

An Unusual Divide Hands Victory to Criminal Defense Bar

Marcia Coyle, *Supreme Court Brief*

March 30, 2016



U.S. Supreme Court Justice Stephen Breyer.
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Prosecutors are barred from freezing criminal defendants' assets unconnected to their alleged crimes and needed to hire defense counsel of choice, the U.S. Supreme Court ruled on Wednesday in a decision that crossed its liberal-conservative divide.

"From a 50,000-foot level, it's a very big decision," said Timothy O'Toole of Miller & Chevalier. "The Supreme Court until today had never said the Sixth Amendment right to counsel of choice trumps a federal statute that appears to have allowed the government to obtain untainted assets to pay for a defense."

O'Toole said the case, *Luis v. United States*, is "a big deal in the sense that a five-member majority talks about a vibrant right to counsel in a way that is new. Other decisions of the court had suggested that the right to counsel of choice was far more limited in this context."

Although the decision clarifies the prosecution's use of pretrial asset freezes, it's unlikely to have wide impact, said Kathie Nandan of Reed Smith. "Prosecutors rarely invoke the fraud injunction statute that was at issue in this case, and other than the Fourth Circuit, pretrial freezes on untainted assets were not granted by courts under existing forfeiture statutes," she said.

O'Toole, however, said "a decision the other way would have opened the floodgates on this."

Justice Stephen Breyer led a plurality in *Luis* that included Chief Justice John Roberts Jr., and Justices Ruth Bader Ginsburg and Sonia Sotomayor. Justice Clarence Thomas concurred in the judgment, resting his agreement "strictly" on the text of the Sixth Amendment and its common-law history.

Justice Anthony Kennedy, joined by Justice Samuel Alito Jr., dissented. Justice Elena Kagan wrote a separate dissent.

Sila Luis was charged in 2012 with paying kickbacks, conspiring to commit fraud, and engaging in other crimes all related to health care. The government claimed that Luis had fraudulently obtained close to \$45 million, almost all of which she had already spent. Hoping to preserve the \$2 million remaining in Luis' possession for payment of restitution and other criminal penalties, the government successfully sought a pretrial order prohibiting Luis from disposing of her assets up to the equivalent value of the proceeds of the federal health care fraud—\$45 million.

Luis claimed that the freeze order would prevent her from using her own untainted funds to hire lawyers to defend her in the criminal case.

In his plurality opinion, Breyer rejected arguments by the government and the main dissenters that two 1989 high court decisions favored their position that pretrial freezes do not violate the Sixth Amendment: *Caplin & Drysdale v. United States* and *United States v. Monsanto*.

Those two decisions, Breyer wrote, relied "critically" on the fact that the property at issue was "tainted" and that title to the property had passed from the defendant to the government before the courts issued their freeze orders.

"The relevant difference consists of the fact that the property here is untainted; i.e., it belongs to the defendant, pure and simple," Breyer wrote. "In this respect it differs from a robber's loot, a drug seller's cocaine, a burglar's tools, or other property associated with the planning, implementing, or concealing of a crime."

The government's interests in payment of a criminal forfeiture or restitution, he added, do not enjoy constitutional protection. "Rather, despite their importance, compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system."

Shifting the burden to overworked and understaffed public defenders, Breyer said, was no substitute for counsel of choice.

Kennedy countered that the court's "unprecedented" decision "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. It matters not, under today's ruling, that the defendant's remaining assets must be preserved if the victim or the government is to recover for the property wrongfully taken."

A pretrial restraint, he acknowledged, might make it difficult for a defendant to hire a lawyer who insists that defense costs be paid in advance. But, he added, "That difficulty, however, does not result in a Sixth Amendment violation any more than high taxes or other government exactions that impose a similar burden."

Luis drew amicus support from a number of defense and anti-forfeiture organizations, including the National Association of Criminal Defense Attorneys, the libertarian Cato Institute, the American Bar Association and Americans for Forfeiture Reform.

The United States was supported by the National Association of State Legislatures, National League of Cities, Council of State Governments and other local government groups who warned that a decision against the government threatened to overturn numerous state and local forfeiture laws.