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Feds can no longer seize 'untainted' assets pre-trial

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Abrams**

Criminal defendants in the federal courts covered by the 4th U.S. Circuit Court of Appeals may have an easier time coming up with the funds to pay for their defense attorneys from now on. On

Aug. 18 the full 4th Circuit took the unusual step of overruling its own case law, which for decades had allowed prosecutors to restrain assets that belong to a defendant, but were totally unconnected to the alleged crime, prior to trial.

Federal criminal forfeiture laws allow prosecutors to seize "tainted" assets—assets believed to be the ill-gotten loot of the alleged crime—prior to bringing a case to trial. It also allows courts to restrain untainted, or "substitute," assets belonging to defendants charged with a fairly narrow range of banking or health care offenses. But the 4th Circuit had been the only circuit that allowed prosecutors to also restrain the substitute assets of any defendant, if the tainted ones lay beyond their reach.

Last year, however, the U.S. Supreme Court ruled in *Luis v. United States* that courts could not restrain a defendant's untainted assets if the defendant needed those funds to hire his preferred lawyer. Because *Luis* was based on constitutional concerns, the justices did not consider whether federal law permits pretrial seizure of untainted assets that aren't needed to hire counsel. But the appeals court judges said that the language of the high court's decision had fatally undermined the foundation for the circuit's anomalous interpretation of those laws.

The 4th Circuit had been asked to consider the government's request to restrain the sale of substitute property belonging William Chamberlain, a non-commissioned officer in the U.S. Army who is accused of helping to steal funds earmarked for the ongoing military operation in Afghanistan. The property had a value roughly equal to the allegedly stolen funds but was unconnected to the charges, and Chamberlain did not need to money to pay for his lawyers.

Nevertheless, Judge James Wynn,

writing for a unanimous court, held that federal law did not allow prosecutors to restrain the sale of the property. The court held that the plain language of the federal forfeiture statute indicated that Congress did not intend for the power to be construed so expansively.

"The Supreme Court has signaled that there is a firm distinction between the government's authority to restrain tainted and untainted assets," Wynn wrote. "Consistent with this important distinction, when Congress intends to permit the government to restrain both tainted and untainted assets before trial, it has clearly provided for such authority. Lacking such express authorization, [federal law] does not by its terms permit pretrial restraint of substitute assets."

Elliot Abrams of Cheshire Parker in Raleigh and Sam Hartzell of Womble Carlyle in Raleigh represented Chamberlain. In a written statement, the attorneys said that they "appreciate the Court's willingness to reexamine this important issue. We are pleased that the Court has continued the judicial trend of requiring careful adherence to the plain language of forfeiture statutes. This ruling will protect innocent peo-

ple and businesses and is a strong step toward restoring the balance of power between the government and the accused."

Abrams said the court's ruling means that there will now be a much narrower set of circumstances in which lawyers will have to ask a court to release funds in order to comply with the protections afforded by *Luis*.

"In the 4th Circuit before the opinion came out, the government could seize untainted assets pre-trial in any case, and now that's been narrowed to a very small subset," Abrams said. "So to the extent that having to litigate release of assets is a burden on getting a lawyer involved, I do think it will increase access to counsel."

Abrams said that the ruling will level the balance of power between defendants and the government in other ways because even if funds aren't needed to pay for a lawyer, defendants might need them to pay for expenses such as a child's education or a parent's nursing care. The need to access frozen funds can put defendants under pressure to accept plea bargains that they otherwise might not accept, he said.

The case was procedurally unusual in that the 4th Circuit choose to overrule its own case law. A

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Cheshire Parker Schneider & Bryan, PLLC, Samuel Hartzell, Womble Carlyle

three-judge panel cannot overrule a prior panel's decision; only the U.S. Supreme Court or the full 4th Circuit can do so. More unusual still, the full court opted to decide the case without oral argument after the government submitted a supplemental brief indicating that it agreed with Chamberlain's interpretation of the federal law.

Stephen West of the Office of the U.S. Attorney in Raleigh represented the government.

U.S. Attorney John Bruce said in a written statement that the Justice Department decided to take a uniform position in all circuits on whether the government can seek pretrial restraint of substitute assets in criminal cases where criminal forfeiture is applicable: "The DOJ decided to ask the full Fourth Circuit to overrule its prior precedent, to make it consistent with other circuits and the position that DOJ was taking in the Supreme Court" in *Honeycutt v. U.S.*

The 15-page decision is *U.S. v. Chamberlain* (Lawyers Weekly No. 001-175-17). The full text of the opinion is available online at nclawyersweekly.com.

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