

The government charged Luis with paying kickbacks, conspiring to commit fraud, and engaging in other crimes related to health care fraud, alleging the defendant obtained close to \$45 million in fraud proceeds, most of which she had spent or transferred out of the country or to family members. The government sought a pretrial restraining order to preserve the \$2 million in Luis' possession for payment of restitution, a criminal forfeiture judgment, and other criminal penalties upon conviction pursuant to 18 U.S.C. § 1345(a)(2), which allows the pretrial restraint of property traceable to a banking law violation or Federal health care offense or "property of equivalent value." The funds the government sought to restrain included some assets that had not been traced to the charged crimes. The district court entered the restraining order, recognizing that it would prevent Luis from obtaining counsel of her choice, but held there is no Sixth Amendment right to use untainted, "equivalent" assets to hire counsel. Id. at 1087-88.

The Eleventh Circuit affirmed, citing Kaley v. United States, 134 S. Ct. 1090 (2014), Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), and United States v. Monsanto, 491 U.S. 600 (1989). Id. at 1088. The Supreme Court vacated the judgment and remanded the case. The plurality opinion was authored by Justice Breyer, and joined by Chief Justice Roberts and Justices Ginsburg

and Sotomayor. Justice Thomas added the deciding fifth vote but concurred only in the judgment that the pretrial restraint of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. Justice Kennedy authored a dissent, joined by Justice Alito. Justice Kagan issued a separate dissent.

Justice Breyer's Plurality Opinion

The plurality opinion was based on balancing a defendant's Sixth Amendment right with the government's interests in ensuring assets are available for fines and restitution. Justice Breyer stated that the Sixth Amendment right to counsel is a "fundamental" right which grants a defendant a fair opportunity to secure counsel of her own choice that she can afford to hire. The Sixth Amendment right to counsel is understood to require the government to provide counsel for an indigent defendant accused of all but the least serious crimes and the wrongful deprivation of this right is a structural error that affects the framework within which the trial proceeds. Id. Against this backdrop, the plurality held that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violated the Sixth Amendment. Id. at 1095.

The plurality distinguished this case from the Caplin & Drysdale and Monsanto cases on the fact that the restrained property in this case included untainted assets and belonged to the defendant. Id.

at 1089-90. In the other cases, the defendant's ownership was imperfect because it was tainted and title passed to the government at the instant the crime was planned or committed. Id. at 1090. As a result, the plurality reasoned that even before trial in Caplin & Drysdale, the government had a substantial interest in the tainted property sufficient to justify the property's pretrial restraint. Id. Justice Breyer went on to say that this distinction alone does not answer the constitutional question, but insofar as innocent funds are needed to obtain counsel of choice, the Sixth Amendment prohibits the restraint of untainted assets. Id. at 1092-93.

To reach their result, the plurality weighed the competing interests of victim restitution and criminal punishment against the Sixth Amendment right to counsel of choice and found that the former lie "somewhat further from the heart of a fair, effective criminal justice system." Id. at 1093. The plurality found no decision authorizing unfettered, pretrial forfeiture of a defendant's "innocent" property that is needed to pay defense counsel. The opinion notes that "[a]s far as Luis' Sixth Amendment right to counsel of choice is concerned, a restraining order might as well be a forfeiture; that is, the restraint itself suffices to completely deny this constitutional right." Id.

The plurality then reaches its result, in which Justice Thomas concurred, because the defendant in this case had "a Sixth Amendment

right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel." Id. at 1095. The district court's order prevented Luis from exercising that right. As a result, the judgment of the Court of Appeals was vacated and the case remanded for further proceedings. Id.

Justice Thomas' Concurrence

Justice Thomas concurred only in the result. Id. at 1096. Based on the text of the Sixth Amendment and the law at the time of the ratification of the Constitution, he drew a distinction between pretrial restraint of tainted and untainted assets, reasoning that the government's pretrial restraint of untainted assets needed to pay defense counsel would violate the Sixth Amendment. He reasoned that the right to counsel was originally understood to provide a person the right to hire his counsel of choice, and that right would be rendered meaningless if he could not use his funds to pay for that attorney. Id. at 1096.

Justice Thomas refused to endorse the balancing approach proposed by the plurality opinion, reasoning that because the Sixth Amendment guarantees the right to counsel of choice, and a pretrial freeze of untainted assets infringes that right, there was no room for balancing of any sort. Id. at 1101-02.

Analysis

First, as the Government emphasized in its motion, the holding of a majority of the Court in Luis lies at the point the plurality opinion and separate concurring opinion of Justice Thomas overlap: the pretrial restraint of untainted substitute assets *needed* by a criminal defendant to pay defense counsel of choice violates the Sixth Amendment. The plurality and Justice Thomas arrive at this holding through different reasoning and neither approach commands a majority of the Court. In fact, Justice Thomas' textualist/historical interpretation of the Sixth Amendment was joined by no other justice.

Nothing in any of the opinions calls into question the part of the Jones-Farmer rule requiring a defendant to demonstrate, as a prerequisite to challenging a restraining order or seizure warrant on Sixth Amendment grounds, that he has access to no other assets with which to retain defense counsel of choice. United States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998); United States v. Farmer, 274 F.3d 800, 804-05 (4th Cir. 2001). Where a defendant has access to such assets a pretrial restraint or seizure does not violate the defendant's Sixth Amendment right to counsel of choice regardless of whether the restrained/seized assets are tainted or untainted. Indeed, the plurality opinion recognizes that even in cases involving untainted, substitute assets, "the law of property sometimes allows

a person without a present interest in a piece of property to impose restrictions upon a current owner, say, to prevent waste.” Luis, at 1092-93. Yet when assets are needed to secure counsel of choice, the Court found that the government’s interest in covering the costs of forfeiture and providing restitution to victims was outweighed by the fundamental Sixth Amendment concern. Id. at 1093.

Whatever the operative rationale of Luis, the case is inapplicable here, as the defendant has demonstrated no need for nor argued that he has need of revenue from the sale or encumbrance of the single tract of real property for of which restraint is sought to pay his counsel of choice. Indeed, he articulates no interest that is impacted by the sought restraint at this juncture. If in fact the property must be sold or borrowed against to pay counsel of choice because there are no other funds, the defendant can seek a modification of the restraining order to the extent needed to pay counsel of choice a reasonable fee. This would be consistent with Farmer.

Yet the defendant’s reading of the opinion is not so nuanced. He believes that a majority of the Court invalidated the pretrial restraint of substitute assets for forfeiture in *all* circumstances. However, even if the combined opinions are read to limit the Court’s prior decisions in Monsanto and Caplain & Drysdale, they do so only in the context of a Sixth Amendment claim and, as pointed out above,

do not negate the Government's significant interest in preserving even untainted assets in the event of forfeiture. Victim restitution is an important concern, even if not of constitutional magnitude. In short, the plurality and Justice Thomas address only the constitutional validity of pretrial restraints of untainted substitute assets needed by a criminal defendant to pay criminal defense counsel of choice. They do not address the issue here: the validity of pretrial restraint of substitute assets based on important governmental interests when no constitutional concerns are implicated. In such a setting, even the plurality would likely strike the balance in favor of preserving potentially forfeitable assets.

Conclusion

Luis is not implicated here, and thus the court need not parse the splintered opinion for guidance. As no Sixth Amendment concerns are implicated at this juncture, the limited restraint requested by the government should be granted, as it will preserve from waste or dissipation an asset that may upon conviction be needed to pay either forfeiture or restitution.

Accordingly, the motion should be granted.

Respectfully submitted this 26th day of April, 2016.

JOHN STUART BRUCE
Acting United States Attorney

BY: /s/ Stephen A. West
STEPHEN A. WEST
Assistant United States Attorney
Attorney for Plaintiff
Civil Division
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, N. C. 27601-1461
Telephone: (919) 856-4530
Facsimile: (919) 856-4821
E-mail: steve.west@usdoj.gov
NC State Bar #12586

CERTIFICATE OF SERVICE

I certify that I have on this 26th day of April, 2016, served a copy of the foregoing Government's Reply Memorandum upon counsel electronically via ECF:

Thomas C. Manning
Manning Law Firm
P.O. Box 12105
Raleigh, NC 27605

Elliot Sol Abrams
Cheshire Parker Schneider & Bryan, PLLC
P. O. Box 1029
133 Fayetteville St., Suite 500
Raleigh, NC 27602

JOHN STUART BRUCE
Acting United States Attorney

BY: /s/ Stephen A. West
STEPHEN A. WEST
Assistant United States Attorney
Attorney for Plaintiff
Civil Division
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, N. C. 27601-1461
Telephone: (919) 856-4530
Facsimile: (919) 856-4821
E-mail: steve.west@usdoj.gov
NC State Bar #12586