RECORD NO._____

IN THE
SUPREME COURT of the UNITED STATES

MARTIN LOUIS BALLARD,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Charles R. Brewer
ATTORNEY AT LAW
79 Woodfin Place, Suite 206
Asheville, NC 28801
828) 251-5002

Counsel of Record for Petitioner
Martin Louis Ballard

QUESTION PRESENTED

The question presented is: Whether the pretrial seizure of petitioner's bank account, without any hearing, deprived him of his right under the Sixth Amendment to the United States Constitution on select counsel of his own choosing or violated his Fifth Amendment right to procedural due process.

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Martin Louis Ballard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The Fourth Circuit's unpublished opinion in this case is found at App. 1. The district court's judgment can be found at App. 23.

JURISDICTION

The Court of Appeals entered its judgment on March 15, 2018; and it denied petitioner's petition for panel or *en banc* rehearing on April 17, 2018. App. 21.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This case began when petitioner and 15 co-defendants were named in a five count indictment on March 14, 2012. The indictment contained no forfeiture provision naming petitioner. Petitioner was charged only in Count 1 which alleged that he participated in a conspiracy to possess with intent to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base. Petitioner entered a plea of not guilty on March 19, 2012. On March 23, 2012, petitioner's business bank account containing $26,043.25 was seized by the government.

On May 30, 2012, the court continued the case; this was the first continuance of what would eventually total a dozen continuances.

On September 12, 2012, the first of what would eventually total four superseding indictments was returned. It named one additional defendant, expanded the dates of the original alleged drug conspiracy, and added an additional count against petitioner alleging a violation of 18 U.S.C. 924(c). It also added a forfeiture provision which named petitioner.

From September 12, 2012, until the end of the year 2012, and all through the year of 2013, one continuance after another was granted for the government.

On January 6, 2014, a jury was selected to try the drug conspiracy case. Significantly, on February 25, 2014, a second superseding indictment was returned. This indictment named petitioner and others with the drug conspiracy

and added charges against petitioner and others for having shot with intent to kill a then unnamed victim to prevent him from testifying in the upcoming drug conspiracy trial. CA JA 210. [1]

On February 25, 2014, petitioner appeared for his initial first appearance on the new charges. At the hearing petitioner's counsel requested that the record reflect that he and another attorney from his office were making a "special appearance" on the new indictment. The court inquired as to when the clerk's office could be advised as to whether counsel would be retained for the new charges; he was given ten days to do so. On March 11, 2014, a third superseding indictment was returned. This indictment added new names to the drug conspiracy and expanded the dates. The forfeiture provision remained.

On March 12, 2014, petitioner's retained counsel filed a motion to be relieved as counsel for the petitioner. Counsel alleged the money had "run out" for the defense, and new charges other than drug charges had been added to the case. On May 15, 2014, the court denied the motion of petitioner's counsel to withdraw. On August 4, 2014, petitioner's counsel filed a motion to sever the drug conspiracy counts from the counts alleging the shooting of the witness.

On September 22, 2014, a bond hearing was held. At the hearing defense counsel argued and objected to the government's continuances. A letter from the petitioner to the trial court regarding his objection to any further trial

[1] CA JA references the Joint Appendix filed in the Court of Appeals.

continuances was filed on October 8, 2014, noting that his truck company which was his primary source of income had been forced to slow down. CA JA 284.

On November 12, 2014, the fourth superseding indictment was filed. It added two new names and expanded the drug conspiracy dates. Petitioner alone was charged in Counts 2 and 4, which alleged a firearm charge and a possession with intent to distribute cocaine. (Count 2 was eventually dismissed with prejudice because the government did not proceed with it at trial, and petitioner was found not guilty as to Count 4.) Petitioner was charged in Count 10 with conspiracy to use, carry a firearm in relation to drug trafficking and crimes of violence. The forfeiture provision remained.

On November 12, 2014, petitioner's counsel filed a second motion to be relieved as counsel, or in the alternative, be appointed as CJA attorney so that he could collect CJA fees. On December 19, 2014, the court granted CJA status for petitioner's counsel with the caveat that said counsel might be required to make some accounting to the court in connection with the fees he had already been paid.

On March 31, 2015, the government filed a response to the petitioner's August 4, 2014, motion to sever. On April 10, 2015, defense counsel withdrew his motion to sever. Petitioner's counsel filed a motion for a bench trial, and the bench trial began on May 5, 2015. Petitioner was convicted of Counts 1, 5, 6, 7, 8, 9, 10, and 11 of the Fourth Superseding indictment and was convicted of a lesser

included offense in Count 3. He was found not guilty as to Count 4 and Count 2 was dismissed. Subsequently, the trial judge died; and a sentencing hearing was conducted by another judge on October 18, 2016. Petitioner was sentenced to a term of Life plus ten years. App. 23. Petitioner appealed; the Fourth Circuit Court of Appeals affirmed. App. 1.

REASON FOR GRANTING THE WRIT

Petitioner respectfully asserts that the *ex parte* pretrial seizure of his business account, which forced indigency upon him, violated his Sixth Amendment right to choice of counsel and his Fifth Amendment right to Due Process of Law. This Court's decision in *Luis v. United States,* 578 U.S. ___ , 136 S. Ct. 1083, 1088, 194 L.Ed. 2d 256 (2016), held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." The facts in *Luis* and the facts in this case are very similar. In *Luis*, the government obtained a pretrial court order freezing her accounts. Here, the government, based upon an *ex parte* motion, obtained a pretrial court order freezing his account. In *Luis,* the parties stipulated that an unquantified amount of revenue not counted to the indictment had flowed into some of the accounts. Here, two days prior to the account freezing during a detention hearing, the record reveals the government states, "the government doesn't contest that he does have legitimate income coming in through the business, but we believe there's commingling, and there are potentially money laundering charges down the road."[2] In *Luis*, she was

[2] Petitioner was never charged with money laundering.

prevented from dissipating her accounts, which forced indigency upon her, and she could not pay to retain a private attorney of her choice. Here, petitionere was prevented by the action of the government from using his account, which forced indigency upon him; and he could not pay to retain a private attorney of his choice.

In *Luis,* because of the account freezing she was forced to be represented by an attorney appointed under the Criminal Justice Act, which the court citing an *amicus* brief pointed out that "[m]any federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources." *Id.,* 1095. Petitioner herein, because of the freezing of his assets, was forced to be represented by an attorney appointed under the Criminal Justice Act for the defense of the murder plot charges. In *Luis,* the Court of Appeals for the Eleventh Circuit affirmed the district court's pretrial freezing of her accounts.

Here, the Court of Appeals for the Fourth Circuit affirmed the district court's pretrial freezing of petitioner's business account asserting that it need not resolve the issue of whether there were any legitimate, untainted monies in petitioner's business account since the pretrial seizure of the business account did not affect his choice of counsel.

> We need not resolve whether the funds in question were tainted because the seizure did not affect Ballard's choice of counsel. Ballard initially retained private counsel. After his assets were seized and he could no longer pay counsel, the district court appointed the same attorney to continue representing Ballard under the Criminal Justice Act ("CJA") 18 U.S.C. §3006A(20012). Although counsel twice moved to withdraw from representation prior to being appointed under the CJA, nothing in the record on appeal suggests that Ballard desired different

> counsel or that counsel's motions were motivated by anything beyond financial considerations. Indeed, counsel's second motion sought permission to withdraw or to be appointed under the CJA, and the court granted counsel's request for court appointment. We therefore conclude that Ballard is not entitled to relief on this claim.

App. 3-4.

Petitioner contends that in so ruling the Fourth Circuit ignores several pertinent and pivotal facts in his case that match as well as support this Court's reasoning in *Luis*. The Fourth Circuit's erroneous determination that the pretrial seizure of petitioner's business account did not affect his choice of counsel directly conflicts with *Luis* as well as subsequent decisions post *Luis* from sister circuits and conflicts with the facts of this case.

As an initial matter, petitioner contends that the Fourth Circuit's conclusion that there was no need to determine whether the seizure of defendant's business account was proper, *i.e.*, whether there were legitimate, untainted monies in the account before doing anything else is misplaced. Mr. Justice Thomas concurred only in the judgment in *Luis.* 136 S.Ct. at 1096 (Thomas, J concurring in the judgment). Eschewing the plurality's "atextual balancing analysis," Justice Thomas concluded that the text of the Sixth Amendment and the common law of criminal forfeiture prohibited the restraint of Luis' untainted assets, thereby obviating the necessity of any other inquiry. *Id.* at 1101.

The Fourth Circuit glosses over the issue of whether or not the initial pretrial seizure of petitioner's business account was proper. For nearly two decades prior to *Luis* the Fourth Circuit routinely allowed the seizure of criminal defendants' assets

pretrial without providing any hearing to determine whether or not the assets were tainted. *In re Billman*, 915 F.2d 916 (4th Cir. 1990), the Fourth Circuit extended this Court's holding in *US v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989) for the proposition that the government may seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable. 915 F.2d at 919. Acknowledging that *Monsanto* addressed the distinct issue of the government authority to restrain tainted assets described under 21 U.S.C. §853(a), the Fourth Circuit extended this Court's reasoning to include untainted substitute assets under 853(e).

Seven sister circuits disagreed with the Fourth Circuit's holding, yet this weight of authority failed to move the Fourth Circuit to revisit its minority view. *See U.S. v. Parrett*, 530 F.3d 422 (6th Cir. 2008); *US v. Jarvis*, 499 F3d 1196 (10th Cir. 2007): *U.S. v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *U.S. v. Riley*, 78 F.3d 367 (8th Cir. 1996); *U.S. v. Goth*, 155 F.3d 144 (2nd Cir. 1998); *U.S. v. Moya-Gomez,* 860 F.2d 707 (7th Cir. 1988); and *U.S. v. Long,* 654 F.2d 911 (3rd Cir. 1981).

In *Luis* this Court rejected such an expansive reading of its earlier holding in *Monsanto*. Specifically the Court explained in *Luis* that unlike tainted assets where the defendant's ownership is necessarily imperfect—untainted assets belong to the defendant pure and simple. Likewise, the plain language of 21 U.S.C. § 853(a) provides no authority to restrain substitute assets prior to trial. The seizure herein was based upon an *ex parte* motion filed by the government. This bank account was, at least in part,

legitimate, untainted assets which petitioner could have and would have used to retain different counsel to assist him in defending the charges relating to the shooting of a witness, a considerably different nature of charges from the drug charges.

Two days prior to the business account seizure during the defendant's detention hearing, the record reveals the government (AUSA Phillips) states, "the government doesn't contest that he does have legitimate income coming in through the business, but we believe there's commingling, and there are potentially money laundering charges down the road." (Petitioner was never charged with money laundering). Certified Forensic Accountant Richard Livingston, (who the government stipulated was an expert in the field), testified the funds in the account appeared to come from legitimate activity and the defendant's lifestyle was consistent with his income. (The government offered nothing in rebuttal). Petitioner privately retained Jerry Theos to represent him in the defense of the original indictment in which he was only charged with drug offenses. Thereafter, the government's unilateral *ex parte* action impoverished him taking away his ability to select counsel of his choosing when the murder plot charges were brought.

The Fourth Circuit's glossing over these facts and failure to make a determination of whether petitioner's account held legitimate, untainted assets directly conflicts with this Court's holding in *Luis* and its earlier holding in *Monsanto.* This holding denies the petitioner both his substantive and procedural Due Process rights. The Due Process Clause of the Fifth Amendment of United States Constitution guarantees that liberty and property cannot be taken unless the government

offers a fair procedure to contest the taking. Due Process requires an opportunity to be heard at a meaningful time and in a meaningful manner. (*Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). No forfeiture hearing was provided to petitioner under 21 U.S.C. §853 in which petitioner and his counsel were present to contest the freezing of his bank account. The Fourth Circuit asserts that because the defendant had counsel that he selected throughout the proceedings, there can be no Sixth Amendment violation for the seizure of his bank account. At first blush the argument may sound reasonable , but it will not stand up to scrutiny. Attorneys tend to specialize; some attorneys specialize in family law, others commercial law, and others criminal law, etc. This specialization can and does occur within each sector of law as well. For example, some attorneys who practice criminal law specialize in handling drug cases, others, for instance, specialize in handling capital cases or traffic cases and so on. Some lawyers are known for research and writing abilities, others for trial work. Attorneys are sought out and hired everyday for these reasons. Consequently, petitioner originally hired his attorney J. Theos because he was a well known attorney in the area who specialized in drug cases. Two years later when new charges were lodged against petitioner alleging a murder plot, he would have wanted to hire either a new or additional counsel specializing in murder cases.

As a consequence of the account seizure the trucking business operations were essentially shut down, forcing indigency upon petitioner approximately one week after his arrest. Thereafter he could not afford counsel of his own choosing when the murder

plot charges were lodged nearly two years later. Whereas petitioner had been charged with only one drug count when he retained counsel, by the time he went to trial he was facing eleven counts including murder plot charges.

The Fourth Circuit relies upon the fact that petitioner had the same attorney he originally chose, from start to finish to conclude that no choice of counsel violation of the Sixth Amendment can, or has occurred. Therefore, it concludes that there is no reason to determine if the pretrial account seizure was improper. This conclusion ignores the fact that as each new indictment is returned, petitioner was taken for an initial appearance hearing in which the status of his counsel was reviewed and in which the judicial authority inquired as to whether he would have the same counsel, new counsel, represent himself, or seek a CJA attorney.

Petitioner had a "choice of counsel" decision to make at each of the four different hearings. A decision that for all intents and purposes was made over two years earlier for petitioner, by the government on March 23, 2012, when by *ex parte* motion it seized petitioner's legitimate, untainted monies in his business account, forcing indigency upon him. Because petitioner was made destitute by the seizure of his bank account he was unable to select counsel of his choice no less than four times to defend the sweeping changes in the original indictment as a result of the attempted murder charges.

Luis observed that the Sixth Amendment gives a criminal defendant "a fair opportunity to secure counsel of his own choice." *Luis* at 1089. Quoting *Caplin and Drysdale, Chartenal v. United States,* 491 U.S. 617, 624 (1989) the Court emphasized

again the fundamental nature of the right. The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Luis at* 1089. While the government in *Luis* did not deny that defendant had such a right, it undermined the value thereof by taking from Luis the money she would need to pay the attorney of her choice. Like in *Luis*, the government here took petitioner's money he needed to pay for the attorney of his choice. Further, in so doing, the government interfered with petitioner's relationship with the attorney originally hired to represent him on the one count drug conspiracy. *See* generally, *Kirch v. Liberty Media Corp.,* 449 F. 3d 388 (2nd Cir. 2006); *Israel v. Wood Dolson Co.*, 1 N.Y. 2d 116, 134 N.E. 2d 97, 151 N.Y.S. 2d 1 (Court of Appeals of New York 1956) (Interference with prospective economic advantage covers interference with the ability to pursue legal remedies against another party).

Criminal defendants have an undeniably strong interest—indeed, one protected by the Constitution – in presenting a defense via counsel of their choice, and in obtaining, without government interference, the contractually guaranteed fee advances that allow them to do so . *See U.S.v. Stein*, 435 F. Supp. 2d. 350, 367-69 (S.D.N.Y. 2006). The *Stein* court, relying on this Court's holding in *Gonzalez-Lopez*, *infra,* appropriately noted:

> Virtually everything the defendants do in this case may be influenced by the extent of the resources available to them. There simply would be no way to know, after the fact, whether the outcome had been influenced by limitations improperly placed upon the availability of resources.

Stein at 372. This Court wrote in *Gonzalez-Lopez* the following:

> We have little trouble concluding that erroneous deprivation of the rights to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."' Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defence, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of those myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,'--or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. *Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.*

U.S. v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557, 2559-60, 165 L.Ed. 2d 409. (Emphasis added).

The Fourth Circuit for two decades, relying on their erroneous reading of this Court's holding in *Monsanto*, 491 U.S. 600, has been allowing the seizure of pretrial criminal defendants' legitimate, untainted assets without providing any hearing. This has upset the balance between criminal defendants and the prosecuting authorities sufficient to deny them their rights under the Sixth Amendment and Fifth Amendment. Petitioner asserts that it is improper and constitutionally infirm for the government to prosecute a criminal defendant while at the same time seeking to influence the manner in which the defendant seeks to defend the case. Likewise, petitioner contends the Fourth Circuit has

erroneously interpreted the decision in *Luis.* The pretrial seizure of the petitioner's business account, which forced indigency upon him, and interfered with his relationship with his attorney, violated his Sixth Amendment right to choice of counsel and his Fifth Amendment right to Due Process.

As an alternative matter, it is well recognized that conflicts of interest between attorney and client are structural errors that so affect the framework within which the trial proceeds that courts may not even ask whether the error harmed the defendant. There is a presumption of prejudice requiring reversal. *See*, *Holloway v. Arkansas*, 435 U.S. 475, 55 L.Ed. 2d 426, 98 S. Ct. 1173 (1978) (held a rule that required a defendant to show that a conflict prejudiced him would not be susceptible to intelligent, even handed application).

The application of 21 U.S.C.§ 853 to encompass bona fide attorneys fees violates a criminal defendant's Sixth Amendment rights in two ways. First, it violates the defendant's right to obtain counsel of his choice. Sixth Amendment includes right to reasonable opportunity to obtain and be represented by an attorney of one's choosing where defendant can do so from his own resources. Second, it creates inherent conflicts of interest between the attorney and his client and chills the free flow of information between attorney and client, resulting in a deprivation of the defendant's right to effective assistance of counsel.

Application of forfeiture provisions to attorneys fees violates due process because the government would possess the ultimate tactical advantage of being able to exclude

competent defense counsel as it chooses. It would undermine the adversary system itself, by providing an imbalance of powers that violates the Due Process Clause of the Fifth Amendment. *See Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208. (1973) (Due Process requires the balance of forces between the accused and his accuser). Also, the possibility of an attorney appearing as a third party petitioner in a 21 USC § 853(n) hearing also undermines the attorney-client relationship, further impinging on the right to counsel. The threat of an attorney having to disclose information obtained from his/her client chills the openness of attorney-client communications. If an attorney advises his/her client of the possible ramifications of the disclosure of this information , the free flow of information is even further chilled depriving the defendant of effective representation. *U.S. v. Reckmeyer,* 631 F. Supp. 1191 (E.D. VA. - 1986); *U.S. v. Badalamenti,* 614 F. Supp. 194 (S.D.N.Y. 1985); *U.S. v. Rogers*, 602 F. Supp. 1332 (District of Colorado- 1985); and *U.S. v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel. Many conflicts are readily apparent. To name a few, the attorney's obligation to thoroughly investigate his/her client's case would conflict with his/her interest in not learning facts tending to inform him/her that his/her fee will be paid with proceeds of an illegal activity; the attorney's obligation to negotiate a guilty plea which is in his/her client's best interest may conflict with his/her desire to have his /her client enter a plea that does not involve forfeiture; the attorney's

desire to fight the forfeiture claiming he/she was reasonably without cause to believe that the property was subject to forfeiture would conflict with his/her obligation to maintain his/her client's confidences-- and this is just to name a few.

After this Court ruled in *Woods v. Georgia*, 450 U.S. 261, 67 L.Ed. 2d 220, 101 S. Ct. 1097 (1981) there are two certain rules of Sixth Amendment law. One, if an actual conflict of interest is present, constitutional error has occurred, as prejudice is inherent in the conflict. Two, reversal is mandated when the trial court fails to make an inquiry when it knows or reasonably should know a conflict may exist. See also, *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed. 426 (1978). Petitioner contends there is an actual conflict of interest present in his case created by the government's seizure of his bank account which contained promised legal fees. Further, petitioner contends the possibility of a conflict of interest was sufficiently apparent to the court when counsel twice filed to be relieved as counsel for petitioner, and/or when counsel filed to have the drug conspiracy trial severed from the murder conspiracy trial. This sufficiently apparent conflict of interest imposed a duty on the court to inquire further, which it failed to do. Thus, reversal is mandated.

CONCLUSION

For the reasons stated herein, defendant respectfully requests this Court to reverse and vacate the judgment of the district court.

July 16, 2018

Respectfully submitted,

s/ Charles R. Brewer
Charles R. Brewer
79 Woodfin Place, Suite 206
Asheville, NC 28801
(828) 251-5002
Counsel of Record for Petitioner