

No. 25-465

In the Supreme Court of the United States

TIMOTHY BARTON, PETITIONER

v.

UNITED STATES SECURITIES AND EXCHANGE
COMMISSION, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF OF AMICUS CURIAE KEN PAXTON,
ATTORNEY GENERAL OF TEXAS,
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

Amicus curiae is Ken Paxton, Attorney General of Texas.¹ Attorney General Paxton is the “chief law officer of the State,” *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (1943), and has also sworn an oath to “preserve, protect, and defend the Constitution and laws of the United States.” Tex. Const. art. XVI, §1. General Paxton has an interest in the protection of the rights of Texas citizens in the courts of the United States, including preservation of the right to retain counsel.

SUMMARY OF ARGUMENT

The core of the Sixth Amendment’s right to assistance of counsel is “to be represented by an otherwise qualified attorney whom that defendant can afford to hire.” *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989). Violation of this right is a structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

Although this Court has held that the Government may freeze or seize “tainted” assets before trial, the Government cannot prevent a defendant from using “untainted funds, *i.e.*, funds not connected with the crime, to hire counsel to defend her in her criminal case.” *Luis v. United States*, 578 U.S. 5, 8 (2016) (plurality op.); *see also id.* at 25 (Thomas, J., concurring in the judgment).

This Petition presents the important and complex question regarding the interaction of these principles—and petitioner’s Sixth Amendment rights—with parallel civil and criminal proceedings in which the Securities and

¹ No counsel for any party authored this brief, in whole or in part. No person or entity other than amicus contributed monetarily to its preparation or submission. On November 7, 2025, counsel of record for all parties received notice of amicus’s intention to file this brief.

Exchange Commission has obtained a receivership over companies that allegedly benefited from criminal activity. According to petitioner, these receiverships have “seized *all* of Mr. Barton’s assets, leaving him unable to pay his lawyers in the parallel criminal prosecution brought by the Department of Justice, Pet. 25, raising significant Sixth Amendment concerns. This Court should grant the Petition to address whether petitioner’s Sixth Amendment right to retain counsel permits the receiverships over his assets.

ARGUMENT

I. The Sixth Amendment Protects the Right to Retain Counsel.

This Court has recognized “[t]he right to select counsel of one’s choice” as “the root meaning of the constitutional guarantee” to assistance of counsel. *Gonzalez-Lopez*, 548 U.S. at 147-48. The Sixth Amendment protects “the right of a defendant who does not require appointed counsel to choose who will represent him.” *Id.* at 144 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)). A defendant is entitled to “a fair opportunity to secure counsel of his own choice.” *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *see also Gonzalez-Lopez*, 548 U.S. at 154 (Alito, J., dissenting) (“There is no doubt, of course, that the right ‘to have the Assistance of Counsel’ carries with it a limited right to be represented by counsel of choice. . . . 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.”).

The assistance of counsel is of “vital importance” to a criminal defendant. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Counsel “plays a crucial role in the adversarial system embodied in the Sixth Amendment,

since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

This right is violated when a defendant is deprived of his choice of counsel, regardless of whether the defendant was prejudiced by that denial. A defendant who can retain counsel has the right to “be defended by the counsel he believes to be best.” *Gonzalez-Lopez*, 548 U.S. at 146; *see also id.* (“[T]he right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation ‘complete.’”). “[E]rroneous deprivation of the right to counsel of choice” is a “structural error.” *Id.* at 150 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

The right “to be represented by an otherwise qualified attorney whom that defendant can afford to hire,” *Caplin & Drysdale*, 491 U.S. at 624-625, necessarily includes some right of access to funds to hire an attorney. Put simply, a defendant “may not insist on representation by an attorney he cannot afford.” *Wheat*, 486 U.S. at 159.

On three occasions, this Court has addressed the interaction between the Sixth Amendment right to retain counsel of choice and laws permitting a defendants’ assets to be frozen before trial. *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale*, 491 U.S. 617, involved the Comprehensive Forfeiture Act of 1984 (CFA), 21 U.S.C. § 853(a). This Act provides for forfeiture of “property constituting, or derived from . . . proceeds . . . obtained” from certain drug crimes. 21 U.S.C.

§ 853(a). Courts can enter ex parte restraining orders or injunctions to “preserve the availability of property” that would be subject to forfeiture. *Id.* § 853(e)(1).

In *Monsanto*, the defendant “moved to vacate this restraining order” so that he could “use the frozen assets to retain an attorney,” 491 U.S. at 604, in addition to seeking a declaration that the funds could not be reclaimed if used to pay an attorney, *id.* Failure to allow access to these funds, the defendant contended, would violate his Sixth Amendment rights. *Id.*

This Court rejected these arguments. First, the statute did not include an attorney’s fees exception. “[T]he language of § 853 is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney’s fees—or anything else, for that matter.” *Id.* at 606. Nor is there equitable discretion in the statute for a district court to refuse to extend pretrial restraining orders to these assets; the provision is “plainly aimed at implementing the commands of § 853(a) and cannot sensibly be construed to give district court discretion to permit the dissipation of the very property that § 853(a) requires be forfeited upon conviction.” *Id.* at 612-13. “[T]here is no exemption from § 853’s forfeiture or pretrial restraining order provisions for assets which a defendant wishes to use to retain an attorney.” *Id.* at 614.

This statutory holding required this Court to address the constitutionality of these provisions under the Sixth Amendment. It did so in *Caplin & Drysdale*, 491 U.S. at 619, released the same day, where this Court held that forfeiture of assets that would be used to pay an attorney’s fees does not violate the Sixth Amendment. In that case, a law firm asserted a claim against forfeited

property based on services it had provided the defendant in conducting its defense. *Id.* at 621.

This Court held that the forfeiture law places only a “limited” burden on a criminal defendant: “The forfeiture statute does not prevent a defendant who has non-forfeitable assets from retaining any attorney of his choosing.” *Id.* at 625.

The right to retain counsel is limited to an individual’s right “to spend his own money.” *Id.* at 626; *see id.* (“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.’” (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting))). “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.” *Id.* Any title in the forfeitable assets vested in the United States “at the time of the criminal act giving rise to forfeiture.” *Id.* at 627. The defendant thus had no right to use these assets to retain counsel. *See id.* at 628 (“There is no constitutional principle that gives one person the right to give another’s property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right.”). “[T]here is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense.” *Id.* at 631.

Relying on *Caplin & Drysdale*, this Court held in *Monsanto* “that assets in a defendant’s possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable.” 491 U.S. at 615. “[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial.” *Id.* at 616.

Seventeen years later, this Court revisited these principles in *Luis*, 578 U.S. 5. That case addressed a federal statute allowing a court to freeze before trial (1) property “obtained as a result of” violations of federal health care or banking laws, (2) property “traceable” to these violations, and (3) other “property of equivalent value.” *Id.* at 8 (plurality op.) (quoting 18 U.S.C. § 1345).

An order freezing assets in the third category, which “prevent[ed] [a defendant] from using her own untainted funds, *i.e.*, funds not connected with the crime, to hire counsel to defend her in her criminal case”—violated the Sixth Amendment. *Id.* at 9; *see also id.* at 25 (Thomas, J., concurring in the judgment).

The plurality reached this result through a balancing test. “[T]he constitutional right at issue here is fundamental: ‘The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire.’” *Id.* at 12 (cleaned up). “[T]he property here is untainted; *i.e.*, it belongs to the defendant, pure and simple.” *Id.* Although the Government may be able to freeze or seize “tainted” assets before trial, it cannot seize “untainted” assets, which belong to the defendant. *Id.* at 13-16. “If we

analogize to bankruptcy law, the Government, by application of § 853(c)'s relation-back provision, became something like a secured creditor with a lien on the defendant's tainted assets superior to that of most any other party." *Id.* at 16.

The Government had an interest in "preserv[ing] [the defendant's] untainted assets so that they will be available to cover the costs of forfeiture and restitution," much like an order protecting against waste or dissipation. *Id.* at 18. But this interest was outweighed by the defendant's Sixth Amendment right: "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." *Id.* at 20. Moreover, the principle urged by the Government "would have no obvious stopping place." *Id.* at 21.

Justice Thomas reached the same result through a historical analysis: "The Sixth Amendment provides important limits on the Government's power to freeze a criminal defendant's forfeitable assets before trial" because "[t]he common law limited pretrial asset restraints to tainted assets." *Id.* at 25 (Thomas, J., concurring in the judgment). "[T]he Sixth Amendment prevents the Government from freezing untainted assets in order to secure a potential forfeiture." *Id.* "An unlimited power to freeze a defendant's potentially forfeitable assets in advance of trial would eviscerate the Sixth Amendment's original meaning and purpose." *Id.* at 27; *see also id.* at 29 ("[F]or *in personam* criminal forfeitures like that at issue here, any interference with a defendant's property traditionally required a conviction."). "The common law thus offers an administrable line: A criminal defendant's untainted assets are protected from Government

interference before trial and judgment. His tainted assets, by contrast, may be seized before trial as contraband or through a separate *in rem* proceeding.” *Id.* at 32.

* * *

In sum, this Court has recognized the “root meaning” of the Sixth Amendment’s right to assistance of counsel as the right “to be represented by an otherwise qualified attorney whom that defendant can afford to hire.” *Id.* at 19 (plurality op.) (quoting *Caplin & Drysdale*, 491 U.S. at 624–625). Deprivation of this right is a fundamental, structural error. *Gonzalez-Lopez*, 548 U.S. at 147–48. Although the Government can freeze a defendant’s “tainted assets”—which are not rightfully the defendant’s, *Caplin & Drysdale*, 491 U.S. at 626—even when the defendant seeks to use those assets to retain counsel, the government cannot freeze untainted assets before trial. *Luis*, 578 U.S. at 5.

II. This Petition Presents Serious Questions Regarding the Interaction of Receiverships with the Sixth Amendment Right to Retained Counsel.

This Petition presents important questions regarding the application of these rules in a different context: receiverships in a civil action to enforce the securities laws by the Securities and Exchange Commission against a defendant who faces parallel criminal proceedings.

According to the Petition, the receivership has “left Mr. Barton without the resources to pay or retain counsel to defend himself against the Government’s charges.” Pet. 15. Mr. Barton contends that he must “rel[y] on his children for shelter and [is] without resources to pay counsel defending against the Government’s allegations.” Pet. 21.

Because of the parallel criminal proceedings, the Government’s deprivation of petitioner’s assets—which

will prevent petitioner from retaining counsel of his choice—raises concerns under the Sixth Amendment. Before petitioner is forced to proceed to trial without access to the counsel of his choice, this Court should consider how the standard set forth in *Luis*, *Caplin & Drysdale*, and *Monsanto* applies in this context.

Tracing financial assets is far from straightforward. *See, e.g.*, Sean Michael Welsh, *Financial Tracing in Asset Forfeiture Cases*, 67 DOJ J. Fed. L. & Prac. 65, 67 (2019). And in this case, the assets being frozen are themselves companies. Pet. 28. The application of this Court’s test for “tainted” and “untainted” assets to corporations owned by a defendant appears to present a complex and novel question. *See* Pet. 28 (“No decision of this Court has ever held that an entire company and each of its assets become ‘tainted’ if the company benefits in any way from the proceeds of an illegal act.”).

When a defendant is subject to parallel civil and criminal proceedings, the freezing of the defendants’ assets, including in the form of a receivership, raises significant constitutional concerns. Granting certiorari would allow this Court to address the application of the Sixth Amendment right to retain counsel in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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