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CRIMINAL LAW

Miami attorney to challenge criminal asset seizures in Supreme Court case

Miami appellate lawyer G. Richard Strafer, left, and criminal defense attorney Howard M. Srebnick stand at the columned front of their office on Friday, Oct. 11, 2013. They will argue a major issue involving a South Florida white-collar crime case before the U.S. Supreme Court on Wednesday, Oct. 16, 2013. Both are at Black, Srebnick, Kornspan & Stumpf, P.A., 201 Biscayne Blvd., Miami. Srebnick is a Partner at the law firm.
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Federal prosecutors can legally grab, with a judge's nod, the assets of criminal defendants before trial.

In South Florida, the land of dope dealers and con artists, it happens routinely.

On Wednesday, a Miami criminal defense attorney will have the rare opportunity to argue before the U.S. Supreme Court that the tactic — long a powerful tool for prosecutors — violates the constitutional rights of defendants.

Why? With their assets frozen until a trial's outcome, they're effectively being stripped of the ability to hire the defense lawyer of their choice.

That will be the thrust of Howard Srebnick's argument Wednesday morning, when he appears for the first time before the nine Supreme Court justices. Their ultimate opinion, in a South Florida white-collar criminal case, could potentially affect countless federal prosecutions nationwide.

Srebnick will have a half hour to make his case, and the U.S. government's lawyer will have the same amount of time to counter his challenge.

Srebnick will argue that defendants should be allowed to keep their bank accounts and other worldly possessions unless prosecutors can show before trial that the evidence supporting an indictment justifies the seizure of those assets.

For decades, prosecutors have only needed to point to a federal grand jury indictment to argue that defendants' assets are traceable to the criminal allegations and therefore can be seized. And judges have almost always ruled in the prosecution's favor because of the presumption that the grand jury found "probable cause" that a crime was committed.

Eventually, depending on whether a defendant is found guilty or innocent, frozen assets are either kept or returned by the government.

In legal briefs, Srebnick has asked the Supreme Court to allow a hearing that would test the strength of the prosecution's evidence before an actual jury hears the government's case against his two clients, a New York couple. Kerri and Brian Kaley were charged in 2007 with illegally profiting from the resale of older medical devices in South Florida's "gray market." The equipment had been given to the wife and other equipment sales representatives by hospitals that no longer needed them because they purchased newer devices.

The couple obtained a $500,000 equity line of credit on their home so they could pay projected legal fees to their "preferred" defense lawyers, Srebnick, and colleague, Susan Van Dusen, who claimed the government's case was "baseless." But after the couple's indictment, prosecutors obtained a judge's order to seize their home and other assets valued at nearly $2.2 million, leading to the Supreme Court case.

There have been other recent, high-profile asset grabs as well: The U.S. attorney seized millions of dollars of bank deposits, waterfront property and jewelry that once belonged to notorious Fort Lauderdale Ponzi schemer Scott Rothstein, who was charged in late 2009 and eventually sentenced to 50 years in prison.

In that instance, Rothstein was allowed to hire his own attorney, a former partner in his bankrupt law firm, but he agreed to plead guilty to a $1.2 billion investment scheme and cooperate with prosecutors against other targets of the still-ongoing conspiracy investigation.

Srebnick argues that two constitutional amendments — due process of law and right to counsel — require that defendants such as his clients be given a pretrial hearing that would force prosecutors to establish the integrity of the indictment as a basis to seize the couple's assets.

If prosecutors fail to put forth compelling evidence, then "the assets needed for counsel of choice and legal expenses must be unfrozen," Srebnick argues in his briefs, written with Miami appellate lawyer Richard Strafer.

The Obama administration's solicitor general, Donald B. Verrilli Jr., will defend the practice as a way to prevent criminals from spending ill-gotten gains that could be returned to victims or the government.

In court briefs, he argues that the purpose of the existing law — adopted by Congress in 1970 to target organized crime — is to preserve the "availability of property" before trial that may ultimately be forfeited so that it is "not dissipated before a conviction."

The solicitor general points out that the law allows for a pre-trial hearing to determine whether defendants' assets are "traceable" proceeds from their crimes, but that the hearing should not allow defense attorneys to challenge the "validity" of an indictment.

The issue before the Supreme Court is whether defendants before trial have a "due process right to challenge the probable cause underlying the criminal charge," Verrilli wrote. "The Constitution guarantees no such right."

The high court, which hears about 75 oral arguments a year, took Srebnick and Strafer's petition because there has been a split among appellate courts in the country over whether the due process clause requires such a pretrial hearing before prosecutors can seize defendants' assets.

Another aspect of the argument: Defendants whose assets are frozen before trial can always be represented by a less costly lawyer or a federal public defender, thereby guaranteeing their right to counsel under the Constitution.

The solicitor general's deputy, Michael Dreeben, who has appeared 77 times before the Supreme Court, will be Srebnick's adversary.

Srebnick and Strafer's petition before the high court has drawn support from influential organizations, including the American Bar Association, which filed amicus briefs. Also, University of Miami law professor Ricardo Bascuas wrote the amicus brief for the National Association of Criminal Defense Lawyers.

Srebnick, a law partner with famed criminal defense attorney Roy Black, has prepared for his Supreme Court showdown by attending three moot courts with professors at UM, Duke University and his alma mater, Georgetown University Law Center.

Srebnick may be making his first appearance before the U.S. Supreme Court, but he is no stranger to Chief Justice John Roberts. Back in 1987-88, when Roberts headed the Washington law firm Hogan & Hartson's appellate department, Srebnick worked for him as a student law clerk while attending Georgetown.