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Government's Freeze on 'Untainted' Assets Worries Justices

Marcia Coyle, *Supreme Court Brief*

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Concerns about the government having unlimited power to require pretrial forfeiture or a freeze of a criminal defendant's assets—unrelated to the crime charged—swarmed across the bench of the U.S. Supreme Court on Tuesday in a case that involves the Sixth Amendment right to counsel.

The government's argument in *Luis v. United States* appeared to be in trouble when Justice Anthony Kennedy leaned forward and said to Deputy Solicitor General Edward Dreeben: "Just to be clear: the necessary consequence of your position is that any state in the union can provide for forfeiture or 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, to pay for medical costs, to pay for pain and suffering, and can freeze those assets even if the consequences of that is that in most of those cases most people cannot afford counsel.”

Twenty-six years ago in *United States v. Monsanto*, the high court upheld a pretrial order freezing assets in a criminal defendant’s possession, even where the defendant seeks to use those assets to pay an attorney. The assets—a home, an apartment and cash—resulted from the defendant’s narcotics trafficking. That same year in *Caplin & Drysdale v. United States*, the high court ruled that forfeiture of fees paid to a criminal defense attorney with funds derived from the crime does not impermissibly burden a defendant’s Sixth Amendment right to counsel of his choice.

Both cases involved so-called tainted assets—property or money resulting from the proceeds of the crimes. In Tuesday’s arguments, the justices were asked whether a pretrial injunction prohibiting a defendant from using *untainted* assets to hire a lawyer violates the defendant’s Sixth Amendment right to counsel.

Sila Luis, owner-operator of two businesses providing in-home health care, was indicted for paying and conspiring to pay illegal kickbacks for patient referrals and Medicare fraud to the tune of \$45 million. The government sought forfeiture of \$45 million and won an order freezing any proceeds or profits from the alleged offenses as well as “property of an equivalent value of such proceeds or profits.” Luis, according to the government, had spent nearly all of the \$45 million on foreign travel and personal luxury items.

The frozen \$45 million exceeded Luis’ assets. She sought unsuccessfully to modify the order so she could get funds to hire a private attorney. The court declined her request even though both sides stipulated that the order included some untainted assets.

“Nothing about *Monsanto*, nothing about *Caplin & Drysdale*, suggested that assets over which the government has no present property interest, no relation-back theory, no taint theory to speak of, can then take Aunt Sally’s money or a client’s pension funds needed to use those assets to retain counsel,” Luis’ counsel, Howard Srebnick of Miami’s Black, Srebnick, Kornspan & Stumpf told the justices. “Nothing in this court’s precedent in those cases suggests that.”

Srebnick, who argued first, was pressed by several justices on the logic and limit of his arguments. Chief Justice John Roberts Jr., referring to the *Monsanto* decision, asked him, “So what is the logic that says it doesn’t violate the Sixth Amendment if it’s tainted funds, but it does if it’s untainted funds?”

Srebnick distinguished the two, saying the no one has a rightful claim or valid property right to drug money. But Justice Samuel Alito Jr. offered a hypothetical in which twin brothers rob a bank and divide the proceeds of \$10,000 evenly. The same day, their rich uncle gives each \$5,000 as a birthday present. The brothers go partying. One spends the \$5,000 from the robbery; the other spends the uncle’s gift.

“And your position is that the one who spent the money from the so-called ‘tainted assets,’ the money from the bank robbery, is entitled to use the remaining \$5,000 to hire an attorney, but the other one is out of luck?” asked Alito, adding, “What sense does that make?”

Srebnick said the property interest in a gift is not negated simply because the defendant has allegedly committed a crime.

Justices Sonia Sotomayor and Ruth Bader Ginsburg told Srebnick that his argument would prohibit the government from ever restraining untainted assets, not just because of the Sixth Amendment. But Srebnick said his position is limited to the Sixth Amendment which “in the context of the adversarial proceeding, will determine the ultimate ownership of those assets at the end of the day.” Unlike any other amendment, he argued, the Sixth Amendment guarantees the defendant will be represented at the proceeding where his property and liberty are at stake.

The justices then turned to the government’s counsel, Dreeben, who argued that the *Monsanto* decision applied to Luis’ case even though *Monsanto* involved tainted assets.

Justice Stephen Breyer said, “Let’s try that principle in a case where it’s the defendant’s money. The principle is that the government, without proving that he’s guilty of any crime beyond a reasonable doubt, can take all his money. Oh, because he might be fined. I’ve never heard of such a principle, frankly. I’ve just never heard of it.”

Dreeben argued, “*Monsanto* basically said that if the government has shown adequately that it will be able to forfeit the money at the conclusion of the case, the Sixth Amendment doesn’t override the government’s interests. After all, Justice Breyer, this is basically a zero-sum game. Either there will be money available at the end of the case for the victims or the money will have been spent on lawyers.

But what limits that rationale to a specific category of crimes, asked Kennedy, who then said if the government prevails, every state and locality would feel entitled to restrain assets in every crime involving injuries. “And this would, in effect, prevent the private bar from practicing law unless it did so on a contingent basis.”

Although the principle is not limited to the types of crimes in Luis’ case, Dreeben answered, it is limited to the government making an adequate showing that at the end of the case, it will have the right to the money.

And what if the justices are no longer comfortable with “the path we started down the road on in *Monsanto*,” Justice Elena Kagan asked. “And you might be right that it just doesn’t make sense to draw a line here, but it leaves you with a situation in which more and more and more we’re depriving people of the ability to hire counsel of choice in complicated cases.

Dreeben said he hoped that even if there are some “uncomfortable aspects” of *Monsanto*, the court would see “it actually rests on a sound legal judgment.”

Luis has drawn the support of numerous amici, including the American Bar Association, Americans for Forfeiture Reform, The Rutherford Institute, the National Association of Criminal Defense Lawyers and the Cato Institute. The United States has support from associations of state legislatures, counties, mayors and cities.