

12-464 KALEY V. UNITED STATES

DECISION BELOW: 677 F.3d 1316

LOWER COURT CASE NUMBER: 10-15048

QUESTION PRESENTED:

Title 18 U.S.C. § 853(e) authorizes a district court, upon an *ex parte* motion of the United States, to restrain an indicted defendant's assets that are subject to forfeiture upon conviction. The statute does not provide for a post-restraint, pretrial adversarial hearing at which the indicted defendant may challenge the propriety of the restraints.

In *United States v. Monsanto*, 491 U.S. 600 (1989), this Court rejected a Fifth and Sixth Amendment challenge to the restraint of an indicted defendant's assets needed to pay counsel of choice but, in a footnote, explicitly left open the question -by then already dividing the circuits -"whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Id.* at 615 n.10.

Since 1989, the circuit courts have continued to wrestle with the issue, producing a firmly entrenched split among the eleven circuits that have addressed it.

Acknowledging the widespread conflict, the Eleventh Circuit held that assets needed to retain counsel of choice may remain frozen through trial based solely on a restraining order obtained *ex parte*, despite a defendant's timely demand for a hearing to challenge the viability of the charges and forfeiture counts that purportedly justify the pretrial restraint. *United States v. Kaley*, 677 F.3d 1316 (11th Cir. April 26, 2013) ("*Kaley II*"), App. 1-31.

Thus, the question presented in this petition, which would resolve a split in the circuits, is:

When a post-indictment, *ex parte* restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

CERT. GRANTED 3/18/2013