

# KALEY V. UNITED STATES: THE RIGHT TO COUNSEL OF CHOICE CAUGHT IN THE WIDE NET OF ASSET FORFEITURE

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## I. INTRODUCTION

*Kaley v. United States*<sup>1</sup> is the type of case that can inspire intense passions. It presents a deceptively simple question: Should the government, on the basis of a grand jury's finding of probable cause, be permitted to restrict the defendant's use of assets she has set aside to retain counsel for her defense? Or, framed from the other side, is a defendant who needs potentially forfeitable assets to retain counsel of choice entitled, under the Due Process Clause, to a hearing at which she can challenge the grand jury's finding of probable cause? This question pits two longstanding constitutional doctrines against one another: the right to retain counsel of choice and the principle that a grand jury indictment is immune to challenge.

The backstory of *Kaley v. United States* reads like something out of a civil libertarian's nightmare. A victimless crime, overzealous prosecutors, vindictive use of asset forfeiture, and deprivation of the right to counsel of choice all play starring roles. The full might of the federal government is on display—proposing a showdown by accusing defendants of a crime and then stripping them of the means to employ their chosen advocate before the battle has even begun. The old adage that “[g]reat cases, like hard cases, make bad law,”<sup>2</sup> however, counsels caution. As Justice Sotomayor noted, this case might be “one in a million.”<sup>3</sup> The hearing that seems appropriate and just in the Kaley's circumstance might serve only to delay and distract in the vast

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1. *Kaley v. United States*, No. 12-464 (U.S. argued Oct. 16, 2013).

2. *Northern Secs. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

3. Transcript of Oral Argument at 15, *Kaley v. United States*, 133 S. Ct. 1580 (2013) (No. 12-464).

majority of cases without making any difference as to the restraints ultimately placed on the defendant's assets.

## II. FACTUAL & PROCEDURAL BACKGROUND

Kerri Kaley received notice in early 2005 that she was the subject of a grand jury investigation in the Southern District of Florida.<sup>4</sup> Kaley, a sales representative for prescription medical device (PMD) distributor Ethicon Endo-Surgery (Ethicon), was accused of stealing PMDs from hospitals and re-selling them on the black market.<sup>5</sup> Kerri and her husband Brian, who was also under investigation, maintained that the PMDs they sold were old, unwanted models that hospitals had voluntarily *given* to them.<sup>6</sup> Kerri and Brian retained separate counsel.<sup>7</sup> To secure the funds to pay counsel through trial, the Kaleys obtained a \$500,000 home equity line of credit on their home, which they used to purchase a certificate of deposit (CD).<sup>8</sup>

In February 2007, the grand jury returned a seven-count indictment, including one count of conspiracy to transport PMDs in interstate commerce while knowing them to be stolen, five substantive counts of transporting stolen property, and one count of obstruction of justice.<sup>9</sup> Under 21 U.S.C. § 853, the Government sought criminal forfeiture of all assets deemed traceable to the substantive offenses.<sup>10</sup> Later, the Government obtained a superseding indictment that added a money laundering count.<sup>11</sup> Under the new indictment, the Government sought criminal forfeiture of the Kaleys' home on the theory that it was "involved with" the money laundering offense.<sup>12</sup> The magistrate judge granted a protective order to restrict all the assets subject to forfeiture, including the CD.<sup>13</sup> The Kaleys requested a "pretrial, post-restraint evidentiary hearing" to challenge the restrictions on their property.<sup>14</sup> The magistrate judge denied this request, finding that no hearing was necessary until trial.<sup>15</sup> After the

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4. United States v. Kaley (*Kaley I*), 579 F.3d 1246, 1249 (11th Cir. 2009).

5. *Id.*

6. Brief for Petitioner at 8–10, *Kaley v. United States*, 133 S. Ct. 1580 (2013) (No. 12-462).

7. *Kaley I*, 579 F.3d at 1249.

8. *Id.*

9. *Id.* at 1249–50.

10. *Id.* at 1250.

11. *Id.* at 1250–51.

12. *Id.* at 1251.

13. *Id.*

14. *Id.*

15. *Id.*

district judge affirmed that decision, the Kaleys lodged an interlocutory appeal.<sup>16</sup>

In the first of the Kaleys' two appeals (*Kaley I*), a panel of the Eleventh Circuit reversed the district court and remanded the case for a more searching analysis of the Kaleys' request for an adversarial hearing.<sup>17</sup> The panel found that the district court had (1) failed to properly assess the scope of the hearing and (2) had not fully considered the prejudice the Kaleys might suffer as a result of the asset restraint.<sup>18</sup> On remand, the district court held a hearing at which it allowed the Kaleys to contest the traceability of the assets in question to the underlying crime, but did not permit them to challenge the basis for the charges themselves.<sup>19</sup> The Kaleys did not attempt to challenge traceability.<sup>20</sup> Instead, they maintained that while the assets were traceable to the conduct alleged in the indictment, the conduct itself was not unlawful.<sup>21</sup> They argued that only a hearing in which they could contest probable cause would satisfy the demands of due process. After the district court refused to permit such a hearing, the Kaleys lodged a second interlocutory appeal.<sup>22</sup>

While the Kaleys' case was up on appeal, the Government proceeded with the trial of the Kaleys' former co-defendant, Jennifer Gruenstrass.<sup>23</sup> Gruenstrass's argument at trial was that hospitals had voluntarily *given* unwanted, old-model PMDs to her and the Kaleys.<sup>24</sup> After the Government failed to produce any witnesses from the hospitals or from Ethicon that would testify to being victims of theft, the jury acquitted Gruenstrass of all charges.<sup>25</sup>

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16. *Id.* at 1251–52.

17. *Id.* at 1259–60.

18. *Id.* at 1257–58.

19. *United States v. Kaley (Kaley II)*, 677 F.3d 1316, 1320 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 1580 (Mar. 18, 2013).

20. *Id.*

21. *Id.*

22. *Id.*

23. Brief for Petitioner, *supra* note 6, at 18.

24. *Id.* at 18–20.

25. *Id.* at 21.

### III. LEGAL BACKGROUND

#### A. *Right to Counsel of Choice*

The Sixth Amendment to the Constitution affords criminal defendants the right to assistance of counsel.<sup>26</sup> Long before the Supreme Court decided that indigent defendants had a right to government-appointed counsel,<sup>27</sup> the Sixth Amendment guaranteed a defendant the right to secure counsel he could afford or who was willing to represent her without being compensated.<sup>28</sup> This right, however, has always been qualified. Limitations include rules governing admission to practice in the relevant court, conflicts of interest, and the caseload of the desired attorney.<sup>29</sup>

The right to counsel of choice is independent from the right to effective assistance of counsel.<sup>30</sup> The right to effective assistance of counsel is part of the broader purpose of the Sixth Amendment to ensure a fair trial.<sup>31</sup> A violation of the right to effective assistance of counsel, then, is complete only if the violation resulted in a substantively unfair trial.<sup>32</sup> In contrast, a violation of the right to counsel of choice is complete as soon as the defendant is erroneously prevented from being represented by her chosen counsel.<sup>33</sup> Because it is the *defendant's choice* that the right protects, the court's opinion of the relative effectiveness of counsel is irrelevant.<sup>34</sup>

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26. U.S. CONST. amend. VI.

27. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

28. *Caplin & Drysdale, Chartered v. United States (Caplin & Drysdale)*, 491 U.S. 617, 624–25 (1989); see also *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”).

29. *United States v. Gonzales-Lopez*, 548 U.S. 140, 154 (2006) (Alito, J., dissenting) (“A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure. But from the beginning, the right to counsel of choice has been circumscribed.”).

30. *Id.* at 146–48.

31. *Id.* at 147.

32. *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

33. *Id.* at 146.

34. *Id.* at 148.

### B. Asset Forfeiture and the Right to Counsel of Choice

Here, the Government seeks criminal asset forfeiture under 21 U.S.C. § 853, which provides for forfeiture of property earned from, used in, or related to criminal activities.<sup>35</sup> The statute establishes the “relation back” theory that property vests in the government as soon as it is used in the commission of a crime.<sup>36</sup> In order to preserve assets for forfeiture, a court “may” issue a restraining order based on a grand jury indictment.<sup>37</sup> As a general matter, criminal asset forfeiture has been held constitutional, even for assets needed to retain or repay counsel.<sup>38</sup> The remaining controversy surrounds whether due process requires a hearing before the court continues to restrain assets the defendant needs to retain counsel of choice.<sup>39</sup>

#### 1. The Grand Jury’s Role in Determining Probable Cause

The Fifth Amendment to the Constitution provides that a person may be “held to answer” for a felony charge upon indictment by a grand jury.<sup>40</sup> The grand jury determines, based on evidence presented by a prosecutor, whether there is probable cause to indict the defendant.<sup>41</sup> The defendant has no right to be assisted by counsel before the grand jury.<sup>42</sup> At the proceeding, the prosecutor may present hearsay and other forms of evidence that would be inadmissible at trial<sup>43</sup> and the prosecutor has no duty to present exculpatory evidence.<sup>44</sup> A line of Supreme Court cases beginning with *Costello v. United States*<sup>45</sup> indicates that courts should “abstain from reviewing the evidentiary support for the grand jury’s judgment”<sup>46</sup> and respect

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35. 21 U.S.C.A. § 853(a) (West 2013).

36. *Id.* § 853(c).

37. *Id.* § 853(e)(1).

38. *See Caplin & Drysdale*, 491 U.S. at 624–25.

39. *Kaley II*, 677 F.3d 1316, 1328–29 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 1580 (Mar. 18, 2013).

40. U.S. CONST. amend. V.; *see Green v. United States*, 356 U.S. 165, 187 (1958) (holding that “infamous” crimes for purposes of the Sixth Amendment are those that carry a potential penalty of incarceration for one year or more), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968).

41. *United States v. Williams*, 504 U.S. 36, 51 (1992).

42. *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

43. *Costello v. United States*, 350 U.S. 359, 362 (1962) (“An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits.”).

44. *Williams*, 504 U.S. at 55.

45. 350 U.S. 359 (1962).

46. *Williams*, 504 U.S. at 54.

its important role as an independent body.<sup>47</sup> Circuit courts disagree, however, over whether this line of cases indicates that the grand jury's finding of probable cause is conclusive as to all pretrial matters.<sup>48</sup>

## 2. Bail Hearings: Challenging the Grand Jury's Probable Cause Determination?

Bail hearings may constitute an exception to the general proposition that judges do not reconsider probable cause after the grand jury has issued an indictment.<sup>49</sup> Before a judge may refuse to release a defendant on bail due to concerns about the safety of the community, the Bail Reform Act requires an adversarial hearing at which the judge examines, among other things, the weight of the evidence for the underlying indictment.<sup>50</sup> In *United States v. Salerno*,<sup>51</sup> the Supreme Court determined that pretrial detention did not violate due process because (1) Congress had a legitimate and compelling regulatory purpose<sup>52</sup> and (2) the Act offered defendants significant procedural protections.<sup>53</sup>

## 3. Modern Decisions on Asset Forfeiture and the Right to Counsel

### a. *Caplin & Drysdale* and *Monsanto III*

On the same day in June 1989, the Supreme Court decided a pair of cases addressing the interaction of criminal asset forfeiture and the right to counsel of choice.<sup>54</sup> Read together, the two cases, *Caplin &*

47. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

48. *See Kaley II*, 677 F.3d 1316, 1323–24 (11th Cir. 2012) (noting a circuit split as to whether the grand jury indictment conclusively establishes probable cause for the purpose of asset forfeiture when the right to counsel of choice is at stake), *cert. granted*, 133 S. Ct. 1580 (Mar. 18, 2013); *United States v. Monsanto (Monsanto IV)*, 924 F.2d 1186, 1196 (2d Cir. 1991) (“[W]e do not read these cases as precluding a reconsideration of probable cause as to the defendant’s commission [of the crimes giving rise to forfeiture] in a pretrial hearing.”).

49. *See, e.g., United States v. Lopez-de la Cruz*, 431 F. Supp. 2d 200, 203 (D.P.R. 2006) (“Even though a grand jury has found probable cause to believe [defendant is] guilty of a crime of violence, the evidence currently before the Court does not support a finding that no condition or combination of conditions would reasonably assure the safety of any other person and the community.”).

50. 18 U.S.C.A. § 3141(g) (West 2013).

51. 481 U.S. 739 (1987).

52. *Id.* at 747.

53. *Id.* at 750.

54. *Caplin & Drysdale*, 491 U.S. 617 (1989); *United States v. Monsanto (Monsanto III)*, 491 U.S. 600 (1989). *Monsanto III* arrived at the Supreme Court after a panel decision (*Monsanto I*) and an en banc decision (*Monsanto II*) at the Second Circuit. On remand from the Supreme Court decision (*Monsanto III*), the Second Circuit decided *Monsanto IV*,

*Drysdale, Chartered v. United States*<sup>55</sup> and *Monsanto III*,<sup>56</sup> hold that the government may restrain funds subject to forfeiture before trial based on a finding of probable cause, even if a defendant demonstrates that the funds are needed to retain counsel of choice. *Monsanto III*, however, explicitly leaves open whether due process requires the court to hold a hearing before imposing pretrial asset restraint.<sup>57</sup>

In *Caplin & Drysdale* the Court rejected a counsel-of-choice based challenge to 21 U.S.C. § 853.<sup>58</sup> *Caplin & Drysdale* involved a defendant who had *already* pleaded guilty to drug importation charges and sought to use funds to pay attorney's fees he had previously incurred.<sup>59</sup> The Court held, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of h[er] choice."<sup>60</sup> The Court also noted that there was nothing unique about asset forfeiture's interference with the right to counsel.<sup>61</sup> After all, the right to practice one's religion, to speak, or to travel may all be limited by a defendant's lack of financial resources.<sup>62</sup>

Because *Monsanto III* involved the restriction of a defendant's assets before trial and before any plea had been entered, it presented distinct issues.<sup>63</sup> There, the Court read *Caplin & Drysdale* to indicate that the Fifth and Sixth Amendments provide no general bar against seizing funds needed to retain counsel of choice based on a finding of probable cause.<sup>64</sup> The Court explicitly declined to decide an issue that was already dividing the circuits: "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed."<sup>65</sup>

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discussed below.

55. 491 U.S. 617 (1989).

56. 491 U.S. 600 (1989).

57. *Monsanto III*, 491 U.S. at 615 n.10.

58. *Caplin & Drysdale*, 491 U.S. at 619.

59. *Id.* at 621; *Monsanto IV*, 924 F.2d 1186, 1190 (2d Cir. 1991).

60. *Caplin & Drysdale*, 491 U.S. at 626.

61. *Id.* at 628.

62. *Id.*

63. *Monsanto III*, 491 U.S. at 615 & n.10.

64. *Id.* at 614.

65. *Id.* at 615 n.10.

b. *Monsanto IV*

On remand, the Second Circuit took up the question the Supreme Court left open in *Monsanto III*.<sup>66</sup> The Second Circuit split the central question into two parts: (1) does the Due Process Clause require a pretrial, post-restraint hearing? and (2) if so, what is the proper scope of the hearing?<sup>67</sup>

To answer these questions, the Second Circuit applied the framework established in *Mathews v. Eldridge*.<sup>68</sup> The *Mathews* test invites courts to consider the interests on both sides of the suit in determining what procedures due process requires when a party stands to lose a property interest.<sup>69</sup> The test accounts for the following three factors: (1) the private interest affected by the government action, (2) the risk of erroneous deprivation of the interest through the current procedures and the likely value of additional procedural safeguards, and (3) the government's interest, including the additional burdens of the proposed procedure.<sup>70</sup> After considering the *Mathews* test, the Second Circuit held that the factors weighed decidedly in favor of permitting a post-restraint hearing at which the defendant could challenge the finding of probable cause for the underlying indictment.<sup>71</sup>

Today, a majority of circuits that have considered the matter have agreed with the Second Circuit and permitted the type of hearing the Kaleys seek.<sup>72</sup> A minority holds that such a hearing must be limited to traceability—whether the assets are traceable to the underlying crime in the indictment—and may not address probable cause.<sup>73</sup> After *Kaley II*, the Eleventh Circuit is among the circuits that limit the pretrial

66. *Monsanto IV*, 924 F.2d 1186, 1188 (2d Cir. 1991).

67. *Id.* at 1203.

68. *Id.* at 1193; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

69. See *Monsanto IV*, 924 F.2d at 1192–93 (applying the *Mathews* balancing test to assess the private and governmental interests at stake when the government sought pretrial asset restraint, which constituted a “deprivation of property subject to the constraints of due process” (citation omitted) (internal quotation marks omitted)); see also Brief for Petitioner, *supra* note 6, at 34 (collecting cases in which the Supreme Court applied the *Mathews* test to a variety of due process challenges to government procedures, including property rights cases).

70. *Mathews*, 424 U.S. at 335.

71. *Monsanto IV*, 924 F.2d at 1196.

72. Petition for Writ of Certiorari at 23, *Kaley v. United States*, 133 S. Ct. 1580 (2013) (No. 12-464).

73. *Id.* The Second, Fourth, Seventh, Ninth, and D.C. Circuits allow for an adversarial hearing addressing both probable cause and traceability. The Tenth, Sixth, and Eleventh Circuits allow for a hearing limited to traceability. The Fifth, Third, and Eighth circuits have not addressed the issue since the Supreme Court's ruling in *Monsanto III*.



hearing to traceability.<sup>74</sup>

#### 4. The *Medina* Test

If the Supreme Court declines to apply the *Mathews* test, it may look to the test developed in *Medina v. California*.<sup>75</sup> *Medina* involved a due process challenge to a California state rule about the burden of proof for demonstrating incompetency to stand trial.<sup>76</sup> There, the Court declined to use *Mathews* to assess a state rule of criminal procedure. Instead, the Court, drawing upon *Patterson v. New York*,<sup>77</sup> held that a state rule of criminal procedure is prescribed by the Due Process Clause only if it contravenes a principle of justice so deeply rooted that it is viewed as fundamental.<sup>78</sup> The Court reasoned that explicit provisions of criminal procedure enumerated in the Bill of Rights embody the Constitution's careful balancing of liberty and order.<sup>79</sup> Judicial expansion of constitutional guarantees under the "open ended rubric of the Due Process Clause" threatens to upset that balance.<sup>80</sup> Though the parties in this case dispute whether federalism concerns were essential to the holding in *Medina*,<sup>81</sup> no Supreme Court case to date has applied the *Medina* test to federal rules of criminal procedure.

### IV. HOLDING

Having determined in *Kaley I* that due process demanded a pretrial hearing, the issue before the Eleventh Circuit in *Kaley II* was the scope of that hearing.<sup>82</sup> The court held that the district court was correct to limit the scope of the hearing to traceability and to prohibit the Kaleys from challenging probable cause as to the underlying crimes in the indictment.<sup>83</sup>

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74. *Kaley II*, 677 F.3d 1316, 1323 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 1580 (Mar. 18, 2013).

75. 505 U.S. 437 (1992).

76. *Id.* at 439.

77. 432 U.S. 197 (1977).

78. *Medina*, 505 U.S. at 443–46.

79. *Id.* at 443.

80. *Id.*

81. Brief for the United States at 18, *United States v. Kaley*, 133 S. Ct. 1580 (2013) (No. 12-462); Reply Brief for Petitioners at 1–2, *Kaley*, 133 S. Ct. 1580 (No. 12-462).

82. *Kaley II*, 677 F.3d 1316, 1317 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 1580 (Mar. 18, 2013).

83. *Id.*

The court found that 21 U.S.C. § 853 clearly states that, based on a grand jury indictment, assets subject to forfeiture may be restrained without further proceedings.<sup>84</sup> As a result, the case presented the constitutional question of whether due process itself requires a hearing.<sup>85</sup>

Due process, the court determined, requires a hearing on the traceability of the assets to the alleged crime, but does not permit defendants to challenge the grand jury's finding of probable cause.<sup>86</sup> Relying heavily on *Costello* and its progeny, the court held that allowing a hearing on the merits of the indictment would run counter to the weight of precedent evincing a "powerful reluctance to allow pretrial challenges to the evidentiary support for an indictment," while adding nothing to the ultimate guarantee of a fair trial.<sup>87</sup> Because the grand jury is an independent institution long seen as a bulwark against oppressive or arbitrary prosecution, defendants have no right to challenge the sufficiency of its probable cause findings.<sup>88</sup> The Eleventh Circuit reasoned that the hearing proposed by the Kaleys would amount to a type of mini-trial that would pose a direct challenge to the grand jury.<sup>89</sup> The district court, then, was correct to prohibit the Kaleys from challenging the grand jury's finding that they had violated federal laws against theft and money laundering.<sup>90</sup>

## V. ARGUMENTS

### A. *The Kaleys' Argument*

The Kaleys' central argument is that when property essential to retain counsel of choice is at stake, the *ex parte* grand jury proceeding does not satisfy the central tenet of due process: the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>91</sup> Instead, due process requires a pretrial adversarial hearing at which the defendant may challenge the grounds for asset restraint.<sup>92</sup> The *Mathews* test, which provides the proper framework for assessing the

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84. *Id.* at 1321.

85. *Id.*

86. *Id.* at 1323.

87. *Id.* at 1325.

88. *Id.*

89. *Id.* at 1326.

90. *Id.* at 1326–28.

91. Brief for Petitioner, *supra* note 6, at 30.

92. *Id.* at 32.

demands of due process in this context, calls for an adversarial hearing in the Kaleys' case.<sup>93</sup>

### 1. *Mathews* Test Analysis

#### a. The Kaleys' Private Interests

The Kaleys argue that the private interest at stake—the ability to use their property to retain counsel of choice—is significant.<sup>94</sup> For the right to counsel of choice to be of consequence, it must be exercised during the relevant window of opportunity.<sup>95</sup> Although delaying the due process hearing until trial would only temporarily deprive the Kaleys of their property, it would “completely eviscerate their right to counsel of choice.”<sup>96</sup>

The Kaleys argue that because they have a significant property interest at stake, the Supreme Court should apply the *Mathews* test to determine the procedures to which they are entitled under the Due Process Clause.<sup>97</sup> The Court, applying the *Mathews* test, has repeatedly held that due process requires an adversarial hearing in civil attachment and forfeiture cases.<sup>98</sup> Unlike parties to civil suits, the Kaleys stand to lose not only property but also liberty.<sup>99</sup> Because, for the Kaleys, “[t]he stakes could not be much higher,” they are entitled to at least as much process as civil defendants in forfeiture cases.<sup>100</sup>

#### b. The Risk of Erroneous Deprivation

Further, the Kaleys argue that the risk of erroneous deprivation is significant because the Government has a direct pecuniary interest in the result of the proceeding.<sup>101</sup> As the Court has noted, it makes sense for the judiciary to provide closer scrutiny of government action when

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93. *Id.* at 33.

94. *Id.* at 52–54.

95. *Id.* at 54.

96. *Id.* at 53–54 (quoting *Kaley I*, 579 F.3d 1246, 1266 (11th Cir. 2009) (Tjoflat, J., concurring)).

97. *Id.* at 33.

98. *Id.* at 54. The Kaleys' brief discusses six civil attachment and forfeiture cases in detail: *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Connecticut v. Doehr*, 501 U.S. 1 (1991); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969). See Brief for Petitioner, *supra* note 6, at 36–46.

99. *Id.* at 55.

100. *Id.*

101. *Id.* at 51–52.

the government stands to profit from the result.<sup>102</sup>

In *United States v. James Daniel Good Real Property (Good)*,<sup>103</sup> the Court cited a 1990 memorandum that the Attorney General distributed to all United States Attorneys admonishing them to significantly increase “the volume of forfeitures in order to meet the Department of Justice’s annual budget target.”<sup>104</sup> Since then, United States Attorneys have dutifully heeded that admonition and asset forfeiture funds have increased dramatically.<sup>105</sup> The possibility that a prosecutor’s judgment may be clouded by the prospect of institutional gain necessitates proper procedural safeguards.<sup>106</sup>

The Kaleys further argue that, although the grand jury serves a constitutional role as a “shield against . . . unfounded charges,” it should not be transformed into a sword to undercut the defendant’s ability to fight those charges.<sup>107</sup> Though formally independent, the grand jury often functions as the “handmaiden of the prosecution.”<sup>108</sup> There, the accused has no right to testify and the prosecution has no obligation to present exculpatory evidence.<sup>109</sup> Such a proceeding does not sufficiently mitigate the risk of erroneous deprivation of property needed to exercise the right to counsel of choice.<sup>110</sup>

### c. The Government’s Interest

The Kaleys argue that the Government’s interests are relatively minor. Presently, the Government has no property interest in the Kaleys’ CD or home; rather, it has an interest in the *potential* future divestment of that property.<sup>111</sup>

102. *James Daniel Good Real Property*, 510 U.S. at 56; *see also* Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (“[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.”).

103. 510 U.S. 43 (1993).

104. Brief for Petitioner, *supra* note 6, at 56 (citation omitted).

105. *Id.* (“In the 22 years from 1989 to 2010, an estimated \$12.6 billion in assets was seized by U.S. Attorneys in asset forfeiture cases.” (citing Brief of the Cato Institute as Amicus Curiae at 11 & nn.3–4, *United States v. Kaley*, 133 S. Ct. 1580 (2013) (No. 12-462))).

106. *Id.* *See also* *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980); *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (observing the “potential for abuse” and “corrupting incentives” of a system where the Department of Justice “conceives the jurisdiction and ground for seizures, . . . executes them, [and] also absorbs their proceeds”).

107. Brief for Petitioner, *supra* note 6, at 56.

108. *Id.* at 58 (quoting Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (Winter 2004)) (internal quotation marks omitted).

109. *Id.* at 56.

110. *Id.*

111. *Id.*

The Government's interest in not revealing its case prior to trial does not weigh heavily.<sup>112</sup> Even prior to trial, the Government must comply with significant disclosure requirements in discovery. This is an interest, then, of limited duration—it amounts to a question of *when* the Government will need to disclose its evidence or trial strategy.<sup>113</sup> In addition, prosecutors can always elect not to seek pre-conviction asset restraint in any case where the burden is too great.<sup>114</sup> The due process inquiry embodied in the *Mathews* factors thus weighs in favor of granting the Kaleys a pretrial hearing at which they may challenge the underlying indictment.<sup>115</sup>

### B. *The Government's Argument*

The Government's primary argument is syllogistic: The grand jury's indictment is conclusive as to probable cause; probable cause is sufficient to restrain assets, including assets needed to retain counsel of choice; thus, the Kaleys are not entitled to additional, post-indictment proceedings to challenge probable cause for restraining their assets.<sup>116</sup> The Government argues that, in analyzing this question, the court should employ the *Medina* test, not the *Mathews* test. Because “[t]he inviolability of the grand jury's determination of probable cause is itself a deeply rooted principle of American justice,” the Kaleys claim fails the *Medina* test.<sup>117</sup> In the alternative, the Government argues that the Kaleys overestimate their own interest while understating the Government's, and that they would not be entitled to any additional process even if the Court applied the *Mathews* test.<sup>118</sup>

#### 1. The Grand Jury Indictment is Dispositive of Probable Cause

The Government argues that, under long-standing precedent, the grand jury's finding of probable cause is not subject to attack based on evidentiary sufficiency, even with the added consideration of the right to counsel of choice.<sup>119</sup> A grand jury indictment places restrictions on a variety of liberty and property interests.<sup>120</sup> An

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112. *Id.* at 61–62.

113. *Id.*

114. *Id.*

115. *Id.* at 64.

116. Brief for the United States, *supra* note 81, at 16–17.

117. *Id.* at 13.

118. *Id.* at 14–15.

119. *Id.* at 20; *Costello v. United States*, 350 U.S. 359, 363 (1956).

120. Brief for the United States, *supra* note 81, at 20.

indicted defendant can be arrested, held pending trial, suspended from her job, or deprived of the right to possess firearms—all without any right to an adversarial hearing to contest probable cause.<sup>121</sup> If a grand jury indictment is sufficient to deprive a defendant of her *liberty* pending trial, it must be sufficient to deprive her of her *property*.<sup>122</sup>

Holding a separate hearing to reassess probable cause after a grand jury indictment could lead to anomalous and disruptive consequences.<sup>123</sup> A defendant could be told that, based on the grand jury indictment, probable cause that she committed the crime in question exists for the purpose of proceeding to trial, but that, based on the judge’s independent finding, probable cause that she committed the crime does not exist for the purpose of restraining her assets.<sup>124</sup> This “legal cognitive dissonance” would undermine the public’s confidence in criminal proceedings, destabilize the role of the grand jury, and “diminish the ‘high place [the grand jury has] held as an instrument of justice.’”<sup>125</sup>

## 2. Even Under the *Mathews* Balancing Test, the Kaleys are Not Entitled to Any Additional Process

### a. The Kaleys Overstate the Interest in Retaining Counsel of Choice

Asset forfeiture does not eviscerate the qualified right to counsel of choice; it merely places a limited burden on it.<sup>126</sup> The Court has acknowledged that this right is circumscribed by a variety of factors, including the ongoing legal duty to pay taxes.<sup>127</sup> In this case, the Kaleys funds are subject to asset forfeiture, which, like taxation, is a policy that promotes general public interests.<sup>128</sup> Asset forfeiture is not designed to interfere with the defendant’s relationship with any particular lawyer, though it may have that peripheral effect.<sup>129</sup>

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121. *Id.*

122. *Id.*

123. *Id.* at 33–34.

124. *Id.*

125. *Id.* at 34 (quoting *Costello v. United States*, 350 U.S. 359, 362 (1956)).

126. *Id.* at 38 (citing *Caplin & Drysdale*, 491 U.S. 617, 624–25 (1989)).

127. *Id.* at 39–40; *Caplin & Drysdale*, 491 U.S. at 624–26, 631.

128. Brief for the United States, *supra* note 81, at 39–40.

129. *Id.* at 40 (discussing *Monsanto III*, which held that “a pretrial restraining order” under § 853 “does not ‘arbitrarily’ interfere with a defendant’s ‘fair opportunity’ to retain counsel” (quoting *Monsanto III*, 491 U.S. 600, 616 (1989))).

Restraining potentially forfeitable assets, then, is not the type of arbitrary interference with the right to counsel of choice that the Court has prohibited.<sup>130</sup>

b. A Probable Cause Hearing Could Jeopardize Substantial Government Interests

Further, the Government has substantial interests in preserving potentially forfeitable assets for full recovery and in avoiding the unnecessary risk to witnesses, time, and expense of a hearing that would force the Government to prematurely reveal portions of its case.<sup>131</sup>

Criminal asset forfeiture serves three broad purposes: (1) ensuring that “crime does not pay,” thereby deterring crime, punishing criminal actors, and weakening the economic power of criminal organizations; (2) returning money to victims and to communities; and (3) providing financial support for law enforcement activities.<sup>132</sup> These important purposes give rise to “a strong governmental interest in obtaining full recovery of all forfeitable assets.”<sup>133</sup>

A pretrial evidentiary hearing would burden the Government significantly by diverting scarce prosecutorial resources and by forcing premature disclosure of its case and trial strategy.<sup>134</sup> Beyond putting the prosecution at a disadvantage, premature disclosure could put witnesses at risk.<sup>135</sup> These burdens could prompt the Government to relinquish forfeiture claims even when its concerns have nothing to do with the strength of the underlying case.<sup>136</sup> Consequently, defense counsel could invoke this procedure simply to gain a strategic advantage.<sup>137</sup>

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130. *Id.*

131. *Id.* at 40–41 (arguing that “premature disclosure could . . . jeopardize the safety of witnesses, including victims and cooperators[.]” particularly in cases involving drug trafficking, terrorism, organized crime and political corruption where the risk of witness tampering is most acute).

132. *Id.* at 41–42.

133. *Id.* at 41 (quoting *Caplin & Drysdale*, 491 U.S. 617, 631 (1989)).

134. *Id.* at 43.

135. *Id.* at 45.

136. *Id.* at 46–47.

137. *Id.*

c. The Additional Procedure Would Not Prevent Erroneous Deprivations of Assets

The Kaleys' interests might outweigh these burdens if there were reason to believe that the proposed proceeding would prevent the erroneous deprivations of assets.<sup>138</sup> In over two decades since the Second Circuit authorized these hearings, the Government is unaware of a single case in which a district court has disagreed with a grand jury determination of probable cause.<sup>139</sup> Because probable cause requires merely the "fair probability" that the defendant committed the crime, this is unsurprising.

Given the limited utility of these types of proceedings and the significant burdens that such proceedings impose on the prosecution, the Government argues that the *Mathews* test tips in its favor.

## VI. ANALYSIS

The Supreme Court is faced with a vexing, if not uncommon, dilemma in *Kaley*—the conflict of two longstanding principles of constitutional law. Both the right to counsel of choice and the sacrosanct nature of a grand jury indictment are fundamental to the American criminal justice system. As a result, the Court is likely to attempt to finesse the line by devising a solution that respects both principles. The case will probably split the Court, though not along traditional ideological lines.

### A. *Costello and the Inviolability of the Grand Jury*

Drawing on a long line of precedent, the Justices will likely emphasize that the grand jury is an important fixture of the American criminal justice system whose findings are rarely, if ever, subject to collateral attack. The primary divide among the Justices may be between those who are willing to allow a limited parallel inquiry into probable cause for the underlying charges and those who see such an inquiry as an unnecessary and impermissible challenge to the conclusive nature of the grand jury indictment. Even those Justices that favor a post-restraint hearing will operate under the principle that the grand jury's finding of probable cause is typically beyond reproach. No matter how much skepticism about grand juries

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138. *Id.* at 47.

139. *Id.* at 49.



pervades the modern academy,<sup>140</sup> it is nearly unthinkable that the Court would openly question a system that is enshrined in the Bill of Rights.<sup>141</sup> Even if the independence of the grand jury is a fiction, it is a fiction the judiciary has been content to accept for centuries.<sup>142</sup>

The Court will not permit a post-indictment hearing that would involve direct inquiry into the grand jury proceeding itself. The *Costello* line of cases clearly forecloses peering behind that curtain.<sup>143</sup> The Kaley's argue, however, for something different—an independent, adversarial hearing during which a judge would consider whether probable cause exists based on the evidence presented at *that* hearing before *that* judge.<sup>144</sup> Though other considerations might counsel against such a hearing, *Costello* and its progeny are readily distinguishable. *Costello*, *United States v. Williams*,<sup>145</sup> and *United States v. Calandra*<sup>146</sup> all involved attempts by defendants to pull back the curtain and directly challenge the validity of what transpired in the grand jury itself.<sup>147</sup> In addition, much of the logic underlying the *Costello* line's refusal to reassess matters considered by the grand jury breaks down with the additional consideration of the right to counsel of choice.

Because the deprivation of property needed to retain counsel of choice can affect the outcome of trial, *Kaley* animates concerns that were not present in *Costello* or its progeny. The Court in *Williams* cited Blackstone for the proposition that the procedural protections and rules of evidence deemed so fundamental at trial need not apply before the grand jury because “the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined.”<sup>148</sup> If the grand jury makes a mistake, the defendant

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140. See generally Kuckes, *supra* note 108, at 2.

141. See *United States v. Williams*, 504 U.S. 36, 47 (1992) (describing the grand jury as “a constitutional fixture in its own right” (citation omitted)).

142. *Id.* (“[T]he whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”).

143. *Id.* at 49 (“Over the years, we have received many requests to exercise supervision over the grand jury’s evidence-taking process, but we have refused them all . . .”).

144. Transcript of Oral Argument, *supra* note 3, at 12.

145. 504 U.S. 36 (1992).

146. 414 U.S. 338 (1974).

147. *Williams*, 504 U.S. at 51 (noting that the prosecutor is under no obligation to present exculpatory evidence to the grand jury); *Calandra*, 414 U.S. at 343 (permitting presentation of evidence to the grand jury that was obtained in violation of the Fifth Amendment); *Costello v. United States*, 350 U.S. 359, 362 (1962) (permitting presentation of hearsay to the grand jury).

148. *Williams*, 504 U.S. at 51 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 300

will have the opportunity to be vindicated at trial where all the familiar protections apply.<sup>149</sup> The purpose of trial is to get at the truth. As long as the trial is fair, all's well that ends well. This logic works when the question is merely about the admission of hearsay or the exclusion of exculpatory evidence before the grand jury. Whether the grand jury bases its indictment on hearsay will not change the outcome of the trial because hearsay evidence will not be admitted at the trial itself. The logic breaks down, however, when the grand jury's finding of probable cause is used not only to compel the defendant to stand trial, but also to restrict the defendant's right to counsel of choice. Interference with the right to counsel of choice can change the dynamic and ultimate outcome of the trial. To use Blackstone's terms, the grand jury's "inquiry and accusation" functions are being used to prejudice the "determination" function of trial. In light of these considerations, asset forfeiture requires additional procedural safeguards.

*B. To an Indicted Defendant, the Right to Counsel of Choice Is Uniquely Important*

For an indicted defendant, the right to counsel of choice could be the right on which all others depend. Though impossible to quantify, an experienced lawyer with time to devote to the case may have a greater ability to mount a full and complete defense, giving the defendant the greatest possible chance to avoid a complete loss of liberty or, in capital cases, even life. And, regardless of merit or skill, the Court has recognized the importance of a defendant's qualified right to *choose* her counsel.

Although other rights may be temporarily suspended pretrial, the defendant's right to counsel of choice is undermined if she cannot exercise the right while it matters. The *temporary* deprivation of the right to property will lead to an immediate deprivation of the right to counsel of choice, potentially increasing the likelihood that the defendant will suffer a *permanent* loss of liberty. This is simply not the case with other rights to which the Government seeks to draw analogies.<sup>150</sup> A defendant whose assets are restrained may not presently be able to, for example, make a pilgrimage she believes is

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(1769)).

149. See *id.* ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.").

150. See Transcript of Oral Argument, *supra* note 3, at 24.

necessary to practice her religion. But this temporary deprivation will not increase the probability she will be incarcerated, and thereby permanently deprived of her liberty.

Even so, the Court in *Caplin & Drysdale* leaned heavily on the logic that the right to counsel is just one right among many.<sup>151</sup> In this vein, Justice Scalia inquired of the Kaleys' counsel how it could be unconstitutional to restrain the defendant's *property* pending trial based on the grand jury indictment, when it is constitutional to restrain her *liberty* and hold her pending trial on that basis.<sup>152</sup> However, Chief Justice Roberts observed: "It's not that property is more valuable than liberty . . . . It's that the property can be used to hire a lawyer who can keep h[er] out of jail."<sup>153</sup> Robert's basic logic should win out on this point. There may be no "hierarchy among[] constitutional rights"<sup>154</sup> in an abstract sense, but there is little question that to a defendant awaiting trial, the right to counsel of choice is paramount.<sup>155</sup>

### C. Will it Make Any Difference?

Five circuit courts currently permit hearings of the type for which the Kaleys advocate,<sup>156</sup> but it is unclear how this fact will weigh with the Court. On the one hand, there is now empirical evidence that judges rarely, if ever, release assets based on finding at an independent hearing that there is no probable cause for the underlying charges.<sup>157</sup> On the other hand, five circuits have used this procedure and federal prosecutions have continued, seemingly unabated.<sup>158</sup> Perhaps both sides have exaggerated the likely effect of such a hearing.

Reports from the Second Circuit indicate that although judges are unlikely to order the release of assets at a post-indictment hearing, the looming possibility of a hearing strengthens a defendant's position in negotiations with the prosecution over the status of assets needed to retain counsel of choice. Since *Monsanto III*, district-level judges in the Second Circuit have presided over twenty-five hearings of the

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151. See *supra* text accompanying notes 60–62.

152. Transcript of Oral Argument, *supra* note 3, at 3–4.

153. *Id.* at 24–25.

154. *Caplin & Drysdale*, 491 U.S. 617, 628 (1989).

155. Transcript of Oral Argument, *supra* note 3, at 24.

156. See *supra* note 73. See also Transcript of Oral Argument, *supra* note 3, at 8.

157. Brief for the United States, *supra* note 81, at 15.

158. Petition for Writ of Certiorari, *supra* note 72, at 23.

type the Kaleys seek. None of the hearings resulted in a district court ruling that there was no probable cause for the indictment and that, as a result, assets needed to retain counsel of choice should be released.<sup>159</sup>

Chief Justice Roberts, however, took issue with the Government's claim that these statistics indicated that the hearings made no difference.<sup>160</sup> It is likely, he reasoned, that the possibility of the hearing discourages prosecutors from seeking forfeiture of assets that might be subject to release at such a hearing.<sup>161</sup> If probable cause is tenuous, the prosecutors may determine that the hearing is not worth the effort or risk. Likewise, counsel for the Kaleys pointed to an amicus brief detailing how the Second Circuit rule had resulted in several "courthouse steps" agreements between prosecutors and defense counsel on the issue of restraining assets needed to retain counsel.<sup>162</sup> As the Court has observed in the context of plea-bargaining, most of the work of modern federal criminal prosecution is done through informal negotiations.<sup>163</sup> That practical reality, however, in no way indicates that the formalized procedural rules are insignificant. Parties negotiate in the shadow of the law that they know will be invoked if negotiations break down. The Court will likely recognize, then, that statistics about the outcome of formalized proceedings tell only a sliver of the full story in this context, particularly with so little data available.

#### *D. Asset Forfeiture and Healthy Judicial Skepticism of Government Motives*

One reason that *Kaley* has received a moderate amount of media attention is that asset forfeiture has slowly crept into the public view in recent years and become increasingly controversial.<sup>164</sup> Most of the

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159. Transcript of Oral Argument, *supra* note 3, at 36.

160. *Id.* at 16.

161. *Id.* at 37.

162. *Id.* at 16; Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 8–9, *United States v. Kaley*, 133 S. Ct. 1580 (2013) (No. 12-464).

163. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“[P]lea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (quoting Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 *YALE L. J.* 1909, 1912 (1992)) (internal quotation marks omitted)).

164. See, e.g., MARIAN R. WILLIAMS ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (Institute for Justice Report 2010), available at <http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4>; Sarah Stillman, *Taken*, *THE NEW YORKER* (Aug. 12, 2013), [http://www.newyorker.com/reporting/2013/08/12/130812fa\\_fact\\_stillman](http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman).

attention has been on civil asset forfeiture, under which the government may seize property in the absence of an indictment or even an arrest.<sup>165</sup> Many of the same concerns about due process that animate concern about civil asset forfeiture—the presumption of innocence, perverse incentives, and abuse of the criminal justice system—also apply to freezing funds subject to criminal forfeiture prior to conviction. In cases like this one, there is the added concern that prosecutors may seek forfeiture to dismiss a particularly zealous or effective defense attorney.<sup>166</sup> In seeking the broadest possible scope for forfeiture, the prosecutor has nothing to lose and everything to gain.<sup>167</sup>

In *Good*, the Court noted the potential perverse incentives created by forfeiture, concluding that more searching judicial analysis is appropriate when the government has a direct pecuniary interest in the outcome of its law enforcement action.<sup>168</sup> Justice Breyer seemed to channel this skepticism about government motivations when he pressed the Assistant Solicitor General about the percentage of forfeiture funds actually allocated to victims of crime.<sup>169</sup> While insisting that paying restitution to victims is one of the government's central goals in seeking asset forfeiture, the Assistant Solicitor General conceded that about five to ten percent of forfeiture funds are likely allocated to this purpose.<sup>170</sup>

The sympathetic facts of *Kaley* may also help to elicit this more searching judicial analysis. After all, freezing assets may make sense in the context of insider trading, racketeering, and organized crime. It makes less sense for couples that sell—or allegedly steal—medical devices.

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165. See, e.g., Stillman, *supra* note 164.

166. See Brief for Cato Institute as Amicus Curiae, *supra* note 105, at 13–14; *Kaley I*, 579 F.3d 1246, 1266 (11th Cir. 2009) (Tjoflat, J., concurring) (“A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel.”).

167. *Kaley I*, 579 F.3d at 1266.

168. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55–56 (1993).

169. Transcript of Oral Argument, *supra* note 3, at 42–43.

170. *Id.* at 43.

### E. *Likely Disposition*

It is likely that a narrowly divided court will hold that defendants in the Kaleys' position are entitled to a pretrial, post-restraint adversarial hearing at which they may contest the issue of probable cause for the underlying indictment.

A slight majority of the Court, including Chief Justice Roberts and Justice Breyer, will reason, in line with the Second Circuit's opinion in *Monsanto IV*, that such a hearing would satisfy the due process rights of a defendant who needs restrained assets to retain counsel of choice. Such a hearing would not conflict with *Costello* because it would not require pulling back the curtain on grand jury proceedings. At such a hearing, the government might choose to present different evidence than it did at the grand jury proceeding, and the defense will be able to present exculpatory evidence. The hearing, then, would take place at a different time, with a different purpose, and with different evidence presented. If the judge ultimately allows the release of funds, she would do so on the grounds that the evidence presented *at that hearing* did not establish probable cause sufficient to justify continued asset restraint. There would be no inquiry into whether the grand jury, in light of the evidence before the grand jury, properly found probable cause. The grand jury's indictment, then, would still be a perfectly valid instrument for compelling the defendant to stand trial on the charges alleged.

A second group, perhaps including Justices Scalia and Ginsburg, will likely dissent from the holding that due process requires a post-restraint, pretrial adversarial hearing under the circumstances. This group could rely on the history of the grand jury's role in American criminal law and the *Costello* line of cases. They may argue that the grand jury's finding of probable cause has long been considered sufficient to deprive the defendant of a variety of rights pending trial. They also may warn that exposing the grand jury to criticism or contradiction, even indirectly, is opening a proverbial can of worms. Further, they may argue that denying defendants an opportunity to challenge probable cause at a hearing does not violate due process by drawing from the Court's opinion in *Medina*.<sup>171</sup> If the inviolability of

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171. See *id.* at 9 (Scalia, J., seemingly channeling *Medina* in suggesting that "it's hard to say that [the ex-parte nature of the grand jury proceeding] violates . . . our concept of fundamental fairness"). Because *Medina* is arguably limited to state criminal procedure cases in which federalism concerns are implicated, this dissenting group may draw upon the language of *Medina*, without holding that *Medina* controls.

the grand jury's determination of probable cause is itself deeply rooted in American traditions and a sense of justice, there is no way that denying a defendant the opportunity to challenge the grand jury's probable cause determination violates that sense of justice. Finally, the dissenting Justices may emphasize the anomalies and further due process challenges which a ruling for the Kaleys would invite.<sup>172</sup>

As an unlikely alternative, the Court could decide to overrule *Caplin & Drysdale* entirely and hold that asset forfeiture simply cannot constitutionally reach funds a defendant needs to retain counsel of choice. Justice Scalia even offered some off-the-cuff praise for this approach, given its simplicity and clarity.<sup>173</sup> This approach would have several advantages. First, it would be easy to administer. Second, it would avoid entirely the morass of second-guessing the grand jury. And third, it would provide the most vigorous protection for the right to counsel of choice. With some of the blunt assets-are-guilty-until-proven-innocent logic of *Caplin & Drysdale* eliminated, more defendants could retain counsel with their own funds, easing pressure on an overburdened public defender system. This approach, however, would broadly contravene the intent of Congress in passing 21 U.S.C. § 853 and could inflate the right to counsel of choice beyond its "qualified" status. Even libertarian organizations like the Cato Institute and the Institute for Justice did not dare dream so big as to argue for overruling *Caplin & Drysdale* in their briefs.<sup>174</sup> Thus, this approach is unlikely to garner a single vote.

## VII. CONCLUSION

The Supreme Court will likely find a special carve-out of the broader asset forfeiture regime in *Kaley*. *Kaley's* most lasting impact, however, may be in raising awareness about forfeiture policies that will then prompt action in Congress. Congress is where clean, equitable solutions could be crafted to allow defendants controlled

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172. Transcript of Oral Argument, *supra* note 3, at 9 (Ginsburg, J. noting the anomaly of allowing a judge to preside over a trial after he has determined that there is no probable cause for the underlying charges); *id.* at 14 (Scalia, J. stating "the next case we have, if we agree with you, will be somebody saying due process does not allow you to proceed with a trial when it has been found by an impartial judge that there is no probable cause").

173. *Id.* at 14.

174. See generally Brief of Cato Institute as Amicus Curiae, *supra* note 105; Brief of the Institute for Justice as Amicus Curiae, *United States v. Kaley*, 133 S. Ct. 1580 (2013) (No. 12-462).

access to personal funds needed to retain counsel. Congress has previously acted to reform civil asset forfeiture, and could now act to reform the intersection of forfeiture and the right to counsel of choice.

Federal criminal defendants must confront the United States government, the most powerful organization in history.<sup>175</sup> In this battle of Goliath v. David, is it too much to ask that David be allowed to keep his own sling?

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175. Ilya Shapiro et al., *Legal Briefs: Kaley v. United States*, CATO INST. (July 1, 2013), <http://www.cato.org/publications/legal-briefs/kaley-v-united-states>.