

Can Federal Prosecutors Seize Untainted Assets Before Defendant Hires an Attorney?

Celia Ampel, Daily Business Review

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L-R: Howard Srebnick, Black, Srebnick, Kornspan & Stumpf and Scott A. Srebnick, of The Law Office of Scott A. Srebnick
J. Albert Diaz

The U.S. Supreme Court agreed Monday to decide in a Miami case whether federal prosecutors can freeze untainted assets a criminal defendant needs to retain an attorney.

Miami attorneys and brothers Scott and Howard Srebnick filed a petition for writ of certiorari in the case of Sila Luis. Senior U.S. District Judge Paul Huck in Miami froze Luis' assets after she was indicted in a Medicare fraud scheme.

The defense attorneys believe the government violated Luis' Fifth and Sixth Amendment rights to due process and to counsel of her choice.

"Our view is that she's not yet been convicted, she's not yet had a trial, and under our Constitution she has the right to use her own legitimate assets to pay for defense," said Howard Srebnick of Black, Srebnick, Kornspan & Stumpf.

Seizure of assets has become a pet cause for Howard Srebnick, who argued a similar case before the U.S. Supreme Court less than two years ago. In *Kaley v. USA*, the Supreme Court ruled 6-3 that assets traceable to a crime can be restrained even when needed for attorney fees.

"I think this is probably a first for a lawyer to have the follow-up issue heard by the Supreme Court the following term," said Miami criminal defense attorney David O. Markus of Markus/Moss. "Kudos to Howard and Scott for something very special."

The Supreme Court will likely hear *Luis v. USA* by the end of the year, Srebnick said. U.S. District Judge Marcia Cooke has stayed Luis' criminal trial until the end of the appellate process.

The court's decision could have lasting consequences for the criminal justice system, defense attorneys said.

"If the government wants to deny people the opportunity to mount a good defense, they can certainly help to accomplish that by freezing untainted funds," said Miami attorney Neal Sonnett, who specializes in white-collar and corporate criminal cases.

Sonnett said relevant cases in the past 25 years, such as *Caplin & Drysdale Chartered v. USA*, *USA v. Monsanto* and *Kaley v. USA*, have addressed only the constitutionality of restraining tainted assets.

"That's bad enough," he said. "Even that kind of activity turns the Fifth Amendment on its head, really denies someone who is presumed innocent by law the right to spend their assets that are not yet forfeitable for the lawyer of their choice."

To restrain untainted assets would "do great damage" to the Fifth and Sixth amendments, Sonnett said. "This is an extremely important issue to criminal justice and ought to be decided in a way that does not do damage to the constitutional right to counsel."

Nail In The Coffin?

Freezing a criminal defendant's untainted assets can have a significant impact on the trial, said Howard Srebnick, who expects the case to be heard this year.

"It can be the difference between having many talented lawyers on your team to battle against the government with unlimited resources versus having a single public defender—underworked, underpaid with no resources," he said. "Private counsel can be more experienced and can spend more time on a case than a public defender can."

If the Supreme Court decides that freezing untainted assets is constitutional, public defender's offices would see an influx of complicated cases, Markus added.

"Typically when there's pretrial restraint of assets, you're talking about large white-collar cases," he said. "Putting that burden on the public defender's office is not a throwaway."

Fort Lauderdale criminal defense attorney and former federal prosecutor Bruce Udolf said he could understand the justification for going after untainted assets.

"The legal argument is that if there aren't enough tainted assets to cover the damage that was done by the defendant in committing the fraud, then the victim should be entitled to the other assets that they have available," he said.

But Udolf said the Supreme Court would be making a mistake if it allowed the government to freeze untainted assets before trial.

"It would be the final nail in the coffin of a defendant's right to counsel of their choice in this country," he said.