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

CASE NO. 22-80022-CR-CANNON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN PAUL GOSNEY, JR., et al.,

Defendants.
_____/

ORDER DENYING RENEWED
MOTION FOR REVIEW OF GRAND JURY TRANSCRIPTS [ECF No. 407]

THIS CAUSE comes before the Court upon Defendant John Paul Gosney Jr.'s Renewed Motion for Review of Grand Jury Transcripts (the "Motion"), filed on October 19, 2022 [ECF No. 407].[1] Defendant Thomas Dougherty joins the Motion [ECF Nos. 409, 418].[2] The Court has reviewed the Motion, the Government's Response in Opposition [ECF No. 432], Defendant Gosney's Reply [ECF No. 438], and the full record. For the reasons set forth below, the Motion [ECF No. 407] is **DENIED**.

ARGUMENTS

Defendants move for an Order under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) authorizing Defendants to review "the grand jury transcripts, in particular the legal instructions provided to the grand jury, and testimony related to the government's (flawed) theory of

[1] The Court denied an earlier motion for lack of compliance with the conferral requirements of Local Rule 88.9(a) [ECF No. 393].

[2] For purposes of this Order, "Defendants" refers to Defendant John Paul Gosney Jr. and Defendant Thomas Dougherty; there are three Defendants pending trial who have not joined the Motion (Jose Goyos, Louis Carver, and Daniel Carver).

prosecution, as outlined in Gosney's earlier filed Motion to Dismiss" [ECF No. 407 p. 1]. In that earlier Motion [ECF No. 350]—since denied by the Court as an improper sufficiency challenge to a facially valid Indictment [ECF No. 493]—Defendants relied on pre-indictment testimony from HHS Special Agent Brian Frank ("S/A Frank"), *see* [ECF No. 170 pp. 67–101 (Testimony of S/A Frank)], to argue that no health care fraud exists because almost all of the "cardio tests" that form the basis of a portion of the alleged health care fraud conspiracy were performed and ordered by physicians according to those physicians' "independent" and "uncorrupted" medical judgment. As posited in the Motion,

> either (1) the grand jury received (inaccurate) testimony that Gosney conspired to bill Medicare tens of millions of dollars for 'testing that was not medically necessary,' DE#23:13 (Indictment, 'Purpose of the Conspiracy'), despite Agent Frank's testimony at the February 22, 2022 hearing regarding doctors' approvals for virtually all of the testing, or (2) 'the government may have improperly instructed the grand jury on the applicable legal principles (and thus the grand jury was (mis)led to believe that billing Medicare doctor-approved testing constitutes health care fraud).

[ECF No. 407 p. 12; *see* ECF No. 438 p. 8 ("[E]ither the grand jury was misinformed on the law, or received inaccurate testimony.")]. Alternatively, Defendants ask the Court to review the grand jury transcripts *in camera* "to evaluate and address the irregularities identified by Gosney (and determine whether disclosure to Gosney would be appropriate)" [ECF No. 407 p. 15].

The Government opposes the Motion, arguing that (1) Defendants' Motion amounts to a challenge to the completeness of the government's factual presentation to the grand jury and to the sufficiency of the evidence, neither of which is permitted at this stage nor warrants piercing the grand jury's secrecy [ECF No. 432 p. 5 (citing *United States v. Williams*, 504 U.S. 36, 51 (1992); *United States v. Waldon*, 363 F.3d 1103, 1109 (11th Cir. 2004); *United States v. Hyder*, 732 F.2d 841, 844 (11th Cir. 1984))]; (2) Defendants' Motion is based on a flawed theory about the controlling law as relates to physician-executed orders certifying medical necessity and the

relevant fraud statutes [ECF No. 432 p. 6]; and (3) Defendants' Motion seeks information about legal instructions to the grand jury, where no such legal instructions are required [ECF No. 432 pp. 6–7].

LEGAL STANDARD

There is a presumption of secrecy attached to grand jury proceedings. Fed. R. Crim. P. 6(e)(2); *see Douglas Oil Co. v. Petrol Stops Nw*., 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."). To overcome this presumption, "[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil Co.*, 441 U.S. at 222. This is a demanding standard. *See United States v. Aisenberg,* 358 F.3d 1327, 1348 (11th Cir. 2004). Further, "[s]uch a showing must be made even when the grand jury whose transcripts are sought has concluded its operations." *Douglas Oil Co.*, 441 U.S. at 222. This is because courts must consider not only the effects upon a particular grand jury but also "the possible effect upon the functioning of future grand juries." *Id*. (referring to the likelihood that disclosure of grand jury transcripts may deter persons from "frank and full testimony").

DISCUSSION

Upon a full review of the competing interests at stake, Defendants have not met their burden under the circumstances to show a compelling and particularized need for the grand jury transcripts sufficient to overcome the traditional secrecy of the grand jury.

First, in line with Defendants' earlier Motions [ECF Nos. 172, 493], the present Motion relies heavily on S/A Frank's pre-indictment testimony to support Defendants' broad theory that

no fraud exists because doctors signed requisition forms for almost all of the "cardio tests" alleged in this case. But Defendants overstate the relevant testimony and the implications to be drawn from it, and in any event, even accepting Defendants' theory of the case does not warrant piercing the grand jury's veil of secrecy. Defendants make much of the fact that S/A Frank testified that primary care physicians (who are not alleged to have received kickbacks) signed requisition forms for the vast majority of the 3,700 "cardio tests" performed in this case—the implication being that no fraud can lie from those tests because "uncorrupted" doctors signed off on the orders. Yet Defendants overlook the full scope of S/A Frank's testimony and the Government's proffer as relates to the doctors and the medical necessity of the ordered tests [ECF No. 170 p. 67].[3] As a full review of S/A Frank's testimony indicates, (1) HHS did receive some complaints from patients and doctors about unauthorized tests, as did a certain lab director (from Progenix) who received additional complaints from doctors [ECF No. 170 pp. 99, 100, 109], and (2) evidence developed during HHS's investigation revealed that doctors signed orders because they were under the false impression that their patients (pitched by the call center as a "mutual patient" of the laboratory and the physician) wanted the test, but the patients themselves were the victims of fraud and often did not ask for the test or did so under false pretenses [ECF No. 170 pp. 40–42; *see* ECF No. 170 p. 170]. Further, S/A Frank clarified that "cardio tests" can be conducted if the test is "reasonable

[3] Defendants also fail to address the full scope of Count 1, which charges a wide-ranging conspiracy involving cardio testing as well as cancer genetic testing and durable medical equipment (DME) [ECF No. 23 pp. 1–17]. As to Gosney more specifically, the Indictment references Gosney's recruitment of individuals to serve as nominee owners of laboratories to conceal Gosney's beneficial ownership of, or managing control over, the laboratories; Gosney's receipt of kickbacks and bribes from laboratories in exchange for referring Medicare beneficiaries and doctors' orders for genetic testing (and concealing of such kickback and bribe arrangements); Gosney's submission of false and fraudulent claims on behalf of three laboratories (CERGENA, PROGENIX, THERAGENE) totaling over $67 million for services that were not medically necessary and not eligible for reimbursement; and Gosney's use of the fraud proceeds to benefit himself and others [ECF No. 23 pp. 1–17].

and necessary" *under HHS guidelines*—not simply because the physician orders the test [ECF No. 170 p. 72 ("Q. OK. And these cardiovascular tests, if they're ordered by a primary care physician, they can be conducted, correct? A. If it meets the guidelines, yes."); *see* ECF No. 23 pp. 5–6 (citing 42 C.F.R. §§ 411.15(a)(1), 410.32(a))].[4]

In any event, even accepting S/A Frank's testimony as characterized by Defendants does not show a particularized need sufficient to warrant the relief sought. There is no indication in S/A Frank's testimony or in the Motion generally that the government presented fabricated evidence to the grand jury. Nor have Defendants shown any impediment to pursuing their theory of the case at trial—i.e., that doctors' signing of orders for "cardio tests" purportedly negates the existence of health care and wire fraud as alleged. In the end, the ultimate question of medical necessity and the impact of doctors' orders on that necessity—including associated misrepresentations or deceptions to doctors through the layers of fraud as alleged—are contested issues best left for the trier of fact. Defendants' Motion does not present a basis to believe that breaking the grand jury's traditional secrecy is necessary to avoid a "possible injustice" in this proceeding. *See generally Aisenberg*, 358 F.3d at 1348.

Second, and relatedly, Defendants' Motion relies on the view that a doctors' order, without evidence of a kickback to the doctor, is sufficient to negate an alleged scheme to defraud Medicare. But that argument, like Defendants' Motion to Dismiss and Gosney's Motion to Vacate the Ex Parte Restraining Order [ECF Nos. 172, 350], reduces again to a backdoor attempt to dispute the allegations in the facially valid indictment, which for reasons previously stated alleges the essential elements of the charged offenses and tracks the relevant statutory language [ECF No. 493; *see*

[4] The regulation specifies that tests "not ordered" by a treating physician "are not reasonable and necessary," but it does not say the converse—i.e., that tests ordered by a treating physician are *ipso facto* "reasonable and necessary." 42 C.F.R. § 410.32(a)(1).

ECF No. 256]. Nor does Defendants' broad theory of fraud follow from Eleventh Circuit precedent, which has affirmed convictions for health care fraud and related conspiracies even where a doctor prescribed the treatment or medication. *See United States v. Grow*, 977 F.3d 1310, 1321 (11th Cir. 2020) (citing *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *United States v. Mateos*, 623 F.3d 1350 (11th Cir. 2010)).[5]

Third, and finally, Defendants seek disclosure of the grand jury transcripts to determine if the grand jury possibly was mis-instructed on the meaning of fraud under the circumstances, again relying on Defendants' theory about the effect of a doctor's order on medical necessity [ECF No. 407 p. 12 ("[T]he government *may have* improperly instructed the grand jury . . . on the applicable legal principles." (internal citations and quotation marks omitted, and emphasis added))]. Defendants present no basis other than speculation, however, to believe the grand jury was misinformed on the law, assuming any such detailed instructions about medical necessity were even given to the grand jury. Further, the indictment alleges the essential elements of the charged offenses and alleges lack of medical necessity [*see* ECF No. 23 p. 13 ¶ 3(d)]. And again, any theory of the case Defendants wish to present about the purported absence of fraud given doctors' requisition orders is a theory Defendants can seek to present at trial. In the end, although Defendants argue otherwise, Defendants' request for grand jury transcripts to investigate a possible

[5] In Reply, Defendants raise factual distinctions to *Grow*, arguing that the prescriptions written in that case, unlike the orders authorized by PCPs in this case, were authorized by doctors whose medical judgment was compromised [ECF No. 438 p. 3]. But the Indictment refers, albeit in general terms, to Defendants' submission of false and fraudulent claims to Medicare under false and fraudulent pretenses [ECF No. 23 pp. 12–13, 18]; there is no dispute that the Indictment tracks the statutory language of the charged offenses and alleges the essential elements of the crimes; and the Government's position as developed [*see* ECF No. 432 (citing ECF No. 399)], is that Defendants' fraudulent conduct *did* interfere with the doctors' independent medical judgment [ECF No. 399 pp. 10, 15 (referring to "doctor chase unit" and other deceptive marketing practices targeted at PCPs); ECF No. 399 p. 9; ECF No. 170 pp. 40–42].

legal mis-instruction rests on speculation and is insufficient to meet the demanding standard to grant a Rule 6(e) motion.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant John Paul Gosney Jr.'s Renewed Motion for Review Grand Jury Transcripts [ECF No. 407] is **DENIED**.[6]

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 31st day of January 2023.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

[6] For the same reasons set forth in this Order, the Court also rejects Defendants' alternative request for *in camera* inspection of the grand transcripts. The Motion characterizes this alternative request as necessary to evaluate the "irregularities" identified by Gosney. But the Court is not persuaded of the existence of such "irregularities," and although Defendants attempt to cast their secondary request as a narrow one limited to medical necessity and related legal instructions, any such review necessarily would require a broad review of the grand jury transcripts—a request the Motion does not support.