

It's hard to pay your lawyer without any money

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NOVEMBER 10, 2015 11:10PM

If you're arrested and charged with a white-collar crime, can the government freeze the assets you need to pay for a lawyer to prove your innocence? Remarkably, there's no definitive legal answer to this question, which was on the Supreme Court's docket Tuesday. It's established that the government can freeze tainted assets that it traces to your alleged crime, and that you don't get to challenge that determination. But Tuesday's case will answer the further question of whether the government can freeze any of your assets up to the value of what it says you stole -- not just assets it identifies as tainted proceeds.

The case involves Sila Luis, a Miami home-care provider with two companies. In 2012, she was charged with Medicare fraud that the government says amounted to \$45 million. According to Luis, the government wasn't her only source of revenue; she says her companies earned some \$15 million from private sources.

The government moved to freeze all of Luis's assets, roughly \$2 million. Under the federal statute governing health-care fraud, the government says it can freeze not only assets "traceable to the commission of the offense" but also, if those assets have been spent by the defendant, "substitute assets of equivalent value."

Luis says this freezing violates her constitutional right to counsel under the Sixth Amendment. The government says she has a right to an attorney, just not to the high-priced attorney of her choice. If she's broke as a result of the seizure, one will be provided for her. Luis rejoins that this is a pretty funny interpretation of the Sixth Amendment. The Founding Fathers never dreamed of appointed counsel, so when they provided a right to an attorney they must've meant a right to hire your own.

More fundamentally, Luis is arguing that the basic constitutional logic of allowing you the right to an attorney is to create some fairness between a person who's supposed to be innocent until proven guilty and the all-powerful government. According to this logic, it's frankly shocking that the government can accuse you and then block you from hiring a good lawyer, saddling you instead with a public defender provided and paid for by the government.

In 1989, the Supreme Court held that the government could constitutionally freeze the proceeds of a crime before trial based merely on a showing of probable cause -- even if the money would've been used to pay for a lawyer. This precedent is bad for Luis, of course. But it doesn't definitively cover her case, which is instead about substitute assets, not money directly identifiable as proceeds of a crime.

As a matter of economic logic, there probably shouldn't be a difference between money you stole and held onto as opposed to other money in your possession after you spent what you'd stolen. Money is fungible. But sometimes the law treats identifiable assets differently from general funds. Indeed, that was the central issue in a case the Supreme Court heard Monday involving an employee benefit plan's recovery of health-care expenses disbursed to an accident victim. This technical difference is part of the reason Luis has some shot at winning her case.

Further reason to think she has a chance comes from the fact that the Supreme Court agreed to hear her case at all. When she brought her claim to

the U.S. Court of Appeals for the 11th Circuit, Luis got nowhere, and the court rejected it in an unpublished order because it considered the issue so simple and unimportant. It's extremely unusual for the Supreme Court to take a case with no published opinion in the court below. That's a sign that the justices were looking for this issue -- and that at least four of them, the number required to accept a case, thought it was worth resolving.

Another hint comes from a case decided two years ago, *Kaley v. United States*. Then, the court held that you can't get into court to challenge the grand jury's probable cause determination that particular assets are the proceeds of your alleged crime. That's not a great holding for Luis, but what's promising is that Chief Justice John Roberts wrote a dissent, joined by more liberal Justices Stephen Breyer and Sonia Sotomayor.

In that dissent, Roberts signaled displeasure with the precedent that allows freezing assets to block a defendant from hiring the counsel of his or her choice. He thought that the defendant should get a chance to object to the seizure.

Roberts likes to follow precedent, and is unlikely to hold that the 1989 rule should be overturned. But, consistent with precedent, he could certainly seek to limit its effect. Luis's case is an ideal vehicle for that limiting. By relying on the distinction between stolen assets and substitute assets, Roberts could strike a blow in favor of hiring the counsel of one's choice. Breyer and Sotomayor would surely join him, leaving the question of whether Justices Ruth Bader Ginsburg and Elena Kagan would get on board.

If Roberts succeeds, it'll be a victory for fairness in criminal trials. If not, the government's already extensive power to block you from hiring a lawyer of your choice will expand.

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