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The Government Has Frozen My Bank Accounts, What Do I Do Now? Analyzing Asset Forfeiture After Kaley V. U.S.

March 3, 2014 | Criminal Procedure,Government Investigations,The GEE Blog

On Feb. 25, 2014, the United States Supreme Court issued an opinion in *Kaley v. United States*, No. 12-464, 571 U.S. ___ (2014), a case eagerly followed by many in the white collar defense bar. Brian and Kerri Kaley, who were indicted by a grand jury for transporting stolen medical devices and laundering the proceeds from the sale of those devices, took a simple legal position.

After the United States froze their assets, including a certificate of deposit that contained the only source of funds the Kaleys had available to pay their lawyers, the Kaleys argued that the Government should have been required to establish that there was probable cause to restrain those assets in an adversarial evidentiary hearing where witnesses could be cross-examined and exculpatory defense evidence presented. If the United States was unsuccessful at that hearing, the property would be returned.

The Kaleys' case appeared to be a strong one. After all, by the time the Kaleys case made it to the Supreme Court, another defendant who had been charged with the same crimes for the same conduct in a superceding indictment went to trial and was fully acquitted. The Kaleys also established that they had no other resources, except for those in the Government's possession, which they could use to retain the defense attorneys of their choice.

The Fifth Amendment's right to due process and the Sixth Amendment's right to counsel must certainly allow criminal defendants access to their own assets in order to prove their innocence, the Kaleys felt. The Kaleys' dilemma was one that many criminal defendants face: "We have been wrongfully indicted, but the only way we can adequately defend ourselves is to hire

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competent counsel. And the only assets we have to retain that counsel were frozen by the Government." The restraint of assets after indictment, but *prior to* any conviction also seems to run counter to very principle upon which the American criminal justice system is built: *innocent, until proven guilty*. Yet the Supreme Court, in a 6 to 3 opinion authored by Justice Kagan, ruled against the Kaleys.

The Court determined that a post-deprivation hearing was not needed for the Government to maintain the possession of assets until the outcome of the trial. The Court's logic was simply that a grand jury, which is itself a longstanding institution relied upon to charge individuals with criminal conduct, is more than qualified to determine whether there is sufficient evidence to restrain a criminal defendant's assets.

The Court determined if a grand jury can find probable cause to indict, it could certainly find probable cause to determine that an indicted person's assets were the proceeds of that crime. A separate evidentiary hearing would simply be a second bite at the apple that could only create problematic fissures in the criminal justice process, if granted.

The Court asked rhetorically, what would happen if the grand jury found probable cause to indict, but a judge found, after a hearing such as the one the Kaleys sought, that there was not probable cause to believe that a crime had occurred to maintain possession of a defendant's assets? The potential for such a seemingly irreconcilable outcome was too much for the Court to risk. That opinion, however, displays far too much confidence in the grand jury.

In a federal grand jury, only prosecutors are present. They present only selective evidence. Witnesses are not subject to cross-examination and there is no constitutional requirement that grand jurors hear about exculpatory or contradictory evidence. A judge is not even present and evidence, such as hearsay, that is excluded by the Federal Rules of Evidence in a trial setting, is permitted in a grand jury. Grand juries get it wrong, a point made by Chief Justice Roberts in his dissent in *Kaley*.

Contrary to the Majority's opinion, courts do not rely entirely on a grand jury to detain individuals after indictment and prior to trial. Bail proceedings are required and commonplace and are similar evidentiary proceedings to what the Kaleys contemplated where a judge must evaluate multiple factors to determine whether a person must be imprisoned pending the outcome of their trial. There are plenty of mechanisms – the posting of bond, the use of probation, the surrender of passports – that are used to ensure an individual shows up for trial after being released. Why should the restraint of assets prior to trial be treated differently?

The opinion also misses another important reality. Not all defense counsel are created equally. Of course, attorneys will be appointed for indigent defendants, but the practice of criminal law is not standard.

Complex white collar cases, where asset forfeiture is commonplace, require specialized attorneys and also often expert and/or summary witnesses to prepare and analyze complicated financial, scientific, or other detailed business records. Imagine asking the Denver Broncos to win the Super Bowl – the biggest game of many players' careers without their chosen quarterback, Peyton Manning – but with one that is randomly selected and may have never played a single down of NFL football, let alone played in a game as critical as the Super Bowl.

So what is a criminal defendant to do, now that the Supreme Court has made it even easier to deny a person, who may be wrongfully accused, access to their own resources to fight back? First, the Supreme Court's decision is confined to *criminal* forfeitures *after* indictment. Often the Government will seize assets during an investigation and that seizure does not always occur under the criminal forfeiture laws. Prior to indictment, the Government will often proceed under the civil or administrative forfeiture laws, 18 U.S.C. § 981 or 18 U.S.C. § 983 respectively. Those laws require the Government to provide notice and with few exceptions, only allow the Government to restrain the assets for 90 days after a claim has been filed.

If the Government initiates a civil forfeiture action, claimants are entitled to the same broad right to discovery that litigants in other civil lawsuits are entitled to pursue. And in one of the few areas where the subjects of a criminal investigation are provided a remedy against Government abuses, Congressional reforms enacted in 2000 entitle a claimant who prevails against the Government in a civil forfeiture action to recover his or her attorneys' fees. If the Government does seek to pursue a pre-indictment restraint of assets under the criminal forfeiture statutes, 21 U.S.C. § 853(e)(1)(B) requires the court to hold an evidentiary hearing to determine if there is "a substantial probability" that the Government will prevail on the issue of forfeiture and that the need to restrain the property "outweighs the hardship on any party against whom the [restraining] order is to be entered."

Additionally, during the oral argument in *Kaley*, the Solicitor General made an important concession. Government agents often rush in and seize *all* of a criminal target's or defendant's assets, and not those that are directly traceable to the crime being investigated or charged. The Solicitor General agreed "that a defendant has a constitutional right to a hearing on that question [of traceability]." *See Kaley* at n. 3. The Constitution requires that type of hearing regardless of whether the seizure took place before or after the issuance of an indictment.

Rule 41(g) of the Federal Rules of Criminal Procedure also require a Court to examine situations where an asset seizure poses more than a legal hardship on defendants. If that asset seizure poses a financial hardship on a person's family or business, Rule 41(g) still contemplates a hearing and a judicial determination about whether all or a portion of the funds should be returned.

For criminal defendants and their attorneys, the important lesson from *Kaley* is that it is critical to challenge both an asset seizure and the underlying criminal investigation as early as possible, and preferably before an indictment is ever returned. Even when a grand jury makes a probable cause finding, criminal defendants still have the right to challenge the scope of any asset seizure. The Government has finally conceded that where the seizure is done indiscriminately without any effort to trace the seized assets to the alleged criminal conduct, a post-deprivation hearing is not only appropriate, it is constitutionally required.