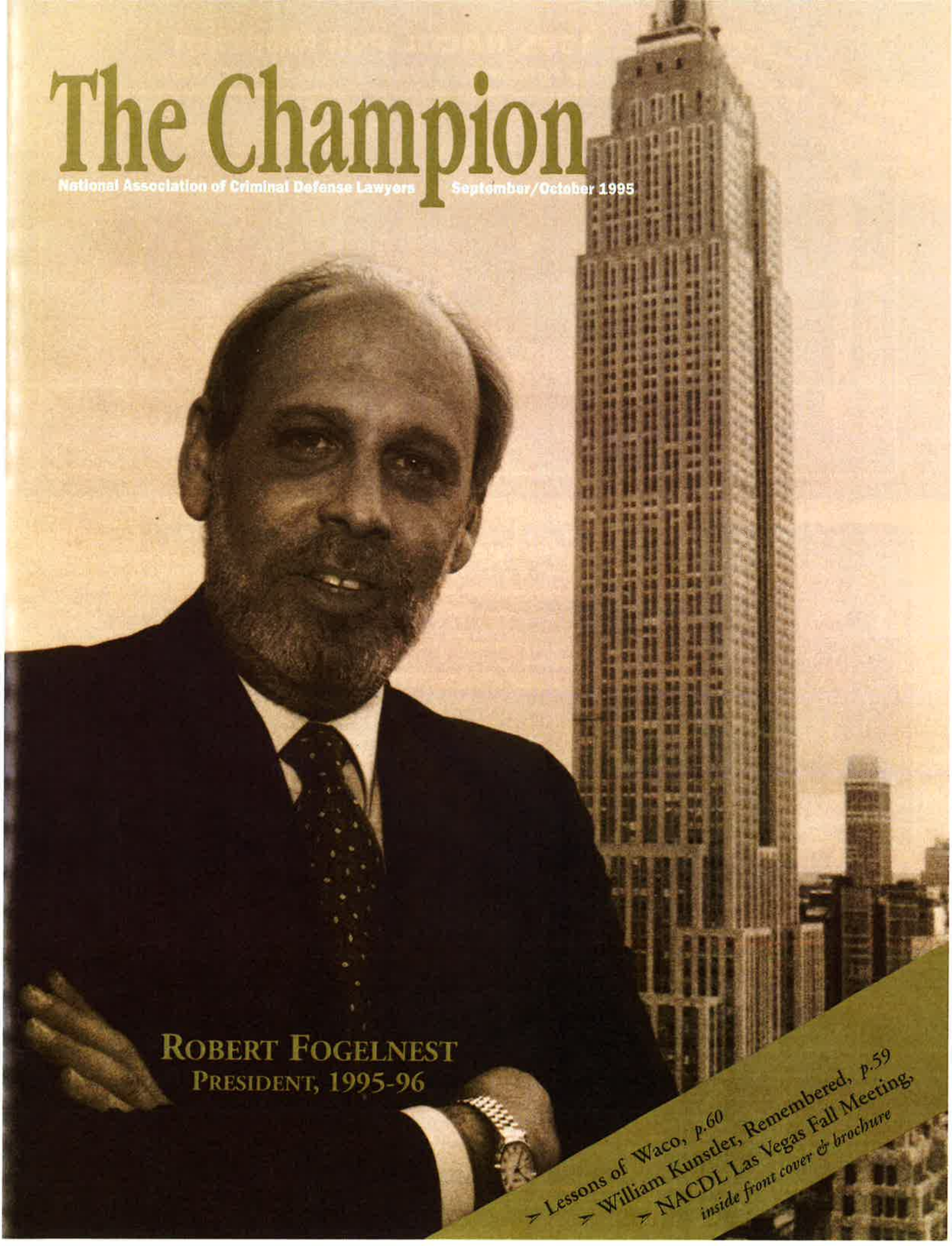
The Champion

National Association of Criminal Defense Lawyers September/October 1995



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FOURTH AMENDMENT FORUM

By Howard M. Srebnick and Scott A. Srebnick

The Frozen Tundra: Mounting a Bull Rush on Pretrial Restraining Orders

Six years after the spanking we took from the Supreme Court in *Caplin & Drysdale* and *Monsanto*, defendants are again lacing up their cleats to tackle the pretrial restraint of assets.

As we can't help but recall, the Supreme Court, in two 5-4 decisions, ruled that the forfeiture provisions in the drug and RICO statutes permit the government to freeze, pre-trial, the "tainted" assets of the accused to insure that the assets will be available for forfeiture if the accused is convicted. The Court read the statutes to provide no exemption for the payment of attorney's fees by the accused to his counsel of choice. The Court observed that the statutes explicitly provide for the forfeiture of *all* of a defendant's "tainted" assets and that, given the "relation back" doctrine, a defendant in possession of these tainted assets has no right to use them to pay attorney's fees. In the Court's view, tainted assets are not property of the defendant so they are not for the defendant to spend. The Court thus found no constitutional obstacle to the restraint and forfeiture of tainted assets notwithstanding the impact that this might have on the ability of the presumptively innocent defendant to retain the assistance of counsel of choice to defend him.

The Court did not address several issues arising out of the restraint and forfeiture of assets: First, the Court reserved ruling on whether due process requires a post-restraint, pretrial hearing on the restrainability and forfeitability of the allegedly tainted assets (given that none is provided for in the statute). *See United States v. Monsanto*, 109 S. Ct. 2657, 2666 n.10 (1989). Second, the Court did not address the pretrial restraint of "substitute" assets — assets that are not tainted by criminal activity but which the government intends to forfeit if tainted assets cannot be located. Courts remain divided on whether the pretrial restraint of substitute assets is authorized by the statute, and if so, whether such a restraint would violate a defendant's constitutional rights.[1]

Given this window of opportunity, a defendant whose properties have been seized or restrained *ex parte* and are subject to forfeiture counts in the indictment must distinguish between "tainted" and "substitute" assets given the absence of statutory authority to restrain substitute assets. The defendant can also press for a pretrial, adversarial hearing on the restraint and forfeitability of his allegedly tainted assets and his substitute assets because: (1) the statutory scheme violates due process because it fails to provide for a post-restraint, adversarial, evidentiary hearing; (2) the restraint of assets is not supported by any finding of probable cause; (3) the restraint interferes with the defendant's ability to fund his defense with assets that are not tainted by criminal activity; and (4) the restraint, if premised on joint and several liability, constitutes a monetary punishment that is not authorized by the statutes and is unconstitutionally excessive.

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Restraining and Forfeiting Tainted Assets

The government typically relies upon three statutes to support the forfeiture and pretrial restraint of assets: 18 U.S.C. § 982 (money laundering, etc.),18 U.S.C. § 1963 (RICO), and 18 U.S.C. § 853 (narcotics). For all practical purposes, these three statutes are identical: section 982 incorporates the procedures set forth in section 853, with minor definitional differences not material to the analysis, sections 853 and 1963 are identical in all relevant respects.

Subsection (a) of the RICO forfeiture statute and subsection (a) of the drug forfeiture statute identify the kinds of property subject to forfeiture upon conviction. Both statutes authorize the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 18 U.S.C. § 1963(a)(3); 21 U.S.C. § 853(a)(1). In essence, "subsection (a)" of each statute authorizes the forfeiture of property used in, or proceeds derived from, the underlying offense, otherwise known as "tainted" assets.[2] According to the "relation back" doctrine, title to the tainted assets vests in the government "upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c). Thus, any transfer of tainted assets (attorney's fees, for example) can be recouped from third-party transferees by the government upon conviction unless the transferee is a bona fide purchaser without notice of the asset's forfeitability. *See Caplin & Drysdale v. United States*, 109 S. Ct. 2646, 2652 (1989).

To aid the government in preserving the tainted "subsection (a)" properties for forfeiture, the statutory scheme provides for *ex parte* pretrial restraining orders:

> **Protective orders**
>
> (e)(1) 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) (emphasis added); *accord* 18 U.S.C. § 1963(d)(1). The statutory scheme does *not* provide for any post-restraint, pretrial hearing with respect to this *ex parte* restraining order upon the filing of an indictment. The assets are restrained based solely on the probable cause "finding" of the grand jury without any judicial evaluation.

Restraining and Forfeiting Substitute Assets

In the event that subsection (a) properties (*i.e.* tainted assets) are not available for forfeiture upon conviction, the statutes provide for the forfeiture of "substitute property" in lieu of subsection (a) properties. Substitute property — or substitute assets, as they are commonly referred to — are properties owned by the defendant that were neither used in, nor derived from, the underlying offense, in other words, not tainted by the criminal activity. They are forfeitable merely because the subsection (a) tainted properties have been dissipated or cannot be located upon conviction. *See* 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m).[3]

Thus, substitute assets (*i.e.*, "any other property of the defendant") become forfeitable upon conviction only when and insofar as the subsection (a) properties are deemed forfeitable *and* the government is unable to execute on the subsection (a) properties. Moreover, the "relation back" provision does not apply to substitute assets: only "property described in subsection (a)," *i.e.* tainted assets, are specified as being subject to the relation back doctrine. *See* 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c). Thus, title to substitute assets does not vest in the government until after conviction, when the order of forfeiture is entered.

Likewise, while the statutes provide for a restraining order "to preserve the availability of the *property described in subsection (a)*. . . ," they do *not* authorize the court to enter a restraining order to preserve the availability of substitute property. In other words, there is no statutory language authorizing the restraint of substitute assets.

Statutory Challenge to Restraint of Substitute Assets

Given the absence of statutory authority, the U.S. Courts of Appeals for the Third, Fifth, Eight, and Ninth Circuits have held that substitute assets cannot be restrained prior to conviction. *See United States v. Field* ___ F.3d ___ (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993). The Fourth Circuit has explicitly upheld the pretrial restraint of substitute assets, *In re Billman*, 915 F.2d 916 (4th Cir. 1990), essentially rewriting the statute to correspond to its view of the legislative intent.

Even "[a] brief examination of the legislative history reinforces . . . that Congress did not intend substitute assets to be subject to pretrial restraint." *Ripinsky*, 20 F.3d at 364. Rather, the Senate Report indicates that Congress intended that the court act on substitute assets only "at the time of conviction," not before. *Id.* at 364 (quoting 1993 Senate report at 197-198, 201, *reprinted in* 1984 U.S.C.C.A.N. at 3380-81, 3384). The legislative history establishes "a clear congressional purpose to exempt . . . substitute assets from any preconviction or pre-indictment restraints." *In re Assets of Martin*, 1 F.3d at 1359.

Not only does the legislative history fail to support the restraint of substitute assets, but consulting the legislative history in the first place violates the rules of statutory construction:

> *Billman* did not explain adequately why the pretrial restraint provisions' clear limitation to subsection (a) assets was furthered by treating [] substitute assets as though they were subsection (a) assets. In our view, *Billman*'s conclusion cannot be reconciled with the normal rule of statutory interpretation that a court does not look to the purpose of a statute when the meaning is clear on its face. . . . [W]hen a statute is plain on its face, we do not resort to legislative history to uncover its meaning.

In re Assets of Martin, 1 F.3d at 1359.

The statutory provisions expressly do *not* authorize the restraint of substitute assets. The language of the statutes explicitly details the properties subject to restraint, and substitute assets are not among them:

> We find that the statute controlling the restraint before us plainly states what property may be restrained before trial. Congress made specific reference to the property described in § 853(a), and that description does not include substitute assets. Congress treated substitute assets in a different section, § 853(p). To allow the government to freeze [the defendant's] untainted assets would require us to interpret the phrase "property described in subsection (a)" to mean property described in subsection (a) *and (p)*.

Floyd, 922 F.2d at 502 (emphasis in original).

> Nothing Congress did, however, suggests that the substitute asset provision and the temporary restraining order provision should be read in conjunction to provide the government with an even greater governmental power: the pre-indictment restraint of substitute assets.
>
> * * *
>
> In the face of clear statutory language to the contrary, we refuse to extend this drastic remedy to the untainted assets of an individual who is merely accused of a crime, and thus is presumptively innocent.

Ripinsky, 20 F.3d at 364-65.

The Supreme Court in *Monsanto*, when construing the same drug forfeiture statute, opted for a literal interpretation despite serious constitutional implications. *See Monsanto*, 109 S. Ct. at 2668 (Blackmun, J., dissenting) (arguing that the majority's construction of the statute infringes upon the Sixth Amendment right to counsel of choice). The Court held that the statute's failure to provide an attorney's fee exemption meant that attorney's fees would not be exempted. Likewise, the same statute's failure to provide for the pretrial restraint of substitute assets should mean that substitute assets *cannot* be restrained. To the extent that the court finds any ambiguity in the statutory language, the rule of lenity directs the court to resolve any doubt in favor of the defendant. *Smith v. United States,* 2050, 2063. (Scalia, J., dissenting).

Thus, substitute assets should be at the defendant's disposal pretrial. Perhaps even more important, the transfer of such assets — *e.g.*, for legitimate attorney's fees — cannot be voided upon conviction, because substitute assets are not subject to the relation back provision. Unlike "tainted" assets in which title vests in the government upon commission of the criminal act, title to substitute assets only vests in the government upon entry of an order of forfeiture following the conviction. So long as the substitute asset is transferred before conviction, the

transferee obtains superior title to this untainted property and the government cannot recoup it upon conviction. *See* 18 U.S.C. § 1963(l)(6); 21 U.S.C. § 853(n)(6).

Constitutional Challenges to Restraint of Substitute Assets

"[C]ourts should construe statutes to avoid decision as to their constitutionality." *United States v. Monsanto*, 109 S. Ct. at 2664. Rewriting the statute to authorize the restraint of substitute assets, as the Fourth Circuit did in *Billman,* raises a host of constitutional problems.

First, it interferes with the Fifth and Sixth amendment rights of the accused to defend himself. As U.S. District Judge Hoeveler observed in the *Noriega* case, in an analogous context:

> The Court fails to see what possible government interest justifies its freezing of Defendant's assets without setting forth any basis for its allegations that the assets are tainted by illegal activity. The danger that an innocent person may be convicted because of the unfair deprivation of assets that would have been used to retain his counsel of choice is simply too great to permit a freeze to go unchallenged.

United States v. Noriega, 746 F. Supp. 1541, 1544 (S.D. Fla. 1990).

Second, the restraint is tantamount to a seizure triggering Fourth Amendment scrutiny. It is less than clear that forfeiture counts in an indictment reflect a finding of probable cause by the grand jury that the assets enumerated are tainted by the alleged criminal activity: The government has taken the position that forfeiture allegations are not elements of the offense so they need not be presented to the grand jury.[4] Thus there is no assurance that the issue of probable cause regarding forfeitability of *any* of the defendant's assets, tainted or substitute, is ever presented to or decided by the grand jury.

By definition, substitute assets are those properties for which there is *no* probable cause to believe that the properties are tainted by the criminal activity or *presently* subject to forfeiture. Substitute assets are *untainted* assets which the government restrains on the chance that the jury will convict the accused, enter a verdict of forfeiture as to tainted assets, and that thereafter, the government will be unable to forfeit the tainted assets because an act or omission of the accused has placed the tainted assets out of the government's reach. *See* 21 U.S.C. § 853(p). In effect, the government restrains *untainted* "substitute assets" to secure a contingent liability that has not yet come due, without probable cause and without a hearing, hence, a Fourth and Fifth Amendment violation.[5]

Third, the restraint and threat of forfeiture of all of a defendant's assets implicates the Eighth Amendment, absent an allegation that the particular defendant himself profited from the criminal activity (and the degree to which he did). The government has historically proceeded under a theory of "joint and several liability" in seeking to restrain and forfeit everything a defendant owns, and more. In the recent "Cali Cartel" case in Miami, the government's indictment seeks the forfeiture of $2 billion from each and every defendant (from the kingpin to the offloader to the indicted lawyers), based on the government's estimation of the wholesale value of all the contraband ever imported.

In *United States v. Caporale*, 806 F.2d 1487, 1506-09 (11th Cir. 1986), the court approved the imposition of joint and several liability in a RICO case, under specifically defined circumstances:

> If the government can prove the amount of the proceeds [that are forfeitable] *and identify a finite group of people receiving the proceeds*, it defeats the purpose of the provision to hold that the proceeds cannot be forfeited because the government cannot prove exactly which defendant received how much of the pot.

Id. at 1508 (emphasis added).

Thus, the government should be required to demonstrate that the indicted and unindicted co-conspirators constitute a group that is "finite" before relying on joint and several liability. Furthermore, the government should allege, either in the indictment or by way of a bill of particulars, the earnings of each defendant to determine whether the sought after forfeiture bears any relationship to the defendant's criminal conduct and earnings.

To the extent that the government can allege some measure of earnings traceable to the defendant, the court must guard against excessive forfeiture. To hold a defendant jointly and severally liable for the entire amount alleged in a multi-defendant indictment may violate the Eighth Amendment's proscription against excessive fines. *Alexander v. United States*, 113 S. Ct. 2766 (1993) (criminal forfeitures are subject to limitations of the Eighth Amendment's excessive fines clause). Likewise, to restrain, pretrial, a defendant's entire portfolio of assets based on the contingency of this excessive forfeiture, effects this unconstitutional punishment ahead of schedule by bringing the impact of the penalty to bear even before conviction.

Constitutional Requirement of a Pretrial Hearing

Noting the absence of any provision for a pretrial probable cause hearing to determine the validity of the restraint of assets, five of the thirteen judges of the *en banc* Second Circuit, on remand from the Supreme Court, have concluded that the statutory scheme is unconstitutional. *See United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (*en banc*) (Oakes, C.J., joined by Winter, Miner, Altimari, and Walker, JJ., concurring and dissenting). Observing that the legislative history of the forfeiture statutes is "decidedly hostile" to a post-restraint, pretrial hearing, these jurists would hold the statute unconstitutional on its face for failing to afford such a hearing.

Indeed, all but one of the thirteen Second Circuit Judges have concluded that due process demands a post-restraint, pretrial probable cause hearing. *See Monsanto*, 924 F.2d at 1198 (*en banc)* (Mahoney, J., joined by Feinberg, Meskill, Newman, Kearse, Pratt, and McLaughlin); *contra id.* (Cardamone, J., dissenting). Citing the opinions of six U.S. Courts of Appeals, the *Monsanto* court held that "a pretrial adversary hearing is required where the question of attorney's fees is implicated." *Monsanto*, 924 F.2d at 1191. The *Monsanto en banc* majority concluded that such a hearing is authorized by the statutory scheme — although not explicitly — thus saving the statute from its certain constitutional demise. *Accord United States v. Michelle's Lounge*, 39 F.3d 684, 694-96 (7th Cir. 1994) (collecting cases).

Although disagreeing with the *Monsanto* court as to what the hearing should entail, the government in *Monsanto* agreed that due process requires a pretrial hearing at which time the defendant can challenge whether there is "probable cause to believe that the restrained assets represent the proceeds of the offense." *Monsanto*, 924 F.2d at 1196. The government contended, however, that the defendant could not challenge the grand jury's finding of probable cause that the defendant committed the underlying offense, an argument that the Second Circuit rejected. The government's concession in *Monsanto* is significant in that it comes *after* the Eleventh Circuit's decision in *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989), the only circuit case seemingly in conflict with *Monsanto* and the six other circuits. *See id.* at 1354 n.7 (noting conflict with Seventh, Eighth and Ninth Circuits); *Caraballo-Sandoval v. United States*, 110 S. Ct. 213, 262 (1989) (White, J., dissenting from denial of certiorari) (noting a conflict).

Judge Hoeveler's opinion in *Noriega*, decided *after Bissell*, concludes:

> [W]here a criminal defendant's only assets for payment of attorney's fees have been placed out of reach by government action, due process mandates that the government be required to demonstrate the likelihood that the restrained assets are connected to illegal activity. This finding must necessarily be established in the context of a limited adversarial hearing which affords the defendant adequate opportunity to test the government's case.

Noriega, 746 F. Supp. at 1546.

Implicit in this equation is the assumption that any assets liberated are for the defendant to spend and the recipient to keep. But is that a safe assumption? Does success at the pretrial hearing insulate the expenditure — *e.g.*, attorney's fees — from government recapture, should the tainted asset used to pay the fee later be deemed forfeitable by the petit jury? Thus the question is whether a judge's pretrial finding of no probable cause to support the restraint, if trumped by the jury, prevents the government from recouping the tainted asset from the attorney through the relation back doctrine; or whether the finding of no probable cause makes the attorney a bona fide purchaser without cause to believe that the property is subject to forfeiture (having the benefit of a judicial finding that there is no probable cause to believe that it is). The *en banc* Second Circuit expressly reserved ruling on this question. *Monsanto*, 924 F.2d at 1203. Other circuits, in earlier cases, have sided with the defense.[6]

Given the weight of this authority, the defendant can persuasively argue that he is entitled to a prompt hearing on the continued restraint of his assets and that if he prevails at the hearing, subsequent expenditures are insulated from forfeiture. Indeed, the defendant should ask for such a hearing even if the restraining order has no impact on the defendant's ability to defend himself. It is enough that the *ex parte* restraint is causing financial hardship. The defendant has a right to a prompt determination, by a judicial officer, that the properties restrained and seized are indeed subject to forfeiture. As the Supreme Court has explained in the context of the *seizure* of real property in a civil forfeiture case:

> The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision making. That protection is of particular importance here, where the government has a direct pecuniary interest in the outcome of the proceeding. . . . [E]ven if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented."

United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 (1993). Absent such a hearing, the defendant's assets will depreciate and might even be foreclosed on before he can vindicate his position at trial.

> The government argues that such restraints only maintain the status quo until the trial is over, but these restraints can have far-reaching effects. They allow the government to reach virtually all of an individual's or a business'[] assets. Such restraints can cripple a business and destroy an individual's livelihood.

United States v. Ripinsky, 20 F.2d 359, 365 (9th Cir. 1994). At a minimum, the court can enter an interim modification of the restraining order to permit the payment of ordinary living and business expenses. *See United States v. Regan*, 858 F.2d 115, 121 (2d Cir. 1988) (approving a district court order authorizing the payment of ordinary business expenses under court supervision).

If the district court rules against the defendant or denies a hearing altogether, he can seek immediate, interlocutory appellate review. *See Ripinsky*, 20 F.3d at 361. To the extent that the continued restraint of assets effectively "disqualifies" counsel of choice by interfering with the contractual relationship between the defendant and counsel, the attorney (not the defendant) may likewise seek immediate appellate review if he can establish "standing."[7] ■

NOTES

1. *Compare* United States v. Ripinsky, 20 F.3d 359 (9th Cir. 1994) (substitute assets not restrainable) and *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993) (same) and United States v. Floyd, 992 F.2d 498 (5th Cir. 1993) (same) and United States v. Field, 867 F. Supp. 869 (D. Minn. 1994) (same) and United States v. Field, *aff'd* ___ F.3d ___ (8th Cir. Aug. 7, 1995) and United States v. Chinn, 687 F. Supp. 125, 127 (S.D.N.Y. 1988) with *In re Billman*, 915 F.2d 916 (4th Cir. 1990) (substitute assets subject to restraint) and United States v. Schmitz, 153 F.R.D. 136, 141 (E.D. Wis. 1994).

Although the Ninth Circuit indicated that the decision in United States v. Regan, 858 F.2d 115, 119 (2d Cir. 1988) suggests that the Second Circuit would uphold the pretrial restraint of substitute assets, Ripinsky, 20 F.3d at 362, Regan was not a substitute asset case.

2. The RICO statute authorizes the forfeiture of "any interest the [defendant] has acquired in violation of" the RICO statute and the defendant's interest in the RICO enterprise. 18 U.S.C. § 1963(a)(1) & (a)(2). The drug forfeiture statute authorizes the forfeiture of "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" the drug violation. 21 U.S.C. § 853(a)(2).

3. The relevant portions of the statutes provide:

> (p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—
>
> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been comingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

21 U.S.C. § 853(p); 18 U.S.C. § 1963(m).

4. *See Monsanto,* 924 F.2d at 1196 (citing United States v. Grammatikos, 633 F.2d 1013, 1025 (2d Cir. 1980)); *see also* United States v. Elgersma, 971 F.2d 690, 692-93 (11th Cir. 1992) (holding that "criminal forfeiture is part of the sentencing process and not an element of the crime itself").

5. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499, 502 (1993) (Fourth and Fifth Amendments require that the seizure of real property be preceded by a hearing and judicial determination of probable cause); United States v. Bissell, 866 F.2d 1343, 1354 (11th Cir. 1989) ("Specifically, the district court in this case issued warrants freezing the appellants' bank accounts based on DEA affidavits describing how the accounts were connected with criminal activity. Thus, the district court's probable cause determination provided a significant check on the government's power to restrain legitimate, non-indicted assets.").

6. *See* United States v. Moya-Gomez, 860 F.2d 706, 729-30 (7th Cir. 1988); United States v. Grove Condominium, 853 F.2d 1445, 1449-52 (8th Cir. 1988); United States v. Crozier, 777 F.2d 1376, 1383 (9th Cir. 1985).

7. *See* Caplin & Drysdale, 109 S. Ct. at 2651 n.3 (law firm had standing to raise client's Sixth Amendment claim); United States v. Estevez, 852 F.2d 239 (7th Cir. 1988) (attorney must file notice of appeal within ten days of an final order restraining assets); United States v. Urbana, 770 F.2d 1552, 1556 n.10 (S.D. Fla. 1991) (attorney may immediately appeal disqualification). *But see* Flanagan v. United States, 465 U.S. 259 (1984) (defendant cannot appeal until after trial).