

High Court Deals Major Blow To Criminal Defendants

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The U.S. Supreme Court's 6-3 decision in *Kaley v. United States*, 571 U.S. ___, No. 12-464 (Feb. 25, 2014), essentially finds that the grand jury should have the last word. The *Kaley* case involved the right to counsel when there has been a pretrial seizure of assets. The criminal defendant suffered a major blow in *Kaley*. Not only did the Supreme Court undercut a criminal defendant's right to counsel, the Supreme Court solidified the power of the grand jury. Brian and Kerri Kaley were indicted by a grand jury for their alleged involvement in a scheme to transport stolen medical devices across state lines to sell them for a profit and laundering the proceeds. *Id.* at 4. The accusations centered on the Kaleys' alleged theft of medical devices from a hospital (the Kaleys argued that they had merely taken old medical devices which were going to be replaced and thrown away by the hospital). To pay for the lawyer of their choice for representation at trial, the Kaleys obtained \$500,000 from a home equity loan. Prosecutors obtained an ex parte order (invoking 21 U.S.C. § 853(e)(1), which authorizes courts to freeze an indicted person's assets prior to trial if the assets would be subject to forfeiture upon conviction) freezing the money the Kaleys intended to use to pay their lawyer, leaving the Kaleys without the ability to fund their lawyer for the anticipated trial. The Kaleys unsuccessfully sought a hearing to challenge the asset freeze by arguing that the case against them was baseless. *Id.* at 5. The district court did not allow such a challenge, which would have been focused on whether the grand jury had probable cause to indict the Kaleys. The Eleventh Circuit Court of Appeals agreed. On appeal, the U.S. Supreme Court framed the issue as whether the district court's refusal to hold a pretrial hearing challenging the grand jury's determination of probable cause violated the Kaleys' Fifth Amendment right to due process and Sixth Amendment right to freedom of choice of counsel. The Supreme Court held that it did not, relying in substantial part on *United States v. Monsanto*, 491 U.S. 600 (1989). In *Monsanto*, the Supreme Court had held that prosecutors may seize assets before trial that a defendant intends to use to pay an attorney, so long as probable cause exists to believe that the property will ultimately be proved forfeitable. *Id.* at 615. The decision functionally limits a criminal defendant's constitutional right to freedom of choice of counsel when there has been a pretrial asset freeze under 21 U.S.C. § 853(e)(1). Specifically, the court held that a criminal defendant who challenges an asset freeze ordered under 21 U.S.C. § 853(e)(1) is not constitutionally entitled to

contest that freeze by challenging the grand jury's determination of probable cause to believe that the defendant committed the crime charged. The opinion is troubling. First, its practical effect and related constitutional peril — it limits the ability of accused people to litigate pretrial seizure of their assets, even when those seized assets would be used to implement hiring counsel of one's choice. The "[r]ight to select counsel of one's choice" is "the root meaning of the constitutional guarantee" of the Sixth Amendment. Kaley thus stands to handicap accused people's ability to prepare a defense and fight the charges at trial. And it limits the power of accused people to challenge prosecutors and the conclusions of grand juries — grand juries, as courts and commentators have long noted, would "indict a ham sandwich" if prosecutors asked. Chief Justice John Roberts, in his strongly worded dissent, found the majority's decision troubling and stated "few things could do more to 'undermine the criminal justice system's integrity' ... than to allow the Government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice — without even an opportunity to be heard." The decision is also concerning because of the majority's suggestion that its ruling merely prevented accused persons from "relitigating" "a grand jury's prior determination of probable cause to believe they committed the crimes charged." Slip Op. at 1. Of course, an accused person has no ability to "litigate" probable cause before the grand jury (which is convened in secret) in the first instance. Interestingly, Chief Justice Roberts, in the dissent, stated that "Common sense ... tells us that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides." The majority, on the other hand, reinforced the power of the grand jury decision and referred to decisions of grand juries as "inviolable grand jury finding" and "the grand jury's singular role." The most concerning aspect of the opinion in Kaley is what effect it will have on bond hearings wherein the facts underlying the indictment are often challenged and the government's likelihood of obtaining a conviction is addressed. An opinion solidifying the probable cause finding by a grand jury will likely have a detrimental effect on a defendant's ability to obtain bond. *Originally published by Law360 (subscription required).*

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