NO. 16-4494

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ANDRACOS MARSHALL,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (CHASANOW, J.), AT GREENBELT

BRIEF OF AMICUS CURIAE NACDL IN SUPPORT OF ANDRACOS MARSHALL'S PETITION FOR REHEARING EN BANC

Elizabeth A. Franklin-Best
Counsel for Amicus Curiae,
National Association of Criminal Defense Lawyers
Fed ID #9969
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

Caleb Kruckenberg
White Collar Crime Policy Counsel
National Association of Criminal Defense Lawyers
1660 L Street NW 12th Floor
Washington DC 20036

TABLE OF CONTENTS

TABLE OF AUTHORITIES....3
STATEMENT OF AMICUS CURIAE....4
INTRODUCTION....5
STATEMENT OF THE CASE....5
ARGUMENT....6
A. This case presents an issue of exceptional importance because it denies all defendants the use of innocent assets to hire counsel if they have been subject to any post-conviction forfeiture....7
B. The published panel opinion conflicts with the Supreme Court's decision in *Luis v. United States*....9
CONCLUSION....13

TABLE OF AUTHORITIES

Cases

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 620, 632 (1989).....9

Griffin v. Illinois, 351 U.S. 12, 18 (1956) 7

Luis v. United States, --- U.S. ---, 136 S.Ct. 1083, 1089 (2016) .....passim

United States v. Marshall, --- F.3d ----, 2017 WL 4227960 (Sept. 25, 2017).....6, 11

United States v. Monsanto, 491 U.S. 600, 615 (1989).....12

STATEMENT OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in the fundamental right to counsel, and the right to counsel of a defendant's choice, as representation by counsel is the most foundational means to safeguard the essential rights of the accused.

No part of this brief was authored by any party's counsel. No funds used in preparing and submitting this brief were obtained from any person or entity other than amicus curiae and undersigned counsel.

INTRODUCTION

In order to protect the fundamental right to a defendant's Sixth Amendment right to counsel, this Court should consider, *en banc*, whether the government may prevent a person from using money that was lawfully obtained to pay for appellate counsel of his choosing. Andracos Marshall has sought to pay his attorney's fees out of funds that the government concedes are untainted by unlawful conduct. Yet a panel of this Court determined, in a published opinion, that the government's statutory right to forfeit those substitute assets overcomes any constitutional right to pay for counsel during his appeal as of right. This decision not only will deny Mr. Marshall representation of his choice at the merits stage of this case, but will effectively eliminate the possibility of representation by private counsel in any future case involving a forfeiture order.

STATEMENT OF THE CASE

When the government charged Andracos Marshall with various federal offenses it placed a hold on approximately $59,000 from his National Institutes of Health Federal Credit Union Account. These funds were derived from Mr.

Marshall's employment at George Washington University, and were untainted by any criminal conduct.

After Mr. Marshall was convicted, and ordered to forfeit the criminal proceeds of his offenses, the government obtained an order forfeiting the untainted assets as substitute assets under 21 U.S.C. § 853(p).

Mr. Marshall, through private counsel, moved for release of the substitute assets because they were untainted by any criminal conduct and were necessary to pay for his counsel of choice. Mr. Marshall's attorney explained that, without using the untainted assets, Mr. Marshall would not be able to pay for the costs of his appeal.

After staying the forfeiture orders for consideration of the issue, a panel of this Court denied Mr. Marshall's request to use the substitute funds and ordered the direct appeal to proceed. *United States v. Marshall*, --- F.3d ----, 2017 WL 4227960 (Sept. 25, 2017). The panel held, in a published opinion, that Mr. Marshall's Sixth Amendment right to counsel of choice, assuming it applied coextensively in this context, was subservient to the government's statutory right to forfeiture over substitute property. *Id.* at *3 n.7, 5.

Mr. Marshall has now moved for re-hearing by the *en banc* Court. The undersigned urge this Court to grant his request and consider this fundamental issue.

ARGUMENT

The panel's decision addresses a basic question that impacts every defendant who is subject to a forfeiture order after a conviction – whether he may hire an attorney of his choice. By deciding that the government's statutory right to forfeiture is superior to a defendant's Sixth Amendment right to counsel, the panel effectively denied any defendant subject to forfeiture the right to hire counsel of his choosing for his appeal. Not only does this have profound consequences for the basic right to counsel of choice, but it is inconsistent with Supreme Court law.

A. This case presents an issue of exceptional importance because it denies all defendants the use of innocent assets to hire counsel if they have been subject to any post-conviction forfeiture.

The Sixth Amendment to the United States Constitution guarantees, among other things, the "fundamental" right to counsel. *Luis v. United States*, --- U.S. ---, 136 S.Ct. 1083, 1089 (2016) (plurality opinion). It also guarantees, through the Fourteenth Amendment, the right to counsel through any direct appeal as of right. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."). Moreover, "[g]iven the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust … the

Sixth Amendment also grants a defendant a fair opportunity to secure counsel of his own choice." *Luis*, 136 S. Ct. at 1089 (plurality opinion).

This "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." *Luis*, 136 S. Ct. at 1096-97 (Thomas, J., concurring); *see also id.* at 1090 (plurality opinion) (reasoning that that the government "would undermine the value of that right by taking from [an accused] the ability to use the funds she needs to pay for her own attorney").

Thus, in order to protect the right to counsel of choice, the government may not restrain "innocent," "untainted," assets that a defendant needs to pay for her attorney of choice. *Luis*, 136 S. Ct. at 1095 (plurality opinion). Any statute that allows such restraint violates the Sixth Amendment. *Id.*

Despite this rule, the panel decision would render Mr. Marshall incapable of hiring the counsel of his choice in this very appeal, by prohibiting him from using funds that all the parties agree were not derived from any criminal activity. The panel decision addressed only the forfeiture of funds needed for the appeal, and did not address the merits of Mr. Marshall's case. By ruling as it did, the panel denied Mr. Marshall the right to continued representation by his counsel.

More significantly, the published panel ruling denies that same right to any defendant in this circuit facing forfeiture after conviction. This applies both on

appeal, as here, and in other criminal matters. If, for example, a defendant faced parallel proceedings in state and federal court, and was subject to conviction and forfeiture in federal court first, the panel ruling would disallow use of any untainted, substitute, funds for the state proceedings. Such an outcome should not result, at a minimum, without full consideration by this Court *en banc*.

B. The published panel opinion conflicts with the Supreme Court's decision in *Luis v. United States*.

The Supreme Court has set out a clear line with respect to the Sixth Amendment right to counsel of choice between forfeitures of tainted and untainted assets.

First, in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 620, 632 (1989), the Court held that a statute that allowed post-conviction forfeiture of assets that were actually "derived from" criminal acts did not violate the Sixth Amendment's right to counsel of a defendant's choice. This was because these assets, directly traceable to unlawful acts, because a defendant "has no Sixth Amendment right" to spend money that "is not rightfully his." *Id.* at 626.

But this did not answer the corollary question of whether a defendant has an unqualified right to spend money that *is rightfully his*, but still subject to a statutory forfeiture order.

In *Luis v. United States*, 136 S. Ct. at 1088, the Court concluded that the Sixth Amendment right to counsel prohibited the forfeiture of funds that were innocent

funds "substitute[d]" for assets derived from unlawful activity. A majority determined that the operative difference between *Luis* and *Caplin & Drysdale, Chartered*, was that Luis' assets were "untainted" by any criminal conduct. *See id.* at 1095-96 (plurality opinion); *id.* at 1096 (Thomas, J.) (concurring).

Writing for a plurality of the Court, Justice Breyer determined that, in order to protect the "fundamental" Sixth Amendment right for a defendant to "secure counsel of his own choice," forfeiture of funds could only pass constitutional scrutiny if the government's property interest in those funds outweighed that of the defendant's. *Luis*, 136 S. Ct. at 1089. This, in turn, involved a question of whether the assets were "tainted," by being the proceeds of a criminal act. *Id.* at 1090. A defendant has an "imperfect" ownership interest in "tainted" assets, which is inferior to the government's statutory interest in ensuring that the assets are subject to forfeiture. *Id.* But, in the case of "*un*tainted property," the government has no "equivalent governmental interest in that property" that can prevail over the Sixth Amendment interest. *Id.* at 1092. (emphasis in original). Applying a balancing inquiry, the Plurality concluded that the government's "contingent interest" in these substitute assets, had to give way to the superior constitutional interest. *Id.* at 1093.

Concurring in the judgment, Justice Thomas agreed that the only relevant question was whether the assets at issue were "untainted" or "tainted," i.e., whether they were themselves traceable to a criminal act or merely substituted for such assets.

Id. at 1096-97. The latter were "protected from Government interference," at least, as in the *Luis* case, "before trial and judgment." *Id.* at 1101. Justice Thomas relied on the longstanding common-law prohibition on seizing or even freezing a "criminal defendants' untainted assets" in supporting his conclusion. *Id.*

The panel departed from this authority by failing to adhere to the distinction between tainted and tainted assets. The panel instead determined that the relevant factor was the fact of a conviction, not the nature of the assets, because the fact of conviction voided all ownership interest in the innocent funds. The panel read "these cases [to] require the conclusion that Marshall may not use his forfeited assets to hire appellate counsel" because "the right to use forfeited funds to pay for counsel hinges upon ownership of the property at issue." *Marshall*, 2017 WL 4227960, at *5. But, in the panel's view, Marshall's "credit union funds forfeited after conviction as § 853(p) substitute assets" granted him no ownership interest at all. *Id.* Thus, the panel determined that "Marshall does not own the property he seeks to use to pay appellate counsel" and therefore had no interest that could compete with the government's *statutory* right to forfeit these substitute funds. *Id.*

The panel's logic was contrary to that used by the Supreme Court. Whereas the panel viewed the fact of Mr. Marshall's conviction as altering his property interest in his untainted assets, that distinction was rejected by the full Court. As a constitutional matter, a defendant's Sixth Amendment interest does not depend on

whether his assets are forfeit or merely frozen. The Sixth Amendment allows both pre and post-conviction seizures on mere "probable cause to believe" that the assets were *tainted*. *United States v. Monsanto*, 491 U.S. 600, 615 (1989). Whereas it does *not* allow seizures of untainted funds based on that same showing of suspicion. *Luis*, 136 S. Ct. at 1096 (plurality opinion), *id.* (Thomas, J., concurring). The only constitutionally significant factor is whether or not the assets were *tainted* or *untainted*. *Id.* This is because "[a]s far as [a defendant's] 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 1094 (plurality opinion.)

To be sure, four members of the Court in *Luis* viewed the nature of the government's statutory interest in a defendant's assets as a relevant factor in a balancing analysis, but, even to the extent the Plurality analysis should guide this case, the panel here misapplied it. The Plurality noted that the government's interest in untainted pre-trial assets was akin to "an unsecured creditor," and thus could not hope to outweigh the "Sixth Amendment right to assistance of counsel that is a fundamental constituent of due process of law." *Luis*, 136 S. Ct. at 1092-93. While, perhaps, the government's property interest here is stronger than in *Luis*, the ultimate interests are the same – "obtaining payment of a criminal forfeiture or restitution." *See id*. Those interests "compared to the right to counsel of choice," which, the panel

assumed applied in equal force in this case, "would seem to lie somewhat further from the heart of a fair, effective criminal justice system." *See id.* The panel's application of the balancing test, even if it controls this case, was therefore erroneous.

CONCLUSION

This Court should consider this case *en banc* to give careful consideration to any rule that would effectively deny all defendants facing forfeiture orders the right to hire counsel of his choice in future matters.

Respectfully submitted,

/s/ Elizabeth A. Franklin-Best
Counsel for Amicus Curiae,
National Association of Criminal Defense Lawyers
Blume Franklin-Best & Young, LLC
Fed ID #9969
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

CERTIFICATE OF SERVICE

I certify that on this day, October 22, 2017, I served the foregoing Motion for Leave to File Brief of NACDL as Amicus Curiae in Support of Appellant's Petition for Rehearing *En Banc* via the Court's ECF system upon all counsel.

Respectfully submitted,

/s/ Elizabeth A. Franklin-Best
Counsel for Amicus Curiae,
National Association of Criminal Defense Lawyers
Blume Franklin-Best & Young, LLC
Fed ID #9969
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 29(b)(4) the undersigned counsel certifies that this brief: (i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger and, (ii) complies with the length requirement of Rules 29(a)(5) and 29 (b)(4) because it is 2561 words.

Respectfully submitted,

/s/ Elizabeth A. Franklin-Best
Counsel for Amicus Curiae,
National Association of Criminal Defense Lawyers
Blume Franklin-Best & Young, LLC
Fed ID #9969
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044