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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** CAPLIN & DRYSDALE, Petitioner V. UNITED STATES

**CASE NO:** 87-1729

**PLACE:** WASHINGTON, D.C.

**DATE:** March 21, 1989

**PAGES:** 1 - 57

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 CAPLIN & DRYSDALE, :

4 Petitioner :

5 v. :

No. 87-1729

6 UNITED STATES :

7 -----x

8 Washington, D.C.

9 Tuesday, March 21, 1989

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 10:12 o'clock a.m.

13 APPEARANCES:

14 PETER VAN N. LOCKWOOD, ESQ., Washington, D.C.; on behalf  
15 of the Petitioner.

16 WILLIAM C. BRYSON, ESQ., Acting Solicitor General,  
17 Department of Justice, Washington, D.C.; on behalf  
18 of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

PETER VAN N. LOCKWOOD, ESQ.

On behalf of the Petitioner

3

WILLIAM C. BRYSON, ESQ.

On behalf of the Respondent

25

REBUTTAL ARGUMENT OF

PETER VAN N. LOCKWOOD, ESQ.

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PROCEEDINGS

(10:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1729, Caplin & Drysdale v. United States.

Mr. Lockwood, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER VAN N. LOCKWOOD

ON BEHALF OF THE PETITIONER

MR. LOCKWOOD: Mr. Chief Justice, and may it please the Court:

The issue that the Court is faced with here today is whether the Comprehensive Forfeiture Act of 1984 and the Fifth and Sixth Amendments to the United States Constitution permit the federal government to deprive a -- an unconvicted defendant of access to his assets to employ counsel to defend him against the very charges on which the proposed forfeiture in the indictment is based and to obtain necessary living expenses.

The facts, briefly stated, in Caplin & Drysdale are -- is that the Petitioner, the law firm of Caplin & Drysdale, was retained in the summer of 1983 by the Defendant Christopher Reckmeyer to represent him in a matter then understood to be a grand jury

1 Investigation involving possible federal tax evasion.

2 In January of 1985, Reckmeyer was indicted for  
3 not only a multiplicity of tax crimes, but a  
4 multiplicity of drug crimes and a -- charged with a  
5 violation of the Continuing Criminal Enterprise statute  
6 or CCE.

7 The indictment also contained what I will  
8 refer to in shorthand as blanket forfeiture allegations  
9 which essentially sought forfeiture of every asset  
10 Reckmeyer owned that was worth more than \$1,000.

11 Approximately simultaneously with the entry of  
12 the indictment, the government, ex parte, obtained a  
13 temporary restraining order against Reckmeyer and all  
14 persons acting in concert with him from transferring any  
15 of the assets listed as forfeitable in the indictment.

16 Immediately prior to the indictment, Reckmeyer  
17 had paid Caplin & Drysdale \$10,000 by check for  
18 previously incurred legal fees. That check -- those  
19 checks were returned unpaid by the banks as a result of  
20 the restraining order.

21 Shortly after the indictment, Reckmeyer paid  
22 Caplin & Drysdale approximately \$25,000 in cash, again  
23 for previous -- pre-indictment legal services. Because  
24 of the restraining order, Caplin & Drysdale deposited  
25 that money in an escrow account and immediately notified

1 both the court and the government of its receipt of  
2 those funds.

3           Thereafter, Caplin & Drysdale continued to  
4 represent Reckmeyer in the criminal proceedings. Some  
5 weeks after the indictment, Caplin & Drysdale filed on  
6 Reckmeyer's behalf a motion with the district court for  
7 -- to amend the temporary restraining order to allow  
8 Reckmeyer access to his restrained assets to pay counsel  
9 and, in addition, requested that the assets so relieved  
10 from restraint would be exempted from subsequent  
11 forfeiture in the event Reckmeyer should be convicted.  
12 That motion came on for a hearing, but the day prior to  
13 the hearing, Reckmeyer pleaded guilty.

14           As a result, the district court deferred  
15 ruling on the motion to some post-conviction procedures  
16 under Subsection N(2) of the CCE forfeiture statute. At  
17 that subsequent -- subsequent hearing, Caplin & Drysdale  
18 at this point, petitioning on its own behalf for the  
19 fees, pursuant to the court's instruction -- and the  
20 court granted Caplin & Drysdale's motion.

21           In the interim, while those proceedings were  
22 transpiring, Reckmeyer also consented to the entry of a  
23 forfeiture decree against him, which once again covered  
24 all the assets listed in the indictment and included the  
25 bank accounts on which the \$10,000 in unpaid checks were

1 drawn and the 25,000 odd dollars that was in the  
2 possession of Caplin & Drysdale in the escrow account.

3 QUESTION: Mr. Lockwood, what are the  
4 requirements for a forfeiture? That the -- the monies  
5 or property have been acquired as a result of the drug  
6 activities?

7 MR. LOCKWOOD: Chief Justice Rehnquist, there  
8 are a variety of properties which are subject to  
9 forfeiture in Section 853(a). They include proceeds of  
10 drug transactions, but --

11 QUESTION: I didn't mean so much the various  
12 kinds of properties, but what does the government have  
13 to show in order to forfeit any property? That it be  
14 acquired from drug proceeds?

15 MR. LOCKWOOD: The government has to show --  
16 well, the government first has to convict the defendant.

17 QUESTION: Yes.

18 MR. LOCKWOOD: Secondly, having convicted it,  
19 it has to show that the property was either obtained or  
20 used in the manner proscribed by the statute itself  
21 which, as I say, involves a variety of different  
22 considerations including, for example, that the property  
23 in a RICO case, which has an identical statute to the  
24 one at issue here, was a portion of the enterprise that  
25 the defendant conducted by a pattern of racketeering

1 activity.

2 For example, if an enterprise is a legitimate  
3 business, but the defendant participated in two or more  
4 predicate crimes which were deemed to be a pattern of  
5 racketeering activity, the defendant's entire interest  
6 in the enterprise could be forfeited, not merely that  
7 portion of the enterprise's assets that resulted from  
8 the criminal activity.

9 QUESTION: What was the basis for the  
10 forfeiture against Reckmeyer here?

11 MR. LOCKWOOD: Well, the ultimate basis was  
12 Reckmeyer's consent.

13 QUESTION: Well, but --

14 MR. LOCKWOOD: There was never any litigation  
15 or findings --

16 QUESTION: Doesn't the court have -- doesn't  
17 the court have to make any findings or anything like  
18 that?

19 MR. LOCKWOOD: Not if the defendant consents.  
20 It's -- It's just like a guilty plea in that regard,  
21 Your Honor.

22 The -- we believe there are certain basic  
23 principles that have to be kept in mind in evaluating  
24 the arguments over whether or not the lower court was  
25 correct in ruling that Caplin & Drysdale should be paid



1 the legal fees from Reckmeyer's assets that it had  
2 earned, or whether the Court of Appeals for the Fourth  
3 Circuit en banc was correct in holding that neither the  
4 statute nor the -- the applicable constitutional  
5 provisions authorize such a result.

6 The first point is that, unlike the  
7 government's argument at various places in its brief  
8 which suggests that this is simply a dispute over  
9 property rights, forfeiture is a criminal penalty in  
10 this statute. It is imposed only upon conviction of the  
11 defendant and is -- it was enacted as an effort to  
12 punish the defendant for his wrongful conduct and deter  
13 others from engaging in similar conduct.

14 The restraining order provisions in both the  
15 CCE and the RICO statutes were intended by Congress --  
16 this much both sides agree on -- to prevent a defendant  
17 from avoiding the impact of forfeiture by disposing of  
18 his property prior to forfeiture but after indictment in  
19 a manner which would, for example, allow him to retain  
20 the economic and beneficial ownership of that property,  
21 which we would refer to as a sham transaction, or which  
22 would enable his organization -- the statute -- these  
23 statutes were, after all, aimed at criminal  
24 organizations -- to maintain its continued use of the  
25 assets in criminal activity. This would be involved in

1 transferring assets to other members of the criminal  
2 organization.

3 The issue in this case --

4 QUESTION: I mean -- there -- there -- there  
5 is not agreement on both sides that that's the only  
6 purpose.

7 MR. LOCKWOOD: Your -- Justice Scalia, I  
8 didn't mean to say it was agreement that that was the  
9 only purpose. It is agreement that that is a major  
10 purpose. I was about to say that the -- the  
11 disagreement between the parties has to do with how much  
12 farther Congress intended to go than those basic  
13 purposes and specifically whether Congress intended that  
14 the government, by indicting a defendant and including  
15 blanket forfeiture allegations, could in fact render a  
16 defendant functionally indigent prior to the time of his  
17 conviction for the offenses on which the forfeiture  
18 charges were based.

19 QUESTION: But that -- is that your principal  
20 contention here, that the forfeiture -- or the tying up  
21 of the assets simply on the basis of an indictment is  
22 not right? I thought you would object also to a later  
23 recapture of those, even after a conviction.

24 MR. LOCKWOOD: That is correct, Chief Justice  
25 Rehnquist.

1 QUESTION: So, it isn't just the fact that it  
2 is just an indictment. You object to the thing even  
3 after a conviction.

4 MR. LOCKWOOD: That is correct, Chief Justice  
5 Rehnquist. Our view is that the so-called relation-back  
6 provision of the statute which purports to vest title to  
7 the -- of the defendant's asset in the government at the  
8 time the defendant committed the crime and therefore  
9 prohibits the transfer of any such assets to a third  
10 party at any time after that crime, subject to very  
11 narrow exceptions, has exactly the same practical effect  
12 as restraint because no third party, whether they be a  
13 lawyer, a grocer, a surgeon or whoever, who is -- who is  
14 aware through publicity or otherwise that the defendant  
15 has been indicted is going to transfer goods or services  
16 to the defendant --

17 QUESTION: It's like a --

18 MR. LOCKWOOD: -- In exchange for money that  
19 the government can come and take back if the defendant  
20 is convicted.

21 QUESTION: It is like a lis pendens in a civil  
22 action.

23 MR. LOCKWOOD: Short of the formality of  
24 filing the lis pendens with the court, it is exactly the  
25 same, Justice Rehnquist.

1 QUESTION: But your claim is limited to  
2 compensation for services performed prior to conviction.

3 MR. LOCKWOOD: Prior to conviction, that is  
4 correct, Justice White.

5 QUESTION: And you think you should be paid  
6 either before or after conviction for those services.

7 MR. LOCKWOOD: As long as the services were  
8 rendered prior to conviction, it is our position that  
9 the procedural context of when the lower court got  
10 around to deciding that we were entitled to be paid is  
11 irrelevant. The -- the key factor is that Reckmeyer had  
12 a -- a statutory and constitutional right to pay us  
13 prior to his conviction, and the conviction does not cut  
14 that right off, as the government seems to suggest.

15 The -- part of the -- the issue here is that  
16 the government's arguments about why the statute should  
17 be interpreted in the way it claims, which is to provide  
18 that this pre-conviction impact through either restraint  
19 or threat of forfeiture is appropriate, is that the  
20 government has a legitimate interest which the Congress  
21 in its view clearly intended in drafting of this statute  
22 in maximizing the forfeiture penalty by "preserving  
23 assets for forfeiture."

24 It is our position that, if analyzed  
25 correctly, that interest, to the extent that it purports

1 to be penal, cannot be given any legal or constitutional  
2 effect prior to conviction. You cannot punish someone  
3 prior to the time they are convicted of the crime. So --

4 QUESTION: So, you -- It's your position that  
5 -- I mean, that -- that relation back to the date of the  
6 offense is just -- you shouldn't construe the statute  
7 that way or that if you do, it's unconstitutional?

8 MR. LOCKWOOD: We do not --

9 QUESTION: What about an -- what about just a  
10 bank loan that the defendant owed and was due and it was  
11 owing? Do you think the -- do you think the bank can  
12 collect that? Or are you --

13 MR. LOCKWOOD: Well, under the statute --

14 QUESTION: -- (Inaudible) something special  
15 out of the fact that these are counsel fees?

16 MR. LOCKWOOD: Well, we are and we aren't,  
17 Justice White. We -- we -- in the pre-conviction  
18 setting, we would not under the statute, as opposed to  
19 the Sixth Amendment argument, distinguish between  
20 counsel fees and other necessary living expenses. We  
21 don't --

22 QUESTION: (Inaudible) bank loan?

23 MR. LOCKWOOD: A bank loan, depending upon the  
24 circumstances under which it would be made, the bank  
25 could very well qualify as a bona fide for -- purchaser

1 for value without notice. There is a dispute between  
2 the government and -- and various claimants in the lower  
3 courts, which is not presented by this case, over  
4 whether a "mere creditor" can get assets that are not  
5 forfeited if the bank did not obtain a security  
6 interest. It's clear under the statute if the bank  
7 loaned money and obtained a security interest prior to  
8 the time the defendant was indicted, the bank could get  
9 the repayment of that loan out of the forfeited assets.

10 QUESTION: But what about the money that is  
11 claimed to be the proceeds of a bank robbery?

12 MR. LOCKWOOD: Chief Justice Scalia, we would  
13 -- excuse me -- Chief Justice Rehnquist.

14 (Laughter.)

15 QUESTION: You see visions of the future.

16 (Laughter.)

17 MR. LOCKWOOD: We would argue that the bank  
18 robbery analogy is not apt. In the bank robbery  
19 analogy, you have a common law fight over title to  
20 property. We do not posit that Reckmeyer or anybody  
21 else has the right to use somebody else's property to  
22 pay a lawyer or for any other purpose. But here, the  
23 notion that the assets that Reckmeyer has in his  
24 possession at the time of indictment belonged to the  
25 government --

1 QUESTION: But --

2 MR. LOCKWOOD: -- by operation is a fiction.  
3 It's a penalty.

4 QUESTION: Well, but -- but why can't the  
5 federal government make property law the same way state  
6 governments make property law when they say that the --  
7 that the money deposited in a bank belongs to a bank?  
8 Why can't the federal government say on the happening of  
9 certain events, this property belongs to United States?

10 MR. LOCKWOOD: They can, provided that they  
11 have a particular, legitimate constitutional purpose.  
12 The Congress under the taking clause of the Fifth  
13 Amendment could not pass a statute that said Peter  
14 Lockwood's property belongs to the government. There  
15 has to have a legitimate purpose. In this case the --  
16 the legitimate purpose behind the forfeiture statute is  
17 the -- is penalizing criminals.

18 Our -- we do not challenge the legitimacy of  
19 that purpose. We challenge the impact of the penalty  
20 being applied prior to the time that the defendant is  
21 convicted.

22 QUESTION: But the only legitimate basis for  
23 imposing the penalty is the wrongful act and, therefore,  
24 it is perfectly proper -- In fact, I should think  
25 necessary -- for the government to make the statute

1 relate back to the occurrence of the wrongful act, which  
2 is all it has done here. That is the whole predicate  
3 for the government asserting the ownership interest.

4 MR. LOCKWOOD: That's correct, Justice  
5 Kennedy, as long as you don't push the principle too far  
6 because if the issue -- to the extent the statute and  
7 the forfeiture provisions are directed at the defendant  
8 himself, it is perfectly appropriate for the statute by  
9 way of a penalty to look back to the time that the  
10 criminal act was committed for purpose of identifying  
11 the forfeitable property.

12 When you get to transfers to third parties who  
13 are presumptively innocent, different considerations are  
14 presented, and where you get to depriving a defendant  
15 under the notion that we are going to take this property  
16 from him after he is convicted, depriving him of the use  
17 of property to hire a lawyer to defend himself against  
18 the very charges which, if he wins, the forfeiture will  
19 not occur, we -- we urge that that is a very draconian  
20 type of remedy. It is an infliction of punishment.

21 QUESTION: That's a -- that's a different  
22 theory. Now -- now you're getting into the right to  
23 counsel aspect of it.

24 You said in response to the Chief Justice's  
25 question a short time ago that on -- your objection to



1 relation back means that you would not draw a  
2 distinction between attorney's fees and other necessary  
3 living expenses. If I -- but if I understand your --  
4 your theory correctly, you shouldn't be drawing a  
5 distinction between attorneys' fees and anything else  
6 the individual does with the money. He could go out and  
7 just say, you know, I know I'm going to get convicted.  
8 They have the goods on me. Boy, I'm going to really  
9 live for the two years it takes for this trial to be --  
10 to be completed. Isn't -- Isn't that consequence of  
11 your theory?

12 MR. LOCKWOOD: Justice Scalia, I don't believe  
13 so.

14 QUESTION: He can go through that money  
15 completely.

16 MR. LOCKWOOD: I don't believe so. We would --

17 QUESTION: Why not?

18 MR. LOCKWOOD: We would concede that the  
19 government has a legitimate interest in preventing the  
20 defendant from simply wasting money that he believes he  
21 will ultimately have to turn over to the government.

22 QUESTION: Why is that if -- if it can't make  
23 any relation back? He doesn't owe any money to the  
24 government until he is convicted. It's his money.

25 MR. LOCKWOOD: We didn't say that the

1 relation-back doctrine is unconstitutional on its face.  
2 We were -- we -- I'm arguing that the relation-back  
3 doctrine cannot legitimately be used in a very limited  
4 class of cases where the impact of the use of the  
5 relation-back doctrine is not to preserve the status  
6 quo, which is the normal purpose for equitable relief,  
7 but to dramatically alter the status quo to the  
8 defendant's detriment by rendering him indigent  
9 functionally by mere indictment alone.

10 QUESTION: Well, you must be reasoning from  
11 something else other than the mere relation back then.  
12 I mean, you must be relying on the -- on right to  
13 counsel or some other -- some other right --

14 MR. LOCKWOOD: Well, we -- the statutory --

15 QUESTION: -- because if you really think that  
16 you can't take it away from him until he is convicted,  
17 he ought to have the right to do whatever he wants with  
18 that money during the period while the trial is  
19 continuing.

20 MR. LOCKWOOD: In the statutory context,  
21 Justice Scalia, we are relying on language in the  
22 statute which we contend gives the court an equitable  
23 discretion both under the restraining order provisions  
24 and under the relation-back provisions. And that  
25 involves balancing of hardships in the government's

1 Interest.

2 And we concede that the -- in that context,  
3 the government's interest in avoiding the dissipation of  
4 assets, whether it's through a restraining order or the  
5 application of relation-back principles, is entitled to  
6 sufficient weight to prohibit what Your Honor has  
7 suggested would be otherwise appropriate, namely,  
8 dissipation of assets. We suggest, as did Judge Winter  
9 in his opinion in Monsanto, that the equitable  
10 discretion inherent in the statute cannot be utilized,  
11 however, to render the defendant a pauper.

12 With respect to the constitutional argument,  
13 we -- we -- we say that -- our argument is essentially  
14 that you've got to balance the invasion of the  
15 defendant's right to counsel of choice against the  
16 government's interest. The relation-back principle in  
17 that context -- the government's interest in its  
18 application is to maximize the amount of money it will  
19 collect as a penalty from the defendant when he is  
20 convicted. That is its only legitimate interest. It  
21 does not have a legitimate interest in putting the  
22 defendant in a posture in which the government picks his  
23 lawyer and chooses how much to pay his lawyer.

24 QUESTION: Well, of course, that -- that's the  
25 issue. You see, you -- you defined status quo, but I

1 suggest the fallacy in that -- the use of that word is  
2 that your definition of the status quo includes the  
3 defendant's balance sheet after he has acquired illegal  
4 assets.

5 MR. LOCKWOOD: Justice Kennedy --

6 QUESTION: And that's the whole point.

7 MR. LOCKWOOD: Justice Kennedy, the problem is  
8 that at the time of the impact of the restraint and  
9 forfeiture, the defendant's assets are only claimed by  
10 the government to be illegal. They have not been proven  
11 to be illegally obtained, and they will only be so  
12 proven when the defendant is convicted at the criminal  
13 trial. But the government, if the statute is to be  
14 interpreted the way it argues, is in effect tying one  
15 hand behind the defendant's back by depriving him of his  
16 ability to hire a lawyer to contest the charges on which  
17 the proposed forfeiture is based.

18 QUESTION: Mr. Lockwood, what if the defendant  
19 has as his property a stash of narcotics, which he had  
20 been planning to sell, and also money that he had  
21 obtained from prior sales of narcotics according to the  
22 government's allegations? Do you think that he can use  
23 that money constitutionally pending the trial and  
24 conviction?

25 MR. LOCKWOOD: We would concede he could not

1 use the narcotics. Narcotics are contraband. Nobody  
2 maintains -- can maintain legal title in them, and they  
3 cannot be sold.

4 With respect to the money, money is fungible.  
5 The money may or may not, in fact, be the proceeds of  
6 narcotics transactions. No one will know until the  
7 defendant is convicted and the forfeiture allegations  
8 are litigated with --

9 QUESTION: And do you think the government has  
10 a different interest there so it can prevent the use of  
11 that money that it alleges were simply obtained by drug  
12 sales?

13 MR. LOCKWOOD: I think the government's  
14 interest at all times in this criminal forfeiture  
15 penalty in this statute that is before the Court is in  
16 penalizing the defendant by stripping him of his assets  
17 that were illegally obtained.

18 QUESTION: Well, are we sure of that? Could  
19 it -- could it not incorporate taking the proceeds of  
20 crime that are usable as evidence or for any other  
21 purpose in the trial?

22 MR. LOCKWOOD: The government could, I  
23 believe, make a different case from the one that is  
24 presented here if the assets sought to be seized were  
25 alleged to be needed to be used for evidence because

1 that gets into a different set of constitutional  
2 considerations more like the typical ones that this  
3 Court has upheld in -- in prior cases where counsel of  
4 choice was at issue, namely, the due and fair  
5 administration of Justice.

6 Here, where the only interest is money, the  
7 only interest on the government side of the equation is  
8 maximization of the penalty regardless of what the basis  
9 for that penalty is.

10 The -- the government's rationale could as  
11 easily apply in this case to -- to tying up assets of a  
12 defendant to enable him to pay fines.

13 QUESTION: What -- what if you applied the  
14 government's rationale to your rather standard  
15 forfeiture of an automobile used in transporting drugs,  
16 nothing to do with CCE or RICO? You know, they've had  
17 that statute on the books for years. Would it be your  
18 position that the government could not seize an  
19 automobile that it claimed was used for transporting  
20 drugs until the person had been convicted?

21 MR. LOCKWOOD: No, Chief Justice Rehnquist.

22 QUESTION: How do you distinguish that case  
23 from this?

24 MR. LOCKWOOD: Well, for openers, we would --  
25 I would not -- I would need to know whether the

1 automobile was the only asset that the defendant  
2 possessed which he could convert to cash to hire a  
3 lawyer because that's what this case entails.

4 QUESTION: Let's suppose it -- let's suppose  
5 it was.

6 MR. LOCKWOOD: And the automobile was not  
7 proposed to be used as evidence. Its sole purpose of  
8 the seizure was to sell it --

9 QUESTION: To -- yes.

10 MR. LOCKWOOD: -- and penalize the defendant  
11 for having --

12 QUESTION: So that the defendant doesn't sell  
13 it -- doesn't sell it before the forfeiture proceedings  
14 are completed.

15 MR. LOCKWOOD: I believe that if the sole  
16 purpose is to maximize the forfeiture penalty and not  
17 for evidence or some other thing and the automobile was  
18 not proven to be used in the crime at the time of its  
19 seizure and the defendant needs to sell it to raise  
20 counsel fees, that -- that that would, in fact, be a  
21 violation of the defendant's Sixth Amendment to counsel  
22 of choice in that very unusual circumstance.

23 QUESTION: Well, I don't think it is terribly  
24 unusual. I mean, typically a libel in a case like that  
25 proceeds on the basis of probable cause just like here

1 you have an indictment.

2 MR. LOCKWOOD: What is unusual is the notion  
3 that a defendant's only asset would be the automobile.  
4 That's unusual.

5 QUESTION: Mr. Lockwood, you would -- I gather  
6 you -- in this example about the car, you -- it was  
7 necessary for you to reach the Sixth Amendment issue.

8 MR. LOCKWOOD: That's correct, Justice White.

9 QUESTION: And so, you concede that the --  
10 that the statute and the forfeiture provision covers  
11 that car.

12 MR. LOCKWOOD: Well, the -- the question of  
13 the scope of the discretion in 853 could be read to even  
14 include it there. It is a more difficult case --

15 QUESTION: Well, it seems to me --

16 MR. LOCKWOOD: -- because it is not a blanket  
17 asset forfeiture; it is a particularized one. I would  
18 urge that the Court would have discretion in that case  
19 as well, although I concede it's a more difficult case.

20 QUESTION: Let me push you one step further.  
21 Supposing the government had made a controlled buy of  
22 drugs and paid the defendant \$500,000 with marked bills.  
23 You -- you wouldn't say that they -- they couldn't --  
24 the government couldn't get those bills back. You  
25 couldn't use that money to hire a lawyer, would you?



1 MR. LOCKWOOD: No, Justice Stevens, I  
2 wouldn't. There the marked bills, among other things,  
3 are evidence.

4 QUESTION: And -- and also, of course, they  
5 would be the property of the government.

6 MR. LOCKWOOD: That's correct, from the  
7 beginning. They are not being returned as a penalty for  
8 the crime that the defendant has yet to be convicted of.

9 I'd like to --

10 QUESTION: Counsel, one more question --

11 QUESTION: Suppose the bills are --

12 QUESTION: -- If I may.

13 You use the word penalize the defendant. In a  
14 standard unjust enrichment action that has been known to  
15 the common law for years, we never talk about penalizing  
16 the person who has been unjustly enriched when we make  
17 that person disgorge, do we?

18 MR. LOCKWOOD: No, Justice Kennedy, but this  
19 is not an unjust enrichment statute, and in an unjust  
20 enrichment case, the defendant generally speaking, is  
21 not deprived of his ability to live and hire counsel  
22 while he litigates with his opponent under some doctrine  
23 of relation back or some restraining order.

24 QUESTION: Your position is there no unjust  
25 enrichment in the prospect of a dope dealer keeping the

1 proceeds of his transaction? That is not unjust  
2 enrichment?

3 MR. LOCKWOOD: By definition, the dope dealer  
4 or the RICO defendant or the -- in the future, the tax  
5 evader who has spent the money on a lawyer has not kept  
6 it. The only question is can he spend it on a lawyer or  
7 for living expenses and have it dissipated that way, or  
8 does he have to go without so that the government can  
9 take all of it after he is convicted.

10 I'd like to reserve the rest of my time for  
11 rebuttal, if I might.

12 QUESTION: Very well, Mr. Lockwood.

13 Mr. Bryson?

14 ORAL ARGUMENT OF WILLIAM C. BRYSON  
15 ON BEHALF OF THE RESPONDENT

16 MR. BRYSON: Mr. Chief Justice, and may it  
17 please the Court:

18 At the outset, I'd like to make a couple of  
19 points applicable to both of the cases before Court  
20 today, and then turn to the Caplin & Drysdale case.

21 First, it is important I think to point out  
22 the procedural posture that these two cases present.  
23 There are two basic issues that have been litigated in  
24 the so-called attorneys' fee forfeiture cases.

25 One is the substantive question, which is the

1 question that is presented in these cases, of whether  
2 funds that a defendant wishes to use to pay an attorney  
3 may be forfeited at all, consistent with the statute and  
4 the Sixth Amendment, and the second is a procedural  
5 question which is not presented in this -- these cases,  
6 but has come up in other cases, involving what kind of  
7 procedures the courts must go through, if any, to  
8 establish the right to a forfeiture, that is to say,  
9 should -- must there be a pretrial hearing of some sort  
10 and what must that hearing consist in.

11 Now, the reason, of course, that these two  
12 cases don't present the procedural point is simply that  
13 in the Caplin & Drysdale case, there was a guilty plea  
14 simultaneously with the motion to modify the restraining  
15 order and, therefore, we know as of the time that the  
16 restraining order modification motion was filed, that  
17 the defendant was, in fact, guilty of the crimes and  
18 that he, in fact, was subject to the forfeiture  
19 provisions with respect to all of the property that he  
20 conceded was forfeitable.

21 And in the Monsanto case, the court of appeals  
22 panel required and the district court held a pretrial  
23 hearing long before any counsel had to prepare for the  
24 trial in which it was determined, as the district court  
25 found, by overwhelming evidence that the defendant had

1 committed the crimes and that the property was  
2 forfeitable.

3 So -- so, these cases present the substantive  
4 question in a very stark posture. They present the  
5 question whether -- that if we know to either a  
6 certainty or by overwhelming likelihood that the fees  
7 are -- excuse me -- that the -- the property in issue is  
8 subject to forfeiture, must that property nonetheless be  
9 excluded from a forfeiture order. And our position on  
10 that is that neither statute nor the Sixth Amendment  
11 requires that result.

12 QUESTION: And you assert that the Fifth  
13 Amendment issue, the due process issue, is not involved  
14 here at all.

15 MR. BRYSON: Well, the -- there is a Fifth  
16 Amendment issue with respect -- a general Fifth  
17 Amendment claim that is made by Caplin & Drysdale with  
18 respect to the question of whether it violates the Fifth  
19 Amendment to put this kind of authority in the hands of  
20 prosecutors. It's related to the Sixth Amendment  
21 question. The procedural due process question --

22 QUESTION: Yes.

23 MR. BRYSON: -- we believe is not presented in  
24 these cases.

25 QUESTION: As to whether you need a hearing --

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MR. BRYSON: A hearing. That's right.

QUESTION: -- and what has to be shown at that hearing.

MR. BRYSON: That's right. And, indeed, the court of appeals in Caplin & Drysdale, en banc court, made exactly that point and pointed out that in light of the posture of this case, we are really presented only with the -- the flat, substantive question of whether forfeiture is possible without regard to the strength of the government's case.

In other words, this is, in essence, the case that I think Justice Stevens put in which we know -- because the bills are marked, we know that this money belongs to the government. In this case we know that the money belongs to the government not because the bills are marked, which gives us a very high degree certitude, but because the defendant admitted that he was guilty and that the money was forfeitable, which gives us a complete degree of certitude, as much as the law --

QUESTION: Yes, but of course, you didn't have that before the guilty plea. You didn't have that degree of certitude then.

MR. BRYSON: When we had it, Your Honor, was -- and let me give you the chronologies because I think

1 it may be important.

2 There was an indictment in January, and six  
3 weeks passed and then on March 7th, the defendant made a  
4 motion to vacate or modify the restraining order in  
5 order to provide for the payment of attorneys' fees.  
6 That was the first time the court or the government  
7 heard anything from the defendant about the question of  
8 whether there should be attorneys' fees --

9 QUESTION: No, that's true. But during that  
10 six-week period, you did not have the certitude that you  
11 had described.

12 MR. BRYSON: That's correct. That's correct.

13 QUESTION: And part of the issue is what can  
14 be done during that six-week period.

15 MR. BRYSON: That's right.

16 QUESTION: Say he makes -- pays his landlord  
17 his rent during that six-weeks period, and the landlord  
18 hears about the indictment and has reason to believe  
19 maybe this fellow is a crook and maybe this is tainted  
20 money. But your position is the landlord cannot take  
21 the money during that period, as I understand it.

22 MR. BRYSON: That's right. And -- and the --  
23 In order to trigger any right to a contrary result, the  
24 defendant has to make some kind of motion, tell the  
25 court that there is something wrong with this regime.

1 The first time that happened --

2 QUESTION: And the landlord has to refuse to  
3 accept any rent from him, too, I guess. I -- we're  
4 talking about the rights of third parties --

5 MR. BRYSON: Well, if the landlord is on  
6 notice.

7 QUESTION: -- In part here.

8 MR. BRYSON: If the landlord is not in a  
9 position to be a bona fide purchaser for value because  
10 he is on notice of the forfeiture.

11 QUESTION: As long as there is enough  
12 information in the newspapers and headlines to put him  
13 on notice that it may be -- and I suppose the grocer and  
14 the doctor that he goes to or the dentist, all those  
15 people can't -- can't -- cannot treat him without doing  
16 so at their peril.

17 MR. BRYSON: If they are not bona fide  
18 purchasers for value, that's right.

19 QUESTION: Well, I'm assuming wide publicity  
20 of -- attending the indictment and people who have  
21 treated this man for many, many years. And I assume  
22 that would go back, would it not, to even -- how far  
23 back do you go? When the offense was committed -- say  
24 he's indicted for drug business. He had been in it for  
25 five or six years, say. Can all the people who have

1 dealt with him during that period with some reason to  
2 suspect the nature of the activities --

3 MR. BRYSON: Well, it -- it requires more than  
4 a reason to suspect the nature of activities. It  
5 requires that you have notice of the probable forfeiture  
6 of the particular assets.

7 QUESTION: I see.

8 MR. BRYSON: That is not likely to happen with  
9 respect to anyone prior to indictment.

10 QUESTION: So, really we're only concerned  
11 about the --

12 MR. BRYSON: We're really realistically only  
13 talking as of the indictment.

14 QUESTION: The period between the indictment  
15 and the conviction.

16 MR. BRYSON: That's right.

17 QUESTION: Mr. Bryson, what if we thought that  
18 it was necessary before trial that there be a hearing at  
19 which evidence would be taken and the defendant would  
20 have an opportunity to rebut the government's claims,  
21 and that procedural due process requires that? What  
22 does that do in the Caplin case do you think?

23 QUESTION: Your Honor, nothing at all because  
24 here, as I say, the request for a modification and a  
25 hearing on the -- on the motion for modification was



1 filed on March 7th. The hearing was -- came on quite  
2 quickly, on March 15th. But, in fact, in the meantime,  
3 on March 14th, the defendant had pleaded guilty and had  
4 conceded forfeitability. So, there was nothing to hear  
5 at that point. All that was presented at that point was  
6 the naked constitutional and statutory question.

7 Now, in the Monsanto case, there is a pretrial  
8 hearing. And that hearing, we contend, was beyond what  
9 any court has required that has required some kind of  
10 due process hearing because in that hearing, not only  
11 was it an adversarial hearing and a four-day hearing at  
12 that, in which the defendant was entitled to put on any  
13 evidence that -- that he chose, but also the finding  
14 that the property was forfeitable was made by a standard  
15 of proof beyond clear and convincing.

16 So, our -- our point is that in -- in both of  
17 these cases, the Court does not have to address the  
18 question of what procedure is necessary because whatever  
19 procedure is necessary was necessarily satisfied here.

20 QUESTION: Well, Mr. Bryson, you say that as  
21 soon as he pled guilty, he was -- he conceded  
22 forfeitability.

23 MR. BRYSON: Yes.

24 QUESTION: I thought you had to -- the  
25 government had to prove that the property was actually

1 forfeitable in the sense that it was a -- used in or a  
2 product of criminal activity.

3 MR. BRYSON: Well, he -- he conceded, number  
4 one, that he had --

5 QUESTION: Well, not -- just not -- not just  
6 by pleading guilty.

7 MR. BRYSON: Well, his plea of guilty included  
8 a concession that, in fact, his assets over a course of  
9 many years were essentially all the product of narcotics  
10 transactions and there was some relation --

11 QUESTION: All he did was plead guilty,  
12 though, isn't it? He didn't --

13 MR. BRYSON: No, he pleaded guilty and there  
14 was a representation on his part that there had been --  
15 that his -- his assets, essentially, were all narcotics  
16 tainted there. So, he did much more than simply concede  
17 that he had committed the particular crimes. He  
18 conceded that his -- the assets that were the subject of  
19 the indictment and named in the indictment were, in  
20 fact, forfeitable under the 853(a). So, he has conceded  
21 --

22 QUESTION: Well, that's certainly not true in  
23 Monsanto, is it?

24 MR. BRYSON: It was -- in Monsanto, he didn't  
25 concede anything, but the court found --

1 QUESTION: Well, I know, but there was --  
2 there was just probable cause to believe that he had  
3 committed these crimes --

4 MR. BRYSON: But you see, the court in  
5 Monsanto --

6 QUESTION: -- and not probable cause to say  
7 that every asset he had was forfeitable.

8 MR. BRYSON: Well, there was more than  
9 probable cause because the district court specifically  
10 found with respect to the only two assets that were at  
11 issue in Monsanto, that they were forfeitable.

12 QUESTION: Okay.

13 MR. BRYSON: That was an issue which the panel  
14 in Monsanto required the district court to address, and  
15 the district court did address. There are only two  
16 assets at issue in Monsanto, so it's -- it's pretty  
17 simple. Here there are many more in Caplin & Drysdale.

18 QUESTION: May I ask you one other question  
19 before I -- about the relation back business? Is it not  
20 true that although the third parties who deal in good  
21 faith with the man would -- prior to indictment would  
22 have no risk. If you had sham transactions prior to the  
23 indictment, but after the date of the first offense,  
24 they could be set aside and the money could be  
25 recovered, could it not?

1 MR. BRYSON: Well, if they were sham  
2 transactions --

3 QUESTION: Say -- say he had a lawyer who just  
4 took a \$5 million fee because -- for general services or  
5 something.

6 MR. BRYSON: You could well conclude from that  
7 that that lawyer had notice of the probable  
8 forfeitability of his assets.

9 QUESTION: Right, I mean, assuming that you  
10 can prove that the -- that the third had -- had -- had  
11 notice of --

12 MR. BRYSON: The fact that it --

13 QUESTION: -- the fact it was probably drug --

14 MR. BRYSON: Yes, the fact that it was a sham  
15 transaction would be very strong proof that there was  
16 some reason for the --

17 QUESTION: Right.

18 MR. BRYSON: -- for the fraudulent transfer --

19 QUESTION: But --

20 MR. BRYSON: -- which would be in anticipation  
21 --

22 QUESTION: But your right -- I mean, the  
23 government's right is to get the money -- all money  
24 earned by the defendant out of the offense all the way  
25 back to the date his illegal activities commenced.

1 MR. BRYSON: That's right, and -- and the  
2 statute -- under common law forfeiture principles, we  
3 would have an absolute right to all that money,  
4 including the grocer's -- monies paid to the grocer,  
5 whatever, or property just given to the grocer or  
6 whatever.

7 But there is an exception. Congress has  
8 modified that admittedly --

9 QUESTION: (Inaudible).

10 MR. BRYSON: -- harsh result by saying in two  
11 settings, we will not require forfeiture. One is where  
12 there was a prior interest prior to the commission of  
13 the -- of the act -- now, that's consistent with the  
14 common law rule -- but, two, where there is a bona fide  
15 purchaser for value without notice.

16 In the second setting, that's contrary to the  
17 old common law rule, but it ameliorates the harshness of  
18 the statute with respect to a very narrowly defined  
19 class of people in -- among whom these lawyers clearly  
20 do not fall.

21 QUESTION: Is there at issue here some -- some  
22 -- some payment of an attorney's fees prior to the plea  
23 of guilty?

24 MR. BRYSON: Yes.

25 QUESTION: Was it -- is that just the \$29,000?

1 MR. BRYSON: No, no. The -- the -- well, it's  
2 a little complicated, but let me see if I can lay it out.

3 QUESTION: Well, I mean, just generally there  
4 is --

5 MR. BRYSON: There were no fees paid. The  
6 only thing that was paid --

7 QUESTION: There's no fees paid prior to the  
8 plea of guilty?

9 MR. BRYSON: That -- that is one of the  
10 problems in this case. There was a -- a payment of  
11 \$25,000 in cash on January 25th --

12 QUESTION: Yes.

13 MR. BRYSON: -- which was after the  
14 indictment, but Mr. Lockwood has -- has said today that  
15 that was for pre-indictment services. And, in fact, the  
16 papers in the lower court indicate that --

17 QUESTION: Well, don't you think that is  
18 recoverable or not?

19 MR. BRYSON: Well, they took the position --

20 QUESTION: Under your theory, I would think it  
21 is.

22 MR. BRYSON: They took the -- well, it -- it  
23 is money which was accepted after -- well, I mean, the  
24 first problem is that it was money which was paid  
25 contrary to the -- to the restraining order. But in any

1 event, it was money that was accepted after th) -- the  
2 attorneys had notice of the indictment --

3 QUESTION: Yes, so you think --

4 MR. BRYSON: -- and therefore were aware.

5 QUESTION: -- It's recoverable under your  
6 theory.

7 MR. BRYSON: I think it's -- that's right.  
8 That's right.

9 QUESTION: And it would have been even if they  
10 had -- they just don't qualify for bona fide purchaser.

11 MR. BRYSON: That's right.

12 QUESTION: And now -- and but now, there is  
13 also at issue attorneys' fees that are due and owing  
14 after the plea --

15 MR. BRYSON: That's right.

16 QUESTION: -- for -- for --

17 MR. BRYSON: That's right. That's the  
18 \$170,000.

19 QUESTION: Yes, exactly.

20 MR. BRYSON: That's right. Now, those --  
21 those fees, of course, have not been transferred. There  
22 has been no transfer, and that is one of the reasons,  
23 among others, that the attorneys in this case are not  
24 entitled to recovery under the statute because to the  
25 extent that the statute provides any recovery -- any

1 opportunity for a recovery for any party, there must be  
2 an actual transfer of property. The statute does not  
3 permit recovery for a party which is simply in the  
4 position of a general creditor.

5 QUESTION: Mr. Bryson, I -- to be a bona fide  
6 purchaser, you -- you have -- you have to know about the  
7 possible forfeiture not when you received the money, but  
8 when you provide the services. Isn't that right? I  
9 mean, Isn't that what counts, whether at the time you  
10 provide the services, you -- you -- you're on notice?  
11 So, wouldn't it be the case that if the lawyers, prior  
12 to the indictment, didn't -- any services they provided  
13 before the indictment -- why is that automatic --

14 MR. BRYSON: Well, it is at the time of the  
15 purchase as the -- the statute states now.

16 QUESTION: Well, I purchase when I provide the  
17 services for which that's the exchange. No?

18 MR. BRYSON: Well, it --

19 QUESTION: Or is it when I -- when he -- when  
20 he turns it over to me?

21 MR. BRYSON: Well, that --

22 QUESTION: That's a very strange rule you're --

23 MR. BRYSON: That is not -- that is not  
24 entirely clear particularly on the facts of this \$25,000  
25 payment.



1           QUESTION: Well, if it isn't clear, I know how  
2 it ought to come out.

3           MR. BRYSON: It -- it may well be that the  
4 purchase was effected at the time the services were  
5 provided, not at the --

6           QUESTION: I would think so.

7           MR. BRYSON: -- time that the money was paid,  
8 but I'd have -- I have to point out that in the lower  
9 court, the Petitioners in this case took the contrary  
10 position that -- saying that the \$25,000 was paid for  
11 money -- was paid for services that were performed after  
12 the indictment, in other words, in connection with the --

13          QUESTION: (Inaudible).

14          MR. BRYSON: -- representation of the case,  
15 or at least that's the way I read their representation  
16 on that.

17          So, that -- the disposition of the \$25,000 is  
18 somewhat up in the air, but under our --

19          QUESTION: Well, I --

20          MR. BRYSON: -- theory of the case, it doesn't  
21 matter because the \$170,000 that's at issue here is  
22 clearly and concededly not subject to the bona fide  
23 purchaser for value.

24          QUESTION: May I just ask one other question?  
25 Supposing the man has a genuine preexisting debt of a

1 mortgage or something for \$100,000, and pays that off  
2 after the indictment, but before the guilty plea, is  
3 that money recoverable by the government? He's  
4 apparently using government money to pay it.

5 MR. BRYSON: If it is a secured --

6 QUESTION: No, it's an unsecured debt, but a  
7 genuine debt.

8 MR. BRYSON: If it is an unsecured debt --

9 QUESTION: He bought a --

10 MR. BRYSON: -- and the -- and the payment is  
11 made to somebody, again, with notice --

12 QUESTION: Well, at the time of the payment,  
13 notice; at the time of the services, no notice. I'm  
14 assuming it's a payment for a preexisting debt that was  
15 incurred by the -- that the services were performed --  
16 really the problem Justice Scalia identified. He is  
17 paying that debt with the government money I think under  
18 your view.

19 MR. BRYSON: Well, again, it depends on how  
20 you view the -- the term "purchase." If the purchase  
21 occurs at the time the service is --

22 QUESTION: Well, I'm wondering -- I'm asking  
23 you how do you view it.

24 MR. BRYSON: Well, I -- I think one could --

25 QUESTION: I know one can argue both sides.

1 How do you argue it?

2 (Laughter.)

3 MR. BRYSON: Well, we believe that the  
4 purchase is not complete until the money --

5 QUESTION: That was for your view. Unlike  
6 Justice Scalia's suggestion, it's the time of payment  
7 because it's being paid with government money.

8 MR. BRYSON: That's right.

9 QUESTION: Well, under fraudulent conveyance  
10 law, under voidable preference law in bankruptcy, it has  
11 to be a fresh service performed. A payment on an old  
12 debt doesn't make you a bona fide purchaser.

13 MR. BRYSON: Yes, that's true.

14 QUESTION: Mr. Bryson, you say you don't have  
15 to address it here, but do you think that a  
16 post-indictment restraining order can be obtained ex  
17 parte by the government?

18 MR. BRYSON: Yes, Your Honor. There is -- the  
19 restraining order itself clearly can be obtained simply  
20 -- as the statute makes clear, simply by petitioning to  
21 the district court ex parte. And, in fact, there is a  
22 lot in the legislative history that indicates that that  
23 -- it is important that it be able to be done that way  
24 because of the possibility of transfers being done very  
25 quickly if notice is given of the restraining order.

1           The -- however, as the -- the legislative  
2 history also makes clear, the -- excuse me -- the court  
3 certainly can hold a hearing at any time after the  
4 restraining order is entered to consider modifying the  
5 restraining order or vacating it altogether. Now,  
6 that's when in our view any process that may be due is  
7 properly to come into play.

8           So, in our view, the -- whatever due process  
9 is required applies to any hearing that may be held on a  
10 motion to modify the restraining order if one has been  
11 entered post-indictment. The actual right to enter the  
12 restraining order initially can -- applies -- it could  
13 be done ex parte.

14           QUESTION: You are going to argue the  
15 constitutional issue I suppose.

16           MR. BRYSON: Yes, yes.

17           QUESTION: May I just ask one other  
18 preliminary question because I -- you do -- you do have  
19 -- fortunately you have two hours today, so we're not  
20 quite as unfair as we sometimes are.

21           The general scheme is the same under both the  
22 RICO statute and the CCE statute --

23           MR. BRYSON: Yes, that's right.

24           QUESTION: -- so that whatever we decide  
25 pertaining to the drug business applies to everyone

1 subject to RICO, too. Is that correct?

2 MR. BRYSON: It applies to everyone subject to  
3 RICO in which there is a forfeiture allegation. I would  
4 have to --

5 QUESTION: I understand.

6 MR. BRYSON: I would hasten to point out that  
7 the number of cases that are affected is vastly more in  
8 the context of -- of narcotics forfeiture than RICO.

9 QUESTION: Why do you say that? There are an  
10 awful lot of RICO cases.

11 MR. BRYSON: Well, there are, but we only have  
12 about 50 cases a year in which RICO forfeitures are  
13 sought. We have many more than that --

14 QUESTION: Yes, but potentially there are an  
15 awful lot more than that.

16 MR. BRYSON: Well, that's right, but then we  
17 only have about 100 RICOs a year, total. It's -- RICO  
18 is -- you see a lot of the RICO cases, of course,  
19 because most of them are appealed all the way up, but in  
20 spite of the disproportionate number that you see, there  
21 are, in fact, a very small number that are actually  
22 brought. So, it's 100 cases out of a total of 50,000  
23 criminal cases that are brought a year. So,  
24 proportionately the vast majority of -- of cases in  
25 which forfeiture is going to be an issue will be drug

1 cases. That's right.

2 Now, on the constitutional question -- and let  
3 me -- let me turn directly to that -- It is our view  
4 that the Sixth Amendment requires only -- with respect  
5 to the right to counsel of choice, only that there be no  
6 arbitrary or unreasonable limitation of the right to  
7 counsel of choice. It's different from the right to  
8 counsel, period.

9 And the question then in this case is does the  
10 forfeiture statute operate in a way that is somehow  
11 arbitrary or unreasonable. And what in this context the  
12 question really comes down to is is it arbitrary or  
13 unreasonable to bar defendants from using to pay  
14 lawyers' fees money that has been determined, as in  
15 these cases, either conclusively or by overwhelming  
16 evidence to be subject to forfeiture, to be, in other  
17 words, the government's money.

18 Now, the first question I guess one could  
19 start with is to say is there any constitutional flaw in  
20 the process of -- or in -- in the fact of determining  
21 that this is, in fact, the tainted money, money that was  
22 obtained as a result of drug transactions, is  
23 forfeitable. Is there any Fifth Amendment bar to that?

24 Now, Mr. Lockwood said, and quite correctly,  
25 the government couldn't simply -- the Congress couldn't

1 simply declare that Mr. Lockwood's funds are  
2 forfeitable, all of his property is forfeitable. But  
3 what we submit there would be absolutely no Fifth  
4 Amendment bar to is a rule that says any of his property  
5 that are the proceeds of drug transactions are  
6 forfeitable. And that's a -- a traditional civil  
7 notion, and it is, we -- we'd submit, entirely  
8 consistent with the Fifth Amendment to do that. That's  
9 what Congress has done.

10 Now, once you accepted that it is permissible,  
11 then the only remaining question is whether there is  
12 something arbitrary about saying that the defendant  
13 cannot use those funds, funds that the government --  
14 that Congress has declared belong to the government, to  
15 hire a lawyer. There is, in our view, no Sixth  
16 Amendment right to use somebody else's property to hire  
17 a lawyer, and that's what's going on in this case.

18 As I say, we have in this case established  
19 with a high degree of confidence that this is the  
20 government's property, and that is what the defendants  
21 are contending for is that even though the government  
22 has established that it is government property, they are  
23 entitled to dip into that property to the extent  
24 necessary to hire the lawyers of their choice.

25 QUESTION: So, suppose you had a statute which

1 permitted the defendant to have ordinary living expenses  
2 and to pay for grocery and medical bills, but it  
3 specifically prevented use of the proceeds to pay an  
4 attorney. There was no exemption for that. Would that  
5 be constitutional?

6 MR. BRYSON: I think it probably would be  
7 constitutional, assuming that Congress had some -- some  
8 reasonable purpose behind --

9 QUESTION: Well, suppose the purpose is so  
10 that the defendant doesn't hire a first-rate attorney.

11 MR. BRYSON: Well, if the purpose is to  
12 defraud -- deny the -- specifically to deny the  
13 defendant a right to counsel, then I think there are  
14 problems with that statute. That is, of course, not the  
15 situation --

16 QUESTION: Well, can -- if it's the  
17 government's money, can't the government say we don't  
18 want you to be using this money to hire the best law  
19 firm in the United States.

20 MR. BRYSON: It would be the discrimination,  
21 specifically picking out lawyers if there is no reason  
22 other than simply to hobble the defendant in his  
23 defense, if that's the sole purpose of this rule. We're  
24 talking about a very narrow and unusual statute, but I  
25 would think that there would be a problem.



1 QUESTION: And this statute is okay because it  
2 doesn't allow him to keep money for food either. Is  
3 that right?

4 (Laughter.)

5 MR. BRYSON: This was not specifically -- this  
6 was not -- this is a general policy. This is not --  
7 this is a sweeping, general, overall policy. The  
8 purposes behind this policy are not to hobble the  
9 defendant.

10 QUESTION: But there are no exemptions. There  
11 --

12 MR. BRYSON: There are no exemptions. That's  
13 right.

14 This is not a statute in which Congress has  
15 set out to skew the scales between the defense and the  
16 -- and the government. And that I think makes a big  
17 difference for purposes of looking at the  
18 constitutionality of the statute.

19 There are a lot of situations in which the  
20 defendant's property posture with respect to his  
21 property can affect the likelihood that a lawyer will --  
22 will take on his representation. And some of them  
23 relate to the defendant's just not having the money.  
24 Others relate to the defendant's situation with respect  
25 to other creditors, and some of them relate to problems

1 that the defendant may have with respect to creditors  
2 where the creditor is the government. And I would just  
3 give you examples.

4 Suppose, for example, the defendant had --  
5 prior to his criminal trial, had been slapped with a  
6 jeopardy assessment for back taxes based, let's say, on  
7 the narcotics transactions that the government has  
8 discovered. That would discourage, no doubt, some  
9 lawyers from representing the defendant on the theory  
10 that they would not be likely to get paid in light of  
11 this very high likelihood that the jeopardy assessment  
12 would result in tax --

13 QUESTION: Well, Mr. Bryson, the jeopardy  
14 assessment would be justified by the government's  
15 legitimate interest in fiscal purposes, collecting tax  
16 money that is due.

17 And we had a little discussion earlier about  
18 what really is the motivation for this whole program.  
19 We've heard your opponent's view. Is it fiscal in  
20 nature or -- is that part of it, or is it -- is it --

21 MR. BRYSON: It's principally -- it's fiscal  
22 in this sense. It's fiscal in that the purpose is to  
23 strip drug dealers of economic power, and at the same  
24 time to deter drug dealers from engaging in drug  
25 dealings when they expect, as they have in the past,

1 that whatever penalties they suffer, they will not lose  
2 the vast profits that they have been able to  
3 accumulate. So, it is deterrence stripping them of  
4 their power, and also to collect assets in order to  
5 continue the asset forfeiture --

6 QUESTION: But to the extent you talk about  
7 stripping the defendant of economic power, that purpose  
8 is not defeated if some of the money is spent for  
9 legitimate living expenses and attorneys' fees.

10 MR. BRYSON: Well, it can be in this sense,  
11 Your Honor. First of all, he knows that even though he  
12 may be subject to forfeiture, that he knows that he can  
13 exercise some considerable economic power by hiring  
14 whatever lawyer he wants to hire, and he knows also --  
15 and this is even --

16 QUESTION: Well, but we're not talking about  
17 sham transactions now. We're talking about hiring  
18 reputable counsel who charge normal legal rates or  
19 paying normal food bills. And so, we are not talking  
20 about just extravagant living and that --

21 MR. BRYSON: I -- I understand.

22 QUESTION: Yes.

23 MR. BRYSON: But, nonetheless, there is --  
24 It's a matter of considerable comfort I think to a lot  
25 of potential defendants in -- in the drug trade to know

1 that they can have in a sense --

2 QUESTION: That they can afford a good lawyer.

3 MR. BRYSON: -- they were assured of being  
4 able to pay us, as was true in a couple of the cases  
5 involving this issue.

6 QUESTION: So, part of the motivation then is  
7 to deprive them of that right to select lawyers that  
8 they think they'd like to have represent them.

9 MR. BRYSON: Not specifically with respect to  
10 lawyers.

11 QUESTION: That seems to me what you're saying.

12 MR. BRYSON: I -- it is with respect to not  
13 allowing them to -- to exercise economic power. One way  
14 --

15 QUESTION: And one -- one way of exercising  
16 economic power, as you define it, is to hire the counsel  
17 of your choice.

18 MR. BRYSON: And to -- to make whatever other  
19 uses of the money that you can justify to a district  
20 court.

21 QUESTION: No, but I -- am I right in saying  
22 that the desire of the defendant to hire counsel of his  
23 or her choice is part of the economic power the  
24 government seeks to take away from him?

25 MR. BRYSON: Well, the government is -- I

1 mean, the Congress --

2 QUESTION: Yes or no.

3 MR. BRYSON: It is certainly true that -- that  
4 that is one of the manifestations of economic power that  
5 is --

6 QUESTION: That you think Congress intended to  
7 deprive the defendant of.

8 MR. BRYSON: They didn't specifically address  
9 the question.

10 QUESTION: In fact, they said just the  
11 opposite is the only comment on the issue that I  
12 remember.

13 MR. BRYSON: They -- they did not specifically  
14 want to deprive anybody of counsel. They did want to  
15 deprive defendants of the ability to spend large sums of  
16 money on whatever resources that they --

17 QUESTION: But they didn't spell out any  
18 restrictions.

19 MR. BRYSON: No restrictions.

20 QUESTION: No restrictions at all.

21 MR. BRYSON: The -- the statute is -- is quite  
22 sweeping, that's right, except for the provisions --

23 QUESTION: And you agree it includes food.

24 MR. BRYSON: That's right, Your Honor.

25 QUESTION: And medical services.

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MR. BRYSON: That's right. That's right.

QUESTION: Burial services, too?

MR. BRYSON: That's right, Your Honor, to anyone who isn't a bona fide purchaser for value.

QUESTION: Is there an order of forfeiture entered in cases like this?

MR. BRYSON: Yes, there was in this case.

QUESTION: And so, the issue here -- the -- this property X -- bank account X, for example, is forfeited to the government, and the issue is whether the attorneys may collect out of that forfeited property.

MR. BRYSON: That's right, whether they can get a court order declaring that that property must be conveyed back to the government -- I mean, back to the defendant or to the third party. That's right.

Now --

QUESTION: You're saying essentially the government didn't want -- want him to have gold-plated anything, watches or lawyers or anything else.

MR. BRYSON: Gold-plated anything, that's right. That's right. It wasn't specifically addressed to lawyers.

QUESTION: To lawyers --

MR. BRYSON: But it was addressed to the general --

1 QUESTION: To gold-plating or even food, for  
2 that matter.

3 MR. BRYSON: That's right.

4 QUESTION: Well, I take it you -- any other  
5 creditors, if they weren't a bona fide purchaser of  
6 value, couldn't -- couldn't collect out of that  
7 forfeited property either.

8 MR. BRYSON: Not according to our theory,  
9 that's right.

10 Now, the -- the -- Caplin & Drysdale would say  
11 that any creditor whose credit -- whose obligations --  
12 the obligations to whom arose because of ordinary living  
13 expenses would be entitled to collect under the statute.  
14 That is not, as I understand it, their Sixth Amendment  
15 argument, but they say the statute provides for --

16 QUESTION: But at least they -- their argument  
17 is that lawyers at least should be treated specially.

18 MR. BRYSON: Under the Sixth Amendment, they  
19 do take that position, and that is certainly the  
20 position that Monsanto takes. Their argument on the  
21 statute goes beyond lawyers and -- and reaches ordinary  
22 living expenses, as I understand it.

23 The --

24 QUESTION: And you agree that lawyers can't be  
25 singled out, but --

1 MR. BRYSON: That's right, by a statute. I  
2 think that would raise -- raise serious problems unless  
3 there were some good reason, such as Congress deciding  
4 there was a serious problem with the narcotics defense  
5 bar collecting fees, and they specifically addressed  
6 that problem of collecting huge fees under dubious  
7 circumstances. There very well might be a statute that  
8 would be constitutional if it addressed that problem for  
9 that reason. But if it was simply designed in order to  
10 skew the balance against the defendant and for no other  
11 purpose, then I think there would be a problem. That is  
12 not the purpose of this statute.

13 QUESTION: Well, it's not designed to skew the  
14 balance. It's designed to prevent money that the  
15 government owns from being used for that purpose.

16 MR. BRYSON: Well, that's -- that's the  
17 purpose of this statute.

18 QUESTION: Is that skewing the balance?

19 MR. BRYSON: No. That's the purpose of this  
20 statute, that -- if another purpose -- well, thank you.

21 QUESTION: Thank you, Mr. Bryson.

22 Mr. Lockwood, you have two minutes remaining.

23 REBUTTAL ARGUMENT OF PETER VAN N. LOCKWOOD

24 MR. LOCKWOOD: Your Honor, counsel for the  
25 government has persistently attempted to suggest that



1 the Caplin & Drysdale case is unusual because the -- it  
2 involves a situation where at the time the defendant was  
3 deprived of the ability to pay his lawyer, the  
4 government had proven or had a high degree of certainty  
5 that the assets were forfeitable. That is simply not  
6 the case. What is the case is that it was proven after  
7 the services were rendered that the assets were  
8 forfeitable by consent.

9 But if you -- if you posited that Caplin &  
10 Drysdale had been paid as it went along, because there  
11 was no restraining order, then we would not have  
12 received any money prior to the time of the -- at which  
13 the government knew to be forfeitable or the court knew  
14 to be forfeitable. But under 853(c), the relation-back  
15 doctrine, the -- the government would be here arguing we  
16 would have to give it back.

17 The question, therefore, is -- is -- is  
18 whether or not the fact that Caplin & Drysdale, as part  
19 of its ethical obligation to its client, agreed to  
20 proceed forward and represent him without having been  
21 paid, should now be penalized for having done so or,  
22 alternatively, should have given into a conflict of  
23 interest and said to the defendant don't plead guilty on  
24 March the 14th. We've got a hearing on March 15th on  
25 our fees. We want to make sure we get paid first. And

1 maybe the government will withdraw the guilty plea offer  
2 if we don't take it today, but that's not really very  
3 important because it's more important that we get paid.  
4 That is, it seems to me, an extremely harsh and  
5 unjustified rule to try and single out Caplin & Drysdale  
6 from all other lawyers that could come in here and make  
7 an argument --

8 QUESTION: But you still are --

9 MR. LOCKWOOD: -- to get you to pay.

10 QUESTION: -- wanting to -- wanting to collect  
11 your attorneys' fees out of property that has been  
12 ordered forfeited.

13 MR. LOCKWOOD: It was ordered forfeited  
14 because a person with no economic --

15 QUESTION: Well, anyway, the answer is yes.

16 MR. LOCKWOOD: Yes, sir.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
18 Lockwood.

19 The case is submitted.

20 (Whereupon, at 11:12 o'clock a.m., the case in  
21 the above-entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
No. 87-1729 - CAPLIN & DRYSDALE, Petitioner V. UNITED STATES

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BY alan friedman

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