No. 12-464

In the
Supreme Court of the United States of America

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[*]

The National Association of Criminal Defense Lawyers is a nonprofit professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. Its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only national professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in its House of Delegates. This case implicates NACDL's mission because it concerns the structural Sixth Amendment right to counsel of choice.

SUMMARY OF THE ARGUMENT

The circuit courts of appeals are divided over the process due defendants whose assets are restrained while the government prosecutes them. The courts disagree over whether a pre-trial adversarial hearing is always required, whether defendants can challenge the probable cause finding underlying the charges, and whether defendants bear the burden of proof. In this case, the Petitioners retained counsel when they came under investigation. Two years later, after indictment, the government obtained an *ex parte* order calculated

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[*]Counsel for the parties was timely notified of NACDL's intent to file this brief and agreed to its filing. No party or counsel for a party authored any part of it or contributed money intended to fund its preparation or submission. NACDL paid all costs associated with preparing and submitting it.

to impoverish the Petitioners and deprive them of any further assistance of their counsel. The Eleventh Circuit afforded the Petitioners a hearing only as to whether the restrained assets were traceable to the charges, not as to whether the government was likely to prove the charges. Other circuits allow challenges to the probable cause finding embodied in a grand jury's indictment because, even if a case ends in acquittal, there is no way to know whether an erroneous asset seizure prolonged the prosecution or inflicted other injury. Because this issue implicates a structural right critical to the Nation's adversarial system of criminal justice, this Court should clarify that a grand jury's probable cause determination does not relieve the government of any of its usual burden, when it seeks to restrain or seize property, of showing at a prompt, adversarial hearing that it has good cause to do so.

ARGUMENT

Whether effected via criminal-forfeiture provisions, *see* 18 U.S.C. § 1963(d), 21 U.S.C. § 853(e), or through parallel civil-forfeiture proceedings, *see United States v. Michelle's Lounge*, 39 F.3d 684, 696 (C.A.7 1994), restraining defendants' assets during a prosecution implicates a structural right and risks inflicting unknowable injustices. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Our faith that confrontation between the government and the accused reliably uncovers truth and separates the guilty from the not-guilty depends on the endurance of "a healthy, independent defense bar" to ensure "a truly equal and adversarial presentation of the case." *Caplin & Drysale, CA v. United States*, 491 U.S. 617, 647–48

(1989) (Blackmun, J., dissenting). Pre-trial restraints of assets corrode this pillar of our system by threatening "to decimate the criminal defense bar" and bring about the "'virtual socialization of criminal defense work in this country.'" *Id.* at 651, 647.

The circuit courts of appeals are splintered over the process due defendants deprived of the use of assets for their defense. *See* Petition at 23–29. The decision below comprehends three erroneous holdings that conflict with those of other circuits: **(1)** Due process does not always require a pre-trial hearing on the legality of restraining assets needed to hire counsel. *United States v. Kaley*, 677 F.3d 1316, 1322 (C.A.11 2012). *Compare United States v. E-Gold, Ltd.*, 521 F.3d 411, 419 (C.A.D.C. 2008); *United States v. Melrose East Subdivision*, 357 F.3d 493, 499 (C.A.5 2004); *United States v. Farmer*, 274 F.3d 800, 805 (C.A.4 2001); *United States v. Jones*, 160 F.3d 641, 647 (C.A.10 1998); *United States v. Roth*, 912 F.2d 1131, 1134 (C.A.9 1990). **(2)** Defendants can challenge only whether the assets flowed from or facilitated the crimes alleged. *Kaley*, 677 F.3d at 1323. *Compare E-Gold*, 521 F.3d at 419; *Michelle's Lounge*, 39 F.3d at 700–01; *United States v. Monsanto*, 924 F.2d 1186, 1203 (C.A.2 1991); *Roth*, 912 F.2d at 1134; *United States v. Lewis*, 759 F.2d 1316, 1324 (C.A.8 1985); *United States v. Long*, 654 F.2d 911, 915 (C.A.3 1981). **(3)** Defendants have the burden of proof. *Kaley*, 677 F.3d at 1322. *Compare Jones*, 160 F.3d at 647; *Monsanto*, 924 F.2d at 1203; *Roth*, 912 F.2d at 1134.

This Court has not had occasion to reach this issue because rarely will a case travel to this Court burdened by the millstone of a pre-trial restraint on assets.

Petitioners retained counsel in 2005 when they came under investigation. 677 F.3d at 1318. Two years later, after indictment, the government obtained an *ex parte* order aimed at terminating their counsels' involvement and relegating the defense to appointed counsel having no familiarity with the case. *Id.* Petitioners' original counsel have since then championed their clients' structural right to choose their own counsel through two interlocutory appeals. *Id.* It is this increasingly uncommon level of advocacy that *ex parte* restraints have imperiled and that this Court should safeguard.

The last cases raising issues of restraints on assets needed for attorney's fees reached this Court only after conviction. The defendant in *United States v. Monsanto* was tried with appointed counsel representing him, 491 U.S. 600, 605 n.5 (1989), and the defendant in *Caplin & Drysdale* pled guilty, 491 U.S. at 621. Neither case required this Court to decide "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed," *Monsanto*, 491 U.S. at 615 n.10, and the issue remains open and pressing.

Another asset seizure case decided in the 1988 term indicates that the Eleventh Circuit's decision gives the government an unconstitutional advantage in criminal prosecutions. *Fort Wayne Books v. Indiana* held that a racketeering defendant whose assets were seized was entitled to a pre-trial hearing not only as to whether the assets were traceable to the charges but also as to whether the crimes occurred. 489 U.S. 46, 67 (1989). Alleging the sale of obscenity, Indiana seized three bookstores and their contents. *Id.* at 52. This Court treated the inventory of books and films just as any other proceeds or instrumentalities of crime, "such as

a bank account or a yacht." *Id.* at 65. But, because the seizure might effect a prior restraint on speech, the state had to show a pattern of racketeering at a pre-trial, adversary hearing. *Id.* at 67.

As much as prior restraints on speech, restraints on the right to counsel of choice have unknowable and potentially grave consequences. *Gonzalez-Lopez*, 548 U.S. at 150. While the Court had no reason to decide whether the "extensive, 4-day hearing" afforded in *Monsanto* "was an adequate one," 491 U.S. at 615 n.10, the allusion to *United States v. Salerno*, 481 U.S. 739 (1987), *id.* at 616, indicates what due process requires. *Salerno* approved the pre-trial detention of an indicted person only after a hearing at which the weight of the government's evidence is considered. 481 U.S. at 750. The circuits holding that a grand jury's *ex parte* probable cause determination is unassailable have unduly compromised the structural right to counsel.

CONCLUSION

Foreclosing the choice of counsel limits defenses in the courtroom just as stopping the sale of books limits ideas in the marketplace. The writ should issue.

Respectfully submitted,

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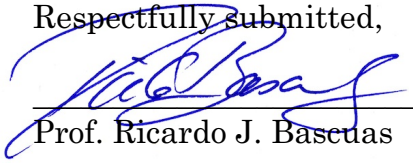
CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1(h)., I certify that the Petition for Writ of Certiorari contains 1,277 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 14th of November, 2012.

Respectfully submitted,



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