

Case Pits Freezing Assets Against Hiring Lawyers



Gabriella Demczuk/The New York Times

Outside the Supreme Court on Wednesday. Justices heard a case involving defendants' rights to use their own money for counsel.

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WASHINGTON — Kerri and Brian Kaley, a New York couple, were unable to hire a lawyer to defend themselves against serious criminal charges because the government had frozen their assets. That seemed to trouble several justices at a Supreme Court argument on Wednesday.

But it was not clear that a majority of the justices could agree on a way to address the couple's situation without cutting back on earlier decisions or intruding into what a government lawyer insisted was the job of the grand jury.

The Kaleys were accused of participating in a scheme to obtain and sell prescription medical devices. They said they were likely to win at trial because no one had been harmed by their conduct, a point two justices seemed to find plausible.

The couple's lawyer, Howard Srebnick, said the case posed a fundamental issue.

“I ask that this court not rule that the government can beggar a defendant into submission,” Mr. Srebnick said. “I ask this court not to rule that the government can impoverish someone without giving them a chance to be heard through their counsel of choice.”

But the relief the Kaleys actually sought was substantially narrower. They did not challenge the general framework established by a pair of 1989 Supreme Court decisions, which ruled that freezing assets before a criminal trial was permissible, even if it frustrated the defendant’s ability to hire a lawyer, so long as there was probable cause that a crime had been committed and the assets were linked to the offenses described in the indictment.

All the Kaleys were seeking was a hearing at which they could try to show that they were entitled to use their money to defend themselves because the charges against them were flawed.

Justice Antonin Scalia said he was uncomfortable with the modest step of allowing a hearing but might be open to a bolder one.

“To save your client, I would prefer a rule that says you cannot, even with a grand jury indictment, prevent the defendant from using funds that are in his possession to hire counsel,” he said. “Don’t need a hearing.”

Later in the argument, he proposed another solution. “I don’t like casting into doubt the judgment of the grand jury,” he said, “but why couldn’t we say that when you’re taking away funds that are needed for hiring a lawyer for your defense, you need something more than probable cause?” he asked. “Couldn’t we make that up?”

Michael R. Dreeben, a deputy United States solicitor general, responded that earlier decisions by the court had ruled out that approach.

Some justices tried to assess the practical consequences of allowing the requested hearings. Justice Elena Kagan said that defendants had never prevailed in any of 25 such hearings conducted in a part of the country that allowed them.

“So what are we going through all this rigamarole for,” she asked, “for the prospect of, you know, coming out the same way in the end?”

Chief Justice John G. Roberts Jr., who emerged as the Kaleys’ primary defender, said those statistics were only part of the picture.

“Who knows how many hundreds of times the government would have sought to seize the assets but didn’t because they knew they would have to justify it at a hearing?” he asked.

Mr. Dreeben said that grand jury findings of probable cause often serve as a basis for jailing a defendant until trial. It followed, he said, that such findings may also serve as the basis for freezing tainted money.

Chief Justice Roberts rejected the comparison. “It’s not that property is more valuable than liberty or anything like that,” he said. “It’s that the property can be used to hire a lawyer who can keep him out of jail for the next 30 years. So the parallels don’t strike me as useful.”

Mr. Dreeben said that requiring hearings could allow defendants to have an early look at the government’s evidence, put prosecution witnesses at risk and frustrate efforts to pay restitution to crime victims.

Chief Justice Roberts jumped on the last point. A hearing, he said, could also establish whether there had been any victims, a question in dispute in the case, *Kaley v. United States*, No. 12-464.