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Supreme Court Holds That Criminal Defendants Challenging Pre-Trial Asset Seizure Cannot Contest a Grand Jury's Determination of Probable Cause

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On February 25, 2014, in *Kaley v. United States*, the U.S. Supreme Court held 6-3 that criminal defendants challenging the legality of a §853(e)(1) pre-trial asset seizure may not contest a grand jury's determination of probable cause to believe the defendant committed the crime charged, and, therefore, may only contest whether the assets are traceable to the crime charged. Defendants in *Kaley* wanted to use the seized funds to pay for counsel of their choice. The case pit the sanctity of a grand jury's finding of probable cause up against the Sixth Amendment's right to select counsel of one's choice.

Background

21 U.S. Code §853(e)(1) grants the government the power to petition a federal court to freeze a criminal defendant's assets before trial, in order to ensure that those assets are available to be forfeited if the defendant is convicted. A federal court may order seizure of assets upon the issuance of an indictment by a grand jury, which also alleges that the property sought is traceable to the crime charged. Courts have held the defendants subsequently are entitled to a hearing to contest the assets' traceability to the crime. However, a circuit split arose as to whether a defendant also is entitled to challenge the probable cause basis to believe that he committed the crime at all. In *Kaley* , the Supreme Court resolved the split and held that a criminal defendant may not challenge a grand jury's finding of probable cause to believe the defendant committed the crime permitting forfeiture.

Kaley v. United States

Kerri and Brian Kaley, a married couple, were indicted on charges arising from the sale of stolen medical devices. Thereafter, a federal trial court froze the Kaleys' assets, including the money they intended to use to pay their defense counsel of choice. The Kaleys did not contest that the assets were traceable to the crimes charged. Instead, the Kaleys argued that the government's charges were "baseless" because their conduct did not constitute a criminal offense and that they should be entitled to a hearing allowing them to challenge the grand jury's determination that there existed probable cause to believe they committed the crimes charged. The lower courts rejected that argument. The Supreme Court affirmed, finding that the grand jury has the last word on probable cause, and that determination may not be revisited by a judge. Although the majority recognized the vital interest at stake—the Sixth Amendment right of defendants to retain counsel of their own choosing—they found nothing wrong with deferring to the grand jury's finding of probable cause, even where that finding would constrain the defendant's ability to choose counsel. The majority noted that the grand jury's finding of probable cause, powerful enough sometimes to restrain persons and deprive them of their freedom, is sufficient and sound enough to seize a person's property, without recourse, ahead of trial. The Court followed its previous holding in *United States v. Monsanto*, that an asset freeze depriving a defendant of that interest is erroneous only when unsupported by a finding of probable cause. The Court reasoned that there is no good cause to undermine the grand jury's initial finding of probable cause.

Impact

There may be cases, like the Kaleys', where the issue is not whether the seized funds are traceable to alleged conduct (because they clearly are), but rather whether the alleged conduct underlying the asset forfeiture is even criminal. Where the assets at issue include funds intended to pay legal fees, criminal defendants may be placed in a very precarious position. As the dissent in *Kaley* noted, at stake is the defendant's "precious right" to engage an attorney of his choosing who will in turn fight for all the other rights the defendant enjoys. After *Kaley*, that "precious right" may be at risk.

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