

**CONSTITUTIONAL LAW – CRIMINAL
FORFEITURE – ASSET RESTRAINTS
SUPPORTED BY A JURY’S PROBABLE
CAUSE DETERMINATION ARE NOT
JUDICIALLY REVIEWABLE REGARDLESS
OF THE DEFENDANT’S INABILITY TO
RETAIN CHOSEN COUNSEL**

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I. FACTS

Kerri Kaley worked as a sales representative for a company that sold prescription medical devices.¹ In 2005, a grand jury for the federal Southern District of Florida investigated Kaley and her husband, Brian Kaley, for allegedly selling stolen medical devices for profit.² Preparing for possible charges, the Kaleys

¹ *Kaley v. United States*, 134 S. Ct. 1090, 1095 (2014). Kerri Kaley’s company was a subsidiary of Johnson & Johnson. *Id.*

² *Id.* at 1105 (Roberts, C.J., dissenting). The Kaleys argued throughout the proceedings that the medical devices were outdated or unwanted surplus inventory, which they could legally take and market to others. *Id.* at 1095 (majority opinion).

secured an equity line of credit on their home to obtain a \$500,000 deposit for legal services.³

In 2007, a grand jury indicted the Kaleys for the alleged criminal conspiracy.⁴ A superseding version of the indictment also accused the Kaleys, along with other sales representatives, of transporting the stolen devices across state lines and laundering the profits of their enterprise.⁵ After obtaining the indictment, the Government sought a restraining order under 21 U.S.C. § 853(a) to freeze any of the Kaleys' assets involved in the purported offenses.⁶ These assets included the \$500,000 certificate of deposit the Kaleys intended to use for legal representation.⁷

The Kaleys moved to vacate the asset restraint, but the District Court denied an evidentiary hearing and confirmed the order.⁸ However, on interlocutory appeal, the Eleventh Circuit's holding caused the District Court to allow the Kaleys an evidentiary hearing only to the issue of which assets were traceable to the alleged conduct.⁹ The Kaleys informed the court that they did not contest this issue, but only wanted to demonstrate that there was no probable cause to believe their conduct constituted a crime.¹⁰ The Kaleys took another appeal only for the Eleventh Circuit to uphold the restraint.¹¹ The Circuit

³ *Id.* at 1106 (Roberts, C.J., dissenting). Almost immediately after learning of the investigation, the Kaleys acquired an attorney who prepared their defense over the course of two years. *Id.* at 1105.

⁴ *Id.* at 1106.

⁵ *Id.* at 1095 n.5 (majority opinion). The original indictment did not include a charge for money laundering. *Id.* The Government's superseding indictment also accused Jennifer Gruenstrass and other sales representatives of transporting stolen property and laundering the proceeds. *Id.* Gruenstrass was taken to trial and later acquitted, while other sales representatives entered guilty pleas during the course of the investigation. *Id.*

⁶ *Id.* at 1095. See *infra* notes 17-18 for an explanation of how the Government obtained a valid restraining order.

⁷ *Id.* at 1096.

⁸ *Id.* However, based on the parties' written submissions, the court found that \$63,000 was not connected to the alleged offenses. *Id.*

⁹ *Id.* The Eleventh Circuit reversed and remanded the decision of the District Court with instructions to consider if any evidentiary hearing was warranted. See *United States v. Kaley*, 579 F.3d 1246 (11th Cir. 2009).

¹⁰ *Kaley*, 134 S. Ct. at 1096 (“[T]hey wished to show only that the case against them [was] ‘baseless.’”) (internal quotation marks omitted).

¹¹ *Id.* (citing *United States v. Kaley*, 677 F.3d 1316 (11th Cir. 2012)).

Court held that the Kaleys were not entitled to a hearing on the asset restraint because such a hearing would ultimately challenge the validity of the underlying indictment.¹²

The Supreme Court granted certiorari in light of a circuit split and affirmed the Eleventh Circuit.¹³ The Court therefore concluded the Kaleys were not entitled to the requested evidentiary hearing even if the overarching restraining order prevented them from retaining the counsel of their choice.¹⁴

II. RELATED LAW

A. 21 U.S.C. § 853

In order to preserve forfeitable assets gained from criminal activity, federal statute 21 U.S.C. § 853(e) allows a court to freeze a defendant's assets prior to trial if there is probable cause to believe they would be subject to forfeiture upon conviction.¹⁵ However, before § 853 may be used to freeze a defendant's assets, the indictment must include what assets are subject to forfeiture.¹⁶

While the civil forfeiture statute states that only assets traceable to the alleged conduct are subject to forfeiture, the criminal forfeiture statute also allows for the forfeiture of assets that are "involved in" the alleged crime.¹⁷ Respectively, this distinction may have great impact on what assets the Government may restrain under § 853(e).¹⁸

¹² *Id.* ("[T]he Kaleys were not entitled [to] a hearing on the asset freeze 'to challenge the factual foundation supporting the grand jury's probable cause determination . . .'" (quoting *Kaley*, 677 F.3d at 1317)).

¹³ *Id.*

¹⁴ *See id.* at 1105.

¹⁵ 21 U.S.C. § 853(e) (2012).

¹⁶ *See infra* notes 17-18 and accompanying text.

¹⁷ Compare 18 U.S.C. § 981(a) (2012) ("[a]ny property . . . which constitutes or is derived from proceeds traceable to a violation"), with 18 U.S.C. § 982(a) (2012) ("any property . . . involved in such offense, or any property traceable to such property") (emphasis added).

¹⁸ *See Kaley*, 134 S. Ct. at 1106 (Roberts, C.J., dissenting). In the immediate case, the original indictment alleged a "money judgment" of over \$2 million and the \$500,000 certificate of deposit forfeitable under the civil forfeiture statute. *Id.* However, the prosecution conceded it could only trace \$140,000 to the alleged conduct. *Id.* Consequently, the Government obtained an indictment alleging a charge for money laundering, thus allowing the prosecution to proceed under the criminal forfeiture

B. The Sixth Amendment

The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the Assistance of Counsel for his defence.”¹⁹ The Supreme Court has held that effective and reliable representation is the “root meaning” of the Sixth Amendment.²⁰ Moreover, the Court has also ruled that the ability for a defendant to choose his or her own counsel is a foundational component of this constitutional guarantee.²¹ Wrongful deprivation of choice of counsel engenders unfairness that could affect the outcome of the entire trial.²²

C. Mathews v. Eldridge

In *Mathews v. Eldridge*, the plaintiff brought an action challenging the constitutional validity of administrative procedures that were eventually used to discontinue his disability benefits.²³ The plaintiff claimed that denying him an evidentiary hearing to dispute the discontinuance of his benefits violated procedural due process.²⁴ Ultimately, the Supreme Court held the administrative procedures to be constitutional because the Due Process Clause does not require the beneficiary to be afforded an evidentiary hearing before disability benefits are terminated.²⁵ The Court recognized, however, that due process may require

statute. *Id.* This indictment allowed the Government to also claim the Kaleys’ home as a forfeitable asset. *Id.*

¹⁹ U.S. CONST. amend. VI.

²⁰ *Kaley*, 134 S. Ct. at 1102 (majority opinion) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006)).

²¹ *See Powell v. Alabama*, 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice.”); *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) (describing the scope of a defendant’s right to counsel).

²² *Kaley*, 134 S. Ct. at 1102 (citing *Gonzalez-Lopez*, 548 U.S. at 150).

²³ *Mathews v. Eldridge*, 424 U.S. 319, 324-25 (1976).

²⁴ *Id.* at 325. The plaintiff was given the opportunity by the Social Security Administration (SSA) to seek reconsideration from the state agency that determined his lack of disability. *Id.* at 324. However, the plaintiff did not seek reconsideration and insisted upon an evidentiary hearing. *Id.* at 324-25.

²⁵ *Id.* at 348-49.

procedural protections (i.e. an evidentiary hearing) “as the particular situation demands.”²⁶

Therefore, the Court in *Mathews* provided a balancing test to determine whether a procedure should be implemented in order to protect procedural due process.²⁷ This test requires a court to weigh “(1) the burdens that a requested procedure would impose on the Government against (2) the private interest at stake, as viewed alongside (3) the risk of erroneous deprivation of that interest without the procedure and the probable value, if any, of [the] additional . . . procedural safeguard[].”²⁸

D. Caplin & Drysdale, Chartered v. United States

In *Caplin & Drysdale*, a defendant convicted for charges related to drug trafficking was required to forfeit assets that he had intended to use for the payment of his attorney.²⁹ Prior to his conviction, the defendant requested a pre-trial asset restraining order to be modified so that he would be able to retain his present attorney.³⁰ However, before the motion could be considered, the defendant pled guilty and forfeited all assets included in the indictment.³¹

The defendant’s representation claimed they were entitled to a portion of their client’s forfeited property.³² The basis of their claim argued that money owed to an attorney was exempt from forfeiture because the defendant had a right to choose his own counsel under the Sixth Amendment.³³

However, the Court quickly reasoned that a defendant had no constitutional right to use another’s assets to pay for legal representation.³⁴ The Court likened the defendant to a robber who

²⁶ *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

²⁷ *Id.* at 335.

²⁸ *Kaley v. United States*, 134 S. Ct. 1090, 1100 (2014) (quoting *Mathews*, 424 U.S. at 335) (internal quotation marks omitted). See *infra* Part III for the Court’s application of *Mathews* in the immediate case.

²⁹ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 620-21 (1989).

³⁰ *Id.* at 621. The defendant also requested to exempt from post-conviction forfeiture any assets he had intended to use to pay his attorney. *Id.*

³¹ *Id.*

³² *Id.* The defendant’s representation filed a third party claim to forfeitable assets under 21 U.S.C. § 853(n) claiming an interest in \$170,000 of the defendant’s assets. *Id.*

³³ *Id.* at 623-24.

³⁴ *Id.* at 626.

wished to use stolen funds in order to pay his attorney.³⁵ Conclusively, the Court held that a defendant had no right to provide forfeited assets, or the proceeds deriving from such assets, to a third party even in the furtherance of a constitutional right.³⁶

E. United States v. Monsanto

In *United States v. Monsanto*, an indicted defendant wished to use restrained assets in order to pay his attorney.³⁷ The Second Circuit upheld but later vacated the restraining order so that the defendant may pay for the attorney of his choice.³⁸

However, the Supreme Court reversed the decision.³⁹ The Court reasoned that it would be contradictory to not allow the Government to restrain property after a probable cause determination, while the same determination allows the Government to restrain persons.⁴⁰ More importantly, the Court held the restraint does not offend the defendant's constitutional right to counsel.⁴¹ The restraint is constitutionally sound as long as the Government proves there is probable cause to believe that the assets in question are forfeitable.⁴² Consequently, in accordance with 21 U.S.C. § 853(a), "[t]here must be probable cause to [believe] (1) that the defendant has committed an offense

³⁵ *Id.* The petitioners argued that the Court's analogy is flawed because the bank has "pre-existing property rights" to the stolen funds while the Government's claims rest on a "penal statute" meant to prevent "fraudulent conveyances of the defendant's assets." *Id.*

³⁶ *Id.* at 628.

³⁷ *United States v. Monsanto*, 491 U.S. 600, 604 (1989). The defendant was indicted for several charges relating to heroin distribution. *Id.* at 602.

³⁸ *Id.* at 605-06. After upholding the restraining order, the Second Circuit remanded the case back to the District Court with instructions to hold an adversarial hearing "at which the government ha[d] the burden to demonstrate the likelihood that the assets are forfeitable." *United States v. Monsanto*, 836 F.2d 74, 84 (2d Cir. 1987). However, during the four-day hearing, the Second Circuit vacated its decision, holding that the restraint unlawfully denied the defendant's Sixth Amendment right to counsel. *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988).

³⁹ *Monsanto*, 491 U.S. at 616.

⁴⁰ *Id.* at 615-16.

⁴¹ *Id.* The Court's reasoning was based upon the holding of *Caplin & Drysdale*, which was decided the same day as *Monsanto*. *Id.* at 614.

⁴² *Id.* at 615.

permitting forfeiture, and (2) that the property at issue has the requisite connection to [the offense].”⁴³

The *Monsanto* Court did not address whether a defendant is entitled to an evidentiary hearing on either issue.⁴⁴ Since *Monsanto*, lower courts have generally allowed the defendant a hearing to litigate the second issue when seeking to vacate an asset restraint in order to hire an attorney.⁴⁵ However, lower courts have been divided over providing a hearing in order to litigate the first issue.⁴⁶

III. *KALEY V. UNITED STATES*

A. *Majority Opinion*

In *Kaley v. United States*, the Supreme Court denied the Kaleys’ request for a hearing to challenge the asset restraint imposed by the Government.⁴⁷ The Court held that the Kaleys could not litigate the issue as to whether there was probable cause to believe their assets were forfeitable because this would challenge the validity of the indictment previously determined by the grand jury.⁴⁸ But more importantly, the Court further held that the denial of such a hearing is warranted even when the Kaleys’ constitutional right to secure an attorney of their choosing is substantially frustrated.⁴⁹

The Court began its analysis by reinforcing the state interest in restraining certain assets of an indicted defendant—“to ensure that crime does not pay.”⁵⁰ The Court then acknowledged that the furtherance of this interest does not necessarily constrain the defendant’s Fifth Amendment right to due process and Sixth

⁴³ *Kaley v. United States*, 134 S. Ct. 1090, 1095 (2014).

⁴⁴ *Monsanto*, 491 U.S. at 615 n.10. The District Court held a four-day hearing to determine whether there was probable cause to believe the defendant’s assets were forfeitable. *Id.* at 605. The Second Circuit has allowed a hearing to contest this issue for the past two decades. *Kaley*, 134 S. Ct. at 1112 (Roberts, C.J., dissenting).

⁴⁵ *Kaley*, 134 S. Ct. at 1095 (majority opinion).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1105.

⁴⁸ *Id.*

⁴⁹ *Id.* (“[T]he Due Process Clause, even when combined with a defendant’s Sixth Amendment interests, does not command [a hearing].”).

⁵⁰ *Id.* at 1094.

Amendment right to counsel.⁵¹ To that end, the Court stated that the holdings of *Caplin & Drysdale* and *Monsanto* constitute the foundation of its reasoning in the immediate case.⁵²

The Court went on to say that in *Caplin & Drysdale*, it held that “[a convicted] defendant has no Sixth amendment right to spend another person’s money” and is therefore not entitled to use forfeitable assets to pay an attorney.⁵³ Accordingly, the Court recalled the holding in *Monsanto* in which the principles of *Caplin & Drysdale* affirmed the Government’s ability to freeze assets prior to trial regardless of whether assets obstruct a defendant’s interest in retaining his choice of counsel.⁵⁴ However, the Court in *Kaley* chose to highlight that in *Monsanto*, they held that a probable cause determination is sufficient to restrain both persons and assets.⁵⁵ The Court thus concluded there is “no constitutional infirmity” in freezing an indicted defendant’s assets as long as probable cause had been established.⁵⁶

However, the Court noted that the Kaleys did not dispute the holdings of *Caplin & Drysdale* or *Monsanto*.⁵⁷ Nonetheless, the Court deduced that the Kaleys’ request for a hearing would ultimately decide who has the final word in determining probable cause that supports the preceding criminal charges.⁵⁸

Subsequently, the Court referred to a variety of precedent to conclude the jury’s probable cause determination is final and

⁵¹ *Id.* at 1096 (citing *Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989)).

⁵² *See id.* (“We begin with those rulings not as mere background, but as something much more.”).

⁵³ *Id.* (quoting *Caplin & Drysdale*, 491 U.S. at 626).

⁵⁴ *Id.* at 1096-97 (citing *Monsanto*, 491 U.S. at 615).

⁵⁵ *Id.* at 1097 (“[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial.” (quoting *Monsanto*, 491 U.S. at 616)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (“The only question is whether the Kaleys are constitutionally entitled to a judicial re-determination of the conclusion the grand jury already reached: that probable cause supports this criminal prosecution . . .”).

conclusive.⁵⁹ This precedent has also allowed the jury to do more than commence a criminal proceeding.⁶⁰ Again referring to the principles of *Monsanto*, the Court reasoned that any restraint on liberty imposed on persons or assets is permissible by a jury's determination of probable cause.⁶¹

The Court went on to warn that the Kaleys' proposed hearing would have destructive consequences for the integrity of the criminal justice system.⁶² First, the Court reasoned that a judicial hearing would infringe upon the jury's "integral, constitutionally prescribed role."⁶³ In other words, the Court argued that not only would a hearing undermine the jury's previous determination, but two inconsistent findings of probable cause would govern the trial.⁶⁴ If a judge determined there was no probable cause to believe the Kaleys' assets were forfeitable, the Court argued that the judge's discretion in trial would be wrongfully premised upon the prior determination.⁶⁵

The Court then addressed the Kaleys' claim that a hearing would not create the likely dissonance.⁶⁶ If a hearing had taken place, the Court reasoned that there is still a distinct possibility that the judge and the jury would come to different conclusions.⁶⁷ By analyzing a hypothetical situation in which a hearing is granted, the Court demonstrated differing strategies of the

⁵⁹ *Id.*; see, e.g., *Costello v. United States*, 350 U.S. 359, 362 (1956) (holding that jury's indictment is fair and final upon a grand jury's probable cause determination).

⁶⁰ See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 117-19 (1975) (acknowledging that a probable cause determination by the jury may also be required to restrain a defendant's liberty).

⁶¹ See *Kaley*, 134 S. Ct. at 1099 n.7. The dissent believed that the reasoning of the majority is based on the assumption that one consequence of the determination of probable cause, a restraint on liberty, is greater than that of the latter consequence, a restraint on assets. *Id.* In response, the Court stated that its reasoning is rather founded upon the notion that either restraint can only arise from the jury's determination of probable cause. *Id.*

⁶² *Id.* at 1099.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* ("[A]ssuming the prosecutor continued to press the charges, the same judge who found probable cause lacking would preside over a trial premised on its presence.") (footnote omitted).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1100 ("A judge could hear the exact same evidence as the grand jury, yet respond to it differently, thus rendering . . . a contradictory finding.").

prosecution could allow the defense to win the hearing not based upon the merits of the case.⁶⁸

Based upon previous analysis, the Court concluded that the probable cause standard of *Monsanto* and the principles of *Caplin & Drysdale* allow pre-trial seizure of assets regardless of the defendant's need of hiring representation.⁶⁹ The Court determined this standard is also applicable to the long-standing rule that "[a] defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime."⁷⁰ The Court therefore concluded the Kaleys' requested hearing would unjustly attempt to re-litigate the finding that brought them to trial.⁷¹

Aside from this conclusion, the Court addressed the balancing test of *Mathews v. Eldridge* to determine whether the Kaleys had a constitutional right to the requested procedure in order to challenge the seizure of their assets.⁷² The first of the three-pronged *Mathews* test required the Court to determine whether a hearing would place an undue burden on the Government.⁷³ The Court quickly determined that a hearing would be redundant, a waste of judicial resources, and most notably, would hinder the Government from obtaining a conviction or preserving forfeitable assets.⁷⁴

⁶⁸ *Id.* In this scenario, the prosecution would leave home several witnesses he took to the grand jury in order to not reveal likely testimony or overall strategy. *Id.* With only the evidence of one or two witnesses, the judge may determine there is no probable cause to believe that defendants' assets are forfeitable when it is apparent probable cause had been proven to the grand jury. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* The Court acknowledged there is a debate as to whether this test may be applied to this case. See *Medina v. California*, 505 U.S. 437, 443 (1992) (holding the *Mathews* test does not apply to state procedural rules that are part of the criminal process). However, the Court disregards this debate and applies the *Mathews* test in order to demonstrate the Kaleys' requested application would not yield a result different from the Court's initial analysis. *Kaley*, 134 S. Ct. at 1101.

⁷³ *Kaley*, 134 S. Ct. at 1101; see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *supra* Part II.C to review the elements of the *Mathews* test.

⁷⁴ *Kaley*, 134 S. Ct. at 1101-02. Overall, the Court believed a hearing would place the prosecution in a "lose-lose dilemma" leaving them unable to protect their vital interests: "Protect your forfeiture by providing discovery or protect your conviction by surrendering the assets." *Id.* at 1102 (internal quotation marks omitted).

Next, the Court weighed the Government's interests against the Kaleys' interest in retaining the counsel of their choice.⁷⁵ In accordance with the guarantees of the Sixth Amendment, the Court conceded the Kaleys' right to counsel is indeed invaluable.⁷⁶ But nonetheless, the Court again recalled *Monsanto*, declaring that an asset freeze depriving the defendant of this right is "erroneous only when unsupported by a finding of probable cause."⁷⁷ In applying this standard, the Court deduced that since the connection of the assets to the conduct is not in dispute, pre-trial seizure is unlawful only when there was no probable cause to support the underlying indictment.⁷⁸

With the final prong of *Mathews*, the Court evaluated whether there was "probable value, if any," in allowing the Kaleys the requested hearing.⁷⁹ The Court first determined that a hearing has little utility because redetermination of the low standard of probable cause would more than likely not lead to a different result.⁸⁰ The standard of probable cause is difficult to undermine because it "determines only whether adequate grounds exist to proceed to trial."⁸¹ This assumption led the Court to forecast that many judges would not come to a probable cause determination that contradicts the jury's original findings.⁸²

Therefore, the Court concluded that the application of the *Mathews* balancing test would ultimately tip in favor of the Government.⁸³

Though the Court suggested that Congress may take measures in order to provide the Kaleys the hearing they desire, the Court definitively held their analysis denies the Kaleys their

⁷⁵ *Id.* at 1102.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1103.

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁸⁰ *Id.* The Court noted here that the determination of probable cause is based upon the standard of fair probability rather than the standards of "legal technicians." *Id.* (quoting *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013)).

⁸¹ *Id.* at 1104.

⁸² *Id.* The Court also took time to address the Kaleys' amici. *Id.* Though these supporters cited about twenty-five cases that have allowed for the judicial hearing the Kaleys seek, the Court is quick to state that only in one case has the judge reversed the jury's probable cause determination. *Id.*

⁸³ *Id.*

requested hearing regardless of their constitutional interest in retaining chosen counsel.⁸⁴

B. Chief Justice Roberts Dissenting

Chief Justice Roberts, joined by Justice Breyer and Justice Sotomayor, disagreed with the majority's opinion that the Kaleys were not entitled to a hearing as to whether there was probable cause to believe their assets were forfeitable.⁸⁵ Therefore, the Chief Justice argued the Government should not prevent a defendant from challenging the restraint of his assets in a way that would prevent him from exercising his Sixth Amendment right to retain chosen counsel.⁸⁶

After a brief recount of factual material, Chief Justice Roberts proposed the fundamental elements of the Sixth Amendment are at stake in the immediate case.⁸⁷ Chief Justice Roberts agreed with the majority that the right to counsel of choice is limited.⁸⁸ However, he reasoned that the prosecution might unjustly place a defendant at a significant disadvantage at trial by freezing assets needed to retain the counsel of his choice.⁸⁹

The Chief Justice began his analysis by stating that the "straightforward" reasoning of the majority does not effectively resolve this case.⁹⁰ He reminded the majority that in order to impose an asset restraint, the Government must demonstrate probable cause to believe (1) the defendant committed a crime giving rise to forfeiture, and (2) the restrained assets are traceable to the alleged conduct.⁹¹ Therefore, the Chief Justice reasoned that it would be contradictory to only provide a hearing on the

⁸⁴ *Id.* at 1105.

⁸⁵ *Id.* (Roberts, C.J., dissenting).

⁸⁶ *Id.* (acknowledging that the subject of asset restraints imposed by the Government is not at issue).

⁸⁷ *Id.* at 1105-07. Chief Justice Roberts highlighted that after the prosecution conceded that only \$140,000 of the Kaleys' assets were traceable to the alleged conduct, the magistrate questioned the validity of the restraining order. *Id.* at 1106.

⁸⁸ *Id.* at 1107; *see also* *Wheat v. United States*, 486 U.S. 153, 159 (1988) (describing the scope of a defendant's right to counsel).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1108.

⁹¹ *Id.* (citing 21 U.S.C. § 853(e) (2012)).

issue of traceability, but not to the issue of whether the assets are at all forfeitable.⁹²

Next, Chief Justice Roberts disagreed with the majority's assumption that the Kaleys' requested hearing would relitigate the probable cause determination underlying the indictment.⁹³ He reasoned that a hearing would only "determine whether there is probable cause to believe the Kaleys' assets are forfeitable, [and] not to determine whether the Kaleys may be tried at all."⁹⁴ This line of reasoning led the Chief Justice to conclude that any difference in determinations between judge and jury would allow the prosecution to go forward with the trial while preserving Kaleys' right to retain their chosen counsel.⁹⁵

Chief Justice Roberts proceeded to argue that at the requested hearing, the judge would hear different evidence than what was presented to the grand jury.⁹⁶ From this argument, he reasoned that this evidence would only be used for the purpose of lifting the asset restraint.⁹⁷ Since the evidence would be used for this exclusive purpose, it would not discredit the probable cause determination that brought the defendants to trial.⁹⁸ Accordingly, the Chief Justice argued that a hearing would reinforce the traditional functions of the justice system: the grand jury would fairly determine that the defendant should stand trial and the judge would determine how the trial should proceed.⁹⁹

Later, Chief Justice Roberts likened this reasoning to pre-trial determination of bail in which the justice system "allow[s] judicial inquiries into the underlying merits of the indicted charges."¹⁰⁰ In a bail situation, the defendant may contest

⁹² *Id.* ("[T]he majority [cannot] give[] any reason why the District Court may reconsider the grand jury's probable cause finding as to traceability . . . but may not do so as to the underlying charged offenses.").

⁹³ *Id.*

⁹⁴ *Id.* at 1108-09.

⁹⁵ *Id.* at 1109.

⁹⁶ *Id.* The Kaleys desired to bring evidence from the Gruenstrass trial—evidence that the jury could not have considered when indicting the Kaleys. *See supra* note 5.

⁹⁷ *Kaley*, 134 S. Ct. at 1109.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

evidence that could lead to pre-trial detention.¹⁰¹ Likewise, the Chief Justice reasoned that a defendant should also have the ability to contest the evidence that could lead to a restraint on assets.¹⁰²

After analyzing the majority's initial arguments, Chief Justice Roberts proceeded to discredit the majority's *Mathews* analysis.¹⁰³ First, he condemned the majority for what he believed to be a gross underestimation of the Kaleys' interest at stake.¹⁰⁴ He went on to describe the importance of the Kaleys being able to retain the counsel of their choice.¹⁰⁵ Ultimately, Chief Justice Roberts concluded that consequences of the deprivation of choice of counsel are too great not to provide substantial consideration in favor of the Kaleys.¹⁰⁶

Second, in accordance with the first prong of the *Mathews* test, Chief Justice Roberts did not believe that a hearing would create a burden on the court or harm the Government's interests.¹⁰⁷ The Chief Justice first labeled such concerns as an exaggeration, namely because he did not believe that a prosecutor's trial strategy would be weakened by an adversarial hearing.¹⁰⁸ Within this context, Chief Justice Roberts also reasoned that the judge has considerable ability to maintain the purity of the impending trial.¹⁰⁹

¹⁰¹ *Id.* (acknowledging that a defendant is entitled to contest the weight of the evidence against him in order to avoid pre-trial detention).

¹⁰² *Id.* at 1109-10 (“[N]o one would say that the district court encroached on the grand jury’s role if the court determined that it would not authorize pretrial detention [based upon] the weakness of the prosecution’s case.”).

¹⁰³ *Id.* at 1110.

¹⁰⁴ *Id.* (“[T]he majority gives short shrift to the Kaleys’ interests at stake.”).

¹⁰⁵ *Id.* at 1111.

¹⁰⁶ *Id.* Chief Justice Roberts described the consequences of the Kaleys’ not being able to retain the attorney of their choice, including possible imprisonment and the loss of their home. *Id.*

¹⁰⁷ *Id.* at 1111-12.

¹⁰⁸ *Id.* at 1111. Chief Justice Roberts reasoned that since the prosecution must argue the traceability of assets in an adversarial hearing, the concerns of revealing trial strategy in a hearing regarding whether assets are at all forfeitable are greatly exaggerated. *Id.*

¹⁰⁹ *Id.* at 1112. Chief Justice Roberts noted that not only can the judge maintain learned discretion, but the judge may also host in camera proceedings in order not to reveal certain evidence to the jury. *Id.*

The Chief Justice did acknowledge that the Government has an interest in preserving forfeitable assets.¹¹⁰ However, he reconciled this concern by citing several avenues in which these assets may still be preserved while also allowing the defendants the counsel of their choice.¹¹¹

Lastly, in regards to the last prong of the *Mathews* test, Chief Justice Roberts argued that there is “probable value” in allowing the Kaleys their requested hearing in order to protect their right to procedural due process.¹¹² Chief Justice Roberts claimed that the majority has ignored the considerable value of ensuring the constitutional guarantees of the Sixth Amendment.¹¹³ Without chosen counsel, the Chief Justice reasoned that a defendant would suffer an unfair trial, not allowing him to prove his innocence on the case’s true merits.¹¹⁴ He reasoned that a defendant must have chosen counsel before trial begins in order to meaningfully challenge the accusations of a powerful prosecution.¹¹⁵

In closing, Chief Justice Roberts reasoned that the majority’s holding greatly undercut individual constitutional protections.¹¹⁶ The Chief Justice argued that such deprivation erodes the main objective of the criminal justice system—to ensure “the guilty be convicted and the innocent go free.”¹¹⁷ Therefore, Chief Justice Roberts ultimately concluded that an infringement on a defendant’s right to retain chosen counsel by freezing his assets may implicate greater “prosecutorial abuse and government overreaching.”¹¹⁸

¹¹⁰ *Id.* at 1112-13 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989)).

¹¹¹ *Id.* at 1113. Chief Justice Roberts referred mainly to the relation-back provision under 21 U.S.C. § 853(c). *Id.* The Chief Justice also argued that the administrative process of conveying forfeited assets is not a heavy enough burden to tip the *Mathews* test in favor of the Government. *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1114. Chief Justice Roberts argued, “the guilt or innocence of the accused is [not] adjudicated” solely in the grand jury. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974)).

¹¹⁵ *Id.* (“A person accused . . . of committing a crime is presumed innocent until proven guilty beyond reasonable doubt.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

¹¹⁸ *Id.*

IV. DISCUSSION

Though two aspects of forfeiture must be proven in order to constitutionally restrain the assets of an indicted defendant, the Court in *Kaley* decided upon distinctly different measures to prove each aspect.¹¹⁹ Subsequently, on one hand, the Court indirectly upheld that a hearing regarding the traceability of assets to the alleged conduct should be permitted.¹²⁰ On the other hand, the Court resolved the unanswered question of *Monsanto* and disallowed a hearing to contest whether there is probable cause to believe the defendant's assets will be subject to forfeiture.¹²¹ The Court's foundational approach logically argued that a judicial redetermination of this issue is simply an attempt to prematurely resolve the central question of the impending trial.¹²²

However, the dissent made several valid points arguing that an evidentiary hearing is warranted to determine whether there is probable cause to believe the defendant committed an offense permitting forfeiture.¹²³ Chief Justice Roberts made a strong argument by implementing his bail analogy.¹²⁴ While the majority correctly acknowledged that a grand jury has the power to determine probable cause leading to a restraint on persons or assets, the Chief Justice noted that a judge is able to examine evidence to determine whether a restraint on a person is warranted.¹²⁵ Therefore, considering this practice is unquestioned when deciding to restrain a person, the dissent rationally concluded that such practice should be applied when deciding to restrain assets.¹²⁶

¹¹⁹ See *supra* notes 43, 71, 84 and accompanying text. Again, according to *Monsanto*, “[t]here must be probable cause to [believe] (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to [the offense]” in order to constitutionally restrain the assets after indictment. *Kaley*, 134 S. Ct. at 1095 (majority opinion) (citing *United States v. Monsanto*, 491 U.S. 600, 615 (1989)).

¹²⁰ See *supra* notes 42-46, 84 and accompanying text.

¹²¹ See *supra* notes 44-46, 84 and accompanying text.

¹²² See *supra* notes 58-60, 71 and accompanying text.

¹²³ See *supra* notes 92-99 and accompanying text.

¹²⁴ See *supra* notes 100-02 and accompanying text.

¹²⁵ See *supra* notes 55-56, 100-02 and accompanying text.

¹²⁶ See *supra* notes 100-02 and accompanying text.

In retrospect, Chief Justice Roberts may have also been able to discredit the Court's argument that holding the requested hearing would create legal dissonance.¹²⁷ Again, considering the language of criminal forfeiture statutes, the two-pronged probable cause determination established by *Monsanto* may possibly be viewed as one single element.¹²⁸ If a judge has the ability to determine whether there is probable cause to believe the assets are traceable to the conduct, then during that hearing, the judge, in some degree, would simultaneously evaluate evidence as to whether the defendant engaged in unlawful activity giving rise to forfeiture.¹²⁹ However, this possible simultaneous analysis may not rise to the degree needed to answer the formerly unresolved question left by *Monsanto* and overrule the Court's decision in the immediate case.

Regardless of the majority and dissent's practical and logical arguments, it is apparent that each opinion prioritized competing interests.¹³⁰ In its analysis, the majority was concerned with maintaining the integrity of the legal system—ensuring that crime does not pay and the roles between judge and jury are clearly defined.¹³¹ However, in the pursuit of this interest, the dissent argued that the majority wrongly undermined a defendant's Sixth Amendment right to secure the counsel of his choice.¹³² With these competing interests, the possible consequences of maintaining each objective have serious implications.

Ultimately, the weight of each interest not only has serious ramifications for individual defendants, but also for the objectives of the criminal justice system. With the Court's decision in the immediate case, the Court furthered its objective of ensuring crime yields little to no benefit for the offender.¹³³ But as the dissent argued, the promotion of this objective came at the expense of further limiting a defendant's Sixth Amendment right

¹²⁷ See *supra* notes 62-65 and accompanying text.

¹²⁸ See *supra* notes 17, 43 and accompanying text.

¹²⁹ See *supra* notes 17-18, 87 and accompanying text.

¹³⁰ See *supra* notes 50-51, 86 and accompanying text.

¹³¹ See *supra* notes 50-51 and accompanying text.

¹³² See *supra* notes 86, 116-18 and accompanying text.

¹³³ See *supra* notes 50-51, 84 and accompanying text.

to counsel who may best protect the defendant's liberty.¹³⁴ From this dilemma, the Court has taken on more responsibility in balancing the objectives of the criminal justice system.¹³⁵

However, the Court may have the ability to ease the burden of its responsibilities. Recalling the majority's proposition, some type of measure may be implemented to balance competing interests while maintaining the overall integrity of the criminal justice system.¹³⁶ Considering the Court has upheld that a defendant is entitled to a hearing on the issue of traceability, a judge could be given more discretion to determine exactly what assets are traceable to the alleged conduct.¹³⁷ In *Kaley*, it is true that some, but not all, of the Kaleys' assets were traceable to the alleged conduct.¹³⁸ Considering this factual information alongside the proposed solution, it is possible that the Kaleys would be able to secure the attorney of their choice while the Government has preserved at least some possibly forfeitable assets.¹³⁹

CONCLUSION

In *Kaley v. United States*, the Court resolved the question left by *Monsanto* by holding the Kaleys were not entitled to a judicial hearing to contest whether there was probable cause to believe that their restrained assets would later be subject to forfeiture. Though the Court cited numerous consequences of allowing the Kaleys their requested hearing, the Court ultimately concluded that the hearing would wrongfully undermine the jury's probable cause determination underlying the indictment. The Court held that such an outcome must be prevented regardless of the defendant's inability to obtain the counsel of his choosing.

Chief Justice Roberts concluded the reasoning of the majority preserves vital interests of the Government and the criminal

¹³⁴ See *supra* notes 116-18 and accompanying text.

¹³⁵ See *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting) ("In this area it is to the courts that those charged with crime must turn.").

¹³⁶ See *supra* note 84 and accompanying text.

¹³⁷ See *supra* notes 17-18, 87 and accompanying text.

¹³⁸ See *Kaley*, 134 S. Ct. at 1106; see also *supra* notes 17-18, 87 and accompanying text.

¹³⁹ See *supra* notes 17-18, 87 and accompanying text.

justice system, yet unfairly undermines the constitutional guarantees of the Sixth Amendment. The Chief Justice further concluded that not only had the scope of the Sixth Amendment's right to counsel been severely limited, but that the objectives of the criminal justice system had been sorely displaced.

The ultimate disagreement between the majority and dissent has forced the judiciary to further weigh numerous objectives of the criminal justice system against a defendant's constitutional rights. A judicial or legislative compromise may provide effective solutions to maintain this delicate balance.

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