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Can the Government Put a Price Tag On Your Right to Choose Your Lawyer?

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When, if ever, can the government effectively prevent a criminal defendant from using their legitimate assets to hire a lawyer? That's the fundamental question that the Supreme Court confronts in *Luis v. United States*--a question that implicates the integrity of the criminal justice system. The Court should squarely hold that the government cannot "freeze" legitimate assets a defendant needs to hire the advocate he or she believes will best represent them at trial, simply because there is probable cause to believe that the defendant has committed a crime.

In 2012, the federal government charged Sila Luis with conspiracy to commit Medicare fraud. The scope of the alleged fraud was staggering--over $45 million, stemming from claims for home health services that were neither medically necessary nor actually performed. The government invoked the Fraud Injunction Act, a federal statute that authorizes a "restraining order" against assets when a person is "alienating or disposing of

property, or intends to alienate or dispose of property" that is "obtained from" or "traceable to" certain federal offenses.

In such cases, § 1345(a)(2)(B) permits a court to prohibit the use of either tainted property "or property of equivalent value" before trial in order to ensure that sufficient assets are available to satisfy any judgment. But rather than just freeze the allegedly tainted property, the federal government asked the district court below to freeze *all* of Luis's assets, including those that were not even allegedly obtained through fraud. The district court did so.
It is highly questionable whether the Fraud injunction Act authorizes the restraint of all of Luis's assets. As an amicus brief filed by Americans for Forfeiture Reform points out, the relevant statutory provisions are written in the present tense, strongly suggesting that the statute is designed "to stop fraudulent conduct before or while it is happening."
The district court, however, concluded that Luis "has alienated or disposed of property, and unless enjoined could continue to alienate or dispose of property," without any evidence that she either was presently doing so or intended to do so in the future.

Further, to freeze Luis's property under § 1345(a)(2), the district court had to identify the property *presently held* by Luis that was "obtained from" or "traceable to" Luis's alleged fraud. The district court did not analyze Luis's current holdings. Instead, the district court focused only on the fact that Luis's alleged health care offenses "resulted in $45 million of improper Medicare benefits being paid," and imposed a $45 million freeze on all of her property, including $15 million of concededly legitimate assets. True, the district court could have concluded that $15 million was "property of equivalent value," but not without identifying the presently-held tainted property that it was equivalent *to*. Nonetheless, Luis's assets were frozen.

Luis then requested that the court release untainted assets that she could use to retain a lawyer. The request was refused. The district court's reasoning, simply stated, was that money is fungible--as an alleged bank robber is not entitled to use money that he is said to have stolen to pay his lawyer, neither should he be able to spend the bank's money and then use other money at hand to pay his lawyer.

Luis appealed the decision, arguing that she was being deprived of her Fifth Amendment right to due process of law and her Sixth Amendment right to hire the counsel of her choice. The Eleventh Circuit upheld the denial of her request, stating that Luis's arguments were foreclosed by the Supreme Court's decision in *Kaley v. United States* (2014), among other decisions. In *Kaley*, the Court held that when the government, following a grand jury indictment, restrains tainted assets needed to retain a lawyer, the Fifth and Sixth Amendments do not require a pretrial hearing at which the defendant can challenge a grand jury's finding of probable cause.

The government has an undeniable interest in preventing criminal defendants from spending ill-gotten gains before a judgment can be reached and thus ensuring that victims can be compensated if the defendants are convicted. Further, the government would not be able to freeze all of Luis' assets but for the nature of the crimes she is charged with committing. Only because the government is accusing her of a $45 million fraud did it move to impose a freeze of $45 million.

But the fact remains that Luis has not been convicted of a crime, nor has the government's case been subjected to any meaningful adversarial testing. Luis's property was restrained on the basis of a probable cause determination--a determination supported only by a grand jury indictment and an FBI agent's declarations summarizing the unsworn, hearsay statements of eight unidentified informants who were cooperating with the government in exchange for leniency. While Luis requested a hearing in which she could cross-examine these informants, that request was denied.

What process is due under the Fifth Amendment before a presumptively innocent person's concededly "innocent" property may be thus restrained? Luis argued below that the government should bear the burden of proving its entitlement to an injunction of untainted assets beyond a reasonable doubt, the same standard of proof that will govern her criminal trial and determine whether her assets will ultimately be subject to forfeiture. In *Fort Wayne Books, Inc. v. Indiana* (1989), the Court unanimously held that the government must show more than "mere probable cause" to seize the alleged proceeds and instrumentalities of crime if the seizure chills freedom of speech. Sila Luis's interest in ensuring that she, rather than the government, controls who defends her against the government's charges is at least as compelling.

At oral argument on Tuesday, the frightening breadth of the power claimed by the government was made apparent. Justice Anthony Kennedy, addressing the Department of Justice's lawyer, Michael Dreeben, stated that "the necessary consequence of your position is that any State in the union can provide for forfeiture or a freeze--a freeze of assets pending trial in any assault and battery case, spousal abuse case, criminal negligence, date rape cases in order to make the victim whole... even if the consequences of that is that in most of those cases most people cannot afford counsel." Dreeben answered "yes." Howard Srebnick, arguing the case for Luis, seized upon this concession: "The government says quite candidly there is no line. If the fine is $1 million, the defendant has to pony up, ante up $1 million up front in order to exercise his right to counsel. The right to counsel of choice will have a price tag. And it is whatever the government says the maximum fine is." Given the stakes of a criminal trial and the importance of one's lawyer in preparing one's case, Srebnick might have gone a step further: One's security against wrongful conviction would in certain cases have a price tag.

To borrow language from the Federal Rules of Evidence, the ultimate end of the adversarial process is "ascertaining the truth and securing a just determination." That end cannot be realized if the government can deprive those who have not yet been convicted of any wrongdoing of what may be their only effective means of preventing the loss of their liberty, their property, and even their lives without more than an indictment and unsworn hearsay. In *Luis*, the Court must preserve a right upon which the most fundamental of Americans' rights often depend, and which is crucial to public confidence in the justice of our legal order.