No. _____

In The
Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

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, 2012) ("*Kaley II*"), App. 1-31.

QUESTION PRESENTED FOR REVIEW
Continued

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?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners, Kerri L. Kaley and Brian P. Kaley, were the defendants in the district court and were the appellants in the Eleventh Circuit. The Kaleys are individuals. Thus, there are no disclosures to be made by them pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

Jennifer Gruenstrass was a party defendant in the district court. While the Kaleys were pursuing their interlocutory appeals in the Eleventh Circuit, Gruenstrass went to trial and was acquitted.

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PETITION FOR WRIT OF CERTIORARI

Kerri L. Kaley and Brian P. Kaley respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's final opinion, App. 1-37, is reported at 677 F.3d 1316. The Eleventh Circuit's preliminary opinion, App. 48-93, is reported at 579 F.3d 1246. The relevant orders of the District Court, App. 38-47, 94-117, are unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on April 26, 2012, App. 1-37, and denied rehearing on July 17, 2012, App. 113-14. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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. . . .

Title 18 U.S.C. § 2314 provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; . . . [s]hall be fined under this title or imprisoned not more than ten years, or both. . . .

Title 18 U.S.C. § 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

> purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. . . .

STATEMENT OF THE CASE

A. Introduction

In *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), this Court rejected a Fifth and Sixth Amendment challenge to the federal statute (18 U.S.C. § 853) that allows for the forfeiture of tainted funds used to pay counsel of choice. In a companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), this Court approved the pretrial restraint of those allegedly tainted assets needed to pay counsel of choice, writing: "assets in a defendant's possession may be restrained . . . based on a finding of probable cause to believe that the assets are forfeitable."

In a footnote to the *Monsanto* opinion, this Court 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." *Monsanto*, 491 U.S. at 615 n.10. In the twenty-three years since *Caplin & Drysdale* and *Monsanto*, the circuit split has become further entrenched. To date, all but one of the twelve circuit courts of appeals have addressed the issue.

The Eleventh Circuit, in the course of two interlocutory appeals in this case, 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 restraints. *United States v. Kaley*, 677 F.3d 1316 (11th Cir. April 26, 2012) ("*Kaley II*"), App. 1-31.

In a specially concurring opinion in the first interlocutory appeal, Judge Tjoflat, noting the circuit split, concluded that "the Kaleys are entitled to a pretrial hearing on the merits of the protective order," and that the case should have been "remanded to the district court with instructions to afford the Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restrain their assets." *United States v. Kaley*, 579 F.3d 1246, 1267-68 and n.14 (11th Cir. 2009) ("*Kaley I*") (Tjoflat, J., concurring), App. 75, 92-93.

In the second interlocutory appeal from the district court's order denying relief after remand, Judge Edmondson's concurring opinion expressed "deep doubts" about the majority opinion, recognized that the case "touches on the fundamentals and, thus, impresses [him] as being unusually important," and acknowledged that "if [he] were deciding the case alone, [he] expect[s] he would reach a different result and write something largely in line with *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), and *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008)." *Kaley II*, 677 F.3d at 1330 (Edmondson, J., concurring), App. 32.

The district court has stayed the arraignment and trial of this case pending disposition of this petition for a writ of certiorari. App. 115-17. Absent the pretrial hearing sought by petitioners, they will be denied access to the funds they need to retain counsel of choice to defend them at trial against the very accusation that threatens to permanently deprive them of those funds . . . and their freedom.

This Court should grant the petition for a writ of certiorari to resolve the long-standing circuit split on what Judge Edmondson characterizes as an issue that "touches on the fundamentals and, thus, impresses [him] as being unusually important."

B. The Pre-Indictment Investigation And Retention Of Counsel Of Choice

In January 2005, Petitioner Kerri L. Kaley, a sales representative for a subsidiary of Johnson & Johnson, Inc. ("J&J"), learned that she and her husband, Petitioner Brian Kaley, were targets of a Florida grand jury investigation. R17:4; R20. The government claimed that the Kaleys and other J&J sales representatives were obtaining from hospitals prescription medical devices ("PMDs") – such as sutures, trocars and other devices used during surgery – that J&J had previously sold to those hospitals and were reselling them on a gray market. R17:4.

The Kaleys retained counsel to represent them in what turned out to be a two-year investigation. During that period, counsel interviewed witnesses,

investigated J&J's onerous return policies (which were largely responsible for the creation of the gray market), reviewed countless documents, researched legal issues and conferred with the prosecutors. R17:4-6.

When settlement discussions collapsed and an indictment was presumably forthcoming, the Kaleys applied for a $500,000 credit line on a home they had owned for more than a decade to raise funds necessary to pay their counsel to defend them at the anticipated trial. R17:7. On the advice of their bank, the Kaleys used the credit line funds to buy a certificate of deposit ("CD"), which would earn interest to partially offset the interest expense on the home equity loan until they were indicted. *Id.* No indictment was returned in 2006. In early 2007, the Kaleys deposited an additional $63,000 into the CD, earned from sources other than their residence. *Id.*

C. The Initial Proceedings In The District Court

In February 2007, the Kaleys were indicted, along with Jennifer L. Gruenstrass (another J&J sales representative), for conspiring to traffic in "stolen" PMDs and money laundering. R1, 45.[1] The original and superseding indictments included a forfeiture count and were accompanied by restraining

[1] The Kaleys and Gruenstrass were also charged with one count of obstruction of justice.

orders, obtained *ex parte*, that selectively froze *only* the Kaleys' assets, including their marital residence and the CD. R1:10; R5-6. The Kaleys promptly challenged the orders, arguing that they were constitutionally entitled to a pretrial adversarial hearing where the government would have to prove that it was likely to prevail at trial in order to justify denying the Kaleys the use of their assets to retain their counsel of choice for that very trial. R17. The government opposed the motion, arguing that under *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989), *cert. denied*, 493 U.S. 876 (1989), the only adversarial hearing the Kaleys were entitled to *was* their trial. Alternatively, the government argued that the Kaleys could have a hearing to contest the *tracing* of restrained assets to the crimes but only if the Kaleys first proved that they could not retain counsel by liquidating every unrestrained asset worth over $500. R27:8-10.

Agreeing with the government, a magistrate judge convened a limited hearing to examine the Kaleys' available assets and determine whether the $63,000 that had been added to the CD was traceable to the crimes charged. R 68, 99. After barring the Kaleys from putting on evidence to show that the PMDs were never stolen by anyone R99:94-96, the magistrate judge denied the Kaleys' motions, finding "probable cause" to believe that they would be convicted based only on the indictment, as supplemented by an agent's *ex parte* affidavit. App. 109; R80-82. The magistrate judge also found that the Kaleys' Sixth

Amendment right to counsel of choice was not violated because they could retain other "competent" counsel for less money if they liquidated all their other assets. App. 110-11.

The district court adopted most of these rulings, holding that the Kaleys were not entitled to any kind of adversarial hearing under the four-factor "speedy trial" test in *United States v. $8,850 in U.S. Currency,* 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), adopted by the Eleventh Circuit in *Bissell*. App. 94-104. The district court agreed only to release the $63,000 as unconnected to the alleged crimes. App. 104; R123:4. The district court then stayed the Kaleys' criminal trial pending their interlocutory appeal.

D. The Eleventh Circuit's Decision In *Kaley I*

In their first interlocutory appeal to the Eleventh Circuit (*Kaley I*), the Kaleys argued that they were constitutionally entitled to a pretrial adversarial hearing on the strength (or lack thereof) of the government's case for two reasons. First, they argued that the district court had misapplied the *$8,850*/*Barker* factors and that *Bissell* did not create a bright-line rule limiting pretrial hearings to the issue of "tracing." Second, they argued that to the extent *Bissell* precluded a hearing, it was wrongly decided and that *Mathews v. Eldridge*, 424 U.S. 319 (1976), not *$8,850* and *Barker*, provided the proper constitutional framework to determine their due process

rights. The government maintained its position that the only process due the Kaleys was their criminal trial and that requiring a pretrial hearing would risk the "damaging premature disclosure of the government's case and trial strategy." *See Kaley I*, Brief for the United States (Sept. 26, 2007), at p. 31.

Meanwhile, co-defendant Gruenstrass – whose assets had not been frozen and who thus had retained her counsel of choice – moved for a continuance of her trial pending the outcome of the Kaleys' appeal. R131. Despite its alleged concern over "damaging premature disclosure[s]" to the Kaleys, the government *opposed* the continuance and demanded that Gruenstrass be tried immediately. R135. The district court agreed but forced the government to first provide a bill of particulars identifying who "owned" the allegedly stolen PMDs. Apparently because no hospital was claiming to be the victim of the alleged thievery, the government instead identified J&J as the "owner" of the PMDs, even though J&J had been paid in full for the devices by their hospital customers. Under the government's "constructive trust" theory, when hospital staff gave the unwanted PMDs to a J&J sales representative like Ms. Kaley – with no expectation of a refund – the sales representative was nevertheless holding those unwanted PMDs in "constructive trust" for J&J, so J&J thereby became the owner again (without paying anyone for the PMDs). Notwithstanding binding case law in the Eleventh Circuit

rejecting this constructive trust theory of property in the context of a criminal prosecution,[2] this fatal defect went unnoticed, and Gruenstrass proceeded to trial. She was acquitted anyway.

When the Eleventh Circuit issued its opinion in *Kaley I*, it left the core constitutional issues unresolved. The majority opinion felt bound by *Bissell*, although stating that "[i]f we were writing on a blank slate today we would be inclined . . . to apply the test announced by the Supreme Court in *Mathews*." App. 72. However, the majority reversed the district court for misapplying the *Barker* factors and remanded to "re-weigh" them "in order to calculate whether the Kaleys [were] entitled to a post-indictment pretrial evidentiary hearing." App. 72, 75. The majority did not specify the *scope* of such a hearing but cautioned that its purpose "would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure." App. 68. The Kaleys bore the burden of proof, thus "sav[ing]" the government "from having to preview its entire case." *Id.* The majority acknowledged that, in the interim, the government had tried Ms. Gruenstrass, App. 65, but did not address whether the district court was now free to consider either that trial record or the flawed theory of prosecution in "determining the propriety of the seizure." The majority suggested only that the hearing could mirror the

[2] *See United States v. Goodrich*, 871 F.2d 1011 (11th Cir. 1989); *accord United States v. Miller*, 997 F.2d 1010, 1021 (2d Cir. 1993).

"approach" of the prejudgment attachment hearing in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). App. 68.

In a concurring opinion, Judge Tjoflat believed that most of the language in *Bissell* was *dicta* and that the proper due process test was the one set forth in *Mathews*. App. 80. As Judge Tjoflat recognized, the *Mathews* test weighs the (1) private interest affected by the restraint, (2) risk of erroneous deprivation through the procedures used and the probable value of additional procedural safeguards, and (3) the prejudice to the government. *Id.* The Kaleys' interests, Judge Tjoflat found, were enormous. "Delaying the due process hearing until trial will only temporarily deprive the Kaleys of their property rights, but it will completely eviscerate their right to counsel of choice." App. 88-89. The risk of an erroneous deprivation likewise weighed in the Kaleys' favor because neither a prosecutor's judgment, a grand jury's *ex parte* finding of probable cause nor an agent's *ex parte* affidavit were likely to protect a defendant "against an erroneous deprivation." App. 90-91. Also citing *Mitchell* as a guide, Judge Tjoflat stated that at the hearing, the Kaleys could challenge "the merits" but the burden would be on them to "show that the Government did not have probable cause to restrain their assets." App. 91-92.

E. The Remand From *Kaley I*

On remand, the district court re-weighed the *Bissell* factors and, this time, held "that the equities lie in favor of Defendants and an evidentiary hearing to determine the propriety of the pretrial seizure of Defendants['] [property] is warranted." App. 47. The hearing the district court then convened, however, was no different from the one held in 2007. The Kaleys conceded that they were not contesting the "traceability" of the house and CD to the *alleged* crimes but proffered evidence that the PMDs were not stolen from anyone – the record from Ms. Gruenstrass' trial, as well as additional evidence concerning J&J's return policies. R233:15-31, 196, 221.[3] The government continued to maintain that the Kaleys had no right to contest any issue other than "traceability" and that the district court had no discretion to refuse to continue the restraining order, despite the dearth of evidence at Ms. Gruenstrass' trial and the defects in the Indictment. R233:34-35, 43. The district court agreed with the government, declined to consider the Kaleys' arguments and enforced the restraining order. App. 38-43.

[3] The Kaleys did not concede that "probable cause" was the appropriate standard of proof but argued that they would prevail under any standard because the government based the prosecution on a legally defective theory of "property."

F. The Eleventh Circuit's Opinion In *Kaley II*

The district court stayed the case to allow the Kaleys to take a second interlocutory appeal. This time, the Eleventh Circuit affirmed. The majority opinion held unequivocally that "[t]o the extent that *Kaley I* did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges." App. 15. The majority further held that even though the Kaleys had prevailed under the *Bissell-Barker* test on remand from *Kaley I*, the *only* hearing that *Bissell* permitted was about traceability. App. 24. The court of appeals held that the Kaleys' Sixth Amendment concerns could be satisfied through court appointed counsel. App. 25.

Judge Edmondson wrote a concurring opinion that essentially agreed with Judge Tjoflat's concurring opinion in *Kaley I*:

> I concur in today's result. I concur because I cannot say with strong confidence that my colleagues on the panel are incorrect in the way they see the law working. But I concur with deep doubts. And if I were deciding the case alone, I expect I would reach a different result and write something largely in line with *United States v. Monsanto,* 924 F.2d 1186 (2d Cir.1991) (en banc), and *United States v. E-Gold, Ltd.,* 521 F.3d 411 (D.C.Cir.2008).

App. 32.

Judge Edmondson posited that when the government wished to impose a restraining order as an "add on to ordinary prosecution," due process required an evidentiary hearing "about probable cause on both the predicate criminal offense and the forfeitability (traceability of assets to supposed crime) of the specified property." App. 33-34. The government would then be free to "decide for itself what cards to show before the actual trial; the worst that will happen is that the pretrial restraint on property will not continue. . . ." App. 34. Judge Edmondson ended his opinion by emphasizing the importance of these issues to our entire system of justice:

> The potential for the dominating power of the Executive Branch to be misused by the arbitrary acts of prosecutors is real. The courts must be alert. To hear from the other side at a time when it matters (in this instance, before the criminal trial: a trial without counsel of the defendant's choice) is the basic and traditional way that American judges assure things are fair. So, I do think that *Monsanto* and *E-Gold*, as law decisions, are very possibly on the right tack: stressing judicial responsibility and requiring a broader hearing to keep up a pretrial restraint on property when the restraint interferes with a citizen's abilities to employ legal counsel of his choice to defend him in a criminal proceeding.

* * *

> I have voiced my doubts, but I cannot firmly conclude that the legal position my experienced, able colleagues have taken is definitely erroneous. Therefore, I do not dissent, although I am uneasy that the limits that we set today for the hearing essential to continue a pretrial restraint on property might well be too limiting under the Constitution.

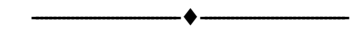
App. 36-37.

The Kaleys petitioned for rehearing en banc, which the Eleventh Circuit denied on July 17, 2012. App. 113-14. The Kaleys then moved the district court to stay the trial proceedings pending the disposition of this petition for a writ of *certiorari*. In an order granting the stay, the district wrote:

> Defendants have properly exercised their right to appellate review, and the [sic] they were vindicated in their first interlocutory appeal. The government has acknowledged that if the Supreme Court agrees to review the appellate decision, the case will once again have to be put on hold. In view of the extensive delay that has already occurred and the prospect that the case will once again have to be stayed if the Supreme Court grants review, this Court concludes that the equities weigh in favor of granting a stay for the relatively short additional period of time required for the Supreme Court to consider Defendants [sic] petition for review, rather than possibly improperly forcing Defendants to defend the case without the benefit of the

> assets they claim are necessary to retain counsel of their choice.
>
> In view of the foregoing, Defendants' Motion [for a stay] is GRANTED.

App. 116-17.



REASON FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO RESOLVE A LONG-STANDING CIRCUIT SPLIT CONCERNING A CRIMINAL DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHT TO A PRETRIAL, ADVERSARIAL HEARING TO CHALLENGE A RESTRAINING ORDER, ENTERED *EX PARTE*, THAT FREEZES ASSETS NEEDED TO RETAIN COUNSEL OF CHOICE

A. The Pre-*Monsanto* Circuit Split Caused By *Bissell*.

In 1970, Congress enacted two criminal statutes, 21 U.S.C. § 848 ("CCE") and 18 U.S.C. § 1963 ("RICO"), that for the first time (1) contained *in personam* forfeiture penalties and (2) authorized district courts to restrain the property subject to forfeiture pretrial. *See* 21 U.S.C. § 848(d); 18 U.S.C. § 1963(b). The restraining order provisions, however, included no guidelines for their implementation.

In 1984, Congress expanded the government's forfeiture powers. Through the Comprehensive Crime Control Act, Pub. L. No.98-473, 98 Stat. 1976 (1984),

Congress substantially amended the CCE and RICO restraining order provisions and enacted a new comprehensive statute, 21 U.S.C. § 853. In order to secure a pre-indictment restraining order, Congress required a series of procedural safeguards, including a hearing at which the government had to prove "a substantial probability" of success. *See* pp. 2-3 *supra*.

In contrast, a post-indictment restraining order could be entered merely "upon the filing of an indictment." *Id.* A Senate Report indicated that the absence of procedural safeguards for the post-indictment provision was intentional. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3385-86.

The defense bar challenged the constitutionality of both the 1970 and 1984 restraining order provisions under the Fifth and Sixth Amendments. The Sixth Amendment challenges focused on whether funds used to pay counsel of choice were completely exempt from forfeiture (and, hence, would also be exempt from pretrial restraint).

While the circuits split on this issue, until the Eleventh Circuit's 1989 opinion in *Bissell*, no other circuit had held that a defendant could be denied a meaningful pretrial opportunity to contest the restraints. Whether required by Rule 65, Fed. R. Civ. P., or as a matter of due process, the Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits all held that, in the absence of any explicit procedural protections, a defendant was entitled to a pretrial

hearing at which the government would need to at least establish its "likelihood of success in convicting the defendant and obtaining forfeiture of the disputed assets. . . ." *United States v. Monsanto*, 836 F.2d 74, 85 (2d Cir. 1987), *vacated on rehearing en banc on other grounds*, 852 F.2d 1400 (2d Cir. 1988) (*per curiam*), *and rev'd on other grounds*, 491 U.S. 600 (1989); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd on other grounds sub nom., In re Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (en banc); *United States v. Thier*, 801 F.2d 1463, 1468-69 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Lewis*, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985).

Some of these courts expressly rejected the government's contention that a grand jury's finding of probable cause was sufficient due process: "A grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof. . . ." *United States v. Crozier*, 674 F.2d 1293, 1297 (9th Cir. 1982), *vacated on other grounds*, 468 U.S. 1206 (1984); *accord Harvey*, 814 F.2d at 928; *Long*, 654 F.2d at 915. Some rejected the government's argument, based on *$8,850,* that the defendant's trial

provided all the process that was due: "Relief not obtained prior to the commencement of the criminal trial simply will not be helpful in securing the assistance of counsel of choice at the criminal trial." *Moya-Gomez*, 860 F.2d at 728.

The one potential fissure in these rulings was whether the Fifth Amendment Due Process Clause always required such a hearing without regard to the Sixth Amendment right to counsel of choice issue, *see, e.g., Crozier*, 674 F.2d at 1297, or whether the defendant first had to demonstrate "a bona fide need to utilize assets subject to the restraining order to conduct his defense." *Moya-Gomez*, 860 F.2d at 730.

In 1989, the Eleventh Circuit in *Bissell* disagreed with all existing precedent. Relying on the legislative history of § 853(e), the Eleventh Circuit held that "the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment . . . but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial." *Bissell*, 866 F.2d at 1349. In assessing whether such a scheme was constitutional, the Eleventh Circuit eschewed *Mathews* and, instead, adopted the speedy trial framework in *$8,850* and *Barker*, characterizing the issue as a challenge to "'only the length of time between the seizure and the initiation of the forfeiture trial.'" *Id.* at 1352, quoting *$8,850*, 461 U.S. at 564. The Eleventh Circuit then held that providing the defendant with his trial complied with

due process, recognizing only in passing that its opinion was "contra" to other circuits. *Id.* at 1354 n.7.

B. The Supreme Court Rulings In *Caplin & Drysdale* And *Monsanto*.

Just months after *Bissell* was decided, this Court resolved one of the circuit conflicts, holding that the Fifth and Sixth Amendments did not exempt attorneys fees from forfeiture. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989). In *Caplin & Drysdale*, the attorneys did not seek access to the defendant's funds until *after* the defendant was convicted and, therefore, the case did not address whether or under what circumstances a defendant could be precluded *pretrial* from using only *potentially* forfeitable assets to retain counsel of choice.

In *Monsanto*, the government sought to forfeit the defendant's real and personal property as proceeds of drug trafficking, and the district court issued a restraining order freezing those assets pending trial. 491 U.S. at 602-04. When the defendant moved to vacate the order so that he could use the assets to retain an attorney, the district court conducted a four-day evidentiary hearing, after which it concluded that "the Government had 'overwhelmingly established a likelihood' that the property in question would be forfeited at the end of the trial." *Id.* at 605. In light of the lengthy evidentiary hearing and the district court's finding, this Court declined to address the

circuit split created by *Bissell* on the due process question. Nonetheless, at the end of its opinion, the Court added the following: "We conclude . . . that assets in a defendant's possession may be restrained in the way they were here *based on a finding of probable cause* to believe that the assets are forfeitable." *Id.* at 615 (emphasis added). The Court expressly left open the question concerning the procedural due process requirements, including whether "a hearing was required at all" or whether the four day hearing that occurred "was an adequate one." *Id.* at 615, n.10.

C. The Circuit Split Continues.

Since *Monsanto*, the circuit split on the due process question has become both more entrenched and multifaceted.

The Ninth Circuit reaffirmed its support for *Crozier*, *see United States v. Roth*, 912 F.2d 1131, 1333 (9th Cir. 1990), including the requirement that at the pretrial adversarial hearing the government meet the standards set forth in Rule 65, Fed. R. Civ. P.

The Second, Fourth, and Seventh Circuits likewise reaffirmed that due process requires a pretrial hearing, but not the Rule 65 hearing contemplated by the Ninth Circuit. Rather, at the adversarial hearing approved by these circuit courts, the defendant may test "the existence of probable cause as to both the [predicate criminal offense] and the forfeitability of

the specified property. . . ." *United States v. Monsanto*, 924 F.2d 1186, 1197-98 (2d Cir. 1991) (en banc); *accord United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) ("Considering the three *Mathews* factors as they apply to Farmer, we conclude that due process requires a hearing for him to challenge probable cause."), *cert. denied*, 543 U.S. 1022 (2002); *United States v. Michelle's Lounge*, 39 F.3d 684, 700-01 (7th Cir. 1994) ("At a hearing, the defendant could rebut the government's showing of probable cause – for example, by proof of innocent ownership, or that a government informant is unreliable, or that the property had no connection to drugs.").[4]

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[4] Given this parenthetical quotation from *Michelle's Lounge*, it appears that Judge Marcus was mistaken when, in *Kaley II*, he counted the Seventh Circuit (citing *Moya-Gomez*) among those circuits that reject *Monsanto*'s requirement of a hearing on probable cause. *Kaley II*, 676 F.3d at 1329. Actually, the Seventh Circuit embraced the Second Circuit's en banc decision after remand in *Monsanto*, explicitly aligned itself with the other circuits that require a hearing, and noted the conflict with the Eleventh Circuit's opinion in *Bissell*:

> Clearly *Moya-Gomez* has lost none of its vitality after the Supreme Court decisions in *Caplin* and *Monsanto*; rather, it is joined by *Monsanto IV* (in which the government conceded that a hearing was required). Several other courts agree that due process requires a hearing when assets are seized in this context through criminal forfeiture. *See Crozier*, 777 F.2d at 1383-84; *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied,* 474 U.S. 994, 106 S.Ct. 406, 88 L.Ed.2d 357 (1985); *United States v. Long,* 654 F.2d 911, 915-16 (3rd Cir.1981); *but see United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir.), *cert. denied,*

(Continued on following page)

The Fifth Circuit has not re-addressed a criminal defendant's due process rights to challenge a restraining order under 18 U.S.C. § 853(e). However, in an appeal brought by a third-party claimant (not the defendant) challenging a restraining order imposed under 18 U.S.C. § 853(e), the Fifth Circuit en banc held that at a pretrial adversarial hearing the government need only establish probable cause, thus overruling a pre-*Monsanto* case, *United States v. Thier*, 801 F.2d 1463, 1468-69 (5th Cir. 1986), insofar as it had required the government to meet the more rigorous Rule 65 standard. *United States v. Holy Land Found.*, 493 F.3d 469, 474 (5th Cir. 2007) (en banc).

In the face of a mounting body of precedent requiring an adversarial hearing to determine, at a minimum, whether there is probable cause to believe that the asset is forfeitable, the Tenth Circuit concluded that the Due Process Clause requires nothing more than a hearing to determine if the asset is "traceable to the commission of the offense." *United States v. Jones*, 160 F.3d 641, 648 (10th Cir. 1998). While purporting to use the *Mathews* framework, the Tenth Circuit reached the same conclusion as the Eleventh Circuit: "We do not require . . . that the government reestablish probable cause to believe that

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493 U.S. 876, 110 S.Ct. 213, 107 L.Ed.2d 166 (1989) (defendants did not request a hearing, and no hearing required).

Michelle's Lounge, 39 F.3d at 700.

defendants are guilty of the underlying health care offense." *Id.* And, a defendant would only get a "tracing" hearing if he or she could first "demonstrate to the court's satisfaction that she has no assets" to pay counsel. *Id.*[5]

The Third Circuit has not re-addressed the issue in any published opinion since issuing its pre-*Monsanto* opinion in *Long*. However, in an unpublished opinion, the Third Circuit in *United States v. Yusuf*, 199 Fed. Appx. 127, 132-33 (3d Cir. 2006), followed the Tenth Circuit's decision in *Jones*, holding that "[t]he post-restraint inquiry at the adversarial hearing is limited to the traceability of the restrained assets, and, thus, the government need not reestablish probable cause to believe that defendants are guilty of the underlying offense." Although *Jones* directly conflicts with the Third Circuit's published position in *Long*, *Yusuf* did not distinguish, or even cite, *Long*.

The Eighth Circuit has not spoken since *Monsanto*, but two district courts in that circuit ignored the Eighth Circuit's pre-*Monsanto* decision in *Lewis*, which categorically applied the Rule 65 standard; instead, those two district courts – in unpublished

[5] The three traditional burdens of persuasion are preponderance, clear and convincing and beyond a reasonable doubt. The Tenth Circuit did not explain where the "to the court's satisfaction" burden fit within these paradigms.

opinions citing the Tenth Circuit's *Jones* case – have adopted a 2-part test in which a defendant

> is entitled to a post-restraint, pretrial hearing *only if* he demonstrates: (1) he has no assets other than those restrained, with which to retain private counsel and provide for himself and his family; and (2) a prima facie showing of a bona fide reason to believe that the grand jury erred determining that the restrained assets would be subject to forfeiture if the defendant is convicted.

United States v. Lewis, Crim. No. 04-403, 2006 WL 1579855, 2006 U.S. Dist. LEXIS 36134 (D. Minn. June 1, 2006) (internal quotations omitted); *United States v. Mueller*, No. 08-Cr-0206 (PJS/FLN), 2008 WL 2890258, 2008 U.S. Dist. LEXIS 62921 (D. Minn. July 18, 2008).

The Sixth Circuit in *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005), also followed the Tenth Circuit in a case in which the defendant "did not object or appeal the district court's decision to use the *Jones* framework and . . . never put forth any arguments that the *Jones* framework should not be applied to his case." 427 F.3d at 406. Moreover, the district court had "provided the defendant with an adversarial hearing and an opportunity to be heard." *Id*. at 407.

Prior to the Eleventh Circuit's opinions in *Kaley I* and *Kaley II*, the last circuit to enter the fray was the

District of Columbia Circuit in *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008). In *E-Gold*, the government used a civil forfeiture seizure warrant and an indictment with a restraining order to put a money transmitting company out of business. The defendants moved for access to the $1,481,976.38 seized in order to pay counsel of choice and sought an evidentiary hearing "specifically as to the existence of probable cause to believe that the defendants committed" the charged offenses. *Id*. at 413. The district court denied the motion and the defendants appealed.

After adopting the *Mathews* test as the correct analytical framework, the D.C. Circuit reversed, disagreeing with *Jones* and *Bissell* and wholeheartedly joining "the majority of those circuits in holding that the adversarial hearing sought by the appellants is constitutionally required." *Id.* at 419. The D.C. Circuit emphasized that the required hearing would address "'the existence of probable cause as to both the [predicate criminal offense] and the forfeitability of the specified property. . . .'" *Id.* at 418, quoting *Monsanto*, 924 F.2d at 1197. And, like the majority of circuits, the D.C. Circuit added that at such a hearing the defendant would be free to offer "evidence not presented to the grand jury . . . in support of the proposition that there is no probable cause supporting the seizure of the assets." *Id.* at 421. While recognizing "the weightiness of the government's concern in grand jury secrecy," the court found "nothing that outweighs the defendant's constitutional rights to due

process and to counsel under the Fifth and Sixth Amendments." *E-Gold, Ltd.*, 521 F.3d at 419.[6]

D. The Views Of The Tenth And Eleventh Circuits Represent A Significant Departure From This Court's Due Process Precedents

For decades, this Court has applied the cost-benefit analysis of *Mathews* to determine when and how an otherwise unchecked government action will be reviewed by an objective decision maker. *Mathews* offers a time-tested methodology that this Court "has consistently" used, "balancing the parties' interests to determine what constitutes an individual's procedural due process right to be heard 'at a meaningful time and in a meaningful manner' when the government acts to deprive a person of his property, even when the deprivation is temporary and pending the outcome of further proceedings." *United States v. Simms*,

[6] Any government interest in grand jury secrecy and not having to prematurely "show its hand" was voluntarily abandoned by the government in the Kaleys' case when it chose to force co-defendant Gruenstrass to trial while the interlocutory appeal in *Kaley I* was pending. The Kaleys were willing to rely on the Gruenstrass trial record, supplemented by additional evidence *the Kaleys* wished to introduce. All the government needed to do – without showing any additional cards – was defend its own indictment based on the trial record of co-defendant Gruenstrass that the government chose to create while the Kaleys were on appeal.

No. 12-701 (EGS), 2012 U.S. Dist. LEXIS 93052, at **26-27 & n.10 (D. D.C. July 6, 2012).[7]

The power of the *Mathews* formulation is apparent from the key role it played when the Court last addressed this issue in the forfeiture context. In *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993), the Court held that citizens are constitutionally entitled to an informal hearing that precedes the seizure of their homes for potential forfeiture. *Id*. at 62. A pretrial hearing avoids the harm that results from delay between a preliminary deprivation – be it by seizure or restraining order – and trial. Without an interim hearing, the "meaningful time" component of all due process equations goes unsatisfied. "*Barker* does not address this issue. Rather, it asks how long a government may keep open a case before it is fundamentally unfair to allow it to continue. The *Barker* test, therefore, does not apply." *Simms*, 2012 U.S. Dist. LEXIS 93052, at *27.

The risk of erroneous deprivation is particularly elevated in the forfeiture setting because "the Government has a direct and pecuniary interest in the outcome of the proceeding." *Good*, 510 U.S. at 56, citing *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991) (opinion of Scalia, J.) ("It makes sense to scrutinize government action more closely when the State stands to benefit"). As this Court noted in *Good*, in

[7] *See, e.g.*, *Connecticut v. Doehr*, 501 U.S. 1 (1991) (prejudgment attachment of real property); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license suspension).

1990 the Attorney General distributed a memorandum to all U.S. Attorneys encouraging them "'to significantly increase production'" – *i.e.*, "the volume of forfeitures in order to meet the Department of Justice's annual budget target." *Id.* at 56 n.2 (citation omitted). The result of the Department's efforts has been staggering. In the 22 years from 1989 to 2010, an estimated $12.6 billion in assets was seized by U.S. Attorneys in asset forfeiture cases. *See* Maguire, Kathleen, ed., "Sourcebook of Criminal Justice Statistics," U.S. Department of Justice, Bureau of Justice Statistics (Albany, NY: University of Albany, School of Criminal Justice, Hindelang Criminal Justice Research Center, 2009) Table 4.45.2010, http://www.albany.edu/sourcebook/pdf/t4452010.pdf. In FY 2011, the Department's Asset Forfeiture Fund contained assets of approximately $6.9 billion, an increase of nearly 72% from 2010. *See Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements*, Fiscal Year 2011, U.S. Dept. of Justice, Office of Inspector General, January 2012, at p. 6. Of that amount, approximately $1.7 billion was added in FY 2011. *Id*. at p. 11. By statute, DOJ uses the forfeited assets to fund is own operations. *Id.* at pp. 4-5, citing 28 U.S.C. § 524(c). Because of these incentives, extra procedures are necessary "to ensure the requisite neutrality that must inform all government decision-making." *Good*, 510 U.S. at 55. *See also Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (due process would be violated if, in a civil enforcement scheme, there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous

enforcement efforts."); *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (noting the "potential for abuse" and "corrupting incentives" of a system where the Department of Justice "conceives the jurisdiction and ground for seizures, and executes them, [and] also absorbs their proceeds. . . .").

Even before *Mathews* was decided, the Court engaged in a similar balancing test to determine what interim process was due. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (pre-judgment seizure of household goods); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (pre-judgment garnishment of bank account); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (pre-judgment attachment); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (license suspension proceedings); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-judgment garnishment of wages).

The majority opinion in *Kaley I* claimed that *Bissell* was somehow consistent with this line of authority, in particular, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). *See Kaley I*, 579 F.3d at 1257. It plainly is not. The type of hearing this Court approved in *Mitchell* was not limited to "tracing." Upon a buyer's default in paying the balance of the purchase price of various appliances, the creditor obtained e*x parte* a "writ of sequestration" for the recovery of the goods under a Louisiana statute that required only a sworn affidavit and the posting of a bond. After the appliances were seized, the debtor moved to dissolve the writ, arguing that he had a right to a pre-seizure hearing under the Due Process Clause of the

Fourteenth Amendment. This Court upheld the Louisiana statute, holding that the absence of a pre-seizure hearing was ameliorated by the fact that the Louisiana statute provided the debtor, *upon his mere request*, a prompt post-seizure hearing where *the creditor* had to "'prove[ ] the grounds upon which the writ was issued,' the existence of the debt, lien, and delinquency." *Id.* at 606. If the creditor failed to meet this burden, the court could order the return of the property and "assess damages in favor of the debtor, including attorney's fees." *Id.* at 606.[8]

Presumptively innocent criminal defendants, we respectfully submit, are entitled to no less due process where the failure to afford it will deprive them of the use of the assets they need to vindicate their "structural" Sixth Amendment right to counsel of choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

E. This Court Granted Certiorari To Decide Whether Property Owners In *Civil* Forfeiture Cases Had A Due Process Right To A Post-Seizure, Pretrial Adversarial Hearing.

Not only are the circuits split on the due process rights of criminal defendants whose assets are

[8] The majority and concurring opinions in *Kaley I* erroneously read *Mitchell* as placing the burden of proof on the Kaleys. The *Mitchell* Court considered the party with the burden of proof as the party *seeking to restrain* the assets, not the party seeking *the removal* of the restraints.

restrained *ex parte* for later criminal forfeiture, but the courts are likewise divided on the due process rights of claimants whose assets are restrained in a civil forfeiture case. In *Alvarez v. Smith*, 558 U.S. 87, 130 S.Ct. 576 (2009), this Court

> granted certiorari . . . to determine whether Illinois law provides a sufficiently speedy opportunity for an individual, whose car or cash police have seized without a warrant, to contest the lawfulness of the seizure.

Thus it appeared that this Court would address – in the context of a civil case not implicating the Sixth Amendment – the framework for analyzing whether the Due Process Clause requires an interim hearing before a civil forfeiture trial. As the Solicitor General of the United States framed the issue in its amicus brief in *Alvarez*:

> Whether courts should apply the "speedy trial" test employed in *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in determining whether the Due Process Clause requires a state or local government to provide owners of property seized for civil forfeiture with a post-seizure probable cause hearing before the actual forfeiture proceeding.

2008 U.S. Briefs 351; 2009 U.S. S. Ct. Briefs LEXIS 396. After briefing and argument, however, the issue

became moot, leaving this important constitutional question unanswered. *Alvarez*, 130 S.Ct. at 578.

Alvarez had sought certiorari review of *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), in which the Seventh Circuit had applied *Mathews*, not *$8,850*, to conclude that due process required some sort of pre-forfeiture mechanism to test the validity of retaining an owner's property. The Seventh Circuit cited with approval the Second Circuit's opinion, authored by then-Judge Sotomayor, in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

Krimstock considered New York City forfeiture statutes which allowed the police to seize vehicles driven by defendants arrested for drunk driving. Although the statutes required the City to initiate civil forfeiture proceedings within 25 days, the proceedings were commonly stayed until the criminal cases concluded. *Id*. at 45. This resulted in a situation where the forfeiture proceedings generally took "months or even years to be finalized." *Id.* at 44. Relying on *$8,850* and *United States v. Von Neumann,* 474 U.S. 242 (1986), the district court held that due process did not require interim probable cause hearings prior to the forfeiture trials. The Second Circuit, however, reversed and, consistent with its parallel ruling in *Monsanto IV*, held that probable cause hearings were required in addition to forfeiture proceedings. In so ruling, the Second Circuit distinguished *$8,850* and *Von Neumann* as cases where the claimants sought the complete *dismissal* of all forfeiture proceedings based on the delay in providing the

ultimate forfeiture trials, recognizing that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." *Id.* at 68. Accordingly, the Second Circuit applied *Mathews* in concluding that a prompt post-seizure hearing was constitutionally required. *Accord Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994); *United States v. Simms*, No. 12-701 (EGS), 2012 U.S. Dist. LEXIS 93052 (D. D.C. July 6, 2012).

The Illinois Supreme Court, in a case decided after *Alvarez* was dismissed as moot, decided that under *$8,850* and *Von Neumann*, no prompt probable cause hearing is required after the seizure of a vehicle, claiming that *Krimstock* was "wrongly decided" and that the Seventh Circuit's opinion in *Smith* was equally "flawed." *People v. One 1998 GMC*, 960 N.E.2d 1071, 1082, 1085, 355 Ill. Dec. 900, 2011 IL 110236 (Ill. 2011), *cert. denied*, 130 S.Ct. 2718 (2012).[9]

Thus, the debate rages on over whether a ***civil*** claimant is entitled to a post-seizure, interim hearing and concomitant interim relief. Of note, the Solicitor General in its amicus brief in *Alvarez* made the observation that:

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[9] We assume that the Court declined to review *One 1998 GMC* due to mootness concerns. *See One 1998 GMC*, 960 N.E.2d at 1103 (Karmeier, J., concurring) (noting that the issue "has become a moot point" due to a statute, effective Jan. 1, 2012, authorizing "the type of postseizure hearing demanded in this case").

> Regardless whether the due process question is analyzed under the general rubric of *Mathews v. Eldridge,* 424 U.S. 319 (1976), or under the forfeiture-specific analysis of *$8,850,* a statute that provides for a forfeiture hearing within a reasonable time limit is facially constitutional. ***When, on the facts of a particular case, an individual claimant faces genuine hardship from delay, she may be entitled, under $8,850, to additional redress.*** But respondents have disclaimed any ability to make such an individualized showing in this case. The Illinois forfeiture statute is facially valid, and the Constitution does not require that it be supplemented with the additional ***preliminary procedure*** that the court of appeals imposed.

2008 U.S. Briefs 351 at p. 7; 2009 U.S. S. Ct. Briefs LEXIS 396 at pp. 13-14 (emphasis added). Although we disagree with the Solicitor General's view that *$8,850* (and *Barker*) provide the proper framework, it is significant that the Solicitor General recognizes that, in particular cases, due process may require some "additional redress," presumably through a "preliminary procedure."

Unlike a civil forfeiture case in which the only issue at the ultimate trial is the forfeitability of the assets seized, in a criminal case, so much more is at issue and so much more is at stake. A criminal defendant may be accused of multiple charges, some of which form the predicate for the restraint and

forfeiture of assets, while others do not. The consequences of losing at a criminal trial are likely to be far more serious than just the loss of property rights.[10]

With so much at stake, due process requires a "preliminary procedure" to provide interim "redress" from the *ex parte* restraint of assets, where the "genuine hardship" facing a claimant/defendant is the denial of her Sixth Amendment right to counsel of choice at trial. For without such a pretrial hearing – at which the defendant is prepared to demonstrate that the prosecution's theory of forfeiture is misguided and thus the restraint of assets is unjustified – she cannot hire her chosen counsel to mount the most aggressive defense at trial against the charges that threaten to strip her of those assets, as well as incarcerate her for those and other charges alleged in the indictment.

[10] Here, the Kaleys are also charged with obstruction of justice, which does *not* authorize the restraint or forfeiture of their assets. Even if they are acquitted of the stolen property and money laundering counts used to obtain the restraining order, they may be unfairly convicted of the obstruction count having been denied counsel of choice.

CONCLUSION

Every circuit but one has ruled on the due process issues this Court reserved in *Monsanto*.[11] This case presents the appropriate opportunity for the Court to resolve the intractable circuit split that has developed. The circuits are in disagreement over the proper analytical framework for addressing the due process issues (*Mathews* versus *Barker/$8,850*); whether a post-restraint hearing may address the weaknesses in the government's underlying case or merely "tracing" issues; whether the standard of proof is "probable cause" or the "likelihood" of conviction; and whether the government or the defendant bears the burden of proof.

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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[11] Only the First Circuit has not spoken. *See United States v. Real Property in Waterboro*, 64 F.3d 752, 757 (1st Cir. 1995) (reserving issue).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-15048

D.C. Docket No. 9:07-cr-80021-KAM-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

KERRI L. KALEY,
BRIAN P. KALEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(April 26, 2012)

Before EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

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* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

MARCUS, Circuit Judge:

In this interlocutory criminal appeal, Kerri L. Kaley and Brian P. Kaley challenge a district court's order denying their motion to vacate a pretrial protective order restraining their assets. This is the second time the case has come before us. In *United States v. Kaley,* 579 F.3d 1246 (11th Cir. 2009) ("*Kaley I*"), we reversed the district court's prior order which had concluded that the Kaleys were not entitled to a pretrial evidentiary hearing on their motion to vacate the protective order, and we remanded for further proceedings. On round two, the district court determined that the Kaleys were entitled to a pretrial, post-restraint hearing, but that the only question to be addressed at the hearing was whether the restrained assets were traceable to or involved in the conduct charged in the indictment. At the hearing, the Kaleys did not present any evidence regarding traceability, and the district court declined to set aside the protective order.

The Kaleys once again appeal, arguing that, in addition to traceability, they should have been allowed to challenge the factual foundation supporting the grand jury's probable cause determinations (the very validity of the underlying indictment) at a pretrial, post-restraint hearing. Because, as we see it, the defendants are not entitled to try the entire case twice, once before trial and then again before a judge and jury, we affirm the district court's order denying the Kaleys' motion to vacate the protective order.

I.

In *Kaley I,* we summarized the basic facts and procedural history of the case in this way:

> In January 2005, Kerri Kaley, then a sales representative with Ethicon Endo-Surgery, was informed she was the target of a grand jury investigation in the Southern District of Florida. Kaley was suspected of stealing prescription medical devices ("PMDs") from hospitals and then selling them on the black market. Kaley retained . . . counsel in the investigation. Kaley's husband, Brian Kaley, who was also under investigation . . . retained a separate attorney. . . . Together, the two attorneys informed the Kaleys that their legal fees to take the case through trial would be approximately $500,000. To obtain funds to pay those fees, the Kaleys applied for and obtained a home equity line of credit of $500,000 on their residence and used the proceeds to buy a certificate of deposit ("CD").
>
> On February 6, 2007, the grand jury returned a seven-count indictment against the Kaleys.[FN1] Count One charged a conspiracy to transport PMDs in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. § 371. Counts Two through Six charged five substantive [18 U.S.C.] § 2314 offenses, and Count Seven charged obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). The indictment also sought criminal forfeiture of all property

traceable to the § 2314 offenses, including the CD. . . .

FN1: The indictment was also returned against Jennifer Gruenstrass, whose case has since been severed from the Kaleys'.

On February 7, 2007, the Government moved the district court *ex parte* for a protective order restraining the Kaleys from transferring or otherwise disposing of the property listed in the forfeiture count, and a magistrate judge, concluding that the indictment established probable cause that the property was "traceable to" the Kaleys' commission of the § 2314 offenses, granted the motion the same day. . . .

On March 5, 2007, the Kaleys moved the district court to vacate the February 7th protective order. They contended that the order prevented them from retaining counsel of their choice in violation of their Sixth Amendment right to the representation of counsel. A magistrate judge heard this motion too on April 6th and sustained the protective order; however, he limited the protective order's scope (insofar as it applied to the CD) to $140,000.

On April 10, 2007, the grand jury returned a superseding indictment. This indictment replicated the first seven counts of the first indictment and added an additional count – a charge that the Kaleys had conspired to launder the proceeds of the § 2314 offenses, in violation of 18 U.S.C. § 1956(h).

This indictment also sought the criminal forfeiture of the CD and the Kaleys' residence on the theory that those assets were "involved in" the Kaleys' commission of the § 1956(h) offense. On April 17th, the Kaleys renewed their motion to vacate the February 7th protective order (as amended by the order of April 6th), and expressly requested a pretrial, post-restraint evidentiary hearing.

The magistrate judge heard the motion on April 27th. He questioned whether the indictment alone provided probable cause to restrain the defendants' assets and ordered the prosecutor to submit an affidavit supporting probable cause. The prosecutor responded by filing, in secret and under seal, an affidavit executed by the FBI case agent.

On May 1, 2007, the magistrate judge issued two orders. In the first order, he found probable cause – based on the indictment and the case agent's affidavit – that the CD and the Kaleys' residence were "involved in" the violations of § 1956(h) and § 2314. In the second order, he amended the February 7th protective order to include within its scope the full value of the CD and the Kaleys' residence. On May 2nd, the magistrate judge issued a third order denying the Kaleys' motion to vacate the protective order and to hold a pretrial, post-restraint evidentiary hearing. . . .

On May 7, 2007, the Kaleys appealed the magistrate judge's May 1st and 2nd

> orders to the district court. On June 25th, the district court affirmed the magistrate judge's issuance of the protective order. . . . The trial court also affirmed the magistrate judge's denial of a pretrial evidentiary hearing, concluding that postponing the hearing until the trial itself satisfied due process. On June 27, 2007, the Kaleys lodged [an] interlocutory appeal, challenging the district court's decision.

Kaley I, 579 F.3d at 1249-53 (footnotes omitted).

In *Kaley I,* this Court reversed the district court's denial of the Kaleys' request for an evidentiary hearing and remanded for further proceedings. We held that under controlling case precedent the district court was correct to apply the four factors enumerated in *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989), to determine whether a pretrial, post-restraint hearing was required, but that the district court had erred in weighing those factors. *Kaley I,* 579 F.3d at 1256-57. We remanded the case for the district court to reweigh the *Bissell* factors in light of our ruling. *Id.* at 1260. On remand, the district court found that the *Bissell* factors favored holding an evidentiary hearing.

In pre-hearing memoranda, the Kaleys argued that the question for the district court to consider at the hearing was whether the government would be likely to prevail at trial. They asserted that the government would be unlikely to prevail because the theory underlying its prosecution was baseless and

the underlying facts could not support the charges. The Kaleys explained that they were accused of receiving unwanted prescription medical devices ("PMDs") from hospitals that previously had purchased them from Ethicon, Kerri Kaley's employer, and then reselling those PMDs themselves rather than returning them to Ethicon. According to the Kaleys, the government's theory of prosecution was that Kerri Kaley held the returned PMDs in a "constructive trust" for Ethicon, and so, by selling the PMDs, the Kaleys unlawfully converted Ethicon's property. The Kaleys contended that there could be no constructive trust because they did not owe any fiduciary duties to Ethicon, and because Ethicon had never asserted any property rights in the unwanted PMDs. The Kaleys also noted that the government had offered this constructive trust theory at the separate trial of a codefendant, Jennifer Gruenstrass, who was acquitted of all charges, and they asserted that this Court had rejected a similar theory of prosecution in *United States v. Goodrich,* 871 F.2d 1011 (11th Cir. 1989).

At an evidentiary hearing conducted on July 29, 2010, the district court heard arguments from the parties regarding the hearing's proper scope. The Kaleys explained that they were not contesting whether the restrained assets were traceable to or involved in the conduct charged in the indictment, but instead were taking the position that the protective order should be vacated because the underlying facts did not support the charged crimes in the first place. The government responded that, in light of this Court's

decisions in *Bissell* and *Kaley I,* it was not required to offer substantive evidence from its case against the Kaleys in order to establish the evidentiary foundation of the criminal charges, and that the only purpose of the hearing was to determine whether the restrained assets were traceable to or involved in the conduct charged in the indictment.[1]

On October 24, 2010, the district court issued an order denying the Kaleys' motion to vacate the protective order. Citing language taken from *Bissell* and *Kaley I,* the district court concluded that the only relevant inquiry at the hearing was whether the restrained assets were traceable to or involved in the alleged criminal conduct. Because the Kaleys did not attempt to challenge traceability in any way – arguing only that the government's underlying case had no merit – the district court denied their motion to vacate the protective order. On October 27, 2010, the Kaleys lodged this second interlocutory appeal from the district court's order.

II.

In *Bissell,* a panel of this Court laid out the factors that courts must weigh in determining whether an indicted defendant whose assets have been restrained

[1] The Kaleys had previously acknowledged that if the district court were to agree with the government, then the district court would have no choice but to uphold the restraints on the Kaleys' assets.

pretrial is entitled to an evidentiary hearing. In *Kaley I,* we determined that the district court erred in weighing the *Bissell* factors. On remand, the district court reweighed the factors and determined that the Kaleys were entitled to a pretrial hearing. We are now called upon to address the nature and scope of that hearing. The district court concluded that the Kaleys could not challenge whether the alleged conduct actually supported the probable cause determination made by the grand jury. We agree.

We begin by emphasizing again that the Sixth Amendment right implicated here – the qualified right to counsel of choice – is a weighty concern. *See, e.g., Powell v. State of Ala.,* 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). A pretrial restraining order may make unavailable assets that a criminal defendant needs to pay for his counsel of choice. As we recognized in *Kaley I,* this is a serious consequence for the defendant: "Being effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice. . . ." *Kaley I,* 579 F.3d at 1258.[2]

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[2] The Supreme Court has made clear, however, that the right to counsel of choice does not include the right to use illegitimate, forfeitable assets to pay for counsel. *Caplin & Drysdale v. United States,* 491 U.S. 617, 626-32 (1989). As the Court explained:

(Continued on following page)

Despite this weighty concern, the forfeiture statute at issue, 21 U.S.C. § 853, does not require a hearing for the issuance or continuation of a *post-indictment* restraining order. And the statute makes it abundantly clear that Congress knew how to provide for such a hearing if it had wanted to do so. Section 853(e) authorizes a court to restrain property that would be subject to criminal forfeiture upon conviction. 21 U.S.C. § 853(e). Under subparagraph (1)(B), to obtain such a restraining order *before* the filing of an indictment requires "notice to persons appearing to have an interest in the property and opportunity for a hearing." *Id*. § 853(e)(1)(B). But, in sharp contrast, subparagraph (1)(A), dealing with post-indictment restraining orders, contains no such

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> A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.

Id. at 626. The more difficult issues are whether due process requires a hearing to maintain a pretrial restraining order on assets alleged but not yet proven to be forfeitable and, if so, what such a hearing would entail. The Supreme Court has not yet addressed these issues. *See United States v. Monsanto,* 491 U.S. 600, 615 & n.10 (1989) (holding that assets can be restrained pretrial "based on a finding of probable cause to believe that the assets are forfeitable," but noting that "[w]e do not consider today, however, whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed").

requirement. *See id*. § 853(e)(1)(A). Rather, it states that the court may enter a restraining order upon the filing of an indictment that alleges that the property would be subject to forfeiture in the event of conviction. *Id*.[3] The difference between these two subparagraphs unambiguously demonstrates that Congress contemplated the issue of a hearing, but decided not to require one post-indictment.[4]

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[3] Specifically, the statute provides in pertinent part:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section –
>
> (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter 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).

[4] The statute also provides for a pre-indictment temporary restraining order without a hearing if certain requirements are met, but it requires that, upon request, a hearing "shall be held at the earliest possible time." 21 U.S.C. § 853(e)(2). Thus, Congress was also aware that it could require a hearing *after* the entry of an ex parte restraining order, but it plainly declined to impose any such requirement for the continuation of post-indictment restraints.

Since the statute itself imposes no hearing requirement, the only pretrial hearing required is one provided under the Due Process Clause. In *Bissell,* this Court held that, when a restraint on the defendant's assets prevents him from retaining counsel of choice, due process requires a pretrial hearing if the four-factor balancing test enunciated in *Barker v. Wingo,* 407 U.S. 514, (1972), weighs in favor of a hearing. *Bissell,* 866 F.2d at 1353. The four *Bissell/ Barker* factors are: "(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's interest in the subject property." *Kaley I,* 579 F.3d at 1254.

In this case, the Kaleys are entitled to a pretrial hearing under the *Bissell* test, as the district court ultimately concluded after our *Kaley I* remand. The district court found that the first two factors weighed in favor of the government, because the projected delay until trial was short and the government had a substantial interest in not revealing its case before trial.[5] But the third and fourth factors weighed in the Kaleys' favor and were enough to entitle the Kaleys to an evidentiary hearing. As we explained in *Kaley I,*

[5] In *Kaley I,* we held that the district court's determinations on these first two factors did not amount to an abuse of discretion. 579 F.3d at 1256.

the third factor must weigh in the defendants' favor when they "have taken every available step to contest the restraints." *Id*. at 1257-58. And as for the fourth factor, although the government has a strong interest in restraining the property, it is outweighed by the significant prejudice the Kaleys would suffer without a hearing: the potentially wrongful deprivation of the resources needed to retain their counsel of choice. The Kaleys were thus entitled to a pretrial, post-restraint hearing.

The question now before this Court is exactly what the hearing requires. *Kaley I* suggested that the defendants cannot challenge the underlying indictment itself. *Kaley I*'s holding that the district court had incorrectly applied the *Bissell* test was based on the district court's error in evaluating the third factor – the defendants' assertion of the right to a pretrial hearing. We explained:

> [I]n evaluating the third factor, the district court concluded that, under *Bissell,* once probable cause has been determined, the only way that a defendant can show that assets are not forfeitable is to establish that the crime charged in the indictment did not occur. This, however, was not the holding of *Bissell* and could not have been the opinion's intent, because, as the district court correctly noted, a challenge to the indictment cannot be made pretrial. A pretrial challenge to the indictment would require the district court to hold an evidentiary hearing to determine whether the crime occurred. . . . In many

> cases, such a hearing would go so far as to render the trial on the merits of the criminal charge unnecessary. . . . But the *Bissell* court undeniably contemplated some circumstances in which, despite the presence of probable cause, a pretrial hearing would be required.
>
> The principle of law *Bissell* advances is that, after weighing the four *Barker* factors, the district court *may* grant the defendant's request for a pretrial evidentiary hearing in order to determine whether assets described in the forfeiture count of the indictment were wrongly seized (or placed under the restraint of a protective order). . . . The purpose of the hearing would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure. Moreover, in such a hearing, the defendant, as the movant, would have the burden of proof, and the prosecution would thus be saved from having to preview its entire case.

Id. at 1257-58. *Kaley I* concluded that the district court had erred in its analysis of the third *Bissell* factor because it misconstrued the nature of the hearing to which the Kaleys would be entitled. The district court had assumed that the only way to challenge the restraint was by conducting a global pretrial hearing challenging the factual sufficiency of the underlying indictment. *Kaley I* explained that, although such a challenge is not permissible, a more modest hearing addressing the "propriety of the seizure" would be lawful in an appropriate case. *Id.* at 1257.

Admittedly, because the issue before this Court in *Kaley I* was simply whether the Kaleys were entitled to some kind of hearing, we did not have occasion to discuss the hearing's exact nature and contours. That is the only issue raised by the Kaleys in this second appeal: whether the scope of the hearing is limited to the issue of traceability or instead permits the defendants to challenge both traceability and the grand jury's probable cause determinations for the charged offenses. To the extent that *Kaley I* did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges.

Several reasons counsel for this limitation on the scope of the hearing. In the first place, as we've noted, the statute itself does not provide for a hearing, and to the extent that Congress contemplated a hearing, it determined that a defendant should not be allowed to challenge the indictment itself. The legislative history surrounding the codification of [21] U.S.C. § 853(e) couldn't be clearer or more unambiguous on the point:

> Paragraph (1)(A) provides that a restraining order may issue "upon the filing of an indictment or information charging a violation . . . 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." Thus, the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the

> court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the government to produce additional evidence regarding the merits of the case. . . .
>
> In contrast to the pre-indictment restraining order authority set out in paragraph (1)(B), the post-indictment restraining order provision does not require prior notice and opportunity for a hearing. . . . This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper (e.g., where information presented at the hearing shows that the property restrained was not among the property named in the indictment). However, *it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment.* For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.

S. Rep. No. 98-225, at 168-69 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3385-86 (emphasis added). It is not too much to say that allowing a challenge to the factual underpinnings of the underlying charges at a pretrial, post-restraint hearing would be at war with this legislative history.

Moreover, this kind of pretrial challenge to the evidence supporting an indictment would be wholly inconsistent with the Supreme Court's repeated pronouncements in *Costello v. United States,* 350 U.S. 359 (1956), and its progeny. In these cases, the Court has shown a profound reluctance to allow pretrial challenges to a grand jury's probable cause determination. As the Court observed in *Costello*: "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.* at 363. This holding has been repeatedly reaffirmed. *See United States v. Williams,* 504 U.S. 36, 54-55 (1992) ("Our words in *Costello* bear repeating: Review of facially valid indictments on [the] grounds [of inadequate evidence] 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.'" (alterations omitted) (quoting *Costello,* 350 U.S. at 364)); *Bank of Nova Scotia v. United States,* 487 U.S. 250, 261 (1988) (explaining that a facially valid indictment is not subject to "a challenge to the reliability or competence of the evidence presented to the grand jury," because "a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient"); *United States v. Calandra,* 414 U.S. 338, 344-45 (1974) ("[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ."); *Lawn v.*

United States, 355 U.S. 339, 349 (1958) ("[An] indictment returned by a legally constituted nonbiased grand jury, . . . if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.").

In *Costello,* the defendant sought to challenge his facially valid indictment because it was not supported by competent evidence, inasmuch as the only evidence presented to the grand jury was in the form of hearsay. *Costello,* 350 U.S. at 361. The Supreme Court refused to allow the challenge. The Court observed that a rule allowing defendants to challenge indictments on the basis of inadequate or incompetent evidence "would run counter to the whole history of the grand jury institution," and "would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364. Under such a rule, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," but, as the Court explained, "[t]his is not required by the Fifth Amendment." *Id.* at 363.

Subsequent case law clearly establishes that an otherwise valid indictment may not be invalidated even if the grand jury has considered evidence obtained in violation of a defendant's constitutional rights. *Calandra,* 414 U.S. at 351-52; *Lawn,* 355 U.S. at 349 (noting that a facially valid indictment is not subject to challenge on the ground that the grand jury relied on evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination).

In *Calandra,* the Supreme Court declined to extend the exclusionary rule to grand jury proceedings. 414 U.S. at 351-52. Thus, the grand jury's consideration of evidence obtained in violation of the Fourth Amendment does not invalidate an otherwise facially sufficient indictment. After discussing the historic role of the grand jury and its responsibility to make the probable cause determination, *id.* at 342-43, the Court reasoned that applying the exclusionary rule would "seriously impede" the role of the grand jury by "delay[ing] and disrupt[ing] grand jury proceedings," *id.* at 349. The Court explained that it was "disinclin[ed] to allow litigious interference with grand jury proceedings," observing that application of the exclusionary rule would "effectively transform[ ] them into preliminary trials on the merits." *Id.* at 350.

Similarly, the Court has held that an indictment cannot be invalidated based on the government's failure to present known exculpatory evidence to the grand jury. *Williams,* 504 U.S. at 55. In *Williams,* the district court had dismissed the indictment, reasoning that the withheld exculpatory evidence "created a reasonable doubt about [the defendant's] guilt" and "thus rendered the grand jury's decision to indict gravely suspect." *Id.* at 39 (alterations and internal quotation marks omitted). But the Supreme Court squarely rejected this kind of "[j]udicial supervision of the quantity and quality of the evidence relied upon by the grand jury." *Id.* at 51. Since courts must "abstain from reviewing the evidentiary support for the grand jury's judgment" under *Costello* and its

progeny, the Court reasoned that "[i]t would make little sense" to require courts to "scrutiniz[e] the sufficiency of the prosecutor's presentation." *Id.* at 54. Thus, so long as the grand jury finds that there is probable cause, the prosecutor's failure to present even "substantial" exculpatory evidence does not invalidate the indictment. *See id.* at 39.

Underlying all of these cases is the Supreme Court's recognition of the unique nature of the grand jury as an independent body, not an arm of the prosecution. *See, e.g., Calandra,* 414 U.S. at 343 (noting the grand jury's responsibility to protect citizens against "arbitrary and oppressive governmental action" in the form of "unfounded criminal prosecutions"); *Costello,* 350 U.S. at 362 (summarizing the historical independence of the grand jury). In *Williams,* the Court explained that the grand jury "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *Williams,* 504 U.S. at 47. As the Court had previously explained, the grand jury "serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Branzburg v. Hayes,* 408 U.S. 665, 687 n.23 (1972) (alteration in original) (quoting *Wood v. Georgia,* 370 U.S. 375, 390 (1962)) (internal quotation marks omitted). Indeed, "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a

group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States,* 361 U.S. 212, 218 (1960).

In light of the important historical role of the grand jury as an independent accusatory body, *Costello* and its progeny evince a powerful reluctance to allow pretrial challenges to the *evidentiary* support for an indictment. Of course, a defendant may challenge an indictment on a variety of other grounds, including failure to state an offense, lack of jurisdiction, double jeopardy, improper composition of the grand jury, and certain types of prosecutorial misconduct. *See* Fed. R. Crim. P. 6(b) (allowing a defendant to move to dismiss the indictment on the basis that the grand jury "was not lawfully drawn, summoned, or selected," or that an individual juror was not legally qualified); Fed. R. Crim. P. 12(b)(3)(B) (allowing a defendant to challenge an indictment for "fail[ure] to invoke the court's jurisdiction or to state an offense"); *Bank of Nova Scotia,* 487 U.S. at 257 (noting prior cases holding that racial or gender discrimination in the selection of grand jurors requires dismissal of the indictment); *id.* at 255-56 (holding that a district court may dismiss an indictment based on prosecutorial misconduct, but only if the defendant can show prejudice); *United States v. Salman,* 378 F.3d 1266, 1267 n.3 (11th Cir. 2004) (recognizing that "a district court may dismiss an indictment . . . when immunity, double jeopardy, or jurisdictional issues are implicated").

But under this long line of case authority, a defendant cannot challenge whether there is a sufficient

evidentiary foundation to support the grand jury's probable cause determination. Yet that is exactly what the Kaleys propose to do at a pretrial hearing, laying out an elaborate theory that they cannot be charged with transporting stolen goods in interstate commerce because the goods (the prescription medical devices) were not stolen in the first place. In support of this claim, the Kaleys sought to introduce various pieces of evidence apparently never heard by the grand jury in an effort to convince the district court that the government could not prove that the Kaleys had committed the charged offenses.[6] In that sense, the Kaleys sought to do precisely what the Supreme Court prohibited in *Williams*: adduce additional evidence not presented to the grand jury in order to show that it would be unreasonable to find probable cause. In other words, the Kaleys presumably would have the district court consider all of the new evidence they had offered at their hearing and weigh it together with either the evidence previously presented to the grand jury or whatever evidence the prosecutor presented at the hearing, in order to determine whether there was probable cause to support the charges. In *Williams,* the Court rejected this kind of pretrial direct assault on the indictment. We, too,

[6] For the hearing, the Kaleys sought to introduce into evidence: policy manuals and other materials from Ethicon; a bill of particulars filed by the government in the Gruenstrass case; transcripts of the Gruenstrass trial; and the transcript of the sentencing hearing of Frank Tarsia, another alleged coconspirator.

decline the defendants' invitation to lodge such a challenge to the grand jury's probable cause determination at a post-restraint due process hearing.

This case does fairly raise a Sixth Amendment issue, but we decline to resolve it in the manner proposed by the Kaleys. Due process does not require that a defendant be allowed to challenge at a pretrial, post-restraint hearing whether there is probable cause to believe that he committed the underlying offenses. This kind of challenge would require the district court to review the grand jury's probable cause determination, undermining the grand jury system and contravening the Supreme Court's repeated observation that a facially valid indictment "is enough to call for trial of the charge on the merits." *Costello,* 350 U.S. at 363.[7] In the face of the Supreme Court's

[7] It is true that a prosecutor could theoretically still proceed to trial even after a defendant successfully challenged the restraint on his assets by attacking the sufficiency of the evidence purporting to show that he committed the crime for which forfeiture is sought. A successful challenge at the post-restraint hearing would lead only to the removal of the restraint, not to the dismissal of the indictment itself. But in practice, if the defendant has successfully challenged the restraint by undermining the evidentiary support for the indictment, it is quite unlikely that the prosecutor would proceed to trial. In some cases, the prosecution might have additional evidence to present at trial – if, for instance, it decided not to disclose crucial evidence at the pretrial, post-restraint hearing. But if the government has disclosed the guts of its case, it is hard to see how the prosecutor could proceed to trial after the district judge has already determined that there is insufficient evidence to support the underlying charges. In fact, proceeding to trial under such

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repeated admonitions against allowing pretrial challenges to the evidence supporting a facially valid indictment, the congressional design of the statute, and the undeniable fact that a defendant may still fully confront the evidentiary support for the charge at trial, we conclude 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. *Accord United States v. Jones,* 160 F.3d 641, 648 (10th Cir. 1998) ("The district court must take those allegations of the indictment as true and assume at the [pretrial, post-restraint] hearing that the underlying offense has been committed.").

It's worth emphasizing that the prosecution cannot unilaterally restrain a defendant's assets between the time of indictment and trial. In the first place, a prosecutor may seek a pretrial restraint only because Congress has specifically authorized the government to proceed in this manner. *See* 21 U.S.C. § 853(e). To

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circumstances might implicate ethical constraints imposed on the prosecutor. *See, e.g., Town of Newton v. Rumery,* 480 U.S. 386, 409 (1987) (Stevens, J., dissenting) (noting that a prosecutor "is ethically obligated . . . to drop charges when he believes that probable cause as established by the available, admissible evidence is lacking"); *see also* Ala. Rules of Prof'l Conduct, Rule 3.8(1)(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. . . ."); Fla. Rules of Prof'l Conduct, Rule 4-3.8(a) (same); Ga. Rules of Prof'l Conduct, Rule 3.8(a) (same).

effect a pretrial restraint, the prosecution must obtain a restraining order from a court. *Id.* § 853(e)(1). And the restraining order will issue only if a lawfully constituted grand jury has found probable cause that the assets would be subject to forfeiture upon conviction. *Id.* § 853(e)(1)(A). Without the grand jury's probable cause determination *and* the court's approval, the prosecution is not free to restrain anything.

It's also worth remembering that a defendant whose assets have been restrained will ultimately receive a thorough hearing – the trial itself – that goes to the merits of the underlying charge. And at that trial, the defendant will have counsel (appointed, if necessary), and the right to confront and cross examine witnesses, and to present evidence and call witnesses in his own defense. The question is simply whether the Due Process Clause requires that the defendant get *two* such hearings. We conclude that the answer is no. To rule otherwise would effectively require the district court to try the case twice. *See Kaley I,* 579 F.3d at 1257 ("A pretrial challenge to the indictment would require the district court to hold an evidentiary hearing to determine whether the crime occurred. . . . In many cases, such a hearing would go so far as to render the trial on the merits of the criminal charge unnecessary."). Again, at their post-restraint hearing, the Kaleys sought to argue that their actions did not constitute a crime because Ethicon did not have any ownership interest in the allegedly converted PMDs. This very fact-specific inquiry would amount to a mini-trial on the merits. But

this is precisely the kind of mini-trial that concerned the Supreme Court in *Costello* and *Calandra*. *See Calandra,* 414 U.S. at 350 (explaining that to apply the exclusionary rule in grand jury proceedings would "effectively transform[ ] them into preliminary trials on the merits," and that "[i]n some cases the delay might be fatal to the enforcement of the criminal law"); *Costello,* 350 U.S. at 363 (noting that if the Court adopted the defendant's proposed rule, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," creating long delays). Simply put, the Kaleys are not entitled to try this case twice – once before trial, and then again in the main act before judge and jury.[8]

We add that allowing a defendant to convert a post-restraint hearing into a mini-trial on the merits would often interfere with the real interest expressly recognized by Congress in the pretrial preservation of assets. The legislative history surrounding the statute reveals that 21 U.S.C. § 853(e) was intended to

[8] The Kaleys' proposed rule would also lead to an anomalous result: defendants with assets that the government seeks to restrain would get a chance to attack the validity of the indictment before trial, but defendants without such assets would not, no matter how severe the potential implications for their liberty interests. It would be odd indeed to conclude that a charge supported by a grand jury's probable cause determination requires additional proof at a collateral hearing when assets are restrained, but that a defendant without any assets gets no opportunity for a similar sneak preview of the government's case, even if he faces capital charges.

avoid just such a result. As the Senate Report explained:

> Although current law does authorize the issuance of restraining orders in the post-indictment period, neither . . . statute articulates any standard for the issuance of these orders. Certain recent court decisions have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation. . . . In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order – the sole means available to the government to assure the availability of assets after conviction – quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims . . . who would be required to testify at the restraining order hearing.

S. Rep. No. 98-225, at 162, 1984 U.S.C.C.A.N. at 3378-79 (footnote omitted). This legislative history is

persuasive. *Cf. United States v. Moya-Gomez,* 860 F.2d 706, 729 (7th Cir. 1988) (quoting this same passage and noting that "[t]hese considerations, the product of a careful and deliberate judgment of Congress[,] . . . require our careful and respectful acceptance"); *United States v. Monsanto,* 924 F.2d 1186, 1206 (2d Cir. 1991) (en banc) (Cardamone, J., dissenting) ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the government's case during the post-restraint, pretrial period.").

At least one of our sister circuits, however, has concluded that allowing such a challenge imposes no real burden on the government, because the United States may always choose to forgo the pretrial restraint. The Second Circuit has suggested that "the hearing . . . is not being forced upon the government," and that "[i]f the government determines in any case that an adversary hearing in advance of a criminal trial is inadvisable, it always has the option of forgoing the restraint and obtaining forfeiture after conviction." *Monsanto,* 924 F.2d at 1198 (majority opinion). But this does not resolve the issue. Rather, it just shapes the dilemma the government would face.

To force the United States to choose between prematurely revealing its evidence in support of charges a grand jury has already found by probable cause and forgoing altogether a congressionally created right to

seek a pretrial restraint would impose a powerful burden on its interest – a burden neither imposed nor intended by Congress. In fact, Congress provided for pretrial restraints on forfeitable assets precisely because postconviction forfeiture alone was thought to be inadequate. As the legislative history surrounding the codification of 21 U.S.C. § 853(e) explains, criminal forfeiture is important because it can remove the economic incentives for crime and strip criminals of their ill-gotten gains. S. Rep. No. 98-225, at 158, 1984 U.S.C.C.A.N. at 3374. But, as the Senate Report observed, defendants can easily "defeat[ ] forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 162, 1984 U.S.C.C.A.N. at 3378. Thus, Congress concluded that pretrial restraining orders may be necessary "to guard against [the] improper disposition of forfeitable assets." *Id.* at 160, 1984 U.S.C.C.A.N. at 3377; *see also id.* at 162, 1984 U.S.C.C.A.N. at 3378 (explaining that, without a pretrial restraining order, a defendant subject to postconviction forfeiture "has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial").

By our count, at least three of our sister circuits have reached the same conclusion we reach. The Tenth, Sixth, and Seventh Circuits have all held that a defendant at a pretrial, post-restraint hearing may challenge only the connection between the restrained assets and the alleged criminal activity. *Jones,* 160 F.3d at 647-48 (holding that due process requires a pretrial hearing at which "the government must

establish probable cause to believe that the restrained assets are traceable to the underlying offense," but need not "reestablish probable cause to believe that [the] defendants are guilty of the underlying . . . offense"); *United States v. Jamieson,* 427 F.3d 394, 406-07 (6th Cir. 2005) (determining that the district court did not err in applying the *Jones* framework); *Moya-Gomez,* 860 F.2d at 728-31 (requiring a post-restraint hearing "at which the government is required to prove the likelihood that the restrained assets are subject to forfeiture," but holding, based on the legislative history, that "the court may not inquire as to the validity of the indictment and must accept that 'the probable cause established in the indictment or information is . . . determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based'"). As the Tenth Circuit explained, allowing a defendant at a pretrial, post-restraint hearing to challenge the grand jury's probable cause finding for the underlying offense would "do[ ] more damage than necessary to section 853(e)(1)(A) and the role of the grand jury." *Jones,* 160 F.3d at 648 (citing *Costello,* 350 U.S. at 363-64).[9]

[9] The Third and Eighth Circuits have held otherwise, concluding that a court must hold a full hearing at which "the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, . . . that the defendant is guilty of [the statutory violation] and . . . that the profits or properties at issue are subject to forfeiture." *United States v. Long,* 654 F.2d 911, 915 (3d Cir. 1981); *United States v. Lewis,* 759 F.2d 1316, 1324 (8th Cir. 1985) (following *Long*). However, these cases involve an old pretrial restraint provision, which was replaced

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In short, the Kaleys' motion to vacate the protective order on their assets was properly denied. We agree with the district court that a defendant may not challenge the evidentiary support for the underlying charge at a hearing to determine the propriety of a post-indictment pretrial restraining order. Having declined to present any evidence about whether the restrained assets were traceable to or involved in the charged conduct, the Kaleys failed to show that the restraint on their assets was improper.

AFFIRMED.

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by 21 U.S.C. § 853(e). *See* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 303, 305, 98 Stat. 2040, 2044-50 (1984) (adding 21 U.S.C. § 853 and striking out what had been subsection (d) of 21 U.S.C. § 848). It is unclear whether the Third and Eighth Circuits would impose the same standard today, especially given that the Supreme Court has since held that pretrial restraints can be based on a finding of probable cause. *See Monsanto,* 491 U.S. at 615. Indeed, the Third Circuit, albeit in an unpublished opinion, has more recently adopted the Tenth Circuit's analysis in *Jones,* concluding that "[t]he post-restraint inquiry at the adversarial hearing is limited to the traceability of the restrained assets, and, thus, the government need not reestablish probable cause to believe that defendants are guilty of the underlying offense." *United States v. Yusuf,* 199 F. App'x 127, 132-33 (3d Cir. 2006) (citing *Jones,* 160 F.3d at 648).

The D.C. and Ninth Circuits, like the Second Circuit in *Monsanto,* have held that the post-restraint hearing must address whether there is probable cause to believe that the defendant is guilty of the crime that makes the assets forfeitable. *United States v. E-Gold, Ltd.,* 521 F.3d 411, 419 (D.C. Cir. 2008); *United States v. Roth,* 912 F.2d 1131, 1134 (9th Cir. 1990).

EDMONDSON, Circuit Judge, concurring in the result:

I concur in today's result. I concur because I cannot say with strong confidence that my colleagues on the panel are incorrect in the way they see the law working. But I concur with deep doubts. And if I were deciding the case alone, I expect I would reach a different result and write something largely in line with *United States v. Monsanto,* 924 F.2d 1186 (2d Cir. 1991) (en banc), and *United States v. E-Gold, Ltd.,* 521 F.3d 411 (D.C. Cir. 2008).

In a case like this one, the use of a pretrial restraining order to freeze a defendant's property is an entirely discretionary function, dependent on a decision initially made by the Executive Branch's prosecutors. Congress has not commanded that such restraints be used in this kind of criminal case. Congress has merely given its permission to prosecutors to use the tool of pretrial restraints on property.

By its letter, the statute that applies in this case requires no adversarial hearing in the present circumstances. But this Court – correctly, I believe – has earlier decided that the Constitution (the combination of the Fifth Amendment and Sixth Amendment) does require some kind of pretrial evidentiary hearing. This appeal presents the question of how broad a hearing is required by the Constitution. This question is important, and one on which the circuits are split. The Supreme Court has never considered the question presented in this appeal.

By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen (and, as a practical matter, his family and perhaps others) is subjected to severe hardship. The hardship includes in this case the inability to employ counsel of Defendants' choice to defend them in court from the mighty power of the federal government in a criminal proceeding. In the criminal proceeding ultimately, both their liberty and their property will be at stake. The chips are down.

In this criminal prosecution, the government is the aggressor. The government initiates the criminal action by bringing charges. The Executive Branch's prosecutors are in the driver's seat, choosing the nature and number of the charges to be brought and here choosing, in addition, to restrain the accused citizens' property before trial. This later step is something extra, beyond ordinary prosecution; and in this case, the step is said to disable Defendants, in fact, from employing counsel to defend themselves.

That this add-on to ordinary prosecution – in effect, the seizure of property in advance of trial – would trigger extra and significant procedural safeguards for the citizen and his property is in no way odd to me. And by a probable cause hearing following the seizure, I do not understand the government to be forced to do anything, much less to try its criminal case twice. The government can simply choose to release the property. If the government does not wish to release the property, an evidentiary hearing should be conducted about probable cause on both the

predicate criminal offense *and* the forfeitability (traceability of assets to supposed crime) of the specified property. At that hearing, the government can decide for itself precisely how much evidence it wishes to present about the criminal offense. If the government does not wish to reveal certain evidence before trial, the government can rightly withhold that evidence.

To ask the government to respond to a challenge on probable cause that the charged crime actually occurred is not to place on the government a heavy burden; everything needed for a conviction at trial is most likely not needed for probable cause. But, in any event, the government can decide for itself what cards to show before the actual trial; the worst that will happen is that the pretrial restraint on property will not continue. The criminal trial still looms ahead.

For the government to participate in an adversary hearing after seizure and before trial is inconvenient, of course. But the government's inconvenience ought not to determine the outcome of this kind of case. The government takes this inconvenience upon itself by making its own choice about how it will proceed in a criminal case. At the outset, the choice to go for pretrial restraint is the prosecutors' to make. Before deciding to employ a strategy that includes a pretrial restraint on a defendant's property, the prosecutors can weigh (1) the extra time and trouble associated with an evidentiary pretrial hearing to keep up the restraint on a defendant's property against (2) the benefit (as the prosecutors see it) to the country that would flow from prohibiting

the defendant from using his property before trial. Cost-benefit choices are a necessary and normal part of life, including litigation.

Furthermore, the outcome of the ultimate trial itself need not be jeopardized by a probable cause hearing; if the government thinks that it is best to keep some evidence secret until the actual trial, the government can keep it secret. Moreover, the probable cause hearing very possibly can be tailored by the presiding judge in such a way as to make the hearing be significantly different from any kind of criminal trial.[1] Besides, even if the government loses at the probable cause hearing, all the property itself might not ultimately be lost to the government – if a conviction is later actually obtained at the criminal trial.[2]

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[1] This tailoring of the evidentiary hearing functions not just to protect evidence for trial. "In such an adversary hearing, the court could use limitations on the disclosure of evidence, such as *in camera* hearings and appropriate application of the normal rules of evidence to protect the grand jury proceedings against unwarranted invasion." *United States. v. E-Gold, Ltd.,* 521 F.3d 411, 419 (D.C. Cir. 2008); *see also United States v. Monsanto,* 924 F.2d 1186, 1198 (2d Cir. 1991) (en banc) (Fed. R. Evid. do not apply to hearings on whether a pretrial restraint on property can continue).

[2] The government retains the option of obtaining forfeiture of property after the government obtains a conviction. Forfeitable property in the hands of transferees commonly is recoverable by the government. I put aside the question of whether money paid to defense counsel as reasonable fees could be recovered, in a case like this one.

The Constitution's Bill of Rights, including the Fifth and Sixth Amendments, was intended by the Framers to protect citizens from the high power of the federal government. The Constitution is to guarantee each citizen a fair deal when the federal government takes aim at him. More specifically about property, we ought to bear in mind this fact: "*Liberty, property, and no stamps!* It had been the first slogan of the American Revolution." Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787,* at 70 (1966). Property rights, in themselves, deserve to be amply guarded by American courts. But when a citizen's liberty (as in the present case) depends to a high degree on his property, the stakes are particularly high.

For the Federal Executive, in effect, to seize a citizen's property; to deprive him thereby of the best means to defend himself in a criminal case; and then, by means of the criminal case, to take his liberty strikes me as a set of circumstances about which our nation's history and its Constitution demands that the process at each step be fully fair. The potential for the dominating power of the Executive Branch to be misused by the arbitrary acts of prosecutors is real. The courts must be alert. To hear from the other side at a time when it matters (in this instance, before the criminal trial: a trial without counsel of Defendants' choice) is the basic and traditional way that American judges assure things are fair. So, I do think that *Monsanto* and *E-Gold,* as law decisions, are very

possibly on the right tack: stressing judicial responsibility and requiring a broader hearing to keep up a pretrial restraint on property when the restraint interferes with a citizen's abilities to employ legal counsel of his choice to defend him in a criminal proceeding.

Like many appellate judges (probably most), I do not write separately or dissent every time that I find myself in disagreement with the majority of the judges on a case upon which we are working: almost always, the majority has taken a hard look at the case; and their position (in my view) is a reasonable one; and the resulting precedent will make an impression on the body of law that will be neither deep nor wide. I stop to write separately today because the case touches on the fundamentals and, thus, impresses me as being unusually important.

I am satisfied that the panel of judges of which I am a part has genuinely and seriously studied this case. Judge Marcus has written a thoughtful opinion in which Judge Fawsett has fully concurred. I have voiced my doubts, but I cannot firmly conclude that the legal position my experienced, able colleagues have taken is definitely erroneous. Therefore, I do not dissent, although I am uneasy that the limits that we set today for the hearing essential to continue a pretrial restraint on property might well be too limiting under the Constitution.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES
OF AMERICA,

v.

KERRI L. KALEY and
BRIAN P. KALEY,

Defendants. /

ORDER DENYING DEFENDANTS' MOTION TO VACATE PROTECTIVE ORDER

(Filed Oct. 25, 2010)

BACKGROUND.

This matter is before the Court upon Defendant' Kerri L. Kaley and Brian P. Kaley's Motion to Vacate the *Ex Parte* Protective Order restraining Defendants' property. [DE 6 and 17] The procedural history of this case is fully set forth in the opinion issued by the Eleventh Circuit Court of Appeals in *United States v. Kaley,* 579 F.3d 1246 (11th Cir. 2009). In *Kaley,* the Court of Appeals reviewed an order of this Court which denied Defendants' request for an evidentiary hearing on their motion to vacate the protective order. The Court of Appeals held that this Court erred in its analysis of the four factors to be considered in determining whether an evidentiary hearing was

required.[1] The Court of Appeals remanded the case to this Court to reweigh the factors in light of its ruling. This Court did so and granted Defendants' request for an evidentiary hearing. [DE 193]

At the evidentiary hearing, the parties had divergent views about the scope of the hearing. Defendants asserted that the government had the burden of proof of demonstrating that it was likely to prevail at trial in order for the protective order to remain in effect. [DE 196 at 5; DE 221 at 2] Defendants further claimed that the government's case against them is "baseless." [DE 196 at 4] Therefore, there is no legal basis to continue to restrain Defendants' assets which are needed to retain counsel of their choice, regardless of who has the burden of proof and what that burden is.[2] On the other hand, the

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[1] In *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989), the court adopted the balancing test enunciated in the case of *Barker v. Wingo,* 407 U.S. 514 (1972), and established the four factors to be considered. The four factors are: 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's interest in the subject property. *Bissell,* 866 F.2d at 1352.

[2] Defendants assert that the burden of proof at this hearing should be on the government to show that "there is a substantial probability that the United States will prevail on the issue of forfeiture." [DE 221 at 2] Defendants acknowledge, however, that the Eleventh Circuit Court of Appeals held that the burden of proof is on them to show that the government did not have probable cause to restrain their assets. *Kaley,* 579 F.3d at

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United States argued that the burden is on Defendants to demonstrate that the seized assets are not traceable to or involved in the alleged criminal conduct. Defendants specifically declined to attempt to rebut the government's claim that the seized assets are traceable to or involved in the activity alleged in the indictment. [DE 221 at 3] Because the Court concludes that the law in the Eleventh Circuit supports the government's position, Defendants' motion to vacate the protective order, and their request for the release of the seized assets for the purpose of retaining counsel, is denied.

DISCUSSION.

In this case, a grand jury has found probable cause to believe that Defendants committed the crimes alleged in the superceding indictment. [DE 44] A careful review of the opinions of the Eleventh Circuit Court of Appeals in *Kaley* and *Bissell* demonstrates that the relevant inquiry for this hearing is whether the seized assets are traceable to or involved in the alleged criminal conduct. In *Bissell,* the court noted that Congress, in enacting the forfeiture statute, did not intend there to be a hearing prior to the issuance of the restraint, but recognized the authority of a district court to hold a post-restraint hearing. *Id.*

1257;1268 (Tjoflat, J., specially concurring). In *United States v. Monsanto,* 491 U.S. 600, 615-16 (1989), the Court held that the appropriate burden of proof was probable cause.

at 1349, *citing* S. Rep. No. 225, 98th Cong., 1st Sess. 191, 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3128, 3386. The court then described the post-restraint hearing that the district court could hold.

> At that hearing, the defendant may undertake to prove that the government *wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity,* but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial.

Id. (emphasis added)[3] Later in the opinion, the court reiterated this principle by stating:

> Although the statute does not require the district court to hold a post-restraint hearing, the legislative history evidences that such a hearing may be held *to determine whether legitimate assets – those outside the scope of the indictment – have been wrongfully restrained.*

Id. at 1353.(emphasis added) The court went on to state that:

> The clear danger posed by this statutory scheme is the possibility that perfectly

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[3] Other Circuit Courts of Appeals have also held that at a post-restraint hearing, the defendant cannot challenge the merits of the crimes charged in the indictment. *United States v. Jones,* 160 F.3d 648 (10th Cir. 1998); *United States v. Moya-Gomez,* 860 F.2d 706, 727-28 (7th Cir. 1988).

> *legitimate assets* will be wrongfully restrained. . . . A wrongful deprivation of *legitimate assets* will severely impair the defense.

Id. at 1354. (emphasis added) Lastly, the court stated that "the district court's probable cause determinations provided a significant check on the government's power to restrain *legitimate, nonindicted assets.*" *Id.* (emphasis added)

This concept of the post-restraint hearing was reaffirmed by the court in *Kaley. See Kaley,* 579 F.3d at 1254, 1257-59. The *Kaley* court stated that Defendant could not challenge the validity of the indictment at the post-restraint hearing; the hearing would not be for the purpose of determining guilt or innocense; and by requesting a post-restraint hearing, Defendants "would not be requiring the Government to establish the charged offense," but rather the hearing would be to determine the "propriety of the seizure" *Id.*

The basic thrust of Defendants' challenge to the pretrial restraint of their assets is that the government's case has no merit. Defendants have not attempted to challenge the governments's [sic] assertion, nor this Court's probable cause determination,[4] that the restrained assets are traceable to and involved in the alleged criminal activity. Yet, according to the

[4] DE 123 at 2-5.

Eleventh Circuit Court of Appeals,[5] this is precisely the purpose of the hearing, "to determine whether legitimate assets – those outside the scope of the indictment – have been wrongfully restrained." *Bissell,* 866 F.2d at 1349. Because Defendants are challenging the validity of the indictment, and are not challenging the probable cause finding that their restrained assets are traceable to or involved the alleged criminal conduct, Defendants' motion to vacate the protective order [DE 17] is **DENIED.**

Done and Ordered in Chambers in West Palm Beach, Florida, this 24th day of October, 2010.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

[5] Other Circuit Courts of Appeals are in accord with the Eleventh Circuit Court of Appeals on limiting the scope of a post-restraint hearing to the question of whether the restrained assets are traceable to or involved in the alleged criminal conduct. *United States v. Farmer,* 274 F.3d 800, 805-06; *Jones,* 160 F.3d at 647-48; *Moya-Gomez,* 860 F.2d at 727-31. *Contra United States v. E-Gold, Ltd.,* 521 F.3d 411, 418 (D.C. Cir. 2008); *United States v. Monsanto,* 924 F.2d 1186, 1203 (2d Cir. 1991) (post-restraint hearing goes to the questions of probable cause of the defendant's guilt as well as to whether the seized assets are traceable to and involved in the alleged criminal conduct).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES
OF AMERICA,

v.

KERRI L. KALEY and
BRIAN P. KALEY,

Defendants. /

ORDER GRANTING DEFENDANTS' REQUEST FOR A POST-RESTRAINT DUE PROCESS HEARING

(Filed Mar. 29, 2010)

This matter is before the Court based upon the mandate issued by the Eleventh Circuit Court of Appeals. *United States v. Kaley,* 579 F.3d 1246 (11th Cir. 2009). In *Kaley,* the Court of Appeals reviewed an order of this Court which denied Defendants' request for an evidentiary hearing on their motion to vacate a protective order which restrained their use of certain property pending a trial. The Court of Appeals held that this Court erred in its analysis of the four factors required by the case of *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989).[1] Specifically, the Court of

[1] The four factors were adopted from the balancing test enunciated in the case of *Barker v. Wingo,* 407 U.S. 514 (1972). The four factors are: 1) the length of the delay before the

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Appeals held that this Court did not abuse its discretion in weighing the first two factors in favor of the government. *Kaley,* 579 F.3d at 1256. The court explained, however, that this Court "plainly made an error of law in disposing of *Bissell's* third factor" and further held that "[a]t a minimum then, *Bissell's* third factor, 'the assertion of the right' to a pretrial hearing, should weigh in the defendants' favor when the defendants have taken every available step to contest the restraints." *Id.* at 1258. Lastly, the Court of Appeals held that this Court "should engage in a more searching exposition and calculus of the fourth *Bissell* factor, which requires it to weigh the prejudice suffered by the defendants due to the delay before their post-restraint probable cause hearing against the strength of the United States' interest in the subject property, and take care to give the powerful forms of prejudice that the Kaleys will suffer ample consideration." *Id.* After carefully considering the mandate from the Court of Appeals and re-weighing the *Bissell* factors, the Court finds that Defendants are entitled to an evidentiary hearing.

As previously discussed, the first two *Bissell* factors weigh in favor of the government. *Kaley,* 579

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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's interest in the subject property. *Bissell,* 866 F.2d at 1352.

F.3d at 1256. The third factor weighs in favor of Defendants. *Id.* at 1257. In reevaluating the fourth factor, the Court notes that it is not, at this time, determining the propriety of continuing the pretrial seizure. Rather, it is only determining whether the seizure should be permitted without affording Defendants an opportunity to challenge it at an evidentiary hearing. The seizure at issue, if wrongful, will deprive Defendants of their ability to retain counsel of their choice, which will "severely impair [their] ability to defend [themselves]." *Kaley,* 579 F.3d at 1258, quoting *Bissell,* 866 F.2d at 1354. This deprivation "is a substantial source of prejudice" in this case. *Kaley,* 579 F.3d at 1258. Moreover, in this case, Defendants will lose "access to long-time counsel who have already invested substantial time into learning the intricacies of [their] case and preparing for trial will unquestionably cause the Kaleys prejudice." *Id.* Additionally, "in order to retain any private counsel (not even counsel of choice), the Kaleys must incur a $183,500 non-recoverable liquidation and tax penalty in order to release their only remaining unrestrained assets (retirement and college savings accounts)." *Id.* at 1258-59. Under the facts of this case, the Court can discern little prejudice to the government in requiring an evidentiary hearing in view of the fact that at such a hearing "the defendant, as the movant, would have the burden of proof, and the prosecution would thus be saved from having to preview its entire case." *Id.* at 1257. When the prejudice to Defendants is weighed against the government's interest of recovering the seized assets without affording Defendants an

evidentiary hearing, the Court concludes that the fourth *Bissell* weighs in favor of Defendants.

In weighing all four factors, and recognizing that the Court has discretion to conduct an evidentiary hearing "notwithstanding the fact that the return of the indictment established probable cause to seize or restrain the assets," *Bissell,* 579 F.3d at 1257, the Court finds that the equities lie in favor of Defendants and an evidentiary hearing to determine the propriety of the pretrial seizure of Defendants is warranted.

In view of all of the foregoing, Defendants' motion for an evidentiary hearing on whether the pretrial restraint of their property should remain in place is **GRANTED.**

Done and ordered in Chambers in West Palm Beach, Florida, this 29th day of March, 2010.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

[PUBLISHED]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-13010

D.C. Docket No. 07-80021-CR-KAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KERRI L. KALEY,
BRIAN P. KALEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 18, 2009)

Before TJOFLAT, MARCUS and WILSON, Circuit Judges.

MARCUS, Circuit Judge:

In this case, a grand jury sitting in the United States District Court for the Southern District of Florida returned an indictment charging the defendants, Brian Kaley and Kerri Kaley, with conspiracy to transport stolen property, transportation of stolen

property, obstruction of justice, and money laundering. The indictment also included a criminal forfeiture count. After the return of the indictment, the government, *ex parte,* obtained a protective order enjoining the Kaleys from encumbering the property listed in the forfeiture count. The Kaleys moved the district court to vacate the order so they could use the restrained assets to retain counsel of their choice, and they requested that the district court hold an evidentiary hearing to determine whether there was probable cause to believe that the property was forfeitable. The district court declined to hold a hearing and denied the motion to vacate the protective order. The Kaleys now appeal these rulings. After thorough review, we reverse and remand for further proceedings consistent with this opinion.

I.

In January 2005, Kerri Kaley, then a sales representative with Ethicon Endo-Surgery, was informed she was the target of a grand jury investigation in the Southern District of Florida. Kaley was suspected of stealing prescription medical devices ("PMDs") from hospitals and then selling them on the black market. Kaley retained Howard Srebnick of Black, Srebnick, Kornspan & Stumpf, P.A. as her counsel in the investigation. Kaley's husband, Brian Kaley, who was also under investigation was initially represented by Howard Srebnick and later retained a separate attorney, Susan Van Dusen, to avoid a potential conflict of interest. Together, the two attorneys informed

the Kaleys that their legal fees to take the case through trial would be approximately $500,000. To obtain funds to pay those fees, the Kaleys applied for and obtained a home equity line of credit of $500,000 on their residence and used the proceeds to buy a certificate of deposit ("CD").

On February 6, 2007, the grand jury returned a seven-count indictment against the Kaleys.[1] Count One charged a conspiracy to transport PMDs in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. § 371. Counts Two through Six charged five substantive § 2314 offenses,[2] and Count Seven charged obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). The indictment also sought criminal forfeiture of all property traceable to the § 2314 offenses, including the CD, and a money judgment in the amount of $2,195,635.28.[3]

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[1] The indictment was also returned against Jennifer Gruenstrass, whose case has since been severed from the Kaleys'.

[2] Section 2314 provides that "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud" shall be subject to criminal liability. 18 U.S.C. § 2314.

[3] The forfeiture was authorized by the civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C), which provides for forfeiture of property actually "traceable to" the specific crime alleged – here, conspiracy to violate and violations of § 2314. Such forfeiture can become part of a criminal sentence pursuant to 28 U.S.C. § 2461(c), which provides in pertinent part that "[i]f the defendant is convicted of the offense giving rise to the forfeiture, the

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On February 7, 2007, the Government moved the district court *ex parte* for a protective order restraining the Kaleys from transferring or otherwise disposing of the property listed in the forfeiture count, and a magistrate judge, concluding that the indictment established probable cause that the property was "traceable to" the Kaleys' commission of the § 2314 offenses, granted the motion the same day.[4] The next day, the Government filed a notice of *lis pendens* against the Kaleys' residence.

On March 5, 2007, the Kaleys moved the district court to vacate the February 7th protective order. They contended that the order prevented them from retaining counsel of their choice in violation of their Sixth Amendment right to the representation of counsel. A magistrate judge heard this motion too on April 6th[5] and sustained the protective order; however, he

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court shall order the forfeiture of the property as part of the sentence in the criminal case." The "traceable to" language limited the United States to forfeiture of $140,000 of the Kaleys' assets.

[4] The Government based its motion on § 413 of the Controlled Substances Act, 21 U.S.C. § 853, which provides that "[u]pon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the property [listed in the forfeiture count]." That section of the Controlled Substances Act applies to the Kaleys pursuant to 28 U.S.C. § 2461(c). *See supra* note 3.

[5] The motion was referred to a second magistrate judge, who handled the case in place of the initial magistrate judge.

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limited the protective order's scope (insofar as it applied to the CD) to $140,000.[6]

On April 10, 2007, the grand jury returned a superseding indictment. This indictment replicated the first seven counts of the first indictment and added an additional count – a charge that the Kaleys had conspired to launder the proceeds of the § 2314 offenses, in violation of 18 U.S.C. § 1956(h).[7] This indictment also sought the criminal forfeiture of the CD and the Kaleys' residence on the theory that those assets were "involved in" the Kaleys' commission of the § 1956(h) offense.[8] On April 17th, the Kaleys renewed their motion to vacate the February 7th protective order (as amended by the order of April 6th), and expressly requested a pretrial, post-restraint evidentiary hearing.[9]

This magistrate judge heard the Kaleys' motion during a telephone conference call, which was not recorded or transcribed.

[6] At the same time, the magistrate judge scheduled a hearing for April 16, 2007 on the Kaleys' motion to vacate the protective order in its entirety.

[7] Section 1956(h) provides that "any person who conspires to commit any offense defined in this section or § 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

[8] By adding the money laundering conspiracy to the indictment, the grand jury enabled the United States to utilize the criminal forfeiture statute, 18 U.S.C. § 982(a)(1), which authorizes forfeiture of assets "involved in" – rather than "traceable to the proceeds of" – the offense.

[9] In addition to moving the district court to vacate the protective order, the Kaleys moved the district court to strike

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The magistrate judge heard the motion on April 27th. He questioned whether the indictment alone provided probable cause to restrain the defendants' assets and ordered the prosecutor to submit an affidavit supporting probable cause. The prosecutor responded by filing, in secret and under seal, an affidavit executed by the FBI case agent.

On May 1, 2007, the magistrate judge issued two orders. In the first order, he found probable cause –

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from the indictment the allegation seeking forfeiture under 18 U.S.C. § 982(a)(1) on the ground that the allegation was "vindictive," in retaliation for the Kaleys having moved the court on March 5th to vacate the February 7th protective order. The Kaleys also moved the district court to strike from the indictment the allegation seeking forfeiture under 18 U.S.C. § 981(a)(1)(C) on the ground that § 981(a)(1)(C) could not be applied without violating the Ex Post Facto Clause. The district court denied both motions.

In their blue brief, the Kaleys ask us to review these two rulings as well, which are not independently appealable, under the doctrine of pendent appellate jurisdiction. "Under the pendent appellate jurisdiction doctrine, we may address [such] orders [only] if they are 'inextricably intertwined' with an appealable decision or if 'review of the former decision [is] necessary to ensure meaningful review of the latter.' " *Hudson v. Hall,* 231 F.3d 1289, 1294 (11th Cir. 2000) (quoting *Summit Med. Assoc., P.C. v. Pryor,* 180 F.3d 1326, 1335 (11th Cir. 1999)) (quotation marks omitted). However, the two rulings are not inextricably intertwined with the district court's ruling denying the Kaleys' motion for a pretrial hearing on the validity of the February 7th protective order; nor is review of those rulings necessary to ensure meaningful review of the district court's June 25, 2007 order denying the pretrial, post-restraint hearing the Kaleys are seeking. We, therefore, decline to exercise our pendent appellate jurisdiction.

based on the indictment and the case agent's affidavit – that the CD and the Kaleys' residence were "involved in" the violations of § 1956(h) and § 2314. In the second order, he amended the February 7th protective order to include within its scope the full value of the CD and the Kaleys' residence. On May 2nd, the magistrate judge issued a third order denying the Kaleys' motion to vacate the protective order and to hold a pretrial, post-restraint evidentiary hearing. In that order, the magistrate judge concluded that "no post-restraint hearing was necessary until trial."

On May 7, 2007, the Kaleys appealed the magistrate judge's May 1st and 2nd orders to the district court. On June 25th, the district court affirmed the magistrate judge's issuance of the protective order, concluding that the case agent's affidavit "demonstrated probable cause to believe that the Defendants' residence was 'involved in' the money laundering offense charged in the superseding indictment, and that all but $63,007.65 of the funds used to obtain the CD were 'traceable to' the residence." The trial court also affirmed the magistrate judge's denial of a pretrial evidentiary hearing, concluding that postponing the hearing until the trial itself satisfied due process. On June 27, 2007, the Kaleys lodged this interlocutory appeal, challenging the district court's decision.

II.

This Court has jurisdiction to entertain appeals of "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing, or dissolving injunctions." 28 U.S.C. § 1292(a)(1). Protective orders designed to preserve forfeitable assets, like the one in this case, qualify as injunctions for the jurisdictional purposes of § 1292(a)(1). *United States v. Monsanto,* 491 U.S. 600, 602-06 (1989) (exercising interlocutory jurisdiction to review a pretrial restraining order, which was granted *ex parte* for the purpose of preserving forfeitable assets prior to forfeiture); *Roberts v. United States,* 141 F.3d 1468, 1471 (11th Cir. 1998) (stating that denial of a motion to vacate a protective order over forfeitable assets would be reviewable as an interlocutory order in the appellate courts under § 1292(a)(1)). Such protective orders are like injunctions because they are "directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by the complaint in more than temporary fashion." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3922, at 65 (2d. ed. 1996) (quotation marks omitted). We, therefore, review under § 1292(a)(1) the district court's order denying the Kaleys' motion to vacate the protective order and denying them a pretrial evidentiary hearing.

III.

With our jurisdiction settled, we address the main issue raised today: the Kaleys' argument that they have a due process right to a post-indictment, pretrial evidentiary hearing on the legality of the restraints on their property especially needed for the purpose of retaining counsel of their choice. In doing so, we are controlled by our decision in *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989). *Bissell* presented the same argument and this Court 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 enunciated in *Barker v. Wingo,* 407 U.S. 514 (1972), is satisfied. *Id.* at 1353. Thus, our task in this appeal is to decide whether the district court correctly interpreted and applied the *Barker* balancing test. After thorough review, we conclude that the district court incorrectly applied that test, and we, therefore, reverse and remand the case for further consideration consistent with this opinion.

In *Bissell,* a grand jury indicted each of the defendants with one or more of the following offenses: violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; engaging in a Continuing Criminal Enterprise, 21 U.S.C. § 848; and conspiring to import cocaine, 21 U.S.C. § 846. *Bissell,* 866 F.2d at 1347. The indictment contained criminal forfeiture counts pursuant to 21 U.S.C. § 853, in which the grand jury alleged that

all assets derived from, or devoted to, violations of federal narcotics laws were subject to forfeiture upon the defendants' convictions. *Id.* Following the return of the indictment, the Government seized the defendants' assets pursuant to a warrant it obtained from the district court *ex parte* pursuant to 21 U.S.C. § 853(f). *Id.* No pretrial, post-indictment motion was made to the district court contesting the legality of the court-ordered restraints and no hearing was sought. *Id.* at 1347-48, 1353.

On appeal, the *Bissell* defendants argued, among other things, that they were entitled under the Fifth Amendment's Due Process Clause to a pretrial hearing at which the government must demonstrate that the forfeiture was justified *and* that the failure to provide that hearing fatally tainted their convictions. *Id.* at 1352. A panel of this Court directly addressed and unambiguously rejected this claim, applying the *Barker v. Wingo* framework and holding[10] under the

[10] *Bissell*'s determination that the *Barker* factors should be used to evaluate when a defendant is entitled to a post-indictment, pretrial hearing under due process of law is holding, not dicta. As our cases frequently have observed, dicta is defined as those portions of an opinion that are "not necessary to deciding the case then before us." *United States v. Eggersdorf,* 126 F.3d 1318, 1322 n.4 (11th Cir. 1997); *Schwab v. Crosby,* 451 F.3d 1308, 1327 (11th Cir. 2006); *Jordan v. Hamlett,* 312 F.2d 121, 124 (5th Cir. 1963); *Carpenter Paper Co. v. Calcasieu Paper Co.,* 164 F.2d 653, 655 (5th Cir. 1947); *see also United States v. Crawley,* 837 F.2d 291, 292 (7th Cir. 1988) ("We have defined dictum as a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of

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the holding.") (quotation marks omitted). Conversely, the holding of a case is, as the Supreme Court observed, comprised both of the result of the case and "those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 66-67 (1996). *Bissell*'s conclusion that there was no violation of the defendants' Fifth Amendment due process rights was necessary to its ultimate decision. In fact, *Bissell*'s adoption and use of the *Barker* test forms a critical part of the case's holding. Our conclusion that the defendants' due process rights were not violated was driven by, and cannot be understood apart from our application of the *Barker* test to the facts of the case. While it is true that the court could have decided the case on other grounds, such as plain error, the panel resolved the defendant's due process claim by explicating and applying the *Barker v. Wingo* analysis.

Despite the suggestion in the special concurring opinion, it is of no moment that it was the *Bissell* panel, and not the parties, that proposed the *Barker* analysis as the legal rule of decision. Plainly, this Court employed the *Barker* factors to determine whether a pretrial hearing was required. There is no requirement in our law that the explication of the governing principle of law may only be taken from an argument advanced by a party. What matters in discerning whether a rule of law expounded by a court is in fact holding is whether it was *necessary* to the result reached, or, in the alternative, could be discarded without impairing the foundations of the holding. And here, a panel of this Court deliberately and carefully offered the analytical framework set forth in *Barker* as the way to analyze and ultimately decide the issue.

We add that another prior panel of our Court has also observed that *Bissell*'s application of the *Barker* factors is holding. *United States v. Register* questioned the soundness of *Bissell,* observing that "in the appropriate case" *Bissell* "perhaps should" be re-examined in light of the fact that we are "the only circuit *holding* that, although pre-trial restraint of assets needed to retain counsel implicates the Due Process Clause, the trial itself satisfies this requirement." 182 F.3d 820, 835 (11th Cir. 1999) (emphasis added). And our Court is not the only one to

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circumstances of the case that the defendants were not entitled to a post-indictment, pretrial hearing. Indeed, we framed the specific issue before us this way:

> [Appellants] contend that this scheme violate[d] due process. They argue that when pretrial restraints are imposed on assets, the Fifth Amendment requires a hearing on the merits at which the government must prove the probability that the defendant will be convicted and that his assets will be forfeited. Since no such hearing occurred in this case, appellants urge that they have been denied due process of law. We disagree.

Id. at 1352; *see also id.* ("We must consider whether appellants had a right to an immediate post-restraint hearing.").

The *Bissell* panel recognized that "once an indictment has issued, the court may order such restraints [to preserve forfeitable assets in a criminal

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have thought that the application of the *Barker* factors by the *Bissell* court constituted holding. *See, e.g., United States v. Monsanto,* 924 F.2d 1186, 1191 (2d Cir. 1991); *United States v. Holy Land Found. for Relief & Dev.,* 493 F.3d 469, 475 (5th Cir. 2007); *United States v. Kirschenbaum,* 156 F.3d 784, 793 (7th Cir. 1998); *United States v. Farmer,* 274 F.3d 800, 803 (4th Cir. 2001); 13 Fed. Proc. § 35:790 ("At the other end of the spectrum, the Eleventh Circuit has held that there is no due process right to a hearing prior to the entry of an order freezing a defendant's property, and the due process clause imposes no bright line dictating when a post-restraint hearing might occur in a criminal forfeiture case.").

case] *ex parte*." *Id.* at 1349. In addition, the Court explained that by its own terms 21 U.S.C. § 853(a)(1) does not require a hearing before or after the restraint of assets, and that "the statute's legislative history reveals that while Congress did not intend there to be a hearing prior to the issuance of a restraint, the district court does retain authority to hold a post-restraint hearing." *Id.* (citing S. Rep. No. 225, 98th Cong., 1st Sess. 191, 203, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3386). Further, the panel observed:

> At that hearing, the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity, but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial.

Id.

In deciding which analytical framework to apply to determine what process, if any, is due to a criminal defendant whose assets have been restrained pursuant to a criminal forfeiture charge thereby preventing him from retaining his counsel of choice, the *Bissell* panel looked to *United States v. $8,850 in U.S. Currency,* 461 U.S. 555 (1983), for guidance. In that case, the Supreme Court addressed the narrow question of whether an eighteen-month delay between the seizure of currency that was being transported without being reported to the U.S. Customs Service, in violation

of 31 U.S.C. § 1101, and the resulting civil forfeiture proceedings, violated the due process rights of an individual with an interest in the seized currency. *Id.* at 556-62. In *$8,850,* the Court imported the four-factor balancing test laid out in *Barker v. Wingo,* 407 U.S. 514 (1972), a case that assessed whether a delay in trying a criminal case violated a defendant's Sixth Amendment right to a speedy trial as the applicable analytical framework. The stated reason for importing the *Barker* test into the realm of the defendant's claim under the due process clause in *$8,850* was that "the Fifth Amendment claim here – which challenges only the length of time between the seizure and the initiation of the forfeiture trial – mirrors the concern of undue delay encompassed in the right to a speedy trial." *Bissell,* 866 F.2d at 1352 (quoting *$8,850,* 461 U.S. at 564). *Bissell,* in turn, imported the *Barker* test into the realm of a defendant's due process claim when his assets were restrained without a hearing pursuant to § 853, thereby preventing him from retaining counsel of choice.

Thus, in *Bissell,* we evaluated the defendants' claim in light of the four factors taken from *Barker*: (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's interest in the subject property. 866 F.2d at 1352.

As for the first of the *Barker* factors, in *Bissell,* we concluded that no post-restraint hearing was necessary because the delay of eight months between the restraint of the assets and the criminal trial was insignificant. 866 F.2d at 1353. As for the reason for delaying the hearing until trial (the second of the *Barker* factors), we referenced the statute's legislative history and explained that requiring the government to meet the requirements for issuing a temporary restraining order and to establish the merits of the underlying criminal case and the forfeiture before the trial would make obtaining a restraining order difficult because of the abundant dangers surrounding the premature disclosure of the government's case and its witnesses. *Id.*

As for the third factor, we held that whether the defendants' asserted their right to a post-indictment hearing prior to trial, weighed against the defendants in *Bissell* because the defendants "d[id] not point to, and the record d[id] not disclose, any motion for a hearing to contest the government's restraints." *Id.* at 1353.

Finally, as for the last of the *Barker* factors (the prejudice associated with the restraint), we recognized the not inconsiderable danger that "perfectly legitimate assets will be wrongfully restrained," which would, in turn, result in palpable prejudice to the defendant, particularly when the defendant sought to use those assets to retain counsel of his choice. 866 F.2d at 1354. But, we observed, when both parties arguably have property rights in the constrained

assets, "a due process analysis must comprehend both interests." *Id.* Finally, weighing the four *Barker* factors in concert, we concluded that the defendant suffered no due process violation. *Id.*

The Kaleys argue, however, that *Bissell* is no longer good law in light of the United States Supreme Court's recent decision in *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006). They are mistaken. We may disregard the holding of a prior opinion only where that "holding is overruled by the Court sitting en banc or by the Supreme Court." *Smith v. GTE Corp.,* 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). To constitute an "overruling" for the purposes of this prior panel precedent rule, the Supreme Court decision "must be clearly on point." *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.,* 344 F.3d 1288, 1292 (11th Cir. 2003); *see also Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.,* 475 F.3d 1228, 1230 (11th Cir. 2007) ("Of course, we will not follow prior panel precedent that has been overruled by a Supreme Court decision, but without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court.") (quotation marks and citations omitted); *United States v. Chubbuck,* 252 F.3d 1300, 1305 n.7 (11th Cir. 2001) ("[T]he prior precedent rule would not apply if intervening on-point case law from either this Court en banc, the United States Supreme Court, or the Florida Supreme Court existed."). In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening

Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel. *See In re Provenzano,* 215 F.3d 1233, 1235 (11th Cir. 2000) ("We would, of course, not only be authorized but also required to depart from [our prior decision] if an intervening Supreme Court decision actually overruled or conflicted with it."); *Chambers v. Thompson,* 150 F.3d 1324, 1326 (11th Cir. 1998) ("We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision.").

In *Gonzalez-Lopez,* the Supreme Court addressed whether a district court erroneously refused the defendant's chosen counsel the right to practice *pro hac vice* before that court. 548 U.S. at 147-51. The government conceded that the denial deprived the defendant of counsel of choice, and the Supreme Court reversed, finding the disqualification to be erroneous and not subject to harmless error review. *Id.* The case in no way addressed what, if any, right a criminal defendant has to use assets subject to criminal forfeiture pursuant to an indictment in order to pay for the legal fees of the counsel of his choice. Nor did the case in any way address the circumstances under which a defendant making a Sixth Amendment counsel of choice challenge to a post-indictment pretrial restraint would be entitled to a hearing. Thus, it cannot be said that *Gonzalez-Lopez* is "clearly on point," or that it "directly conflicts with" the analytical

framework announced by this Court in *Bissell*. In fact, the Supreme Court itself said in *Gonzalez-Lopez* that "[n]othing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them," *id.* at 151, including cases such as *Bissell*. Accordingly, the district court was bound to apply *Bissell* in exercising its discretion to award the Kaleys a hearing.

In the case at hand, the district court did employ the *Bissell* factors to determine whether the Kaleys had a due process right to a pretrial evidentiary hearing on the legality of the restraints. It addressed each of the four factors and found that the first and second factors weighed in favor of the Government. Among other things, the district court found that the length of delay in this case (a projected eight months) was not significant and that the government had a substantial interest in not revealing its case and witnesses before trial. Neither of these two determinations amounts to an abuse of discretion, although it is worth noting in passing that in this white collar case the defendants have already had access to much of the government's evidence as the case against their co-conspirator, Jennifer Gruenstrass, was severed and she was tried and acquitted in November, 2007. *See Bissell,* 866 F.2d at 1349 (explaining that the legislative history of 21 U.S.C. § 853(a)(1) "reveals that while Congress did not intend there to be a hearing prior to the issuance of a restraint, the district

court does retain authority to hold a post-restraint hearing.").

As for the third factor – the defendants' pretrial assertion of their right – the district court held that

> [w]hile Defendants have [asserted their right to a hearing] in this case, that fact does not end the inquiry. As the *Bissell* court noted, the purpose of a post-restraint hearing is to determine whether legitimate assets – those outside the scope of the indictment – have been wrongfully restrained. In the present case, *based upon* the money laundering charge and *this Court's probable cause determination, the only way Defendants could demonstrate that the restrained assets,* other than the $63,007.65 that is being released by this order, *are outside the scope of the indictment is to challenge its validity on the merits.* As has been seen previously, such a challenge cannot be made pretrial. At best, the third factor is in equipoise.

United States v. Kaley, No. 07-80021-CR, 2007 WL 1831151, at *3 (S.D. Fla. June 25, 2007) (citations and quotations omitted) (emphasis added and omitted). As for the fourth factor, the district court did not clearly state whether it cut in favor of or against a pretrial evidentiary hearing, observing only that "a district court's probable cause determination, as is present here, diminishes the prejudicial effect of the pretrial restraint," but offering no indication of the nature, degree, or impact of any such diminution. *Id.* at *4.

The district court plainly made an error of law in disposing of *Bissell*'s third factor. As the underscored language of the district court's holding reveals, in evaluating the third factor, the district court concluded that, under *Bissell,* once probable cause has been determined, the only way that a defendant can show that assets are not forfeitable is to establish that the crime charged in the indictment did not occur. This, however, was not the holding of *Bissell* and could not have been the opinion's intent, because, as the district court correctly noted, a challenge to the indictment cannot be made pretrial. A pretrial challenge to the indictment would require the district court to hold an evidentiary hearing to determine whether the crime occurred. The court would hear the Government's case and the defendant's response, and then determine whether the crime had occurred and, thus, whether the assets were forfeitable. In many cases, such a hearing would go so far as to render the trial on the merits of the criminal charge unnecessary. In short, such a procedure would require the Government to preview its case – at the very least, the Government would have to put on enough evidence to withstand a motion to dismiss the charge. But the *Bissell* court undeniably contemplated some circumstances in which, despite the presence of probable cause, a pretrial hearing would be required.

The principle of law *Bissell* advances is that, after weighing the four *Barker* factors, the district court *may* grant the defendant's request for a pretrial evidentiary hearing in order to determine whether

assets described in the forfeiture count of the indictment were wrongly seized (or placed under the restraint of a protective order). The court in an appropriate case may grant the defendant's request notwithstanding the fact that the return of the indictment established probable cause to seize or restrain the assets, possibly, as in the Kaleys' case, with that probable cause buttressed by an affidavit submitted by the case agent *ex parte* and in camera. The purpose of the hearing would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure. Moreover, in such a hearing, the defendant, as the movant, would have the burden of proof, and the prosecution would thus be saved from having to preview its entire case.

This is the same approach that the Supreme Court has taken in civil cases where property is seized based on an *ex parte* proceeding. *See, e.g., Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974). In these cases, a creditor claims an interest in a debtor's property and files suit against the debtor to obtain such interest. *Id.* at 601-02. To ensure that the property is not disposed of prior to the trial on the merits, the creditor obtains a court order freezing the debtor's property by making an *ex parte* showing of probable cause that the creditor is likely to prevail on the merits. *Id.* at 602-03. The Supreme Court has held that, in these situations, the debtor is, at least, owed a post-restraint hearing to determine whether probable cause actually exists. *See id.* at 607; *Fuentes v. Shevin,* 407 U.S. 67 (1972). The post-restraint hearing the

Court has ordained, however, is not the trial on the merits of the plaintiff's claim. *Mitchell,* 416 U.S. at 603 (identifying the pretrial hearing as separate from the trial on the merits). Rather, the purpose of the hearing is to reduce the possibility that the court imposed the restraint improvidently. *Fuentes,* 407 U.S. at 81, 92 S. Ct. at 1994 (noting that the purpose of a pretrial hearing is to prevent "substantively unfair and simply mistaken deprivations of property interests").

It is clear, then, that notwithstanding the district court's probable cause determination, the Kaleys were entitled to challenge the restraints on their assets; in doing so, they would not be requiring the Government to establish the charged offense. Because the Kaleys challenged the restraints early and often, this case is very different than *Bissell,* where "nothing in the record indicate[d] that [the defendants] desired an early hearing to contest the government's restraints." *Bissell,* 866 F.2d at 1353. At a minimum then, *Bissell*'s third factor, the "assertion of the right" to a pretrial hearing, should weigh in the defendants' favor when the defendants have taken every available step to contest the restraints.

In addition, the district court also should engage in a more searching exposition and calculus of the fourth *Bissell* factor, which requires it to weigh the prejudice suffered by the defendants due to the delay before their post-restraint probable cause hearing against the strength of the United States' interest in the subject property, and take care to give the powerful

forms of prejudice that the Kaleys will suffer ample consideration. 866 F.2d at 1354. As *Bissell* pointed out, a wrongful deprivation of a defendant's legitimate assets rendering him unable to retain his counsel of choice will severely impair his ability to defend himself. *Id.* at 1354. Indeed, our law is clear and unambiguous that depriving a defendant of the counsel of his choice is a serious and significant impediment to his ability to effectively navigate our nation's criminal procedures and protections. *See Gonzalez-Lopez,* 548 U.S. at 146 ("[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best."); *Wheat v. United States,* 486 U.S. 153, 159 (1988) (explaining that, although it is subject to limitations to ensure representation by effective counsel, "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment"); *see generally United States v. Garey,* 540 F.3d 1253, 1263 (11th Cir. 2008) (*en banc*) ("The right to counsel is a fundamental part of the adversary system of criminal justice and recognizes the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.") (quotation marks and citation omitted).

Being effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice, but

the inequities in this case actually go beyond being able to retain the counsel of choice. The restraint of assets in the present case prohibits the Kaleys not only from retaining their counsel of choice, but also from retaining the experienced attorneys who have represented them since the grand jury investigation began in January, 2005. Losing access to long-time counsel who have already invested substantial time into learning the intricacies of the Kaleys' case and preparing for trial will unquestionably cause the Kaleys prejudice.

Moreover, in order to retain any private counsel (not even the counsel of choice), the Kaleys must incur a $183,500 non-recoverable liquidation and tax penalty in order to release their only remaining unrestrained assets (retirement and college savings accounts). On this record, it is clear that in order to access the $323,000 contained in their 401(k) plan at the time the district court considered their motion, the Kaleys would be forced to pay $168,000 in early withdrawal penalties and income taxes leaving them with only $155,000 to allocate for their legal fees. To access the $111,000 contained in college savings accounts, the Kaleys must pay $15,000 in liquidation penalties and capital gains taxes. And, even if they ultimately prevail in this case, the Kaleys will never be able to recover those penalties and taxes.

These serious and substantial burdens must be weighed by the district court against the government's real interest in recovering the seized assets if, indeed, the Kaleys are guilty of the charged criminal

conduct and those assets are found to be traceable to the illicit activity. This interest is supported in some measure by the grand jury's probable cause determinations in returning two indictments seeking the criminal forfeiture of the CD and the Kaleys' residence, as well as by the probable cause affidavit executed by the FBI case agent and filed by the Government. *See Bissell,* 866 F.2d at 1354 ("[T]he district court's probable cause determinations provided a significant check on the government's power to restrain legitimate, nonindicted assets."). We leave it to the district court to weigh the powerful competing interests in order to calculate whether the probable cause determination and the accompanying government affidavit diminish the undeniable and substantial prejudice the Kaleys will suffer if they are forced to liquidate their remaining unrestrained assets and retain new counsel at this stage in the proceedings. Under *Bissell,* therefore, the trial court must re-weigh the *Barker* factors in order to calculate whether the Kaleys are entitled to a post-indictment pretrial evidentiary hearing.

IV.

If we were writing on a blank slate today we would be inclined, as Judge Tjoflat suggests in his special concurrence, to apply the test announced by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), in order to determine what process is due to defendants in circumstances like these.

Indeed, virtually every circuit to address this issue other than this Court has found that criminal defendants such as these are entitled, under the Due Process Clause of the Fifth Amendment, to a pretrial hearing in order to determine whether it is likely that the restrained assets will be subject to forfeiture.[11] *See Holy Land Found. for Relief & Dev.,* 493 F.3d at 475; *United States v. Jones,* 160 F.3d 641, 647 (10th Cir. 1998); *Monsanto,* 924 F.2d at 1195-98; *United States v. Moya-Gomez,* 860 F.2d 706, 728-29 (7th Cir. 1988); *United States v. Harvey,* 814 F.2d 905, 929 (4th Cir. 1987), *superseded as to other issues, In re Forfeiture Hearing as to Caplin & Drysdale, Chartered,* 837 F.2d 637 (4th Cir. 1988) (*en banc*), *aff'd,* 491 U.S. 607 (1989); *United States v. Crozier,* 777 F.2d 1376, 1384 (9th Cir. 1985); *United States v. Lewis,* 759 F.2d 1316, 1324-25 (8th Cir. 1985); *cf. United States v. Long,* 654 F.2d 911, 915 (3d Cir. 1981). In fact, the more recent cases have utilized the balancing test employed in *Mathews.*

The *Mathews* test may be particularly well suited to the present case, because it is the traditional test employed in order to determine what process is due before a deprivation of property at the hands of the

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[11] Because 21 U.S.C. § 853(1)(a), the statute governing the procedures applicable to a criminal forfeiture charge, does not expressly provide for a pretrial hearing regarding a post-indictment restraint of assets subject to criminal forfeiture, such a hearing is required only because it may be mandated by the Fifth Amendment's right to due process.

state may be sustained. *See Mathews,* 424 U.S. at 333 (deciding whether an individual is entitled to a hearing under the Fifth Amendment to contest the government's deprivation of a property interest); *Grayson v. King,* 460 F.3d 1328, 1340 (11th Cir. 2006) ("*Mathews* applies only where an individual has a liberty or property interest that the government seeks to eliminate."); *see also Moya-Gomez,* 860 F.2d at 725-26 (determining that the defendant suffered "a deprivation of property in the constitutional sense," because "[t]he restraining order . . . operates to remove the assets from the control of the defendant on the claim of the government that it has a higher right to those assets. While the restraining order does not divest definitively the ownership rights of the defendant, it certainly does remove those assets from his immediate control and therefore divest him of a significant property interest"). There can be little doubt that the posture of this case plainly deprives the defendants of their assets and that the question the Kaleys have raised is one of procedural due process.

If we were to apply *Mathews* in this case, the Kaleys would be entitled to a pretrial hearing on the merits of the protective order. At the end of the day, however, we are duty bound to apply our case precedent and examine this matter under the framework outlined by this Court in *Bissell.*

V.

In sum, the district court did not abuse its discretion in assessing the first two *Bissell* factors. But, the district court plainly made an error of law in interpreting and applying the third of the *Bissell* factors. On the record before us, this factor weighed in the defendants' favor as a matter of law. Moreover, the district court did not make a clear finding as to the fourth *Bissell* factor – the prejudice associated with the restraint. We, therefore, reverse the district court's decision and remand the case to the district court so that it may recalibrate the fourth *Bissell* factor, and then weigh all of the factors together in order to determine the defendants' entitlement to a post-indictment evidentiary hearing.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring:

I agree with the court's decision to reverse and remand, but I write separately because I disagree with the court's rationale for its decision. The court reverses and remands because it holds that the district court misapplied the four factor test from *United States v. Bissell*.[1] That test, which uses *Barker v. Wingo*'s Sixth Amendment speedy-trial standard to

[1] *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989).

resolve the procedural due process issue this appeal presents, was not necessary to the holding in *Bissell* and is therefore non-binding dicta. The district court erred in relying on the *Bissell* test because the test cannot, in my view, be squared with Supreme Court procedural due process precedent.[2] As I shall explain, the court should have resolved this appeal using that Supreme Court precedent rather than the contradictory dicta from our own circuit.

I.

In *Bissell,* the defendants were indicted for various violations of the federal narcotics laws. *Bissell,* 866 F.2d at 1347. The grand jury later returned two superceding indictments, containing counts seeking the forfeiture of assets pursuant to 21 U.S.C. § 853. *Id.* After the superseding indictments were returned, the Government appeared before the district court *ex parte* and obtained the issuance of warrants authorizing the Government to seize the assets listed in the forfeiture counts,[3] including the

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[2] *See Barker v. Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[3] The district court issued the warrants pursuant to 21 U.S.C. § 853(f), which states:

> (f) Warrant of seizure
>
> The Government may request *the issuance of a warrant authorizing the seizure of property* subject to forfeiture under this section *in the same manner as provided for a search warrant.* If the court determines that there is probable cause to believe that the property

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defendants' bank accounts. *Id.* The Government then executed the warrants and seized the assets. *Id.* In due course, the case proceeded to trial, and the defendants were convicted. *Id.* at 1348 & n.2. At sentencing, the assets listed in the forfeiture counts were forfeited to the United States as part of the defendants' sentences.

At no point following the Government's seizure of the defendants' assets did any of the defendants move the district court to quash the warrants or otherwise challenge the validity of the Government's retention of their assets.[4] *Id.* at 1353. On appeal, for the first time, the defendants challenged "the constitutionality of the *ex parte,* pretrial restraints on their assets." *Id.* at 1348.[5] Even in their brief on appeal, the

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> to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(emphasis added). Fed. R. Crim. P. 41 provides the procedure for obtaining a search warrant and, thus, the seizure of property subject to forfeiture. Fed. R. Crim. P. 41(g) provides a procedure for challenging the seizure. *See infra* note 4.

[4] The defendants could have challenged the seizure of their property in the district court pursuant to Fed. R. Crim. P. 41(g). *See supra* note 3.

[5] The defendants had waived their challenge to the constitutionality of the *ex parte* restraints by not presenting it to the district court. *See Madu v. U.S. Att'y Gen.,* 470 F.3d 1362, 1366 n.2 (11th Cir. 2006) ("[A]n argument made for the first time in the court of appeals is generally waived. . . .") (citing *Sterling*

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defendants failed to argue that they were entitled to a pretrial, post-restraint hearing.

On its own initiative, however, the court posed the question the defendants had never asked: whether, after issuing the warrants, the district court should have held a pretrial hearing to determine whether the application for the warrants authorizing the seizures was supported by probable cause. The court then answered its own question by stating that under the Sixth Amendment speedy-trial standard of *Barker v. Wingo,* a pretrial evidentiary hearing was not required.[6] The court's answer constituted pure dicta, as the question was never raised by any party, was unnecessarily injected into the case by the court itself, and was therefore unnecessary to the resolution of the *Bissell* defendants' appeals.[7]

Fin. Inv. Group, Inc. v. Hammer, 393 F.3d 1223, 1226 (11th Cir. 2004)); *Mills v. Singletary,* 63 F.3d 999, 1008 n.11 (11th Cir. 1995) ("The law in this circuit is clear that arguments not presented in the district court will not be considered for the first time on appeal."); *Lancaster v. Newsome,* 880 F.2d 362, 371 (11th Cir. 1989); *Stephens v. Zant,* 716 F.2d 276, 277 (5th Cir. 1983) (per curiam).

[6] Since the court recognized that the defendants had never asked the district court for a hearing, one could interpret its application of the *Barker v. Wingo* standard as a statement that a district court is required to consider whether to hold a pretrial hearing even though the defendant does not request a hearing. There is no basis for this interpretation.

[7] A reading of the *Bissell* opinion clearly demonstrates that the court did not entertain the question and answer it under the rubric of the plain error doctrine. *See United States v. Evans,*

(Continued on following page)

II.

If we acknowledge that *Bissell*'s discussion of the issue at hand is dicta, we are left with no binding precedent on the question of whether a criminal defendant standing in the Kaleys' shoes is entitled as a matter of due process to a post-restraint hearing prior to trial.[8] In the absence of binding precedent, the panel should have looked to the general requirements of procedural due process. *See United States v. E-Gold Ltd.,* 521 F.3d 411, 415 (D.C. Cir. 2008) (using this approach to determine whether a post-restraint, pretrial hearing was due). The court's approach today,

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478 F.3d 1332, 1338 (11th Cir. 2007) (finding that defendant's due process argument was subject to plain error review because it was not raised before the district court).

[8] In *United States v. Monsanto,* 491 U.S. 600, 603-06, 109 S. Ct. 2657, 2660-61, 105 L. Ed. 2d 512 (1989), the Supreme Court explicitly sidestepped this question. In that case, the Government, *ex parte,* obtained a pre-trial order restraining the defendant's purportedly forfeitable assets. The defendant moved to vacate the order, and the district court heard the motion in a four-day evidentiary hearing. The district court found probable cause for restraining the defendant's assets and thus upheld the order. The defendant then took an interlocutory appeal, which worked its way to the United States Supreme Court. The Court upheld the validity of the restraining order, holding that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Monsanto,* 491 U.S. at 615; 109 S. Ct. at 2666. It declined "to consider whether . . . a hearing was required by the Due Process Clause" because the district court had held an extensive post-restraint hearing on the issue. *Id.* at 615 n.10, 109 S. Ct. at 2666 n.10.

following the dicta in *Bissell,* contravenes these principles.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" upon the deprivation of liberty or property. *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). This basic statement of due process requires different measures in different contexts. *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) (holding that due process requires a hearing "appropriate to the nature of the case"). In any particular context, three factors are relevant to the question of what constitutes a meaningful hearing:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S. Ct. at 903.

Under ordinary circumstances, the private interest weighs heavily enough to require the government to provide notice and some sort of hearing prior to the deprivation. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53, 114 S. Ct. 492, 501, 126 L. Ed. 2d 490 (1993) (civil forfeiture); *Fuentes v. Shevin,* 407 U.S. 67, 82, 92 S. Ct. 1983, 1994-95, 32 L. Ed. 2d 556 (1972) ("Although . . . due process tolerates variances in the form of a hearing appropriate to the nature of the case, . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.") (quotation omitted). In *Fuentes,* for example, the Court struck down a state law that allowed creditors, *ex parte,* to obtain a prejudgment writ ordering the sheriff to seize a debtor's goods. The law failed because it did not afford the debtor notice and a hearing prior to the seizure. *Fuentes,* 407 U.S. at 83, 92 S. Ct. at 1995, 92 S. Ct. 1995; *see also Wolff v. McDonnell,* 418 U.S. 539, 557-58, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974) ("[S]ome kind of hearing is required at some time before a person is finally deprived of his property interests."); *Connecticut v. Doehr,* 501 U.S. 1, 18, 111 S. Ct. 2105, 2116, 115 L.Ed.2d 1 (1991) (requiring prior notice and a hearing in the absence of "exigent circumstance[s]").

In extraordinary situations, notice and a hearing may be postponed until after the deprivation. *Good Real Property,* 510 U.S. at 53, 114 S. Ct. at 501 ("We tolerate some exceptions to the general rule requiring

predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.") (quotations omitted). In *Mitchell v. W.T. Grant,* 416 U.S. 600, 611, 94 S. Ct. 1895, 1902, 40 L. Ed. 2d 406 (1974), for example, the Court distinguished *Fuentes* and upheld a statute allowing creditors to sequester the goods of delinquent debtors without affording them prior notice and a hearing. Under the statute in *Mitchell,* to sequester the goods, a creditor could file an *ex parte* application with a judge showing that the delinquent debtor had the power to "conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." *Id.* at 605, 94 S. Ct. at 1899 (quoting La. Code Civ. Proc. Ann. art. 3571). If satisfied with the showing, the judge would then issue a writ of sequestration. *Id.* at 605-06; *see also Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679-80, 94 S. Ct. 2080, 2089-90, 40 L. Ed. 2d 452 (1974) (allowing postponement of notice and a hearing until after the seizure of a yacht in part because pre-seizure notice might have prompted the defendant to destroy, conceal, or remove the property).

If postponed, however, notice and a hearing must be given immediately after the deprivation. *See Mitchell,* 416 U.S. at 606, 94 S. Ct. at 1899. Under the statute upheld in *Mitchell,* a creditor could obtain a writ of sequestration based on an *ex parte* judicial determination, but the debtor, afterwards, could

"*immediately* . . . seek dissolution of the writ." *Id.* (emphasis added). Similarly, in *Barry v. Barchi,* 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979), the Court struck down a statute allowing the New York State Racing and Wagering Board to postpone notice and a hearing until an unspecified time after the suspension of a horse racing license. It held that the provision for delaying the administrative hearing "neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues." *Barchi,* 443 U.S. at 66, 99 S. Ct. at 2650.

These constitutional principles are mirrored in the framework of Rule 65 Federal Rules of Civil Procedure. Rule 65 provides that, under ordinary circumstances, courts have discretion to order a certain course of action by issuing a preliminary injunction only after affording the "adverse party" notice and a hearing.[9] Prior notice and a hearing are required even if the hearing will be duplicative of the

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[9] In noting the similarities between the due process requirement of a prompt post-restraint hearing and Rule 65, I do not adopt the view that due process necessarily requires Rule 65 compliance. *See United States v. Holy Land Foundation for Relief and Development,* 493 F.3d 469, 473-76 (5th Cir. 2007) (en banc); *but see United States v. Roth,* 912 F.2d 1131, 1133 (9th Cir. 1990) ("[I]n order for a restraining order under [21 U.S.C.] § 853 to be constitutional, the district court must hold a hearing under Rule 65."). I refer to Rule 65 only to underscore the point that in those exceptional cases where notice and a hearing are delayed until after the restraint occurs, the hearing ought to be conducted as promptly as possible.

issues to be litigated at trial. *See* Fed. R. Civ. P. 65(a)(2).

In extraordinary situations, Rule 65, like the Due Process Clause, provides an exception to the general rule of prior notice and a hearing. Rule 65 provides that a temporary restraining order ("TRO") may be granted without notice, but only if the party requesting the order can offer specific facts clearly showing that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). TROs are "designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction." 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2951, at 253 (2d. ed. 1995).

Consistent with due process, Rule 65 requires a prompt post-restraint hearing when a TRO is granted. TROs expire after a fixed period of time set by the court that can be no longer than ten days. Fed. R. Civ. P. 65(b)(2). Immediately after the TRO is granted, therefore, the applicant must move for a preliminary injunction, which requires prior notice and a hearing. Fed R. Civ. P. 65(a); *see* Fed. R. Civ. P. 65(b)(3). Unless notice and a hearing are afforded within the ten-day period, the TRO will expire.

Congress also recognized these norms in those parts of the criminal forfeiture statute that regulate protective orders entered prior to the return of an

indictment, 21 U.S.C. § 853.[10] Before the indictment is returned, § 853 authorizes the court to restrain property only "after notice to persons appearing to have an interest in the property and opportunity for a hearing." § 853(e)(1)(B). At the hearing, before it issues the restraint, the court must determine that "there is a substantial probability that the United States will prevail on the issue of forfeiture." § 853(e)(1)(B)(i). Section 853, like Rule 65, allows this hearing to be delayed until after the restraint occurs only in exceptional cases. When an indictment has not yet been returned, the court may enter a temporary restraining order without notice or opportunity for a hearing "if the United States demonstrates that there is probable cause to believe that . . . provision of notice will jeopardize the availability of the property for forfeiture." § 853(e)(2). Even in these rare cases, however, the hearing must be held within ten days of the restraint, or the restraint will expire: "[s]uch a temporary order shall expire not more than ten days after the date on which it is entered. . . . A hearing requested concerning [a TRO] shall be held at the earliest possible time and prior to the expiration of the temporary order." *Id.*

In those parts of the criminal forfeiture statute that regulate protective orders entered following the return of an indictment, however, Congress was silent

[10] Section 853 speaks to the return of an indictment or the filing of an information. I refer here only to indictments.

as to whether the defendant is entitled to a post-restraint hearing prior to trial. *See id.* § 853(e)(1)(A). I apply the general due process requirements discussed above to determine that the Constitution requires that such a hearing be held in this context.

III.

In general, then, once property has been seized or restrained by a court order, the property owner must, at minimum, be given notice of the seizure or restraint and a prompt hearing. The Government argues for a departure from this general rule in cases like this one, where the court restrains property subject to forfeiture in a criminal case. The Government argues that, in these cases, a hearing on the propriety of the restraint may be delayed until the criminal case comes to trial. To determine whether the Kaleys' case justifies a departure from the general requirement of a prompt post-restraint hearing, I examine the three relevant interests that have been set out by the Supreme Court: (1) the private interest in a prompt hearing, (2) the risk of an erroneous deprivation without a prompt hearing, and (3) the government interest in delaying the hearing until trial. *See Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976) (the "*Mathews* factors").

First, the Kaleys have a private interest in using their property that is akin to the private interests in *Mitchell* and *Fuentes.* In those cases, a creditor

alleged an interest in the delinquent debtor's property and wished to freeze that property before the parties' rights could be adjudicated. *See Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 601-02, 94 S. Ct. 1895, 1897, 40 L. Ed. 2d 406 (1974); *Fuentes v. Shevin,* 407 U.S. 67, 69-70, 92 S. Ct. 1983, 1988-89, 32 L. Ed. 2d 556 (1972). The only difference here is that the Government, rather than a private creditor, asserts the interest. In both *Mitchell* and *Fuentes,* the Court noted that, even though the status of the property was contested, the defendant retained an interest,[11] and due process therefore required a prompt hearing on the propriety of the deprivation. *Mitchell,* 416 U.S. at 606-07, 94 S. Ct. at 1899-1900 (holding that a statute entitling the defendant to an immediate hearing following issuance of a writ of sequestration "effect[ed] a constitutional accommodation of the

[11] Our decision in *United States v. Bailey,* 419 F.3d 1208 (11th Cir. 2005), further affirms that criminal defendants retain an interest in forfeitable property. Prior to *Bailey,* some courts had held that potentially forfeitable assets vest in the government immediately upon commission of the act giving rise to the forfeiture. Under such a rule, the government takes all right and title to forfeitable assets even before investigation and indictment of the criminal defendant. *Bailey* clarified that there is no "unheard-of provision for immediate, undecreed, secret vesting of title in the United States." *Bailey,* 419 F.3d at 1213 (quoting *United States v. 92 Buena Vista Ave.,* 507 U.S. 111, 134, 113 S. Ct. 1126, 1140, 122 L. Ed. 2d 469 (1993) (Scalia, J. concurring in the judgement)). Under *Bailey,* potentially forfeitable assets listed in the forfeiture count do not vest in the government until they are actually forfeited upon conviction or court order. *See id.*

conflicting interests of the parties"); *Fuentes,* 407 U.S. at 81-82, 92 S. Ct. 1994-95 (holding that the defendant's property interest requires a pre-seizure hearing).

The Kaleys also have an additional private interest in a prompt hearing that is not present in the civil context because, as a result of the protective order, they cannot use their assets to employ their preferred attorneys. The protective order therefore implicates their Sixth Amendment right to counsel of choice. The right to counsel of choice, while not absolute, is not satisfied merely because the defendant is able to retain adequate substitute counsel. It protects a criminal defendant's ability to hire the particular lawyer he prefers. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 146, 126 S. Ct. 2557, 2562, 165 L. Ed. 2d 409 (2006) ("[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best."). In this case, therefore, it is irrelevant from a Sixth Amendment point of view that the Kaleys have $270,000 in unrestrained assets with which to hire less expensive counsel. What matters is that, without access to the property covered by the protective order, the Kaleys are unable to retain their preferred attorneys, Howard Srebnick and Susan Van Dusen.

Delaying the due process hearing until trial will only temporarily deprive the Kaleys of their property rights, but it will completely eviscerate their right to

counsel of choice. After the verdict is handed down, of course, the Kaleys will no longer need to retain Srebnick and Van Dusen. "While the [Sixth Amendment] deprivation is nominally temporary, it is 'in that respect effectively a permanent one.' 'The defendant needs the attorney *now* if the attorney is to do him any good.'" *United States v. E-Gold, Ltd.,* 521 F.3d 411, 417-18 (D.C. Cir. 2008) (quoting *United States v. Monsanto,* 924 F.2d 1186, 1193 (2d Cir. 1991) (en banc); *United States v. Moya-Gomez,* 860 F.2d 706, 726 (7th Cir. 1988)) (emphasis in original). The Sixth Amendment interest, for that reason, weighs heavily in the balance.

I next analyze the second factor, the risk of an erroneous deprivation without an immediate hearing. In this case, prosecutorial incentives increase the likelihood of an erroneous deprivation in the absence of a prompt hearing. A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel. If the prosecutor can delay judicial oversight of the restraint until trial, he also has nothing to lose, as he does not have to dedicate any extra resources to defending his decision.

Also relevant to the risk of an erroneous deprivation is "the probable value, if any, of additional or substitute procedural safeguards." *Mathews,* 424 U.S. at 335, 96 S. Ct. at 903. In this case, without a prompt hearing, probable cause rests, initially, on the

grand jury having found probable cause before returning the indictment and, then, on the district court's finding of probable cause, both of which findings were made on the Government's *ex parte* showing.[12] Neither procedure significantly reduced the risk of an erroneous deprivation. In grand jury proceedings, the government may rely, even entirely, on "read-backs and hearsay witnesses," *United States v. Waldon,* 363 F.3d 1103, 1109 (11th Cir. 2004) (per curiam), or illegally acquired evidence, *United States v. Calandra,* 414 U.S. 338, 344-45, 354-55, 94 S. Ct. 613, 618, 623, 38 L. Ed. 2d 561 (1974).[13] The government has no duty to disclose exculpatory evidence to the grand jury, *United States v. Williams,* 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992), and the defendant has no right to testify or even appear, *see* Fed. R. Crim. P. 6(d)(1). The grand jury, then, is not a mechanism well designed to protect a defendant against an erroneous deprivation.

The district court's finding is slightly more reliable than the grand jury's. It was, however, made upon an *ex parte* showing; the Kaleys had no opportunity to

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[12] In some cases, the court may treat the indictment, standing alone, as establishing probable cause. The magistrate judge did that here. It was only after the Kaleys moved the court to vacate the protective order that the magistrate judge required the prosecutor to present, *in camera,* independent proof of probable cause.

[13] The government may even rely on testimony that turns out to be perjured. *See Anderson v. Sec'y for the Dep't. of Corr.,* 462 F.3d 1319, 1326-27 (11th Cir. 2006) (per curiam).

challenge the Government's showing. In this sense, the court's probable cause finding is comparable to the *ex parte* judicial determination in *Mitchell. See Mitchell,* 416 U.S. at 606, 94 S. Ct. at 1899 (describing a statute that allowed a judge to issue a writ of sequestration upon a creditor's *ex parte* application). Here, as in that case, the *ex parte* determination is insufficient to justify delaying the post-restraint hearing for long after the restraint is imposed. *See id.* at 618, 94 S. Ct. at 1905 (stressing that, after the deprivation, the debtor is entitled to an immediate hearing).

Finally, I examine the Government's interest. Citing the legislative history of the forfeiture statute, the Government asserts that:

> requiring the government to prove the merits of the underlying criminal case and forfeiture pretrial would make obtaining a restraining order too difficult and would make pursuing such an order inadvisable from the government's standpoint because of the potential for damaging premature disclosure of the government's case and trial strategy, as well as jeopardizing the safety of witnesses and victims.

Gov't. Br. at 31. Although these are certainly legitimate interests, the Government overlooks the fact that the party challenging the restraint bears the burden of convincing the court that probable cause is lacking. This is true whether the defendants challenge a seizure made pursuant to a § 853(f) warrant

via a motion filed pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, as they could have in *Bissell,* or a restraint affected pursuant to a § 853(e) protective order via a motion to vacate the order.

The *Mathews* factors, on balance, do not justify an exception to the settled minimum due process requirement of a prompt post-restraint hearing. Accordingly, the Kaleys are entitled to a pretrial hearing on the merits of the protective order.[14] This court should therefore have reversed and remanded to the district court with instructions to afford the

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[14] The majority of our sister circuits that have considered the issue are in accord. *See E-Gold,* 521 F.3d at 419 (requiring a post-restraint, pretrial hearing when the defendant needs the assets to meaningfully exercise the right to counsel); *Monsanto,* 924 F.2d at 1203 (same); *Moya-Gomez,* 860 F.2d at 728-29 (same); *United States v. Lewis,* 759 F.2d 1316, 1324-25 (8th Cir. 1985) (same with respect to restraining orders issued pursuant to 21 U.S.C. § 848); *United States v. Crozier,* 777 F.2d 1376, 1383-84 (9th Cir. 1985) (noting due process requirement of a post-restraint hearing in cases involving § 853 orders); *see also United States v. Melrose East Subdivision,* 357 F.3d 493, 499 (5th Cir. 2004) (noting the "broad agreement that due process requires the district court to hold a prompt hearing at which the property owner can contest the restraining order – without waiting until trial to do so – at least when the restrained assets are needed to pay for an attorney"); *cf. United States v. Long,* 654 F.2d 911, 915 (3rd Cir. 1981) (rejecting due process challenge to restraining order issued pursuant to § 848 where order issued after hearing); *United States v. Farmer,* 274 F.3d 800, 803, 805-06 (4th Cir. 2001) (requiring a post-restraint, pretrial hearing but only where the defendant shows the restrained assets are untainted and necessary to secure counsel of choice); *United States v. Jones,* 160 F.3d 641, 647 (10th Cir. 1998) (same).

Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restraint their assets. Because the court mistakenly believes that it is bound by *Bissell,* however, the Kaleys may be deprived of this right. For these reasons, I specially concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES
OF AMERICA,

v.

KERRI L. KALEY and
BRIAN P. KALEY, *et al.,*

DEFENDANTS. /

OPINION AND ORDER AFFIRMING IN PART AND REVERSING IN PART ORDER OF MAGISTRATE JUDGE AND OVERRULING IN PART AND SUSTAINING IN PART OBJECTIONS TO ORDER DENYING DEFENDANTS' MOTION TO VACATE PROTECTIVE ORDER

(Filed Jun. 25, 2007)

This matter is before the Court on the appeal and objections filed by Defendants Kerri L. Kaley and Brian P. Kaley to the order entered by Magistrate Judge James M. Hopkins that denied their motion to vacate the protective order which restrained their use of certain property and which denied their motion for an evidentiary hearing on whether the pretrial restraint of the property should remain in place pending a trial. DE 82. The Court has considered the arguments of the parties and has conducted a *de novo* review of the record. Upon the Court's *de novo* review

of the record, it is hereby ORDERED AND ADJUDGED as follows:

I. PROBABLE CAUSE AND A POST-RESTRAINT EVIDENTIARY HEARING:

The Court has conducted a *de novo* review of the Declaration[1] submitted by the United States to support a finding of probable cause that, among other things, the property subject to the protective order, namely Defendants residence and a certificate of deposit which was obtained from an equity line of credit based upon Defendants' ownership interest in their residence,[2] constitutes property "involved in" the money laundering offense charged in the superceding indictment, and constitutes "property traceable to such property." *See* Superceding Indictment, Count 7, Criminal Forfeiture Count (DE 44); 18 U.S.C. § 982(a)(1). The Court affirms the Magistrate Judge's determination, and independently finds, that the United States has demonstrated probable cause to believe that Defendants' residence was "involved in"

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[1] DE 77 (under seal)

[2] As will be discussed more fully below, the Court concludes that the record evidence supports Defendants' appeal and objection to the Magistrate Judge's order to the extent it failed to exclude from the protective order $63,007.65 of "untainted" funds which were incorporated into the certificate of deposit. Through no fault of the Magistrate Judge, the most compelling evidence supporting Defendants' position relative to these funds was not submitted to the Court until June 13, 2007, after the Magistrate Judge entered his ruling. DE 119, 120 (under seal)

the money laundering offense charged in the superceding indictment, and that all but $63,007.65 of the funds used to obtain the certificate of deposit are "traceable to" the residence.

Because there exists probable cause to believe that the property in question was "involved in" money laundering activity or is "traceable to such property", the protective order has been properly entered. Defendants seek a post-restraint evidentiary hearing to challenge the propriety of the protective order and its scope. Defendants assert that the government must show, in an evidentiary hearing, the amount of proceeds from the allegedly stolen prescription medical devices that can be traced to their residence and the certificate of deposit. Because the United States is now proceeding with its forfeiture claim, in part, under 18 U.S.C. § 982(a)(1)[3], and not solely under 18 U.S.C. § 981(a)(1)(C),[4] whether the property restrained in this case constitutes or is derived from proceeds of the allegedly stolen prescription devices is not of critical importance. So long as there is probable cause to believe that the property was used in the money laundering offense or that the property is

[3] In imposing sentence on a person convicted of money laundering under 18 U.S.C. § 1956, the court shall order forfeiture of any property "involved in such offense, or any property traceable to such property."

[4] Property "which constitutes or is derived from proceeds traceable to a violation" of certain criminal statutes is subject to forfeiture.

traceable to property used in the money laundering offense, which is the case here, the restrained property is not outside the scope of the indictment. The only purpose for granting Defendants an evidentiary hearing under the present circumstances would be to permit them to challenge the underlying merits of the indictment. As the court in *United States v. Bissell,* 866 F.2d 1343, 1349 (11th Cir. 1989), stated, in a post-restraint hearing, the defendants "may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial."[5]

In view of the foregoing, the Court affirms the Magistrate Judge's finding of probable cause and his

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[5] As previously discussed, the United States has demonstrated that probable cause exists to believe that Defendants' residence was "involved in" the money laundering charge asserted in the indictment. It appears to be undisputed that with the exception of $63,007.65, the certificate of deposit is "traceable to" Defendants' residence. Hence, in the post-restraint proceedings that have taken place thus far, Defendants have had the opportunity, and have successfully demonstrated, that some of the restrained property is "outside the scope of the indictment." Other than a challenge to the validity of the indictment itself, or Defendants' assertion of the need to trace proceeds from the sale of the allegedly stolen prescription medical devices to the restrained property, which is no longer required, there is no suggestion or indication that any property other than the $63,007.65 is "outside the scope of the indictment." Hence, with the exception of the constitutional challenges made by Defendants, which will be discussed below, no legally permissible purpose would be served by having a post-restraint evidentiary hearing.

conclusion that a post-restraint evidentiary hearing to determine whether the government "wrongfully restrained specific assets which are outside the scope of the indictment" is not required. *See Bissell,* 866 F.2d at 1349. The Court reverses and sustains Defendants' objections to the Magistrate Judge's failure to release from the scope of the protective order $63,007.65 of funds which the record evidence has sufficiently demonstrated were not used in the money laundering offense charged in the superceding indictment or traceable to such property and which the record evidence has failed to show constitute or is derived from proceeds traceable to a criminal violation asserted in the superceding indictment.

II. DEFENDANTS' SIXTH AMENDMENT CLAIM:

The Court affirms and overrules Defendants' objections to the Magistrate Judge's finding that Defendants' Sixth Amendment right to counsel of their choice has not been violated by the pretrial restraint of property which they wish to use to retain counsel. The Court also affirms the Magistrate Judge's determination that there has been no showing of prosecutorial bad faith or vindictiveness. As the Magistrate Judge noted, the court in *Bissell* stated that:

> But where, as here, no prosecutorial bad faith is evident, and the district court has made a determination of probable cause, either on its own or upon the grand jury's return of the indictment, there has been

> no improper denial of defendant's Sixth Amendment right to counsel of choice.

Bissell, 866 F.2d at 1355. This holding is precisely applicable to the present case. This Court has found probable cause to restrain Defendants' assets and there is no showing of prosecutorial bad faith or vindictiveness. The fact that the defendants in *Bissell* did not contend that the government wrongfully restrained non-forfeitable assets, and Defendants in this have made that assertion, is not material. This Court's independent determination of probable cause to believe that the restrained assets fall within the ambit of the superceding indictment's forfeiture count is a sufficient check on the government to pass Sixth Amendment scrutiny. *Bissell,* 866 F.2d at 1354-55.

III. DEFENDANTS' DUE PROCESS CLAIM:

Defendants contend that the failure of the Court to conduct a post-restraint evidentiary hearing to allow them to challenge the propriety of the protective order derives them of due process. Defendants assert that the Magistrate Judge erred in failing to evaluate the factors the court in *Bissell* determined were appropriate for a due process analysis. While the Magistrate Judge did not expressly analyze the factors, a rejection of Defendants' contention is implicit in his order. In any event, this Court, upon a *de novo* review of the record, concludes that Defendants' right to due process has not been violated.

In *Bissell,* the court addressed the defendants' contention that an immediate post-restraint hearing relative to the validity of a government seizure of allegedly forfeitable assets was required by due process. In evaluating the need for a hearing, the court concluded that it was necessary to weigh the four factors of (1) length of the delay in conducting a hearing; (2) the reason for the delay; (3) the defendant's assertion of his right to a hearing and (4) the prejudice to the defendant in not conducting a hearing. *Bissell,* 866 F.2d at 1352.[6]

As for the length of the delay, the *Bissell* court found eight months between the initial restraint and the trial on the merits to not be significant. *Id.* at 1353. But for the delays that have resulted from Defendants' challenge to the pre-trial restraints, this case would have been set for trial. Even with the delays attendant to these post-restraint proceedings, this Court can try this case within the eight months the *Bissell* court found "not significant." The delay factor weighs against Defendants.[7]

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[6] The test was adopted from the case of *Barker v. Wingo,* 407 U.S. 514, 530 (1972), which the United States Supreme Court utilized in a civil forfeiture proceeding challenging on due process grounds the delay between a seizure of currency and a civil forfeiture trial. *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In United States Currency,* 461 U.S. 555 (1983).

[7] Defendants' counsel of choice have only entered a limited appearance in this case. Defendants are hoping these post-restraint proceedings will free-up sufficient funds to allow the

(Continued on following page)

As to the reason for delaying a hearing, the *Bissell* court noted Congress' concern that in criminal cases, the government not be required to prove the underlying criminal case and forfeiture counts in advance of trial in order to restrain property alleged to be forfeitable in an indictment. The *Bissell* court found these concerns justifiable reasons for delaying a hearing on the merits of the governments case until trial, "particularly in light of the government's compelling regulatory interest in preventing crime." *Id.* Contrary to Defendants' assertion, these reasons are not applicable only in cases involving racketeering and narcotics trafficking or where there is concern for the safety of witnesses. Preventing challenges to the validity of the indictment in advance of trial is a legitimate concern in all criminal cases. *See Bissell,* 866 F.2d at 1349 (at a post-restraint hearing the defendant "may not challenge the validity of the indictment itself and thus require the government to present its evidence before trial.") As discussed previously, at this juncture, the only purpose for a post-restraint evidentiary hearing would be to challenge the validity and merits of the indictment. Thus, the

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entry of a permanent appearance in the case by their counsel of choice. Defendants have indicated that they will appeal this order to the Eleventh Circuit Court of Appeals, which *may* cause additional delays in getting this case to trial. While Defendants have every right to challenge the pre-trial restraints and pursue all available appellate remedies, to the extent they do so unsuccessfully, they should not be heard to complain on due process grounds about delays attributable to their actions.

reason for the delay weighs in favor of the government and against Defendants.

The third factor to be weighed is Defendants' assertion of a right to a hearing. While Defendants have done so in this case, that fact does not end the inquiry. As the *Bissell* court noted, the purpose of a post-restraint hearing is "to determine whether legitimate assets-those *outside the scope of the indictment*-have been wrongfully restrained." *Id.* at 1353 (emphasis added). In the present case, based upon the money laundering charge and this Court's probable cause determination, the only way Defendants could demonstrate that the restrained assets, other than the $63,007.65 that is being released by this order, are outside the scope of the indictment is to challenge its validity on the merits. As has been seen previously, such a challenge cannot be made pretrial. At best, the third factor is in equipoise.

The fourth factor is prejudice to Defendants resulting from the absence of a post-restraint hearing. As the *Bissell* court noted, a wrongful deprivation of Defendants' legitimate assets will severely impair their defense, coming back full circle to Defendants' Sixth Amendment right to counsel of their choice. *Id.* at 1354. In analyzing this factor, it was recognized that the court cannot simply look to the interests of the criminal defendant. Rather, the claim and interests of the government to the property must also be considered. In view of these competing interests, the court concluded that judicial control of the process provides a "significant check on the government's

power to restrain legitimate, nonindicted assets." *Id.* Hence, a district court's probable cause determination, as is present here, diminishes the prejudicial effect of the pretrial restraint. When all four factors are weighed in this case, the Court concludes that Defendants have not been denied due process by the absence of a post-restraint evidentiary hearing.

IV. *EX POST FACTO* CHALLENGES.

The Court affirms and overrules Defendants' objections to the Magistrate Judge's conclusion that the pretrial restraint effected in this case does not violate the *ex post facto* provision of the United States Constitution. Moreover, even assuming that Defendants' arguments that the statutory changes in question are deemed substantive rather than procedural, it would not alter the result. Defendants are charged with money laundering under 18 U.S.C. § 1956 and the criminal forfeiture count is based, in part, on 18 U.S.C. § 982(a)(1). As a result, pretrial restraint was authorized through 21 U.S.C. § 853(e)(1). *See* 18 U.S.C. § 982(b)(1); *United States v. Razmilovic,* 419 F.3d 134, 139-40 (2d Cir. 2005). The ability to impose pretrial restraints on property "involved in" money laundering or property "traceable to such property" existed during the period the alleged conspiracy was in existence. Under such circumstances, there is no *ex post facto* violation. *United States v. Hersh,* 297 F.3d 1233, 1244-45 (11th Cir. 2002).

V. CONCLUSION.

Based upon all of the foregoing, the Magistrate Judge's Order is affirmed in all respects, and Defendants' objections are all overruled, except that Defendants' objection to $63,007.65 being subject to the protective order, which funds have been transferred into the certificate of deposit, is sustained and the Magistrate Judge's Order is reversed in this one respect.[8] Therefore, $63,007.65 shall be released to Defendants from the protective order. The remainder of the restrained property shall continue to be subject to the protective order pending further order of the Court.

Done and ordered in Chambers in West Palm Beach, Palm Beach County, Florida, this 25th day of June, 2007.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

[8] The Court notes that the United States agrees that the Magistrate Judge made an error in calculating the number of hours Defendants' counsel claim they need to prepare to try this case. The Magistrate Judge neglected to include 400 hours of associate time in the equation. In the event this error is determined to be relevant to any judicial determination, the Court acknowledges the error and the government's recognition of it.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-80021-Cr-Marra/Hopkins

UNITED STATES
OF AMERICA,

vs.

KERRI L. KALEY and
BRIAN P. KALEY, *et al.,*

Defendants. /

ORDER DENYING DEFENDANTS KERRI AND BRIAN KALEY'S CONSOLIDATED MOTION TO VACATE THE PROTECTIVE ORDER AND FOR A HEARING CONCERNING THE PROTECTIVE ORDER [DE 17] AND TO BAR PRETRIAL RESTRAINTS ON A "FACILITATION" THEORY [DE 52]

(Filed May 2, 2007)

This cause is before the Court on Orders of Referral. [DEs 28, 71]. Defendants Kerri and Brian Kaley have moved to Vacate the Protective Order and for a Hearing [DE 17] and to Bar Pretrial Restraints on a "Facilitation" Theory. [DE 52]. Defendants' motions are denied as indicated below.

PROCEDURAL POSTURE OF THE CASE

On February 6, 2007, a federal grand jury returned an indictment against defendants charging

that they conspired, from approximately January 1995 through on or about February 15, 2005, to transport stolen property and to obstruct FDA proceedings. [DE 1]. The indictment also charged defendants with substantive interstate transportation of stolen property and obstruction of justice. [DE 1]. A criminal forfeiture count seeking the proceeds of defendants' interstate transportation of stolen property including a money judgment in the amount of $2,195,635.28 and a certificate of deposit which had been collateralized by the defendants' primary residence was included in the Indictment [DE 1].

On February 7, 2007, the United States moved *ex parte* for a protective order based on the grand jury's determination of probable cause [DE 5], which motion was granted. [DE 6]. The United States, separate and apart from the protective order, recorded a *lis pendens* against defendants' primary residence in New York.

On March 5, 2007, Defendants moved to vacate the protective order, in whole or in part, and for a hearing alleging (1) defendants cannot retain their counsel of choice as the protective order precludes them from using the certificate of deposit for their fees, (2) that the *lis pendens* prevents them from using the equity in their home to pay legal fees, and (3) that the protective order is vague, over-broad, and violates their Fifth Amendment and Sixth Amendment rights as well as their rights against *ex post facto* increase of punishment. [DE 17].

On April 6, 2007, a status conference on the Protective Order issues was convened. The United States asserted that the *lis pendens* restraint on the principal residence was justified since they had traced $140,000 in proceeds into the residence and since the Mandatory Victim Restitution Act of 1996, 18 U.S. C. Section 3663A, required them to consider the restitution rights of the victims in their charging decisions. Moreover, the United States advised the Court that a hearing could be rendered moot if the United States presented a Superseding Indictment including money laundering as well as money laundering forfeiture.

On April 10, 2007, the grand jury returned a Superseding Indictment encompassing a money laundering charge and money laundering forfeiture, which included the certificate of deposit and the principal residence for forfeiture as proceeds or involved in the criminality. (DE 44).

On April 17, 2007, the Defendants filed an Outline of Remaining Issues (DE 53) and on April 19, 2007, the United States filed its Response. (DE 57).

On April 17, 2007, the Defendants also filed a Motion to Bar Pretrial Restraints on a "Facilitation" Theory. (DE 52). On April 24, 2007, the United States filed its Response (DE 68) and on April 26, 2007, the Defendants filed their Reply. (DE 69).

On April 27, 2007, a hearing was held on the outstanding motions pertaining to the pretrial restraints.

On May 1, 2007, the United States submitted a probable cause affidavit in relation to the certificate of deposit and the principal residence. The undersigned found probable cause and signed a Restraining Order in relation to those assets.

ANALYSIS

The Defendants assert that a pretrial hearing on the propriety of the Government's restraint of their certificate of deposit and principal residence is necessary due to the consequent impediment to their ability to retain counsel of choice.

In *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989), the Eleventh Circuit examined the issue of whether a defendant is entitled to a pre-trial hearing to determine the propriety of restrained assets. It noted that the district court retains authority to hold a post-restraint hearing where "the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity, but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial." *Id.* at 1349.

Where there is a challenge to the propriety of restrained assets being made unavailable for defendant to retain counsel of choice, the Eleventh Circuit stated that "where, as here, no prosecutorial bad faith is evident, and the district court has made a determination of probable cause, either on his own or upon

the grand jury's return of the indictment, there has been no improper denial of defendant's Sixth Amendment right to counsel of choice." *Id.* at 1355. In *Bissell,* the Government had submitted affidavits in support of probable cause before the district court made its probable cause determination. *Id* at 1354. The Eleventh Circuit found that such judicial control, where no prosecutorial bad faith is evident, was sufficient to ensure that there was no Sixth Amendment violation and no post-restraint hearing was necessary until trial. *Id.* at 1354-55.

In the instant case the Court has made a probable cause determination after reviewing the Government's affidavit in support of probable cause.

The Defendant's argue that the Government acted vindictively by superseding the Indictment after they alerted the Government to defects in the Indictment (failure to have the grand jury foreperson sign the Indictment and failure to include the principal residence as forfeitable property) with their motion to vacate. The Government responded that they were merely acting to correct their mistakes pretrial in order to protect their legitimate interests.

In *United States v. Barner,* 441 F.3d 1310 (11th Cir. 2006), the Eleventh Circuit declined to decide whether a presumption of vindictiveness could ever arise in a pre-trial setting, but directed the courts to evaluate whether the facts formed a "realistic likelihood of vindictiveness." *Id.* at 1317-18. In the instant case the Government was merely acting to correct a

defect in the Indictment in order to remove any appellate issues and to ensure that the defendants' forfeitable assets could be properly restrained. These are appropriate Government motives justifying the Superseding Indictment. As in *Barner,* there are no specific facts that show the pre-trial history of this case was so caustic that it could be presumed that the prosecutors acted improperly. *Id.* at 1320.

Moreover, the defendants at the April 27, 2007, hearing admitted that there was no evidence of actual vindictiveness on the part of the prosecutors. *Id.* at 1322.

Furthermore, the evidence at the April 27, 2007, hearing showed that the Defendants have $325,000-$350,000 currently available for retaining counsel, albeit by having to pay taxes and penalties on some of the funds available to be converted. While their counsels of choice are charging them $375,000 in up-front fees and $100,000 for expenses, competent counsel can readily be obtained for $325,000-$350,000. Their counsels of choice stated that they estimate working 400 hours each preparing for and handling the estimated 2-3 week trial. Even assuming that $100,000 is necessary for expenses, at least $225,000 would still be available for fees. Thus, they have sufficient funds to retain attorneys charging $280 per hour or less. The Court notes and the Defendants' temporary counsels agree that many competent attorneys choose to work on the Criminal Justice Act panel where they charge $90 per hour. This Court concludes that the Defendants' Sixth Amendment rights are not being

improperly compromised by the Government's court supervised pre-trial restraints.

The Defendants have also asserted other bases for alleged improper Government pre-trial restraint of assets. They contend that the Government has not shown that the funds were not traceable to or used in "thefts," the underlying criminal activity. However, participants in any post-restraint hearing cannot challenge the underlying forfeitability of property and thereby force the Government to present its evidence before trial. *Bissell* at 1349. In addition, the Court has found probable cause to support the restraints.

Defendants also claim that the pre-trial restraints violate the *ex post facto* clause on two grounds. First, they claim that the Government took advantage of a change in the law, that allowed pre-trial restraint of assets, enacted a year after their alleged crimes ended. Second, they assert that the law that allows the forfeiture of assets was enacted in the middle of the alleged conspiracy and thus permits punishment for crimes committed prior to the law's enactment.

As to the first ground, pre-trial restraints of forfeitable assets are merely "procedures by which the case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins v. Youngblood,* 497 U.S. 37, 45 (1990); *United States v. Crozier,* 777 F.2d 1376, 1383 (9th Cir. 1985). Thus, the *ex post facto* clause is not implicated.

Secondly, for conspiracies a forfeiture penalty enacted during the course of the continuing offense does not violate the *ex post facto* clause. *United States v. Hersh,* 297 F.3d 1233, 1244 (11th Cir. 2002); *United States v. McHan,* 101 F.3d 1027, 1041 (4th Cir. 1996). Additionally, this motion may be premature and properly considered after conviction. *United States v. Sudeen,* 2002 WL 1897095 (E.D. La. 2002).

Wherefore, this Court **DENIES** Defendants Kerri and Brian Kaley's Motion to Vacate the Protective Order and for a Hearing [DE 17] and to Bar Pretrial Restraints on a "Facilitation" Theory. [DE 52].

DONE AND ORDERED in Chambers this 2 day of May, 2007 at West Palm Beach in the Southern District of Florida.

/s/ James M. Hopkins
JAMES M. HOPKINS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15048-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KERRI L. KALEY,
BRIAN P. KALEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Jul. 17, 2012)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

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* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

KERRI L. KALEY and
BRIAN P. KALEY,

Defendant. /

ORDER GRANTING MOTION TO STAY

(Filed Sep. 20, 2012)

THIS CAUSE is before the Court upon Defendants' Motion to Stay or Continue Arraignment Pending Disposition of Petition for Writ of Certiorari [DE 250]. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

This case was indicted over five and one-half years ago. For approximately one and one-half of those years, the parties have been litigating before this Court the question of whether Defendants' assets have been restrained consistent with the requirements of due process. For approximately four of those years, this issue has been litigated before the United States Court of Appeals for the Eleventh Circuit.

Defendants want the restraint of their assets lifted so they can use them to retain counsel of their choice.

As the case presently stands, it has been determined that the restraint of Defendants' assets is consistent with the requirements of due process. Defendants disagree and want to exhaust their appellate remedies by seeking Supreme Court review of the most recent decision of the Eleventh Circuit Court of Appeals. Not surprisingly and understandably, the United States believes that after five and one-half years, it is time for the case to proceed to trial. Defendants seek a stay of the proceeding pending a determination by the Supreme Court as to whether it will review the decision of the Court of Appeals.

There is significant merit to the government's argument. However, the Court does not believe that the delay that has occurred in this case can be attributed to Defendants. Defendants have properly exercised their right to appellate review, and the [sic] they were vindicated in their first interlocutory appeal. The government has acknowledged that if the Supreme Court agrees to review the appellate decision, the case will once again have to be put on hold. In view of the extensive delay that has already occurred and the prospect that the case will once again have to be stayed if the Supreme Court grants review, this Court concludes that the equities weigh in favor of granting a stay for the relatively short additional period of time required for the Supreme Court to consider Defendants petition for review, rather than

possibly improperly forcing Defendants to defend the case without the benefit of the assets they claim are necessary to retain counsel of their choice.

In view of the foregoing, Defendants' Motion is GRANTED.

DONE and ORDERED in West Palm Beach, Florida, this 20th day of September, 2012.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

Copies provided to:

All counsel