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Argument preview: Court to consider scope of challenges to asset freezes

Coverage of the Supreme Court's docket tends to focus on the blockbusters, and this month is no exception: last week the Court heard oral argument in *McCutcheon v. Federal Election Commission*, the challenge to the aggregate caps on campaign contributions, and today in *Schuette v. Coalition to Defend Affirmative Action* it considered whether the Constitution allows a state to prohibit its public universities from considering race in their admissions process. But this emphasis on the hot-button issues can mean that other, often very consequential, cases can fly under the radar.

Kaley v. United States is one such case. The issue before the Court arises from the (seemingly increasingly) common practice of the government freezing the assets of an indicted criminal defendant, who needs the assets to hire a lawyer. The question is whether the defendant can challenge the grand jury's determination that there is probable cause to indict him, when the indictment is the basis for the freeze. At first blush, that question sounds fairly dry. But criminal forfeitures are a key part of the federal government's efforts to prosecute crime – including because, by limiting a defendant's ability to fight the charges against him, the pretrial restraining orders enhance the government's ability to get either a guilty plea or a guilty verdict. As such, a pro-defendant ruling in the case could shift the balance of power in many criminal proceedings back away from the federal government. Underscoring the significance of the case is the fact that Michael Dreeben, the Deputy Solicitor General with primary responsibility for criminal cases at the Court, will argue on behalf of the United States.

Background

When a federal criminal indictment is filed, the district court can enter a restraining order (*i.e.*, an asset freeze) at the government's request if the indictment both includes an offense for which criminal forfeiture may be imposed and also specifies that, if the defendant is convicted, "the property . . . would . . . be subject to [criminal] forfeiture." Nothing in the statute suggests that a defendant whose assets are frozen is entitled to a hearing to challenge the restraining order. But the Senate Report that accompanied the law indicates that, if a hearing is held, the trial court should not consider "challenges to the validity of the indictment." As long as there is probable cause for the indictment, the Report explained, that is "determinative" with regard to the merits of the forfeiture issue.

The petitioners in the case (the criminal defendants below) are a married couple, Kerri and Brian Kaley. When the Kaleys learned in 2005 that they were the targets of a federal grand jury investigation, they each retained attorneys, who told them that they collectively would charge roughly a half-million dollars for their services through a trial. Two years later, the Kaleys were indicted (along with a third co-defendant) on charges stemming from a plan to steal and then re-sell prescription medical devices. Consistent with the notice in the indictment against the Kaleys, the district court entered a pretrial restraining order that prohibited them from selling or otherwise transferring a certificate of deposit and their house. The Kaleys then challenged the order, arguing that it precluded them from retaining their choice of counsel. The district court offered them a hearing, but it declined to consider the only issue that the Kaleys wanted to raise – whether there was probable cause to support their indictment, and therefore the restraining order – and the court of appeals agreed. The Kaleys then filed a petition for certiorari, which the Court granted earlier this year.

Arguments

The Kaleys' brief on the merits discusses the facts and procedural history of the case at some length, no doubt attempting to show the weakness of the underlying charges against them. The crux of the Kaleys' legal argument on the question that the Supreme Court agreed to hear is that the Constitution gives them a right to a pretrial hearing; if the government cannot show at that hearing that there is a "substantial probability" that it will succeed in having the assets at issue forfeited, then the assets needed by the defendant for his defense must be released.

This result, they contend, flows from the Court's landmark decision in *Mathews v. Eldridge*. Under that case, a court considering a due process challenge to a government procedure must balance "the private interest that will be affected by the official action"; the risk that an individual will erroneously be deprived of that interest and whether there are any alternative safeguards to minimize that risk; and the government's interest. All of these factors, the Kaleys argue, weigh in favor of providing defendants with a hearing to challenge probable cause when the right to counsel of choice hangs in the balance. First, their private interest in maintaining control over their own home is strong, while putting off the probable cause hearing "will completely eviscerate their right to counsel of choice." Second, and by contrast, the risk of erroneous deprivation is high given the government's substantial interest in obtaining the proceeds of the forfeitures and the control that government prosecutors wield over the grand

jury process. Third, the government's only real interest in the proceedings is "punitive – preserving the asset for forfeiture upon conviction."

In its brief on the merits, the United States starts by reiterating that, under the Court's decision in *United States v. Monsanto*, a court may enter a pretrial order freezing a defendant's assets as long as there is probable cause to believe that the assets at issue are forfeitable; this is true even when the defendant contends that he needs to be able to use those assets to hire an attorney. Not surprisingly, the government also disputes which test the Court should use to determine whether defendants are entitled to a probable cause hearing: although it contends that it would prevail even under the *Mathews* test, it maintains that standard does not apply because the Kaleys' challenge goes beyond property rights to challenge the grand jury's probable cause determination, which is not reviewable until trial.

Instead, the government asserts, the relevant test comes from *Medina v. California*, which applies to due process challenges to rules of criminal procedure and enquires whether the rule at issue "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." And the Kaleys cannot meet these criteria: the grand jury has long been a "deeply rooted principle of American justice," and depriving them of a hearing (and, thus, potentially access to their assets) cannot offend "fundamental justice" when an individual who is being held in police custody based on an indictment has no right to challenge the grand jury's finding of probable cause. The government assigns no weight to the fact that the Kaleys seek access to their assets to allow them to retain their counsel of choice, observing that, if a hearing to challenge probable cause were allowed in cases involving criminal forfeitures, it would "create the anomalous prospect of continuing to a criminal trial based on the grand jury's finding of probable cause while releasing the defendant's assets based on a finding that probable cause does not exist."

The *amicus* briefs filed in support of the Kaleys reflect an unusual coalition – defense attorneys, who obviously have an interest in being paid by their clients, together with libertarian groups, such as the Gun Owners Foundation and the Institute for Justice, who resent the significant expansion of asset forfeiture and the power that the government wields in that process. Along those same lines, this could well be a case in which the Justices break from what we usually think of as their traditional ideological roles. For example, Justice Scalia, who in 2006 joined the Court's more liberal bloc in an opinion that was protective of a defendant's right to his counsel of choice, could well be skeptical of the government's position, making his one of the pivotal votes in the case.