Written Statement of

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on behalf of the

NEW YORK COUNCIL OF DEFENSE LAWYERS

before the

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

for the hearing entitled

THE NEED TO REFORM ASSET FORFEITURE

Washington, D.C.

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INTRODUCTION

Chairman Grassley and Distinguished Members of the United States Senate Committee on the Judiciary:

Good morning, my name is Jonathan Bach. Thank you very much for inviting me to today's hearing. I am here to address aspects of the asset forfeiture laws that affect the criminal justice system.

I have spent most of my career as a criminal defense lawyer practicing before the federal courts. I represented indigent defendants for several years as a Federal Public Defender and have now spent well over a decade in private practice representing defendants who must pay lawyers to receive their services. I am currently the Partner In Charge of the New York office of Cooley LLP, an international law firm offering legal services in many areas, including the defense of criminal cases. I have also served as an adjunct professor at Columbia Law School, teaching courses in federal criminal law.

I am here today as a representative of the New York Council of Defense Lawyers, an organization comprised of more than 250 experienced attorneys whose principal area of practice is the defense of criminal cases in federal courts. We count among our members some of the most prominent criminal defense attorneys in the country, including numerous former federal prosecutors. We regularly submit amicus briefs on major questions of criminal law and criminal procedure as they arise before the courts.

During the Supreme Court's 2013 term, we submitted an amicus brief, under my authorship, for the Supreme Court to consider in connection with a case known as *Kaley v. United States*—a case which concerned the right of criminal defendants to challenge a pretrial restraint of assets.[1] In our amicus brief, we presented an overview of how the courts in the Second Circuit have undertaken, over the past 25 years, to accommodate the rights of criminal defendants so that their assets are not unfairly restrained.[2] The information presented in our brief was discussed by Justice Kagan in her majority opinion for the Court in the *Kaley* case, and by Chief Justice Roberts in his dissent. In my remarks today, I will summarize key aspects of the information we presented for this Committee.

At the outset, I note that the New York Council of Defense Lawyers respectfully disagrees with the decision that the Supreme Court reached in the *Kaley* case and supports legislative reform of the asset forfeiture laws to protect the constitutional rights of individuals accused of crime.

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[1] *Kaley v. United States*, 134 S. Ct. 1090 (2014).

[2] *See Kaley v. United States*, No. 12-464, Brief of New York Council of Defense Lawyers as *Amicus Curiae* in Support of Petitioner (July 8, 2013).

KALEY V. UNITED STATES

One of the most important concerns of any individual accused of crime is to be able to hire a lawyer of his or her choice. Indeed, the right to counsel is an important constitutional right protected by the Sixth Amendment. As Chief Justice Roberts has observed, "[a]n individual facing serious criminal charges . . . has little but the Constitution and his attorney standing between him and prison. He might readily give all he owns to defend himself."[3] Chief Justice Roberts' comments underscore how, in our system, the ability to retain a lawyer very often depends on having access to the necessary funds.

Our current laws permit the government, in many cases, to freeze or restrain assets that an individual may require to hire a lawyer to present his or her defense. Such assets are subject to forfeiture upon a finding of guilt, and thus the government has a strong interest in restraining, safeguarding and preserving the assets pending the outcome of a criminal case. The government relies on forfeited assets to help recompense victims of crime and to help fund law enforcement activities. Significantly, this restraint of assets typically occurs at the very beginning of a criminal case, as soon as a grand jury has returned an indictment announcing formal charges. As a result, it is often impossible for the accused individual, once these restraints have been set in place, to hire a lawyer of his or her choice.

I am not here today to question the government's right to restrain assets in this manner. Such restraints have become an accepted part of our law. I am here today to question whether such restraints can be imposed without permitting the defendant an opportunity to be heard on the question of whether such restraints are valid and justified in his or her particular case. Our current law limits the ability of individuals accused of crime to obtain a meaningful hearing on this important issue. Our current law also limits the ability of courts to review the propriety of such restraints. Our current law is in need of reform.

The Supreme Court addressed these issues in *Kaley v. United States.* There, a husband and wife, deprived of assets they needed to pay their lawyer, asked for a hearing in which a judge could determine whether there was a sufficient basis for the restraints that had been imposed. The Supreme Court began its analysis by observing that the right to a hearing in this context was an open question that it had not previously resolved. It went on to consider the propriety of such a hearing in two different respects. *First,* the Court considered whether a defendant has a right to a hearing to challenge whether the assets under restraint are, in fact, connected to the crimes charged. The Court observed that "lower courts have generally provided a hearing [on this question] to any indicted defendant seeking to lift an asset restraint to pay for a lawyer."[4] In the common parlance of criminal

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[3] 134 S. Ct. at 1105 (Roberts, C.J. dissenting).

[4] *Id.* at 1095.

law, these hearings are generally referred to as "traceability" hearings—meaning, the government must show that the assets under restraint are not simply property of the defendant, but are actually traceable to the crimes charged.

Second, the Supreme Court considered whether a defendant has a right to a hearing to challenge whether there is probable cause to believe that he or she committed the crimes charged. The Kaleys had requested a hearing on this issue. They wanted the judge assigned to their case to determine whether there was a sufficient basis to justify the restraint of their assets in light of the nature of the charges against them. The Supreme Court observed a split among the circuits. It observed that some circuits recognize the right to a hearing of this type, while others do not.[5]

The Supreme Court resolved this split by siding with the circuits that deny defendants the right to a hearing to challenge a restraint of assets based on a challenge to the underlying probable cause. The Supreme Court reasoned that a grand jury, by returning an indictment, has already decided the issue of probable cause, and that it would not serve justice to have a judge subsequently determine the same issue. Chief Justice Roberts noted in his dissent that "[t]he issues presented here implicate some of the most fundamental precepts underlying the American criminal justice system."[6] He noted, among other things, that grand jury determinations of probable cause are made on the basis of *ex parte* proceedings in which the defendant does not participate and has no right to be heard.[7]

It is important to note that even the Justices who joined the majority in *Kaley*, though deferring to what they regarded as binding precedent, recognized that Congress could provide for a different result. In the concluding paragraphs of her majority opinion, Justice Kagan observed: "Congress of course may strike its own balance and give defendants like the Kaleys the kind of hearing they want."[8]

The New York Council of Defense Lawyers supports legislation that would strike a new balance and thus present a path beyond the Supreme Court's decision in *Kaley*. It supports legislation that would establish a right to a hearing in which a court could determine the propriety of restraints by considering the totality of circumstances and not just the traceability of assets. As we discuss below, the experience in the Second Circuit shows that relatively broad pretrial hearing rights can be meaningfully accommodated within the judicial system, providing for judicial review of pretrial asset restraints without resulting in overload of court dockets or

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[5] The *Kaley* Court observed that the Second Circuit, Seventh Circuit, Ninth Circuit, and D.C. Circuit recognized this right, while the Fourth Circuit, Sixth Circuit, and Tenth Circuit did not. 134 S. Ct. at 1095 n.4.

[6] *Id.* at 1114 (Roberts, C.J. dissenting).

[7] *Id.* at 1113 (Roberts, C.J. dissenting).

[8] *Id.* at 1105.

abuse of the system.

THE EXPERIENCE IN THE SECOND CIRCUIT

Over the past 25 years, criminal defendants in the Second Circuit, facing asset restraints that limit their ability to hire a lawyer of their choice, have been entitled to the type of hearing that the Kaleys sought -- a hearing in which a judge could consider the merits of the government's claim to have probable cause. Experience has shown that recognition of this right has not resulted in strain or in multiple hearings that tax the system. Rather, relatively few such hearings have been held. It appears that the prospect of such a hearing has often encouraged resolution by counsel outside of court without the need for judicial intervention. The experience in the Second Circuit indicates that a rule of law providing for relatively broad pretrial hearing rights can be administered efficiently while promoting important constitutional rights, most especially a defendant's right to be represented by counsel of his or her choice.

Under Second Circuit law, an individual accused of crime is entitled to a pretrial, adversarial hearing to challenge a restraint of assets needed to fund his or her defense. The scope of this hearing right has always included an examination of "the existence of probable cause," not only with respect to the particular assets under restraint (*i.e.*, the question of traceability), but also with respect to the underlying offense (*i.e.*, the question of whether there is probable cause to believe the defendant committed the crimes charged).[9] The Second Circuit has held that, at such a hearing, "grand jury determinations of probable cause may be reconsidered." It has also held that such hearings need not be mini-trials in which all of the rules of evidence apply. Specifically, the government is permitted to present hearsay evidence, summarizing the testimony of witnesses.[10]

In the nearly 25 years that have elapsed since the Second Circuit adopted this doctrine, there have been fewer than 30 reported cases at the district court level concerning instances in which defendants have invoked their right to a hearing to challenge pretrial asset restraints, and only a subset of those have included a challenge to probable cause with respect to the underlying offense.[11]

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[9] *United States v. Monsanto*, 924 F.2d 1186, 1197 (2d Cir. 1991).

[10] *Id.* at 1203 (holding that a district court may receive and consider "evidence and information that would be inadmissible under the Federal Rules of Evidence").

[11] Reported decisions and unreported decisions available on the Westlaw or Lexis search engines include *United States v. Fishenko*, 2014 WL 4804041, at *1-*2 (E.D.N.Y. Sept. 25, 2014); *United States v. Cosme*, 2014 WL 1584026, at *2 (S.D.N.Y. Apr. 21, 2014); *Venkataram v. United States*, 2013 WL 6508819, at *2-*3 (S.D.N.Y. Dec. 12, 2013); *United States v. Daugerdas*, 2012 WL 5835203 (S.D.N.Y. Nov. 7, 2012); *SEC v. McGinn, Smith & Co.*, 2012 WL 4932587 (N.D.N.Y. Oct. 15, 2012); *United States v. All Funds on Deposit in Account Nos. 94660869, 9948199297, 80007487, 9115606297, 9116151903, & 9931127481*, 2012 WL 2900487 (S.D.N.Y. July 6, 2012); *United States v. Clarkson Auto Electric, Inc.*, 2012 WL 345911 (W.D.N.Y. Feb. 1, 2012); *United States v. Martinez*, 2011 WL 4949873 (S.D.N.Y. Oct. 18, 2011); *United States v. Bonventre*, 2011 WL 1197853 (S.D.N.Y.

Even assuming the total number of cases is larger than the number of reported cases, the very small number of reported cases suggests that the total number of all such cases is within manageable limits and that defendants invoke their right to a pretrial hearing only in exceptional cases.

One explanation for the relative infrequency of such hearings—as opposed to, say, the greater frequency of evidentiary suppression hearings—is that defense attorneys representing clients with restrained assets, and thus with limited if any ability to pay attorneys' fees, are unlikely to devote the time and effort needed to pursue a hearing unless they believe there is a genuine possibility that they will prevail. In other words, attorneys confronted with limited resources are likely to refrain from seeking such hearings where the government can easily make its case. They are more likely to seek a pretrial hearing where there are legitimate reasons to challenge a restraint and where there is an expectation of success that would

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Mar. 30, 2011); *United States v. Dupree*, 781 F. Supp. 2d 115 (E.D.N.Y. 2011); *United States v. Egan*, 2010 WL 3000000 (S.D.N.Y. July 29, 2010); *SEC v. FTC Capital Mkts., Inc.*, 2010 WL 2652405, at *20 (S.D.N.Y. June 29, 2010); *United States v. Hatfield*, 2010 WL 1685826 (E.D.N.Y. Apr. 21, 2010); *United States v. Kam*, 2011 WL 3039589 (E.D.N.Y. Mar. 18, 2011), *report and recommendation adopted*, Order, *United States v. Kam*, No. 1:10-cr-00875-RJD (July 20, 2011); *CFTC v. Walsh*, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010); *United States v. Galante*, 2006 WL 3826701 (D. Conn. Nov. 28, 2006); *Oyekoya v. United States*, 108 F. Supp. 2d 315, 317 (S.D.N.Y. 2000); *SEC v. Princeton Economic Int'l Ltd.*, 2000 WL 1559673 (S.D.N.Y. Oct. 19, 2000); *SEC v. Sekhri*, 2000 WL 1036295 (S.D.N.Y. July 26, 2000); *United States v. Berg*, 998 F. Supp. 395 (S.D.N.Y. 1998); *In re All Funds in Accounts in the Names Registry Publishing, Inc.*, 887 F. Supp. 435 (E.D.N.Y. 1995); *SEC v. Coates*, 1994 WL 455558 (S.D.N.Y. Aug. 19, 1994); *United States v. Millan*, 836 F. Supp. 1007 (S.D.N.Y. 1993); *United States v. All Funds on Deposit, etc.*, 767 F. Supp. 36 (E.D.N.Y. 1991).

A search of district court docket reports in the Second Circuit for "Monsanto" yields an additional five cases. *See* Notice of Motion for *Monsanto* Hearing, *United States v. King*, No. 1:10-cr-00122-JGK-1 (S.D.N.Y. July 29, 2011); Notice of Motion, *United States v. $304,041.01 on Deposit at Citibank, N.A.*, No. 1:10-cv-04858-LAP (S.D.N.Y. Apr. 15, 2011) (related proceeding to *Bonventre*, *supra*); Memorandum in Support of Motion for *Monsanto* Hearing, *United States v. Account No. 7F1-998717*, No. 1:10-cv-00443-FB-RML (E.D.N.Y. June 25, 2010); Notice of Motion for *Monsanto* Hearing, *id.*, ECF No. 55; Notice of Motion for *Monsanto* Hearing, *id.*, ECF No. 58; Cross Motion for Review of Bail Determination, *United States v. Schwab*, No. 6:05-cr-06161-DGL-JWF (W.D.N.Y. Jan. 26, 2007); Motion for *Monsanto* Hearing, *United States v. Account #05964419069*, No. 1:02-cv-00072-jgm (D. Vermont Feb. 4, 2003).

At least five of these cases did not involve a challenge to probable cause with respect to the underlying offense. *Fishenko*, 2014 WL 4804041, at *1 (noting that, post-*Kaley*, a challenge to probable cause would not be permitted); *Kam*, 2011 WL 3039589, at *5 n.7 (challenging only whether restrained funds were traceable to commission of alleged offense); *Hatfield*, 2010 WL 1685826, at *2 n.2 (same); *SEC v. FTC Capital Mkts., Inc.*, 2010 WL 2652405, at *7–8 (in civil proceeding with parallel criminal proceeding, defense challenged only whether restrained funds were traceable to commission of alleged offense); *CFTC v. Walsh*, 2010 WL 882875, at *1 (motion challenging traceability heard jointly by judges presiding over criminal proceeding and parallel civil proceeding).

result in payment of legal fees.[12]

For the same reason, defense counsel who do pursue hearings are likely to limit their scope to those areas that present the clearest grounds for challenge. There is little incentive to explore collateral issues that would serve only to make the hearings longer and more expensive.

A separate and further reason for the infrequency of these hearings is that district courts have retained discretion to fashion flexible rules that may limit the availability of hearings in appropriate circumstances. For example, district courts have required defendants seeking a hearing to first establish that they have genuine need for the restrained funds.[13] District courts have also at times required defendants to state a *prima facie* case for non-restraint before a hearing will be granted, although the Second Circuit held in 2013, before *Kaley* was decided, that defendants should not have this burden.[14]

Similarly, the Second Circuit has affirmed the discretion of district courts to limit the number of witnesses where appropriate.[15] Indeed, in light of the Second Circuit's established holding that district courts may "receive and consider . . . evidence and information that would be inadmissible under the Federal Rules of Evidence,"[16] it is not uncommon in the Second Circuit for the government to proceed by presenting a single witness—typically its case agent—who summarizes the

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[12] *See, e.g.*, Letter to the Court, *United States v. Daugerdas*, No. 1:09-cr-00581-WHP (S.D.N.Y. Jan. 27, 2010), ECF No. 67 (defense counsel advising the court that no grounds existed to move for a *Monsanto* hearing, where court had set a deadline for such motions).

[13] *E.g.*, *Kam*, 2011 WL 3039589, at *11 ("[D]istrict courts in this circuit uniformly require a prehearing showing of a legitimate need for the seized funds."); *see also Fishenko*, 2014 WL 4804041, at *2; *Cosme*, 2014 WL 1584026, at *2; *Venkataram*, 2013 WL 6508819, at *3; *United States v. Kramer*, 2006 WL 3545026, at *4 n.4 (E.D.N.Y. 2006); *Martinez*, 2011 WL 4949873, at *2; *Egan*, 2010 WL 3000000, at *5.

[14] *See All Funds on Deposit*, 2012 WL 2900487, at *2 (denying defendant's motion for a hearing for failure to establish *prima facie* case that assets were not forfeitable or that defendant had insufficient unrestrained assets to secure private counsel); *Daugerdas*, 2012 WL 5835203 at *2–3 (same); *Dupree*, 781 F. Supp. 2d at 141 (stating that defendant must make *prima facie* showing of his indigence and of the absence of probable cause for the restraint); *Martinez*, 2011 WL 4949873, at *2; *but see United States v. Bonventre*, 2013 WL 3023011, at *3 (2d Cir. June 19, 2013) (holding that a defendant must establish a genuine need for the restrained funds but that no *prima facie* showing regarding the merits of the restraint is required); *SEC v. Coates*, 1994 WL 455558, at *4 (scheduling hearing in the absence of any indication that court had required defendant to make a *prima facie* showing); *All Funds on Deposit, etc.*, 767 F. Supp. at 42 (placing initial burden on government to demonstrate that defendant had sufficient unrestrained assets to pay for private counsel before a hearing would be required).

[15] *United States v. Walsh*, 712 F.3d 119, 125 (2d Cir. 2013) (affirming quashing of defense subpoenas of potential government witnesses for *Monsanto* hearing where government's case agent testified).

[16] *Monsanto*, 924 F.2d at 1203.

anticipated testimony of other witnesses in hearsay form and then faces cross-examination by defense counsel.[17] In short, district courts within the Second Circuit have safeguarded important due process rights while at the same time managing individual matters as required by the circumstances.

Recognition of a criminal defendant's right to a pretrial hearing in the Second Circuit has also had the beneficial result of encouraging counsel to reach resolution by mutual agreement, often obviating the need for a hearing. It is not uncommon for prosecutors to release funds sufficient for legal fees following negotiations with the defense or limited coaxing by the court.[18]

TRACEABILITY HEARINGS DO NOT ALONE SUFFICE

Some have advocated that, as long as a criminal defendant has a right to a traceability hearing, there is no need for any broader hearing right. We disagree.

In many cases, a hearing that considers whether the assets in question can be traced to the crimes charged might well exhaust the relevant inquiry. But, in many cases, it will not. This is especially so in numerous cases where there is no dispute that the defendants engaged in the conduct in issue, but only a dispute as to whether the conduct constitutes a crime. That was the situation in which the Kaleys found themselves. They did not contest that their assets were traceable to the crimes with which they were charged. Instead, they maintained, and asked a

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[17] *See United States v. La Villa*, 553 F. App'x 45, 48 (2d Cir. 2014) (case agent presented documents and testified about what witnesses told him); *In re All Funds in Accounts*, 887 F. Supp. at 448 (hearing consisted of testimony of case agent, supported by exhibits, including recordings of government witnesses); *Clarkson Auto Electric*, 2012 WL 345911, at *1 (defendant cross-examined case agent); *Dupree*, 2011 WL 3235637, at *3–4 (court considered affidavit and live cross-examination of forensic accountant for Federal Bureau of Investigation); *United States v. Greenwood*, 865 F. Supp. 2d 444, 446 (S.D.N.Y. 2012) (case agent gave live testimony and cross-examination and both sides presented documentary evidence).

[18] *See* Letter from Stanley J. Okula, Jr. to the Honorable William H. Pauley III, *United States v. Daugerdas*, No. 1:09-cr-00581-WHP (S.D.N.Y. Jan. 10, 2013) (government consented to lift restraint on specific account); Minute Entry, *Account No. 7F1-998717*, No. 1:10-cv-004430-FB-RML (E.D.N.Y. Nov. 2, 2010) (parties resolved *Monsanto* issue); *Hatfield*, 2010 WL 1685826, at *4 (court suggested and government agreed to accede to a "bridge loan" to the defendant; *see* Stipulation and Order, *United States v. Schlegel*, No. 2:06-cr-00550-JS-ETB (E.D.N.Y. May 19, 2010)); Minute Entry, *Dupree*, No. 1:10-cr-00627-KAM (E.D.N.Y. Apr. 25, 2011) (court suggested that government could eliminate the need for a hearing by voluntarily releasing *Monsanto* funds); Letter from Craig A. Welin to the Honorable Miriam G. Cedarbaum and George B. Daniels, *United States v. Greenwood*, No. 1:09-cr-00722-MGC (S.D.N.Y. Aug. 26, 2010) (government did not object to release of funds after court granted *Monsanto* hearing); *United States v. Hewett*, 2003 WL 21355217, at *1 (S.D.N.Y. June 10, 2003) (defense raised *Monsanto* issue with government and government agreed not to restrain assets); *Berg*, 998 F. Supp. at 399 n.16 (court suggested that defense negotiate with government regarding *Monsanto* issue).

judge to consider at a pretrial hearing, the possibility that their conduct as charged did not amount to a crime.

It is not uncommon in criminal cases for the defense to be based on the proposition that the conduct in question, even when conceded, does not amount to a crime. Many defendants admit conduct but contend that they did not have the requisite *mens rea* to make it a crime. Other defendants admit conduct but argue that the prosecution is barred by the statute of limitations. Still other defendants admit conduct but contend that the criminal statute under which they were charged is too vague to put them on notice that their conduct was a crime. In short, there are myriad defenses in which conduct is conceded and the defense is predicated on some other aspect of the case. These cases often present the greatest need for skilled and experienced lawyers, capable of presenting the nuances of such arguments. They often cannot be resolved without substantial briefing of the issues or without trials to pin down specific facts. It is therefore critical that defendants—with apparently strong arguments to make on such grounds—not be stripped of their assets or deprived of counsel of their choice. A hearing limited merely to the question of traceability does them no good: even if the government can show that their assets can be traced to their conduct, the real question is whether their conduct is a crime.

In such cases, defendants should be entitled to a pretrial hearing at which a judge, after hearing from both sides, can determine whether there is enough of an issue to justify permitting defendants access to restrained funds in order to present their defense. It should be emphasized that judges presiding over such hearings are not required, at this relatively early stage of the proceedings, to decide the ultimate merits of the case. Depending on the standard applied, a judge may only need to decide whether the defendant has demonstrated a compelling need for access to his or her assets sufficient to override the government's countervailing interest in restraint.

We note that much of the Supreme Court's concern in *Kaley* appears to arise from what the majority perceived as the difficulty of having a judge revisit a grand jury's determination of probable cause. We think that appropriate legislation can eliminate this problem. For example, legislation could set a standard different from probable cause, which would require a court to make a different determination from the grand jury. For example, courts could be asked to balance the competing interests involved, weighing the government's need for restraint against any resulting hardship for the defendant. In cases in which no victims are involved, and restitution is thus not an issue, the government's interest in preserving assets may be less compelling.

CONCLUSION

On behalf of the NYCDL, I wish to thank Chairman Grassley and the Members of the Committee, and I look forward to any questions the Committee may have.