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Criminal Law

Forfeiture

The Supreme Court's recent opinion in *Luis v. United States* forecloses the government's use of a defendant's seized ''untainted'' assets. Paul Hastings attorneys Anand B. Patel and Mark D. Pollack note that the opinion can be applied to different statutes such as the Economic Espionage Act. They suggest, however, that before the holding becomes the boon for defendants many are predicting, several questions need to be answered, including who has the burden of showing that the assets are tainted, will the applicable burden of proof be elevated beyond the traditional ''probable cause'' standard, and will assets transferred to innocent third-parties be subject to pretrial seizure?

The Uncertain Implications of *Luis v. United States*

BY ANAND B. PATEL AND MARK D. POLLACK

The Obama administration has focused its efforts over the past several years on protecting American intellectual property interests from foreign theft, leading to an uptick in trade secret litigations and prosecutions.

As the government commits more resources to that fight, *see, e.g.*, Administration Strategy on Mitigating the Theft of U.S. Trade Secrets (Feb. 2013) (*available at* http://src.bna.com/eS0), prosecutors and investigating agencies are following their mandate to protect American companies' intellectual property by enforcing the Economic Espionage Act, 18 U.S.C. § § 1831-1839 (1996), against potential offenders.

That Act criminalizes the theft of trade secrets, and allows for the pretrial forfeiture or restraint of any assets used in or derived from the offense conduct before trial and based solely on an indictment.

The specter of pretrial asset forfeiture or restraint has become an increasingly-used tool for the government to pressure companies and individuals accused of trade secret misappropriation.

However, U.S. the Supreme Court recently curtailed the government's power to seize or restrain ''untainted'' assets of an indicted individual or entity in *Luis v. United States*, 84 U.S.L.W. 4159, 2016 BL 98101 (U.S. March 30, 2016).

Although the particular pretrial restraint at issue in the *Luis* case was issued pursuant to 18 U.S.C. § 1345, the force and logic of the Court's reasoning are likely to be applied to criminal statutes with similar pretrial restraint and forfeiture provisions, including the Economic Espionage Act.

The Court's plurality decision, though it provides a principled basis by which defendants, particularly individuals, can resist or substantially curtail pretrial asset restraint, leaves many unanswered questions about

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how exactly the holding will be implemented and applied by lower courts confronted with comparable statutory provisions.

Background. Sila Luis was indicted in October 2012 for bribery, conspiracy to commit fraud, and other health care-related crimes.

The government asserted that Luis had received ill-gotten gains of almost $45 million, $43 million of which she had already spent.

In an attempt to preserve the remaining $2 million, the government requested a pretrial restraining order under 18 U.S.C. § 1345, prohibiting Luis from disposing of her assets.

That provision grants a court power to restrain and enjoin before trial certain assets belonging to a criminal defendant accused of violations of federal banking or health care laws. *See* 18 U.S.C. § 1345.

Those assets include property ''obtained as a result of'' the violation, property ''traceable to such violation,'' or ''property of equivalent value'' (''substitute assets''). *Id.* § 1345(a)(2).

The trial court granted the restraining order, which prevented Luis from using any of her assets, whether connected to the crimes (''tainted assets'') or not connected to the crimes (''untainted assets''), to obtain counsel of her choice.

The lower courts held that there was no right under the Sixth Amendment to use untainted, substitute assets to hire counsel.

The court found that there was no right under the Sixth Amendment to use untainted, substitute assets to hire counsel. 966 F.Supp. 2d 1321, 1334 (S.D. Fla. 2013).

That decision was upheld by the Eleventh Circuit, 564 F. App'x 493, 494 (2014) (*per curiam*), before being considered by the Supreme Court.

Plurality Decision. In an opinion by Justice Breyer, a plurality of the Court held ''that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.'' 2016 BL 98101, at ***4.

After stating that the right to counsel is fundamental, the deprivation of which is *ipso facto* reversible error, the Court noted that it has held that the Sixth Amendment grants the accused ''a fair opportunity to secure counsel of his own choice.'' *Id.* at ***5 (citations omitted).

While there are certain limits to that right, the Amendment ''guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire.'' *Id.*

Having established the primacy of the right to counsel, the Court then turned to the government's pretrial restraining order, which would have deprived Luis of that right.

The Court distinguished a body of potentially conflicting precedent—holding that the government's interest in guaranteeing that funds will be available at sentencing to pay for restitution and forfeiture trumps the defendant's right to choice of counsel—by focusing on the untainted nature of the assets in the *Luis* case.

As Justice Breyer put it, while an accused's ownership interest in loot, contraband, or other tainted assets is imperfect, untainted assets ''belong[] to the defendant, pure and simple.'' *Id.* at ***6.

He distinguished the cases relied upon by the government, noting that the property in those cases was traceable to the illegal conduct and therefore had vested in the government at the time the crime was committed; the government therefore ''even before trial had a 'substantial' interest in the tainted property sufficient to justify the property's pretrial restraint.'' *Id.* at ***8.

In contrast, the assets at issue in the *Luis* case indisputably were unrelated to the crime, and Luis was fully vested with title to those assets.

That fact distinguished the case from the precedents invoked by the government, each involving the pretrial restraint of tainted assets more directly tied to the offense conduct.

Consequently, Justice Breyer found there was no governmental interest in such ''untainted'' assets.

But the ownership distinction by itself was not dispositive, the Court noted, as property law allows potential, future owners to impose certain conditions on current owners.

The plurality analogized the government's request to such a restraint: it sought ''an order that will preserve Luis' untainted assets so that they will be available to cover the costs of forfeiture and restitution if she is convicted, and if the court later determines that her tainted assets are insufficient or otherwise unavailable.'' *Id.* at ***9.

But the Court held that the Sixth Amendment prohibits such an order because (i) the Amendment's fundamental due process nature outweighs the government's contingent interest in securing forfeiture and the victim's interest in obtaining restitution, (ii) relevant legal tradition does not support the government's position, and (iii) accepting the government's position could lead to further erosion of the right to counsel via congressional action approving additional pretrial restraints and making more defendants rely on public defenders.

The Court also noted that tracing rules will prevent many of the practicality issues raised by the dissents.

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Concurrence. Justice Thomas concurred in the judgment: ''When the potential of a conviction is the only basis for interfering with a defendant's assets before trial, the Constitution requires the Government to respect the longstanding common-law protection for a defendant's untainted property.'' *Id.* at ***20.

As one might expect, Justice Thomas based his reasoning on a highly textual approach to the Sixth Amendment grounded in the common law.

He reasoned that the Amendment ''implies the right to use lawfully owned property to pay for an attorney. Otherwise the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless.'' *Id.* at ***13.

Like other individual rights, the Sixth Amendment ''implicitly protect[s] those closely related acts necessary to [its] exercise.'' *Id.* at ***14.

Thus, without constitutional protection of at least a portion of an accused's financial resources, Justice Thomas concluded that the right to counsel would be rendered ineffective.

Indeed, he observed that the Sixth Amendment was adopted to overrule the common law practice denying defendants in felony cases the right to counsel; thus, allowing an unlimited pretrial restraint of assets would revive such a system.

The concurrence further noted that, though an indigent defendant can turn to a public defender, ''the original understanding of the right to counsel'' was to protect ''a defendant's right to retain an attorney he could afford.'' *Id.* at ***15.

Justice Thomas further argued that a bright-line rule clearly distinguishing between untainted and tainted assets in the context of pretrial restraint is much preferable to a case-by-case analysis, deeming the latter to be ''woefully inadequate,'' and in any case, not the bailiwick of the judiciary. *Id.* at ***16.

He analogized the restraint to Fourth Amendment seizures, where the Court has held that a nexus between the item to be seized and the criminal act is necessary; untainted assets almost uniformly lack that connection.

The common law instead dictates that ''untainted assets are protected from Government interference before trial and judgment.'' *Id.* at ***18.

Extrapolating from those cases, Justice Thomas wrote that interpreting the Sixth Amendment in a similar vein avoids a factually-intensive, individualized analysis while giving effect to the drafter's original intent.

Justice Thomas concluded by criticizing the plurality's weighing of the accused's right to counsel against the government's interest in freezing potentially forfeitable assets.

That assessment, he stated, was performed when the Sixth Amendment was ratified.

It therefore was improper for the Court to substitute the results of its balancing analysis for those innate in the Amendment.

Dissents. Justice Kennedy, joined by Justice Alito, dissented.

''Since Luis cannot afford the legal team she desires [as a result of the district court's restraining order], and because there is no indication that she will receive inadequate representation as a result, she does not have a cognizable Sixth Amendment complaint.'' *Id.* at ***28.

Looking to the effects of the decision, the dissent noted that the plurality ''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.'' *Id.* at ***20.

The dissenters found such a rule to be illogical, particularly given the fungible nature of money, as it incentivizes criminals to dispose of the proceeds of their crimes as quickly as possible at the expense of potential restitution for victims.

The Court's precedent instead dictates that ''a defendant has no Sixth Amendment right to spend forfeitable assets (or assets that will be forfeitable) on an attorney.'' *Id.*

The dissent argued that the Court has previously held that the Sixth Amendment guarantees a defendant the right to effective counsel, not necessarily counsel of their choosing (nothing prevents a restrained defendant from hiring counsel of his choice, although it may become more difficult).

Those prior decisions also recognized that the government has a strong interest in recovering forfeitable assets, ''an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense.'' *Id.* at ***22. (citation omitted).

The dissent further reasoned that the Court's prior holdings applied with equal force in the context of pretrial restraints, provided probable cause had been established.

The dissent found those holdings to control the result in this case: ''[A] pretrial restraint of assets forfeitable upon conviction does not contravene the Sixth Amendment even when the defendant possesses no other funds with which to pay for an attorney.'' *Id.*

Justice Kennedy found untenable the plurality's attempt to distinguish the Court's precedent based on whether the assets were characterized as tainted or untainted.

From a practical standpoint, the dissent observed that the position articulated by the plurality lacks any bounds, either in terms of implicated constitutional rights or impositions on a defendant's assets.

As he reasoned, any such distinction would be premised on the relation-back doctrine, i.e., the government's ownership of tainted assets would relate back to the time the crime occurs.

But the government's ownership interest does not mature until conviction, even when applying the relation-back doctrine.

In other words, argued the dissent, the government has no greater interest in tainted assets than in untainted assets for purposes of pretrial restraint: ''[F]orfeitable property does not belong to the Government in any sense before judgment or conviction.'' *Id.* at ***25.

From a practical standpoint, the dissent observed that the position articulated by the plurality lacks any bounds, either in terms of implicated constitutional rights or impositions on a defendant's assets.

It also creates an artificial distinction—''[m]oney, after all, is fungible,'' *id.* at ***26—between defendants who are savvy enough to spend their ill-gotten gains and those that spend their own funds.

''The true winners . . . are sophisticated criminals who know how to make criminal proceeds look untainted.'' *Id.* at ***27.

Since the whole point of a pretrial restraint is to maintain the status quo, especially where fungible assets are involved, the plurality's rule will benefit ''criminals whose web of transfers and concealment will take the longest to unravel. For if the Government cannot establish at the outset that every dollar subject to restraint is derived from the crime alleged, the defendant can spend that money on whatever defense team he or she desires.'' *Id.* at ***30.

Justice Kagan, writing separately, also dissented.

Although she questioned the Court's precedent on the issue, since it was not challenged, she deemed those cases to control the result.

''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.'' *Id.* at ***31.

Even then, Justice Kagan found the government's interest and an accused's interest in both untainted and tainted property pretrial to be the same, and could not justify the distinction the plurality imposed.

As she wrote, from a practical perspective, a defendant that dissipates his tainted assets cannot be more deserving of the right to his choice of counsel than an unsavvy defendant who spends his untainted assets first.

Implications and Open Questions. Although the *Luis* decision was grounded in an interpretation of 18 U.S.C. § 1345, the Court's reasoning is likely to influence lower courts confronted with similar pretrial asset restraint provisions, including the provisions of the Economic Espionage Act.

Under that Act, the government has the power to seize proceeds from criminal offenses, including misappropriation of trade secrets.

Conviction of those offenses authorizes forfeiture, among other things, of ''[a]ny property used, or intended to be used, in any manner or part to commit or facilitate the commission of an offense'' and ''[a]ny property constituting or derived from any proceeds obtained directly or indirectly as a result of the commission of an offense.'' 18 U.S.C. § 2323(b); *id.* § § (a)(1)(B) & (C); *see id.* § 1834 (applying section 2323 to trade secret offenses); *see also* 21 U.S.C. § § 853(a), (p) (allowing restraint or forfeiture of substitute assets).

In the case of a defendant confronting pretrial restraint or forfeiture under that Act or a similar statute, the Court's ruling offers a ray of hope that the defendant will be able to retain full use and ownership of his untainted assets pre-conviction.

Indeed, the Court seems to place the burden on the government to prove that targeted assets meet the criteria for pretrial restraint, further advantaging the defendant.

Although the Court's ruling is generally helpful to defendants, it lacks certain critical details that could affect its interpretation and implementation.

For instance, courts have long held that the indictment itself provides enough evidence for the government to be granted a pretrial asset restraint *ex parte*. *See, e.g.*, *Kaley v. United States*, 82 U.S.L.W. 4110, 2014 BL 49923 (U.S. Feb. 25, 2014); *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 790-91 (5th Cir. 2006); *United States v. Monsanto*, 924 F.2d 1186, 1192-93 (2d Cir. 1991) (en banc), on remand from 491 U.S. 600 (1989); *United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986).

In such a case, a defendant has the opportunity to oppose the restraint, under Sixth Amendment or any other grounds, only *after* his assets have been seized.

As a practical matter, such *ex parte* seizure may prevent defendants from securing counsel of their choice to challenge the propriety of that pretrial forfeiture.

The plurality's distinction between tainted and untainted assets, at least in the Sixth Amendment context, also suggests that probable cause that certain assets may be forfeitable should no longer prove sufficient for the grant of a pretrial restraint.

Instead, the government would have to demonstrate that the assets to be restrained are tainted, i.e., connected to the crime.

That burden is higher than the likely-to-be-forfeitable standard.

It is unclear whether such an elevated burden associated with linking assets to specific offense conduct (i) should be placed on the government and (ii) is practical in larger cases involving tens of jurisdictions, hundreds of accounts, thousands of asset transfers, and millions of dollars.

But even if the government is in a position to make such a showing, the Court's ruling did not address the applicable standard of proof: Would the government be required to establish that the assets are tainted by mere probable cause, or would a higher showing be required?

The situation becomes increasingly complex when a defendant sells tainted assets to a bona-fide third party and receives substitute assets—money—in its place.

From a practical perspective, unless and until a defendant's assets are found to be tainted and subject to pretrial restraint, a defendant would seem to be able to spend or dissipate them as he wishes.

However, should the government later obtain a forfeiture or restraining order, such order may also require that traceable assets be clawed back and held or turned over to the government.

The situation becomes increasingly complex when a defendant sells tainted assets to a bona-fide third party and receives substitute assets—money—in its place.

In that scenario, numerous questions remain unanswered by the *Luis* decision.

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For example, are the new funds ''tainted'' even though they effectively have been washed by an innocent third-party?

If not, can the defendant dispose of that property as he wishes, since it is untainted?

And are the tainted assets in possession of the third-party subject to restraint? *See generally United States v. Regan*, 858 F.2d 115 (2d Cir. 1988) (holding that assets related to Racketeer Influenced and Corrupt Organizations Act violations that were transferred to a third party are subject to pretrial restraint).

While the Court's *Luis* decision is being hailed by the defense bar as an important check on the government's ability to restrain assets in the pretrial context, it is evident that several important questions remain to be addressed before it lives up to its billing.