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You're Presumed Innocent. Is Your Money?

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By

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Finally, someone's standing up for the rich.

The Supreme Court struck a blow for wealthy criminal defendants today, holding that before trial the government can freeze only those assets that are demonstrably tainted, not all assets up to the value of the wrongdoing alleged. It's a distinction that doesn't matter to very many people, but matters a lot to a few.

One result will be to make it a bit easier for rich defendants to use their (unfrozen) money to pay for lawyers of their choice, instead of getting by with an appointed public defender. But the court’s cautious plurality opinion, the result of a very strange voting lineup, relied on some seriously doubtful economic logic to get to the desired outcome.

To understand the weirdness, you have to start with the background law that the court had to grapple with. In a 1989 case, U.S. v. Monsanto, the court held that the government can, even before trial, seize assets that a defendant is thought to have derived from the crime alleged. The court at the time thought that it didn’t matter that the defendant was presumed innocent until proven guilty, or that the defendant planned to use the assets to hire a lawyer in the exercise of the Sixth Amendment right to counsel.

The parties to today's case, Luis v. U.S., didn’t ask the court to overturn the Monsanto precedent. They wanted it to resolve a related issue: whether the government can freeze only assets seen as ill gotten. In the instance of Sila Luis, the defendant in this case, the government sought to freeze all her roughly $2 million in assets -- and was charging her with $45 million of Medicare fraud.

What created the strange voting pattern in the case was how the different justices related to the existing precedent. Justice Stephen Breyer, the court's leading pragmatist, wrote the plurality opinion. It first argued that there was a legal difference between tainted money traceable to the case's specific crime and other assets that belong to the defendant. Then it went on to make a classically Breyeresque pragmatic point: allowing the government to seize on tainted assets “would unleash a principle of constitutional law that would have no obvious stopping place.” The government might pass new laws allowing the pretrial seizure of all kinds of assets, which would let the government block defendants from hiring their own lawyers.

Breyer was joined by liberal Justices Ruth Bader Ginsburg and Sonia Sotomayor. But surprisingly, he was abandoned by Justice Elena Kagan, the other pragmatist. Kagan wrote a dissent to say that she thought the 1989 precedent allowing pretrial seizure was very likely wrongly decided. But if the court wasn't going to overturn the precedent, then it should follow it. Particularly, she said, there’s no real-world difference between “tainted” assets and other assets, because money is fungible. Holding otherwise would actually give a perverse advantage to a defendant who spent all the money she stole while keeping a special "rainy day" fund of clean money on the side, for legal defense.

With only three liberal votes, Breyer needed help. He got it from two surprising places. Chief Justice John Roberts joined the plurality opinion without comment, making it the voice of four justices. Roberts likes technical legal doctrine, and so probably didn't mind holding that there was a classic common-law difference between types of assets that could be recovered by a creditor or other party, like the government here. What's more, Roberts was a Washington lawyer representing well-off clients -- and this opinion is great for both those clients and

their lawyers. His background may make him more sympathetic to these parties than the average American would be.

Yet even four justices wouldn't have been enough to win this case. The deciding vote came from Justice Clarence Thomas, who wrote a separate concurring opinion based on his own originalist reading of the Sixth Amendment right to counsel. According to Thomas, the point of the amendment was precisely to allow individuals to hire their own lawyers. Government-appointed counsel wasn't even a gleam in the Framers' eyes, and wouldn't be a constitutional right until the landmark 1963 case of Gideon v. Wainwright, made famous by Anthony Lewis's great book, "Gideon's Trumpet." Thomas therefore agreed with the plurality but refused to join Breyer's pragmatist opinion as a matter of principle.

Justice Anthony Kennedy dissented, joined by Justice Samuel Alito, making roughly the same economically correct point as Kagan about the fungibility of assets. The result was a 5-3 judgment with a four-justice plurality opinion. It will be treated as precedent.

The practical upshot is that, if you're in a business where the government might come knocking, it's a good idea to open an account labeled "criminal defense" and filled with your least dubious sources of income. Your other assets might be tainted, and you don't want to rely on a public defender unless you have to.

My takeaway is that the court reached the right result, but had to defy economic logic to get there. A future court might reverse the Monsanto rule, but I wouldn't count on it. Neither should potential defendants who want to hire their own lawyers.