Luis v. United States: The Distinction That Makes All the Difference

By Dean A. Mazzone

Note from the Editor:

This article discusses the Supreme Court's 2016 decision in *Luis v. United States*, which dealt with asset forfeiture and the Sixth Amendment right to counsel. After summarizing the arguments of the plurality, concurring, and dissenting opinions, the author briefly discusses asset forfeiture more broadly and the potential ramifications of *Luis*.

In *Luis v. United States*, the United States Supreme Court found itself faced with what some would consider a distinction without a difference.[1] The issue of government forfeiture of alleged criminal assets has become fraught with controversy over the past several years.[2] Allegations of government overreach have nearly overwhelmed what was once a safe consensus in favor of the notion that no person should enjoy the benefit of their ill-gotten gains. The change is evident in the legal analysis of the *Luis* majority, and in the case's outcome.

In October 2012, the federal government charged Sila Luis with paying kickbacks, conspiring to commit fraud, and other health care related crimes.[3] The federal government alleged that she had stolen approximately $45 million dollars through an array of health care scams, and had already spent the bulk of it.[4] Luis still had about $2 million in her possession, however, and the government, seeking to preserve those funds for restitution and criminal fines and penalties, obtained a pretrial order from the district court restraining Luis from dissipating these funds in any fashion:[5]

> To establish its entitlement to a restraining order, the Government showed that Luis and her co-conspirators were dissipating the illegally obtained assets. In particular, they were transferring money involved in the scheme to various individuals and entities, including shell corporations owned by Luis' family members. As part of this process, Luis opened and closed well over 40 bank accounts and withdrew large amounts of cash to hide the conspiracy's proceeds. Luis personally received almost $4.5 million in funds and used at least some of that money to purchase luxury items, real estate, and automobiles, and to travel.[6]

Having made that showing, the government stipulated that these funds were "untainted" assets. That is, it stipulated that the funds were not traceable to the criminal acts at issue, and that, because of the government's seizure of these assets, Luis would not be able to afford private counsel to represent her in the criminal case.[7] In its ruling, the district court acknowledged that its order might prevent Luis from retaining a lawyer of her choice, but "that there is no Sixth Amendment right to use untainted, substitute

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This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

1 136 S. Ct. 1083 (2016).

2 *See* Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf (visited April 13, 2017).

3 *Luis*, 136 S. Ct. at 1087.

4 *Id.*

5 *Id.* at 1087-1088.

6 *Id.* at 1104 (Kennedy, J., dissenting).

7 *Id.* at 1088.

assets to hire counsel."[8] The Eighth Circuit upheld the district court's order, and the United States Supreme Court granted Luis' petition for certiorari.[9]

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[10] The Supreme Court has observed, "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."[11] The Court in *Luis*, determining that in the circumstances the constitutional question was unavoidable, held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment."[12] Sila Luis could keep her money.

After a brief sojourn outlining the contours and history of the Sixth Amendment and the Court's cases construing it, the plurality opinion, penned by Justice Breyer and joined by the Chief Justice and Justices Ginsburg and Sotomayor, got to the heart of the matter:

> The Government cannot, and does not, deny Luis' right to be represented by a qualified attorney whom she chooses and can afford. 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.[13]

Acknowledging this fact, the government nonetheless argued that its actions were plainly justified. The government claimed that it needed to freeze Luis' assets in order "to guarantee that those funds will be available later to help pay for statutory penalties (including forfeiture of untainted assets) and restitution, should it secure convictions."[14] The government further asserted that it stood on solid legal ground, rooted in the well-settled precedent of the Court's own cases regarding the Sixth Amendment and asset seizures.[15] Those cases, according to the government, stood for a commonsense proposition relied upon by all levels of law enforcement all across the United States: that property of a criminally accused is subject to pretrial restraint by the government if that property may in the future be deemed forfeitable by a court.[16] The *Luis* majority disagreed.

The difference in this case, the Court observed, was that prior cases "involved the restraint only of tainted assets, and thus [the Court] had no occasion to opine in those cases about the constitutionality of pretrial restraints of other, untainted assets."[17] That difference is crucial; the assets at issue "belong[] to the defendant, pure and simple. 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."[18] Colorfully put, and highly instructive. While the government can freeze, and even seize, assets such as those described above, "untainted" assets are in a wholly different category, as far as concerns the Sixth Amendment and its guarantees.[19] And the government had conceded in this case that the property was in fact untainted.[20]

This concession, in the end, rendered the government's reliance on Supreme Court precedent untenable. In both *Caplin & Drysdale* and *Monsanto*, the government's seizure of funds, in one case pretrial and in the other after a conviction, prevented the defendants from using those funds to hire and pay lawyers of their choosing.[21] The Court held in those cases that the seizures did not violate the Sixth Amendment.[22] In each, the contested property was tainted, that is, traceable to the crime. As the Court pointedly noted:

> The distinction that we have discussed is an important one, not a technicality. It is the difference between what is yours and what is mine. In *Caplin & Drysdale* and *Monsanto*, the Government wanted to impose restrictions upon (or seize) property that the Government had probable cause to believe was the proceeds of, or traceable to, a crime. The relevant statute said that the Government took title to those tainted assets as of the time of the crime. And the defendants in those cases consequently had to concede that the disputed property was in an important sense the Government's at the time the court imposed the restrictions.[23]

In such circumstances, the Court observed, the government had a "substantial" interest, a sort of lien, in the property as a result of its likely criminal provenance, a situation that concededly did not obtain in Luis' case.[24]

> As soon as [the possessor of the forfeitable asset committed the violation] . . . , the forfeiture . . . *took effect*, and (though needing judicial condemnation to perfect it) operated *from that time* as a statutory conveyance to the United States of all right, title, and interest then remaining in the [possessor];

8 *Id.*

9 *Id.*

10 U.S. Const. amend. VI.

11 Powell v. Alabama, 287 U.S. 45, 53 (1932).

12 *Luis*, 136 S. Ct. at 1088.

13 *Id.* at 1089.

14 *Id.*

15 *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 631 (1989); United States v. Monsanto, 491 U.S. 600, 616 (1989).

16 *Id.*

17 *Luis*, 136 S. Ct. at 1091.

18 *Id.* at 1090.

19 *Id.*

20 *Id.* at 1088.

21 *Id.* at 1090.

22 *Id.*

23 *Id.* at 1092 (internal citations omitted).

24 *Id.*

and was as valid and effectual, against all the world, as a recorded deed.[25]

This was not the end of the analysis, however. Importantly, the government also relied on a federal statute, 18 U.S.C. sec. 1345(a)(2)(B)(i), which, it argued, conferred upon a district court the power to enjoin a defendant in a criminal case from disposing of untainted "property of equivalent value" to tainted property.[26] The Court was not persuaded. Noting that Luis needed some of that property to pay for a lawyer, the Court held that the interests protected by the seizure of that property ran headlong into that interest expressly protected by the Sixth Amendment, and that the Sixth Amendment prevailed. Those governmental interests included:

> [T]he Government's contingent interest in securing its punishment of choice (namely, criminal forfeiture) as well as the victims' interest in securing restitution (notably, from funds belonging to the defendant, not the victims). While these interests are important, to deny the Government the order it requests will not inevitably undermine them, for, at least sometimes, the defendant may possess other assets—say, 'tainted' property—that might be used for forfeitures and restitution. Nor do the interests in obtaining payment of a criminal forfeiture or restitution order enjoy constitutional protection. Rather, despite their importance, compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.[27]

For those reasons, the Court explained, and because the Court could find no historical support for the practice of pretrial restraint of untainted assets, the rights afforded by the Sixth Amendment necessarily trumped the government's various asserted, but in the end unavailing, interests.[28]

In a characteristically comprehensive and thought-provoking concurrence, Justice Thomas concurred in the judgment, but not in its particular analytical approach. Noting that, where the Sixth Amendment provides for the right to counsel of choice, it does not, in turn, allow for "unchecked [government] power to freeze a defendant's assets before trial simply to secure potential forfeiture upon conviction," Justice Thomas goes further.[29] He goes on to observe that "[t]he law has long recognized that the 'authorization of an act also authorizes a necessary predicate act.'"[30] The Sixth Amendment, then, implicitly and necessarily provides some protection for the lawful ability to pay for one's counsel of choice. That ability need not be subsidized, but neither can it be handicapped by government action. "Constitutional rights thus implicitly protect those closely related acts necessary to their exercise."[31]

Justice Thomas goes on to cite some examples. He avers first to the Second Amendment and its right to keep and bear arms, which would mean nothing without corresponding rights to obtain the bullets necessary for their use and to acquire and maintain proficiency in the use of those arms.[32] Justice Thomas also points to the right to express one's opinion protected by the First Amendment and its concomitant "right to engage in financial transactions that are the incidents of its exercise."[33] In a similar fashion, one must have the right to use the assets one lawfully possesses in order to fully exercise the right to hire an attorney of one's choice. And certainly the government may not hamper or restrict that right in any way, directly or indirectly.

Justice Thomas also carefully and eruditely limns the historical parameters and evolution of the right at issue, and notes plainly that "[p]retrial freezes of untainted forfeitable assets did not emerge until the late 20th century."[34] Tainted assets, however, were always subject to forfeiture, and the seizure before trial of contraband and stolen goods based on probable cause to believe they are such items has a venerable Fourth Amendment pedigree that is similarly unquestioned.[35] Pretrial seizure of untainted property, however, was another matter.[36] According to Justice Thomas, the common law itself "offers an administrable line: A criminal defendant's untainted assets are protected from Government interference before trial and judgment. His tainted assets, by contrast, may be seized before trial as contraband or through a separate *in rem* proceeding."[37]

Justice Thomas takes issue with what he calls the "plurality's atextual balancing analysis."[38] Gently chiding the plurality for its reasoning while quoting it forthrightly, Justice Thomas states that he has "no idea whether, compared to the right to counsel of choice, the Government's interests in securing forfeiture and restitution lie further from the heart of a fair, effective criminal justice system."[39] Repairing to the authority of one of the Court's landmark cases, Thomas admits that "[j]udges are not well suited to strike the right 'balance' between [two] incommensurable interests. Nor do I think it is our role to do so. The People, through ratification, have already weighed the policy tradeoffs

25 *Id.*, quoting United States v. Stowell, 133 U.S. 1, 19 (1890) (emphases in original).

26 *Id.* at 1093.

27 *Id.* (internal citation and quotation omitted).

28 *Id.* at 1093-94.

29 *Id.* at 1097.

30 *Id.* (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 192 (2012) (discussing the "predicate act canon")).

31 *Id.*

32 *Id.* at 1097-98 (citing and quoting Jackson v. City and County of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) and Ezell v. Chicago, 651 F.3d 684, 704 (7th Cir. 2011)).

33 *Id.* (quoting McConnell v. Federal Election Comm'n, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part)).

34 *Id.* at 1099.

35 *Id.* at 1100.

36 *Id.*

37 *Id.* at 1101.

38 *Id.*

39 *Id.* (internal quotation marks omitted).

that constitutional rights entail."[40] That weighing being done, according to Thomas, the Court's present task is straightforward. Noting further the well-settled proposition that incidental governmental burdens on fundamental constitutional rights do not necessarily violate those rights,[41] Justice Thomas explains that the burden at issue in *Luis* is decidedly *not* incidental.[42] Instead, "it targets a defendant's assets, which are necessary to exercise that right, simply to secure forfeiture upon conviction."[43] In Justice Thomas' view, then, the law at issue simply does not comport with the right that the Sixth Amendment guarantees.

Justice Kennedy, joined in dissent by Justice Alito, saw things quite differently:

> The plurality and Justice Thomas find in the Sixth Amendment a right of criminal defendants to pay for an attorney with funds that are forfeitable upon conviction so long as those funds are not derived from the crime alleged. That unprecedented holding 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. It matters not, under today's ruling, that the defendant's remaining assets must be preserved if the victim or the Government is to recover for the property wrongfully taken.[44]

Justice Kennedy points out what some would consider an obvious flaw in the holding of the case, by way of a particularly provocative illustration:

> Assume a thief steals $1 million and then wins another $1 million in a lottery. After putting the sums in separate accounts, he or she spends $1 million. If the thief spends his or her lottery winnings, the Government can restrain the stolen funds in their entirety. The thief has no right to use those funds to pay for an attorney. Yet if the thief heeds today's decision, he or she will spend the stolen money first; for if the thief is apprehended, the $1 million dollars won in the lottery can be used for an attorney."[45]

Justice Kennedy considers this outcome to be self-evidently unfair, and he would hold that the Sixth Amendment in no way compels it.[46]

Justice Kennedy argued that the Court's holding was actually foreclosed by its prior cases.[47] He observes that, whether tainted or untainted, the government has no property right whatsoever in forfeitable assets "until the Government wins a judgment of forfeiture or the defendant is convicted."[48] But that does not mean it cannot restrain those assets in order to prevent their potential dissipation. Indeed, according to Justice Kennedy, that was the rule of the Court's prior cases; nothing turned on whether the assets at the time of the restraint were traceable to the crimes at issue, and such a determination was irrelevant to the cases' respective outcomes.[49] The plurality argued that only where assets are connected to the crime does the government have a type of property interest in those assets at the time the crime is committed, and thus the concomitant authority to seek pretrial restraint.[50] Justices Kennedy and Alito, however, see no such distinction, and thus they see no constitutional violation. In other words, where, as here, there is statutory authority to seize substitute assets in order to provide restitution to victims of a crime,[51] those assets, whatever their nature or provenance, may be restrained:

> True, the assets in *Caplin & Drysdale* and *Monsanto* happened to be derived from the criminal activity alleged; but the Court's reasoning in those cases was based on the Government's entitlement to recoup money from criminals who have profited from their crimes, not on tracing or identifying the actual assets connected to the crime. For this reason, the principle the Court announced in those cases applies whenever the Government obtains (or will obtain) title to assets upon conviction.[52]

Contra Justice Thomas and like the plurality, Justice Kennedy expressly considers the government's interest and balances it against the defendant's. And, in his analysis, the defendant—the possessor of what are conceded to be wholly innocent assets—comes up short. "This case implicates the Government's interest in preventing the dissipation, transfer, and concealment of stolen funds, as well as its interest in preserving for victims any funds that remain. Those interests justify, in cases like this one, the pretrial restraint of substitute assets."[53] The *Luis*

40 *Id. See* District of Columbia v. Heller, 554 U.S. 570, 634-635 (2008) ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really *worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.") (emphasis in original).

41 *See, e.g.*, Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 878-882 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (internal citation omitted).

42 *Luis*, 136 S. Ct. at 1102.

43 *Id.*

44 *Id.* at 1103.

45 *Id.*

46 *Id.*

47 *Id.* at 1105 (citing *Caplin & Drysdale*, 491 U.S. at 625, and *Monsanto*, 491 U.S. at 616).

48 *Id.* at 1106.

49 *Id.* at 1106-1107.

50 *Id.* at 1090.

51 *See* 18 U.S.C.A. § 1345.

52 *Luis,* 136 S. Ct. at 1108.

53 *Id.*

plurality did not agree, however, and the dissenting opinion laments what it sees as an unnecessary impediment to making victims whole, and a complete windfall for malefactors of all kinds, including Luis herself:

> Notwithstanding that the Government established probable cause to believe that Luis committed numerous crimes and used the proceeds of those crimes to line her and her family's pockets, the plurality and Justice Thomas reward Luis' decision to spend the money she is accused of stealing rather than her own. They allow Luis to bankroll her private attorneys as well as "the best and most industrious investigators, experts, paralegals, and law clerks" money can buy. A legal defense team Luis claims she cannot otherwise afford.[54]

The picture painted by Justice Kennedy, conveyed with palpable passion, is surely not a pretty one.

The dissent goes on to note that while Luis, if her assets were frozen, may not be able to retain her particular counsel of choice, the Sixth Amendment will nonetheless ensure that she receives constitutionally effective counsel, that is, a public defender.[55] Justice Kennedy also maintains that, where the Court's holding is based on the Sixth Amendment, "the States' administration of their forfeiture schemes" is now called into question: "[l]ike the Federal Government, States also face criminals who engage in money laundering through extensive enterprises that extend to other States and beyond."[56]

Further, Justice Kennedy observes that it is not always easy to determine just what assets are "tainted" and what are "untainted."[57] On this score, Justice Kennedy provides another provocative example:

> The plurality appears to agree that, if a defendant is indicted for stealing $1 million, the Government can obtain an order preventing the defendant from spending the $1 million he or she is believed to have stolen. The situation gets more complicated, however, when the defendant deposits the stolen $1 million into an account that already has $1 million. If the defendant then spends $1 million from the account, it cannot be determined with certainty whether the money spent was stolen money rather than money the defendant already had. The question arises, then, whether the Government can restrain the remaining million.[58]

A vexing question, indeed. Justice Kennedy then cites a learned treatise, one noted favorably by the plurality, that instructs that in a situation where misappropriated and lawful monies are commingled in a single account, money may be recovered from that account regardless of whether it can be demonstrated that the money recovered is in fact the misappropriated portion.[59] Money is fungible, after all. That being so, notes Justice Kennedy, why should it matter if the monies are instead in two separate bank accounts, one account containing money from before the crime, the other containing the stolen assets?[60] In the principal dissent's opinion, the holding in *Luis* simply "creates perverse incentives and provides protection for defendants who spend stolen money rather than their own."[61]

Justice Kagan penned a separate dissent. She explained first that she found *Monsanto*—which held that the government may freeze a defendant's tainted assets pretrial so long as there is probable cause to believe they may be forfeitable, even if the assets were going to be used to hire a lawyer—to be a "troubling" decision which she would like to revisit.[62] It seemed, to Justice Kagan, to be putting the proverbial cart before the horse.[63] But the correctness of *Monsanto* was not before the Court in *Luis*. Constrained by *Monsanto*, Justice Kagan, like Justice Kennedy, saw no real distinction between it and the facts of *Luis*: "Indeed, the plurality's use of the word 'tainted,' to describe assets at the pre-conviction stage, makes an unwarranted assumption about the defendant's guilt. Because the Government has not yet shown that the defendant committed the crime charged, it also has not shown that allegedly tainted assets are actually so."[64] Justice Kagan's dissent here sounds an ominous note for certain well-established law enforcement practices regarding pretrial asset forfeiture.

In that vein, certain developments outside of Supreme Court jurisprudence are noteworthy. Since the Court's decision in *Luis*, caselaw considering it and its commands have been relatively sparse.[65] Nonetheless, as Justice Kennedy noted,[66] the rule of *Luis* will likely have a substantial effect on the quantity of such pretrial seizures in an enormous number of cases. In any event, and quite beyond the facts and holding of *Luis* itself, the future of civil asset forfeiture, both state and federal, is in a state of flux as a matter

54 *Id.* at 1109 (internal citation omitted).

55 *Id.* at 1110.

56 *Id.*

57 *Id.*

58 *Id.* at 1110-1111.

59 *Id.* at 1111.

60 *Id.*

61 *Id.* at 1112.

62 *Id.*

63 *Id.*

64 *Id.* at 1112-1113.

65 *See, e.g.*, United States v. Johnson, WL 1226100 (4th Cir. April 3, 2017) (affirming seizure of funds where probable cause existed to seize all of defendant's funds as tainted assets); Estate of Lott v. O'Neill, 2017 WL 462184 (Me. February 3, 2017) (Sixth Amendment right to assistance of counsel not violated when plaintiff in civil wrongful death action attaches funds defendant intends to use for legal defense to homicide charges based on death at issue in civil case); United States v. Malik, 2017 WL 491225 (D. Md. February 2, 2017) (allowing defendant's motion for reconsideration of pretrial restraining order in light of *Luis*, where no contention defendant's assets were tainted); United States v. Lindell, 2016 WL 4707976 (D. Haw. Sept. 8, 2016) (holding *Luis* inapplicable where seized funds were tainted); United States v. Marshall, 2016 WL 3937514 (N.D.W.Va. July 18, 2016) (holding all seized funds but one untainted, and thus available to pay for lawyer under *Luis*).

66 *Luis*, 136 S. Ct. at 1110.

of both constitutional law and policy.[67] In a statement respecting the Court's decision to deny certiorari in a case challenging the constitutionality of the procedures used by the state of Texas to adjudicate the seizure of the petitioner's property under Texas' asset forfeiture law, Justice Thomas observed that:

> [T]he Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding . . . . In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation.[68]

Because the petitioner raised her due process argument for the first time before the Supreme Court, Justice Thomas was compelled to concur in the denial of certiorari; but, he said, "[w]hether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."[69] Based on the various opinions that came out of *Luis*, all forcefully argued and ably presented, on a topic of great import to civil and criminal justice, it would seem that that moment of further consideration will arrive sooner rather than later.

67 *See, e.g.*, Lee McGrath and Nick Sibilla, *Trump Should Be Appalled by Police Asset Forfeiture*, Wall Street Journal, March 5, 2017, https://www.wsj.com/articles/trump-should-be-appalled-by-police-asset-forfeiture-1488751876.

68 Leonard v. Texas, 137 S. Ct. 847 (2017) (statement of Justice Thomas respecting denial of certiorari).

69 *Id.*