, "the presumption of innocence still applies," and the Government's interest in the assets is wholly contingent on future judgments of conviction and forfeiture. I am not altogether convinced that, in this decidedly different circumstance, the Government's interest in recovering the proceeds of crime ought to trump the defendant's (often highly consequential) right to retain counsel of choice.¹¹¹

"As much as [she] sympathize[d] with the plurality's effort to cabin *Monsanto*,"¹¹² Justice Kagan nevertheless felt constrained by *stare decisis* to dissent in *Luis* rather than concur in the opinions of either Justice Breyer or Justice Thomas.

In *Kaley*, Justice Kagan also felt constrained by *Monsanto* and *Caplin & Drysdale*: "On the single day the Court decided both those cases, it cast the die on this one too. . . . When we decided *Monsanto*, we effectively resolved this case too."¹¹³ Faithful to this precedent, in *Kaley* Justice Kagan followed the logic of *Monsanto* where it took her, without proclaiming her disagreement with its premise. But in *Luis*, she would not step any further into the abyss without lodging her objection—although she laid responsibility on defense counsel for "not ask[ing] this Court either to overrule or to modify that decision . . . [B]ecause *Luis* takes *Monsanto* as a given, the Court must do so as well."¹¹⁴

The five justices in the majority have now stated that the pretrial restraint of untainted assets is unconstitutional when needed to retain counsel of choice. The three dissenting justices have stated that tainted and untainted assets stand on equal constitutional footing. If now bound by the holding in *Luis as to untainted assets*, then presumably the dissenting justices would, following their own logic of equivalency, conclude that the pretrial restraint of tainted assets would also be unconstitutional—but for the earlier decisions in *Monsanto* and *Caplin & Drysdale*. The fortuity that the restraint of tainted assets came before the Court first, therefore, has generated the contradictions laid bare by Justice Kagan in her dissent. Indeed, had the Court

¹¹¹ *Luis*, 136 S. Ct. at 1112 (Kagan, J., dissenting) (citations omitted).

¹¹² *Id.* at 1113.

¹¹³ *Kaley*, 134 S. Ct. at 1096, 1105.

¹¹⁴ *Luis*, 136 S. Ct. at 1112.

confronted the restraint of untainted assets first, perhaps *Monsanto* and *Caplin & Drysdale* would have been decided differently.

IV. Pretrial Restraints after *Luis*

For future purposes, the five-vote *Luis* majority will place a threshold restriction on the pretrial authority of a court. This unambiguous holding leaves for further development the means by which the Sixth Amendment protection is implemented and, if appropriate, extended to a defendant's other legitimate pretrial uses of his own property. A non-exhaustive list of such protected pretrial uses could include the use of property whose forfeiture would violate the Eighth Amendment's prohibition on excessive punishment.¹¹⁵

Justice Breyer likened a court's pretrial tracing inquiry to the equitable principles described in *Montanile*.¹¹⁶ Justice Breyer should know. As a former circuit judge, Breyer authored an analysis of the Uniform Commercial Code's (UCC) treatment of when and how equitable tracing can be used to encumber commingled funds in a bank account,¹¹⁷ which has been widely followed since to protect transferees from a bank account absent a transfer out of the ordinary course that is collusive with the payor¹¹⁸—that is, “conduct that, in the commercial context, is rather improper.”¹¹⁹ This precedent correctly anticipated later revisions of the UCC to clarify that only collusive transfers from deposit accounts are subject to tracing.¹²⁰

¹¹⁵ See *United States v. Bajakajian*, 524 U.S. 321 (1998) (Eighth Amendment limits criminal forfeitures); compare *United States v. Hatfield*, 2010 WL 1685826, *4 (E.D.N.Y. April 21, 2010) (applying Eighth Amendment as limit on pretrial restraining order) with *United States v. Diamond Casino Cruise, LLC*, 2013 WL 54001 (S.D. Ga. Jan. 3, 2013) (declining to apply Eighth Amendment pretrial).

¹¹⁶ *Montanile*, 136 S. Ct. at 659–60.

¹¹⁷ *Harley-Davidson Motor Co. v. Bank of New England*, 897 F.2d 611, 622 (1st Cir. 1990) (applying former UCC Article 9-329, Comment 2(c)).

¹¹⁸ See, e.g., *id.* at 622. See also *J. I. Case Credit Corp. v. First Nat'l Bank of Madison Cty.*, 991 F.2d 1272, 1277 (7th Cir. 1993) (construing comment 2(c)'s “out of ordinary course” as equivalent to collusion with payor).

¹¹⁹ *Harley-Davidson*, 897 F.2d at 62.

¹²⁰ See, e.g., *Stierwalt v. Associated Third Party Administrators*, 2016 WL 2996936, *7 (N.D. Cal. May 25, 2016) (describing “collusion” standard of revised UCC § 9-332(b) as consistent with standard previously described by then-Judge Breyer in *Harley-Davidson*).

Whether and how to incorporate these tracing regimes pretrial is a task that awaits trial courts. Likewise, the issue of separating tainted from untainted assets when they have been commingled will assume pretrial significance because *Luis* instructs that a court now has a constitutional mandate to exclude untainted assets from the scope of its pretrial property restraints in order to permit retention of counsel.¹²¹

This Sixth Amendment mandate now restricts a court's authority to issue pretrial restraints, and indeed equally limits the executive branch's authority to request such restraints. Under such bright line constitutional limitations, courts cannot relegate tracing methodologies and burdens to the government, but rather must take affirmative independent steps to confine their orders to the constitutional limits placed on all courts.¹²²

Currently, pretrial restraint applications are commonly drafted solely by the prosecution for submission *ex parte* to a trial court that often simply enters them as judicial orders.¹²³ The deference shown by judges to such *ex parte* applications is understandable. Unlike the prosecutors, the judges have no familiarity with the defendant, his property, or the case. Such *ex parte* pretrial restraining orders offer an immediate way for the prosecution to telegraph to the defendant the degree of risk she faces by choosing to go to trial, and thus they can, and do, influence the plea-bargaining process. Rare are the prosecutors who understate their case at the outset; oftentimes they make *ex parte* requests for restraining orders freezing all a defendant's assets pretrial.¹²⁴ Such *ex parte* applications can look more like prosecution wish lists for a successful trial outcome.

¹²¹ Compare *United States v. Voigt*, 89 F.3d 1050, 1088 (3d Cir. 1996) (jewelry purchased from account containing commingled funds not traceable to money laundering) with *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159 (2d Cir. 1986) (adopting trust principle of lowest intermediate balance to segregate tainted from untainted commingled assets for forfeiture purposes).

¹²² *Wheat v. United States*, 486 U.S. 153, 161 (1988) (“[T]rial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.”).

¹²³ See, e.g., *United States v. Benyo*, 384 F. Supp. 2d 909, 910 (E.D. Va. 2005) (Kelley, J.) (describing *ex parte* process leading to “form order” requested by prosecution in securities fraud conspiracy case).

¹²⁴ *Id.* at 910 (“This Order restrained all of the defendants’ assets. . .”).

But the prosecution now has an affirmative constitutional obligation to ensure that it does not take steps that abridge a defendant's Sixth Amendment rights.¹²⁵ By clarifying that pretrial restraining order applications cannot impair a defendant's exercise of Sixth Amendment rights, *Luis* informs prosecutors (as well as the judges who rely upon their *ex parte* submissions) that they are also responsible for honoring the defendant's right to counsel at the outset of the case.

Justice Breyer's plurality opinion may also be cited as resolving the division between circuits on a significant question of statutory construction. In *Luis*, which charged Medicare fraud, the government invoked 18 U.S.C. § 1345, a statute authorizing pretrial restraints in cases specifically alleging "banking law violation[s]" or "Federal health care offense[s]."¹²⁶ All the justices seemingly agreed that, as a matter of statutory construction, it authorized the pretrial restraint of untainted, substitute assets, so there was "no reasonable way to interpret the relevant statutes to avoid answering th[e] constitutional question."¹²⁷ That is, the words of the Sixth Amendment trump the conflicting words of the statute. By contrast, the more commonly used pretrial restraint statute, 21 U.S.C. § 853, the forfeiture statute actually invoked by the government in *Monsanto* and *Caplin & Drysdale* (and *Kaley*, for that matter), authorizes pretrial restraints in a far broader class of criminal cases than just bank or health care cases. While no court has doubted that the restraint of tainted assets is literally authorized by section 853(e), the circuits had been divided as to whether section 853(e), as a matter of statutory construction, authorizes the pretrial restraint of untainted assets.¹²⁸ In arriving at his conclusion that the decisions in *Monsanto* and *Caplin & Drysdale* turned on the tainted nature of the assets in those cases, Justice

¹²⁵ *Maine v. Moulton*, 474 U.S. 159, 171 (1985) ("The Sixth Amendment also imposes upon the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. . . [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.").

¹²⁶ *Luis*, 136 S. Ct. at 1094.

¹²⁷ *Id.* at 1088.

¹²⁸ Compare *United States v. Ripinsky*, 20 F.3d 359, 362 (9th Cir. 1994) (no pretrial restraint of substitute assets) with *In re Billman*, 915 F.2d 916 (4th Cir. 1990) (upholding pretrial restraints on substitute assets).

Breyer observed that section 853 authorizes *only* the pretrial restraint of tainted assets.¹²⁹ Even if only dicta, it is worth noting that no other justice voiced disagreement with confining pretrial restraining orders under section 853(e) to tainted assets. Presumably, then, the government has no statutory authority under section 853 to restrain *any* of a defendant's untainted assets, even if not earmarked for the retention of counsel.

Finally, the beachhead *Luis* has created for honoring Sixth Amendment rights may be extended to the defendant's other interests in the pretrial use of her legitimate assets for other expenditures. Under Justice Breyer's balancing analysis, for example, a defendant's need to use his untainted assets for living expenses between indictment and trial may trigger the same protection under a Fifth Amendment analysis. Justice Thomas's answer is evident from his historical conclusion that, at the time the Fifth Amendment was ratified, defendants could use their legitimate assets pretrial.¹³⁰ Under English common law at the time of our Constitution's adoption, the relation-back doctrine was inapplicable to chattels, thereby precluding seizure of the defendant's living necessities pending trial.¹³¹

At oral argument in *Luis*, the justices inquired whether, under the terms of the pretrial restraint envisioned by the government, a defendant could pay the rent or the mortgage,¹³² the college tuition of a child,¹³³ or the cost of attending a religious retreat.¹³⁴ The deputy solicitor general suggested that, as a matter of equitable discretion, a court might permit some expenditures, but declined to provide a framework for how a court would make such allowances.¹³⁵

¹²⁹ *Luis*, 136 S. Ct. at 1091 ("We see this in, for example, § 853(e)(1), which explicitly authorizes restraining orders or injunctions against 'property described in subsection (a) of this section' (*i.e.*, *tainted assets*).") (emphasis in original).

¹³⁰ *Id.* at 1099 (Thomas, J., concurring).

¹³¹ Terrance G. Reed, Cato Institute Policy Analysis No. 179: American Forfeiture Law: Property Owners Meet the Prosecutor at 7 & n.41 (1992) (quoting 4 William Blackstone, Commentaries *387-88).

¹³² Transcript of Oral Arg., *supra* note 62, at 8.

¹³³ *Id.* at 8, 37.

¹³⁴ *Id.* at 11-12.

¹³⁵ *Id.* at 38.

Even if it is too much to ask that the Court overrule *Monsanto* altogether, Justice Kagan's discomfort with the path it has taken the Court might at least prompt a harder look at one of its key assumptions: that probable cause is a sufficiently rigorous standard to uphold pretrial restraints that interfere with the retention of counsel. Ms. Luis challenged that assumption in her briefs, but because the Court in *Luis* held that the restraint of untainted assets needed for counsel of choice is categorically prohibited by the Sixth Amendment, the Court did not reach her alternative argument: that the constitutional rights at stake and their relationship to a pending criminal proceeding favor the application of a substantially more demanding standard of proof than probable cause—even to restrain tainted assets.¹³⁶ Ms. Luis urged that the government should bear the burden of proving, through competent evidence, its entitlement to an injunction of untainted assets beyond a reasonable doubt, the same standard of proof that will govern the pending criminal trial and determine whether the assets will ultimately be subject to forfeiture.¹³⁷ To be sure, the Court in *Monsanto* and *Kaley* applied the probable cause standard in evaluating whether the restraint of tainted assets interfered with counsel of choice. But the question of which standard of proof *should apply* was not squarely presented in either case.

Monsanto's assets were frozen after “an extensive, 4-day” adversarial hearing at which the government proved they were drug proceeds.¹³⁸ The adequacy of the hearing was not at issue.¹³⁹ Nonetheless, the five-justice majority assumed “that assets in a defendant’s possession may be restrained in the way they were here

¹³⁶ See *California ex rel. Cooper v. Mitchell Bros.’ Santa Ana Theater*, 454 U.S. 90, 92–93 (1981) (recognizing that “the ‘clear and convincing’ standard [is] reserved to protect particularly important interests in a limited number of civil cases,” but noting that the Court “has never required the ‘beyond a reasonable doubt’ standard to be applied in a civil case.”).

¹³⁷ Cf. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 429 (2006) (“[T]he burdens at the preliminary injunction stage track the burdens at trial.”); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (“And what is at issue here is not even a defendant’s motion for summary judgment, but a plaintiff’s motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher.”).

¹³⁸ *Caplin & Drysale*, 491 U.S. at 615 n.10.

¹³⁹ *Id.*

based on a finding of probable cause to believe that the assets are forfeitable.”¹⁴⁰

The Kaleys did not squarely challenge whether the pretrial restraint of an asset traceable to an alleged crime could be justified based solely on a finding of probable cause that the defendant committed the crime. Instead, they argued that they had a right to judicial review of an *ex parte* restraining order that was based solely on an indictment.¹⁴¹ Relying on *Monsanto*'s dicta, the Court denied relief: “When we decided *Monsanto*, we effectively decided this case too. If the question in a pre-trial forfeiture case is whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides.”¹⁴²

Kaley's characterization presumably did not transform *Monsanto*'s dicta into a holding.¹⁴³ But even if it did, Justice Kagan's discomfort with the path that *Monsanto* has taken the Court suggests that at least she—the author of the Court's opinion in *Kaley*—might be willing to reconsider *its* essential holding: that a defendant has no right to a hearing on whether the government has made a sufficient showing of proof of guilt to justify the restraint of assets traceable to the alleged crime.

If so, a defendant might remind the Court that in the same term it decided *Monsanto* and *Caplin & Drysdale*, so too did the Court decide *Fort Wayne Books, Inc. v. Indiana*,¹⁴⁴ which squarely addressed what process must attend a pretrial asset seizure. In an opinion also authored by the author of *Monsanto* and *Caplin & Drysdale*, Justice White, *Fort Wayne Books* unanimously held that the government must show more than “mere probable cause” to seize the alleged proceeds and instrumentalities of crime where the seizure chills freedom of speech.¹⁴⁵ Of course, legal advocacy (particularly

¹⁴⁰ *Id.* at 615.

¹⁴¹ *Kaley*, 134 S. Ct. at 1097 (“With probable cause, a freeze is valid. *The Kaleys* little dispute that proposition; their argument is instead about who should have the last word as to probable cause.”) (emphasis added).

¹⁴² *Id.* at 1105.

¹⁴³ See *United States v. Dixon*, 509 U.S. 688, 706 (1993) (“Quoting [a] suspect dictum multiple times cannot convert it into case law.”); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) (collecting cases).

¹⁴⁴ *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 50–51 (1989).

¹⁴⁵ *Id.* at 66; *id.* at 68 (Blackmun, J., joining majority's Part III); *id.* at 70 (O'Connor, J., joining majority's Part III); *id.* at 83 (Stevens, J., dissenting on other grounds).

against the government) constitutes protected political speech, the First Amendment's core concern. The power to veto an adversary's choice of counsel is the power to suppress speech and stifle public debate on government actions, no less so than the seizure of pornographic books and films.

While an attorney's speech in his clients' service certainly can be regulated, the Court unanimously held in *Gentile v. State Bar of Nevada* that the First Amendment also protects it.¹⁴⁶ Moreover, that case held that a defense lawyer's speech on his client's behalf is of the highest constitutional order: "The [First Amendment vagueness] inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State."¹⁴⁷ *Gentile*, which "concern[ed] allegations of police corruption,"¹⁴⁸ illustrates that experienced defense attorneys are sometimes the only check on official malfeasance.¹⁴⁹

The combination of the now-acknowledged Sixth Amendment right, with the First Amendment right to challenge government actions through counsel, creates a sufficiently compelling constitutional interest to justify a reconsideration of whether probable cause is an adequate standard upon which to authorize pretrial restraints.

Conclusion

In 2016, the Supreme Court, by a divided vote, confirmed what the Sixth Amendment's authors would have taken for granted in 1791—that a defendant has a constitutional right to use his legitimate assets to pay for an attorney to defend himself against criminal accusations. In *Luis*, the Court fashioned yet another uneasy accommodation between our adversarial system of criminal justice and the criminal forfeiture penalties introduced to federal law in 1970.

¹⁴⁶ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (plurality); *id.* at 1075 (majority); *id.* at 1082 (O'Connor, J., concurring).

¹⁴⁷ *Id.* at 1051 (majority).

¹⁴⁸ *Id.* at 1035–36.

¹⁴⁹ See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–19 (2009) ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials.").

Defense Lawyers Will Fight All the Way to the Supreme Court

For some, this accommodation simply perpetuates a system in which justice depends upon wealth. For prosecutors and others, it simply incentivizes criminals to micromanage their accounts to pay for wine, women (or men), and song with tainted assets. For defense attorneys who work the vineyards of criminal justice, *Luis* offers the prospect that the government will not be able, by allegation alone, to deny defendants their accumulated resources with which to defend themselves. For defendants, who suddenly confront the daunting resources of the federal or state governments, *Luis* offers the same choice the Founders assumed they had: to devote the fruits of their life's lawful labors to defend themselves.