



High Court Determines 'Untainted' Assets Can't Be Frozen

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Law360, Washington (March 30, 2016, 10:40 AM ET) -- The U.S. Supreme Court ruled Wednesday that allowing the government to freeze untainted assets violates defendants' right to counsel of their choosing under the Sixth Amendment, tossing an Eleventh Circuit ruling allowing that hold on the assets of a woman accused of a \$45 million Medicare fraud.

In a 5-3 ruling, Chief Justice John Roberts and Justices Stephen Breyer, Ruth Bader Ginsburg and Sonia Sotomayor voted to upend the judgment, finding the government cannot freeze assets not related to alleged wrongdoing in the case against Sila Luis, while Justice Clarence Thomas concurred in a separate opinion.

"We conclude that the defendant in this case has a Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel," Justice Breyer wrote for the plurality. "On the assumptions made here, the District Court's order prevents Luis from exercising that right."

Under federal statute, the government is allowed to freeze some assets before trial in criminal cases alleging federal health care or banking violations, according to the ruling, but a plurality of the justices — opposed by one dissent from Justices Samuel Alito and Anthony Kennedy and another from Justice Elena Kagan — agreed with Luis that the freeze kept from paying her attorney.

Freezable assets are broken down into three categories of property obtained from or traceable to the alleged crime, as well as "property of equivalent value." Luis' frozen assets came from that third category, and the government had put the freeze in place following her October 2012 grand jury indictment because most of the \$45 million she allegedly obtained from the government fraudulently had been spent.

The government was hoping to reap the \$2 million purportedly still in the defendant's

possession, and a district judge found no Sixth Amendment right to untainted funds to hire counsel, a judgment upheld by the Eleventh Circuit.

In upending that judgment Wednesday, the justices noted the fundamental nature of the right to representation under the Sixth Amendment.

“The government cannot, and does not, deny Luis’ right to be represented by a qualified attorney whom she chooses and can afford,” Justice Breyer said. “But the government would undermine the value of that right by taking from Luis the ability to use the funds she needs to pay for her chosen attorney.”

The government had argued that unfreezing the assets could deny it statutory penalties, should it prevail at trial, but the plurality rejected arguments that the high court’s rulings in *Caplin & Drysdale* and *Monsanto* hold that the Sixth Amendment does not bar asset freezes. The assets in those cases are of a distinctly different nature, according to the plurality, because the assets in those cases were tainted, where Luis’ money is not.

“It belongs to the defendant, pure and simple,” Justice Breyer said. “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.”

Nor would denying Luis’ right to hire an attorney of her choosing “inevitably undermine” the government’s ability to financially punish defendants, Justice Breyer said, noting that at least in some instances defendants can still have tainted property subject to a freeze.

The government’s interests do not outweigh the right to counsel of choice, according to the plurality, which also rejected the government’s arguments on common law grounds as well as based on a fear of eroding the right to counsel. While asset freezes are currently allowed under health care and banking law violations, Congress could expand pretrial restraints to other cases as well, the plurality found.

Justice Thomas concurred with the judgment but not with the plurality’s balancing approach, writing separately that the freeze is improper based purely on the text of the Sixth Amendment and the backdrop of common law, which he said draws a clear distinction between untainted and tainted assets.

The separate opinion, Justice Thomas said, comes because there's no room for "balancing" between the government's interests and the Sixth Amendment's guarantee to counsel of choice.

In a dissent, Justices Kennedy and Alito called the ruling as an "unprecedented" holding that ignores high court precedent finding assets broadly freezeable and "distorts" the right to counsel.

The ruling "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," the dissent said.

Justice Kagan dissented separately based on the argument that Monsanto controls this case.

"Because the government has established probable cause to believe that it will eventually recover Luis's assets, she has no right to use them to pay an attorney," Justice Kagan said.

Justice Kagan argued there's no difference in the government's legal interests between tainted and untainted assets, while also voicing concerns over the fungibility of assets.

The high court granted certiorari in June, following the Eleventh Circuit's affirmation of a district court decision to allow prosecutors to freeze Luis' assets to the tune of \$45 million — the amount they claimed her companies earned in the scheme — so that the government can recoup the full amount should she be found guilty.

Luis' attorneys have said that she does not have access to that amount of money and that to make up for it, the government is digging into millions of dollars she earned from private insurers.

An attorney for Luis praised the ruling Wednesday.

"It's an important decision for citizens accused of a crime and for the criminal defense bar," Howard M. Srebnick said.

Luis' criminal trial was put on hold pending the outcome of the Supreme Court appeal. She's accused of Medicare fraud and Anti-Kickback Statute violations by paying patients who used her two at-home health companies so that she could bill the government for unnecessary or unprovided-for services.

The Supreme Court took on Luis' case a year after ruling in *Kaley v. U.S.* that the government could prevent defendants from accessing funds that were allegedly obtained in the process of a crime while their criminal suits are ongoing. Luis' attorney Howard Srebnick of Black Srebnick Kornspan & Stumpf PA was also lead defense counsel in the Kaley case.

Luis is represented by Howard M. Srebnick and Joshua Shore of Black Srebnick Kornspan & Stumpf PA and Scott A. Srebnick.

The government is represented by Donald B. Verrilli Jr. of the U.S. Office of the Solicitor General.

The case is *Luis v. U.S.*, case number 14-419, in the Supreme Court of the United States.

--Additional reporting by Michael Macagnone. Editing by Sarah Golin.