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Expert Analysis

Supreme Court Limits Scope Of Asset Forfeiture

By **Richard Strassberg** And **William Harrington**

Earlier this year, in *Luis v. United States*,[1] the Supreme Court attempted to clarify the extent to which, prior to trial, the government can seek to freeze property that it claims likely will ultimately be subject to forfeiture. In a plurality opinion, Justices Stephen Breyer, Ruth Bader Ginsburg, John Roberts, and Sonia Sotomayor—joined by Justice Clarence Thomas concurring in the judgment—held that property untainted by the crime charged may not be frozen if it prevents a criminal defendant from paying her lawyer a reasonable fee.[2] The Supreme Court's decision helps to shed light on the limits to the, at times, seemingly limitless breadth of the forfeiture laws; but it raises a series of questions with which courts will now have to grapple.

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Decision in 'Luis'

The opinions of the plurality and principal dissent describe the facts of the case. In October 2012, a federal grand jury charged Sila Luis with paying kickbacks, conspiring to commit health-care fraud, and engaging in other crimes related to health care.[3] The government alleged that Luis used her health care companies to defraud Medicare by billing for services that were not medically necessary or actually provided, resulting in the payment of $45 million in improper Medicare benefits to those companies. The day of Luis' indictment, the government initiated a civil action to freeze her assets before her criminal trial, including funds that were not directly traceable to the alleged criminal activity, referred to as substitute property, that was equivalent to the value of the proceeds of her alleged crimes.[4]

> While 'Luis' makes clear that the government may not freeze a criminal defendant's property untainted by the crime if doing so prevents her from paying her lawyer, the conflicting opinions of the justices leave several questions unanswered.

In seeking a restraining order, the government alleged that Luis and her co-conspirators were transferring money involved in the fraud to various individuals and entities, including shell corporations owned by Luis' family members, opening and closing well over 40 bank accounts and withdrawing large amounts of cash to hide the conspiracy's proceeds. Luis personally

received almost $4.5 million, $2.5 million of which she spent on (among other things) luxury items, real estate, cars, and travel. To preserve the $2 million that was not traceable directly to the crime, but that remained in Luis' possession, for payment of criminal forfeiture and restitution, the government obtained a pretrial order freezing Luis' assets, which prevented her from using funds not connected to the crime charged to hire counsel for her criminal case.

On these facts, the Supreme Court was presented with the question of "[w]hether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments."[5] That question led the eight justices to write four different opinions, each of which answered the question differently.

The Plurality Opinion

The plurality of Breyer, Ginsburg, Roberts, and Sotomayor answered the question presented by concluding that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment."[6] To arrive at that answer, the plurality employed a balancing test, weighing a criminal defendant's Sixth Amendment right to the assistance of counsel against the interests in ensuring that funds will be available for criminal forfeiture and restitution after conviction.

On one side, the plurality found that a Sixth Amendment right to the assistance of counsel is fundamental to due process of law.[7] As the plurality explained, "[g]iven the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust," the Sixth Amendment grants a criminal defendant a fair opportunity to retain counsel whom she chooses and can afford.[8] Freezing the criminal defendant's assets undermines that right by prohibiting her from using her own funds necessary to pay for her chosen attorney.

On the other side, the plurality considered the government's contingent interest in criminal forfeiture and the victims' interest in restitution. The plurality concluded that those interests do not enjoy constitutional protection and, despite their importance, "would seem to lie somewhat further from the heart of a fair, effective criminal justice system" when compared to the right to chosen counsel.[9]

The plurality limited its balancing test—and conclusion—to property that was not obtained as a result of, or traceable to, the crime because such property "belongs to the defendant, pure and simple."[10] Property used to commit a crime (or otherwise traceable to a crime) passes from the criminal defendant to the government at the instant the crime is committed and before a court issues its order freezing the assets, the plurality reasoned, but other substitute property belongs to the criminal defendant.

That distinction constitutes "the difference between what is yours and what is mine."[11] Therefore, the plurality concluded that a criminal defendant "has a Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel."[12]

Justice Thomas' Concurrence

Justice Thomas also answered the question presented by concluding that "a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice."[13] He, however, based his answer on the Sixth Amendment's text and the common law history and rejected the plurality's balancing test.

Thomas agreed that the Sixth Amendment sets limits on the government's power to freeze a criminal defendant's forfeitable

assets before trial. He explained that, since constitutional rights must protect the prerequisites for their exercise, the right to assistance of counsel implies the right to use untainted property to pay that counsel. He detailed how history confirms his textual understanding because the common law did not permit freezing untainted assets. Consequently, freezing those assets violates the Constitution.

Thomas refused, however, to endorse the plurality's balancing test. In his view, the Sixth Amendment guarantees the right to chosen counsel, and a pretrial restraint on untainted assets infringes that right.[14] Period. He did not agree that interests in forfeiture and restitution lie "further from the heart of a fair, effective criminal justice system" than a criminal defendant's right to chosen counsel.[15] Rather, he concluded that judges are not well suited to balance such interests and, in any event, that such judicial balancing violates the constitutional design.[16]

The Principal Dissent

Justice Kennedy's and Justice Samuel Alito's dissent answered the question presented by concluding that "a defendant has no Sixth Amendment right to spend forfeitable assets (or assets that will be forfeitable) on an attorney."[17] In so doing, the dissent relied on the Supreme Court's precedent in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989), which it believed to apply with equal force to this case.[18]

The dissent found that, under *Caplin* and *Monsanto*, a pretrial restraint on forfeitable assets does not violate a criminal defendant's Sixth Amendment right even when she has no other funds to pay for an attorney.[19] Specifically, a pretrial restraint does not prevent a criminal defendant from seeking to convince her chosen counsel to accept the representation without advance payment, does not disqualify any attorney the defendant might choose, and does not prevent a defendant from borrowing funds to pay for an attorney who is otherwise too expensive. Although a pretrial restraint may make it difficult for a criminal defendant to retain counsel who requires advances of high defense costs, that does not constitute a Sixth Amendment violation.

The dissent focused at length on the ramifications of the Supreme Court's decision, which they believed "rewards 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."[20] From their perspective, "[t]he true winners today are sophisticated criminals who know how to make criminal proceeds look untainted"[21] because the funds of those criminals will take the longest to trace and, if the government cannot trace every dollar subject to restraint to the crime charged, the defendant can spend that money on whatever counsel she chooses.

Justice Kagan's Dissent

Justice Elena Kagan also answered the question presented by concluding that, "[b]ecause the government has established probable cause to believe that it will eventually recover Luis's assets, she has no right to use them to pay an attorney."[22] Kagan found no distinction between (1) property obtained as a result of, or traceable to, the crime and (2) other substitute property of equivalent value. Rather, she concluded that "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."[23] She also rejected the plurality's "utterly arbitrary distinctions" between a criminal

defendant "who immediately dissipates his ill-gotten gains and thereby preserves his other assets" and one "who spends those two pots of money in reverse order."[24]

Kagan took *Monsanto* as a given because the defendant had not asked the Supreme Court to overrule or modify that decision, but she invited a criminal defendant to challenge *Monsanto's* correctness. She described *Monsanto* as a "troubling decision" because it permits the government to freeze assets that a defendant needs to hire an attorney prior to trial based only on probable cause that those assets will ultimately be forfeitable at a time when the presumption of innocence still applies and the government's interest in the assets is contingent on future judgments of both conviction and forfeiture.[25] As she explained: "I am not altogether convinced that…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."[26]

Unanswered Questions

While *Luis* makes clear that the government may not freeze a criminal defendant's property untainted by the crime if doing so prevents her from paying her lawyer, the conflicting opinions of the justices leave several questions unanswered. For example:

• Do attorney fees need to be reasonable? The plurality concluded that a criminal defendant has a Sixth Amendment right to use her own untainted property to pay a "reasonable fee" for the assistance of counsel, but Justice Thomas' concurrence did not include—and would not seem to admit of—any requirement of reasonableness.

• If attorney fees need to be reasonable, what constitutes a "reasonable fee?" The contours of "reasonableness" were not defined by the Supreme Court, leaving lower courts with no guidance about how to make such a determination in this context.

• Can the government freeze untainted property if doing so would interfere with a criminal defendant's constitutional rights beyond the Sixth Amendment right to counsel? The plurality concluded that interests in forfeiture and restitution are not constitutionally protected. That would seem to suggest that a criminal defendant has a right to use her untainted assets on free speech or the practice of religion, just as she does on the assistance of counsel.

• What does the decision mean for state forfeiture laws? Grounded in the Sixth Amendment, the Supreme Court's decision appears to prevent states from freezing a criminal defendant's untainted assets in a state when she has transferred tainted assets out of state.

With all of these issues (and several others) left for federal and state courts, the Supreme Court's decision has raised nearly as many questions as it answered.

1. 136 S. Ct. 1083 (2016).
2. Id. at 1087.
3. Id. at 1087-88, 1103.
4. Id. at 1103.
5. Id. at 1087-88.
6. Id.
7. Id. at 1089, 1093.
8. Id.
9. Id. at 1093.
10. Id. at 1090.
11. Id. at 1091.
12. Id. at 1096.
13. Id.
14. Id. at 1101.
15. Id.
16. Id. (alterations omitted).
17. Id. at 1103.
18. Id.
19. Id. at 1105; see also *Monsanto*, 491 U.S. at 616 ("[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.").
20. *Luis,* at 1103.
21. Id. at 1109.
22. Id. at 1112.
23. Id.
24. Id. at 1113.
25. Id.
26. Id.