Is Freezing Assets Needed to Pay Counsel of Choice Constitutional?

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In its October 2013 term, the Supreme Court for the first time in 23 years will squarely consider the constitutionality of pretrial restraints on assets needed by a criminal defendant to pay counsel of choice. In *Kaley v. United States*,[1] the court will decide whether the Fifth and Sixth amendments entitle a defendant whose assets are restrained post-indictment to a pretrial hearing on release of funds needed to pay attorney fees. When the court last considered this issue in 1989, a 5-4 majority in two related cases concluded that attorney fees were not exempt from pretrial restraint, but declined to reach the issue of what, if any, hearing might be appropriate under the Due Process clause.[2] Since that time, however, the number of federal crimes for which forfeiture is available has increased vastly—far beyond narcotics trafficking and organized crime—to all manner of fraud-based offenses.[3] So too has the government's aggressive use of pretrial asset restraints in white-collar cases.[4] Thus, the issue has taken on broad significance.

The lower courts have now struggled with this complicated question for two decades, leaving the case law in this area rife with split decisions, reversals, and en banc hearings.[5] Courts have grappled with, on one hand, the government's interest in separating criminals from their ill-gotten gains and avoiding the expense and strategic disadvantage of pretrial "mini-trials." On the other hand, they must weigh the criminal defendant's constitutional right to counsel of choice. Courts have also dealt with broader systemic issues, balancing the risk that a pretrial hearing will undermine the independence of the grand jury against the risk that denying such a hearing will deter attorneys from taking on criminal matters and will undermine the adversarial criminal justice system. The *Kaley* decision on pretrial forfeiture will likely constitute an important point in the evolution of the Fifth and Sixth Amendment rights of all criminal defendants.

Pretrial Forfeiture Statute

Section 853(e)(1) of Title 21 allows the government to obtain a pretrial order restraining assets that are subject to forfeiture upon conviction.[6] When the order is entered prior to indictment, the statute expressly entitles the defendant to a hearing. After indictment, however, no such hearing is required.[7]

'Kaley v. United States'

Kaley clearly presents the type of issues that can arise in a white-collar prosecution. The indictment alleged that Kerri Kaley and a colleague sold medical devices to hospitals. When the hospitals replaced those devices

with different models, Ms. Kaley, her husband, and their codefendant resold them. The government theorized that the defendants' employers were the rightful owners of the devices and that the defendants were holding them in a constructive trust. Defendants, on the other hand, asserted that their employers had been paid for the devices, that the hospitals had finished their use of the devices, and therefore that no loss had been suffered.

In April 2007, after a two-year investigation during which the same two attorneys represented the Kaleys, a grand jury indicted the Kaleys and their codefendant on seven counts of transporting stolen property, money laundering, and conspiracy. The indictment also sought the criminal forfeiture of the Kaleys' residence and approximately $2.5 million in other assets. At the time of the indictment, the government obtained an order restraining these assets, leaving the Kaleys with approximately $225,000. The Kaleys' counsel anticipated that representation through trial would cost approximately $500,000. The Kaleys moved to vacate the restraining order or, alternatively, to hold an evidentiary hearing, in part on the basis that the order violated the Fifth and Sixth amendments.[8]

A magistrate judge, applying Eleventh Circuit precedent on the right to a speedy trial, denied the Kaleys' request for a pretrial hearing. The district court affirmed, and the Kaleys appealed. Meanwhile, the Kaleys' codefendant was tried separately and acquitted on all counts.[9]

Eleventh Circuit Decisions: 'Kaley I'. A majority of the three-judge appellate panel reversed and remanded, largely on the basis that the district court had failed to give adequate weight to the prejudice the Kaleys would suffer if deprived of "access to long-time counsel who have already invested substantial time into learning the intricacies of [the Kaleys'] case and preparing for trial."[10]

The district court on remand held a pretrial hearing, but limited the scope to "traceability" (i.e., whether the restrained assets were involved in the conduct alleged in the indictment and thus subject to forfeiture). After the hearing, the court again denied the motion to vacate the restraints, and the Kaleys again appealed, this time on the basis that they should have been allowed to challenge the validity of the underlying indictment.[11]

'Kaley II'. The *Kaley II* panel rejected the Kaleys' argument: "[T]o the extent that Kaley I did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges."[12]

On March 18, 2013, the Supreme Court granted the Kaleys' petition for certiorari, which the government did not oppose.[13] The district court has stayed proceedings pending the Supreme Court's decision.

Previous Supreme Court Rulings

Kaley will provide the Supreme Court with its first opportunity since 1989 to consider whether a criminal defendant whose assets are restrained post-indictment, and who requires those assets to retain counsel of choice, is constitutionally entitled to a pretrial hearing on the merits of the indictment. Back in 1989, the Supreme Court had occasion to consider a broader issue: whether assets needed for counsel are even subject to forfeiture in the first instance. In two 5-4 decisions issued the same day, *Caplin & Drysdale, Chartered v. United States* and *United States v. Monsanto*,[14] the court majority emphatically held that there was no exemption for attorney fees.

'Caplin & Drysdale, Chartered v. United States'. After the defendant in *Caplin & Drysdale* pleaded guilty to narcotics-related charges, his attorney petitioned for the release of funds that had been restrained post-indictment, on the basis that under the Fifth and Sixth amendments, funds needed to pay a criminal defendant's counsel of choice should be exempt from forfeiture.[15] In an 8-4 split, a majority of the Fourth Circuit, sitting en banc, held that the pretrial forfeiture statute was constitutional and that no exception exists for funds needed to pay attorney fees.[16]

The Supreme Court affirmed. The cornerstone of the court's slim majority decision was the concept that "[w]hatever 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."[17] Writing for the majority, Justice Byron White explained that because title in forfeitable assets vests in the government at the time of the criminal conduct, forfeitable assets are not actually a criminal defendant's "own money."[18] The majority also expressed concern about creating a two-tiered criminal justice system in which successful criminals get a preview of the government's case before trial, whereas less successful criminals enjoy no such benefit.[19]

Although the court rejected the notion of a Sixth Amendment right "to use the proceeds of crime to finance an expensive defense,"[20] it acknowledged that forfeiture provisions are "powerful weapons [that] can be devastating when used unjustly," and thus left open the possibility that under certain circumstances, the Fifth Amendment might entitle a criminal defendant to additional procedural protections. The court concluded that "[c]ases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise."[21]

Justices Harry Blackmun, William J. Brennan, Thurgood Marshall and John Paul Stevens, in dissent, expressed harsh words for the majority, stating that it "trivialize[d] the burden the forfeiture law imposes on a criminal defendant."[22] The dissent further excoriated what they considered to be the majority's failure to "heed the warnings of [ ] District Court judges, whose day-to-day exposure to the criminal-trial process enables them to understand, perhaps far better than we, the devastating consequences of attorney's fee forfeiture for the integrity of our adversarial system of justice."[23]

'Monsanto v. United States'. The same issue presented itself in Monsanto. There, over a dozen defendants were indicted on racketeering, narcotics, and firearm-related charges. The government froze $400,000 held by one defendant pending trial, which the defendant contended he needed to pay counsel of choice.[24] The district court declined to vacate the restraining order and instead offered to release sufficient funds to pay an attorney at Criminal Justice Act rates.[25] The defendant rejected the offer and appealed.

In *Monsanto I*, a majority of the initial Second Circuit panel found that the order violated the Fifth and Sixth amendments, but instead of establishing "an absolute rule exempting property earmarked for attorney's fees from forfeiture,"[26] the court settled on a "reasonable compromise" of requiring a pretrial hearing on both the validity of the indictment and traceability.[27]

On remand in *Monsanto II*, after a four-day evidentiary hearing, the district court again declined to vacate the restraining order, and the defendant petitioned the Second Circuit for a rehearing en banc. Meanwhile, the trial began, with the restraining order still in place and the defendants represented by court-appointed counsel. Days before summation, the en banc court, in an 8-4 vote, vacated the order.[28] The district court offered the defendant use of the released funds to pay counsel of choice for summation, but the defendant declined, and the jury convicted.[29]

Every member of the en banc court agreed that the district court's pretrial restraining order was improper, but disagreed as to the rationale and whether the appropriate remedy was a hearing or a full exemption from seizure. The eight judges in the majority would have vacated the panel opinion either on the basis that the funds were exempt from seizure, or on the basis that while the funds were not exempt from seizure, the defendant was entitled to a hearing, and it was up to Congress (not the court) to determine procedural issues for the hearing, such as burden of proof.[30] In two separate opinions, the four judges in dissent would have affirmed the original panel decision that the Constitution entitled the defendant to a pretrial hearing on traceability and the merits of the indictment.[31]

In another 5-4 decision issued the same day as *Caplin & Drysdale*, the Supreme Court reversed the Second Circuit en banc decision. Again writing for the majority, Justice White relied on *Caplin & Drysdale* to reject the petitioner's argument that funds needed to pay an attorney are exempt from restraint under the Sixth Amendment. In a footnote, however, the court went on to observe that it was not considering "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." Because a hearing had been held and the government had prevailed, the majority opined that it would be "pointless for [it] now to consider whether a hearing was required by the Due Process Clause."[32]

Post-Supreme Court Ruling in 'Monsanto'

On remand for consideration of the due process question left open by the Supreme Court, the Second Circuit held en banc in a 7-6 decision that the Fifth and Sixth amendments require a hearing on probable cause for the underlying offenses and traceability.[33] Other circuit courts have reached widely different conclusions.[34]

Just recently, in *United States v. Bonventre*,[35] the Second Circuit, in a thoughtful opinion, addressed the issue of the threshold showing required to warrant a Monsanto hearing, as well as the burdens of proof for both criminal and civil pretrial forfeiture hearings. The court held that a criminal defendant "must make a sufficient evidentiary showing that there are no sufficient alternative, unrestrained assets to fund counsel of choice."[36] At the subsequent

hearing, the government's burden is to establish probable cause that the defendant committed the charged offenses and the assets are properly forfeitable.[37]

In *Kaley*, the Supreme Court has the opportunity to resolve the enormous split among the circuit courts on this significant issue.

Unlike the defendants in *Caplin & Drysdale and Monsanto*, the *Kaley* defendants are charged with white-collar violations of questionable validity that have been hard fought by their counsel for two years. Under these circumstances, the Kaleys' right to keep their counsel poses a stark test under both the Fifth and Sixth amendments.

Given the disparity in results and rationales in the lower courts, and the factors that need to be balanced, the Supreme Court's ruling is difficult to predict. While it seems likely that the majority will permit a hearing in some circumstances, determining the threshold standard, the scope of such a hearing, and the government's burden of proof are challenging issues. In Bonventre, the Second Circuit has provided a possible roadmap. Regardless of the outcome, Kaley will likely be a pivotal decision in defining the boundary between the government's forfeiture powers and a criminal defendant's right to counsel of choice.

Endnotes:

1 No. 12-464.

2 See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

3 18 U.S.C. §982 (mandating forfeiture for violations of over 50 federal criminal statutes).

4 The U.S. Attorneys' Offices nationwide collected $4.389 billion in asset forfeiture actions in fiscal year 2012. U.S. Attorneys' Annual Statistical Report, available at http://www.justice.gov/usao/reading_room/reports/asr2012/12s-tatrpt.pdf.

5 All the circuit courts, with the exception of the First Circuit, have weighed in on the issue, but disagree on the circumstances under which a defendant is entitled to a hearing, as well as the scope of, and underlying rationale for, any such hearing. Compare, e.g., *United States v. Roth*, 912 F.2d 1131 (9th Cir. 1990), with *United States v. Holy Land Foundation for Relief & Development*, 493 F.3d 469 (5th Cir. 2007) (en banc).

6 This section applies to all criminal forfeitures pursuant to 18 U.SC. §982(b)(1).

7 7 21 U.S.C. 853(e)(2).

8 See generally *United States v. Kaley*, 579 F.3d 1246, 1249-51 (11th Cir. 2009).

9 Brief for Petitioner at 78-10, 29 n.6, *Kaley v. United States*, available at http://www.scotusblog.com/case-files/cases/kaleyv- united-states/.

10 *United States v. Kaley*, 579 F.3d 1246, 1258 (11th Cir. 2009) (*Kaley I*).

11 *United States v. Kaley*, 677 F.3d 1316, 1317 (11th Cir. 2012) (*Kaley II*).

12 Id. at 1325 (applying *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989).

13 *Kaley v. United States*, 133 S. Ct. 1580 (2013).

14 *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

15 Id. at 618-21.

16 *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988).

17 Id. at 626 (internal citation omitted) (emphasis added).

18 Id. at 632. Justices William Rehnquist, Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy joined in the majority.

19 Id. at 630 (citing *In re Forfeiture Hearing*, 837 F.2d at 649).

20 Id. at 630.

21 Id. at 634.

22 Id. at 635.

23 Id.; see also id. at 635 n.1 (citing numerous district court decisions acknowledging impact of fee forfeiture on criminal justice system).

24 *United States v. Monsanto*, 836 F.2d 74, 75-77 (2d Cir. 1987) (*Monsanto I*).

25 Id. at 76.

26 Id. at 82.

27 Id. At such a hearing, the government would bear the burden of proof beyond a reasonable doubt.

28 *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (*Monsanto II*).

29 *Monsanto*, 491 U.S. at 605-06, n.5.

30 *Monsanto II*, 852 F.2d at 1402-12.

31 Id. at 1412-21.

32 *Monsanto*, 491 U.S. 615-16, n.10.

33 *United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991).

34 See supra note 5.

35 Docket No. 12-3574-cv (2d Cir. June 19, 2013).

36 Id. at 9. The defendant failed to meet the threshold requirement and thus was not entitled to a hearing.

37 Id. at 11. In a civil in rem action, the government must only demonstrate probable cause that the restrained assets are properly forfeitable. Id. at 11-12.