On Remand
An online publication of the New England Law Review

Faculty Blog: Luis v. United States and a Right to Counsel for the Rich

Posted on April 6, 2016

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The Sixth Amendment, which the Supreme Court has for over half a century interpreted to afford indigent criminal defendants a right to a lawyer at government expense, now also provides wealthy defendants something: protection from the government's freezing their untainted assets (as opposed to those traceable to, or proceeds of, crime) to prevent retaining counsel of their choice. As principled—and protective of the Sixth Amendment—as this distinction may be, it reinforces something much more pernicious: there is now effectively a right of the rich to be free from impoverishment by the government, to protect their Sixth Amendment right to *retain* counsel of their choosing, while the identical Amendment does not provide an indigent defendant *access* to an actual lawyer of *anyone's* choice.

Luis v. United States, was quite simple: federal law permits pre-trial freezing of certain criminal defendants' assets that are proceeds of the crime, traceable to the crime, or of equal value to either of the first categories. Ms. Luis allegedly obtained $45 million through health care-related fraud, but when indicted had only $2 million, which the government agreed was neither proceeds of nor traceable to the fraud. Freezing these funds, to satisfy what the government contended would be restitution upon conviction, would preclude her hiring counsel of her choice. If the Sixth Amendment truly conferred a right to hire counsel of one's choice, then did it also prevent the government from vitiating this right by freezing all one's resources with which to pay counsel? Yes, the Court found, although not for any reason that commanded a majority.

Given the essential fungibility of money, the distinction between freezing financial assets that are proceeds of criminal activity, or even arguably such, and those equivalent in amount but conceded to be untainted may be a bit hazy. But it is this distinction between the characterizations "tainted" and "untainted" assets (or what's "mine," i.e., the defendant's, versus what's "yours," i.e., the Government's, in Justice Breyer's language for the plurality), as opposed to simply "forfeitable" assets (Justice

Kennedy's terminology for the dissenters) that divides the four member plurality from the three dissenters. Justice Thomas' concurrence in the judgment, based on a plain meaning interpretation of the term "right to the assistance of counsel," that must have meant to the Framers a right not to have the government seize all one's resources because the only counsel available "back in the day" was one you hired, and 17th and 18th century understandings of "forfeiture" were exclusively post-conviction, is a paean to the late Justice Scalia (cited five times by name). Whatever the merits of the tainted/untainted as opposed to forfeitable characterizations, after *Luis v. United States*, it's crystal clear the government may no longer seek to freeze assets that can't be traced to criminal activity, even if they would be all that's left to ensure adequate resources are available for forfeiture after conviction, if doing so would preclude a rich defendant from hiring counsel of her choice.

Of course, this choice is not limited to wealthy defendants, but one—like the choice to sleep under the bridges of Paris, beg in the streets, or steal bread—that the law in its majesty equally forbids the rich and the poor, though it stands in stark contrast to the right of an indigent criminal defendant to actually have a genuine, living, breathing lawyer of *anyone's* choice. As the Court held in *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008), even the attachment of the right to counsel by appearance before a judicial officer in a criminal proceeding does not *then* give an indigent defendant a right to a lawyer. Whether even a delay of six months to obtain representation by a lawyer would harm this right is a nice, but unreached, question. (The Court's studied avoidance of this question ensures indigent defendants often receive counsel so late that their rights are not effectively protected, as detailed in 2014 by the Sixth Amendment Center.)

Both the plurality and the principal dissent in *Luis* are only too quick to point out the parade of horribles facing such affluent defendants: they would have to "fall back on overworked and underpaid public defenders." (Breyer, J., Slip. Op. at 15.) Of course, "[g]iven the large volume of defendants in the criminal justice system who rely on public representation, it would be troubling to suggest that a defendant who might be represented by a public defender will receive inadequate representation." (Kennedy, J., Slip Op. 14.) Yet this is exactly what the Brennan Center report, that Justice Kennedy himself cites, states: Inadequate funding means public defenders "are simply unable to provide clients with their constitutional right to counsel, effectively making *Gideon* an unfunded mandate at a time when public defenders are needed most."

A wealthy defendant cannot constitutionally be converted into an indigent one, with the attendant disabling effects for her defense, yet an indigent defendant not only has no right to access the sort of preventive, proactive litigation that retained counsel can

provide, but cannot even rely on having the right to counsel made real—with an actual lawyer—until what may be sometime after having appeared in court. Just one more way the rich really are different, even when they are charged with a crime.