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U.S. Supreme Court to hear challenge to pretrial seizure of assets

A challenge to the federal government's pretrial seizure of South Florida defendants' assets is heading to the U.S. Supreme Court.

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On the 50th anniversary of its landmark Gideon ruling giving all criminal defendants access to a lawyer, the U.S. Supreme Court accepted a South Florida case asking whether defendants are entitled to hire the counsel of their choice when federal prosecutors freeze their assets before trial.

The Supreme Court unanimously ruled in the 1963 case of Clarence Gideon, who received a five-year sentence for a pool room theft in Panama City, that state courts are required to provide free representation to indigent defendants under the 14th Amendment. The decision caused the release of 2,000 Florida prisoners.

Fifty years later, the high court agreed to decide whether the federal government can freeze a defendant's assets before trial without an evidentiary hearing.

"Gideon couldn't afford a lawyer, so the government said he had to go to trial without the court appointing one for him," said attorney Howard Srebnick. "Fifty years later, the federal government is now arguing that because court-appointed lawyers are available to indigent defendants, the government can restrain assets needed for counsel of choice without first having to prove to a judge that the government has the evidence and legal authority to justify the restraint."

Srebnick is the partner at Miami criminal defense firm Black, Srebnick, Kornspan & Stumpf. He has teamed up with Miami appellate attorney Richard Strafer in leading the charge for Kerri and Brian Kaley. (Read Petition for Cert. Read brief.)

The Kaleys have been fighting to hire their counsel of choice, Srebnick said, since 2007 when they took out a $500,000 home equity loan to pay for their defense.

They were medical equipment salespeople for a subsidiary of Johnson & Johnson Co. and were charged with taking hospital inventory, such as catheters, and selling them to third parties. Srebnick said the hospitals didn't want the inventory because new products had become available, rendering the old supplies dispensable.

It's the one man's garbage is another man's treasure defense, and it has already worked for co-defendant Jennifer L. Gruenstrass, who went to trial on the same charges and was acquitted.

The government seized the assets on the premise the couple's home for 10 years was used to store the medical equipment, and they kept their checkbook, which was used in the alleged scheme, at home.

Srebnick argues the pretrial seizure of assets circumvents the constitutional right to due process.

"The government restrains the assets so that it can forfeit those assets as punishment after conviction. But that puts the cart

before the horse," he said.

Srebnick, in his 168-page Supreme Court petition, noted federal circuits are conflicted on whether defendants are entitled to an evidentiary hearing on whether assets can be seized before trial.

The issue here goes to the very livelihood of criminal defense attorneys. The National Association of Criminal Defense Lawyers has filed an amicus brief.

Regardless of their owns interests, the attorneys argue federal defendants should be concerned. Srebnick said a well-funded defense can afford to pay investigators to talk to witnesses, experts to testify and look at evidence, and jury consultants.

There is great respect among criminal defense attorneys for the lawyers at the Federal Public Defender's Office in Miami. Many cut their teeth there. But Srebnick notes the office is under the squeeze of sequester budget cuts, with staff ordered to take one day off a week.

"And now the government wants to burden them with clients who do have the money to pay for private counsel," Srebick said.

Atlanta attorney Paul Kish, a partner at Kish & Leitz, writes about these issues on the Federal Criminal Lawyer Blog. He said, "Federal criminal cases are often exceedingly complex, time-consuming and beyond the abilities of many otherwise fine lawyers."

Former federal prosecutor Joseph DeMaria, now a partner at Tew Cardneas in Miami, put it bluntly, saying prosecutors "are trying to take unfair advantage of defendants by freezing money before a trial," he said.

Assistant U.S. Attorney Madeleine R. Shirley in Miami said in her Eleventh Circuit brief that the government is not required to tip its hand in a mini-trial to establish the foundation for criminal charges.

She said prosecutors had demonstrated probable cause before the grand jury and were entitled to protect their interests in assets.

"The fact that appellants seek to use the restrained assets to retain counsel of their choice — a qualified right under the Sixth Amendment — should not justify pretrial sufficiency challenges to evidence supporting their charges," Shirley wrote.

White Collar

Seizing the assets of defendants was authorized by Congress to help prosecutors in cases against mobsters and drug traffickers. In recent years, the tactic has been expanded to white collar fraud, DeMaria said.

These defendants often have the means to put up a vigorous defense.

Srebnick's firm is led by Roy Black, who has notched victories for such celebrity defendants as race car driver Helio Castroneves and William Kennedy Smith. That the U.S. attorney's office in Miami chose to restrict payments to Black's firm, which has won several hard-fought battles against the government, isn't lost on Srebnick.

He said his firm often handles high-profile cases, and that's when the government sometimes moves to restrain assets. However, Srebnick adds, "It may be coincidence, but there was no effort to restrain assets of the co-defendants in the Kaleys' case."

U.S. District Judge Kenneth Marra in West Palm Beach denied the Kaleys a hearing to challenge the asset freeze but was overruled by the U.S. Court of Appeals for the Eleventh Circuit. Marra limited the scope of the hearing and denied the Kaleys' petition.

The appellate court upheld Marra on the second review, and the Kaleys appealed to the U.S. Supreme Court.

DeMaria said even though he thinks it's "awful public policy" to freeze assets of white collar defendants before trial, the high court probably will uphold the practice.

"The way to change this is for somebody to stand up in Congress and say this is just wrong," he said.

Kish, in his blog, contrasted the Gideon decision with the Kaleys' case.

"We certainly hope that the justices will recognize that defendants in federal cases should have the right to use their assets to hire the specialists needed to defend matters in federal court, which is just as important as providing counsel for those without such assets," Kish said.