No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 250 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or concurring justices in cases such as *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment) and *United States v. Booker*, 543 U.S. 220, 266 (2005).

NYCDL has long advocated for the recognition of due process rights where the government restrains funds necessary for those accused of crimes to retain counsel. Nearly 25 years ago, when this Court first addressed the constitutionality of pretrial restraints of a criminal defendant's assets, NYCDL submitted an *amicus* brief urging this Court to require a pretrial, adversarial hearing at which a defendant could broadly

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[1] This brief is filed with the written consent of the parties. Pursuant to Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

challenge the basis for any such restraints. *See* Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae, *United States v. Monsanto*, 491 U.S. 600 (1989) (No. 88-454).

SUMMARY OF ARGUMENT

We understand that one of the principal issues now before the Court is whether a criminal defendant whose assets have been restrained is entitled to a pretrial, adversarial hearing at which he may challenge the evidentiary support and legal theory underlying the charges against him. In this brief, we summarize the experience of trial courts within the Second Circuit, which have operated under a doctrine that provides for such hearings. We observe that, as confirmed by reported case law, recognition of due process rights – including the right to challenge probable cause at a pretrial hearing – has not resulted in strain or abuse of the system. Rather, relatively few such hearings have been held, and the availability of a hearing has often encouraged resolution by counsel 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.

ARGUMENT

I. The Second Circuit's *Monsanto* Doctrine

In *Monsanto*, 491 U.S. 600, this Court expressly left open the question "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Monsanto*, 491 U.S. at 615 n.10. It also left open the question of the appropriate scope of any such hearing. The Second Circuit addressed these questions on remand. It held that a criminal defendant is entitled to a pretrial, adversary hearing to challenge a restraint of assets needed to fund his defense. *United States v. Monsanto*, 924 F.2d 1186, 1198 (2d Cir. 1991). It further held that the scope of such a hearing would include "the existence of probable cause" not only with respect to the particular assets under restraint but also with respect to the defendant's commission of the charged offenses. *Id.* at 1197, 1203.

The Second Circuit specified that, "at such a hearing," a district court may receive and consider "evidence and information that would be inadmissible under the Federal Rules of Evidence," and that "grand jury determinations of probable cause may be reconsidered." *Id.* at 1203. This doctrine has remained unchanged over more than the past two decades.

II. Experience Under The Second Circuit's *Monsanto* Doctrine

In the nearly 25 years that have elapsed since the Second Circuit ruled in *Monsanto*, there have been fewer than 25 reported cases at the district court level concerning instances in which defendants invoked their right to a pretrial hearing,[2] and only a subset of those

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[2] Decisions available on Westlaw or Lexis include *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. 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).

have included a challenge to probable cause with respect to the underlying offense.[3] 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.

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).

[3] *See, e.g.*, *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 heard jointly by judges presiding over criminal proceeding and parallel civil proceeding).

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 requisite probable cause can easily be established. 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 result in payment of legal fees.[4]

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

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[4] *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).

genuine need for the restrained funds. *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."); *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. District courts have also at times required defendants to state a *prima facie* case for non-restraint before a hearing will be granted. *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) (recently 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).

Similarly, the Second Circuit has affirmed the discretion of district courts to limit the number of witnesses where appropriate. *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). Indeed, in light of the Second Circuit's holding that district courts "may receive and consider . . . evidence and information that would be inadmissible under the Federal Rules of Evidence," *Monsanto*, 924 F.2d at 1203, it is not uncommon for the government to proceed by presenting a single witness – typically its case agent – who summarizes the anticipated testimony of other witnesses in hearsay form and then faces cross-examination by defense counsel. *See 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). 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. *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). The ability of counsel to negotiate resolution of these issues has limited any undue burden on the courts.

CONCLUSION

The experience within the Second Circuit demonstrates that relatively broad pretrial hearing rights can be meaningfully accommodated within the judicial system, without resulting in excess or abuse, while safeguarding important constitutional rights.

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Respectfully submitted,

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