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Gov't Can't Put Pretrial Freeze on Untainted Assets

From Criminal Law Reporter

By Lance J. Rogers

March 30 — The government can't freeze a defendant's untainted assets if that pretrial lockdown effectively prevents her from hiring a lawyer, the U.S. Supreme Court ruled March 30.

Court watchers have characterized the decision as an important victory for the Sixth Amendment right to counsel because the court's previous forfeiture decisions suggested that the right was much more restricted and forfeitures have been on the rise.

"This is really a big deal because of the damage it would've done had the court gone the other way," Timothy O'Toole, a member of Miller & Chevalier in Washington, told Bloomberg BNA.

"We have found no decision of this Court authorizing unfettered, pretrial forfeiture of the defendant's own 'innocent' property—property with no connection to the charged crime." *Justice Stephen G. Breyer*

"Instead, a strong five-member majority of the court, for the first time in its history, has held that the Sixth Amendment right to counsel of choice includes a component that prevents the forfeiture of untainted assets," O'Toole said.

National Association of Criminal Defense Lawyers president E.G. "Gerry" Morris, Austin, Texas, lauded the decision in a press release.

"This decision is a reaffirmation of the importance of the Sixth Amendment guarantee and imposes a significant limitation on the government's expanding efforts to seize the funds of an accused before there has been any determination of guilt."

UNDERPAID AND UNDERFUNDED

Both O'Toole and Kimberly A. Jansen, a partner at Hinshaw & Culbertson LLP in Chicago, stressed the significance of the court's discussion of the practical consequence of stripping defendants of the ability to pay for their own lawyers.

The court said it isn't any answer to dump these defendants on public defenders and publicly paid lawyers who are already underpaid and overworked.

"I imagine this language will see some play in the class action suit the ACLU has brought attacking what it calls the chronic underfunding of Louisiana's public defender system, and perhaps even signals some sympathy for the ACLU's position in that case," Jansen told Bloomberg BNA.

"The court took a policy-oriented approach that balances competing interests and sides with the presumptively innocent defendant and her untainted funds," Kent Scheidegger, legal director and general counsel for the Criminal Justice Legal Foundation, Sacramento, Calif., told Bloomberg BNA.

'INNOCENT' MONEY

Federal prosecutors had argued that a defendant's right to pick a private lawyer must give way to the government's strong interest in making sure that some money will later be available to cover statutory penalties and restitution if a defendant is ultimately convicted.

But the court said that this legitimate interest can't trump a defendant's compelling Sixth Amendment right to hire counsel of choice with money that is presumptively "innocent."

Money that isn't tainted "belongs to the defendant, pure and simple," the court said in a plurality opinion by Justice Stephen G. Breyer.

That fact distinguishes this case from the court's landmark rulings in *Caplin & Drysdale v. United States* and *United States v. Monsanto* because those decisions rested on the fiction that title to property traceable to criminal activity passes from the defendant to the government at the instant the crime is committed, Breyer said.

"We have found no decision of this Court authorizing unfettered, pretrial forfeiture of the defendant's own 'innocent' property—property with no connection to the charged crime," Breyer wrote.

Chief Justice John G. Roberts Jr. and Justices Sonia Sotomayor and Ruth Bader Ginsburg joined Breyer's opinion.

Justice Clarence Thomas agreed that the case should be vacated and remanded, but filed a separate concurrence.

PRACTICAL IMPLICATIONS

There are strong practical reasons for rejecting the government's claim that it should be allowed to keep Sila Luis from spending her money to hire an attorney, Breyer said.

If federal prosecutors are allowed to freeze untainted assets, the publicly paid counsel who serve the indigent community will be overwhelmed and swamped, he said

“The upshot is a substantial risk that accepting the Government's views would—by increasing the government-paid-defender workload—render less effective the basic right the Sixth Amendment seeks to protect,” Breyer said.

Breyer rebuffed the suggestion that a pretrial freeze ought to be treated any differently than a pretrial forfeiture.

For all intents and purposes a restraining order might as well be a forfeiture because “the restraint itself suffices to completely deny this constitutional right,” he said.

MEDICARE SCAM

Luis was indicted for allegedly running a Medicare fraud scheme. According to the government, she had already spent most of the \$45 million she had allegedly scammed, so the government froze the remaining \$2 million in her account to cover the anticipated costs of restitution and other penalties if she was convicted.

Under 18 U.S.C. § 1345(a)(2), federal courts have the power to freeze, before trial, certain assets belonging to people accused of violating federal health care or banking laws.

Luis appealed, claiming that the freeze included assets not directly traceable to the alleged fraud and that she intended to use that money to retain counsel to defend her.

The U.S. Court of Appeals for the Eleventh Circuit ruled for the government, saying the statutory right to freeze the assets trumped Luis's right to choose a lawyer using her personal funds.

UNUSUAL IDEOLOGICAL SPLIT

Both O'Toole and Scheidegger remarked on the unusual ideological pairings in the ruling.

It's not every day that you see the chief justice championing a strong Sixth Amendment right and then have Kagan on the opposing side, O'Toole said.

Scheidegger agreed that the decision is interesting because the justices didn't divide along traditional liberal-conservative lines, but he pointed out that each justice hewed closely to their individual views about constitutional doctrine.

“Breyer is your pragmatic, policy guy and Thomas remains the strict constructionist,” Scheidegger said.

In his concurrence, Thomas chided the plurality for watering down the impact of the decision by suggesting that the government's interest needed to be balanced against the Sixth Amendment.

The Sixth Amendment guarantees the right to counsel of choice and a pretrial freeze of untainted assets infringes that right, Thomas wrote. "This conclusion leaves no room for balancing."

Scheidegger speculated that Justice Antonin Scalia's absence probably didn't affect the outcome much in this case, saying "it's likely he would've sided with Thomas."

TIME TO REVISIT MONSANTO?

In a dissent joined by Justice Samuel A. Alito Jr., Justice Anthony M. Kennedy argued that the majority opinion rewards criminals who "hurry to spend, conceal, or launder stolen property" and hurts victims who want their property back.

The true winners in today's decision are the sophisticated criminals who know how to make their ill-gotten gain appear untainted, Kennedy wrote.

Kennedy is being consistent with his pragmatist principles too, Scheidegger observed. "He and Alito just disagree with Breyer about which approach is the most practical."

Justice Elena Kagan wrote a separate dissent, arguing that the distinction between tainted and untainted assets will result in arbitrary distinctions that don't make sense.

"There is no difference between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead," she said.

Kagan also suggested that the original *Monsanto* decision was badly reasoned, saying she was troubled by the notion that the government could freeze assets simply by showing there is probable cause to believe they will ultimately be proved forfeitable.

"She seems to be itching to overturn *Monsanto*," Scheidegger remarked.

The Justice Department's Michael R. Dreeben, argued on behalf of the government. Howard Srebnick, of Black, Srebnick, Kornspan & Stumpf P.A., Miami, argued on behalf of Luis.