

***Caplin & Drysdale, Chartered v. United States (1989)***

**491 U.S. 617**

*Christopher Reckmeyer was indicted on charges of running a massive drug importation and distribution scheme that the government alleged was part of a continuing criminal enterprise (CCE) in violation of 21 U.S.C. Section 848. Relying on that portion of the CCE statute authorizing forfeiture to the federal government of property acquired as a result of drug law violations (Section 853), federal prosecutors sought forfeiture of specified assets in Reckmeyer's possession. After the District Court entered a restraining order forbidding Reckmeyer from transferring any of the potentially forfeitable assets, Reckmeyer moved to modify the order to allow him to use some of the restrained assets to pay legal fees to his attorneys, Caplin & Drysdale, Chartered, and to exempt such assets from postconviction forfeiture. Before the District Court could rule on his motion, Reckmeyer entered into a plea agreement in which he agreed, among other things, to forfeit all the specified assets. The Court then denied his motion and entered an order forfeiting virtually all his assets to the federal government. Caplin & Drysdale, deprived of its legal fees, filed a petition under the CCE statute seeking an adjudication of its third-party interest (a total of \$195,000 for legal services) in the forfeited assets. It argued that assets used to pay an attorney are exempt from forfeiture under the statute, and, if they are not, the statute's failure to provide such an exemption renders it unconstitutional. The District Court granted the relief sought, but the Court of Appeals for the Fourth Circuit reversed, finding that the statute acknowledged no exception to its forfeiture requirement and that the statutory scheme was constitutional. The Supreme Court granted certiorari.*

Opinion of the Court: White, Kennedy, O'Connor, Rehnquist, Scalia.

Dissenting opinion: Blackmun, Brennan, Marshall, Stevens.

**JUSTICE WHITE delivered the opinion of the Court.**

We are called on to determine whether the federal drug forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought. Because we determine that no such exemption exists, we must decide whether that statute, so interpreted, is consistent with the Fifth and Sixth Amendments. We hold that it is.... Petitioner contends that the statute infringes on criminal defendants' Sixth Amendment right to counsel of choice, and upsets the "balance of power"

between the government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment. We consider these contentions in turn....

Petitioner's first claim is that the forfeiture law makes impossible, or at least impermissibly burdens, a defendant's right "to select and be represented by one's preferred attorney," ... Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.... Petitioner does not dispute these propositions.... Instead, petitioner urges that a violation of the Sixth Amendment arises here because of the forfeiture, at the instance of the Government, of assets that defendants intend to use to pay their attorneys.

Even in this sense, of course, the burden the forfeiture law imposes on a criminal defendant is limited. The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing. Nor is it necessarily the case that a defendant who possesses nothing but assets the Government seeks to have forfeited will be prevented from retaining counsel of choice. Defendants like Reckmeyer may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future. The burden placed on defendants by the forfeiture law is therefore a limited one.

Nonetheless, there will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets, and if there was no risk that fees paid by the defendant to his counsel would later be recouped under § 853(c). It is in these cases, petitioner argues, that the Sixth Amendment puts limits on the forfeiture statute.

This submission is untenable. Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of ... counsel." ... A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the government does not violate the Sixth Amendment if it seizes the robbery proceeds, and refuses to permit the defendant to use them to pay for his defense....

Petitioner seeks to distinguish such cases for Sixth Amendment purposes by arguing that the bank's claim to robbery proceeds rests on "preexisting property rights," while the Government's claim to forfeitable assets rests on a "penal statute" which embodies the "fictive property-law concept of ... relation-back" and is merely "a mechanism for preventing fraudulent conveyances of the defendant's assets, not ... a device for determining true title to property." ... In light of this, petitioner contends, the burden placed on defendant's Sixth Amendment rights by the forfeiture statute outweighs the Government's interest in forfeiture....

The premises of petitioner's constitutional analysis are unsound in several respects. First, the property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges. In § 853(c), the so-called "relation-back" provision, Congress dictated that "[a]ll right, title and interest in property" obtained by criminals via that illicit means described in the statute "vests in the United States upon the commission of the act giving rise to forfeiture." ... § 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture.... Petitioner's claim is that whatever part of the assets that is necessary to pay attorney's fees cannot be subjected to forfeiture. But given the Government's title to Reckmeyer's assets upon conviction, to hold that the Sixth Amendment creates some right in Reckmeyer to alienate such assets, or creates a right on petitioner's part to receive these assets, would be peculiar.

There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right. While petitioner and its supporting *amici* attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, ... there is no such distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as full as he might otherwise. Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights, either.

Petitioner's "balancing analysis" to the contrary rests substantially on the view that the Government has only a modest interest in forfeitable assets that may be used to retain an attorney. Petitioner takes the position that, in large part, once assets have been paid over from

client to attorney, the principal ends of forfeiture have been achieved: dispossessing a drug dealer or racketeer of the proceeds of his wrongdoing.... We think that this view misses the mark for three reasons.

First, the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways.... The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.

Second, the statute permits "rightful owners" of forfeited assets to make claims for forfeited assets before they are retained by the government.... The Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim.

Finally, as we have recognized previously, a major purpose motivating congressional adoption and continued refinement of the RICO and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises.... This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent." ... The notion that the government has a legitimate interest in depriving criminals of economic power, even in so far as that power is used to retain counsel of choice, may be somewhat unsettling.... But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." ... Again, the Court of Appeals put it aptly: "The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money ... entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense."

It is our view that there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense. Otherwise, there would be an interference with a defendant's Sixth Amendment rights whenever the government freezes or takes some property in a defendant's possession before, during or after a criminal trial.... Moreover, petitioner's claim to a share of the forfeited assets postconviction would suggest that the government could never impose a burden on assets within a defendant's control that could be used to pay a lawyer. Criminal defendants, however, are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney.

We therefore reject petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the government's—assets adjudged forfeitable, as Reckmeyer's were—to pay attorneys' fees, merely because those assets are in their possession....

**JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting....**

Over 50 years ago, this Court observed: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, ... (1932). For years, that proposition was settled; the controversial question was whether the defendant's right to use his own funds to retain his chosen counsel was the outer limit of the right protected by the Sixth Amendment.... The Court's subsequent decisions have made clear that an indigent defendant has the right to appointed counsel ... and that the Sixth Amendment guarantees at least minimally effective assistance of counsel.... But while court appointment of effective counsel plays a crucial role in safeguarding the fairness of criminal trials, it has never defined the outer limits of the Sixth Amendment's demands. The majority's decision in this case reveals that it has lost track of the distinct role of the right to counsel of choice in protecting the integrity of the judicial process, a role that makes "the right to be represented by privately retained counsel ... the primary, preferred component of the basic right" protected by the Sixth Amendment....

The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate.... Not only are decisions crucial to the defendant's liberty placed in counsel's hands, ... but the defendant's perception of the fairness of the process, and willingness to acquiesce in its results, depend upon confidence in his counsel's dedication, loyalty, and ability.... When the Government insists upon the right to choose the

defendant's counsel for him, relationship of trust is undermined: counsel is readily perceived as the Government's agent rather than his own.

The right to retain private counsel also serves to assure some modicum of equality between the Government and those it chooses to prosecute. The government can be expected to "spend vast sums of money ... to try defendants accused of crime," ... and of course will devote greater resources to complex cases in which the punitive stakes are high. Precisely for this reason, "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses." ... Where cases are complex, trials long, and stakes high, that problem is exacerbated.

In sum, our chosen system of criminal justice is built upon a truly equal and adversarial presentation of the case, and upon the trust that can exist only when counsel is independent of the Government. Without the right, reasonably exercised, to counsel of choice, the effectiveness of that system is imperilled....

Had it been Congress' express aim to undermine the adversary system as we know it, it could hardly have found a better engine of destruction than attorney's-fee forfeiture. The main effect of forfeitures under the Act, of course, will be to deny the defendant the right to retain counsel, and therefore the right to have his defense designed and presented by an attorney he has chosen and trusts. If the Government restrains the defendant's assets before trial, private counsel will be unwilling to continue or to take on the defense. Even if no restraining order is entered, the possibility of forfeiture after conviction will itself substantially diminish the likelihood that private counsel will agree to take the case. The "message [to private counsel] is 'Do not represent this defendant or you will lose your fee.' That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation.' "

The resulting relationship between the defendant and his court-appointed counsel will likely begin in distrust, and be exacerbated to the extent that the defendant perceives his new-found "indigency" as a form of punishment imposed by the Government in order to weaken his defense. If the defendant had been represented by private counsel earlier in the proceedings, the defendant's sense that the Government has stripped him of his defenses will be sharpened by the concreteness of his loss.... Appointed counsel may be inexperienced and undercompensated and, for that reason, may not have adequate opportunity or resources to deal with the special problems presented by what is likely to be a complex trial. The already scarce resources of a public defender's office will be stretched to the limit. Facing a lengthy trial against a better-armed adversary, the temptation to recommend a guilty plea will be great. The result, if the defendant is convicted, will be a sense, often well grounded, that justice was not done.

Even if the defendant finds a private attorney who is "so foolish, ignorant, beholden or idealistic as to take the business," ... the attorney-client relationship will be undermined by the forfeiture statute....

Perhaps most troubling is the fact that forfeiture statutes place the Government in the position to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case. The decision whether to seek a restraining order rests with the prosecution, as does the decision whether to waive forfeiture upon a plea of guilty or a conviction at trial. The Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf—the attorney who is better than what, in the Government's view, the defendant deserves. The spectre of the Government's selectively excluding only the most talented defense counsel is a serious threat to the equality of forces necessary for the adversarial system to perform at its best.... An attorney whose fees are potentially subject to forfeiture will be forced to operate in an environment in which the Government is not only the defendant's adversary, but also his own....

In short, attorney's-fee forfeiture substantially undermines every interest served by the Sixth Amendment right to chosen counsel, on the individual and institutional levels, over the short term and the long haul.