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Supreme Court weighs whether seizing assets prevents a proper defense

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When renowned Broward County psychic Rose Marks was indicted for fraud and money laundering to the tune of $25 million in 2012, a federal grand jury ordered that her assets be frozen so that, if she were found guilty, any illegal profits from her business could be returned to victims.

But her attorney, Fred Schwartz of Boca Raton, found an item among the frozen assets that didn't jibe.

"It was a white Rolls Royce that she bought back in 1977," Schwartz says. "But the conspiracy they accused her of didn't allegedly begin until 1991. She couldn't have bought it with the profits from the activities they were accusing her of."

Apart from some jewelry seized as evidence, Schwartz convinced federal magistrates to unfreeze all of Marks' other assets, not just the Rolls, which would allow her, among other expenses, to pay her legal fees. But Schwartz says instances where courts countermand a grand jury instruction of that kind are rare.

On Wednesday, another South Florida attorney, Howard Srebnick of Miami, argued before the U.S. Supreme Court that defendants should be able to maintain control of their assets unless prosecutors can convince a federal court, not just a grand jury, that the evidence in an indictment justifies freezing their bank accounts and other assets.

Srebnick argued that seizing a defendant's assets can prevent that person from hiring the attorney of his or her choice. He told the justices that the practice violates the Fifth Amendment right to due process and the Sixth Amendment right to legal counsel. He insisted that defendants should be entitled to pre-trial hearings where they can challenge evidence in the indictment that has resulted in their assets being frozen.

The case in question is that of of a New York couple, Kerri and Brian Kaley, who were charged in 2007 with reselling medical devices they knew were stolen. One of their associates in the alleged scheme was John Danks, 51, of Boynton Beach, who cooperated with prosecutors, accepted a plea deal and was sentenced to three years in prison. He has since been released.

But the Kaleys insisted they were innocent. 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. 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. Nonetheless, they were indicted and their case is still pending.

According to documents in the case, even before the grand jury indictment, knowing that they were being investigated, the Kaleys took out a $500,000 equity line of credit on their home to assemble the money they would need to pay attorneys and fight the charges.

But a “forfeiture clause” in the grand jury indictment maintained that the $500,000 was ill-gotten gain. That clause froze their assets and made it impossible for them to access the money.
The Supreme Court has previously upheld the government’s ability to put a hold on property and money that can be tied to illegal activity. But it has never ruled whether defendants are entitled to a court hearing first. Lower federal courts have divided over whether a hearing is necessary, which is why the case is before the Supreme Court.

The issue has taken on increasing importance because the U.S. Department of Justice is seizing more property from indicted individuals than in the past. More than $4.2 billion was deposited in its asset forfeiture fund in the fiscal year that ended Sept. 30. That compares with about $1.6 billion in each of the two previous years.

In its brief to the court, the department argued that granting attorneys the type of pre-trial hearings the Kaleys are insisting on would undermine the grand jury system and “effectively require the district court to try the case twice by inserting a mini-trial between the grand jury’s probable-cause determination and the trial itself, even though the trial gives a defendant a full opportunity to address the merits of the underlying charge.”

Chief Justice John Roberts, who practiced appellate law before becoming a judge, stated Wednesday why he considers the issue 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.”

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.

Tacking in the other direction was Justice Elena Kagan, who pointed out that in one court, the New York-based 2nd U.S. Circuit Court of Appeals, criminal defendants who wanted to use frozen assets to hire lawyers and who were granted hearings at the discretion of judges, have lost all 24 hearings on record.

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

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. He said the court could rule that it was unconstitutional to freeze assets necessary to pay for defense attorneys, and avoid the extra hearings, which he labeled “really strange territory.”

The court is expected to rule in the spring.

Schwartz, the Boca Raton lawyer, won his argument to unfreeze Marks’ assets but she was recently convicted on 14 fraud counts and is awaiting sentencing. Meanwhile, he says he is backing Srebnick and the Kaleys, as are most major legal associations. He says grand juries put “forfeiture clauses” in indictments because prosecutors ask them to.

“Of course, if I were a prosecutor and I asked a grand jury to indict the pope because he’s Catholic, 99 times out of 100 they would do it,” says Schwartz, a former prosecutor. “Grand juries do what prosecutors tell them to do. That’s why you need an independent view of this” outside the grand jury process, he said.