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PRETRIAL RESTRAINT OF ASSETS: Lawful Governmental Interference with the Right to Counsel of Choice?

by Donna L. Eng

In this, the year of the 50th anniversary of Gideon v. Wainwright, we've read a lot of articles discussing the right to counsel, but none, as far as I recall, discussing the right to counsel of choice. While it may be true that there is no right to counsel of choice for those who are appointed counsel, what about those who are fortunate enough to be able to retain counsel? Isn't being entitled to counsel of your choice a logical extension of Gideon?

On March 18, 2013, the United States Supreme Court granted certiorari in United States v. Kaley, 677 F.3d 1316 (11th Cir. 2012). At the time I read the Question Presented on the Supreme Court website, I had just recently attended the annual celebration of Gideon which had been hosted by the Office of the Public Defender for the Fifteenth Judicial Circuit. With thoughts of the Gideon celebration fresh in my mind, reading the Question Presented really piqued my interest. The question presented reads:

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

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

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

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

Thus, the question presented in this petition, which would resolve a split in the circuits, is: When a post-indictment, ex parte restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

After reading the question presented, I read the Kaley I and Kaley II opinions and became increasingly irritated. How can a majority of Eleventh Circuit justly allowing the government to interfere with an individual’s right to counsel of choice—before the individual has even been convicted of any crime—in such a way? I suppose the best way to answer this question is to start with Kaley I.

Kerri Kaley, an employee of Ethicon Endo-Surgery, was accused of stealing prescription medical devices from hospitals and selling them on the black market. After Kerri and her husband Brian both became targets of the investigation, each retained separate counsel. After learning that their legal fees could run up to $500,000, the Kaleys secured a home equity line of credit of $500,000 on their home and used the proceeds to buy a certificate of deposit ("CD").

Eventually, the Kaleys were indicted in a seven-count indictment with conspiracy to transport stolen property, transportation of stolen property, obstruction of justice, and money laundering. Also in the indictment was a criminal forfeiture count. After the grand jury returned the indictment, the government moved, ex parte, for an order enjoining the Kaleys from encumbering the property listed in the forfeiture count. After concluding that the indictment established probable cause to believe that the property was traceable to Counts 2-6, wherein the Kaleys were charged with violating 18 U.S.C. §2314, the Magistrate Judge granted the government’s ex parte motion the same day it was filed. The next day, the government filed a notice of lis pendens against the Kaleys’ residence.

The Kaleys moved the district court to vacate the protective order entered by the Magistrate Judge. In support of their motion, they argued that the restraining order prevented them from retaining counsel of their choice in violation of the Sixth Amendment. After a hearing, the Magistrate Judge granted the Kaleys’ motion in part and limited the protective order’s scope, as applied to the CD, to $140,000.

Several days later, a grand jury returned a superseding indictment against the Kaleys, charging them with the same seven counts as in the original indictment, plus an additional charge of conspiracy to launder the proceeds of the §2314 offense, in violation of 18 U.S.C. §1956(h). The superseding 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. In response, the Kaleys renewed their motion to vacate the Magistrate Judge’s protective order and expressly requested a pretrial, post-restraint evidentiary hearing.

At the next hearing, after questioning whether the indictment, standing alone, provided probable cause to restrain the Kaleys’ assets, the Magistrate Judge ordered the Assistant United States Attorney ("AUSA") to provide an affidavit in support of probable cause. The AUSA submitted, in secret, and under seal, an affidavit of the FBI case agent.

Based on the agent’s affidavit, the Magistrate Judge thereafter issued two orders. In the first order, the Magistrate Judge found probable cause—based on the indictment and the case agent’s affidavit—to believe that the CD and the Kaleys’ residence were “involved in” the violations of §1956(h) and §2314. In the second order, the Magistrate Judge expanded the scope of the previously issued protective order to include the full value of the CD and the Kaleys’ residence. The next day, the Magistrate Judge issued a third order, denying the Kaleys’ motion to vacate and request for pretrial evidentiary hearing, concluding that “no post-restraint hearing was necessary until trial.”

The Kaleys appealed the Magistrate Judge’s orders to the District Court. After the District Court affirmed the Magistrate Judge’s orders, the Kaleys’ appealed to the United States Court of Appeals for the Eleventh Circuit.

On appeal, the Eleventh Circuit addressed 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 needed for the purpose of retaining counsel of their choice. First, the Court noted that the analysis was controlled by United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989), where the Eleventh Circuit 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.

In Bissell, the Court rejected the contention that the Fifth Amendment entitled the defendants to a pretrial evidentiary hearing because 1) once an indictment has issued, the court “may order restraints to preserve forfeitable assets in a criminal case ex parte;” 2) on its face, 21 U.S.C. §853(a)(1) does not require a hearing either before or after the restraint of assets; and, 3) “the statute’s [21 U.S.C. §853] 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.”

The Bissell Court also noted that at the post-restraint 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.

Although the Kaleys argued that Bisell was no longer good law in light of United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), the Eleventh Circuit disagreed, noting that Gonzalez-Lopez “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,” or “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.”

Nevertheless, after determining that the district court misapplied two of the four Barker and Bisell factors, the Eleventh Circuit reversed and remanded for the District Court to reconsider the four Barker factors. In so doing, the Court noted that the District Court misapplied the third Barker factor (the defendants’ pretrial assertion of the right to an evidentiary hearing), and failed to make a clear finding as to the fourth (prejudice associated with the restraint). The Court observed that the third factor weighed in favor of the Kaleys as a matter of law because based on the record, the Kaleys asserted their right to a pretrial post-restraint hearing “early and often.” As to the fourth factor, the Court noted that on remand, the District Court should engage in a more thorough analysis of the fourth factor of Bisell and Barker, taking care 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 [to] take care to give the powerful forms of prejudice that the Kaleys will suffer ample consideration.” The Court specifically instructed the district court to reevaluate the fourth Bisell and Barker factor, and to then reweigh all the factors together to determine whether the Kaleys would be entitled to a post-indictment evidentiary hearing.

On remand, the District Court determined that the Bisell and Barker factors warranted an evidentiary hearing. In prehearing memoranda, and at the hearing, the Kaleys argued that the District Court should consider whether the government should be likely to prevail at trial, and that the protective order should be vacated because the underlying facts did not support the charged crimes in the first place. In response, the government contended that in light of Bisell and the first Kaley decision, 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.

On October 24, 2010, the District Court issued an order denying the Kaleys’ motion to vacate. In its order, the District Court found that the only relevant inquiry at the hearing was “whether the restrained assets were traceable to or involved in the alleged criminal conduct.” However, because the Kaleys were not contesting traceability, and instead challenged the overall merits of the government’s case, the District Court denied the Kaleys’ motion to vacate. The Kaleys appealed again.

In Kaley II, the Court acknowledged that “the qualified right to counsel...is a weighty concern.” In so noting, the Court quoted Powell v. Alabama, 287 U.S. 45, 53 (1932) for the proposition that “[i]t 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.” The Court also acknowledged that a pretrial restraining order may render unavailable assets which a defendant might have otherwise used to retain counsel of choice, and that “[b]eing 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.”

After reading such sweeping pronouncements, I actually thought for a moment that the Court was going to rule in favor of the Kaleys. I should have known better. This is, after all, the Eleventh Circuit. After acknowledging the Kaleys’ interests in retaining counsel of their choice, the Court nevertheless affirmed the order of the District Court for a second time, and specifically held that the Kaleys were not entitled to challenge the merits of the government’s case at the pretrial, post-restraint hearing.

In support of its holding, the Court first reasoned that the statutory construction and legislative history of the forfeiture statute, 21 U.S.C. §853, leads to a conclusion that although Congress contemplated a hearing, Congress rejected the idea of allowing a defendant to challenge the indictment itself. Next, the Court determined that allowing a defendant to challenge, pretrial, the government’s evidence supporting the indictment would be inconsistent with the Supreme Court’s pronouncements in Costello v. United States, 359 U.S. 359 (1956) and its progeny. After noting that the United States Supreme Court has continuously adhered to the Costello holding, the Court reasoned that to allow the Kaleys to challenge the evidentiary basis of their indictments “would run counter to the whole history of the grand jury institution,” and “would result in inextricable delay but add nothing to the assurance of a fair trial.” Moreover, if the Court were to allow such a challenge, then the effect would be that defendants in other cases could “always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.” However, “[t]his is not required by the Fifth Amendment.”

In further support of its holding, the Court explained that a defendant may not challenge a grand jury indictment.
even if the grand jury has considered evidence obtained in violation of his or her constitutional rights, or if the government has failed to present known exculpatory evidence to the grand jury.\textsuperscript{38} The Court also noted that the underlying basis for such rules is the Supreme Court's recognition of the grand jury as an independent body, rather than a mere arm for the prosecution.\textsuperscript{39} The Kaley's request for a pretrial, post-restraint evidentiary hearing simply contravened such precedent.

Although the Court noted that the case “does fairly raise a Sixth Amendment issue,” the majority opinion failed to further address it. Rather, the Court opted to restate that it could not rule in favor of the Kaley's because to do so would mean that the District Court would be put in the position of having to review the grand jury's probable cause determination, thereby undermining the entire grand jury system, and in contravention of the Supreme Court's observation that a facially valid indictment is “sufficient to call for a trial on the merits.”\textsuperscript{40}

In an attempt to soften the blow of its harsh ruling, the Court noted that the government cannot unilaterally restrain a defendant's assets. Rather, the government could only do so because Congress authorized such action, and even then, any attempt to seize a defendant's assets pretrial could only be accomplished in compliance with 21 U.S.C. §853(e)(1) and §853(e)(1)(A). Until then, the Court noted, the government “is not free to restrain anything.”\textsuperscript{41} That should make us all feel better.

The Court also stated that any defendant whose assets are restrained pretrial will ultimately receive a thorough hearing—the trial itself—at which he or she is free to challenge the merits of the government's case.\textsuperscript{42} According to the Court, the only question presented by the Kaley's appeal was whether the Due Process Clause entitles them to two such evidentiary hearings. Unfortunately for the Kaley, and for any other defendant in the jurisdiction of the Eleventh Circuit, the answer to that question is no.\textsuperscript{43}

As noted by the Question Presented, other circuits have reached the same conclusion as the Eleventh and have determined that at a pretrial, post-restraint hearing, a defendant may challenge only the connection between the restrained assets and the alleged criminal activity.\textsuperscript{44}

If the Kaley's had been in the jurisdiction of the Second Circuit, they would have likely fared better.\textsuperscript{45} In reaching its conclusion that a defendant may challenge the evidentiary basis for the government's pretrial restraint of assets, the Second Circuit has observed that allowing such a challenge imposes no real burden on the government because the government is free to forego the option of pretrial restraint.\textsuperscript{46} Because the issue of pretrial restraint of assets is not a matter that is forced upon the government, if the government determines that a pretrial evidentiary hearing would not be in its best interest, then the government can simply assert its right to forfeit after conviction.\textsuperscript{47}

After reading the majority opinion, I was glad to read Judge Edmondson's concurrence. Although he reluctantly agreed with the result reached by the majority, his opinion actually reads more like a dissent. He opens his concurrence with the statement that if he were deciding the case alone, 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).”\textsuperscript{48}

In support of such statement, Judge Edmondson emphasized that in this case, the government's action of freezing the Kaley's assets pretrial is entirely discretionary. In criminal prosecutions, the government is the aggressor. But by choosing to employ the extra step of a pretrial seizure of assets, the government has effectively disabled the Kaley's from employing counsel to defend themselves.\textsuperscript{49} Judge Edmondson eloquently stated,

"By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen is subjected to severe hardship."

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."\textsuperscript{50}
Judge Edmondson also noted that because the government initiated the “add-on” to what would otherwise be an ordinary criminal prosecution, allowing the accused and his or her property extra procedural safeguards would be entirely reasonable. In his view, an extra probable cause hearing following a seizure would not force the government to do anything, much less try the case twice, because the government could simply choose to release the property. If the government did not wish to release the property, the government could choose to go forward with the probable cause hearing—with which should focus on the predicate criminal offense and the forfeitability of the property—and decide for itself how much evidence it wishes to present (or not) about the underlying criminal offense.51

Also noted by Judge Edmondson, asking the government to respond to the Kaley's challenge would not pose any heavy burden on the government. After all, it is likely that the same evidence would be used for a probable cause determination as for trial. At a probable cause hearing, the government could always decide for itself what cards to show before the actual trial, and if the Court determined that there was no probable cause to support the pretrial seizure, then the criminal trial still looms ahead.52

Judge Edmondson's closing observations on the importance of the Fifth and Sixth Amendments to the issues presented by the Kaley's appeal are best quoted:

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 are 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 track: 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.53

Although Judge Edmondson's concurring opinion does not change the end result for the Kaley's at this point in time, the fact that he took the time to express his thoughts on such a fundamental issue as the right to counsel of choice leaves me hopeful. No doubt, when it comes time for the Supreme Court Justices to formulate their decision in the Kaley's appeal, Judge Edmondson's words will resonate with several of the current Justices.54 What remains to be seen is how many will agree with his opinion.

1 See Kaley v. United States, 12-464 (cert. granted March 18, 2013).
2 See United States v. Kaley, 579 F.3d 1246, 1249 (11th Cir. 2009) (Kaley I).
3 See Kaley, 579 F.3d at 1249.
4 Id.
5 Id.
6 See Kaley, 579 F.3d at 1249-1250.
7 Section 18 U.S.C. §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.
8 Id. at 1250.
9 Id.
10 Id. at 1250-1251.
11 Id. at 1251.
12 Id.
13 Id.
14 Id.
15 Id. at 1252.
16 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, introduced a four-part test: 1) the length of the delay before the defendant received their post-arrrest hearing; 2) the reason for the delay; 3) the defendant's assertion of the right to such a hearing pretrial; and 4) whether the prejudice to the defendant's due process claim is the concern of undue delay encompassed in the right to a speedy trial.
17 In Bissell, 866 F.2d at 1347, a grand jury indicted each of the defendants with several offenses, including RICO violations, contrary to 18 U.S.C. §1961 et seq.; engaging in a Continuing Criminal Enterprise, in violation of 21 U.S.C. §848; and, conspiring to import cocaine, in violation of 21 U.S.C. §846. The indictment also contained criminal forfeiture counts pursuant to 21 U.S.C. §853. After the return of the indictment, the government seized Bissell's assets pursuant to an ex parte warrant obtained from the district court pursuant to 21 U.S.C. §853(f).
18 Id. at 1349.
19 Id. at 1349 (emphasis added).
20 In Gonzales-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. After the government conceded that the denial deprived the defendant of counsel of choice, the Supreme Court reversed, finding the disqualification to be erroneous and not subject to harmless error review. Id.

21 See Kaley, 579 F.3d at 1256.
22 Id. at 1256-1260.
23 Id. at 1256-1260.
24 Id. at 1257.
25 Id. at 1258.
26 See United States v. Kaley, 677 F.3d 1316, 1319 (11th Cir. 2012).
27 See Kaley, 677 F.3d at 1319-1320.
28 Id.
29 Id. at 1320.
30 Id.
31 Id. at 1321-1330.
33 Id. at 1323-1327. In Costello, the United States Supreme Court admonished against allowing pretrial challenges to the grand jury’s probable cause determination, noting that 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. Costello, 350 U.S. at 363.
34 Id. at 1323–1324 (citing 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.; 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 and unbiased 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.).
35 Id. at 1324.
36 Id.
37 Id.
38 Id. at 1324 (citing Calandra, 414 U.S. at 351 52; Lawn, 355 U.S. at 349; Williams, 504 U.S. at 551).
39 Id. at 1325.
40 Id. at 1326.
41 Id. at 1327.
42 Id.
43 Id. at 1327-1328.
44 The Sixth, Seventh and Tenth Circuits have reached the same conclusion as the Eleventh. See

United States v. Jones, 160 F.3d 641, 647-648 (10th Cir. 1998) (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. Jarmison, 427 F.3d 394, 406 07 (6th Cir. 2005) (determining that the district court did not err in applying the Jones framework); United States v. Mayo Genes, 860 F.2d 706, 728-731 (7th Cir. 1988) (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’).
45 United States v. Monsanto, 924 F.2d 1186, 1206 (2d Cir. 1991) (en banc)
46 See 677 F. 3d at 1328 (citing Monsanto, 924 F.2d at 1198).
47 Id. at 1328-1329 (citing Monsanto, 924 F.2d at 1198).
48 Id. at 1330 (Edmondson, J., concurring).
49 Id.
50 Id. at 1330-1331.
51 Id. at 1331.
52 Id.
53 Id. at 1332.
54 The Supreme Court docket shows that the Kaley’s submitted their brief on the merits and appendix on July 1, 2013, and that FACDL submitted an amicus brief on July 8, 2013. As of the writing of this article, the government’s brief on the merits is due August 30, 2013.

"I'm sorry, sir, but he must have stepped away from his desk."