No. 14-419

In The
Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

SCOTT A. SREBNICK
SCOTT A. SREBNICK, P.A.
201 S. Biscayne Boulevard, Suite #1380
Miami, FL 33131
Telephone (305) 285-9019
Scott@Srebnicklaw.com

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 S. Biscayne Boulevard, Suite #1300
Miami, FL 33131
Telephone (305) 371-6421
HSrebnick@RoyBlack.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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The Government asserts that the question presented has already been decided by this Court – that in the 1989 companion cases of *United States v. Monsanto*, 491 U.S. 600 (1989) and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989), this Court held that the pretrial restraint of a criminal defendant's *untainted* assets needed to retain counsel of choice violates neither the Fifth nor Sixth Amendments. BIO 8-10. That proclamation is breaking news to the criminal defense bar, which, for the last 25-plus years, has understood those cases as having addressed exclusively the constitutionality of restraining *tainted* assets. *See* Amicus Brief of the Associations of Criminal Defense Attorneys at 3, 15. *Accord* Amicus Brief of the U.S. Justice Foundation at 17-19.[1]

The Government's position would also come as a surprise to the Justices who decided those cases. In *Caplin*, Justice 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 stolen or tainted funds.

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[1] Even the district court in the instant case did not comprehend *Monsanto* and *Caplin* to have addressed the constitutionality of restraining so-called "substitute" assets. App. 30-31 ("[T]he answer to this question is far from clear . . . ").

> 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.

491 U.S. at 626 (citations omitted).

Although candidly admitting that the facts of *Monsanto* and *Caplin* involved only the restraint of tainted assets, the Government asserts that the Court nonetheless implicitly addressed the restraint of substitute assets:

> 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."

BIO 9-10 (citations omitted). Insofar as untainted assets are potentially "forfeitable" as substitute assets, the Government contends that this Court upheld the constitutionality of restraining untainted assets needed to retain counsel.

But when this Court used the term "forfeitable" in *Monsanto* and *Caplin*, this Court was referring exclusively to tainted assets. This 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. *Caplin*, 491 U.S. at 619-20. The Court never once cited 21 U.S.C. § 853(p) ("Forfeiture of substitute property"). Invoking the bank robber hypothetical, the Court 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.

491 U.S. at 626 (citation and quotation omitted). *Caplin* cited the "relation-back" provision, 21 U.S.C.

§ 853(c), a codification of the "taint theory," 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.'" *Id*. at 627. In describing the "the long-recognized and lawful practice of vesting title to any *forfeitable assets*," the Court specified "assets *derived from the crime*." 491 U.S. at 627-28 (emphasis added). Any reference in those cases to "forfeitable" assets was shorthand for tainted assets. *See also id*. at 630 ("'We reject . . . any notion of a constitutional right to use *the proceeds of crime* to finance an expensive defense.'").

The Government cannot credibly suggest otherwise, given that its Briefs in *Monsanto* and *Caplin* invited the Court to use the terms "forfeitable," "forfeited" and "tainted" interchangeably:

> The fact that the forfeiture order reaches property even after its transfer (unless the property is in the hands of a bona fide purchaser) reflects an intention on the part of Congress to deter third parties from accepting *tainted assets* from the defendant for any purpose, even as part of a transaction that is otherwise lawful . . . .

Brief for the United States in *United States v. Monsanto*, No. 88-454, 1989 WL 1115135 at *20 (emphasis added).

> The property that Section 853 declares *forfeited* is not the funds that the defendant intends to use for a particular transaction –

> such as the payment of attorneys' fees – but instead 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.

Id. at *21 (emphasis added).

> 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.

Id. at *28-29 (emphasis added); accord *id*. at *29 ("a prohibition against using *tainted assets* to pay an attorney does not violate the Sixth Amendment. . . ."); *id*. at *30, *31, *37, *41-42.

> [T]here is nothing in the Sixth Amendment that requires that the defendant be permitted to use *funds that are subject to forfeiture* to hire the attorney of his choice. Petitioner argues that if the forfeiture in this case is upheld, attorneys will not agree to represent defendants in cases in which forfeitures are sought, because of the risk that all of the defendant's assets will be forfeited and the defendant will not be able to pay his fee. That

> will occur, if at all, only in cases in which the defendant has no legitimate assets with which to pay his attorneys, *since it is only tainted assets that are subject to forfeiture.*

Brief for the United States in *Caplin & Drysdale, Chtd. v. United States*, No. 87-1729, 1988 WL 1026332 (U.S.) at *13 (emphasis added).

> 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.*

Id. at *29 (emphasis added).

> [N]either the Fifth Amendment nor the Sixth Amendment requires Congress to fashion a special exception to . . . to permit . . . defendants to use *the illicit proceeds and instruments of their narcotics trafficking* to pay legal fees. Nor does either Amendment require Congress to allow an attorney to receive *such assets* in payment of his fees, where the attorney knew or had reason to know that the *assets were illegally derived*. . . .

Id. at *33 (emphasis added); *see also id*. at *35-36 ("the en banc court below was correct in declining to

expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets."); *accord id.* at *42.

Lest there be any doubt, in *Caplin* the Government titled its argument section (bold and all capital letters in original):

> II. THE CONSTITUTION DOES NOT REQUIRE CONGRESS TO FASHION A SPECIAL EXCEPTION TO THE UNIFORM RULE OF MANDATORY FORFEITURE FOR THOSE *TAINTED ASSETS* THAT THE DEFENDANT WANTS TO USE TO PAY AN ATTORNEY

Id. at *33 (emphasis added); *see also id*. at *iii (Table of Contents).

The Government is hard-pressed to find even a single reference in either *Monsanto* or *Caplin* to "substitute" assets. There is none. Although the Court adopted the Government's nomenclature in those cases, it did not decide the question presented in the instant Petition. The restraint of "substitute" assets was not on the Court's radar when it heard those cases 25 years ago. The issue was never raised by the litigants, much less decided by this Court. *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 Services 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).

When *Kaley v. United States*, 134 S. Ct. 1090 (2014), came before the Court, the issue was whether a defendant was entitled to a hearing to challenge the ex parte restraint of assets needed for counsel of choice. Because the Kaleys did not dispute the nexus between the restrained assets and the crime charged, this Court expressly did not "opine" 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." *Id*. at 1095 and n.3. Yet, if, as the Government now suggests, the Court had already decided in *Monsanto* and *Caplin* that taint was not a pre-requisite to restraint, then why the express reservation?

Chief Justice Roberts' dissenting opinion did weigh in on that question, describing traceability as 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 showings must be made to justify a pretrial asset restraint under *Monsanto*. . . .

Id. at 1108 & n.2 (Roberts, C.J., dissenting) (emphasis in original). Nothing in either the majority or dissenting opinions in *Kaley* suggests that this Court had already "foreclosed" a constitutional challenge to the restraint of untainted assets needed for counsel of choice.

The Government conceded as much in response to questions by Justice Kennedy during oral argument. "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." *Kaley*, 134 S. Ct. at 1095 n.3. Surely, that concession was understood by all who heard it to mean that if "the assets that are restrained are not actually the proceeds of the charged criminal offense," *id.* at 1108 (Roberts, C.J., dissenting), 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 that the *Constitution* would ever require a 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?" *Id.*

The Government now offers a different spin on that concession:

> In *Kaley*, the government had sought and obtained a pretrial order restraining under Section 853(e) only directly forfeitable assets – that is, "proceeds obtained from" or involved in "the [charged] offense(s) and all property traceable to such property." As noted above, when the government claims entitlement to forfeiture of such assets and no others, traceability or other direct relation to the crime is indeed a "requirement[ ] for forfeiture." *Kaley*, 134 S. Ct. at 1095. In that situation, if the government obtains a restraint on a bank account or other asset that the defendant contends is not directly forfeitable, then the defendant is entitled to a hearing on that question if he lacks other funds to retain counsel.
>
> Thus, government counsel in *Kaley* conceded only that a defendant is entitled to a hearing on traceability when that is the rationale invoked by the government in support of a pre-trial restraint.

BIO 13-14 (citations omitted).

The Government's explanation is based on a faulty premise: that in *Kaley,* the Government "claim[ed] entitlement to forfeiture of such [directly forfeitable, (*i.e.,* tainted)] assets *and no others.*" BIO 13 (emphasis added). Not so. In addition to seeking forfeiture of a certificate of deposit, a residence and a money judgment in the amount of $2,195,635.28, the forfeiture section of the *Kaley* indictment specifically invoked 21 U.S.C. § 853(p), to claim an entitlement to

the forfeiture of substitute assets. Joint Appendix filed in *Kaley v. United States*, No. 12-464 at 60-62. Thus, the indictment in *Kaley* did "claim[ ] entitlement" to both tainted and substitute assets.

The Government's effort to reconcile *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001), fails for the same reason. In *Farmer*, the Fourth Circuit held that a defendant "possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice." *Id*. at 804. That holding conflicts with the decision of the Eleventh Circuit in this case. The Government denies the conflict by arguing that the Fourth Circuit found a constitutional right to a tracing hearing "[g]iven the theory of forfeiture on which the Government had proceeded." BIO 15.[2]

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[2] The Government also takes refuge in a few district court opinions in the Fourth Circuit purportedly upholding the constitutionality of pretrial restraints of substitute assets. BIO 16. Two of those cases were decided before *Farmer*. *United States v. Bollin*, 264 F.3d 391, 421-22 (4th Cir.), cert. denied, 524 U.S. 935 (2001) and 535 U.S. 989 (2002); *United States v. Helms*, No. 700CR00074, 2001 WL 1057751, at *2 (W.D. Va. 2001). Another was decided after *Farmer* but did not cite to it or even involve any Fifth or Sixth Amendment claims. *United States v. Bromwell*, 222 Fed. Appx. 307, 311 (4th Cir. 2007) (per curiam). Yet another district court mistakenly believed that *In re Billman* was a "post-*Farmer*" decision when, in fact, it pre-dated *Farmer* by ten years. *United States v. Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005). And two of the cases held that *Farmer* actually required a taint hearing. *In re Restraint of Bowman Gaskins Fin. Grp. Accounts*, 345 F. Supp. 2d 613, 627-28 (E.D. Va. 2004); *United States v. Ziadeh*, 230 F. Supp. 2d 702, 704

(Continued on following page)

Nothing in the *Farmer* decision supports the assumption that the Government was eschewing any claim to substitute assets. The Fourth Circuit had already held, contrary to other circuits, *see* Petition 7 n.1, that the forfeiture statute permitted the pretrial restraint of substitute assets. *In re Billman,* 915 F.2d at 921.[3] Given the "strong governmental interest in obtaining full recovery of all forfeitable assets," *Caplin*, 491 U.S. at 631, without giving the defendant a "sneak preview" through a "pre-trial mini-trial," *Kaley*, 134 S. Ct. at 1102, it strains credulity that the Government in *Farmer* would unnecessarily subject itself to a tracing/taint hearing, at which it would need to "present evidence . . . of probable cause to believe that the seized assets are tainted and forfeitable," *Farmer* 274 F.3d at 805, if the Constitution did not require one. In any event, the exercise of prosecutorial discretion to target some assets but not others could not give rise to a *constitutional* right to a tracing hearing to which a defendant would not otherwise be entitled.

(E.D. Va. 2002). *See also* Petition 27-29 (citing district court cases holding that the Fifth and/or Sixth Amendments prohibit the restraint of untainted assets needed to retain counsel).

[3] In *In re Billman*, the Fourth Circuit rejected a sixth amendment claim by the defendant to pay for an attorney with the substitute assets of a fugitive co-defendant, *id*. at 920-22, but did not address a defendant's right to use her *own* untainted assets to retain counsel of choice. See Petition 26-27 n.8.

The debate over the constitutionality of restraining "wholly legitimate funds to hire the attorney of his choice," *id.* at 804, is a matter of great concern: "[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. . . ." *Kaley*, 134 S. Ct. at 1110 (Roberts, C.J., dissenting) (citations and internal quotation marks omitted). This case presents a suitable vehicle to address head-on the constitutional question.[4] The Government does not suggest otherwise.

[4] Although "[P]etitioner's claim is that the Constitution bars pretrial restraint of substitute assets in every case in which the defendant needs funds to pay for counsel," BIO 17, Petitioner has challenged, in the alternative, "the process to contest the preliminary injunction entered by the district court under Section 1345." *Id. See* Petition 11-13 and nn.3&4.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

SCOTT A. SREBNICK
SCOTT A. SREBNICK, P.A.
201 S. Biscayne Boulevard,
Suite #1380
Miami, FL 33131
Telephone (305) 285-9019
Scott@Srebnicklaw.com

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN
& STUMPF, P.A.
201 S. Biscayne Boulevard,
Suite #1300
Miami, FL 33131
Telephone (305) 371-6421
HSrebnick@RoyBlack.com

Counsel for Petitioner

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