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SCOTUS: Freeze on Clean Money Can't Block Hiring Defense; Miami Lawyer Notches Win

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Brothers Scott Srebnick, left, of the Law Office of Scott A. Srebnick and Howard Srebnick of Black, Srebnick, Kornspan & Stumpf at the U.S. Supreme Court.

Miami criminal defense attorney Howard Srebnick won a U.S. Supreme Court victory Wednesday when the court ruled 5-3 that criminal defendants are allowed to use untainted assets to pay for the lawyer of their choice.

The Black, Srebnick, Kornspan & Stumpf partner, who represented Sila Luis in a health care fraud case, persuaded the majority that the federal government should be barred from freezing funds that aren't tied to an alleged crime.

"While the government does not deny Luis' fundamental right to be represented by a qualified attorney whom she chooses and can afford to hire, it would nonetheless undermine the value of that

right by taking from Luis the ability to use funds she needs to pay for her chosen attorney," Justice Stephen Breyer wrote for the majority.

Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Sonia Sotomayor and Clarence Thomas concurred, with Thomas writing a separate opinion.

Justices Anthony Kennedy, Samuel Alito and Elena Kagan dissented.

Srebnick argued the case in November, supported by his co-counsel and brother Scott Srebnick of the Law Office of Scott A. Srebnick in Miami.

The Srebnicks took the case to the Supreme Court as an unpaid passion project. The future of the private criminal defense bar was at stake if the court ruled against Luis, Howard Srebnick said. He called the decision a victory for the Sixth Amendment.

"For the citizens accused of a crime, it means that they can exercise their right to hire counsel of choice by using their legitimate assets," he said. "The government can't interfere with that constitutional right."

It was Srebnick's second trip to the Supreme Court in about two years. In *Kaley v. U.S*., he unsuccessfully argued assets traceable to a crime should not be restrained when needed for attorney fees.

The Kaley case is still moving through the courts, and Srebnick spent Wednesday morning — his birthday — speaking to a judge about the possibility of staying retrial on double-jeopardy grounds.

"As we were arguing, my computer went nuts," he said. "I got a bunch of messages saying, 'The Supreme Court ruled in your favor in Luis.' "

Luis proposed to pay attorney fees with real estate and family jewelry she owned before she was in the health care business, along with some business revenue not related to the alleged $45 million Medicare fraud, Srebnick said.

U.S. District Judge Paul Huck ruled the Sixth Amendment did not give Luis the right to use her own untainted funds to hire her counsel of choice, and the U.S. Court of Appeals for the Eleventh Circuit affirmed that decision.

The Supreme Court found Luis' untainted assets were a different beast than the assets addressed by two key precedents, *Caplin & Drysdale v. U.S.* and *U.S. v. Monsanto*.

In Caplin, forfeiture of the defendant's assets was postconviction, not pretrial as in Luis' case. And Monsanto involved the pretrial restraint of assets traceable to the crime, Breyer wrote.

"The distinction that we have discussed is thus an important one, not a technicality," he wrote. "It is the difference between what is yours and what is mine."

Kennedy and Alito dissented, finding that the majority opinion would encourage criminal defendants to quickly spend their crime-related assets, knowing they could keep other assets to pay for a lawyer.

"It matters not, under today's ruling, that the defendant's remaining assets must be preserved if the victim or the government is to recover for the property wrongfully taken," Kennedy wrote.

'Big Props'

In dissent, Kagan said she found Monsanto "troubling" because it allows pretrial restraint of assets before they are adjudged forfeitable. Nonetheless, the case established that the government can freeze assets when it has "probable cause to believe that the property will ultimately be proved forfeitable," she wrote.

Kagan's dissent was unexpected, said Miami criminal defense attorney David O. Markus.

"I did think she would be in the majority here," the Markus/Moss partner said. "I'm surprised to see her in an opinion that would undercut the Sixth Amendment."

Markus said a loss for Luis would have dealt a severe blow to the Sixth Amendment and the criminal defense bar. He gave the Srebnicks "big props" for their work on the case.

"It's an incredible victory," he said. "It's been Howard and Scott's issue for a long time. They pursued this issue when no one else did. They kept pushing it, have now gone to the Supreme Court twice and have finally won. It's a testament to their intellect and persistence."

The National Association of Criminal Defense Lawyers released a statement Wednesday celebrating the decision. The group filed an amicus curiae brief supporting Luis' position, along with California Attorneys for Criminal Justice and the Florida Association of Criminal Defense Lawyers.

"The importance of this decision cannot be overstated," NACDL President E.G. "Gerry" Morris said in the statement. "The majority of the court recognized the existential threat to the Sixth Amendment the right to counsel of choice posed by the government's position and unequivocally held that the right to counsel must prevail. This decision is a reaffirmation of the importance of the Sixth Amendment guarantee and imposes a significant limitation on the government's expanding efforts to seize the funds of an accused before there has been any determination of guilt."

The death of Justice Antonin Scalia in February left open the possibility that the court could deadlock 4-4, which would have affirmed the lower courts in the government's favor.

Howard Srebnick said he was not necessarily worried about that outcome.

"I had no way to know the leanings of the particular justices because their questions didn't really telegraph for us how each justice would rule," he said. "But it is worth noting that Justice Thomas wrote a separate opinion in favor of the defense today, and historically Justice Thomas and Justice Scalia have routinely joined each other's opinions. So if there is a way to read the tea leaves, I'm going to remember this case as one where the late Justice Scalia would have ruled in our favor."

Black Srebnick associate Josh Shore assisted the Srebnick brothers with the case.

The government was represented by U.S. Solicitor General Donald B. Verrilli.