ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner V. PETER MONSANTO

CASE NO: 88-454

PLACE: WASHINGTON, D.C.

DATE: March 21, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner

v. : No. 88-454

PETER MONSANTO

Washington, D.C.

Tuesday, March 21, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 o'clock a.m.

APPEARANCES:

EDWARD M. CHIKOFSKY, ESQ., New York, New York; on behalf of the Petitioner.

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

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C O N T E N T S

PROCEEDINGS

(11:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-454, United States against Monsanto.

Mr. Chikofsky, you may -- Mr. Chikofsky -- excuse me -- you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWARD M. CHIKOFSKY

ON BEHALF OF THE PETITIONER

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

This case presents another side of the coin of the question that the Court has been hearing for the last hour with regard to a question involving a defendant's right to retain counsel of his own choosing to defend him in his controversy with his sovereign, and the government's ability to interfere with that right by stripping the defendant at the outset of the criminal proceedings of his economic resources by which he may defend himself.

But I think that a very important point that is also raised in this case that has only been adverted to but briefly is the question that should be considered here as to whether or not Congress, in enacting the Comprehensive Forfeiture Act of 1984 in resolving this question, even realized that its enactment of the

statute in question, authorizing a restraint of all of a defendant's enumerated assets prior to trial, would totally abrogate a defendant's ability to retain counsel, much less whether Congress expressly intended to do so.

QUESTION: When you say realized, you don't use that word as synonymous with intended, do you?

MR. CHIKOFSKY: No. In fact, I am making a -- a distinction between whether or not it realized it was doing so in the first instance, or whether it intended to do so. And it's our --

QUESTION: Congress I'm sure enacts many laws which have consequences that it doesn't realize. I mean, we see them here all the time.

(Laughter.)

MR. CHIKOFSKY: Absolute -- absolutely. However, I think there is -- as this Court well recognizes and our discussion of the Catholic Bishop line of cases enumerates that there is a great difference in this Court's analysis of a congressional statute where serious constitutional ramifications are raised by Congress' possible lack of consideration of a particular issue or whether we're dealing with a simple statute -- a question of statutory construction.

In Sedima, you didn't have necessarily, for

example, any serious constitutional overtones. It was merely a question of whether Congress in enacting a particular statute intended it to cover a certain course of conduct or not.

In this case, this has been a statute that was enacted in order to -- admittedly to tighten the pretrial restraint and the criminal --

QUESTION: (Inaudible) you're suggesting that perhaps we shouldn't -- we shouldn't just take the words Congress used at face value. Is that it?

MR. CHIKOFSKY: I'm saying that you cannot do that if one is going to be consonant with Catholic Bishop. In fact, the Catholic Bishop opposes the test in exactly the opposite way. They say that where a serious constitutional question is raised, unless Congress has spoken with an expressly clear voice, either in the words of the statute or in its legislative history, to intend to have that kind of an impact or that it, in fact, at least considered the issue, that under those particular circumstances, the statute must be construed in such a way as to avoid the constitutional question following the prudential concerns in the Ashwander decision.

QUESTION: We have later cases after Catholic Bishops that say that you don't avoid constitutional

questions by reading a statute to say something it doesn't say. I mean, the -- the object of avoiding serious constitutional question doesn't give us a charter to rewrite statutes.

MR. CHIKOFSKY: This is true.

QUESTION: And there's just no exception here for attorneys' fees.

MR. CHIKOFSKY: There's no exception for attorneys' fees, but I think what's important is -- is that when -- when this statute was passed, there was no consideration as to the possible Sixth Amendment ramifications that would exist.

QUESTION: It may have been one of the mistakes that the Chief Justice was referring to. And maybe -- maybe we have to decide whether it violates the Sixth Amendment or not. And if it does, then it's no good; and if it doesn't, then -- then it's harsh, but okay.

MR. CHIKOFSKY: Well --

QUESTION: But you're asking us to sort of rewrite the statute --

MR. CHIKOFSKY: No. There is an -- there is an intermediate position which I'm suggesting to the Court. Obviously one of the two antipodal positions Your Honor suggests, either of -- facing the

constitutional issue head on, directly and deciding it to be either constitutional or unconstitutional would be one way. Rewriting the statute might be another way. But an intermediate course that has been suggested in numerous instances, most recently by Justice O'Connor in Thompson v. Oklahoma last year, is the concept of interpreting the statute in such a way as to give Congress the opportunity for a second look at the statute before you decide on the constitutional question, that in effect the people's enacted representatives, the legislature, should be the first body in question to determine whether or not they really intended constitutional values to be infringed.

QUESTION: Do you have a case where we've done that?

MR. CHIKOFSKY: The -- excuse me?

QUESTION: Where we say it would be okay if Congress wanted to do it, but we don't know whether they really wanted to do it. Even though the statute on its face seems to say they wanted to do it, they have to say it more explicitly. Do you know of one case?

MR. CHIKOFSKY: Catholic Bishop suggested it, and I know that Justice O'Connor's opinion in -- her concurring opinion in Thompson v. Oklahoma said exactly that. She did not, of course, cite to the Catholic

Bishop rationale, but she used the Catholic Bishop analysis in which she said -- and I believe the DeBartolo case was one possible case in which the Court may well have done that, that in those particular kinds of cases, the Court need not and, in fact, should not in the first instance read the statute to -- or decide the constitutional issue unless and until Congress has considered it in the first instance given the extraordinary impact --

QUESTION: It will certainly make our life a lot easier up here, I must say. Whenever we have a really tough constitutional question, we can just say, well, you know, maybe it's okay, maybe it isn't. But at least it's so close that Congress ought to speak more explicitly.

QUESTION: Kind of like the English House of Lords. They can stall something for one year.

(Laughter.)

MR. CHIKOFSKY: Well, there is the -- the certification procedure as to particular kinds of questions. That is true. Nonetheless, this Court -- what this Court can do and in these particular kinds of cases is they would, in effect, be deferring to Congress for the initial consideration as to whether or not they intended attorneys' fees to apply where Congress never

gave any indication that it seriously considered the many ramifications of the issue. And it could do so in such a way without necessarily doing violence to the statute as a matter of statutory construction.

QUESTION: We'd use legislative history to decide whether they seriously considered or not. Right? I mean, we would look in the committee reports and the floor debates.

MR. CHIKOFSKY: That's the --

QUESTION: And if they -- if there had been a lot of that discussion there, then it's okay. But if there hadn't been, then we -- then we --

MR. CHIKOFSKY: Well --

QUESTION: -- send it back to Congress.

Does Congress have to say it in the statute the next time, or is it enough if they discuss it in the floor debate and the committee reports and then send the same statute back to us, but now they've discussed it in the legislative history? Then it's okay?

MR. CHIKOFSKY: Legislative history might be sufficient if Congress spoke a clear enough of a voice, except the only problem with legislative history, of course, is that when you're dealing with a committee report as opposed -- or a House report as opposed to necessarily Congress speaking in terms of the wording of

the statute, that would, of course, give the Court the clearest indication. But as I say, this is a matter of very, very difficult line-drawing.

Nonetheless, I think Congress knows how to, when it wants to, state clearly enough what its intentions are, be it either in their committee reports or in the debates or in the statute itself as to whether or not this was intended.

In fact, there were some discussions with regard to the money laundering statutes, which I cite to you by analogy, not to invoke post-enactment legislative history, but in which there were serious questions about whether or not an attorney fee exception should be added. And among the questions in the debates were, gee, if we add an attorney fee exception under those kinds of circumstances, it might be interpreted by the courts to say that only attorneys are entitled to an exception, and we might not necessarily want to limit it to that kind of a degree.

So, the point is is that legislative debates are of limited utility. It would be much better if Congress spoke clearly in terms of the statute.

QUESTION: Mr. Chikofsky, suppose we think Congress did make it clear here that all property was subject to forfeiture, including that which could be

used for attorneys' fees and food and other necessities.

MR. CHIKOFSKY: Then I think we've got a square Sixth Amendment question with regard to whether or not this has a unconstitutional impact on counsel -- the defendant's --

QUESTION: Okay.

MR. CHIKOFSKY: -- right to counsel of choice.

QUESTION: Do you -- do you concede that in your case there is no Fifth Amendment due process problem?

MR. CHIKOFSKY: I make no such concession, Your Honor.

QUESTION: Why not? You've got -- the defendant received a hearing in this case, did he not?

MR. CHIKOFSKY: Well, the defendant received a hearing, but let me back up a little bit to give the Court a little bit of the procedural context. I discuss it somewhat in one of the footnotes in my reply brief which makes it a little bit clearer.

When the panel decided -- the original Monsanto panel decided this case, and while the case was pretrial -- and this was in December of 1987 -- they directed that a --

QUESTION: The case is still pretrial.

MR. CHIKOFSKY: It is not.

QUESTION: Not.

MR. CHIKOFSKY: There has since been a trial.

QUESTION: Okay.

MR. CHIKOFSKY: I will -- I will take the Court through -- through the procedures quickly.

At the December opinion, the panel in Monsanto, while the case was still at a pretrial phase, set up a hearing and said that a hearing should be held, but it limited the hearing to a two-pronged test, probable likelihood of conviction and probable likelihood of forfeiture of the assets. And it specifically directed that no other aspects be explored into. The Federal Rules of Evidence do not apply.

The district court held a hearing in January of 1988 on that question, the case still being at the pretrial posture. At that hearing, the court then made its findings of fact. We raised numerous objections at that hearing to various aspects of procedural due process to which we were denied: failure to accord defendant Simmons/Castigar immunity so that he might testify or possibly present evidence; questions of the failure to apply the balancing test that applied in United States v. Thier, the then-existing law in the Fifth Circuit as to the necessary impact that this might have on the defendant; failure to apply the Federal

Rules of Evidence; numbers of other aspects that were enumerated in -- in our brief and in the amicus brief of the Association of the Bar of the City of New York. The -- also, we argued that the clear and convincing evidence test should be applied.

The district judge denied our application after this hearing, and within two days thereafter -- we filed a notice of appeal from that. Within two days thereafter en banc review was granted by the Second Circuit of the initial panel decision. In the interim, the appeal of our initial Monsanto hearing was, in effect, brought in abeyance. And when the en banc court of appeals considered this question in the Second Circuit, they did not consider the actual hearing itself. They merely considered the legal standard that had been directed to be applied by the panel so -- the so-called two-pronged test. We, of course, briefed and argued the various procedural defaults that were found at that hearing.

The court en banc, without reaching that, basically abolished the two-pronged test on a variety of rationales and came up with a new test of its own. So, the Second Circuit, in effect, has never considered at this point -- and, in fact, it was not even part of the record on appeal, en banc -- the propriety of the

findings of facts and conclusions of law of the district court as to whether the defendant received procedural due process or whether the findings were properly supported in the record. And --

QUESTION: And then you went back to district court?

MR. CHIKOFSKY: Excuse me?

QUESTION: And then it was sent back to the district court.

MR. CHIKOFSKY: It was sent back to the district court while the trial was still in abeyance. The en banc court inconsistently recalled its mandate to hear the case en banc, but nonetheless allowed the trial to proceed. The matter went back to trial. The en banc decision was rendered on July 1st while the case was in summations. It was a five-month trial, a 16,000-page trial record.

We applied to the district judge on the basis of it for a mistrial. That motion was denied on the basis that in the event of conviction, these matters could be then raised on direct appeal and on the basis that there was the possible likelihood that this Court might well consider the en banc consideration.

So, in effect, the defendant was denied his right to counsel of choice at the trial itself because,

as even the district judge recognized, while he, as a formality, complied with the en banc court's decision and said if you want to bring in a new lawyer right now and retain him out of these funds, I'll let you do so, but he openly recognized on the record -- he said that at this stage of the proceedings in the middle of summation of a 16,000-page record, it's an impossibility.

QUESTION: Now, although the federal government applied to us for certiorari, you filed the opening brief and are making the first argument.

MR. CHIKOFSKY: That's correct, Your Honor.

QUESTION: And that's because of the remand and what happened at trial?

MR. CHIKOFSKY: Well -- well, this was by -- this was by agreement --

QUESTION: By agreement?

MR. CHIKOFSKY: This was by agreement with the parties. We had -- I think partially for the convenience of the -- of the Court and -- and of the parties. There was no specific procedural rationale. This was done on consent --

QUESTION: I see.

MR. CHIKOFSKY: -- of the parties.

But I think that we've got -- what we've got

to get to now is I think we've got to face head on the serious constitutional issue that we're involved here in terms of the Sixth Amendment right to counsel of choice.

Unlike such cases as Wheat and other cases, we're dealing here not with an individual defendant's right to use a particular lawyer and to balance that right against various other systemic considerations that the Court might have in terms of conflict of interest, the integrity of the trial process, or what have you, such that even if that defendant was denied his right to that particular lawyer, he nonetheless had to the right to other counsel of choice.

We're dealing here with a practice by which the government, being in a position to, in effect, impoverish a defendant, and we're dealing here with a defendant who had only two assets. He had his home in Mount Vernon, and he had a cooperative apartment. And by terms of the restraining order, he could not mortgage, encumber, or do anything with those properties by which to raise funds in order to hire himself an attorney. So, we're not dealing with the bank robber analogy or the necessarily contraband asset analogy. An individual was, in effect, deprived totally of his ability not to hire a particular lawyer, but any lawyer of choice.

And I think that the Sixth Amendment makes very, very clear that the fundamental core value of the Sixth Amendment has always been the right of an individual to select counsel of his choice and for a very important reason, so that in his controversy with the sovereign, he may formulate a defense as he chooses that defense to be properly mounted in order to, obviously, maintain the autonomy values that a defendant should have in his controversy with the sovereign, and also for participatory values that where a defendant is, in effect, hailed into court --

QUESTION: He's limited in that respect by his financial means.

MR. CHIKOFSKY: Absolutely he is limited in those financial means, but he may not necessarily be arbitrarily limited by governmental action that chooses to impoverish him.

QUESTION: Well, that chooses to him impoverish him by, in the government's view, reclaiming money that is rightfully the government's not his in the first place.

MR. CHIKOFSKY: Well, but that -- and I think this is where I think the Court must consider what the nature of a criminal forfeiture penalty is on the one hand, and also the relation-back doctrine.

The -- this property -- while the relation-back doctrine may be a legal fiction, it states that the property vests in the United States as of the time of the crime. In point of fact, title does not come to the United States until after, A, the criminal trial at which there has been (a) a verdict of conviction, (b) a verdict of forfeiture, and (c) the litigating of third-party claimants who may claim to be bona fide purchasers of third parties reasonably without cause to believe that these assets are involved. And if you read the particular statutory provision -- and it's 853(n)(7) -- it states that it is not until those proceedings have been completed that "clear title" -- and it uses that term -- finally vests in the United States.

QUESTION: Well, so, under -- under your theory, the -- the defendant in a case like yours could use his money even to hire counsel on appeal.

MR. CHIKOFSKY: Well, that's a question that's really not before the Court.

QUESTION: Well, but I mean, you're saying until the procedure has been completed. Does that mean whatever legal proceedings the defendant wants to engage in after the final judgment of forfeiture in the district court are also subject to this proviso that you

are talking about?

MR. CHIKOFSKY: Well, the statute, of course, views it in terms of a judgment of conviction and a verdict of conviction and forfeiture, and so that -- and perhaps an argument might be made that perhaps appellate rights might be viewed in a somewhat different context, although as a constitutional matter, I would not like to necessarily bind myself to a conclusion that you would not necessarily on your direct appeal be necessarily bound by that.

But that's not necessarily what we necessarily have here. We're talking about in the pretrial context, however we might decide in another case, that once full due process has been provided and there has been a verdict of forfeiture and those funds have been deemed forfeited -- not just deemed, but found forfeited to the United States, the Court might rule otherwise.

We're dealing here in a situation in which at the commencement of the proceedings, the defendant is in effect pauperized by the government and deprived of the ability to hire any lawyer to represent him. And it is on that kind of a basis that the right to counsel of choice is not merely limited or restricted; it's abrogated and abridged completely. It no longer exists. It is a total deprivation of the right to counsel of

choice.

Now, I think that one of the important considerations to be considered here in considering counsel of choice is what are the -- the government's interests here that they posit against this application of the statute where the defendant's constitutional rights are concerned.

It's our belief that clearly where there is such a compelling interest for the defendant to having his Sixth Amendment right to counsel of choice which, as I say, going back to Powell v. Alabama and well beyond, even to the time of the Framers, a core value, the government must apply a strict scrutiny test in order to determine whether or not that abridgment may be permitted because we're not dealing with a limit -- more limited restriction on right to counsel of choice, like time, place and manner where perhaps limited or lesser scrutiny might apply. We're talking about a total deprivation and a deprivation for all time throughout the proceedings.

QUESTION: What about medical services? What about funds for a very expensive operation?

MR. CHIKOFSKY: Well, Your Honor, I think that there is within the statute itself -- I think that under those circumstances, the court might well have the

equitable discretion.

QUESTION: I'm talking about constitutional right. Is there any less constitutional right to that than to a lawyer?

MR. CHIKOFSKY: Well, I don't -- I -- I think that there is certainly a lesser constitutional right to -- to a doctor necessarily than to a lawyer --

QUESTION: Even if it is necessary for your life? I thought life, liberty and property were pretty clearly --

MR. CHIKOFSKY: Well, then there might -- then there might be -- and I think Your Honor has -- I would stand corrected that, obviously, where there may be a taking under these kinds of circumstances that would affect Fifth Amendment values, the court might well under those kinds of circumstances determine on an individual case basis the nature of the interest that's affected by the deprivation and the defendant's interest and you might get into, as I say, the Mathews v. Eldridge test.

QUESTION: It includes property, too -- life, liberty or property. What if I say, gee, you know, you take away this money and I won't be able to make my mortgage payment and I'll lose my house?

MR. CHIKOFSKY: Well --

QUESTION: So, it's a deprivation of property unless you -- unless you let me keep this money.

MR. CHIKOFSKY: Well, I think part of what we must keep in mind here also --

QUESTION: I'm suggesting a where-does-it-all-end argument. I -- I don't -- I don't see --

MR. CHIKOFSKY: I think it has --

QUESTION: -- that lawyer's fees are something, you know --

MR. CHIKOFSKY: I think that there have to be sufficiently flexible procedures that is a -- that is to be applied, and that -- in terms of deciding matters other than attorneys' fees and counsel fees. We're talking, on the one hand, with certain core Sixth Amendment constitutional values, on one hand, and other serious values, nonetheless, that may implicate Fifth Amendment rights nonetheless.

But when we're talking in the context of a criminal forfeiture statute, I believe that you basically have got to give the court, the district court, this equitable discretion on a case-by-case basis applying a -- whatever balancing test may be appropriate, you know, perhaps a Matthews v. Eldridge type of test about considering the -- the necessity of

the interest affected and then quite frankly and the -- the necessity of harm that may befall either of the parties in these case.

I certainly am not going to suggest that there is a -- that the court would have to come to the same result where emergency room surgery is concerned as opposed to necessarily going on a round-the-world cruise. There are clearly different interests, but I still believe that the district courts can make those kinds of determinations, given the authority which I believe that they must have under the Fifth Amendment to make those kinds of due process determinations of appropriate procedural due process.

QUESTION: Well, you -- you talk as though -- it's true that counsel of one's choice is -- is apparently a value in itself, but there still is left the question of whether this regime the government is insisting one would deprive the defendant of effective counsel.

MR. CHIKOFSKY: Well, I think that what that is doing --

QUESTION: Now, let's say -- now, I take it that you -- you're not making any submission that -- that under the government's proposal that you wouldn't have effective counsel. It's just that you don't have

the counsel of your choice.

MR. CHIKOFSKY: Well, they are different --

QUESTION: Isn't that right? Isn't that right?

MR. CHIKOFSKY: They're -- that's correct. What I'm saying is they are different values that cannot necessarily be lumped together and collapsed together. The right to counsel --

QUESTION: I just wanted to make it clear --

MR. CHIKOFSKY: Absolute --

QUESTION: -- clear that that's what you're arguing.

MR. CHIKOFSKY: Exactly.

QUESTION: Even assuming you would have perfectly adequate counsel under the government's submission, you -- this is -- it's -- the -- the -- the statute is unconstitutional as construed by the government.

MR. CHIKOFSKY: Absolutely correct, Your Honor.

And I'd like to reserve the remainder of my time for rebuttal.

QUESTION: And by the way, why did you argue first in this case? I just --

QUESTION: They agreed to.

MR. CHIKOFSKY: Counsel for both sides agreed for the convenience of the Court. We briefed it.

QUESTION: Yes, well, I just -- somehow I missed that agreement.

MR. CHIKOFSKY: I apologize.

QUESTION: Thank you, Mr. Chikofsky.

Mr. Bryson?

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

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

The first point I'd like to make, and I think something that has been touched on in the course of the hour and a half that we've discussed the case so far, is -- is at the risk of oversimplifying our position in addressing this question of the medical services or the attorney services, this -- this notion that the court ought to be in a position to decide whether the defendant or the government ought to be able to spend the money is in this context a very strange one.

Now, Mr. Chikofsky suggests that a court ought to have the equity -- equitable power to decide that the defendant needs the money more than the government was essentially his submission. This is the government's money, as Congress has declared it to be, just as a court could not decide that Mr. Chikofsky needs an operation and I'm going to waste the money on an

around-the-world trip and take my money and give it to Mr. Chikofsky, by the same token the court cannot say, we submit, under either the Constitution or the statute, that Mr. Chikofsky's client needs a better lawyer than he would get by appointment, and he needs a better lawyer more than the government needs to keep the money that is the government's money.

So, our basic position is once we decide that this is the government's money, you don't look to the balancing of hardships between the two parties. You simply decide this is the government's money. That's the end of the question.

Now, with respect to the statute, let move first since we -- we didn't spend very much time on the statute during the last hour and address the -- the points that Mr. Chikofsky makes and the argument also that is made by adoption by Mr. Chikofsky, but principally by Caplin & Drysdale, as to the construction of the statute.

First, it is -- the statute is very clear and very broad. It applies to all property that satisfies one of the three definitions in Section 853(a). All of that property shall be -- is forfeited to the government. The -- that property clearly includes money that a defendant may wish to use for a variety of

purposes including attorneys' fees.

Now, there is no exception or no suggestion of an exception in the statute for attorneys' fees or money that the defendant wishes to use for attorneys' fees and, in fact, the reliance on the legislative history gives no support at all to the suggestion that there ought to be some kind of implicit exception for attorneys' fees.

The one reference in the legislative history that the -- Monsanto and Caplin & Drysdale rely on is a reference in a House report which was reporting a bill, which was different in significant measure from the one that was ultimately passed, in which the House said that it was not resolving the conflict among the district courts about the question of whether the Sixth Amendment was implicated by the forfeiture of the assets of a defendant, and in which the House went on to say that the statute should not be applied in a way that would violate the Sixth Amendment.

Now, that in our view not only does not support the view that there's an implicit exception for attorneys' fees. It merely says that the statute should not be read in a way that violates the Sixth Amendment and, therefore, as we -- since we view the statute as operating consistently with the Sixth Amendment,

particularly if appropriate procedures are employed, that there is no express or implied exception for attorneys' fees.

That position is -- is reinforced by language in the Senate report -- and the Senate report was reporting on the bill that was ultimately passed, almost exactly the bill that was passed -- in which the Senate discusses the Long case which was the Third Circuit case that preceded this statute and in which the -- the court in that case authorized the forfeiture of funds which were in the -- property that was in the hands of attorneys which were designed for the payment of attorneys' fees.

Now, the defendants have -- Monsanto has attempted to distinguish the Long case and the reliance of the -- of the Senate on the Long case on the ground that that was a sham transfer. But, in fact, if you read the Long case, there is nothing in Long that suggests in any way that it was a sham transfer. That was simply a transfer of property to -- to a lawyer, which was designed for all that appears on the -- in the opinion to compensate the lawyer for legal fees, for legal services. The Court upheld the forfeiture. The Senate report relies on Long, among other authorities, as supporting the relation back doctrine, and it

suggests very strongly in our view that attorneys' fees were not intended to be given some kind of special treatment or exception.

Now, the other legislative history point that is made by the parties and amici in this case is that there is -- there are indications in the legislative history that the statute was really only intended to apply to sham or fraud transfers and were not -- was not intended to apply to transfers that did not constitute shams. And our response to this -- and we've discussed this at some length in our brief -- is that there is nothing in the legislative history that suggests a specific intent to limit the forfeitability to those categories.

In fact, what the Senate report states is in the one footnote that is most heavily relied on by the other side, that "provisions -- this provision should be construed to deny relief to third parties acting as nominees or knowingly engaged in sham or fraudulent transactions." That does not suggest that that is the only way that the statute should be applied. It -- it includes that kind of person. It also includes people who are engaged in transactions that are not shams, as long as they satisfy the terms of the statute.

Now, the --

QUESTION: Mr. Bryson, could I ask you a question about protective orders? Why do you need -- I'm trying to figure out how the procedural protections, if there are any, apply. You really don't need a protective order at all to --

MR. BRYSON: Well --

QUESTION: -- to have this statute work, right, I mean, especially as far as lawyers are concerned.

MR. BRYSON: Well, I suspect as far as lawyers are concerned, that's probably true, although not necessarily so. And here I have to get into another area in which the law is not entirely well settled. But let me suggest this scenario, and this is why we think we need protective orders.

The -- suppose that we don't apply for a protective order and money is paid to a lawyer. The lawyer then immediately dissipates the assets by paying them to parties who are --

QUESTION: Right.

MR. BRYSON: -- bona fide purchasers for value. The money may very -- this isn't certain, and I wouldn't want to concede this for sure for purposes of future cases.

QUESTION: Right, I understand.

MR. BRYSON: But it appears from reading the statute frankly -- the money is gone.

QUESTION: You follow the res. Right.

MR. BRYSON: That -- that it's gone.

QUESTION: I understand. Right.

MR. BRYSON: And we can't get it from the lawyer. We can under the substitute assets provision, Section 853(p), go back to the defendant but, of course, if he doesn't have substitute assets to compensate for that, we are probably stuck.

QUESTION: But suppose you don't -- you don't apply for a protective order. How -- how does the lawyer get any -- and suppose I think you need some kind of due process before -- before the defendant's right to get counsel can be cut off. How would -- how would a due process hearing occur? It wouldn't come up in the context of the application for protective order. How -- how otherwise would it come up?

MR. BRYSON: Well, there -- I know of no case in which that situation has arisen because we almost invariably apply for and obtain protective orders in this setting. So, it's -- it's not something that -- it could come up theoretically but simply, as a practical matter, has not arisen.

But I suppose that if a court were troubled by

-- by the prospect of going all the way to final judgment before the -- the government's right to -- to ultimate forfeiture were established beyond the probable cause established in the indictment, which we believe is sufficient -- but in -- in any event, if a court were troubled by that, the court could have a -- could simply hold a hearing to try to determine the likely forfeitability of the property --

QUESTION: But it -- but it really is the case that as soon as you file an indictment, whether you seek a protective order or not, and therefore whether you have a -- some kind of a due process hearing or not, effectively this fellow can't get a good lawyer.

MR. BRYSON: I -- I think that is not necessarily so. There are several --

QUESTION: Well --

MR. BRYSON: -- things that have to happen. I mean, it may be well be that someone will be in that position. Indeed, Mr. Monsanto was in a position that he could not --

QUESTION: Assuming all his assets -- I mean, assuming all his assets are covered by the --

MR. BRYSON: Well, there are -- that's right. And -- and in this case, although Mr. Chikofsky said Mr. Monsanto only had two assets, while this has not been

established, I think it's very doubtful that the only two assets in the world that this man had were two pieces of real property. I mean, he obviously had some other funds. He had $35,000 in cash which was seized, but he obviously had some other assets. How extensive they were we don't know. So, this is a case in which it may very well be that he could have hired an attorney with other assets of which we are unaware. And that is not an uncommon situation.

One of the purposes of the -- of the statute is to avoid putting us in a position that the defendants will be spending the tainted funds first in order to avoid spending funds that are, in fact, unknown to the government, but are other assets.

QUESTION: Well, what if they become known during the course of the proceedings? Can't you subsequently either file some kind of civil forfeiture request for the additional assets that you now learn are products of crime?

MR. BRYSON: Well, if they were products of crime, we could -- we could either supersede -- we could file a superseding indictment naming those specific assets.

QUESTION: But does the forfeiture request have to be in the indictment itself?

MR. BRYSON: Yes.

QUESTION: It does, okay.

MR. BRYSON: Yes, Rule 7 of the -- of the Federal --

QUESTION: And it has to identify the assets?

MR. BRYSON: The property, that's right.

QUESTION: I see.

QUESTION: Uh-huh.

MR. BRYSON: Yes, that's right.

So, it would have to be included in the indictment. And it could be the subject of a separate civil forfeiture, as you say.

But assuming that he has other assets, and assuming that those assets are untainted, it's our position that it will very often be the case that he will be able to hire a lawyer, and he simply won't be able to use the tainted assets.

QUESTION: That's true even as to assets that are in the possession of the defendant? Suppose the trial discloses that there are assets in possession of the defendant that were derived from illegal proceeds, and the indictment does not name those assets. As I take it, under 853(a), the court must ordered those forfeited.

MR. BRYSON: Well, only if they are named in

the indictment. Only if the assets are named in the indictment. They -- the court, in other words --

QUESTION: The statute doesn't -- the statute doesn't require that, does it?

MR. BRYSON: No, but Rule 7 and Rule 31 together have the effect of saying that you -- the forfeiture that's entered in the criminal case is limited to those properties that are alleged in the indictment.

Now, the -- but in any event, I think it's -- it's significant to note --

QUESTION: That's Rule 7 of the Rules of Criminal Procedure?

MR. BRYSON: That's right.

QUESTION: Is that what it is?

MR. BRYSON: The -- the -- it's significant I think to point out that a number of things have to happen in other words for somebody to be denied their right to counsel. There have to be -- has to be -- their right to counsel of choice. There has to be no other provision, no other way, that they counsel can be hired by, for example, the defendant's relatives or other assets. The situation has to be such that the counsel is unwilling to -- to work for Criminal Justice Act fees, and it has to be a situation, frankly, in

which the counsel -- it's clear that the counsel otherwise would have taken the case, which -- which many counsel would --

QUESTION: Do you want us to rewrite the rule about counsel of choice?

MR. BRYSON: No, Your Honor. We -- we believe that our position is --

QUESTION: (Inaudible).

MR. BRYSON: -- entirely consistent with the counsel of choice provision, the -- the construction of the Sixth Amendment.

QUESTION: You also assume that you can get counsel of your choice without money?

MR. BRYSON: Your Honor, there's no question that this is in some cases going to mean the difference between getting counsel of choice and ending up with an appointed counsel. There have been I think a total of four cases that I have been able to find in which that has happened. It doesn't happen every day.

Now, admittedly this is in part because the constitutionality of this provision has been under -- under question, but nonetheless this is not something in which we have hundreds and hundreds and hundreds of cases.

QUESTION: Do you know of any list of lawyers

that are willing to work for nothing?

MR. BRYSON: Well, the -- nobody is going to be put in a position of having to work for nothing. The question is do you either get counsel for whatever fees that you and counsel agree on, payable out of what we believe are government assets, or do you get a --

QUESTION: Then you're taking --

MR. BRYSON: -- lawyer who is working for CJA funds.

QUESTION: Then you're taking over the defense.

MR. BRYSON: Well, not any more than we take over the defense of any defendant who is represented by appointed counsel. And I have had enough cases against very able appointed counsel and public defenders that --

QUESTION: Well, so other people have also had experience.

MR. BRYSON: Well, that's right, and -- and I think -- I think that very often those people do very fine work.

QUESTION: Have you had any experience in -- in getting lawyers to defend people?

MR. BRYSON: I have not, no. No. And I -- I understand the difficulties, Your Honor. It is not an enviable position to be in. Our only point is that someone who is in that position has a right to exercise

a -- a -- his freedom of obtaining counsel of choice, but not by using somebody else's money. And here it's -- the defendant is asking to be allowed to use money that has been determined to be the government's.

QUESTION: You keep stressing this money that belongs to the government. Is this what keeps us out of debt?

(Laughter.)

MR. BRYSON: Well, Your Honor --

QUESTION: I mean --

MR. BRYSON: -- I am sure that -- that this is a drop in the bucket, but it is a --

QUESTION: How much -- well, how much is involved? How much have you gotten in forfeitures?

MR. BRYSON: I don't know what the total amount of forfeitures is.

QUESTION: You've been talking like it's millions.

MR. BRYSON: Well, it is millions. Oh, it's many millions.

QUESTION: It's many millions.

MR. BRYSON: Many millions in forfeitures, oh, yes.

QUESTION: How many?

MR. BRYSON: I can't tell you the exact

figure, but I know it's many millions. Whether it's -- it's in the billions or not, I -- I'm not sure, but it's many millions of dollars --

QUESTION: Well, we're talking about trillions around here now.

(Laughter.)

MR. BRYSON: Well, that's true. That's true. I am not suggesting that we are going to solve the national debt problem, particularly with the feature of this case that's presented with respect to attorneys' fees.

QUESTION: Mr. Bryson, you do not challenge in this case the ruling of the Second Circuit panel on procedural due process.

MR. BRYSON: We don't, no, Your Honor. In fact, the --

QUESTION: The -- the Respondents have it in their red brief as question 4. And so you think that question is not properly before us?

MR. BRYSON: No, I don't think it is, Your Honor. The -- I mean, when I say we don't challenge it, we have laid out in our brief what we think the proper way to analyze the procedural due process question is if the Court decides to look at that question.

But -- and I would emphasize -- we don't think

that is presented here for the simple reason that the en banc court, the Second Circuit, held that these fees -- that these funds are not forfeitable no matter what the validity of the hearing that was held. In other words, they went off purely on the substantive question. They did not address the question of whether that was an adequate hearing. They said that regardless of how good a hearing was held, this -- these funds are exempt by operation of the statute and by operation of the Constitution, three judges on each point, from forfeiture. And that's the -- the issue that we took to this Court in our petition for certiorari.

The -- if there is any question as to the validity of the hearing -- and we certainly think there is not. This was an extremely extensive hearing.

QUESTION: Your opponent thinks there was a question as to it.

MR. BRYSON: He does, and he can present that question. Assuming this Court reverses the en banc Second Circuit, he can present that on that remand. And if he's right and if he persuades the Second Circuit that that hearing was somehow flawed, then he may well get some kind of remedy.

But in our view, that question is not presented here because of what the Second Circuit en

banc did, and that is to rule purely on the substantive question saying no forfeiture of attorney -- funds to be used --

QUESTION: It did not rule on the procedural due process.

MR. BRYSON: And it did not address the procedural question, not the en banc court. That's right. That's right.

Now, there's one other point which I would -- would like to touch on is -- that is the -- the -- the statutory theory employed by Caplin & Drysdale. This is the Judge Winter -- It's Judge Winter of the Second Circuit, not Judge Winter of the Third -- of the Fourth Circuit. But the statutory argument that is made by Caplin & Drysdale and adopted by Monsanto, and that is the reliance on the restraining order provision and Section 853(c).

Very briefly, our point on that is this. They argue that Section 853(e), the restraining order provision, gives discretion to a district court to exclude certain funds from the restraining order; and, two, that a court must exclude from the restraining order certain property, including that property that is necessary for attorney's fees and ordinary living expenses; and, three, that the court then must exclude

from the final order of forfeiture all property that was excluded from the restraining order. Now, we agree with one and disagree sharply with two and three.

There is no question that the district court has discretion at the restraining order stage to modify, vacate, amend, do whatever it wants with the restraining order.

QUESTION: Well, it isn't all that clear to me what the section means. Maybe it just limits the district court to the three options set forth.

MR. BRYSON: Well, Your Honor, I think what it does is -- and -- and the -- you have to look at the purpose underlying the restraining order provision as -- as indicated, both in the statute and in the legislative history. The purpose was to preserve -- and as -- as the legislative history indicates, the sole purpose was to preserve assets for potential forfeiture.

QUESTION: Well, does the district court have discretion to permit the money to be used for attorneys' fees?

MR. BRYSON: Your Honor, the -- no is our -- is the short answer to that. What the district court has the discretion to do is to grant or deny relief depending on the district court's assessment of the risk that that -- those funds will be gone if the restraining

order is not granted. In other words, if there is, let's say, a bond or something that insures that the funds will not be dissipated, then the district court could well exercise discretion and say no restraining order is necessary here. These funds aren't going anywhere. This property is not going anywhere. Or if for some other reason --

QUESTION: Well, a bond is one of the options --

MR. BRYSON: That's right.

QUESTION: -- given in the statute.

MR. BRYSON: That's right. So, it wouldn't have to be --

QUESTION: That's what I suggested that maybe the -- the court's discretion is limited to the three options in the statute.

MR. BRYSON: Well, I think there may be other situations where the court may not want to grant a restraining order.

QUESTION: Like what?

MR. BRYSON: Well, the -- in the Caplin & Drysdale case, for example, Caplin & Drysdale took the $25,000 check and put it an escrow account. Now, I can understand a court saying -- suppose that were the only asset that was in question.

QUESTION: Uh-huh.

MR. BRYSON: I could understand a court saying Caplin & Drysdale is a reputable firm. They aren't going to spend these monies. They've told me that they're going to leave it in the escrow account. There's no need for a restraining order here. That's the only asset in issue.

QUESTION: Would be an abuse of discretion if the trial court were to say I'm just going to deny this and let him use the money --

MR. BRYSON: Yes.

QUESTION: -- for an operation or attorneys' fees or what have you?

MR. BRYSON: Yes, and the reason is this, and this is the crux of our disagreement with points two and point three of -- of the argument. The reason that that would be an abuse of discretion is because that has nothing to co with the question of preserving the funds for ultimate forfeiture. That goes to invading the corpus of the ultimate forfeited funds, and there is what -- if there's anything that's clear about Section E, it is that it does not authorize the -- the judge to essentially give partial summary judgment through an injunction or denial of an injunction with respect to the funds that will ultimately be subject to forfeiture.

QUESTION: (Inaudible) so, and -- and if it did, you would -- you would be wise simply never to apply for --

MR. BRYSON: Yes.

QUESTION: -- a protective order --

MR. BRYSON: That's right.

QUESTION: -- at least if you wanted to deprive --

MR. BRYSON: That's --

QUESTION: -- your opponent of counsel.

MR. BRYSON: That's exactly right.

QUESTION: Because you don't need one to do that as we --

MR. BRYSON: That's right.

QUESTION: -- as we discussed earlier.

MR. BRYSON: And Section C, as we view it, simply does -- does nothing to alter that regime. Section C simply provides that property which is subject to mandatory forfeiture as defined in Section A, 853(a), is also subject to mandatory forfeiture when it is in -- is in the hands of third parties under the relation-back doctrine.

And the defendants rely on a line from Section C in which it is stated that that property in the hands of a third party "may be subject to a special verdict of

forfeiture." And they say, aha, the word may appears. Therefore, that must mean discretion. Therefore, that must mean discretion that can be used to invade the corpus of the forfeited funds.

In fact, it's -- it's clear from reading both the -- the statute in context and the legislative history that that may was not intended to give a court authority to exclude from the final order of forfeiture any funds that the court might think should not be included in the forfeited assets, whether they be for purposes of attorneys' fees or an operation or any other use.

The authorization there is simply for the jury and the prosecutor to seek a special verdict of forfeiture if the circumstances seem appropriate and if the jury is convinced that forfeiture is -- is correct. And, in fact, the next sentence of the statute says that any property that is found to be forfeited by the jury in the special verdict of forfeiture must or shall be ordered forfeited.

If the Court has no further questions, I have nothing.

QUESTION: Thank you, Mr. Bryson.

Mr. Chikofsky, you have five minutes remaining.

REBUTTAL ARGUMENT OF EDWARD M. CHIKOFSKY

MR. CHIKOFSKY: Thank you, Your Honor.

I want to just touch briefly on this question of the kind of a hearing that is -- that is entitled here. I think we and the government may be at some distinction with regard to the kind of procedural due process that is, in fact, due and that's, in fact, deprived to the defendant with regard to the initial pretrial restraining orders that are involved.

I think one of the reasons why we suggest that this matter ought to be remanded to Congress on Fifth Amendment procedural due process grounds is that there's a clear intent stated by Congress in distinguishing between the section -- and Section 853(e)(1)(A) and (e)(1)(B) meaning post-indictment restraints and pre-indictment restraints that where a post-indictment restraint is involved, as were involved here, Congress explicitly stated and the Senate report states -- and this is noted in the amicus brief of the Association of the Bar at page 14 where they enumerate this discussion -- that "the post-indictment restraining order provision does not require prior notice and opportunity for a hearing."

And it said that one of the reasons was that several courts had read a hearing requirement into the predecessor statute on constitutional grounds, and that

the Senate report stated that Congress intended to override those decisions. So, they were, in fact, specifically attempting to do away with the right of a defendant to have a -- a post-indictment hearing.

And I think it's very significant, when you look at the differing protections that are provided in a pre-indictment restraint hearing and a post-indictment restraint hearing, because one of the factors that is provided in the post-indictment restraint -- in a pre-indictment restraint hearing is a balancing of the equities and consideration of the relevant factors.

QUESTION: Well, why wouldn't it be reasonable to -- for Congress to say that where post-indictment, you have a finding of probable cause by a grand jury, and before that you don't?

MR. CHIKOFSKY: Well, because of the fact that it is not required -- and as we noted in our briefs, and particularly citing the Grammatikos case, that there is no requirement that the grand jury in its return of an indictment enumerating forfeiture counts find probable cause or even consider probable cause. It's a -- deemed merely to be a penalty provision not a substantive element of the crime. And, thus, a grand jury does not have to consider forfeiture elements.

Equally importantly, contrary to what Mr.

Bryson says with regard to the enumeration of assets in an indictment -- and this is very, very crucial. If you see the RICO forfeiture indictments and some of the large narcotic type of indictments, they will track the statutory language and without specifying properties in question, they will say any and all assets that may be part of the fruits or instrumentalities or crimes or are derived from, and simply without any kind of specification, tie up everything they can find anywhere without any enumeration to the defendant or to potential bona fide purchasers as to what those assets are. They basically have open sesame. And in most of the large RICO indictments, that's the way forfeiture counts are now framed.

QUESTION: It may be that the Rule 7 should be construed to require the specification of the particular assets.

MR. CHIKOFSKY: Well, the -- the -- I think that it would -- that it might be perhaps even better rather than to --

QUESTION: The government seems to say that's -- that -- that their rule requires it.

MR. CHIKOFSKY: Well, I think that the courts seem to be at variance with the government. What's most important here is that clearly Congress should be given

an opportunity to redraft a hearing.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Chikofsky.

The case is submitted.

(Whereupon, at 12:05 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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No. 88-454 - UNITED STATES, Petitioner V. PETER MONSANTO

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BY alan friedman

(REPORTER)