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The Supreme Court could soon deliver a crushing blow to the Sixth Amendment

By Radley Balko November 11, 2015

(AFP Photo/Karen Bleier)

Over at Reason, Damon Root has a good summary of what's at stake in *Luis v. United States*, a case the Supreme Court heard yesterday.

The case of *Luis v. United States* arose in 2012 when Sila Luis was indicted in Florida on charges of operating a complicated scheme that allegedly defrauded Medicare of upwards of $40 million. The federal prosecutor in her case sought and obtained a pre-trial order freezing her assets. What makes this order notable is that the federal government moved to freeze not only her "tainted" assets, meaning those assets that can be arguably traced back to the alleged underlying crime; but the federal government also moved to freeze Luis'

undisputedly legitimate assets, which amount to some $15 million that cannot be connected in any way to any alleged criminal activity.

Put differently, *Luis v. United States* raises significant questions about both the scope of the Sixth Amendment and the reach of federal asset forfeiture law. Luis—who has yet to be convicted of any crime connected to this matter—seeks to access her wholly legitimate assets in order to fund her criminal defense. She maintains that this is her right under the Sixth Amendment. The federal government seeks to stop her, arguing that the Sixth Amendment should pose no barrier to the prosecution's tactics. According to the federal government, because all of Luis' assets could be subject to forfeiture if she is ultimately convicted, federal prosecutors should not be stopped from freezing all of her "forfeitable" assets before she goes on trial.

Just to restate for emphasis, the court will decide whether the government can freeze *all* of a defendant's assets before trial, even those the government itself concedes aren't tainted by any connection to criminality, thus effectively preventing that defendant from paying for his own defense. Of course, the government won't admit that this is why it is freezing the assets. The claim is that it should be able to freeze enough property to cover any judgment that may be issued against the defendant. But the Supreme Court rarely questions the motives of state actors. If the prosecution can plausibly claim it is freezing the assets for the right reasons, that's generally good enough.

In oral arguments yesterday, the attorneys challenging the government attempted to distinguish this case from the 1989 case *U.S. v. Monsanto*, which allowed the government to freeze property before trial only after it had established a connection between that property and criminal activity in a pretrial hearing. Even these seizures are problematic, because the evidentiary standard is much lower. But yesterday, the challenging attorneys made the

quite reasonable point that there's a huge difference between seizing funds and property that a court has found to be connected to criminal activity in a hearing, and seizing funds that the government admits *are completely legitimate*, because the government wants to be sure the funds are available if the defendant might be convicted and ordered to pay a fine or damages. Deputy Solicitor General Michael Dreeben compared such seizures to bail. Where the latter prevents a defendant from fleeing with his body, the former prevents what Dreeben calls "asset flight."

It's pretty outrageous that the government can already seize assets it acknowledges are untainted. But remarkably, the attorneys challenging this policy weren't even disputing that point (the Supreme Court has already basically allowed for it). Their argument dealt only with the Sixth Amendment — that while the government can seize untainted assets before trial, it must allow a defendant access to enough of his untainted assets to pay for his own defense.

The justices were dubious about this argument. Samuel Alito, John Roberts, Anthony Kennedy, Sonia Sotomayor and Ruth Bader Ginsburg all made some variation of the point that money is fungible. So unless there's some clear separation in a defendant's finances, such as a trust, tainted assets will inevitably be commingled with untainted assets. That's a valid point, although in this particular case, the government is actually conceding that the assets it wants to seize are untainted. There also practical problems here. How much of a defendant's own money should he be allowed to spend on his defense? Who gets to make that determination? Chief Justice Roberts also made the point that it seems somewhat absurd to say that the government can seize all of a defendant's assets, then allow some of those assets to be used to pay an attorney, but not to, say, pay for rent or for college tuition. In short, the attorneys challenging the law were left with unconvincing arguments, but only

because once you've allowed the government to seize all of someone's property, even property the government concedes has no criminal taint whatsoever, there isn't much left to debate. And that's pretty much where we are.

This particular policy is aimed at people accused of bank fraud, insider trading and other high-finance crimes. Those aren't the most sympathetic defendants. (One would hope that the likability of defendants wouldn't affect our assessment of whether a law is fair. But of course it does.) But the radical expansion of the government's power to seize property before trial grew out of the drug war. And as this exchange between Dreeben and Justice Kennedy demonstrates, there's no reason to think the policy will be limited to tycoons.

JUSTICE KENNEDY: But what is it that confines your your rationale to a specific area? It seems to me that if the government prevails in this case, every State in the union, every locality could say that in the event of assault and battery, malicious mischief, an accident caused by drunk driving, any crime involving a bodily injury, that the government is entitled to restrain disposition of assets that might be used for medical care, for pain and suffering. And this would, in effect, prevent the private bar from from practicing law unless it did so on a contingent basis.

MR. DREEBEN: Justice Kennedy, it's correct that our principle is not limited to the types of crimes that are in this case. It is limited to the government making an adequate showing that at the conclusion of the case, it will have the right to the money.

It isn't difficult to see how this scenario presents a grave threat to the Sixth Amendment. (If you thought the public defender system was already overburdened, just wait!) As the defendant's attorney pointed out in oral

arguments yesterday, at the time the Sixth Amendment was written, indigent defendants had no right to a government-funded attorney. It's difficult to imagine that the men who wrote and voted for the Bill of Rights would have both believed in the right to an attorney and in giving the government the power to make it impossible to pay for one.

The fact that in yesterday's oral arguments the line against the government's position seemed weak in light of existing law is really just a testament to the series of awful rulings that got us here.

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