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How The Government Wrongfully Freezes Assets

By Jackie Perczek

United States v. Kaley, 667 F.3d 1316 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 1580 (2013)

The government often freezes assets in criminal cases as an offensive weapon, leaving the defendant without the means to retain private counsel who can challenge the charges and fight the government at trial. Freezing assets pre-trial destroys the defendant's ability to fund a quality and meaningful defense and leaves the defendant without the resources to battle against the federal government and its law enforcement agencies. This government strategy is particularly insidious when the defendant is charged based on a theory of prosecution that the courts have held is not a crime.

In its upcoming term, the U.S. Supreme Court will consider whether federal prosecutors in a white-collar case can freeze a defendant's assets prior to trial when the defendant is indicted for conduct that is not a crime. The answer to this outrageous question seems obvious to everyone except the United States government.

According to the Department of Justice, once a defendant is indicted for a federal offense, assets tied to the charged conduct can be frozen without any further evidence or hearing prior to trial because the indictment itself establishes probable cause that a crime was committed. The government's rhetoric is that the grand jury is an independent body (rather than an arm of the government or the police) that stands between the accused and his accuser and shields citizens from unfounded or abusive criminal charges. Thus, the government contends, once an indictment is returned, the accused should have no opportunity to challenge it's evidentiary basis to contest an order freezing his assets – even if the indictment is based on a theory of prosecution that is unequivocally not a crime, and even if the freeze order leaves the defendant without funds to retain counsel.

The government's argument is a fallacy. A grand jury decidedly does not stand between an innocent person and federal criminal charges. In past decades, we have seen federal prosecutors stretch the mail and wire fraud statutes to freeze assets, seize money, and prosecute conduct that is simply not a crime. Many defendants have been indicted by a grand jury – supposedly the bulwark against oppression – and have served years in prison (for some, entire sentences) for conduct that the Supreme Court later ruled was not a crime.[1] Yet prosecutors continue to overreach by using the grand jury to expand the white-collar criminal statutes into the civil or purely administrative arenas.

The grand jury is not a shield against prosecutorial abuses, and it is certainly not a measure of protection against theories of prosecution that do not establish a crime. The grand jury is a tool of the prosecutor, championed and romanticized by the Department of Justice precisely because the grand jury is captive to the prosecutor – he dominates the entire proceedings. The prosecutor decides what evidence the grand jury will consider. He determines what witnesses to call and what testimony to elicit from them. He decides when to issue subpoenas and for what, and documents produced pursuant to those subpoenas are delivered to the prosecutor, not the grand jurors. The prosecutor reviews the documents and he decides what to show the grand jury. Whatever "independence" the grand jury has, it is certainly not independence to protect the defendant, since the defendant has virtually no protections in this setting.

At the urging of the Department of Justice, the Supreme Court has held that a grand jury can indict based on inadmissible evidence, evidence obtained illegally, evidence obtained in violation of the right against compelled self-incrimination, evidence obtained in an illegal search and seizure, and evidence that is irrelevant, inadequate, or incompetent. An indictment obtained based exclusively on hearsay evidence is perfectly legitimate. The prosecutor does not have to call any victims, eyewitnesses, or anyone with personal knowledge of the matters under investigation. The witness can be a government agent who has no personal knowledge of the substance of his testimony or of the facts he is purportedly testifying about. The grand jury can indict based on tips and rumors; the law does not require that the evidence presented to the grand jury have any indicia of reliability.

A person under investigation has no right to appear before the grand jury or testify on his own behalf. He has no right to offer evidence, present witnesses, or even show that he is innocent. Indeed, an indictment is valid even if the prosecutor chooses not to tell the grand jury about substantially exculpatory evidence in his possession or evidence that clearly negates guilt.

No defense lawyer and no judge are present during grand jury proceedings. A judge makes no evidentiary rulings, does not decide what the correct law is, and makes no rulings on what legal instructions the grand jury should get. In fact, the prosecutor does not have to instruct the grand jury on the law or the elements of the crimes the grand jury ultimately indicts on.

Finally, if one grand jury decides not to indict, the prosecutor can empanel a new grand jury (it only takes 23 people), make his presentation again, and seek an indictment from the new group. And if that does not work, he can try again with another grand jury. He does not need any compelling reason for doing this and need not seek approval from the court.

Clearly, the grand jury is a tool of the prosecutor. He uses it to prepare his case for trial, to gather evidence and develop witnesses, and, ultimately, to scare and intimidate defendants into plea bargaining. The prosecutor controls the entire grand jury proceedings. He answers all of the grand jury's questions. He prepares the indictment and he decides what offenses to charge. He decides when the grand jury has heard enough evidence and when it is time for them to vote. Grand jurors simply sit through the testimony and then sign the indictment that the prosecutor has prepared. And, because grand jury proceedings are completely secret, the defendant is not entitled to transcripts or evidence of what transpired before the grand jury. The grand jury has no accountability to the defendant or even to the court. Everything that transpired before the grand jury will remain secret to everyone — except the prosecutor.

That a grand jury has returned an indictment in a white-collar case offers no protection to defendants charged under questionable or plainly wrong theories of prosecution. This is particularly true when the government freezes assets before trial and the defendant is left without the ability to retain counsel of choice to fight the government and its flawed theories of prosecution. The government obviously has a financial motive to pursue questionable white-collar cases, and to continue to expand the reach of criminal forfeiture statutes into areas that should remain purely civil or regulatory in nature. Under the government's theory that an indictment is sufficient to freeze assets and no additional evidence or hearing is necessary, a defendant charged with conduct that is not a crime would have to suffer the overwhelming toll of being arrested, prosecuted, and tried before he can challenge the order that freezes his assets and impedes his ability to fight against the government's overreaching. Due process and fundamental fairness require that at the very least, the government be called upon to offer evidence establishing that a crime was in fact committed before the government is allowed the extraordinary right of freezing the assets of a person who is presumed innocent and who has not been convicted of committing any crimes.

1 *Skilling v. United States*, 130 S. Ct. 2896 (2010) (holding that government's theory of prosecution under fraud statute not a crime); *Cleveland v. United States*, 531 U.S. 12 (2000) (same); *McNally v. United States*, 483 U.S. 350 (1987) (same). An excellent article on how the grand jury fails to protect the accused is Niki Kickes, *The Useful, Dangerous Fiction Of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1 (2004).

Note: Perczek's partner, Howerd Srebnick, along with co-counsel Richard Strafer, represent the Kaleys and will be arguing the case before the U.S. Supreme Court this October.

Jackie Perczek is a partner at Black, Srebnick, Kornspan & Stumpf, P.A. Her practice focuses exclusively on the defense of criminal cases as co-counsel with Roy Black. In the 16 years she has been with Black, Perczek has defended a variety of massive white collar fraud cases, as well as cases involving banking, UBS-related cases, public corruption, bribery, extortion, gambling, telemarketing, prescription drugs, narcotics, immigration and employment offenses, and the Internet and sex crimes. Perczek can be reached at 201 S. Biscayne Blvd., Suite 1300 Miami, Florida 33131 (305) 371-6421 www.royblack.com