

Criminal Forfeiture Laws

Pretrial Seizure of Assets And the Sixth Amendment Part Two of a Two-Part Article

By Robert J. Anello

The government's ability to freeze a defendant's assets pursuant to 21 U.S.C. Section 853(e) before trial and the resulting impact on the defendant's constitutional right to counsel of his choice is currently before the Supreme Court in *Kaley v. United States*, 12-464 (Oct. 15, 2012). That case focuses on whether defendants who need potentially forfeitable money to hire counsel are entitled to challenge the evidentiary support and legal theory of the underlying charges at a pretrial hearing or are limited to challenging the determination that the restrained assets are connected to the alleged criminal activity. The Circuit Courts of Appeal are split.

The Second, Ninth, and D.C. Circuits have held that a pretrial hearing regarding frozen assets can address whether probable cause exists to believe that the defendant is guilty of the crime that makes the assets forfeitable. The Eleventh, Tenth, Sixth, and Seventh Circuits have held that defendants



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only are allowed to challenge the grand jury's finding of probable cause to believe the restrained assets are linked to the crime with which the defendant is charged. *U.S. v. Kaley*, 677 F.3d 1316, 1329 n.9 (11th Cir. 2012) (citing decisions from other Circuits).

THE CASE

In *Kaley*, the defendants, husband and wife, were charged with conspiracy to transport stolen property, transportation of stolen property, obstruction of justice, and money laundering. They were accused of receiving unwanted prescription medical devices previously purchased by hospitals from Mrs. Kaley's employer, Ethicon. When the devices subsequently were replaced, the Kaleys took possession of the outdated items and resold them on the "black market." The government argues that Mrs. Kaley held the returned devices in "constructive trust" for Ethicon and, therefore, unlawfully converted the property by reselling those devices. The Kaleys counter that they owed no fidu-

ciary duties to Ethicon; that Ethicon never asserted any property rights in the outdated devices; and that the government's constructive trust theory previously has been rejected in a separate prosecution of another Ethicon employee.

The government moved for and obtained an *ex parte* protective order to restrain the defendants from transferring or otherwise disposing of certain property "traceable to" the alleged crimes. The defendants sought to have the protective order vacated, contending that it prevented them from retaining counsel of their choice in violation of the Sixth Amendment. The district court held a hearing to determine whether the frozen assets were traceable to or involved in the alleged criminal conduct. The Kaleys did not dispute this point. Instead, they asserted that the underlying facts did not support the crimes charged, and argued that the hearing should focus instead on whether the government would be likely to prevail at trial. The district court disagreed and denied their motion to vacate the protective order.

THE APPEAL

On review, the Eleventh Circuit Court of Appeals recognized that "[b]eing effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice." The Court noted, however, that the Supreme Court has made clear that the right to counsel of choice does not include the right to use illegitimate, forfeitable assets to pay for

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counsel. *Id.* at 1320 n.2 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626-32 (1989)).

In examining the impact of Section 853(e) on a defendant's constitutional right to counsel of choice, the Eleventh Circuit noted that, because Congress specifically declined to impose a hearing requirement for asset freeze orders sought after the filing of an indictment (evidenced by the fact that the statute specifically requires a hearing for asset freeze orders sought before indictment), a hearing is only mandated for post-indictment, pretrial freeze orders if Due Process concerns are implicated.

Having previously determined that due process dictated a hearing in this case, the Eleventh Circuit held that a petitioner may not challenge the evidentiary support for the underlying charges at a pretrial hearing on the freezing of assets. (In an earlier decision, the court held that, when a restraint on the defendant's assets prevents him from retaining counsel of choice, the court must engage in a four-factor balancing test to determine if due process weighs in favor of a hearing. The factors to be considered are: 1) the length of the delay before the defendants received their post-restraint hearing; 2) the reason for the delay; 3) the defendants' assertion of the right to such a hearing pretrial; and 4) the prejudice.)

The Eleventh Circuit focused on the Supreme Court's frequently articulated reluctance to allow for the pretrial review of grand jury probable cause determinations. According to the Supreme Court, "a rule allowing defendants to challenge indictments on the basis of inadequate or incompetent evidence ... would run counter to the whole history of the grand jury institution," and "would result in interminable delay but add nothing to the assurance of a fair trial." *Costello v. United States*, 350 U.S. 359 (1956).

Acknowledging the significance of the Sixth Amendment issue raised by the Kaleys, the Eleventh Circuit emphasized that Section 853(e) requires the entry of a restraining order by a court, meaning that a pretrial restraint of a defendant's assets cannot take place without both a grand jury's probable cause determination and the trial court's approval. The court further stated,

"It's also worth remembering that a defendant whose assets have been restrained will ultimately receive a thorough hearing — the trial itself — that goes to the merits of the underlying charge." *Kaley*, at 1327.

SUPREME COURT REVIEW

The Eleventh Circuit's rationale is under review by the Supreme Court. In its brief to the Court, the government argues that allowing a defendant to attack the government's evidence and legal theory supporting the indictment in a pretrial hearing not only impermissibly would challenge the grand jury's probable cause determination, but also would unduly burden prosecutors. The government asserts that such a hearing "would risk the premature disclosure of the government's case and trial strategy and could even jeopardize the safety of testifying witnesses, including victims and cooperators." Brief for the United States, *Kaley v. United States*, No. 12-464 at p. 17 (Feb. 2013).

The Kaleys contend that, unless they are provided an opportunity to challenge the government's theory of prosecution, the government effectively will have prevented them from hiring the lawyer of their choice "based solely on a restraining order obtained *ex parte*." As articulated by the National Association of Criminal Defense Attorneys in an amicus brief filed in support of the Kaleys, "The government claims the power to veto the Petitioner's choice of counsel by doing little more than alleging that the Petitioner's assets are 'traceable' to property 'involved in' alleged crimes. This treads on rights guaranteed by the [Constitution] and threatens to impair the functioning of our adversary system of criminal justice." Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of the Petitioners, *Kaley v. United States*, No. 12-464 at p. 4 (July 5, 2013).

TOO CLOSE TO CALL?

Oral argument in the Supreme Court's review of *Kaley* was held on Oct. 16, 2013. Analysts and Court watchers suggest that the outcome is too close to call. At times, the Justices focused on an anomaly of the defendants' position — that notwithstanding the grand jury's determination of probable cause to pros-

ecute, a judge could still conclude that probable cause to support the indictment is lacking. Justice Ruth Bader Ginsberg asked how a judge could proceed to trial in such an instance.

The Justices, however, also expressed skepticism regarding the government's position on the sanctity of the grand jury's probable cause determination. Justice Antonin Scalia, for example, queried why courts could not require more than probable cause in those cases where the government seeks to freeze assets that a defendant needs to hire his counsel of choice. Noting the legal complexity of the Kaleys' case, Chief Justice John Roberts and Justice Stephen G. Breyer expressed concern that the defendants might be prevented from hiring qualified counsel who might be able to keep them out of jail. Amy Howe, "Argument Analysis: Asset Forfeiture Case Is Close Call," *Scotusblog.com* (Oct. 16, 2013).

CONCLUSION

When a defendant is accused of a straightforward crime, like robbing a bank, the misconduct, criminal intent, and funds linked to the criminal activity are relatively identifiable. Often, this is not the situation in white-collar cases, where the issue frequently is not whether the defendant is the person who engaged in the conduct, but whether the conduct is in fact criminal. Critics suggest that the government uses the pretrial forfeiture statutes to its advantage to force defendants to either plead guilty or to restrict their ability to hire specialized counsel. Harvey Silverglate, "How Prosecutors Rig Trials by Freezing Assets," *The Wall Street Journal* (Oct. 7, 2013). The fact of the matter is that a pretrial freezing of assets is a smart play for the government — it not only reduces the likelihood that the defendant can afford a robust defense, but ensures that the likely conviction will result in additional funds for future investigations. A decision in the Kaleys' favor will go a long way in adding some balance to the forfeiture regime.