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Indicted couple want assets freed to pay lawyers

By MARK SHERMAN
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WASHINGTON The best thing Howard Srebnick had going for him at the Supreme Court Wednesday was that he was trying to persuade nine very good lawyers in black robes about the importance of being able to hire a good lawyer.

Miami-based Srebnick was representing a New York couple who have been indicted on charges they stole medical devices. The government froze their assets, including the \$500,000 they set aside for their legal defense.

The Supreme Court has upheld the government's ability to put a hold on property and money that can be tied to illegal activity, but has never ruled whether defendants are entitled to a hearing first. Lower federal courts are divided over whether a hearing is necessary.

The issue is taking on increasing importance at a time when the Justice Department is seizing more property than ever. More than \$4.2 billion was deposited in the Justice Department's asset forfeiture fund in the government spending year that ended September 30, 2012. That compares with about \$1.6 billion in each of the two previous years.

"I ask that this court not rule that the government can beggar a defendant into submission," Srebnick said at the end of his argument.

Kerri and Brian Kaley, the couple at the center of the case, maintain they are innocent. They want the high court to say that they at least are entitled to a hearing to determine if they can use their money to fight the charges.

It was hard to tell where the court would come out in a case in which there was no discernible ideological split among the justices, several of whom also questioned the

underlying charges against the Kaleys. Those charges are not at issue at the Supreme Court.

Chief Justice John Roberts, who had a lucrative appellate law practice before becoming a judge, was clear about why the topic is so important.

A criminal defendant wants to use his money "to hire a lawyer who can keep him out of jail for the next 30 years," Roberts said.

At the time federal investigators began looking at the resale of medical devices in 2005, Kerri Kaley was a sales representative for a company that sold surgical devices and supplies. Her lawyers say she was legally allowed to resell items that hospitals wanted to replace with newer and better equipment. The hospitals were happy to get the items off their shelves and Kaley's employer did not want them back.

Still, the husband and wife who live in Cold Spring Harbor, N.Y., were indicted in 2007 on conspiracy and other charges. Two other sales reps pleaded guilty, but yet another was acquitted by a jury.

The Kaleys say they should be able to point out weaknesses in the prosecution's case so they can win access to their money and enhance their own prospects for acquittal.

That sounded like a reasonable proposition to Justice Stephen Breyer. "To make the arguments is complicated. You can't do it without a good lawyer," Breyer said.

But not everyone on the court appeared to be headed in that direction. Justice Elena Kagan pointed out that in one court, the New York-based 2nd U.S. Circuit Court of Appeals, criminal defendants who want to use frozen assets to hire lawyers have lost all 24 hearings on record.

"So what are we going through all this rigamarole for, for the prospect of, you know, coming out the same way in the end?" Kagan asked.

And Justice Antonin Scalia said he would prefer overturning the 1989 case that said assets could be frozen before trial rather than side with the Kaleys on the need for hearings.

The court could say "it's unconstitutional for the rule to be any broader than withholding money that the defendant does not need to defend himself," Scalia told Srebnick. "I really prefer it to

yours. I think yours leads us into really strange territory."

A decision is expected by spring.

The case is Kaley v. U.S., 12-464.