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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12049

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN PAUL GOSNEY, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cr-80022-AMC-3

(Filed Feb. 1, 2023)

Before LUCK, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

John Paul Gosney appeals the district court's denial of his motion to vacate a restraining order on a bank account. We affirm.

I.

In February 2022, a grand jury charged several defendants, including Gosney, with multiple criminal offenses in connection with a scheme to submit false and fraudulent claims to Medicare for reimbursement. The indictment gave notice that the government would seek criminal forfeiture in connection with the charged offenses. Specifically, the indictment stated that, upon conviction, the defendants would forfeit property constituting or derived from, directly or indirectly, gross proceeds traceable to health care fraud, conspiracy to commit health care fraud and wire fraud, and kickback offenses, as well as any property "involved" in the money-laundering offenses and any property "traceable to" such property. The indictment listed certain property subject to forfeiture as a result of the charged offenses, which "include[d], but [was] not limited to," funds from four listed bank accounts and three parcels of real property.

After filing the indictment, the government applied ex parte for an order under 21 U.S.C. section 853(e)(1) and 18 U.S.C. section 982(b)(1) restraining all funds on deposit in an account at Valley National Bank on which Gosney was a signatory. In support of its application, the government submitted the declaration of an FBI agent setting forth the probable cause to restrain the funds in the account. The account wasn't specifically listed in the criminal forfeiture section of the indictment but was mentioned elsewhere, including a criminal count alleging conduct related to concealment money laundering.

The district court granted the government's request. Based on the grand jury indictment, the district court concluded that there was "probable cause to find that [the account] [was] subject to forfeiture" upon Gosney's conviction and thus that "the United States [was] entitled to a protective order pursuant to 21 U.S.C. [section] 853(e)." The district court entered a protective order restraining the account to preserve its availability for forfeiture.

Gosney moved to vacate the district court's protective order, arguing that the restraint on the account violated his Sixth Amendment right to counsel of choice by denying him access to the funds he needed to hire the counsel he wanted. Specifically, Gosney asserted that the account wasn't restrainable because it wasn't listed in the criminal forfeiture section of the indictment, so neither the district court nor the grand jury had determined that the account was traceable to a charged offense. Gosney also requested that the district court grant him a pretrial hearing on the traceability of the account to the crimes alleged in the indictment. In opposing the motion, the government argued that the indictment and agent declaration established the account as tainted property subject to criminal forfeiture and that Gosney's challenge was barred under the Supreme Court's decision in *United States v. Kaley*, 571 U.S. 320 (2014), as an impermissible attack on the grand jury's probable cause determination underlying the criminal charges.

Following a hearing, the district court denied Gosney's request to vacate outright the restraining order.

But the district court granted Gosney leave to make an ex parte showing of financial need to determine whether he was entitled to a hearing to challenge the restraint. Based on our decision in *United States v. Kaley*, 579 F.3d 1246, 1252 (11th Cir. 2009) ("*Kaley I*"), the district court found that Gosney wasn't entitled to a pretrial hearing unless he showed that the asset restraint effectively prevented him from hiring his counsel of choice. It permitted Gosney to attempt to make such a preliminary showing by submitting documentary evidence of financial hardship.

Gosney filed financial information ex parte as ordered. But he "indicated that he would not testify about his finances at a future adversarial hearing." The district court ordered Gosney to file a notice indicating whether he intended to meet his burden to show financial need by a preponderance of the evidence at an adversarial pretrial hearing. In response, Gosney asserted that only he had sufficient personal knowledge about his finances and that he wouldn't testify in open court without a grant of use immunity.

The district court denied Gosney's motion to vacate the restraining order, finding that a pretrial hearing on traceability of the restrained funds to the charged offenses was "unwarranted." The district court assumed (without deciding) that Gosney had established financial hardship. But it determined that Gosney still wasn't entitled to a hearing under the four-part balancing test established in *Barker*, which we applied to criminal asset restraints in *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989). This test

includes four factors: "(1) the length of the delay before the defendants received their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pre-trial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States'[] interest in the subject property." *Kaley I*, 579 F.3d at 1254.

As to the first *Barker* factor, the district court noted that, "[i]n the context of asset restraints, the relevant length of delay is the amount of time between when the restraint is imposed and when the restraint would be reconsidered and resolved," which the district court calculated to be "between ten and eleven months." The district court found that "[a] delay of that length, although not insignificant, is not so substantial as to clearly favor a pre-trial hearing" and thus determined that this factor was "either neutral or marginally weigh[ed] in Gosney's favor."

As to the second factor, the district court observed that the case involved twenty-two charges against ten defendants "in connection with a multimillion-dollar health care fraud conspiracy, including charges of money laundering that implicate numerous entities and bank accounts." The district court noted that the discovery was "massive," as it involved "hundreds of thousands of documents and necessitat[ed] a detailed and developed discovery protocol for use by a filter team." The district court found that because of "the complexities of this case, the extremely voluminous discovery, and

the expressed need for adequate preparation on both sides," the reason-for-delay factor was neutral.

As to the third factor, the district court found that it weighed in Gosney's favor because he timely moved to vacate the restraining order "one month after [it] was entered."

As to the fourth factor, the district court conducted the "more searching exposition and calculus" we required in *Kaley I*. 579 F.3d at 1258. In doing so, the district court explained that the Supreme Court, in *Kaley*, distinguished between "(1) the grand jury's determination of probable cause to believe a defendant committed a crime and (2) the grand jury's determination that the assets subject to forfeiture are traceable to the charged crime" and "made clear that only the latter determination . . . may be subject to second-guessing." "Conversely," continued the district court, quoting *Kaley*, "the former determination by the grand jury – that probable cause exists to believe a defendant perpetrated the offenses alleged based on the factual allegations supporting the grand jury's probable cause determination – is 'conclusive' at this stage, i.e., not subject to 'any review, oversight, or second-guessing' pending resolution of the case." After a thorough analysis, the district court found that "Gosney's arguments on the merits all reduce[d] to a claim that neither he nor his co-defendants committed the charged crimes or obtained any significant amount of money from improper Medicare claims." But, because that determination "falls within the sole province of the grand jury under the Supreme Court's binding decision in *Kaley,*"

the district court concluded that Gosney had failed to show prejudice. Meanwhile, the government had a "substantial interest in continuing to restrain [the account] without any pre-trial hearing." Accordingly, the district court determined that this factor weighed "decidedly in favor of the [g]overnment."

Gosney timely appealed.

II.

We review a district court's refusal to vacate an injunction for abuse of discretion. *CBS Broad. Inc. v. EchoStar Commc'ns Corp.*, 532 F.3d 1294, 1299 (11th Cir. 2008). The legal conclusions underlying the district court's decision are reviewed de novo, and factual findings are reviewed for clear error. *Dillard v. Baldwin Cnty. Comm'rs*, 376 F.3d 1260, 1265 (11th Cir. 2004). We review de novo issues of constitutional law and statutory interpretation. *United States v. Castro*, 455 F.3d 1249, 1251 (11th Cir. 2006).

III.

Gosney argues that the district court erred in two ways. First, he claims that the indictment didn't permit the district court to enjoin transfers from his account. Second, he argues that he was entitled to a pretrial hearing on whether the restraint was constitutional. We address each argument in turn.

A.

Under 21 U.S.C. section 853(e), a district court may impose pretrial restraints on property that would be subject to criminal forfeiture in the event of a defendant's conviction. Specifically, a district court "may enter a restraining order or injunction" to preserve such property for forfeiture "upon the filing of an indictment or information charging a violation . . . for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section." 21 U.S.C. § 853(e)(1)(A). The Supreme Court has held that a pretrial restraint of assets is constitutionally permissible when it is "based on a finding of probable cause to believe that the assets are forfeitable." *United States v. Monsanto*, 491 U.S. 600, 615 (1989).

Gosney argues that the district court wasn't authorized to issue an order restraining his account because the account wasn't specifically listed in the nonexhaustive forfeiture allegations section of his indictment. To support this argument, Gosney cites *United States v. Kaley*, 677 F.3d 1316, 1327 (11th Cir. 2012) ("*Kaley II*"), for the proposition that such an omission from this specific part of the indictment is "fatal to the validity of the district court's order." But *Kaley II* says no such thing. True, we noted that the prosecution can't restrain assets "[w]ithout the grand jury's probable cause determination and the court's approval." *Kaley II*, 677 F.3d at 1327. But we made this statement in the context of "emphasizing that the prosecution

cannot unilaterally restrain a defendant's assets between the time of indictment and trial." *Id.* We never specified that a grand jury's probable cause determination must appear in a particular part of the indictment, nor did we preclude district courts from making their own post-indictment probable cause determinations.

The indictment's allegations, in conjunction with the FBI agent's declaration, established probable cause that the funds in the account would be forfeitable upon Gosney's conviction. Specifically, the FBI agent declared that investigators had identified more than twenty million dollars in proceeds from Medicare contractors tied to reimbursements for false and fraudulent claims submitted to Medicare by the clinical laboratory used by Gosney and his co-defendants. More than thirteen million dollars of these funds were transferred to an account at JPMorgan. Between October 2020 and February 2021, $1,954,100.00 was transferred in a series of forty-one wire transfers from the JPMorgan account to a Wells Fargo account on which Gosney was the sole signatory. In July 2021, approximately two million dollars was transferred from the Wells Fargo account into the account at issue in this case. The indictment identified Gosney as the owner of this account and charged him for the two-million-dollar transfer, which the indictment described as "proceeds of specified unlawful activity" – namely, "conspiracy to commit health care fraud and wire fraud," "health care fraud," and "receipt of kickbacks in connection with a [f]ederal health care program." In

light of what was presented to the district court, combined with the indictment's clear notice that any property involved in or traceable to the charged offenses would be subject to criminal forfeiture upon a defendant's conviction, the district court's restraint of the account was proper under section 853(e).

B.

On the issue of whether Gosney is entitled to a post-indictment, pretrial hearing on the legality of the restraint on his property, we're bound by our decision in *Bissell*. In *Bissell*, we clearly held that a defendant whose assets are restrained pursuant to a criminal forfeiture charge in an indictment, rendering him unable to afford counsel of choice, is entitled to a pretrial hearing only if the balancing test in *Barker* is satisfied. 866 F.2d at 1353. Thus, we must decide whether the district court correctly interpreted and applied the four factors of the *Barker* balancing test: "(1) the length of the delay before the defendants received their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States'[] interest in the subject property." *Kaley I*, 579 F.3d at 1254.

Gosney provides no legal argument as to the first three factors, which the district court found weighed neutrally or marginally in Gosney's favor. Gosney devotes the lion's share of his brief to challenging the

district court's finding that the fourth factor weighed "decidedly in favor of the [g]overnment." So the question before us is whether the district court erred in finding that Gosney wasn't unduly prejudiced by the restraint on his assets.

When a defendant's assets are forfeitable as a result of criminal conduct, a defendant has no Sixth Amendment right to use those tainted funds to hire an attorney. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 632 (1989). In *Kaley*, the Supreme Court concluded that an asset restraint that deprives a defendant of his Sixth Amendment right to retain counsel of his choice is "erroneous only when unsupported by a finding of probable cause." 571 U.S. at 337 (emphasis omitted); *see also Monsanto*, 491 U.S. at 615 (holding that no constitutional violation occurs where assets are restrained pretrial based on a finding of probable cause that the assets are forfeitable).

The *Kaley* Court recognized that a pretrial asset restraint must be supported by two probable-cause determinations: "There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." 571 U.S. at 323-24. *Kaley* held that a defendant seeking to lift a pretrial asset restraint has no right to a hearing to contest the first determination – the grand jury's finding of probable cause to believe that the defendant committed the crimes charged. *Id.* at 322. The Court emphasized the grand jury's "singular role" in finding "probable cause necessary to initiate a prosecution

for a serious crime" and explained that, because "a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries," a defendant isn't entitled to a "judicial re-determination of the conclusion the grand jury already reached." *Id.* at 328. Thus, only the second determination may be challenged before trial. *See id.* at 331 n.9, 333. This is because "the tracing of assets is a technical matter," whereas the grand jury's determination of probable cause to support criminal charges is part of its "core competence and traditional function" and thus "conclusive[]." *Id.* at 328, 331 & n.9 (quotation omitted). This distinction is consistent with *Kaley II*, where we held that "a defendant who is entitled to a pretrial due process hearing with respect to restrained assets may challenge the nexus between those assets and the charged crime, but not the sufficiency of the evidence supporting the underlying charge." 677 F.3d at 1327; *see also Kaley*, 571 U.S. at 324 (noting that lower courts allow a defendant to challenge "whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment").

Although couched as a traceability challenge, we agree with the district court that Gosney's argument constitutes an impermissible attack on the grand jury's determination of probable cause that he committed an offense permitting forfeiture. Gosney pays lip service to *Kaley II* by stating that he seeks to challenge the "nexus" between the account and the charged crimes. But he doesn't argue that the account's funds

are from sources unrelated to his alleged conduct. Rather, he cites testimony from his co-defendants' preliminary hearing to show the absence of fraud and argues that the scheme didn't constitute fraud because the billings were for medically necessary services authorized by physicians. Essentially, he insists that "the revenues . . . do not constitute proceeds of a fraud" because the conduct with which he is charged doesn't actually constitute fraud. This argument is squarely at odds with the factual allegations in the indictment and thus is foreclosed by *Kaley*. *See* 571 U.S. at 341.

As a fallback, Gosney urges us to overturn *Bissell* and "conclude that, in assessing the need for a hearing, Gosney may challenge not only the nexus prong, but the guilt prong as well." Even if we were at liberty to overturn our binding precedent, as Gosney suggests, it's not *Bissell* that compels our conclusion. Rather, it's the Supreme Court's *Kaley* opinion, which mandates that Gosney has "no right to relitigate" the "grand jury's prior determination of probable cause to believe [he] committed the crimes charged." 571 U.S. at 322. And, "under our system of vertical precedent, we are bound to apply [*Kaley*] until it is overruled, receded from, or in some other way altered by the Supreme Court." *United States v. Henco Holding Corp.*, 985 F.3d 1290, 1302 (11th Cir. 2021).

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-80022-CR-CANNON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN PAUL GOSNEY, JR.,

Defendant.
_____/

ORDER ON NOTICE OF INTENT [ECF No. 248] AND DENYING MOTION TO VACATE RESTRAINING ORDER [ECF No. 172]

(Filed Jun. 10, 2022)

THIS CAUSE comes before the Court upon Defendant John Paul Gosney, Jr.'s Notice of Intent (the "Notice") [ECF No. 248], filed on May 20, 2022. The Notice relates to Gosney's Motion to Vacate the Ex Parte Restraining Order [ECF No. 172], filed on April 8, 2022. Gosney seeks a pre-trial, post-restraint hearing on whether funds on deposit at a Valley Bank account ending in X5348 (also referred to as "Metropolis Account 2") are properly subject to forfeiture pursuant to 18 U.S.C. §§ 982(a)(1), (a)(7), and 981(a)(1)(C). As of February 25, 2022, Metropolis Account 2 had funds in the amount of approximately $818,200, and there is no dispute that Gosney has signatory authority over that account [ECF No. 81 ¶ 33]. The Court previously

restrained these funds via an Order Granting the Government's Post-Indictment, Ex Parte Application, which Gosney challenges [ECF No. 80 (Application and Motion); ECF No. 81 (Declaration of FBI Special Agent in Support of Application); ECF No. 103 (Protective Order for Asset Subject to Forfeiture); ECF Nos. 172, 248].

Following a complete review of the record and the applicable law, including the factors under *Barker v. Wingo*, 407 U.S. 514 (1972), as applied to criminal asset restraints, *see United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989); *United States v. Kaley*, 579 F.3d 1246, 1257 (11th Cir. 2009), the Court determines that due process does not require a pre-trial hearing to evaluate the traceability of the seized property in this case. Defendant's Motion for a hearing to challenge traceability [ECF No. 172] is therefore **DENIED**. For purposes of this Order, and as further explained below, the Court assumes that Gosney has sufficiently demonstrated financial need based on the contents of his ex parte submission [ECF No. 238].

RELEVANT FACTS AND PROCEDURAL HISTORY

On February 24, 2022, a federal grand jury in the Southern District of Florida returned a multi-count indictment charging John Paul Gosney, Jr. and nine others with various offenses related to a complex health care fraud, kickback, and money laundering scheme [ECF No. 23]. The scheme is alleged to have consisted

of, among other things, paying and receiving kickbacks and bribes in exchange for medical referrals, falsifying Medicare enrollment forms to conceal ownership information, submitting false and fraudulent claims to Medicare, and diverting reimbursements for personal gain [ECF No. 23 pp. 13–14, ¶ 3].

Gosney is charged in 11 counts of the 22-count indictment: conspiracy to commit health care fraud and wire fraud, in violation of 18 U.S.C. § 1349 (Count 1); health care fraud, in violation of 18 U.S.C. § 1347 (Counts 4–6); conspiracy to pay and receive health care kickbacks, in violation of 18 U.S.C. § 371 (Count 7); receipt of kickbacks in connection with a federal health care program, in violation of 42 U.S.C. § 1320a–7b(b)(1)(A) (Counts 10 and 13); conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 14); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 15, 17, 19) [ECF No. 23].

As relevant here, the indictment identifies Gosney as the signatory for a Wells Fargo account ending in X2130 ("Metropolis Account 1") and a Valley National Bank account ending in X5348 ("Metropolis Account 2") [ECF No. 23 p. 11, ¶ 41]. It then charges Gosney in Count 19 with money laundering for knowingly transferring from Metropolis Account 1 to Metropolis Account 2 $2,000,000 in proceeds from specified unlawful activities—namely, conspiracy to commit health care fraud and wire fraud, health care fraud, and receipt of kickbacks in connection with a federal health care program [ECF No. 23 pp. 28–29 (Count 19)]. The

indictment then sets forth a nonexhaustive list of property subject to forfeiture as a result of the alleged offenses [ECF No. 23 p. 31, ¶ 5]. Metropolis Account 2 is not included on that list [*see* ECF No. 23 pp. 31–32, ¶5].

On March 2, 2022, the Government submitted an ex parte application for a post-indictment protective order pursuant to 21 U.S.C. § 853(e), seeking to restrain and enjoin all funds in Metropolis Account 2 [ECF No. 80]. In support of its application, the Government submitted the declaration of FBI Special Agent Marcus Williams, who details a series of wire transfers into Metropolis Account 1 between October 2020 and February 2021, totaling $1,954,100 in allegedly fraudulent proceeds, and then explains that, on July 14, 2021, approximately $2,000,000 was transferred from Metropolis Account 1 to Metropolis Account 2 [ECF No. 81 ¶¶ 25–34]. That transfer on July 14, 2021 forms the basis of the money laundering offense in Count 19 of the indictment [ECF No. 23 pp. 28–29]. Based on that financial analysis and the allegations in the indictment, Williams asserts that there is probable cause to believe that the funds in Metropolis Account 2 ($818,200 as of February 25, 2022) constitute or derive from proceeds traceable to the underlying offenses and thus are subject to forfeiture pursuant to 18 U.S.C. §§ 982(a)(1), (a)(7), and 981(a)(1)(C). [ECF No. 81 ¶ 35]. The Court subsequently entered a Protective Order for Asset Subject to Forfeiture, restraining the funds in the Metropolis Account 2 [ECF No. 103].

In support of his Motion to Vacate, Gosney ask the Court to vacate the restraining order immediately, or,

in the alternative, to hold a hearing on the traceability of the restrained funds to the alleged crimes for purposes of reconsidering the restraining order [ECF No. 172]. Gosney argues that the Supreme Court's decision in *Kaley v. United States*, 571 U.S. 320 (2014)—which held that a grand jury's determination of probable cause as to whether a defendant committed a charged offense cannot be second-guessed at a pretrial, post-restraint hearing—should be overruled, and that, at minimum, defendants in his position should not be required to publicly establish financial need to merit a post-restraint hearing [ECF No. 172 pp. 11–20; ECF No. 205 pp. 4–6]. As to why he believes he warrants a traceability hearing on the merits, Gosney presents a series of related arguments about why he considers the allegations in the indictment—and the Government's evidence in support of those allegations—inconsistent with the fraud scheme as charged [ECF No. 172 pp. 4–7; ECF No. 205 pp. 1–4 (arguing, for example, that certain allegations in the indictment do not give rise to a scheme to defraud under *United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), as revised (Oct. 3, 2016), *opinion modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016); that evidence presented by the government during a preliminary hearing for co-defendant Michael Rozenberg supports that view [relying on ECF No. 170]; and that the Government's evidence of fraudulent billings establishes, at most, some irregularity with a "handful" of Medicare claims but does not support the existence of the massive fraudulent scheme as described in the indictment)].

The Court, bound by Supreme Court and Eleventh Circuit authority, denied Gosney's request to vacate the restraining order outright [ECF No. 217]. Out of an abundance of caution, however, the Court granted Gosney permission to attempt to make the prerequisite showing of financial need on an ex parte basis [ECF No. 217]. Gosney subsequently requested and received an extension of time to file the financial information [ECF Nos. 222–23]. On May 12, 2022, as permitted, Gosney filed his ex parte financial information in an effort to satisfy the preliminary showing of financial need [ECF No. 238]. He asked the Court not to share the information with the Government, and he further indicated that he would not testify about his finances at a future adversarial hearing [ECF No. 238; *see also* ECF No. 236]. The Court thereafter requested clarification from Gosney on whether he intended to meet his ultimate burden to prove at an adversarial hearing that he needs the restrained assets to hire his counsel of choice [ECF No. 240 (relying on *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998), and *United States v. Farmer*, 274 F.3d 800, 846 (4th Cir. 2001))]. Following another extension [ECF Nos. 244–45], Gosney filed the instant Notice of Intent [ECF No. 248]. In the Notice, Gosney asserts that he is the only person with sufficient knowledge about his finances, and that he is unwilling to testify in open court unless the court grants him use immunity [ECF. No. 248 (citing *Simmons v. United States*, 390 U.S. 377, 390 (1968))]. He also reiterates his position that the Government's evidence of revenue from improper Medicare claims is de minimis [ECF No. 248 p. 3]. And he does not clearly

acknowledge whether he is willing to testify if the Court were to grant his request for use immunity [ECF No. 248].

DISCUSSION

As noted, for purposes of this Order, the Court assumes that Gosney's ex parte showing of financial need [ECF No. 238] satisfies the preliminary showing requirement for a pre-trial, post-restraint hearing on traceability. *See Kaley*, 579 F.3d at 1252 (referencing a defendant's financial need to afford counsel of choice as a condition precedent to consideration of the *Barker* factors); *United States v. Farmer*, 274 F.3d 800, 846 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998). The Court deems this approach the most prudent under the circumstances presented; Gosney has provided at least a preliminary showing of financial need, albeit on an ex parte basis; there is limited authority on the specific procedures a court should employ to determine a defendant's financial need in this context; and Gosney apparently now insists on the protection of use immunity to meet his burden to show financial need at an adversarial hearing, a request whose legal footing is unsettled, at best.[1]

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[1] "Use immunity" prohibits the government from using a witness's statements or testimony as a basis for any prosecution of that witness. It has a closely related offshoot, "derivative immunity," which prohibits the government from using evidence derived from the testimony of the witness against the same. Discussions of immunity frequently arise in the context of compelled testimony. *See Kastigar v. United States*, 406 U.S. 441, 449 (1972);

Accepting that assumption of financial need, the Court proceeds to conduct an evaluation of the four

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United States v. Dudden, 65 F.3d 1461, 1467 (9th Cir. 1995). In this case, Gosney argues that he should be able to testify about his financial need as relates to exercising his Sixth Amendment right to counsel of choice without having to waive his Fifth Amendment privilege against self-incrimination [ECF No. 248]. Accordingly, Gosney proposes that the Court apply use immunity to any such testimony, citing *Simmons v. United States*, 390 U.S. 377, 390 (1968). In that case, the Supreme Court considered the admissibility of a defendant's testimony to establish a possessory interest in support of a motion to suppress evidence, which, by its nature, posed a significant risk of self-incrimination. *Id.* The Supreme Court held that, where a defendant is in the "intolerable" situation of having to choose between a valid Fourth Amendment claim and the Fifth Amendment privilege against self-incrimination, courts should remedy the situation by applying use immunity to the relevant testimony. *Id.* The notion that having to choose between two constitutional rights constitutes an "intolerable" situation is what courts refer to as the "*Simmons* principle," though the scope and validity of the principle is unclear. Since deciding *Simmons*, the Supreme Court has characterized the rationale underlying the principle as "open to question," casting doubt on whether it may properly be applied to the context of conflicts between the Fifth and Sixth Amendments, *McGautha v. California*, 402 U.S. 183, 212 (1971), *reh'g granted, judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972), as some lower courts have done, *see United States v. Kahan*, 415 U.S. 239, 243 (1974); *United States v. Branker*, 418 F.2d 378, 381 (2d Cir. 1969); *United States v. Anderson*, 567 F.2d 839, 841 (8th Cir. 1977). For its part, the Eleventh Circuit has declined to adopt a broad reading of *Simmons* in light of the Supreme Court's "considerabl[e] narrowi[ing]" of the principle in *McGautha* and *Kahan*. *In re Fed. Grand Jury Proc. (FGJ 91-9), Cohen*, 975 F.2d 1488, 1493 (11th Cir. 1992). Although Gosney's requested extension of *Simmons* and related demand for use immunity seems tenuous to the Court in this context, the Court finds it unnecessary to resolve that unsettled question because due process does not require a pre-trial traceability hearing in this case.

Barker factors and concludes, for the reasons stated below, that due process does not require a pre-trial, post-restraint hearing on traceability in this case. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (establishing a four-factor test to determine whether a delay has deprived a defendant of any rights necessitating a hearing); *United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989) (applying *Barker* to the context of criminal asset restraints); *Kaley*, 579 F.3d at 1257 (recognizing the continued validity of *Barker* and *Bissell* in the asset restraint context).

The *Barker* Test

To determine whether a pre-trial hearing is warranted under the *Barker* test, courts must consider: (1) the length of delay until the issue would otherwise be resolved; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. The Court discusses each factor in turn.

I. Length of Delay

In the context of asset restraints, the relevant length of delay is the amount of time between when the restraint is imposed and when the restraint would be reconsidered and resolved (i.e., trial). Here, the subject asset restraint was imposed on March 7, 2022 [ECF No. 103], and trial is set for January 2023 [ECF No. 231 (setting trial firmly for the two-week trial period beginning on January 17, 2023, noting no further

continuances)]. Thus, the relevant length of delay in this case is between ten and eleven months. A delay of that length, although not insignificant, is not so substantial as to clearly favor a pre-trial hearing. *See Bissell*, 866 F.2d at 1353 (characterizing an eight-month delay as "not significant"); *see also United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in US. Currency*, 461 U.S. 555, 565 (1983) (finding a delay of approximately eighteen months to be significant but outweighed by other factors). This factor thus is either neutral or marginally weighs in Gosney's favor.

II. Reason for the Delay

The indictment in this case brings a total of twenty-two (22) charges against ten (10) Defendants in connection with a multimillion-dollar health care fraud conspiracy, including charges of money laundering that implicate numerous entities and bank accounts [*see* ECF No. 23].[2] As Gosney has acknowledged, discovery is "massive," involving hundreds of thousands of documents and necessitating a detailed and developed discovery protocol for use by a filter team [ECF No. 238 p. 2; *see also* ECF No. 146 (joint request for designation of case as complex under 18 U.S.C. § 3161(h)(7)(B)(ii)); ECF Nos. 220, 224]. Under these circumstances, further explained by the Court in its Order Resetting Trial [ECF No. 231], the ten-month

[2] One defendant, Galina Rozenberg, has since pled guilty [ECF Nos. 190–192].

delay is entirely reasonable in light of the complexities of this case, the extremely voluminous discovery, and the expressed need for adequate preparation on both sides. This factor is neutral. *See generally United States v. Hall*, 551 F.3d 257, 272 (4th Cir. 2009).

III. Assertion of Right

Gosney filed his motion to vacate the restraining order on April 8, 2022—one month after the restraining order was entered [*see* ECF Nos. 103, 172]. This timely assertion weighs in Gosney's favor.

IV. Prejudice

Lastly, the Court conducts a "more searching exposition and calculus" of the fourth factor: measuring the prejudice inflicted upon Gosney by the delay compared to the Government's interest in restraining the subject property without a pre-trial hearing. *See Kaley*, 579 F.3d at 1258 (instructing district courts to pay special attention to this fourth factor). In all asset forfeiture cases, the fundamental risk is that the Government might restrain untainted assets. That risk is related in this case to Gosney's claim that he needs the restrained assets to exercise his Sixth Amendment right to counsel of choice [ECF No. 172]. The Court is mindful of the risk and constitutional principles implicated here but does not find Gosney's arguments sufficient to justify a hearing under the rubric set by the Supreme Court in *Kaley v. United States*, 571 U.S. 320 (2014).

In *Kaley*, the Supreme Court drew a distinction between (1) the grand jury's determination of probable cause to believe a defendant committed a crime and (2) the grand jury's determination that the assets subject to forfeiture are traceable to the charged crime. 571 U.S. at 333. In doing so, the Supreme Court made clear that only the latter determination—which concerns a technical matter removed from the grand jury's core competence and function—may be subject to second-guessing prior to trial. *Id.* at 331 n.9. Conversely, the former determination by the grand jury—that probable cause exists to believe a defendant perpetrated the offenses alleged based on the factual allegations supporting the grand jury's probable cause determination—is "conclusive" at this stage, i.e., not subject to "any review, oversight, or second-guessing" pending resolution of the case. *Id.* at 328–29.

In accordance with *Kaley*, therefore, the following probable cause determination by the grand jury in this case is conclusive: Gosney committed money laundering by transferring approximately $2,000,000 from Metropolis Account 1 to the subject Metropolis Account 2—money that Gosney knew was derived criminally from specified unlawful activity, i.e., conspiracy to commit health care fraud and wire fraud, health care fraud, and receipt of kickbacks in connection with a federal health care program [ECF No. 23 pp. 28–29]. Also conclusive is the grand jury's determination that Gosney conducted that financial transaction "knowing that the transaction was designed in whole and in part to conceal and disguise the nature, the location, the

source, the ownership, and the control" of those proceeds as specified unlawful activity [ECF No. 23 pp. 28–29]. All of this matters because Gosney's challenge to the asset restraint in this case amounts essentially to a frontal assault on the reliability and competence of the factual allegations supporting the Medicare fraud as alleged in the indictment [*see* ECF No. 172 pp. 4–7; ECF No. 205 p. 2]. Gosney relies heavily, for example, on what he considers to be revelations about the absence of fraud as drawn from the testimony of FBI Agent Frank at co-defendant Michael Rozenberg's preliminary hearing [ECF No. 172 pp. 4–7]. According to Gosney, Agent Frank's testimony establishes that roughly 3,700 medical tests at issue in at least part of the alleged fraud were properly "authorized by different treating physicians exercising their independent medical judgment regarding medical necessity" [ECF No. 172 p. 5]. Yet the indictment specifically and repeatedly alleges that Defendants, including Gosney, conspired to and did submit millions of dollars in false and fraudulent claims for medically unnecessary tests [ECF No. 23]. Gosney further argues, again citing to Agent Frank's testimony, that "neither doctors nor patients were paid kickbacks or otherwise unlawfully induced to order or receive unnecessary [medical] tests" [ECF No. 172 p. 5]. Yet again the indictment alleges otherwise, claiming that the conspiracy involved kickback and bribe arrangements with health care providers, companies, and laboratories [ECF No. 23 pp. 14, 21]. In the same vein, Gosney urges that any lies allegedly made by Defendants to induce others to perform these tests cannot form the basis of a "scheme to

defraud" under the Eleventh Circuit's decision in *Takhalov*, 827 F.3d at 1313, but that too is inextricably premised upon a challenge to the reliability and foundation of the charged offenses for which the grand jury found probable cause [ECF No. 172 p. 6]. Finally, in Reply, Gosney again focuses on the substance and extent of the fraud, arguing that any revenue derived from just a few irregular Medicare billings represents a "small fraction" of the revenue from the 3,700 otherwise proper tests [ECF No. 205 p. 3].

All told, other than referencing the issue of whether the subject asset is "traceable to the crimes charged" in passing [ECF No. 172 p. 8; ECF No. 205 pp. 2, 4], Gosney's arguments on the merits all reduce to a claim that neither he nor his co-defendants committed the charged crimes or obtained any significant amount of money from improper Medicare claims. That determination, however, falls within the sole province of the grand jury under the Supreme Court's binding decision in *Kaley.* As a result, Gosney cannot show prejudice from not having an opportunity, at a pre-trial hearing, to challenge the underlying fraud scheme generally or the money laundering offense in Count 19 specifically—a crime built directly on the allegation that Gosney knowingly transferred $2,000,000 in criminally derived funds to the Metropolis Account 2 (whose funds are now seized) [ECF No. 188 pp. 4–5]. Put another way, Gosney's arguments in favor of a hearing necessarily depend upon a challenge to the reliability and competence of the underlying allegations of a fraudulent scheme in the indictment, but *Kaley*

disallows that type of "second-guessing" at this stage [*see* ECF No. 188 pp. 6–7]. Gosney has not shown prejudice by the Court's decision to refrain from holding a hearing.

On the other side of the equation, the Government has a substantial interest in continuing to restrain Metropolis Account 2 without any pre-trial hearing [ECF No. 188p. 5]. *See Kaley*, 571 U.S. at 321. As the Supreme Court has recognized, "there is a strong governmental interest in obtaining full recovery of all forfeitable assets," *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 618 (1989), and requiring the Government to respond prematurely to Defendant's challenges and to rehash the evidence in support of the alleged crimes at a pre-trial "mini-trial" is both legally unwarranted under Kaley and would contravene important government interests. *See Kaley*, 571 U.S. at 335 (discussing government interests in freezing potentially forfeitable assets without an evidentiary hearing, including the time and resources expended at such a hearing).

For all of these reasons, the fourth and most searching *Barker* factor weighs decidedly in favor of the Government.

CONCLUSION

In applying the *Barker* test to this case, the Court finds that a pre-trial, post-restraint hearing on the traceability of the restrained funds to the charged offenses is unwarranted. The first two *Barker* factors—

the length and cause of the contemplated delay—do not weigh in favor of a pretrial hearing in any significant way. The only factor that does is Gosney's timely assertion of his right, and that factor is outweighed significantly by the output of the prejudice calculus under the binding precedent of *Kaley* and in the context of Gosney's challenge.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant John Paul Gosney, Jr.'s Motion to Vacate the Restraining Order [ECF No. 172] is **DENIED**.

2. **Gosney's arraignment, which the Court previously continued pending resolution of this matter [ECF No. 217], shall proceed expeditiously.**

DONE AND ORDERED in Chambers in Fort Pierce, Florida this 10th day of June 2022.

/s/ Aileen M. Cannon
AILEEN M. CANNON
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law. . . ." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

Title 18 U.S.C. § 853 provides, in pertinent part:

Criminal forfeitures

(a) Property subject to criminal forfeiture.

Any person convicted of a violation of this title . . . shall forfeit to the United States. . . .

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such 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, such violation. . . .

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining order . . . to preserve the availability of property described

in subsection (a) for forfeiture under this section –

> (A) upon the filing of an indictment . . . charging a violation of this title . . . for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
>
> (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –
>
> > (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture;
> >
> > and
> >
> > (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:
>
> Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days,

unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order. . . .