

Supreme Court to consider fight over frozen assets



In a Monday, June 17, 2013, photo attorneys Richard Strafer, left, and Howard Srebnick are shown in Miami. The two attorneys will represent Kerri and Brian Kaley of New York, during an appeal before the U.S. Supreme Court to determine whether the government's case against the couple in a medical devices theft case, is strong enough to justify freezing most of their assets and denying them the right to hire the attorney of their choice. (AP Photo/Wilfredo Lee)

AP Associated Press

CURT ANDERSON June 30, 2013

MIAMI (AP) — When Kerri and Brian Kaley came under federal investigation for allegedly stealing medical devices, they took out a \$500,000 line of credit on their New York house to hire lawyers. Yet after their indictment in 2007, prosecutors sought to prevent the Kaleys from using the money because the government intended to seize the house.

The Kaleys insisted they were legally reselling the medical items. At the very least, they wanted a hearing to determine whether the government's case was strong enough to justify freezing most of their assets and denying them the right to hire the attorney of their choice.

It's an issue federal courts around the country are deeply divided over. Now, the U.S. Supreme Court has a chance to settle the matter after agreeing earlier this year to hear the Kaleys' appeal.

The case involves both the Fifth Amendment's due process clause and the Sixth Amendment's right to counsel, and could potentially affect thousands of cases each year in which the Justice Department seeks to seize defendants' property. Such cases typically

range from alleged drug dealers and Mafia figures to Ponzi schemers and Medicare fraudsters, but also could ensnare people who are wrongly accused.

To property rights advocates, the Kaleys' case is an opportunity for the court to tip the scales of justice slightly more in the favor of defendants who are routinely deprived of their assets without being convicted. The ruling would not directly impact state courts, which operate under their own forfeiture laws, but lawyers could cite the Supreme Court decision to help a client.

"People who are indicted on criminal charges in the United States are presumed innocent," said Larry Salzman, an attorney with the Institute for Justice, an Alexandria, Va.-based nonprofit law firm involved in forfeiture and property seizure cases nationwide. "Seizing their assets on the basis of an indictment alone turns the presumption of innocence on its head. It follows the rule of punishment first, evidence later."

Prosecutors, however, say a grand jury's decision to bring criminal charges shows the case has enough merit to enable them to freeze assets that may have been obtained through illegal activity.

In fiscal 2012, more than \$4.2 billion was deposited in the Justice Department's asset forfeiture fund. That compares with about \$1.6 billion in each of the two previous years.

Prosecutors say adding a hearing to allow a defendant to attack the validity of the grand jury's indictment would force prosecutors to prematurely lay out their case and might even endanger witnesses.

"No reason exists to think that an extra layer of procedure on that score — one that could be undertaken only at significant cost — would be beneficial, much less that it is constitutionally mandated," the U.S. solicitor general's office wrote in Supreme Court papers.

The office, which represents the administration of President Barack Obama before the Supreme Court, also asked the justices to settle the question nationally so there would be a single standard in federal courts.

The Kaleys, who live in Cold Spring Harbor, N.Y., have been battling the government for more than six years. They declined an interview request through their Miami-based attorneys, Howard Srebnick and Richard Strafer.

It all started when the Food and Drug Administration began an investigation in 2005 into what appeared to be a highly lucrative but unregulated market of resale of various medical devices, from hardware to sutures. The probe led investigators to a Delray Beach middleman in South Florida who was buying the devices from the Kaleys and others and then selling them to other medical providers. He did some \$10 million in business in one year.

At the time, Kerri Kaley was a sales representative for Ethicon Endosurgery, a subsidiary of medical supplies giant Johnson & Johnson. She and her lawyers insist that she was legally allowed to resell the medical items she was given because Johnson & Johnson would not accept them as returns after a certain date and because hospitals wanted to clear out space for newer products. Hospitals also traded the older items for newer, free devices from the sales force.

Another sales representative, Jennifer Gruenstrass, was charged along with the Kaleys but went to trial separately. She was acquitted in November 2007. Gruenstrass's assets were not frozen before the trial.

"There is a vibrant trading culture that exists between reps and between hospitals," Gruenstrass' attorney Robert Casale said. "Nobody is reporting a theft at any of the hospitals. Nobody at Ethicon is saying, 'We were missing stuff.' No theft."

The prosecutor, Assistant U.S. Attorney Thomas Watts-Fitzgerald, said there was evidence the Kaleys and Gruenstrass knew what they were doing was illegal. For example, he said, Brian Kaley set up two shell construction businesses that actually acted as only conduits for the checks his wife was getting through the device sales. And, he said, the Kaleys hastily cleaned out their garage of the devices when they were first contacted by the FDA.

"Those were stolen devices," Watts-Fitzgerald said. "She had no right, title and interest in any of the equipment they were selling."

Still, the acquittal of Gruenstrass could indicate the Kaleys have a point in questioning the strength of the federal case. What they want from the Supreme Court is a chance to show that weakness to a federal judge so they can win access to the money they need to pay the lawyers they choose.

The \$500,000 line of credit the Kaleys took out on their house was based on their lawyers' estimate of their fees and expenses to take the case all the way through trial.

The 11th U.S. Circuit Court of Appeals, which handles cases from South Florida, said the Kaleys were only entitled to a hearing on whether their frozen assets were connected to the alleged crimes. Three other circuits have similar standards, while five others do require prosecutors to show at least some evidence of guilt.

The Kaleys face an eight-count indictment on conspiracy, transportation of stolen property, money laundering and obstruction of justice charges that carry maximum combined penalties of 85 years in prison. If convicted, they would likely lose their New York house and the \$500,000 line of credit.

"With so much at stake in a criminal case, we believe due process requires a pretrial hearing to determine the propriety of the restraint of assets needed to retain counsel of choice at trial," said Srebnick, one of the Kaley attorneys.

The criminal prosecution is on hold in federal court in West Palm Beach until the Supreme Court makes its decision. Oral arguments are not expected until October, with a ruling likely in late 2013 or early 2014.