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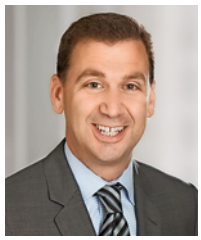
FORFEITURE

Three attorneys with Patterson Belknap Webb & Tyler LLP discuss the recent U.S. Supreme Court ruling in *Luis v. United States*, in which the high court held that the government's pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The authors argue that the *Luis* decision is a welcome departure from, or limitation on, the Supreme Court's prior decisions that have given the government too much power to interfere with a defendant's right to retain counsel of choice.

Supreme Court: Criminal Defendants Can Use Their Own Funds to Hire Counsel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On March 30, 2016, a divided U.S. Supreme Court decided *Luis v. United States*,[1] which stands for the proposition that a criminal defendant may use his or her own legitimate, untainted assets (*i.e.*, funds not traceable to a criminal offense) in order to retain counsel of choice, even if that would result in the defendant having insufficient funds to pay restitution and other financial penalties if convicted at the conclusion of the case. Not surprisingly, the court located this right in the Sixth Amendment, which guarantees a criminal defendant's right to counsel. While four of the five judges in the majority recognized that the government has a competing interest in making crime victims whole, the court viewed this interest as less substantial than the constitutionally protected right to counsel.

Perhaps it should be unsurprising that individuals may use their own assets to retain counsel to defend against a criminal prosecution, but the law did not clearly support such a right prior to *Luis*.

This article discusses the court's ruling and lays out the implications for practitioners.

Background

In October 2012, a federal grand jury in Florida charged Sila Luis with, *inter alia*, health-care fraud offenses. The government filed an emergency *ex parte* motion, under 18 U.S.C. § 1345, seeking to prohibit Luis from spending roughly $2 million of her own assets that the government had earmarked for payment of restitution and criminal penalties upon conviction. The government alleged that Luis had spent almost all of the

[1] 2016 BL 98101, U.S., No. 14-419 (Mar. 30 2016) (plurality opinion) (99 CrL 4, 4/6/16).

$45 million she obtained from engaging in Medicare fraud.

Section 1345, the relevant statute here, permits the pretrial seizure of assets belonging to a criminal defendant who is accused of certain violations of federal health-care or banking laws. Three categories of assets are subject to the statute:

(1) property ''obtained as a result of'' the crime;

(2) property ''traceable'' to the crime; and

(3) other ''property of equivalent value.''

The *Luis* case involved a seizure under the third category; the property to be frozen was not obtained as a result of the crime nor otherwise traceable to the crime.

After the restraining order was issued, Luis filed a motion to modify the order to permit her to use her own assets to pay for counsel. She argued that the Sixth Amendment guaranteed her right to use her own untainted assets to retain counsel of her choice. The district court denied Luis's motion.[2] The U.S. Court of Appeals for the Eleventh Circuit affirmed, and now the Supreme Court has vacated that decision.

The Plurality Opinion: Use of a Balancing Approach When the Stakes Are High

No single opinion received the votes of a majority of the eight justices. Justice Stephen G. Breyer authored a plurality opinion in which Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsberg and Sonia Sotomayor joined. Justice Clarence Thomas joined in the judgment, but not Breyer's opinion; Thomas wrote separately to express his disagreement with an aspect of Breyer's reasoning. Justice Anthony M. Kennedy (for himself and Justice Samuel A. Alito Jr.) and Justice Elena Kagan each wrote a dissent.

The Foundation of the Right to Counsel. Breyer's plurality's decision began with a lengthy block quote from the seminal decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which first recognized that the Constitution guarantees the fundamental right to counsel to those unable to afford it. The plurality then cited the famous ''Scottsboro Boys'' case, *Powell v. Alabama*, 287 U.S. 45 (1932), for the proposition that the defendant must have ''a fair opportunity to secure counsel of his own choice.'' While there are certain limits to the right to select counsel—*e.g.*, the attorney must be a member of the bar and has no conflict of interest with the opposing party—Breyer reaffirmed that ''the constitutional right at issue here is fundamental.''

Prior Decision Didn't Address Pretrial Seizure of Untainted Assets. The plurality readily explained that the government's pretrial restraint of Luis's funds undermined her fundamental right to choose counsel because the funds she needed to retain counsel were frozen. In arguing that it has as important interest in preserving Luis's funds to pay financial penalties upon conviction, the government relied on the cases of *Caplin & Drysdale v. United States*[3] and *United States v. Monsanto*[4] for support. The court distinguished both cases on their facts.

In *Caplin & Drysdale*, the law firm that represented the defendant charged with running a drug distribution, sought to collect a portion of the defendant's forfeited assets after a guilty plea to pay for legal fees.[5] The court held that the law firm had no right to those assets because a criminal defendant is not entitled to use forfeited assets that belong to the government to pay attorney's fees.[6] Stated differently, the defendant did not have ''the right to give another's [namely, the Government's] property to a third party,'' namely, the lawyer.''[7]

Luis, however, presented different facts. *Luis* arose in a pretrial context, and unlike in *Caplin & Drysdale*, there had been no adjudication of Luis's guilt. In *Luis*, the funds in question belonged to Luis, not the government as forfeited assets.

While *Monsanto*, like *Luis*, involved the pretrial restraint of funds, the funds in *Monsanto* were traceable to the charged offense. Therefore, the forfeiture statute ''passed title to those funds at the time the crime was committed (*i.e.*, before the trial.).'' In *Luis*, no such showing had been made by the government; the funds were ''untainted'' and therefore not subject to forfeiture. As Breyer explained, in neither case did the Supreme Court have an occasion ''to opine . . . about the constitutionality of pretrial restraints of other, untainted assets.''[8]

The Sixth Amendment Guarantees the Right to Use Untainted Assets to Secure Counsel

The Supreme Court in *Luis* deemed this distinction between tainted assets that were forfeitable (as in the prior decisions) and untainted assets (as in *Luis*) to be critical: ''The distinction . . . is thus an important one, not a technicality. It is the difference between what is yours and what is mine.''[9] In the prior decisions, the defendants had to concede that the disputed property was ''in an important sense the Government's at the time the court imposed the restrictions.''[10] Even if the government did not own the property in *Monsanto* before obtaining a conviction, the government had a '' 'substantial' interest in the tainted property sufficient to justify the property's pretrial restraint.''[11] Here, Breyer explained, ''the Government seeks to impose restrictions upon Luis' untainted property without any showing of any equivalent governmental interest in that property.''[12]

In reaching its conclusion, the court balanced the competing interests of both parties and found that while there was a constitutional right to counsel of one's

[2] *United States v. Luis*, 966 F. Supp. 2d 1321, 1335 (S.D. Fla. 2013).

[3] 491 U.S. 617, 624 (U.S. 1989).
[4] 491 U.S. 600, 615 (U.S. 1989).
[5] 491 U.S. at 624.
[6] *Id.* at 632.
[7] *Id.* at 628.
[8] *Luis* slip op. at 8 (plurality opinion).
[9] *Id.* at 9.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 10.

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choice, the government had no equivalent constitutional right to preserve assets for criminal forfeiture or restitution. Breyer identified ''[t]hree basic considerations'' that informed this balancing analysis.[13]

First, the order obtained by the government ''would seriously undermine [the] constitutional right'' to assistance of counsel. Second, ''relevant legal tradition offers virtually no significant support for the Government's position.''[14] Third, as a practical matter, the Government's position of unfettered access to restrain assets would ''unleash a principle of constitutional law that would have no obvious stopping place'' and thereby ''erode the right to counsel to a considerably greater extent than we have so far indicated.''[15]

It is possible that Congress, emboldened by a favorable decision concerning Section 1345, would make these pretrial asset freezes *de riguer* in all cases. Defendants whose assets are frozen lack even the ability to pay for an attorney to challenge the asset freeze. This would further strain the already ''overworked and underpaid public defenders'' who have limited resources.

Based on this analysis, the court vacated the decision below and held that Luis ''has a Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel.''[16]

The Concurrence Offers an Historical Approach

Thomas provided the fifth vote for Luis, but his concurrence departed from the plurality's balancing approach. To Thomas, ''[s]uch judicial balancing do[es] violence to the constitutional design.''[17] Instead, he relied exclusively upon the history of the common law and text of the Constitution to reach the same outcome.[18]

Historically, before restraining a defendant's assets, the court required the government to show a ''nexus . . . between the item to be seized and criminal behavior.''[19] Where no showing was made, the assets were protected from interference until judgment.

Moreover, freezing untainted assets infringes upon the defendant's right to retain counsel of choice. Thomas reasoned that if the government were given unfettered authority to restrain a defendant's assets, ''the right to counsel would be meaningless, because retaining an attorney requires resources.''[20] Additionally, the bounds of the common law prohibited pretrial restraint of untainted assets, which the defendant remained free to use to retain counsel. Applying this history to the facts here, Thomas concluded that allowing the government the power to restrain a defendant's funds before trial would ''eviscerate'' the purpose of the Sixth Amendment because an implicit prerequisite to the right to counsel is the right to use one's financial resources for an attorney.

[13] *Id*. at 12.
[14] *Id*.
[15] *Id*. at 14.
[16] *Id*. at 16.
[17] *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004).
[18] *Luis* slip op. at 1 (Thomas, J., concurring).
[19] *Id* at 7.
[20] *Id* at 2.

The Dissenting Opinions

Kennedy's dissent expressed concern that the court's decision rewarded those criminals who dissipated their illegally obtained funds first, ensuring that those criminals could use their ''innocent'' funds later to hire counsel, should they ever face criminal charges. Here, Luis purposely sought to conceal her funds by moving them between 40 different bank accounts, but she will be allowed to use the remaining ''untainted'' funds to pay for counsel. The dissenters relied upon *Caplan & Drysdale* and *Monsanto,* arguing that those rulings were not dependent upon the fact that the restrained assets were tainted. Therefore, the dissent recognized no Sixth Amendment right ''to spend otherwise forfeitable assets on an attorney so long as those assets are not related to or the direct proceeds of the charged crime.''[21]

This is true even when the defendant possesses no other funds with which to pay for an attorney. The dissenters argued that the restraint of assets does not render a defendant unable to choose his or her counsel, because arrangements can be made to borrow funds or to pay counsel at some later time in the proceedings.

Kennedy also focused on the practical implications of the court's decision. Given that money is fungible and defendants often structure their affairs to disguise the source of their funds, the type of tracing analysis envisioned by the plurality opinion will be time-consuming and ineffective in preventing the dissipation of the forfeitable assets. Kennedy also questioned the plurality's holding that Luis could choose counsel who charged a ''reasonable fee,'' asking why—if the money really is hers—she could not use all of it to pay for counsel. ''The plurality's willingness to curtail the very right it recognizes reflects the need to preserve substitute assets from further dissipation.'' One aspect of Kennedy's decision, however, urges an impractical and potentially unethical approach: That a defendant should ''seek lawyers willing to represent her in the hopes that their fees would be paid at some future point.''[22]

Kagan authored a brief dissent. She described the court's *Monsanto* decision as ''troubling'' because it permits a defendant's assets to be frozen prior to trial, at a time when the presumption of innocence still applies. Luis did not ask the court to overrule *Monsanto*; however, Kagan felt compelled to apply *Monsanto* to the facts presented. As much as she ''sympathize[d] with the plurality's effort to cabin *Monsanto*,'' she could not distinguish it from Luis's case.[23]

Luis Leaves Several Issues Unresolved

Luis is definitely a step in the right direction. By limiting *Caplin & Drysdale* and *Monsanto* to their facts, the Supreme Court allows defendants to spend money not traceable to the alleged crime on their own defense and prevents the government from defunding their opposing counsel at the outset of a prosecution. *Luis* should slow or stop the government's increasingly common practice of freezing assets to prevent the accused from mounting a strong defense, much as the KPMG

[21] *Luis* slip op. at 2 (Kennedy, J., dissenting).
[22] *Compare id*. at 6 with ABA Rule 1.5(d)(2) (''A lawyer shall not enter into an arrangement for . . . a contingent fee for representing a defendant in a criminal case.'').
[23] *Luis* slip op. at 9 (Kagan, J., dissenting).

tax shelter litigation deterred the government from interfering with the advancement and indemnification of legal fees.[24]

At the same time, the court's opinion in *Luis* leaves several issues unresolved and ripe for future litigation, both in the lower courts and in the Supreme Court.

First, how will *Luis* be implemented? The government will have to work to freeze a defendant's assets by demonstrating that they are connected to the crime. In some cases, it may be easy to identify the ill-gotten gain, such as when a bank robber is apprehended walking out of the bank with a plastic bag full of cash, or a drug dealer whose only access to wealth is through criminal activity. But in many white collar cases, it will be more difficult for the government to freeze assets of a defendant who has significant and indisputable legitimate wealth. To the extent that a defendant has commingled innocent and tainted funds over a lengthy period of time, the government's task may prove complicated. However, it should not prove impossible in most cases. The Second Circuit gave some guidance on the subject of tracing in its decision in *United States v. Banco Cafetero Panama*.[25]

Second, what will courts make of the plurality's reference to the payment of a ''reasonable'' fee? Breyer does not explain why he has imposed this limitation as part of his balancing analysis. Nor does he provide any guidance to future litigants about how this ''reasonableness'' determination will be made. Defending a complicated federal criminal case can be an expensive proposition. In the KPMG tax shelter litigation from roughly 10 years ago, one judge held that ''$3.3 million would be a 'very conservative estimate' of what it would cost to defend this case.''[26] Will courts impose a limit on the assets available to pay attorneys' fees, restraining some untainted assets? This seems inconsistent with the fundamental right discussed in *Luis*.

Third, is further change still to come with respect to the continuing viability of *Monsanto*? It appears that six justices of the Supreme Court (the four in the plurality, Thomas and Kagan) all have some unease with the decision. While the plurality opinion is able to draw a distinction between *Monsanto* and *Luis* based on the tracing analysis that is absent in *Luis*, Kagan makes a fair point that overruling *Monsanto* would have been the most logical way to protect the right to counsel. The correctness of *Monsanto's* holding appears ripe for a challenge.

In short, the *Luis* decision is a welcome departure from, or limitation on, the Supreme Court's prior decisions that have given the government too much power to interfere with a defendant's right to retain counsel of choice.

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[24] *See United States v. Stein*, 495 F. Supp. 2d 390, 427-28 (S.D.N.Y. 2007) (dismissing indictment of individual KPMG employees whose due process rights and right to counsel were impaired by the government's pressure on KPMG to limit indemnification and advancement of fees).

[25] 797 F.2d 1154, 1159-60 (2d Cir. 1986) (''Where the credit in a depositor's account represents the net results of transactions that include a deposit of drug money, there is a plausible argument to be made *either* that the account contains the 'traceable proceeds' of the tainted deposit (so long as the balance has not fallen below the amount of the tainted deposit) *or* that any withdrawal (in excess of the tainted deposit) contains the 'traceable proceeds' of such a deposit'').

[26] *See Stein*, 495 F. Supp. 2d at 424.

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