Casenotes and Comments

KALEY v. UNITED STATES: SANCTIFYING GRAND JURY DETERMINATIONS AND MARGINALIZING THE RIGHT TO COUNSEL OF CHOICE

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In *Kaley v. United States*,[1] the United States Supreme Court considered whether the Due Process Clause of the Fifth Amendment[2] or the Sixth Amendment right to assistance of counsel[3] entitles defendants to a pretrial hearing to challenge a grand jury's determination of probable cause supporting the charges against them.[4] A grand jury indictment establishes that there is probable cause to believe that an individual has committed a crime, and in some cases, can permit an individual's assets to be seized. The seizure of assets can leave the individual without sufficient funds to retain the legal counsel of his or her choice.[5]

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1. 134 S. Ct. 1090 (2014).

2. U.S. CONST. amend. V.

3. U.S. CONST. amend. VI.

4. *Kaley*, 134 S. Ct. at 1094.

5. The authority for such a criminal forfeiture is derived from the criminal forfeiture statute, 21 U.S.C. § 853 (2012). The statute provides for the forfeiture of "(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [the] violation; (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, [the] violation." *Id.* § 853(a). The statute also applies the forfeiture of such property to those who have been indicted for an applicable crime, if "(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order [of forfeiture] will result in the property being destroyed, removed from jurisdiction of the court, or otherwise made unavailable for forfeiture; and (ii) the need to preserve the availability of the property through [forfeiture] outweighs the hardship on any party against whom the order is to be entered." *Id.* § 853(e).

The Court concluded that the Constitution does not give the defendants a right to a pretrial hearing to relitigate the grand jury's finding of probable cause.[6] Although the *Kaley* Court came to the correct holding, the Court erred in concluding that the issue hinged on the finality of the grand jury's determination.[7] For the purposes of clarity and finality, the Court should have instead focused on the absence of such a hearing consequently limiting the defendant's right to counsel of choice, which precedent has shown to be a right separate and distinct from the right to effective counsel.[8] As the right to counsel of choice is qualified, the infringement of the right caused by a denial of a pretrial hearing to contest probable cause is insufficient to generate a constitutional violation.[9]

I. THE CASE

In January 2005, Kerri Kaley was informed that she and her husband, Brian Kaley, were under grand jury investigation for stealing prescription medical devices from hospitals and selling them on the black market.[10] Both Kerri and Brian Kaley retained separate attorneys who informed them that the cumulative cost of their legal fees would be approximately $500,000.[11] The Kaleys responded by obtaining a home equity line of credit for $500,000 on their residence and then used the proceeds to buy a certificate of deposit.[12]

Two years later, in February 2007, a grand jury in the Southern District of Florida indicted the Kaleys on seven counts, including conspiracy to transport in interstate commerce prescription medical devices that they knew to be stolen.[13] The indictment sought criminal forfeiture[14] of all of the Kaleys' property traceable to the offenses, including the certificate of deposit.[15] The district court granted the government's protective order, and the Kaleys moved to vacate, arguing that the order prevented them from retaining the counsel of their

6. *Kaley*, 134 S. Ct. at 1094.

7. *See infra* Part IV.B.

8. *See infra* Part IV.A.1.

9. *See infra* Part IV.

10. United States v. Kaley, 677 F.3d 1316, 1318 (11th Cir. 2012), *aff'd*, 134 S. Ct. 1090 (2014). At the time, Kerri Kaley was working as a sales representative for Ethicon Endo-Surgery. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The Kaleys were also indicted on five counts of substantive 18 U.S.C. § 2314 charges and one count of obstruction of justice. *Id.*

14. 21 U.S.C. § 853 (2012).

15. *Kaley*, 677 F.3d at 1318.

choice in violation of their Sixth Amendment rights.[16] They also filed a motion expressly requesting a pretrial, post-restraint evidentiary hearing.[17] In May 2007, the magistrate judge issued an order finding probable cause that the certificate of deposit and the Kaleys' residence were involved in the violations, another order amending the protective order to include the full value of the certificate of deposit and the Kaleys' residence, and a third order denying the Kaleys' motion to vacate the protective order and hold a pretrial, post-restraint evidentiary hearing.[18]

The Kaleys appealed the orders, and the United States District Court for the Southern District of Florida affirmed, concluding that the trial itself would satisfy due process.[19] On June 27, 2007, the Kaleys lodged an interlocutory appeal, challenging the district court's decision.[20] The Court of Appeals for the Eleventh Circuit reversed the district court's denial of the evidentiary hearing and remanded for further proceedings.[21] On remand, the district court found that the hearing was required.[22]

During the evidentiary hearing conducted on July 29, 2010, the Kaleys focused on the scope of the hearing; they explained that they were not contesting the traceability of the assets to the alleged conduct, but were instead arguing that the underlying facts did not even support the crimes with which they were charged.[23] The government

16. *Id.*

17. *Id.* A magistrate judge heard the initial motion raised by the Kaleys and sustained the protective order, but the judge limited the scope of the order as it applied to the certificate of deposit to $140,000. *Id.* A month later, the grand jury returned a superseding indictment that added an additional count for money laundering and sought criminal forfeiture of the full certificate of deposit, as well as the Kaleys' residence. *Id.* On April 17, 2007, the Kaleys renewed their motion to vacate the initial, amended protective order; it was in this motion that they expressly requested a pretrial, post-restraint evidentiary hearing. *Id.* The magistrate responded to the motion by ordering the prosecutor to submit an affidavit supporting probable cause. *Id.* The prosecutor filed an affidavit executed by the FBI case agent, in secret and under seal, and in response to this affidavit the magistrate judge issued the three orders denying the Kaleys' motions. *Id.* at 1318–19.

18. *Id.* at 1318–19.

19. *Id.* at 1319.

20. *Id.*

21. United States v. Kaley, 579 F.3d 1246, 1260 (11th Cir. 2009), *appeal after remand*, United States v. Kaley, 677 F.3d 1316 (11th Cir. 2012), *aff'd*, Kaley v. United States, 134 S. Ct. 1090 (2014) ("[T]he district court plainly made an error of law in interpreting and applying the third of the *Bissell* factors. . . . Moreover, the district court did not make a clear finding as to the fourth *Bissell* factor . . . . We, therefore, reverse the district court's decision and remand the case to the district court . . . .").

22. *Kaley*, 677 F.3d at 1319.

23. *Id.*

in return argued that it was not required to offer substantive evidence to establish the criminal charges, but that it was only required to prove that the restrained assets were traceable to the offenses charged in the indictment.[24] In October 2010, the district court issued an order denying the Kaleys' motion to vacate the protective order, concluding that the only relevant inquiry was the traceability of the assets.[25] The Kaleys appealed three days later, and the Court of Appeals for the Eleventh Circuit affirmed that the Kaleys' motion to vacate the protective order was properly denied.[26] The United States Supreme Court granted certiorari to decide whether due process or the right to counsel constitutionally entitles criminal defendants to contest a grand jury's prior determination of probable cause to believe they committed the crimes charged at a post-indictment pretrial hearing.[27]

II. LEGAL BACKGROUND

The United States Supreme Court has created arguably blurry lines demarcating the scope and parameters of the Sixth Amendment right to assistance of counsel as well as the Fifth Amendment right to due process. Part II.A.1 of this Note discusses how the Court has granted both expansive domain to the Sixth Amendment's right to counsel, while simultaneously significantly qualifying the right.[28] Part II.A.2 discusses how the Court has determined that the criminal forfeiture statute[29] implicates the qualified right to counsel of choice, in contrast to the separate and distinct right to adequate counsel.[30] Part II.B examines how the Due Process Clause of the Fifth Amendment has complicated the analysis, particularly in light of the broad deference given to the grand jury institution.[31] Part II.C focuses on the case law generated from the consideration of these issues, which has produced even less clarity as to where these lines are drawn and resulted in a split among the circuit courts over the permissive scope of a pretrial hearing.[32]

24. *Id.* at 1319–20.

25. *Id.* at 1320.

26. *Id.* at 1330 (holding that the order was properly denied on the grounds that "a defendant may not challenge the evidentiary support for the underlying charge at a hearing to determine the propriety of a post-indictment pretrial restraining order").

27. Kaley v. United States, 134 S. Ct. 1090, 1095, 1096 (2014).

28. *See infra* Part II.A.1.

29. 21 U.S.C. § 853 (2012).

30. *See infra* Part II.A.2.

31. *See infra* Part II.B.

32. *See infra* Part II.C.

A. The Criminal Forfeiture Statute Does Not Violate the Sixth Amendment

The Supreme Court of the United States has granted expansive domain to the Sixth Amendment's right to counsel but has also significantly qualified the right in specific situations.[33] The Court has determined that the criminal forfeiture statute implicates the qualified right to counsel of choice, rather than the separate and distinct right to adequate counsel.[34] Therefore, the pretrial seizure of assets, even though it may restrict a defendant's ability to obtain the counsel of his or her choice, does not violate the Sixth Amendment.[35]

1. The United States Supreme Court Has Granted Expansive Domain to the Sixth Amendment Right to Counsel but Has Similarly Created Significant Qualifications to This Right

The Sixth Amendment guarantees an individual the right "to have the Assistance of Counsel for his defense."[36] The Court has clarified the parameters of this right in several seminal cases, one of the earliest being *Powell v. Alabama*,[37] a case that involved nine African-American men who were charged and convicted of raping two white women on a train heading to Scottsboro, Alabama in 1931.[38] As the *Powell* Court noted, the defendants were not represented by counsel upon arraignment, and no lawyer had been specifically named until the morning of the trial.[39] The Court reversed the convictions, holding that in a capital case in which a defendant is unable to employ his own counsel, it is "the duty of the court, whether requested or not, to assign counsel for him" and emphasized that it must be done in a time and manner to ensure effective aid before and during the trial.[40] The Court also emphasized that "the failure of the trial court to give

33. *See infra* Part II.A.1.

34. *See infra* Part II A.1.

35. *See infra* Part II A.2.

36. U.S. CONST. amend. VI.

37. 287 U.S. 45 (1932).

38. *Id.* at 49–51.

39. *Id.* at 56. The Court also noted that the appointment of counsel—supposedly an appointment of all members of the bar to the defense—was "little more than an expansive gesture, imposing no substantial or definite obligation upon any one" and that prior to the trial one of the members of the bar had accepted employment for the prosecution. *Id.*

40. *Id.* at 71.

[the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process."[41]

In *Strickland v. Washington*,[42] the Supreme Court further expanded the right to counsel by considering the quality of counsel as part of that right.[43] The Court explained that the adequacy of an accused's counsel is a crucial part of the constitutional right to a fair trial, as recognized in the Sixth Amendment.[44] The Court reasoned that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[45] The Court then explained that whether counsel is ineffective to the point of giving rise to a constitutional violation is determined by whether or not the defendant has received a fair trial.[46] To measure this violation, the *Strickland* Court held that two factors are to be considered: first, showing that counsel was deficient, having made errors so serious that counsel could no longer be considered "counsel" as guaranteed by the Sixth Amendment; and second, proving that this deficient performance prejudiced the defense.[47] The *Strickland* test has become the standard to determine the threshold for insufficient counsel.[48]

The Court demonstrated that the right to counsel can be qualified, however, in *Wheat v. United States*.[49] The case raised the issue of whether it was within the district court's discretion to decline a defendant's voluntary waiver of his right to conflict-free counsel by re-

41. *Id.* ("In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.").

42. 466 U.S. 668 (1984).

43. *Id.* at 685.

44. *Id.* at 685–86.

45. *Id.* at 685 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942)).

46. *Id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

47. *Id.* at 687.

48. *See, e.g.*, Hinton v. Alabama, 134 S. Ct. 1081 (2014) (holding that the Alabama courts did not correctly apply the *Strickland* test to the defendant's case); Chaidez v. United States, 133 S. Ct. 1103 (2013) (explaining that the Court has granted relief under *Strickland* in diverse contexts); Lafler v. Cooper, 132 S. Ct. 1376 (2012) (explaining how to apply *Strickland*'s prejudice test in the context of plea offers).

49. 486 U.S. 153 (1988).

fusing to permit his proposed substitution of counsel.[50] The Court explained that the essential aim of the Sixth Amendment is to "guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."[51] Thus, the Court held that the deference to a petitioner's preferred counsel of choice can be overcome by showing the potential for a conflict.[52]

In *United States v. Gonzalez-Lopez*,[53] the Court demonstrated that the Sixth Amendment right to counsel of choice is a qualified right, both separate and distinct from the right to effective counsel.[54] In *Gonzalez-Lopez*, the defendant was charged with conspiracy to distribute more than 100 kilograms of marijuana, and his family hired a Missouri attorney, John Fahle, to represent him.[55] Gonzalez-Lopez also contacted and hired a California lawyer, Joseph Low, to represent him, but during the course of an evidentiary hearing the judge revoked Low's provisional acceptance to appear in court because he violated a court rule.[56] Despite repeated efforts, Low was unable to regain permission to represent the defendant.[57] The jury found the defendant guilty, and he appealed.[58] The Eighth Circuit vacated the conviction, holding that the district court misinterpreted the rule that Low violated, on which the court based its denials of his motions for

50. *Id.* at 154.

51. *Id.* at 159.

52. *Id.* at 164 ("The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.").

53. 548 U.S. 140 (2006).

54. *Id.* at 142.

55. *Id.*

56. *Id.* The Magistrate Judge found Joseph Low to have violated the court rule restricting the cross-examination of a witness to one counsel because he was passing notes to John Fahle during cross-examination. *Id.*

57. Acting on the respondent's wishes, Low filed two successive applications for admission, both of which were denied by the district court, and an appeal, which was dismissed by the United States Court of Appeals for the Eighth Circuit. *Id.* Fahle filed a motion to withdraw as counsel, which was granted, and respondent retained a local attorney, Karl Dickhaus, to represent him for his trial. *Id.* at 142–43. Low again applied for and was denied permission for admission and was ordered to have no contact with Dickhaus during proceedings. *Id.* at 143. A United States Marshal sat between Low and Dickhaus at trial to enforce the court order. *Id.*

58. *Id.* at 143.

admittance, and therefore violated respondent's Sixth Amendment right to counsel of his choice.[59]

The Supreme Court granted certiorari, and subsequently held that no additional showing of prejudice sustained by the defendant is required when deprivation of counsel is erroneous and that such an error requires the Court to vacate the conviction.[60] The Court, however, was careful to point out the distinction between the Sixth Amendment right to effective representation and the right to select counsel of one's choice, the latter being violated "whenever the defendant's choice is wrongfully denied."[61] The Court explained that these are two separate rights, and the deprivation of the right to one's counsel of choice is complete when a defendant is erroneously deprived of the counsel that he chooses to represent him, regardless of the quality of that representation.[62] The Court also reiterated that a violation of an individual's right to counsel of his or her choice does not extend to those defendants who require counsel to be appointed for them and cited several other legitimate qualifications on the right to choice of counsel.[63]

2. *The United States Supreme Court Determined That the Forfeiture Statute Does Not Exempt Legal Fees and Is Constitutional*

The Supreme Court has addressed challenges to the constitutionality of the criminal forfeiture statute, 21 U.S.C. Section 853, in the right to counsel context in two cases, *Caplin & Drysdale, Chartered v. United States*[64] and *United States v. Monsanto*,[65] both decided on the same day. The statute provides for pretrial seizure of any assets held by an individual convicted or indicted on the crimes specified, provided those assets are found traceable to the crime.[66] *Monsanto* addressed the question of whether the forfeiture statute authorized the district court to enter a pretrial order freezing assets in a defendant's possession, even when the defendant seeks to use those assets to pay

59. *Id.* at 143–44.

60. *Id.* at 144, 146, 152.

61. *Id.* at 150 (emphasis omitted).

62. *Id.* at 147–48.

63. *Id.* at 151–52 (noting that a defendant may not be represented by counsel who is not a member of the bar or demand that a court grant his waiver of conflict-free representation) (citing Wheat v. United States, 486 U.S. 153, 159–60 (1988); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624, 626 (1989)).

64. 491 U.S. 617 (1989).

65. 491 U.S. 600 (1989), *remanded to* 924 F.2d 1186 (2d Cir. 1991).

66. 21 U.S.C. § 853(a) (2012).

an attorney, and if so, whether such an order was constitutional.[67] *Caplin & Drysdale* addressed the similar question of whether the forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney in the criminal case where forfeiture exists, and if the statute, as interpreted without such an exemption, is constitutional in light of the Fifth and Sixth Amendments.[68]

Both holdings, which cited each other, agreed that the district court is authorized to enter such a pretrial order freezing the defendant's assets, that there is not an exemption for assets needed to pay for legal fees, and that the statute is not a violation of either the Fifth or Sixth Amendments.[69] The *Monsanto* opinion explained that the text of the statute is clear and unambiguous in its failure to exclude assets that could be used to pay an attorney from forfeiture.[70] The Court also looked to the construction of the statute's text and noted that the language of "[Section] 853(e)(1)(A) is plainly aimed at implementing the commands of [Section] 853(a) and cannot sensibly be construed to give the district court discretion to permit the dissipation of the very property that [Section] 853(a) requires be forfeited upon conviction."[71] The *Monsanto* opinion also examined the legislative history of the statute, finding that the foremost objective in drafting the statute was to preserve the availability of the property in question and to ensure that defendants do not profit from criminal acts.[72]

In its discussion, the *Monsanto* opinion deferred to the *Caplin & Drysdale* opinion, which specifically addressed the lack of Fifth and Sixth Amendment violations raised by the statute's authorization of pretrial criminal forfeiture of assets intended to be used to pay legal counsel.[73] The *Caplin & Drysdale* opinion explained that a defendant cannot give good title to his or her assets, even if used to pay an attorney, because the assets were vested in the United States at the time

67. *Monsanto*, 491 U.S. at 602.

68. *Caplin & Drysdale*, 491 U.S. at 619.

69. *See id.* at 623; *Monsanto*, 491 U.S. at 602, 614 ("In another decision we announce today, *Caplin & Drysdale, Chartered v. United States*, . . . we hold that neither the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees. We rely on our conclusion in that case to dispose of the similar constitutional claims raised by the respondent here.").

70. *Monsanto*, 491 U.S. at 608–09.

71. *Id.* at 612–13.

72. *Id.* at 613–14 (noting that "this view is supported by the relevant legislative history" and that Congress' intent, as well as the statute's text itself, makes it clear that "the statute, as presently written, cannot be read any other way").

73. *Id.* at 614 (explaining that "[w]e rely on our conclusion in [*Caplin & Drysdale*] to dispose of the similar constitutional claims raised by respondent here").

the criminal act giving rise to the forfeiture took place.[74] The Court also conducted a balancing test and concluded that the "strong governmental interest in obtaining full recovery of all forfeitable assets" outweighs "any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense."[75] The *Caplin & Drysdale* Court similarly disposed of the Fifth Amendment challenge, which it summarized as the accusation that the power available to prosecutors under the forfeiture provision *could* potentially be abused, resulting in a violation of due process.[76] The Court concluded that just because the provision *could* be abused does not by itself make the law facially invalid.[77] Additionally, as several circuit courts later noted, the *Monsanto* Court explicitly stated that it was not considering "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed."[78]

B. The Role of the Grand Jury Is a Key Component in Defining the Scope of the Fifth Amendment Right to Due Process in the Context of the Criminal Forfeiture Statute

The Fifth Amendment provides in part that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of

74. *Caplin & Drysdale*, 491 U.S. at 627. The Court also noted that there is no "distinction between, or hierarchy among, constitutional rights" and that as a defendant has no similar right to spend forfeitable assets on the right to free speech, to practice one's religion, or to travel, which also depend on finances, it would therefore be illogical to make an exception in this case for the right to counsel. *Id.* at 628.

75. *Id.* at 631.

76. *See id.* at 633–34 (explaining that even if "the Fifth Amendment provides some added protection not encompassed in the Sixth Amendment's more specific provisions," the Constitution "does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them").

77. *Id.* at 634.

78. *Monsanto*, 491 U.S. at 615 n.10; *see, e.g.*, United States v. E-Gold, Ltd., 521 F.3d 411, 416 (D.C. Cir. 2008) (noting that the *Monsanto* Court "left open for the circuit's decision on remand" whether such a hearing is required by due process); United States v. Jamieson, 427 F.3d 394, 406 (6th Cir. 2005) (explaining that the *Monsanto* Court "specifically refrained from ruling on whether due process requires such a probable cause hearing"); United States v. Farmer, 274 F.3d 800, 803 (4th Cir. 2001) (recognizing that the *Monsanto* Court "expressly left open" whether the Fifth Amendment requires the pretrial hearing); United States v. Jones, 160 F.3d 641, 648 (10th Cir. 1998) (explaining that its holding is "not at odds" with the Supreme Court because neither the *Monsanto* nor the *Caplin & Drysdale* Court decided whether due process requires a hearing allowing the challenge to whether or not the assets are forfeitable); United States v. Monsanto, 924 F.2d 1186, 1190–91 (2d Cir. 1991) (explaining that the *Monsanto* Court "declined . . . to address the procedural aspects of such a pretrial restraint of property" and remanded the case for further proceedings).

law . . . ."[79] The Supreme Court has held that at the very least, the Due Process Clause requires that such deprivations be preceded by notice and an opportunity for a hearing appropriate to the case.[80] A traditional function of the grand jury is to screen for unfounded criminal charges.[81] The role of the grand jury, as it has been defined by the courts, is therefore a key component in defining the scope of the Fifth Amendment right to Due Process as it applies to the Criminal Forfeiture Statute.

In *Costello v. United States*,[82] the Supreme Court examined whether a grand jury indictment could be challenged on the basis that the only type of evidence presented was hearsay.[83] The Court looked to the Constitution in its analysis and found it to be silent on the types of evidence upon which grand juries may or may not act.[84] The Court also considered the history of the grand jury and explained that grand jurors have traditionally acted on their own knowledge, "unfettered by technical rules."[85] The *Costello* Court thus held that "[a]n indictment returned by a legally constituted and unbiased grand jury" is enough to satisfy the Fifth Amendment, even if the only evidence before the grand jury was hearsay.[86]

Less than two years later, the Supreme Court was again asked to establish a rule which would allow a grand jury indictment to be challenged on the grounds of inadequate evidence in *Lawn v. United States*.[87] The *Lawn* Court refused to establish such a rule, noting that "this Court has several times ruled that an indictment returned by a legally constituted nonbiased grand jury . . . if valid on its face . . . sat-

79. U.S. CONST. amend. V.

80. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (holding that at a minimum the Due Process Clause requires that deprivation of life, liberty or property be proceeded by notice and an opportunity for a hearing appropriate to the case).

81. *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 390 (1962) (explaining that the grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution").

82. 350 U.S. 359 (1956).

83. *Id.* at 359.

84. *Id.* at 362 ("But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act.").

85. *Id.* at 362–64.

86. *Id.* at 361, 363.

87. 355 U.S. 339 (1958). The Supreme Court affirmed the United States Court of Appeals for the Second Circuit's decision, holding that the defendants were not deprived of due process by the refusal to hold a hearing to investigate whether the grand jury considered certain evidence when it returned the indictment. *Id.* at 348–50.

isfies the requirements of the Fifth Amendment."[88] The Court was also careful to distinguish the case at hand from a case dealing with "incompetent or illegal evidence in a trial on the merits," and instead held that the situation conformed with the precedent set in *Costello*.[89]

The unassailability of grand jury indictments was further affirmed in *Bracy v. United States*,[90] in which a witness admitted to having committed perjury during the grand jury proceedings that led to the indictment of the defendant.[91] The Court denied the petition for certiorari review and a request to stay the enforcement of the judgment.[92] Again, in *United States v. Calandra*,[93] the Court further bolstered the grand jury's invulnerability by refusing to extend the exclusionary rule to grand jury proceedings.[94] In its holding, the Court emphasized that allowing witnesses to invoke the exclusionary rule before a grand jury would expose issues reserved for the trial and delay proceedings.[95] The Court explained that such suppression hearings would require extended litigation that would transform the hearing into a trial on the merits and potentially fatally delay the enforcement of criminal law.[96]

Over thirty years after *Costello*, the Supreme Court again reinforced the finality of grand jury determinations in *United States v. Williams*[97] by holding that a facially valid indictment may not be dismissed because the prosecutor failed to disclose exculpatory evidence to the grand jury.[98] The Court found that the Tenth Circuit's attempt to require a mandatory disclosure of exculpatory evidence to the grand jury was unsupported by its supervisory power.[99] The Court explained that because the grand jury is an institution separate from the courts, there is no supervisory judicial authority over the conduct of the

88. *Id.* at 349.

89. *Id.* at 349–50.

90. 435 U.S. 1301 (1978).

91. *Id.* at 1301.

92. *Id.* at 1301, 1303. Chief Justice Rehnquist reiterated the principle that the function of the grand jury is not to "sit to determine the truth of the charges brought" but instead "only to determine whether there is probable cause to believe them true." *Id.* at 1302.

93. 414 U.S. 338 (1974).

94. *Id.* at 354 ("In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect.").

95. *Id.* at 349.

96. *Id.* at 350.

97. 504 U.S. 36 (1992).

98. *Id.* at 55.

99. *Id.* at 45–47.

grand jury, and the courts therefore cannot prescribe standards for the grand jury to follow in their proceedings.[100]

Through this progression of cases, by a process of elimination and rejecting grounds for potential evidentiary challenges, the Supreme Court has made it clear that the primary method by which to invalidate a grand jury indictment is to allege that the grand jury was illegally constituted, such as in cases of purposeful discrimination.[101] Even then, it is an uphill battle; multiple courts have found the burden of proof of discrimination to be on the defendant[102] and the failure to raise a discrimination challenge in a timely manner to be the equivalent of waiver.[103] In short, the sanctity of the grand jury's role in making determinations of probable cause is well established and difficult to assail.

The Supreme Court has also used a balancing test introduced in *Mathews v. Eldridge*[104] to further determine the scope of the Due Pro-

100. *See id.* at 46–47 ("[T]he supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986))).

101. The Federal Rules of Criminal Procedure allow a defendant to move to dismiss a grand jury indictment on the basis that it was not "lawfully drawn, summoned, or selected." FED. R. CRIM. P. 6(b)(1). Selection procedures of a grand or petit jury may be challenged on the basis of discrimination on account of "race, color, religion, sex, national origin or economic status." 28 U.S.C. § 1867(e) (2012).

102. United States v. Miller, 116 F.3d 641, 657 (2d Cir. 1997) (holding that the burden is on the defendant to show a "substantial failure" in proportional representation which is greater than "[m]ere technical violations"); *see also* United States v. Fernandez, 497 F.2d 730, 733 (9th Cir. 1974) (explaining that defendants have the burden of showing prima facie discrimination in jury selection); United States v. McDaniels, 370 F. Supp. 298 (E.D. La. 1973), *aff'd sub nom.* United States v. Goff, 509 F.2d 825 (5th Cir. 1975) (holding that defendants must show "substantial failure" of complying with 28 U.S.C. § 1867, resulting in an intentional underrepresentation).

103. *See, e.g.*, United States v. Jones, 687 F.2d 1265 (8th Cir. 1982) (holding that failure to move to dismiss an indictment before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefore constitutes a waiver of the right to challenge the racial composition of the grand jury which indicted him); United States v. Grismore, 546 F.2d 844 (10th Cir. 1976) (explaining that when the defendant accepts the jury, he waives the right to object to any errors in the jury selection process); Ward v. United States, 486 F.2d 305 (5th Cir. 1973) (holding that the appellant waived his right to challenge the racial composition of the grand jury that indicted him by failing to raise the issue by motion before trial).

104. 424 U.S. 319 (1976). The *Mathews* Court considered whether due process required an evidentiary hearing prior to the termination of an individual's Social Security benefit payments. *Id.* at 323. The Government in *Kaley* argued that because of the Court's recent decision in *Medina v. California*, which held that the *Mathews* test was not the appropriate framework for addressing the validity of state procedural rules that are part of the criminal process, the *Mathews* test is similarly not applicable to determinations of the valid-

cess Clause.[105] *Mathews* raised the issue of when an individual's Fifth Amendment due process guarantee requires that an individual be given an opportunity to contest administrative action prior to the implementation of these actions.[106] The *Mathews* Court held that due process requires the consideration of three factors: the private interest that will be affected by the official action, the risk of an erroneous deprivation of this interest through the procedures used and the probable value of any procedural safeguards, and the Government's interest, including the burden that the additional safeguard would entail.[107] The Court explained the necessity of the test by rationalizing that the "essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[108]

The Court also reasoned that precedent has consistently held that some form of hearing has generally been required before an individual is permanently deprived of a property interest.[109] The Court also noted, however, that due process is not a "technical conception with a fixed content unrelated to time, place, and circumstances" and that it is "flexible" and requires situation-specific protections.[110] As a result of these concerns, and the factors considered in precedent, the *Mathews* Court established the three-factor test to ensure accuracy and to ultimately satisfy due process.[111]

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ity of criminal forfeiture orders. Kaley v. United States, 134 S. Ct. 1090, 1101 (2014) (citing Medina v. California, 505 U.S. 437 (1992)). The *Kaley* Court declined to "define the respective reach of *Mathews* and *Medina*, because we need not do so." *Id.*

105. *Mathews*, 424 U.S. at 323.

106. *Id.*

107. *Id.* at 334–35.

108. *Id.* at 348 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

109. *Id.* at 333. The *Mathews* Court further explained that "Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review." *Id.* The Court has also held that in some cases due process does not guarantee any process to an individual because the violation could not be predicted. *See* Parratt v. Taylor, 451 U.S. 527 (1981) (holding that even though the respondent, an inmate of a Nebraska prison, was permanently deprived of his property, the deprivation was not the result of an established state procedure but the failure of the state agents to follow the established procedure, and thus due process could be adequately satisfied by a subsequent tort claim).

110. *Mathews*, 424 U.S. at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)) (internal quotation marks omitted).

111. *Id.* at 334–35 (holding that "our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors").

The *Mathews* balancing test has been applied by several of the circuits to determine the necessity of a pretrial hearing to contest the seizure of assets under the criminal forfeiture statute.[112] The Court of Appeals for the District of Columbia, in *United States v. E-Gold, Ltd.*,[113] noted that the lack of an opportunity to have an evidentiary, adversary hearing could potentially give rise to a due process infringement, particularly in instances when the seizure led to an inability to retain counsel of choice.[114] The Appellants, however, requested an evidentiary hearing to address the existence of probable cause, and the Court of Appeals also recognized that in some cases "it may be impossible to afford a full adversarial hearing" before seizure.[115] The Court of Appeals also noted that the government may have rights in the property at issue that require immediate action.[116] The determination of whether a due process violation would occur, the court concluded, required "further inquiry."[117] Furthermore, as the *Mathews* test had been previously employed in situations of "protected interests" threatened by official action, and other circuits had used the test in cases involving criminal forfeiture, the *E-Gold* court held that application of the *Mathews* test was required.[118]

The United States Court of Appeals for the Seventh Circuit also concluded, in *United States v. Moya-Gomez*,[119] that in order to determine if a party's Fifth Amendment right to due process is violated by refusing an immediate post-restraint hearing, the *Mathews* test must be applied to the facts of the case.[120] The court first determined that the forfeiture caused the defendant to suffer a deprivation of property in the constitutional sense.[121] The court then asked whether the depri-

112. *See, e.g.*, United States v. E-Gold, Ltd., 521 F.3d 411, 417 (D.C. Cir. 2008) (noting that the Second Circuit applied the three *Mathews* factors and that therefore it must as well); United States v. Farmer, 274 F.3d 800, 805 (4th Cir. 2001) (explaining that after "[c]onsidering the three *Mathews* factors as they apply to Farmer," due process required a hearing to challenge probable cause); United States v. Jones, 160 F.3d 641, 645 (10th Cir. 1998) (explaining that the determination of whether due process requires a post-restraint, pretrial hearing requires that the three *Mathews* test factors be considered); United States v. Moya-Gomez, 860 F.2d 706, 726 (7th Cir. 1988) (noting that the due process determination for a particular setting requires an analysis consisting of the three *Mathews* factors).

113. 521 F.3d 411 (D.C. Cir. 2008).

114. *Id.* at 415.

115. *Id.* at 413, 415–16.

116. *Id.* at 415–16.

117. *Id.* at 416.

118. *Id.* at 415–19.

119. United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988).

120. *Id.* at 725–26.

121. *Id.* at 725.

vation of this property met the requirements of the Due Process Clause.[122] In order to answer this question, the court determined, the three factors enumerated in the *Mathews* test must be weighed.[123] The *Moya-Gomez* court indicates that application of the *Mathews* test is critical because without it, the present statutory scheme created by 21 U.S.C. Section 853, the criminal forfeiture statute, provides no opportunity to question the government's contention that certain property is subject to forfeiture, and therefore violated due process when the forfeiture renders the defendant unable to retain his or her counsel of choice.[124]

C. The Circuits Have Split on What Grounds an Order to Restrain Assets May Be Challenged During a Pretrial Hearing

The circuits have concluded that a pretrial hearing to challenge a restraining order issued pursuant to the forfeiture statute is required to satisfy due process but split on the issue of what exactly may be challenged. After applying the *Mathews* test, the Seventh Circuit in *United States v. Moya-Gomez*[125] concluded that an immediate, adversarial hearing is required to satisfy due process, provided that the restraining order implicates funds that have been demonstrated to be necessary to defendants in retaining the counsel of their choice.[126] The Seventh Circuit, however, limited such a hearing to the issue of whether the assets are subject to forfeiture and noted that the court "may not inquire as to the validity of the indictment"[127] and must accept that the probable cause decision made by the grand jury is "determinative."[128] In a subsequent case, *United States v. Michelle's Lounge*,[129] the Seventh Circuit clarified a district court's confusion in applying the *Moya-Gomez* holding.[130] The Court applied the *Mathews* test and concluded that a post-seizure adversary hearing on probable

122. *Id.* at 726.

123. *Id.*

124. *Id.* at 729.

125. 860 F.2d 706 (7th Cir. 1988).

126. *Id.* at 728–30.

127. *Id.* at 728.

128. *Id.* (quoting S. REP. NO. 98-225, at 3386 (1984)) (internal quotation marks omitted).

129. 39 F.3d 684 (7th Cir. 1994).

130. *Id.* at 688, 691. "Thus, the most accurate description of the district court's order is that although it released two assets, . . . it otherwise denied Messino's motion that *Moya-Gomez* required an adversary hearing or the release of sufficient assets to pay attorney's fees. We are thus called upon to review whether *Moya-Gomez*'s requirements are applicable here." *Id.* at 691.

cause is required even when the assets are seized through *civil* forfeiture, provided they are needed to obtain counsel.[131] The Fourth Circuit, in *United States v. Farmer*,[132] similarly limited the hearing to the very narrow purpose of determining whether some of the assets seized may have been untainted.[133]

Several circuits have fallen on the other side of the spectrum, holding that there can never be a hearing to contest probable cause. For example, the Tenth Circuit in *United States v. Jones*[134] held that the lower court may not revisit any matter to which probable cause is established in the indictment.[135] The Sixth Circuit in *United States v. Jamieson*[136] followed the *Jones* Court.[137] The Ninth Circuit reviewed a district court's denial of a motion for reconsideration in a matter that dealt with seized funds in *United States v. Dejanu*.[138] The Ninth Circuit held that a lack of new evidence is sufficient grounds alone for denying the motion.[139] The Court further elaborated, however, explaining that a restraining order under the criminal forfeiture statute is constitutional as long as the district court holds a hearing to determine whether probable cause exists, provided that probable cause is found independently from the indictment during this hearing.[140]

Finally, the Second Circuit's holdings are the most favorable for the defendants, such as in *United States v. Monsanto*,[141] on remand from the Supreme Court. In *Monsanto*, the Second Circuit explicitly held that grand jury determinations of probable cause may be consid-

131. *Id.* at 700–01. "The criminal defendant whose assets have been seized via civil forfeiture is deprived of a significant interest just as if the assets were restrained pursuant to criminal forfeiture." *Id.* at 701.

132. 274 F.3d 800 (4th Cir. 2001).

133. *See id.* at 801 ("[W]e . . . remand with directions to hold a hearing for the limited purpose of determining whether untainted assets have been seized and whether Farmer requires those assets to hire counsel.").

134. 160 F.3d 641 (10th Cir. 1998).

135. *Id.* at 644.

136. 427 F.3d 394 (6th Cir. 2005).

137. *See id.* at 407 (noting that "[w]e have no quarrel with the district court's decision to apply *Jones*" particularly in light of the fact that the defendant in this case "failed to allege prejudice," had "not even voiced dissatisfaction with his two trial attorneys," and "cannot show that he was deprived of counsel of his own choosing, because the record indicates that his primary court-appointed attorney was, in fact, his counsel of choice").

138. 37 F. App'x 870, 871 (9th Cir. 2002).

139. *Id.* at 873.

140. *Id.*

141. 924 F.2d 1186 (2d Cir. 1991).

ered at the pretrial hearing.[142] The District of Columbia Circuit in *United States v. E-Gold, Ltd.*[143] followed the Second Circuit's holding.[144]

III. THE COURT'S REASONING

In *Kaley v. United States*, the United States Supreme Court affirmed the judgment of the Eleventh Circuit, holding that the Due Process Clause, even when combined with the defendants' Sixth Amendment interests, does not command a pretrial hearing to contest the grand jury's finding of probable cause supporting the charges against them.[145] The Court reasoned that the decisions in *Caplin & Drysdale, Chartered v. United States* and *United States v. Monsanto* had already "cast the die" on this case as well, because these cases concluded that the Fifth Amendment's right to due process and the Sixth Amendment's right to counsel do not constrain the way that federal forfeiture statutes apply to assets needed to retain an attorney.[146]

The *Kaley* Court first reiterated the holding in *Caplin and Drysdale*, which concluded that a defendant does not have a Sixth Amendment right to spend another person's money, even if this means that he will not be able to retain the attorney of his choice.[147] As the assets seized from a defendant pursuant to the forfeiture statute are considered "not rightfully his," they cannot be spent by the defendant.[148] The *Kaley* Court then looked to M*onsanto*, which reaffirmed that as long as there was probable cause, the freeze on a person's assets is valid.[149]

The *Kaley* Court stated that the primary issue raised in this case is who should have the last word on probable cause, and the Court concluded that the "fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand

142. *See id.* at 1199 ("[W]e concededly would require reconsideration of probable cause determinations made by a grand jury in the course of returning an indictment, contrary to the view expressed in the Senate Report.").

143. 521 F.3d 411 (D.C. Cir. 2008).

144. *See id.* at 419 ("We thus join the Second Circuit in holding that defendants have a right to an adversary post-restraint, pretrial hearing for the purpose of establishing whether there was probable cause 'as to the defendant[s'] guilt . . . ." (citing *Monsanto*, 924 F.2d at 1195)).

145. Kaley v. United States, 134 S. Ct. 1090, 1094, 1096 (2014).

146. *Id.* at 1096.

147. *Id.* (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623–35 (1989)).

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

149. *Id.* at 1097 (citing United States v. Monsanto, 491 U.S. 600, 616 (1989)).

juries."[150] The Court first looked to precedent to support this conclusion, explaining that the totality of the case law has consistently held that the grand jury gets to determine whether probable cause exists, "without any review, oversight, or second-guessing."[151] The Court found that similar statutes also supported the finality of the grand jury's finding.[152] The *Kaley* Court compared 21 U.S.C. Section 853 to the Bail Reform Act of 1984, which denies judicial reconsideration of an indictment returned by a proper grand jury finding probable cause, and explained that as such the Bail Reform Act is evidence of the lack of constitutional compulsion to require any additional inquiry.[153] Finally, the Court cited a host of potential "strange and destructive consequences," including the possibility for multiple, inconsistent findings, an undermining of the grand jury's role in the criminal justice system, and the likely freezing of the prosecutor's case if the grand jury determinations were allowed to be disputed during a pretrial hearing.[154]

The *Kaley* Court declined to address the applicability and reach of the *Mathews v. Eldridge*[155] balancing test in this situation, because the balancing enquiry is not capable of "trumping this Court's repeated admonitions that the grand jury's word is conclusive."[156] Even if it were able to do so, however, the Court explained that the test tips against the Kaleys and they would still not be entitled to a hearing to contest probable cause.[157] When conducting the test, the Court noted the significant government interest in freezing potentially forfeitable assets and the substantial use of judicial resources that such a hearing would consume, as well as the heavy burden the freeze places on the defendants' ability to hire the lawyer of their choice.[158]

150. *Id.*

151. *Id.* at 1097–98 (citing Costello v. United States, 350 U.S. 359 (1956); Gerstein v. Pugh, 420 U.S. 103 (1975); United States v. Williams, 504 U.S. 36, 54 (1992); and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)).

152. *Id.* at 1098 n.6.

153. *Id.*

154. *Id.* at 1099–1100.

155. *See supra* notes 104–107 and accompanying text.

156. *Kaley*, 134 S. Ct. at 1101.

157. *Id.* (explaining that the test tips against the Kaleys because "the problem . . . comes from *Mathews*' prescribed inquiry into the requested procedure's usefulness in correcting erroneous deprivations of their private interest" and that as "a seizure of the Kaleys' property is erroneous only if unsupported by probable cause, the added procedure demanded here is not sufficiently likely to make any difference").

158. *Id.* at 1101–03.

The Court particularly emphasized the importance of the final prong of the test, which boils the issue down to the probable value of the judicial hearing in uncovering a mistaken grand jury finding of probable cause.[159] The Court concluded that both the Supreme Court precedent and other courts' experiences "indicate that a full-dress hearing will provide little benefit" because of the relatively low bar set by the probable cause standard.[160] The *Kaley* Court even went so far as to analyze the potential arguments that the Kaleys could pursue at a pretrial hearing for assessing probable cause, including attacking the evidence that the Government had previously offered in support of the allegations and introducing new evidence.[161] Neither of these methods would be successful, the Court explained, because the adversarial process has relatively little impact on the threshold finding of probable cause.[162] The Court then pointed out the inability of anyone to find a case in which an indictment had been overturned on rehearing because of insufficient probable cause.[163]

In his dissent, Chief Justice Roberts argued that the possibility for abuse by the prosecution, specifically the ability of the prosecutor to take away a defendant's ability to choose his or her own counsel, implicates the overall fairness of the trial, as protected by the Sixth Amendment.[164] He contended that the deprivation of the right to counsel in this case is a permanent deprivation, one that is lost once the trial begins, and therefore the Kaleys must have an opportunity to meaningfully challenge that deprivation *before* the trial begins.[165] The Chief Justice also disputed the majority's application of the *Mathews* test factors, maintaining that the Kaleys' interests at stake were shortchanged and the government's interests and potential concerns were exaggerated.[166]

IV. ANALYSIS

In *Kaley v. United States*, the United States Supreme Court held that the Due Process Clause of the Fifth Amendment, even when considered in combination with an individual's Sixth Amendment right to counsel, does not command a pretrial hearing to contest the grand

159. *Id.* at 1103.
160. *Id.*
161. *Id.* at 1104.
162. *Id.*
163. *Id.*
164. *Id.* at 1107–08 (Roberts, C.J., dissenting).
165. *Id.* at 1114.
166. *Id.* at 1111.

jury's finding of probable cause for the offenses permitting criminal forfeiture.[167] The *Kaley* Court erred in concluding that this issue hinged on the conclusiveness of a grand jury's determination.[168] Even though the Court came to the correct holding, the Court used precarious grounds.[169] The practical result of the holding is that a traceability hearing is required by Due Process but a probable cause hearing is not.[170] The deference due to the grand jury is far from a settled matter,[171] and as such, the Court should have instead focused on the absence of a hearing depriving an individual of the counsel of his or her choice.[172] An infringement upon the right to counsel of choice, which is separate and distinct from the right to adequate counsel and does not apply to indigent defendants, has been deemed insufficient to generate a constitutional violation.[173] The digression into a discussion of the function and necessity of the grand jury, and the importance of maintaining the finality of grand jury determinations, is an unnecessary and distracting detour. This digression could potentially cause confusion among the district courts when interpreting the *Kaley* decision and could be considered a violation of the Supreme Court's avoidance principles.[174]

A. The Kaley *Court Should Have Focused on the Conclusion That the Deprivation of the Right to One's Choice of Counsel Does Not Give Rise to a Constitutional Violation*

The Supreme Court was correct in determining that the denial of a pretrial hearing does not give rise to a constitutional violation, and therefore such a hearing is not constitutionally required. The *Kaley* Court failed to adequately consider, however, the central issue in the case: that the absence of a hearing severely limits or even eradicates an individual's right to counsel of choice.[175] The right to counsel of

167. *Id.* at 1094, 1096 (majority opinion).

168. *See infra* Part IV.A.

169. *See infra* Part IV.B.

170. *See infra* Part IV.B.1.

171. *See infra* Part IV.B.2.

172. *See infra* Part IV.A.

173. *See infra* Part IV.A.

174. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application.").

175. *See* Kaley v. United States, 134 S. Ct. 1090, 1102 (2014) (recognizing the right to counsel of choice as a "vital interest" and considering it only as a factor in the balancing

choice is a right described by the Court as "'the root meaning' of the Sixth Amendment" and one that "matters profoundly" to defendants like the Kaleys.[176] Yet when considering the weight of this right in the framework of the *Mathews* balancing test—even though the Court declined to consider the test's applicability to this case it proceeded to undertake the analysis regardless—the *Kaley* Court readily dispenses with the right to counsel's relevance in this context.[177] The Court accomplishes this by reasoning that, as explained by the *Monsanto* Court, an asset freeze depriving a defendant of the counsel of his or her choice is only erroneous when conducted without a finding of probable cause.[178] As the grand jury found that in this case there was probable cause, the burden on the right, even though "weighty," is permissible.[179] The Court failed to hold that the right to counsel of choice is a separate and distinct right from the right to counsel, and as the right to counsel of choice does not apply to indigent defendants, the Kaleys have suffered no constitutional violation.[180] It is on these grounds, rather than on the basis of the inviolability of the grand jury, that the Kaleys' case should have been resolved.

1. *The Right to Counsel of Choice Is a Right That Is Separate and Distinct from the Right to Counsel*

It is important to clarify that the right to counsel is a right that is separate and distinct from the right to counsel of choice.[181] A violation of the right to counsel of one's choice has been defined by the Supreme Court as one that is completed when a defendant has been "erroneously prevented from being represented by the lawyer he wants, regardless of the *quality* of the representation he received."[182] The right to adequate counsel, in contrast, was discussed at length in *Strickland v. Washington*,[183] which devised a two-part test to determine whether or not that right has been violated.[184] The defendant first must show that his or her counsel's performance was deficient by

test, but failing to consider it in the context as an enumerated right that could potentially give rise to a constitutional violation).

176. *Id.* at 1102–03.

177. *Id.* at 1103.

178. *Id.*

179. *Id.*

180. *See infra* note 196.

181. United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006).

182. *Id.* (emphasis added).

183. 466 U.S. 668 (1984).

184. *Id.* at 687; *see supra* note 47 (describing the two-step *Strickland* adequate counsel test).

showing that the errors made by counsel were of such a serious nature that the defendant did not have "counsel" in the same sense as guaranteed by the Sixth Amendment, and second, the defendant must show that as a result of the deficient performance, the defense was prejudiced.[185]

In contrast to the right to counsel, the right to counsel of choice has been repeatedly held to be a qualified right.[186] In *Wheat v. United States*, the Supreme Court explained that a defendant has no right to counsel that he cannot afford, to counsel who declines to represent the defendant, or to counsel who has a conflict of interest as a result of representing an opposing party.[187] The *Gonzalez-Lopez* Court noted further limitations on the right, including the inability of a defendant to be represented by a person who is not a member of the bar.[188] In short, the Supreme Court has held that the courts have an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession" and as such, limitations of the right to counsel of choice can be validly imposed to accommodate this "institutional interest."[189]

The criminal forfeiture statute advances exactly these types of legitimate institutional interests of the court, in addition to government institutional interests.[190] Therefore limiting the right to counsel of choice in this instance, by denying a pretrial hearing that will contest an indictment allowing the seizure of assets that are intended to be used to retain one's counsel of choice, is compatible with the previously held qualified nature of that right. This is therefore not an infringement that gives rise to a constitutional violation. The *Kaley* Court could have and should have ended its analysis there, without unnecessarily wading into the murky waters of grand jury reviewability.

185. *Strickland*, 466 U.S. at 687.

186. *See supra* notes 183–85.

187. 486 U.S. 153, 159 (1988).

188. United States v. Gonzalez-Lopez, 548 U.S. 140, 151–52 (2006).

189. *Wheat*, 486 U.S. at 160.

190. *See, e.g.*, *Kaley*, at 1101–02 (discussing the governmental interest in criminal forfeiture); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 627 (1989) (discussing the substantial nature of the property rights the forfeiture statute gives the government).

2. The Right to Counsel of Choice Does Not Apply to Indigent Defendants and as a Result of a Valid Indictment, the Kaleys Are Indigent Defendants

Most critically, the *Kaley* Court failed to recognize that the right to counsel of choice is also not applicable to indigent defendants, and therefore the forfeiture of assets that renders a defendant unable to afford his preferred representation, while a deprivation, is not a constitutional violation.[191] In 1963, the Supreme Court extended the *Powell v. Alabama* holding in *Gideon v. Wainwright*[192] by holding that the right to appointed counsel applied to all felony cases, including state crimes, in addition to capital cases.[193] Less than ten years after *Gideon*, the Supreme Court extended the right to appointed counsel even further in *Argersinger v. Hamlin*,[194] holding that unless the defendant has knowingly and intelligently waived his or her right to counsel, an individual has the right to appointed counsel in any case in which he or she is threatened with imprisonment, regardless of whether it is a misdemeanor or felony crime.[195] These extensions to indigent defendants' right to appointed counsel in effect bolster and protect their right to adequate counsel as well. This creates a sharp contrast to the right to counsel of choice, which as the *Gonzalez-Lopez* Court explicitly stated, "does not extend to defendants who require counsel to be appointed for them."[196]

The argument has been raised that the government is attempting to blunt the adversary system in favor of the prosecution through the use of the forfeiture statute, which prevents defendants from being able to afford their counsel of choice.[197] As the *Kaley* Court points out, however, the "majority of criminal defendants proceed with appointed counsel" and "the Court has never thought . . . that doing so

191. *See, e.g.*, *Kaley*, 134 S. Ct. at 1102 n.13 (noting that a restraint on assets would require the appointment of effective counsel and that appointed counsel has never been held by the Court to be less effective or unfair). The Court fails to note the crucial distinction between the right to effective counsel and the right to counsel of choice, how forfeiture impacts the former but not the latter, and therefore is not a violation of the Sixth Amendment. *Id.*

192. 372 U.S. 335 (1963).

193. *Id.* at 339–40, 344 (explaining that the right to counsel is a fundamental right, and is essential to a fair trial in all criminal cases, in both state and federal courts).

194. 407 U.S. 25 (1972).

195. *Id.* at 37.

196. United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006).

197. *See* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 80 & n.299 (1991).

risks the 'fundamental fairness of the actual trial.'"[198] Publicly provided legal counsel is not a rare or uncommon occurrence; in fact, about three-fourths of state prison inmates and about half of those inmates in federal prisons reported using publically provided counsel for the offenses for which they were serving.[199] While it is a reality that the sheer number of defendants unable to afford representation in combination with insufficient funding and resources are challenges to the quality of public defenders,[200] due process nevertheless sets the standard that each and every defendant receive equal, constitutionally adequate treatment within the justice system.[201] Placing all defendants on equal footing, regardless of their financial status, is a principle that the courts have strived to uphold.[202]

Defendants who have had their assets legitimately frozen by the forfeiture statute in effect are placed in the same position as defendants who cannot afford to pay for an attorney.[203] As such, in this instance, the right to counsel of choice does not apply to defendants such as the Kaleys, and the right to effective counsel can be satisfied by appointing a qualified attorney to defend them.[204] If the Kaleys were to be treated differently by the justice system from indigent defendants simply because they used to be wealthy, such treatment would create a different standard based on current or prior economic status.[205] This unequal treatment could be considered a violation of equal protection, and thus it could be held to be unconstitutional.[206]

198. *Kaley*, 134 S. Ct. at 1102 n.13 (quoting *id.* at 1111 (Roberts, C.J., dissenting)).

199. U.S. DEP'T OF JUSTICE, NCJ-158909, BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS: INDIGENT DEFENSE 1 (1996), *available at* http://www.bjs.gov/content/pub/pdf/id.pdf.

200. *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS: FACT SHEET (2011), *available at* http://ojp.gov/newsroom/factsheets/ojpfs_indigentdefense.html (explaining the challenges and obstacles faced by local indigent defense systems).

201. U.S. CONST. amend. V.

202. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 16–17 (1956) (holding that a defendant cannot be denied an appeal because he or she does not have the money to pay for a transcript of their trial and noting that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

203. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another person's money' for legal fees—even if that is the only way to hire a preferred lawyer.").

204. *See* Kaley v. United States, 134 S. Ct. 1090, 1097 (2014) (noting that the Kaleys do not dispute the proposition that with probable cause a freeze is valid).

205. *See id.* at 1096 (discussing how assets seized from a defendant pursuant to the forfeiture statute are no longer "rightfully his" (quoting *Caplin & Drysdale*, 491 U.S. at 618)(internal quotation marks omitted))).

206. U.S. CONST. amend. XIV.

Provided the Kaleys' appointed attorney meets the constitutional requirements of effectiveness laid out by *Powell* and *Strickland*,[207] they will have suffered no constitutional violation and therefore have no constitutional right to a pretrial hearing to challenge the deprivation of their assets; due process will have been satisfied.[208]

B. The Kaley *Court Came to the Correct Holding but on Precarious Grounds*

The *Kaley* Court based the majority of its holding on the conclusiveness of the grand jury determination.[209] The practical result of this decision is that pretrial hearings held to contest the traceability of assets seized are still required by due process, but a pretrial hearing held solely to contest a grand jury's finding of probable cause for the underlying offense supporting the asset seizure is not.[210] This contradiction is complicated by the Court's including the *Mathews* balancing test in its analysis but explicitly choosing not to rule on the test's applicability to this case.[211] If the *Mathews* framework is applied to this issue, particularly when taking into consideration the harm that the grand jury institution would sustain if such a hearing was permitted, the *Kaley* holding does make more sense. The stability and significance of the *Kaley* holding, even once bolstered by the *Mathews* framework, is weakened significantly by the considerable debate over the importance of and deference to the grand jury institution, howev-

207. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that in a capital case, where the defendant is unable to employ counsel and incapable of making his own defense, that "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law" and that this duty is not discharged unless the assigned counsel has given effective aid in the preparation and trial of the case); *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (explaining the test for effective counsel).

208. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on "governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."). The Kaleys were not deprived of their interest in effective counsel, and so no hearing is required. *See id.* at 333 ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest."); *see also Kaley*, 134 S. Ct. at 1111 (Roberts, C.J., dissenting) (explaining that the freezing of assets that would be used to fund attorney's fees amounts to the deprivation of a property interest).

209. *Kaley*, 134 S. Ct. at 1100 (majority opinion).

210. *Id.* at 1108 (Roberts, C.J., dissenting) (noting that the majority has not given any reason to why a grand jury's determinations as to traceability must be reconsidered but probable cause may not be reconsidered).

211. *Id.* at 1100–04 (majority opinion) (conducting a *Mathews* analysis but declining to comment on its applicability to the Kaleys' case).

er.[212] It is this doubt that, even when integrating the *Mathews* analysis into the Court's reasoning, makes the *Kaley* holding less than satisfying.

1. *The Practical Result of the* Kaley *Holding Is That a Traceability Hearing Is Required by Due Process but a Probable Cause Hearing Is Not*

The *Kaley* Court did not extensively address the anomalous treatment that the court system gives pretrial hearings contesting the traceability of forfeited assets to the crime being tried, as compared to pretrial hearings that challenge grand jury determinations of probable cause for the underlying charges authorizing those same seizures.[213] It is currently undisputed among the circuit courts that due process requires a pretrial hearing to challenge the traceability of assets frozen pursuant to the forfeiture statute.[214] Not only is such a hearing on this issue merely allowed, it is generally considered constitutionally *required*.[215]

The only explanation that the Court offers to account for why traceability is subject to judicial review and probable cause is not, is that tracing assets is "a technical matter far removed from the grand jury's core competence and traditional function."[216] This justification fails to explain exactly how the "technical" nature of traceability means that its review is *required* by due process but probable cause is not.

It is possible that in citing the "technical" nature of traceability the *Kaley* Court was alluding to the origins of criminal forfeiture, which was first introduced in 1970 with the passage of the Racketeering Influenced and Corrupt Organizations Act ("RICO").[217] Until the RICO Act was passed, virtually no American legal precedent for the

212. *See infra* Part V.B.2.

213. *See Kaley*, 134 S. Ct. at 1095 (noting that the lower courts have "uniformly allowed" a defendant to litigate traceability); *see also id.* at 1095 n.3 (noting that the Government agreed that a defendant has a constitutional right to a hearing on traceability and declining to opine on the issue).

214. *Id.* at 1095.

215. *See id.* at 1108 (Roberts, C.J., dissenting) (noting that a district court constitutionally must, if asked, review the grand jury's findings as to traceability but may not do so as to the underlying charged offenses); *see also supra* note 214.

216. *Kaley*, 134 S. Ct. at 1099 n.9 (majority opinion).

217. Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§ 1961–1968 (2012).

forfeiture mechanism existed.[218] The RICO Act was initially enacted as a weapon against large-scale organized crime and drug trafficking.[219] One of Congress' objectives in enacting the legislation was to separate and protect the legitimate businesses that had been infiltrated by organized crime; as a result, only those assets that are traceable to, or the fruit of illegal activity, are forfeitable, rather than the entirety of the defendant's property.[220]

Courts have debated over the precise definitions and quantifications of this traceability analysis, particularly in the pretrial context.[221] In 2000, Congress approved Rule 32.2 of the Federal Rules of Criminal Procedure, which preserved a defendant's right to contest traceability, provided that the government has established the "requisite nexus between the property and the offense."[222] It is important to note, however, that this right is not a constitutional one, but merely one legislatively prescribed and which can be voluntarily waived.[223] The criminal forfeiture statute, 21 U.S.C. Section 853, defines the property forfeitable as proceeds obtained "directly or indirectly" from the violation and such property used to "facilitate the commission of" the violation, and also includes a "rebuttable presumption" provision.[224] Under this provision, the government must establish by a preponderance of the evidence that: (1) the assets were acquired during the same period in which the violation in question occurred and (2) that there is no likely source for the defendant to have gained this

218. Richard W. Mass, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663, 664–67 (1987) (noting that "[c]riminal forfeiture was a typical punishment under English common law for those who were convicted of treason or felony" but that "criminal forfeiture never gained acceptance in the American colonies").

219. *Id.* at 663–64. The same year that RICO was passed, Congress also passed the Comprehensive Drug Abuse Prevention and Control Act, which contained an almost identical forfeiture provision. Both provisions were enacted in the Comprehensive Crime Control Act of 1984. *Id.* at 665.

220. *Id.* at 666–67.

221. Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 67–69 (2004).

222. *Id.* at 73 (quoting FED. R. CRIM. P. 32.(b)(1)(A)).

223. Cassella, *supra* note 221, at 95. Cassella examines the pre-American roots and recent case law concerning criminal forfeiture and ultimately concludes that the criminal defendant's right to a jury determination on forfeiture issues is merely a statutory right, not a constitutional one. *Id.*; *see* Libretti v. United States, 516 U.S. 29, 34 (1995) ("Libretti acknowledged in the agreement 'that by pleading guilty to Count Six of the Indictment, he waive[d] various constitutional rights, including the right to a jury trial.").

224. 21 U.S.C. § 853(a), (d) (2012).

property other than from the violation.[225] If the government meets this burden of proof at trial, then the assets are presumed to be forfeitable unless proven otherwise.[226]

In light of the history of the criminal forfeiture statute, the property rights at stake, and the nature of the analysis required, the due process requirement of a pretrial hearing to contest traceability of seized assets is logical. In order to reconcile why the *Kaley* Court held that the probable cause pretrial hearing is not similarly required by due process, it is helpful to turn to the *Mathews* analysis. In conducting the test, the *Kaley* Court considered the restraint on the defendants' ability to retain the counsel of their choice.[227] The *Kaley* Court weighed this interest against the value to the government of forfeiture, as well as the costs and time consumed by a probable cause hearing, or "mini-trial."[228] Along with this cost, the Court included the potential exposure of the prosecution's case.[229] The Court considered this harm in light of the second prong of the *Mathews* analysis, the risk of an erroneous deprivation of this interest through the procedures used and the probable value of any procedural safeguards.[230] The Court concluded that any deprivation of the right to counsel of choice would not be erroneous as a result of the *Monsanto* holding, requiring only probable cause to commit the deprivation.[231] In short, the *Kaley* Court determined that the first two factors were a wash, but that the third prong of the test, the government's interest, including the burden that the additional safeguard would entail, tipped the scale against the Kaleys.[232]

This prong of the test in essence left the Court with two options: hold that the grand jury determinations of probable cause can be overturned by a judge at a subsequent probable cause hearing, and in doing so, effectively render irrelevant an institution that has been a part of the criminal justice system since its foundation, or alternatively hold that due process does not require the probable cause hearing. Placed between a rock and a hard place, colloquially speaking, the Court's decision to forestall the application of the *Mathews* test and

225. *Id.* § 853(d).
226. *Id.*
227. Kaley v. United States, 134 S. Ct. 1090, 1101 (2014).
228. *Id.*
229. *Id.*
230. *Id.* at 1103.
231. *Id.*
232. *Id.* at 1103–04.

instead base the holding on the grand jury's unassailable role in the system becomes less of a mystery.

2. The Deference Due to the Grand Jury Is Far from Settled Law

The *Kaley* Court based the majority of its holding on precedent that recognizes the grand jury's exclusive role in determining probable cause and prohibits challenges to the reliability or sufficiency of the evidence supporting a grand jury's finding of probable cause.[233] The Court explained that as a practical matter, because a grand jury indictment can effect a pretrial restraint on a *person* by restricting his or her liberty in such a way that is conclusive until trial, it follows that a higher standard is not constitutionally required for an individual's *property*.[234] In short, the Court concluded that no matter how compelling an argument the Kaleys make, such a hearing cannot be required because of "a fundamental and historic commitment of our criminal justice system" to trust the grand jury to make such probable cause determinations.[235]

The sanctity and vital nature of the role of the grand jury is not as clear-cut as the *Kaley* Court makes it out to be, however. Scholars disagree on whether grand juries are a necessary, or even advantageous, element of the criminal justice system.[236] Most notably, the grand jury has been accused of being an inadequate check on over-zealous prosecutions.[237] The grand jury is designed to act as a screen, weeding out charges that are not supported by adequate evidence, shielding individuals from malicious or unwarranted prosecutions.[238] In fulfilling this role, a grand jury is primarily responsible for hearing the prosecution's side of the case, to determine if it has met its burden of probable cause.[239] The decision does not have to be unanimous, and there are few limits on the types of evidence the jury can hear.[240] The prosecutor is also not required to inform the grand jury of any evidence that is favorable to the defendant.[241] The result is an extremely

233. *Id.* at 1097.

234. *Id.* at 1098.

235. *Id.* at 1097.

236. *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 262 (1995) (noting that "[t]his division of opinion is not only sharp, but fundamental").

237. *Id.* at 263. Leipold argues that "as currently constructed, grand juries not only do not, but cannot, protect the accused from unfounded charges." *Id.* at 264.

238. *Id.* at 262–63.

239. *Id.* at 265–66.

240. *Id.* at 266–67.

241. *Id.* at 267.

high indictment rate; for example, in one study, a 99.6% success rate was recorded.[242] This has prompted many to allege that the grand jury is an ineffective screen, and famously, willing to "indict a ham sandwich" if asked.[243]

The lack of restraints that are placed on the grand jury have caused even the Supreme Court to comment that the body is a "grand inquest" whose "scope of . . . inquiries is not to be limited narrowly by questions of propriety" or "by doubts whether any particular individual will be found properly subject to an accusation of crime."[244] These and other concerns relating to the grand jury as an institution were even vocalized by the justices themselves during the *Kaley* oral arguments. As Chief Justice Roberts noted, the grand jury, even though in theory designed to protect individuals from unfounded prosecutions, is "not great insulation from the overwe[e]ning power of the government."[245]

There is overwhelming evidence that the grand jury is not a perfect institution, and it is cases like the Kaleys', which directly challenge the authority of an institution deeply entrenched within the history and values of our criminal justice system, that are particularly difficult to resolve. Framing the issue in this context is a lose-lose situation—the Court cannot directly disregard or circumvent the role of the grand jury in determining probable cause, but upholding the grand jury's determinations as unchallengeable leaves a lot of lingering uncertainty over fairness and government power. As Justice Scalia said in response to Howard Srebnick, who argued on behalf of the Kaleys that the grand jury is a one-sided presentation that does not give the defendant an opportunity to be adequately heard, "[w]e've been doing it for a thousand years, though, and it's hard to say that it violates what our concept of fundamental fairness is."[246]

Justice Scalia's point goes to the core of the problem: even though we've been doing it this way for many years, longevity alone does not mean the grand jury remains an effective screening tool in an evolving criminal justice system, despite its original function.[247] With criticism and doubt in the grand jury institution's infallibility

242. *Id.* at 274.

243. *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (N.Y. Sup. Ct. 1989).

244. Blair v. United States, 250 U.S. 273, 282 (1919).

245. Transcript of Oral Argument at 26, Kaley v. United States, 134 S. Ct. 1090 (2014) (No. 12-464).

246. *Id.* at 9.

247. *See supra* note 238 and accompanying text.

both widespread and considerably well-founded, it becomes increasingly clear that the *Kaley* Court has only opened the door for uncertainty and dispute by basing its holding on the finality of the grand jury. Instead, the Court should have looked to the lack of Fifth and Sixth Amendment violations as grounds for the *Kaley* holding.

V. CONCLUSION

In *Kaley v. United States*, the Supreme Court concluded that the Constitution does not give the defendants a right to a pretrial hearing to relitigate a grand jury's determination of probable cause to believe that the defendants committed the crime charged.[248] Although the *Kaley* Court came to the correct holding, the Court erred in concluding that this issue hinged on the conclusiveness of a grand jury's determination.[249] The Court should have instead focused on the absence of such a hearing resulting in deprivation of the defendant's access to his or her counsel of choice, which does not amount to a constitutional violation.[250] To do otherwise would be to raise questions of efficiency, generate issues relating to equal protection, and most importantly, create the potential for confusion and inconsistent interpretations of the *Kaley* holding by the lower courts.

248. 134 S. Ct. 1090, 1094, 1096 (2014).

249. *See supra* Part IV.B.

250. *See supra* Part IV.A.