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Argument analysis: Asset forfeiture case is close call

When veteran advocate Michael Dreeben appears before the Court in a criminal case on behalf of the United States, he is there because the case is exceptionally important to, or hard for, the government. This morning in *Kaley v. United States* it was both. At issue in the case is whether an indicted criminal defendant whose assets have been frozen can challenge the grand jury's determination that there is probable cause to indict him, when the government has relied on that indictment to freeze the funds but he contends that he needs the assets to hire his counsel of choice to defend him. As the Justices peppered both Dreeben and his opponent, Howard Srebnick, with tough questions, the case looks to be a close one. Several Justices seemed willing to agree that any potential burdens imposed on the government by a ruling in the defendant's favor are outweighed by the significant costs to the defendant if he is unable to hire his desired attorney. But it was unclear whether a majority would reach that conclusion.

Representing Kerri and Brian Kaley, attorney Howard Srebnick began by emphasizing that, when the federal government freezes the assets of a criminal defendant, the defendant has the right to be heard, before his trial, at a meaningful time and in a meaningful manner so that he can have access to his assets to pay his attorney. The Justices however, noted that a grand jury's finding of probable cause has long been sacrosanct, even with regard to arguably more onerous burdens such as whether a defendant can be detained pending trial. Moreover, as the government suggested in its brief, the defendant's position would lead to an

anomaly: notwithstanding the grand jury's determination that there is probable cause to prosecute a defendant, a judge could still conclude that there is no probable cause to support the indictment. Knowing that, Justice Ginsburg queried, how can the judge conduct the trial?
Srebnick also faced questions about the more tangible implications of his proposed rule. Justice Alito – himself a former federal prosecutor – was clearly concerned about the additional efforts and risks that a pretrial hearing would impose, asking Srebnick whether a defendant could, for example, subpoena witnesses or require the government to disclose the names of its witnesses, while Justice Ginsburg expressed concern that, if the assets were released, the defendant could spend them on something else besides his defense. And although Srebnick sought to reassure the Court by noting that some circuits have allowed such hearings for twenty-five years without any significant problems, that contention then led Justice Kagan to observe that virtually all of those hearings have resulted in a ruling for the government. If the defendant's prospects for success are so slim, she wondered, "what are we going through all this rigamorole for?"

Deputy Solicitor General Michael Dreeben found an equally skeptical audience during his half-hour at the lectern. He began by emphasizing (as some Justices had during Srebnick's argument time) that, "for over two hundred years, the grand jury's determination of probable cause is conclusive," and that such a determination extends not only to the trial but also to other restrictions such as a defendant's liberty or his ability to own firearms. But the Chief Justice quickly suggested that this case might be different because it went to the Kaleys' ability to hire their counsel of choice to keep them out of jail. Justice Breyer echoed that sentiment later in the argument, noting that the Kaleys' case is "pretty complicated" and that they can't fight the charges "without a good lawyer." And Justice Scalia chimed in, asking Dreeben why, when the government is freezing the assets that a defendant needs to hire his counsel of choice, courts can't require more than probable cause.

Several Justices also appeared unconvinced by the government's assertion that the costs of the additional hearing to the government dwarfed the benefits to the defendant. Addressing the statistics indicating that a defendant's prospects of prevailing are virtually non-existent, the Chief Justice countered that "it may be that the government believes it isn't worth it to go through" with the hearing in some cases, rendering Dreeben's proffered statistics "phony." The Chief Justice later described the issue before the Court as a "side show": although the government wants to freeze the defendant's assets so that they can be forfeited if the defendant is ultimately convicted, he posited that "it's not like the whole case falls apart." Moreover, although Dreeben asserted that the government needed to freeze the assets so that they can be used to pay restitution, Roberts countered that "there are no victims in this case," and Breyer later estimated

(and Dreeben did not disagree) that, at most, five to ten percent of forfeited assets ultimately go to the victims. Justice Anthony Kennedy focused on the fact that courts already hold pretrial detention hearings, at which judges must consider the weight of the evidence. If courts are already making those determinations in the detention context, he suggested, why can't they do them with regard to asset freezes?

The Kaleys' most likely path to victory may come from a suggestion made by Justice Breyer, who had pressed Dreeben (unsatisfactorily, in Breyer's view) to provide concrete examples of serious problems stemming from pretrial hearings in the circuits that allow them. Breyer raised the possibility of adopting a narrow exception to the prohibition on pretrial hearings that would give the trial judge discretionary authority to hold a hearing but at the same time allow him to impose conditions that would prevent the defendant from conducting the kind of "fishing expedition" that Dreeben and Justice Alito decried. Will he be able to get five votes for that rule? We'll know by the end of June.