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The Constitutionality of Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act

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CURRENT ISSUES

THE CONSTITUTIONALITY OF ATTORNEY FEE FORFEITURE UNDER THE COMPREHENSIVE FORFEITURE ACT

The origins of criminal forfeiture can be traced to the common law of England.¹ It is accomplished through an *in personam* proceeding whereby a defendant's property is subjected to forfeiture as a penalty upon conviction of a crime.² The development and

¹ 1 W. BLACKSTONE, COMMENTARIES *299. Early England utilized criminal forfeiture when a defendant was found guilty of treason or a felony. *Id.* It was believed that "all property [was] derived from society," therefore if "a member of any national community violate[d] the fundamental contract of his association, by transgressing the municipal law, he forfeit[ed] his right to such privileges as he claim[ed] by that contract . . ." *Id.* See S. REP. NO. 1030, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3376 [hereinafter 1984 SENATE REPORT]; Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures On The Right To Counsel*, 72 VA. L. REV. 493, 493 n.1 (1986).

In 1790, the First Congress outlawed criminal forfeiture. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117; H.R. REP. NO. 1549, 91st Cong., 1st Sess. 188, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4083 [hereinafter 1970 HOUSE REPORT]. See Note, *Bane of American Forfeiture Law - Banished At Last?*, 62 CORNELL L. REV. 768, 795 n.160 and accompanying text (1977). Only once between 1790 and 1970 did Congress provide for forfeiture by statute. See Confiscation Act, 37th Cong., 2d Sess., ch. 195, § 5, 12 Stat. 589, 590 (1862). It gave to the President of the United States the authority to seize the life estates of Confederate soldiers. *Id.* The Confiscation Act of 1862 was considered constitutional by the United States Supreme Court in *Bigelow v. Forest*, 76 U.S. (9 Wall.) 339, 352 (1869), and *Miller v. United States*, 78 U.S. (11 Wall.) 268, 268 (1870). Hughes & O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613, 619-20 (1984) (history of *in personam* forfeiture and discussion of Confiscation Act of 1862).

² 1984 SENATE REPORT, *supra* note 1, at 3376. "[C]riminal forfeiture is *in personam*: it operates against a convicted criminal defendant." *United States v. Nichols*, 841 F.2d 1485,

use of criminal forfeiture in the United States has flourished recently due to a perceived need to combat an increase in criminal activity.³ Two of the most comprehensive federal criminal forfeiture provisions are found in the Racketeering Influenced and Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) statutes.⁴

1486 (10th Cir. 1988). See *United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985) (forfeiture of defendants' money was *in personam*), *cert. denied*, 474 U.S. 821 (1986); *United States v. Long*, 654 F.2d 911, 914 (3d Cir. 1981) (criminal forfeiture proceedings under CCE are *in personam*); Brickey, *supra* note 1, at 494-95 nn.6-7 ("[C]riminal forfeitures operate *in personam* against the defendant upon conviction of a crime."); Note, *supra* note 1, at 796 (section 1963 proceeding is *in personam*) (quoting S. REP. NO. 617, 91st Cong., 1st Sess. 7980 (1969)).

Civil forfeiture, on the other hand, is an *in rem* action. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). Whether the defendant is innocent or guilty is of no consequence because the action operates against the property itself, not the person. *Id.* at 683-86.

³ See generally 1970 HOUSE REPORT, *supra* note 1, at 4083; 1984 SENATE REPORT, *supra* note 1, at 3376-77. In 1970, after a long period of holding criminal forfeiture illegal, with one exception, Congress enacted the original RICO and CCE statutes. See Hughes & O'Connell, *supra* note 1, at 621 (Congress' intent to attack economic base of criminal activity). See also *United States v. Martino*, 681 F.2d 952, 957 (5th Cir. 1982) (RICO and CCE employed as both deterrent and penalty).

⁴ 18 U.S.C.A. §§ 1961-to-1968 (West Supp. 1987) comprise the RICO statutes. The RICO forfeiture provisions are contained primarily in 18 U.S.C.A. §§ 1963(a) and 1963(c). § 1963(a) provides:

Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—(1) any interest the person has acquired or maintained in violation of section 1962; (2) any— (A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

Id.

§ 1963(c) provides:

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Id. (emphasis added).

The CCE statutes are represented by 21 U.S.C.A. §§ 848-853 (West Supp. 1988). The CCE forfeiture provisions are contained primarily in 21 U.S.C.A. §§ 853(a) and 853(c). § 853 (a) provides:

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In their original form, the forfeiture provisions contained "limitations and ambiguities" which rendered them essentially ineffective, since criminal defendants were able to transfer their assets to third parties before conviction.⁵ Additionally, the government failed to aggressively pursue forfeiture.⁶ In an attempt to remedy this ineffectiveness Congress enacted the Comprehensive Forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than year shall forfeit to the United States, irrespective of any provision of State law- (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; and (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise

Id.

§ 853(c) provides:

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Id. (emphasis added).

"Congress first acted to provide for criminal forfeiture when it passed [RICO and CCE]." 1984 SENATE REPORT, *supra* note 1, at 3376. See Note, *supra* note 1, at 794-95 ("Congress thought it was providing for the first use of forfeiture as criminal punishment since the first Congress abolished the common law forfeitures").

RICO sought to "stymie organized crime's growing infiltration of legitimate business." 1970 HOUSE REPORT, *supra* note 1, at 4081. CCE aimed at "punish[ing] and tak[ing] out of circulation persons who were engaged in the manufacture and sale of drugs primarily for the profits to be derived therefrom." *United States v. Jeffers*, 532 F.2d 1101, 1110 (7th Cir. 1976), *aff'd in part & vacated in part, on other grounds*, 432 U.S. 137, *reh'g denied*, 434 U.S. 880 (1977).

* See 1984 SENATE REPORT, *supra* note 1, at 3374 (citing *Asset Forfeiture - A Seldom Used Tool in Combatting Drug Trafficking*, General Accounting Office Release (April 10, 1981)). The GAO release concluded that the results of the RICO and CCE provisions, 18 U.S.C.A. § 1963(c) and 21 U.S.C.A. § 853(c) respectively, were "far below Congress' expectations." *Id.* Reasons given for the ineffectiveness of the forfeiture provisions were, (1) lack of aggressive pursuit on the part of government agents, and (2) "that the current forfeiture statutes contain[ed] numerous limitations and ambiguities that have significantly impeded the full realization of forfeiture's potential as a powerful law enforcement weapon." *Id.* See also *United States v. Nichols*, 841 F.2d 1485, 1487 (10th Cir. 1988) ("Despite the new provisions, the drug problem continued unabated."); *Hughes & O'Connell*, *supra* note 1, at 621 (non administrative loopholes existed).

* See *supra* note 5 and accompanying text.

ture Act of 1984 (CFA).⁷

To further its intention of stripping organized crime of its economic power, Congress enacted a "relation back" provision, via the CFA, which made the application of forfeiture more effective by vesting title to a convicted criminal defendant's ill gotten assets in the United States at the commission of the crime charged rather than at conviction.⁸ Thus, criminal forfeiture has become a more powerful weapon for the government to utilize in its fight against organized crime because a transfer of tainted assets by a criminal defendant will be invalid unless it is shown that the transferee was a bona fide purchaser for value.⁹

⁷ 21 U.S.C.A. § 853 (West 1985).

⁸ See *United States v. Monsanto*, 836 F.2d 74, 78 (2d Cir. 1987), *aff'd*, 852 F.2d 1400 (2d Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454). "It is clear that Congress, in enacting the CFA, intended to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of third party transfers prior to conviction." *Id.*; *United States v. Ianniello*, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985). "[F]orfeiture authority was designed to strip . . . offenders and organizations of their economic power." 1984 SENATE REPORT, *supra* note 1, at 3374. Only those assets to be transferred as part of a "sham or artifice" are to be forfeited. *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985). See also *supra* note 4 for the relevant text of 18 U.S.C.A. § 1963(c) and 21 U.S.C.A. § 853(c); *United States v. Bassett*, 632 F. Supp. 1308, 1316 (S.D.N.Y. 1985) ("[T]he true impact [of forfeiture] is felt prior to conviction" because of the relation back provision).

⁹ *United States v. Cauble*, 706 F.2d 1322, 1346 (5th Cir. 1983) (remedy for innocent parties affected by forfeiture restrictions is to petition Attorney General for "remission or mitigation of the forfeiture"), *cert. denied*, 465 U.S. 1005 (1984); Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U. L. REV. 225, 228 n.13 (1980) (forfeiture restrictions only directed at defendant's interest; jury's special verdict will take cognizance of innocent party interests); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 287-89 (1980) (discussion of rights of innocent parties when they share interest in forfeitable property with RICO defendant). *But see* *United States v. L'Hoste*, 609 F.2d 796, 812 (5th Cir. 1980) (concern for innocent persons "does not require the erosion of the directive nature of section 1963's language"), *cert. denied*, 449 U.S. 833 (1980).

Prior to the amendments to RICO and CCE, Congress felt that "the serious problem of a defendant's pretrial disposition of his assets" was not properly dealt with and that it was necessary to preserve those assets for forfeiture. 1984 SENATE REPORT, *supra* note 1, at 3379. Providing for "relation back" in criminal forfeiture would work to void sham or fraudulent "pre-conviction transfers" to third parties. *Id.*

Another feature of the forfeiture provisions is that a defendant cannot escape forfeiture by simply transferring his tainted assets to third parties before conviction unless the third party establishes that he is a bona fide purchaser for value. See *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985) (government's interest does not attach until conviction, but title vests upon commission), *cert denied*, 475 U.S. 1101 (1986); *United States v. Nichols*, 654 F. Supp. 1541, 1546 (D. Utah 1987) (CCE forfeiture provisions of § 853 provide for protection of bona fide purchasers of defendants' property through post conviction procedures), *rev'd on other grounds*, 841 F.2d 1485 (10th Cir. 1988) (CCE forfeiture provi-

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The new amendments to the forfeiture provisions have been controversial.¹⁰ Courts have not uniformly interpreted the application of the CFA's provisions to the forfeiture of attorneys' fees.¹¹ In earlier cases courts used the statutes' legislative history in their analyses.¹² Scrutiny of the legislative history has generally led courts to conclude that the forfeiture provisions of the CFA were not intended to reach attorneys' fees, unless the fee transaction was fraudulent or a sham.¹³ In later cases, courts have relied on the CFA's plain meaning rather than its congressional history and have come to the conclusion that the forfeiture provisions also encompass attorneys' fees.¹⁴ The courts which have con-

sions of section 853 provide for protection of bona fide purchasers of defendant's property through post-conviction procedures); Comment, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up For Grabs?*, 39 Sw. L.J. 1067, 1076 (1986) ("if a defendant sells tainted property for value to a bona fide purchaser . . . the transfer will stand").

¹⁰ See Comment, *supra* note 9, at 1076 n.73 and accompanying text.

¹¹ See *United States v. Harvey*, 814 F.2d 905, 909-13 (4th Cir. 1987). The court recognized the expanded power of the government provided by the Comprehensive Forfeiture Act, yet realized the exact scope of such power was uncertain. *Id.* See also *United States v. Monsanto*, 836 F.2d 74, 78-79 (2d Cir. 1987) (split in courts on exemption of legitimate attorneys' fees from forfeiture), *aff'd*, 852 F.2d 1400 (2d cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); Note, *infra* note 36, at 830 (scope of issues brought up in RICO cases involving attorney fee forfeiture has varied widely, resulting in controversy to whether attorneys' fees are forfeitable); Note, *Forfeitability of Attorney's Fees Traceable As Proceeds From A RICO Violation Under The Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499, 1509 (1986) (courts disagree as to whether attorneys' fees are forfeitable as proceeds of the crime).

¹² Compare *United States v. Estevez*, 645 F. Supp. 869, 872 (E.D. Wis. 1986) (relying on legislative intent in finding that attorneys' fees from non-fraudulent transactions were exempt from forfeiture) and *United States v. Figueroa*, 645 F. Supp. 453, 456 (W.D. Pa. 1986) (comporting with legislative intent by finding legitimate attorneys' fees exempt from forfeiture) with *United States v. Caplin & Drysdale*, 837 F.2d 637, 641-43 (4th Cir. 1988) (court did not examine legislative intent) and *United States v. Monsanto*, 836 F.2d 74, 78 (2d Cir. 1987) (plain language of statute provided no exemption from forfeiture for attorneys' fees), *aff'd*, 852 F.2d 1400 (2d cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454).

¹³ See *United States v. Ianniello*, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985) (scant legislative history proved that legitimate attorneys' fees were not subject to forfeiture unless connected with scheme or fraud); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) (legislative history indicated that attorneys' fees were not encompassed by statute); *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985) (court looked to legislative history to determine that legitimate attorneys' fees were exempt from forfeiture).

¹⁴ *United States v. Monsanto*, 836 F.2d 74, 79 (2d Cir. 1987) (Act's clear and plain meaning should control), *aff'd*, 852 F.2d 1400 (2d Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); *United States v. Harvey*, 814 F.2d 905, 913 (4th Cir. 1987) (statutory interpretation begins and ends with statute when language is clear and unambiguous), *rev'd on rehearing sub nom.* *United States v. Caplin & Drysdale*, 837 F.2d 637 (4th

cluded that the language of the CFA is clear and unambiguous have found themselves confronted with constitutional challenges to the CFA's provisions.¹⁵

This Article will address the constitutional implications associated with attorney fee forfeiture under the CFA. First, sixth amendment considerations will be discussed. Second, the ethical problems arising from attorney fee forfeiture will be addressed. Finally, this Article will discuss fifth amendment due process violations inherent in the forfeiture provisions of the Act.

I. SIXTH AMENDMENT CONSIDERATIONS

The sixth amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel.¹⁶ It is submitted that the forfeiture provisions of the CFA have been construed in a manner which directly undermines this right. Courts' reliance on the existence of public defenders' of-

Cir. 1988). *See generally* *Russello v. United States*, 464 U.S. 16, 20 (1983) (if language of statute is unambiguous, scrutiny of legislative history is precluded unless literal language would contravene clearly expressed legislative intention); *United States v. Turkette*, 452 U.S. 576, 580 (1981). "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Id.* (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

¹⁵ *See Monsanto*, 836 F.2d at 80 (no constitutional clash even though attorneys' fees fall under the Act); *Harvey*, 814 F.2d at 931 (defendant's deprivation of property used for attorneys' fees violated due process and sixth amendment right to counsel). Since the initial circuit court panel opinion, the case was reheard *en banc* and the Fourth Circuit reversed, holding that there was no sixth amendment violation, thus illustrating the vacillating opinions over such forfeitures. *See United States v. Caplin & Drysdale*, 837 F.2d 637, 643 (4th Cir. 1988) ("forfeiture of attorney's fees poses no threat whatsoever to the absolute right to be represented by counsel").

¹⁶ U.S. CONST. amend. VI. The sixth amendment provides in part that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his Defence." *Id.*

Although the language of the sixth amendment does not specifically set forth that there should be "effective" assistance of counsel, it has been construed as requiring such. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("right to counsel is the right to effective assistance . . ."). *See also United States v. Cronin*, 466 U.S. 648, 654 (1984) (text of amendment implies right to effective counsel); *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (same); Cloud, *Forfeiting Defense Attorneys' Fees: Applying An Institutional Role Theory To Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 4 (1987) (defense counsel must "provide effective representation"); Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 140 (1986) (right to counsel means effective assistance).

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fices¹⁷, the Criminal Justice Act (CJA)¹⁸ and caselaw involving forfeiture pursuant to jeopardy tax assessments¹⁹ has led to the presumption of constitutionally valid forfeiture of attorneys' fees. It is suggested that such reliance is misplaced in the light of the serious sixth amendment concerns which remain.

Most public defenders' offices lack the economic resources and specialized staff required to adequately represent a defendant in a complex RICO or CCE trial.²⁰ Moreover, where there are multi-

¹⁷ See, e.g., *United States v. Caplin & Drysdale*, 837 F.2d 637, 643 (4th Cir. 1988) (sixth amendment has come to mean representation for defendant either by retained or appointed counsel). See also *United States v. Curcio*, 680 F.2d 881, 890 (2d Cir. 1982) (noting right to counsel is constitutional right, yet right to counsel of choice is not absolute right); *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979) (defendant's right to counsel of choice is not absolute).

¹⁸ 18 U.S.C.A. § 3006A (West Supp. 1988). The CJA is a plan for furnishing court appointed counsel to criminal defendants who are financially unable to obtain attorneys. *Id.* at § 3006A(a). The CJA sets caps on appointed counsel's hourly rate, and the overall amount receivable in a case. *Id.* at § 3006A(d)(2). The hourly rate is not to exceed \$60 per hour for time in court, and \$40 per hour for time spent outside of court, if it is reasonable, and a maximum of \$75 per hour. *Id.* at § 3006A(d)(1). The maximum amount to be received for a case taken under CJA is \$3,500 for each attorney if the case involves at least one felony, and \$1,000 each if only misdemeanors are charged. *Id.* at § 3006A(d)(2). Maximum amounts may be waived by the court if deemed necessary. *Id.* at § 3006A(d)(3). See also *Caplin & Drysdale*, 837 F.2d at 650 (Murnaghan, J., concurring) (CJA rates may be inadequate); Cloud, *supra* note 16, at 48-49 and accompanying footnotes.

It is unlikely that an experienced and competent attorney would represent a defendant in such a case, potentially for several months, for a mere \$3,500. See *United States v. Rogers*, 602 F. Supp. 1332, 1350 (1985) (appointing counsel three to four months before RICO/CFA trial is inadequate and gives government unfair tactical advantage).

It has been suggested that the federal courts should develop a compensation system comparable to that of England, wherein courts will pay an attorney 90% of the fees charged against his indigent client. See Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 89 n.94 (1974) (citing R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 174-90 (1940)). Cf. *United States v. Nichols*, 841 F.2d 1485, 1505 (10th Cir. 1988) (no sixth amendment violation when Criminal Forfeiture Act used, as defendant can pay for counsel from legitimate sources or have counsel appointed); *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196-97 (E.D. Va. 1986) (forfeiture of attorneys' fees under CJA, RICO or CCE realistically precludes possibility of private counsel because of fee ceilings under acts; government therefore denies defendant's choice of counsel), *rev'd on rehearing sub nom.* *United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988).

¹⁹ I.R.C. § 6861(a) (1982). See *infra* note 28 and accompanying text; *United States v. Marshall*, 526 F.2d 1349, 1353-54 (9th Cir. 1975) (strong policy against judicial interference with tax collection process; no prevention of choice of counsel as defendant did not assert interest in money equal to government's), *cert. denied*, 426 U.S. 923 (1976). See also *Summers v. United States*, 250 F.2d 132, 134 (9th Cir. 1957) (that money seized under assessment would have been used to hire accountant to assist counsel does not amount to denial of "effective counsel").

²⁰ See *United States v. Ianniello*, 644 F. Supp. 452, 456 (S.D.N.Y. 1985). Because RICO prosecutions involve such complex litigation, public defender offices do not have the neces-

ple defendants in the same action, conflicts of interest would bar the same public defender's office from representing more than one co-conspirator.³¹ Inevitably, the remaining defendant or defendants who could not receive representation through the public defender's office would be forced to seek private counsel at a compensation level set by the CJA.³²

Alternatively, courts have relied on the existence of the CJA in RICO and CCE cases as a means of providing competent counsel in satisfaction of the sixth amendment.³³ However, the limited

sary resources to handle them competently. *Id.* See also *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985) ("The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office . . ."); *United States v. Veon*, 538 F. Supp. 237, 248 (E.D. Cal. 1982) ("CCE cases are viewed as the most complex in federal criminal law"); Cloud, *supra* note 16, at 47 ("The harsh reality is that appointed counsel is probably inadequate for lengthy and complex RICO and CCE cases."); cf. Portman, *Financing Your Right to Counsel: A View From A Local Public Defender*, 19 *LOY. L.A.L. REV.* 363, 365 (1985) (public defender offices are too overworked and understaffed for their lawyers to do their work properly); Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime?"*, 39 *STAN. L. REV.* 663, 675 (1987) (RICO and CCE cases are complex).

³¹ See *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 488-91 (1978). "[T]he Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants." *Cuyler*, 446 U.S. at 351 (Brennan, J., concurring in part) (citing *Holloway*, 435 U.S. at 488-89). See also *Glasser v. United States*, 315 U.S. 60, 76 (1942) (requiring attorney to represent two codefendants who have conflicting interests in same case denies one of them his sixth amendment right to effective assistance of counsel); Cloud, *supra* note 16, at 48 n.228 and accompanying text ("conflicts of interest among multiple defendants require that a single public defender's office may not represent them all").

³² Cloud, *supra* note 16, at 48. It follows that if a criminal defendant is unable to obtain representation from a public defender's office, he will have to find it elsewhere. *Id.* Unless the defendant has assets separate and apart from those subject to forfeiture, the only remaining source of compensation for a private attorney is the CJA. *Id.*

³³ See, e.g., *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), *aff'd*, 852 F.2d 1400 (2d Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454). In effect, *Monsanto* presumed that the CJA enables a RICO or CCE defendant to retain counsel of his choice, "thus, minimizing the incursion upon the defendant's limited right to counsel of choice." *Id.* at 85. See generally *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (court appointed counsel deprives defendant of his attorney of choice).

It has been said that the deprivation of a defendant's choice of counsel is as unconstitutional as deprivation of his right to counsel. See *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979). "An essential element of the Sixth Amendment's protection of the right to the assistance of counsel is that a defendant must be afforded reasonable opportunity to secure counsel of his own choice." *Id.* See also *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985) (appointment of counsel under CJA "pays no more than lip service to due process and the right to counsel"). But see *Brickey*, *supra* note 1, at 519 ("some courts will be satisfied that the availability of appointed counsel adequately neutralizes the sixth amendment objections raised by

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compensation provided under CJA would probably be insufficient to attract attorneys who are equipped to handle such complex litigation.²⁴ The CJA fee schedule has been described as “niggardly” and criticized as apt to attract only attorneys of limited experience and ability.²⁵ By contrast, the government’s case is presented by an experienced prosecution team supplied with substantial financial reserves and assisted by federal and state investigatory and law enforcement personnel.²⁶ Therefore, an “adequate defense” as promised by the Constitution, is unlikely to be mounted.²⁷

Courts have also analogized the RICO and CCE forfeiture provisions to those of jeopardy tax assessment cases to support the contention that fee forfeiture does not offend the sixth amendment.²⁸ Jeopardy tax assessments are utilized in the government’s

defendants”).

²⁴ See *supra* note 18 (discussion of CJA).

²⁵ Cloud, *supra* note 16, at 48-49. Professor Cloud bases this theory on language contained in *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1985), *aff’d sub nom. 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). See also *supra* note 18 and accompanying text (compensation provided under CJA wholly inadequate to attract competent counsel).

²⁶ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). “Governments, both state and federal, . . . spend vast sums of money to establish machinery to try defendants accused of crime.” *Id.*; *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”); ABA Project on Standards for Criminal Justice, *Providing Defense Services*, 1 (1968) (Society’s goal should be “that the system for providing counsel and facilities for the defense be as good as the system which society provides for the prosecution.”).

²⁷ See *supra* notes 20, 24 & 25 and accompanying text; *Nutt v. United States*, 335 F.2d 817, 818 (10th Cir.) (sixth amendment means effective assistance “as distinguished from bad faith, sham, pretense, or lack of opportunity for conference and preparation”), *cert. denied*, 379 U.S. 909 (1964); J. Casper, *Criminal Courts: The Defendant’s Perspective* ii (1978). “Nearly 30% of the defendants who had public defenders reported that their attorney spent less than 10 minutes with them; 32% stated 10-29 minutes; 27% stated ½ hour to 3 hours; and only 14% stated more than 3 hours” *Id.* In view of these findings, it is not surprising that nearly half (49%) of all public defenders’ clients thought their attorney was “on the side of the state.” *Id.*

²⁸ See, e.g., *Caplin & Drysdale*, 837 F.2d at 646; *Brickey*, *supra* note 1, at 525-29. See also Brief for Appellee at 41-42, *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987) (analogy to jeopardy tax assessment to justify forfeiture). But see Tarlow, *Criminal Defendants And Abuse of Jeopardy Tax Procedures*, 22 UCLA L. REV. 1191, 1217-18 (1975) (significant constitutional problems arise from immediate seizure of assets which impact on defendant’s right to fair trial).

Black’s Law Dictionary defines “jeopardy assessment” as follows:

If the collection of a tax appears in question, the IRS may assess and collect the tax immediately without the usual formalities. Also, the IRS has the power to terminate a taxpayer’s taxable year before the usual date if it feels that the collection of the tax

effort to raise revenues by forfeiting the property of one against whom a tax has already been assessed.²⁹ Conversely, the criminal forfeiture provisions used by the government in its fight against crime attach before the conviction or indictment.³⁰ It is submitted that the RICO and CCE forfeiture provisions are not analogous to jeopardy tax assessments, as the purposes and effects of each are distinct.

Effective assistance of counsel is a right conferred by the constitution aimed toward protecting a criminal defendant's liberty interest.³¹ It is well established in the law of the United States that a higher standard of proof is required when depriving one of his liberty rather than his property interest.³² Some courts, however, have merely required proof by a preponderance of the evidence in pre-trial hearings where the issue of forfeiture is decided.³³ It is suggested that forfeiture of attorneys' fees bears upon the criminal defendant's liberty interest to such an extent that the highest standard of proof, proof beyond a reasonable doubt, should apply.

may be in peril because the taxpayer plans to leave the country.

BLACK'S LAW DICTIONARY 749 (5th ed. 1979).

"The jeopardy assessment procedure permits the IRS, when it believes that assessment or collection of a tax currently due and payable would be 'jeopardized by delay,' to assess the tax immediately." Brickey, *supra* note 1, at 525 (citing I.R.C. § 6861(a) (1982)).

²⁹ Cloud, *supra* note 16, at 40 n.189 (citing *Blumenfield v. United States*, 306 F.2d 892, 900 (8th Cir. 1962)) (jeopardy tax assessments utilized to further the government's purpose of raising revenues via taxation).

³⁰ See *supra* notes 2-4 & 8-9 and accompanying text (purpose behind criminal forfeiture provisions is to provide weapon for government's fight against crime). See also Note, *supra* note 16, at 138 n.77 (forfeiture cases' reliance on tax cases is wrong because the government's interest in the two are distinct).

³¹ See *supra* note 16 and accompanying text (sixth amendment guarantees to a criminal defendant the right to "effective" assistance of counsel). To deny a defendant his right to the effective assistance of counsel violates the sixth amendment guarantee. See *Cronic*, 466 U.S. at 657-62; *Strickland*, 466 U.S. at 692; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). "[I]n our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." *Id.* "[N]o person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment." *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972) (quoting *Stevenson v. Holzman*, 254 Ore. 94, 102, 458 P.2d 414, 418 (1969)). See also *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (sixth and fourteenth amendments mandate that criminal indigent cannot be incarcerated if state has not provided counsel in his defense).

³² See *infra* note 65 and accompanying text (where defendant's life or liberty is threatened, proof beyond a reasonable doubt must be used to avoid error).

³³ See *infra* notes 65-68 and accompanying text (preponderance standard used by some courts at pre-trial hearings).

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In sum, it is asserted that courts which have relied on the existence of public defenders' offices and court appointed counsel to fulfill the effective assistance guarantee or which have analogized jeopardy tax assessments to RICO and CCE forfeiture have failed to fully protect criminal defendants' sixth amendment rights. Unless the transaction is fraudulent, the RICO and CCE statutes should be construed to except from forfeiture legitimate attorneys' fees to avoid all potential constitutional infirmities.³⁴

II. ETHICAL CONCERNS OF ATTORNEY FEE FORFEITURE

Contingency fee arrangements in criminal cases are void as against public policy.³⁵ It is suggested that some courts would have RICO and CCE defense attorneys face an ethical problem by maintaining that attorneys' fees may be subject to forfeiture. If attorneys' fees are forfeitable under RICO and CCE the defendant's attorney will have a pecuniary interest in the outcome of the case because his compensation would be dependent upon his success.³⁶ This situation could lead to conflicts; the potential for

³⁴ See *United States v. Ianniello*, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985). The court noted that bona-fide attorney's fees paid to counsel who serve defendant's needs were not intended by Congress to be forfeitable. *Id.* Such fees were not paid as part of a sham or merely so that defendant could avoid forfeiture. *Id.* at 456; *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985) 602 F. Supp. 1332, 1348. The court stated that "an attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture." *Id.* See also *Cloud*, *supra* note 16, at 31 (if government can show funds paid to attorney were for fraudulent purposes, neither defendant nor defense counsel can claim legitimate interest in transaction, nor is there any sixth amendment interest deserving protection); Note, *supra* note 11, at 1499 (pre-trial hearing should be provided in determining whether attorneys' fees should be forfeitable); DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-111.410. "Forfeiture of an asset transferred to an attorney as fees for legal services may be pursued where there are reasonable grounds to believe that the transfer is a fraudulent or sham transaction designed to shield from forfeiture assets which otherwise are forfeitable." *Id.*

³⁵ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) n.3 (1980). See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 670 (1985) (criminal contingent fee is a violation of disciplinary rules); *Nolan v. Foreman*, 665 F.2d 738, 741 n.5 (5th Cir. 1982) (quoting DR 2-106) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."); *Cloud*, *supra* note 16, at 63 (violation for attorney to take criminal case on contingency fee basis); Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 *FORDHAM L. REV.* 1171, 1181 (1986) (same).

³⁶ See *Caplin & Drysdale*, 837 F.2d at 642-43 (if defendant prevails, assets will be available to pay legal fees); *Ianniello*, 644 F. Supp. at 457 (defendant's attorney may be viewed as having accepted criminal contingent fee); Note, *Forfeiture of Attorneys' Fees: A Trap For The*

which would warrant a new trial.⁹⁷

Avoidance of many of these ethical problems may be accomplished by interpreting the forfeiture provisions of RICO and CCE as exempting attorneys' fees. It would also be less problematic for the government to forego those assets which potentially are forfeitable than it is for an attorney to have to face ethical charges.

III. FIFTH AMENDMENT CONSIDERATIONS

The fifth amendment to the Constitution guarantees that no person shall be forced to give up life, liberty, or property without due process of law.⁹⁸ Under the forfeiture provisions of the RICO and CCE statutes defendants may be deprived of the use of their property pursuant to pre- or post-indictment restraining orders.⁹⁹

Unwary, 88 W. VA. L. REV. 825, 844 (1986) (payment depends on outcome). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103, EC 5-7 (1980) (criminal attorney may not acquire financial interest in case's outcome).

⁹⁷ See *Simon v. Murphy*, 349 F. Supp. 818, 824 (E.D. Pa. 1972) (citing *Miller v. Myers*, 253 F. Supp. 55, 57 (E.D. Pa. 1966)). Only a showing of conflict need be shown, not actual prejudice. *Id.* See also *Ianniello*, 644 F. Supp. at 457 (potential for attorney to put his interests before his client's); *Badalamenti*, 614 F. Supp. at 196-97 (attorney may plea bargain in order to minimize risk of forfeiture); Comment, *The 1984 RICO Amendments: Will Defendants and their Attorneys be Short-Changed?*, 18 PAC. L.J. 31, 55 (1986) (forfeiture logically leads to increased plea bargaining). Cf. Note, *supra* note 36, at 844-45 (attorney in "Catch-22" position of ensuring payment by guilty plea which may be ethically unsound).

⁹⁸ U.S. CONST. amend. V. The fifth amendment provides: "No person shall be deprived of life, liberty, or property, without due process of law" *Id.*

⁹⁹ 18 U.S.C.A. § 1963 (d)(1)(A),(B) (West Supp. 1987). The RICO statute provides: 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) for forfeiture under this section- (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter 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 of 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 is to be entered

Id.

The forfeiture provision of the CCE is codified at 21 U.S.C.A. § 853 (e)(1)(A), (B) (West Supp. 1988) and is essentially the same as RICO. See *United States v. Jones*, 837 F.2d 1332, 1334 (5th Cir. 1988) (the two statutes are identical); *United States v. Harvey*, 814 F.2d

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Although this attachment may only be temporary if a defendant is subsequently acquitted,⁴⁰ the United States Supreme Court has determined that even such temporary deprivations of property fall within the parameters of due process.⁴¹

A. *Due Process: The Right to a Hearing*

Due process is a flexible concept; the adherence to which is analyzed on an *ad hoc* basis.⁴² In a case in which a person is being

905, 909 n.1 (4th Cir. 1987), *rev'd on rehearing sub nom.* United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988) (RICO and CCE forfeiture provisions are essentially the same).

Under subdivision (d)(1)(B), if the restraint of property is to occur pre-indictment, a hearing is required once the restraining order has been issued. 18 U.S.C. § 1963 (West Supp. 1988). Section (d)(1)(A) which addresses post-indictment forfeiture procedures does not acknowledge a defendant's entitlement to a post-deprivation hearing. *Id.*

⁴⁰ See Cloud, *supra* note 16, at 63. In order for a defendant to actually forfeit assets, including attorneys' fees, there must be a conviction. *Id.* Conversely, a verdict of not guilty will vest the assets in the acquitted defendant. *Id.* See also United States v. Ianniello, 644 F. Supp. 452, 457 (S.D.N.Y. 1985) (because defendant could retain his money upon acquittal, this is the only time when attorney is assured of receiving his fee).

⁴¹ See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975). The Court held that the fourteenth amendment due process procedures are required any time there has been a significant taking of property, and the length of time in which the defendant has been deprived of his property is only relevant to determine what type of procedures will be involved. *Id.* See also Fuentes v. Shevin, 407 U.S. 67, 84-85 (1971) (temporary taking of property is still under purview of fourteenth amendment); Bell v. Burson, 402 U.S. 535, 539 (1971) (temporary suspension of driver's license in accordance with state statute promoting safety involved questions of due process); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339-42 (1969) (interim taking of wages violates due process if done without a hearing); Note, *RICO Post-Indictment Restraining Orders: The Process Due Defendants*, 60 N.Y.U. L. REV. 1162, 1165 (1985) ("The Supreme Court has recognized that temporary . . . deprivations of property . . . are deprivations within the meaning of . . . due process . . .").

⁴² See Mathews v. Eldridge, 424 U.S. 319, 334 (1975). "Due process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)). The Mathews court suggested a balancing of the individual interests affected, the procedures used and government's interest in analyzing due process questions. *Id.* at 335. See also United States v. \$8,850, 461 U.S. 555, 564 (1983). The Court analogized the test from Barker v. Wingo, 407 U.S. 514, 530 (1972), to determine that because courts approach speedy trial cases on an *ad hoc* basis, courts should approach the due process element of having a hearing within a reasonable time on an *ad hoc* basis as well. *Id.*; Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part) (constitutional procedures require scrutiny of the individual private and governmental interests involved in each case); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (concept of due process is flexible and procedural safeguards vary with circumstance); United States v. Rogers, 602 F. Supp. 1332, 1344 (D. Colo. 1985) (same); Comment, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary From the Adversarial System*, 62 WASH. L. REV. 201, 223-24 (1987) (due process is not a fixed technical conception, but must be shaped around the

deprived of his property, due process requires both notice⁴³ and an opportunity to be heard.⁴⁴

The right to a hearing prior to deprivation of property⁴⁵ is re-

circumstances of each case).

⁴³ See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The Court noted that it is fundamental to due process to receive notice of a proceeding within a reasonable time and in a reasonable manner. *Id.* See also *United States v. Monsanto*, 836 F.2d 74, 83 (2d Cir. 1987) (due process requires notice), *aff'd*, 852 F.2d 1400 (2d Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); *United States v. Harvey*, 814 F.2d 905, 928 (4th Cir. 1987) ("[d]ue process requires that a person not be deprived of his property without notice and opportunity for a hearing"), *rev'd on rehearing sub nom. United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (in any proceeding, essential requirement for due process is notice of proceeding given within reasonable time); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (giving notice to those involved in proceeding constitutes due process within meaning of the fourteenth amendment).

For purposes of a RICO proceeding, the indictment by the grand jury will suffice to put the defendant on notice. 1984 SENATE REPORT, *supra* note 1, at 3386. The Committee for the Judiciary found that "[t]he indictment . . . itself gives notice of the government's intention to seek forfeiture of the property." *Id.* See also *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986) (when indictment describes property to be forfeited it satisfies constitutional notice requirements); *United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983) (indictment does not have to list every item subject to forfeiture but it will serve as notice to defendant that government seeks forfeiture). Although the indictment may serve as notice of the forfeiture to the defendant, the Federal Rules of Criminal Procedure require that "[i]f the indictment or information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." FED. R. CRIM. P. 31(e). See also *United States v. Jones*, 837 F.2d 1332, 1333 (5th Cir. 1988) (jury determined what property was forfeitable pursuant to RICO statute).

⁴⁴ See *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972). People whose possessions may be taken must be afforded an opportunity to be heard. *Id.* See also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1913)); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236 (1900) (same); *Simon v. Craft*, 182 U.S. 427, 436 (1901) ("The essential elements of due process of law are notice and opportunity to defend."); Note, *supra* note 41, at 1165 (deprivations of property mandate due process procedural requirements which include an opportunity to be heard). See generally *Southern Ry. v. Virginia*, 290 U.S. 190, 196 (1933) (absence of notice and opportunity to be heard violates due process); *Londoner v. Denver*, 210 U.S. 373, 385 (1908) (opportunity to be heard and notice of proceeding must be given in order to satisfy due process rights).

In *United States v. Crozier*, the Ninth Circuit Court of Appeals held that the hearing must be within a reasonable time after the issuance of a restraining order which affects a person's right to his property, in order to satisfy due process notice requirements. *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985). See also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The Supreme Court in *Armstrong* held that the due process requirements of notice and an opportunity to be heard must both occur within a reasonable time and in a reasonable manner. *Id.*

⁴⁵ See *United States v. \$8,850*, 461 U.S. 555, 562 n.12 (1983) (general rule is that hearing must come before deprivation of property unless extraordinary circumstances exist); *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972) (previous Supreme Court cases have established that

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quired when such deprivation encompasses an interest embraced by the fourteenth amendment.⁴⁶ However, in certain circumstances, due process will be satisfied even in the absence of a pre-deprivation hearing.⁴⁷ The situation must be one in which an important public or governmental interest is at stake, and which requires prompt action that is appropriately tailored to the stan-

in order to satisfy due process opportunity for hearing must be afforded before deprivation of property takes place). *Cf. Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring) (notice and hearing establish validity of underlying claim); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-53 (1941) (no special time during which hearing must be afforded as long as it occurs before the deprivation is effective); Note, *supra* note 41, at 1165 ("due process . . . protect[s] against arbitrary deprivations of property" so chance for hearing will usually be before the defendant is deprived of his property).

While a prior hearing can impose greater costs in time, effort, and expense, and it may be more efficient to dispense with the opportunity for such hearings, these factors cannot outweigh the constitutional right at stake. *See Bell v. Burson*, 402 U.S. 535, 540-41 (1971) (due process not intended to promote efficiency, but to promote necessary protections for defendant); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (due process is method of protection, not system of efficiency).

⁴⁶ U.S. CONST. amend. XIV, §1. The fourteenth amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." *Id.* The fourteenth amendment has been held to apply the fifth amendment to the states. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969) (Court found fifth amendment guarantee against double jeopardy to be fundamental right and applied it to states through fourteenth amendment); *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) ("[M]any of the rights guaranteed by the first eight amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the fourteenth amendment."); *Malloy v. Hogan*, 378 U.S. 1, 5-7 (1964) (noting amendments one and four applied to states through fourteenth amendment and holding that fifth amendment protection from self-incrimination does also).

The right to a prior hearing applies only to the deprivation of an interest encompassed within the fourteenth amendment's protection. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (where property interest is at stake, Supreme Court has consistently required hearing prior to deprivation).

⁴⁷ *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969) (depriving a person of property without prior opportunity to be heard may well satisfy due process requirements in extraordinary situations); Note, *supra* note 41, at 1165 (extraordinary situation will allow for seizure of property before notice and opportunity for hearing are exercised). *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80 (1974) (interest of government in holding yacht containing marijuana was extraordinary circumstance to allow for seizure before hearing); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (where seizure occurs prior to hearing, as long as there is a hearing at some point, due process will be satisfied); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 320 (1908) (destruction of contaminated food before a preliminary hearing was not denial of due process). *See generally Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1972). The Court has allowed seizure before a hearing in a number of situations including: The "collect[ion] of the internal revenue of the United States, to meet the needs of a national war effort, to protect against economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." *Id.*

dards of a narrowly drawn statute.⁴⁸ Even in such a situation a hearing must ensue soon after the deprivation.⁴⁹

The CFA satisfactorily provides for a hearing if the restraining order is to be issued before the filing of an indictment or information.⁵⁰ If the government seeks a restraining order once the indictment or information has been filed, however, no hearing is required.⁵¹ It is submitted that where the forfeiture of attorneys'

⁴⁸ *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972). In *Fuentes*, the Court defined the extraordinary circumstances which must exist in any one situation:

First, . . . the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, . . . the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. See also *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (slight variation on *Fuentes* criteria); *Ivers v. United States*, 581 F.2d 1362, 1368 (9th Cir. 1978) (*Fuentes* criteria reiterated).

⁴⁹ See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process requires an opportunity to be heard that is "granted at a meaningful time and in a meaningful manner." *Id.* See also *Peralta v. Heights Medical Center, Inc.*, 108 S. Ct. 896, 899 (1988) (interested parties must be given notice calculated to apprise them of action and give them an opportunity to object); *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (once restraining order has been issued hearing must be afforded within meaningful time); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 779-80 (9th Cir. 1982) (opportunity to be heard must be at reasonable time in meaningful manner). See generally *United States v. \$8,850*, 461 U.S. 555, 564-67 (1983). The Court employed the *Barker v. Wingo* test, *supra* note 42, to ensure that hearing is afforded within reasonable time after seizure of property. *Id.*

⁵⁰ See *supra* note 39 (section 1963 (d)(1)(B) of Act provides that hearing will be afforded in situations where there is pre-indictment restraint of property).

⁵¹ See *supra* note 39 (section 1963 (d)(1)(A) of Act makes no mention of a hearing requirement after indictment has been filed). Before the passing of the Comprehensive Forfeiture Act, case law analysis of the forfeiture provisions indicated that a post-indictment, post-deprivation hearing was required by due process and thus read it into the statute. See *United States v. Thier*, 801 F.2d 1463, 1466-69 (5th Cir. 1986) (applied FED. R. Civ. P. 65 requiring an adversary hearing to follow all restraining orders and injunctions issued by United States courts), *modified*, 809 F.2d 249 (5th Cir. 1987); *United States v. Crozier*, 777 F.2d 1376, 1382-84 (9th Cir. 1985) (absence of hearing upon imposition of restraining order violates due process); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.) (applied FED. R. Civ. P. 65 requiring adversary hearing after indictment is issued), *cert. denied*, 474 U.S. 994, 995 (1985); *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (due process requires that "defendant be afforded a prompt hearing once the restraining order has been entered."); *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981) (government must establish that defendant violated CCE and property is subject to forfeiture in order to obtain post-indictment restraining order); *United States v. Veon*, 538 F. Supp. 237, 243 (E.D. Cal. 1982) (court read requirement of post-indictment hearing into statute to avoid constitutional confrontations). *But see* *United States v. Musson*, 802 F.2d 384, 386 (10th Cir. 1986) (Congress' intent was to require hearing only when restraining order is issued pre-indictment); *United States v. Draine*, 637 F. Supp. 482, 485 (S.D. Ala. 1986) (to find that failure of statute to provide for post-indictment hearing in all cases is unconstitutional is contrary to the concept of due process flexibility), *cert. denied*, 108 S. Ct. 94

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fees is implicated in a post-indictment restraining order, due process mandates that notice and hearing be afforded to defendants.

It is suggested that the courts employ the balancing test fashioned by the Supreme Court in *Mathews v. Eldridge*⁵³ to determine whether, in the context of attorney fee forfeiture, a post-indictment/post-restraint hearing is necessary to comply with due process. The test consists of three factors to be balanced: 1) the private interests at stake due to the government's action;⁵³ 2) whether the action being considered decreases the chance of an erroneous outcome;⁵⁴ and 3) the government's interest in the action.⁵⁵ In the case of a RICO or CCE defendant, the private interest of defendants in retaining their assets is great since forfeiture of such assets could impact on their sixth amendment right to obtain counsel of choice.⁵⁶ Restraining a defendant's assets which would otherwise be used for payment of attorneys' fees may prevent a defendant from obtaining competent counsel, and therefore increases the chance of an erroneous outcome.⁵⁷

(1987).

⁵³ 424 U.S. 319, 335 (1976). See Comment, *supra* note 42, at 224 (*Mathews* test of due process requirements is readily applicable to fee forfeiture issue). Cf. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985) (Court used *Mathews* test to determine what process was due a defendant deprived of wages without opportunity for hearing); *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970) (Court used balancing test to determine procedures which would insure defendant's due process rights).

⁵⁴ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., Comment, *supra* note 42, at 224 (defendant risks losing all his assets and possibly his entire estate). It is clear that the right to counsel of choice is qualified since one of its limits is the amount of funds available to secure counsel. See *United States v. Harvey*, 814 F.2d 905, 923 (4th Cir. 1987) (right to counsel of one's choice "means, in general, a right to retain private counsel of choice out of one's private resources, and up to the limit of those resources, free of government interference."), *rev'd on rehearing sub nom.* *United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988); Note, *supra* note 35, at 1177-78 (to extent defendant can afford to pay for counsel, he has right to choice of counsel); Note, *supra* note 20, at 675 ("[c]o-extensive with the defendant's right to counsel is his right to a fair and reasonable opportunity to retain the counsel of his choice.").

If a RICO defendant stands to lose all of his money, including money with which to pay his attorney, his right to counsel will certainly be affected. See *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) (forfeiture of defendant's money with which he would pay an attorney legitimate fee would be sixth amendment violation); Brickey, *supra* note 1, at 496 ("For the defendant whose only assets are allegedly traceable to criminal conduct, the government's decision to seek forfeiture may have an immediate and adverse impact on his ability to retain counsel of choice.").

⁵⁷ See Comment, *supra* note 42, at 224. A defendant who has money to retain his counsel

While the government has a substantial interest in separating the defendant from tainted funds, this interest can be furthered without restraining the assets that are allocated to pay the defendant's attorney.⁵⁸ It is suggested that the application of the *Mathews* test mandates that in order to satisfy due process, a RICO or CCE defendant is constitutionally entitled to a post-indictment/post-deprivation hearing. A procedure which did not require the hearing would raise serious questions as to a defendant's fifth amendment due process rights.⁵⁹

of choice enhances the reliability of the trial process because private counsel presumably has better funding. *Id.* Moreover, if the defendant can choose his own counsel, the free flow of information is likely to be greater because a defendant has more trust and confidence in an attorney of his own choice. *Id.* at 225. While this is not to suggest that public counsel is incompetent, the public defense bar lacks the necessary resources to effectively handle long and complex RICO and CCE proceedings. *Id.* at 224-25. *See also* United States v. Harvey, 814 F.2d 905, 921 (4th Cir. 1987) ("The available force of public defenders and legal aid lawyers is insufficient to provide this assurance [that defendant has competent counsel]."), *rev'd on rehearing sub nom.* United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988). *But see In re* Grand Jury Subpoena Dated Jan. 2, 1985 (Payden v. United States) 605 F. Supp. 839, 853 n.19 (S.D.N.Y.) (explicitly rejecting the *Rogers* court's contention that appointed counsel is unable to adequately defend a RICO prosecution), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (defendant's sixth amendment right to counsel not violated by representation by court appointed counsel); *supra* note 20 (discussion of public defender's lack of adequate resources).

⁵⁸ *See* United States v. Monsanto, 852 F.2d 1400, 1402-03 (2d Cir.) (Feinberg, C.J., concurring) (government's interest in claiming defendant's assets is weak in relation to defendant's sixth amendment rights), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); Comment, *supra* note 42, at 225. The government's only interest in the forfeiture is to separate the defendant from his tainted funds and this interest would be served whether the assets went to the government or to a legitimately paid attorney. *Id.* *Cf.* United States v. Veon, 538 F. Supp. 237, 248 (E.D. Cal. 1982) (government interest is separating defendant from all profits and property); 1984 SENATE REPORT, *supra* note 1, at 191 (Congress felt RICO defendant had to be stripped of his economic power); Taylor, *Forfeiture Under 18 U.S.C. § 1963 RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 379 (1980) (Congress' aim was to remove RICO defendant's economic power); Note, *supra* note 20, at 666 (legislature wanted to separate defendant from source of money).

⁵⁹ *See* United States v. Monsanto, 852 F.2d 1400, 1419 (2d Cir.) (Cardamone, J., concurring in part, dissenting in part) (post-indictment restraint hearing required as matter of fifth amendment due process), *cert. granted*, 57 U.S.L.W. (U.S. Nov. 8, 1988) (No. 88-454); United States v. Harvey, 814 F.2d 905, 928-29 (4th Cir. 1987) (immediate post-deprivation hearing required by due process), *rev'd on rehearing sub nom.* United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988); United States v. Thier, 801 F.2d 1463, 1466-70 (5th Cir. 1986) (employing FED. R. Civ. P. 65 requires post-deprivation hearing to comply with due process), *modified*, 809 F.2d 249 (5th Cir. 1987); United States v. Crozier, 777 F.2d 1376, 1382-84 (9th Cir. 1985) (required hearing after issuance of indictment to satisfy due process); United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (due process requires post-indictment hearing). *See also* Note, *supra* note 35, at 1188 (in forfeiture case where restraint of property can impinge upon defendant's sixth amendment rights, hearing

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B. *Due Process, Standard of Proof*

Courts have differed with regard to what the government's burden is at post-indictment/post-deprivation hearings.⁶⁰ A number of courts have determined that the government has the burden of proof⁶¹ to show a likelihood that a jury will believe beyond a reasonable doubt that the defendant is guilty of a RICO or CCE violation and that the property in question is forfeitable under the statute.⁶² Other courts, however, have criticized such a standard

should be required); Note, *supra* note 41, at 1177 (despite contrary congressional intent, courts have required post-indictment adversarial hearing to ensure due process for defendant). *But see* United States v. Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988) (*en banc* court reversed a circuit court panel opinion to hold that attorneys' fees were subject to forfeiture, but made no requirement for post-indictment/post-restraint hearing); United States v. Musson, 802 F.2d 384, 386 (10th Cir. 1986) (because Congress did not intend for hearing in post-indictment situation, none was required); United States v. Draine, 637 F. Supp. 482, 485 (S.D. Ala. 1986) (due process flexibility does not require hearing in all situations of restraint), *cert. denied*, 108 S. Ct. 94 (1987).

⁶⁰ See *infra* notes 64-68 and accompanying text (discussion of government's burden at hearing). See, e.g., United States v. Monsanto, 836 F.2d 74, 83-84 (2d Cir. 1987) (government must prove its chance of success on merits at trial by preponderance of the evidence), *aff'd*, F.2d 1400 (2d Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); United States v. Thier, 801 F.2d 1463, 1470 (5th Cir. 1986) (indictment itself constitutes strong showing required at hearing); United States v. Lewis, 759 F.2d 1316, 1324 (8th Cir.) (followed reasonable doubt standard), *cert. denied*, 474 U.S. 994 (1985); United States v. Beckham, 562 F. Supp. 488, 490 (E.D. Mich. 1983) (required intermediate standard of clear and convincing evidence).

⁶¹ United States v. Veon, 538 F. Supp. 237, 245-46 (E.D. Cal. 1982) (at adversarial hearing burden of proof rests on proponent of motion). See also United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982) (prosecution must show likelihood of jury convicting defendant); Kouba v. Allstate Ins. Co., 523 F. Supp. 148, 154 (E.D. Cal. 1981) ("all permissible inferences [are] properly . . . drawn . . . in favor of the non-moving party," so party making motion has burden of proof) (quoting *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1279 (9th Cir. 1979)). See generally 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2948 at 429 (1975) ("movant . . . carries . . . burden of persuasion"). Various courts have uniformly held that the burden of proof rests with the government, the proponent of the motion, at post-indictment hearings. United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976) (petitioner has burden of coming forward with substantial evidence to show he will prevail on the merits); Note, *supra* note 41, at 1181-82.

⁶² See United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981). The Court stated that: Before a court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute [or RICO] and two, that the profits or properties at issue are subject to forfeiture under the provisions of section 848 (a)(2) [or RICO counterpart].

Id. See also United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (government must show probability to convince jury that defendant has violated statute and that assets are subject to forfeiture), *aff'd*, 852 F.2d 1400 (2d Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); United States v. Lewis, 759 F.2d 1316, 1324 (8th Cir.) (standards set out by *Long* used as criteria for government's standard of proof in upholding restraining

as being uncertain and imprecise in application.⁶³ At least two courts have interpreted this "likelihood standard" as requiring a preponderance of the evidence.⁶⁴

IV. A CLEAR AND CONVINCING STANDARD

A standard of preponderance of the evidence is the least burdensome standard which a court can impose, indicating a case in which society has "minimal concern for [the] outcome."⁶⁵ A post-

orders), *cert. denied*, 474 U.S. 994 (1985); Note, *supra* note 35, at 1190-92 (standard imposed upon government by *Long* court analyzed).

⁶³ See *United States v. Beckham*, 562 F. Supp. 488, 489 (E.D. Mich. 1983). The court refused to apply the *Long* standard because it could not be applied with "any degree of precision." *Id.* The standard was not workable because a court cannot determine how a reasonable jury would decide. *Id.* at 490. See also Note, *supra* note 35, at 1190 n.170 (comparison between *Long* standard and civil preliminary injunction showed that although *Long* seemed nebulous, it was just as feasible for application as civil standard).

⁶⁴ See, e.g., *United States v. Veon*, 538 F. Supp. 237, 247-48 (E.D. Cal. 1982). The court found that only a property interest would be affected, and therefore the minimum standard of preponderance of the evidence was applicable. *Id.* The *Veon* court came to this conclusion by applying "due process standards for fundamental fairness in the selection of the applicable burden of proof." *Id.* at 247 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

The *Veon* court applied the preponderance of the evidence standard, using the three factors used in *Mathews v. Veon*, 538 F. Supp. at 248. See *supra* note 52 and accompanying text (discussion of *Mathews* analysis). In balancing the three factors, the *Veon* court decided that the first and third elements of the test only require the preponderance of the evidence standard, while the second factor called for proof by clear and convincing evidence; thus the standard of preponderance of the evidence was favored. *Veon*, 538 F. Supp. at 248. See also *United States v. Harvey*, 560 F. Supp. 1040, 1085 (S.D. Fla. 1983) (proper standard is preponderance of the evidence), *aff'd*, 814 F.2d 902 (4th Cir. 1987), *rev'd on rehearing sub nom.* *United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988). But see *United States v. Beckham*, 562 F. Supp. 488, 490 (E.D. Mich. 1983) (intermediate standard of clear and convincing evidence required).

⁶⁵ See *Santosky v. Kramer*, 455 U.S. 745, 755 (1982). In a civil dispute over money damages, society itself is not as concerned with the outcome and the litigants should both bear the risk of error in equal degree, so the minimal burden of preponderance of the evidence is employed. *Id.* However, in a criminal case where the defendant's life or liberty is at stake, the highest degree of proof, beyond a reasonable doubt, is employed to minimize any chance of error. *Id.* See also *California ex rel. Cooper v. Mitchell Brothers Santa Ana Theater*, 454 U.S. 90, 93 (1981) (recognizing three standards of proof ranging from preponderance of evidence to beyond reasonable doubt), *cert. denied*, 459 U.S. 1093 (1982); *Addington v. Texas*, 441 U.S. 418, 423 (1979) (at one end of spectrum is preponderance of the evidence when society has minimal concern, at other end, in a criminal prosecution, more stringent standard is beyond a reasonable doubt); *McBaine, Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 245-57 (1944) (analysis of three recognized types of burden of proof from preponderance of evidence to beyond a reasonable doubt); *Morano, A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507 (1975) (reasonable doubt presents less strict standard than previous common-law rules). See generally CLEARY, MCCORMACK ON EVIDENCE § § 339-341 at 956-64 (3d ed. 1984) (discussion of bur-

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restraint hearing incident to a RICO or CCE indictment is vital since it can concern more than just a proprietary right.⁶⁶ The outcome of the hearing can affect the defendant's right to counsel.⁶⁷ To require a minimal standard, such as a mere preponderance of the evidence, reduces the pre-trial hearing to an illusory burden on the government rather than an actual one. In contrast, a burden of "proof beyond a reasonable doubt" puts the judge in the position of determining how a reasonable jury would decide.⁶⁸ It is therefore suggested that the intermediate standard of clear and convincing evidence should be used in order to balance the defendant's fifth amendment due process rights and the interest of the government in preventing the pre-trial transfer of assets.

V. MAINTAINING THE BALANCE BETWEEN THE PROSECUTION AND THE DEFENSE

In order to satisfy due process, it is imperative that there be a balance between an accused and his accuser.⁶⁹ The Supreme

dens of proof in ascending order); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

⁶⁶ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause . . ." *Id.* See also *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (due process required for property); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (same).

⁶⁷ See Note, *supra* note 35, at 1188-89 (outcome of hearing may impinge on sixth amendment right to choice of counsel, because choice is determined in part by defendant's funds); Note, *Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys?*, 62 NOTRE DAME L. REV. 734, 743 (1987) (finances limit defendant's right to choice of counsel); Note, *supra* note 41, at 1184 (defendant's interest in outcome of hearing which may result in restraint of assets is very strong because ultimately choice of counsel may be affected). See also *Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984) (cannot deprive financially able defendant of right to choice of counsel).

⁶⁸ See *United States v. Beckham*, 562 F. Supp. 488, 490 (E.D. Mich. 1983) (reasonable doubt standard could not be applied because it would compel judge to decide what reasonable jury would determine).

⁶⁹ See *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (due process clause speaks to balance between strength of accused and accuser); *Williams v. Florida*, 399 U.S. 78, 82 (1970) (equity in adversary system should be preserved); Note, *supra* note 20, at 678 ("[d]ue process requires a balance between the accused and accuser . . ."). See also *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985). The *Rogers* court held that the mere opportunity for a prosecutor to manipulate the adversarial system was adverse to the requirements of due process. *Id.*

Court has taken affirmative steps to insure that the criminal defendant receives the same basic litigation tools as the prosecution.⁷⁰ However, the power to forfeit attorneys' fees may lead to an imbalance because it gives the government improper influence over the defendant's right to counsel,⁷¹ as well as defendant's choice of counsel.⁷²

Through manipulation of the forfeiture device, the government can successfully deter private counsel from taking on RICO or CCE cases.⁷³ If the government chooses not to seek a restraining

⁷⁰ See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985) (indigent allowed to secure psychiatrist at state expense to rebut prosecutor's evidence); *Little v. Streater*, 452 U.S. 1, 14 (1981) (father in paternity action unable to afford blood grouping test entitled to state sponsorship); *Wardius*, 412 U.S. at 475 ("[I]n the absence of a strong showing of state interests to the contrary, discovery must be a two way street."); *Williams v. Florida*, 399 U.S. 78, 82 (1970) (adversary system requires that defendant have same opportunity as state in discovery); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (due process requires that criminal defendant be provided with counsel if defendant cannot afford it); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (criminal defendant must be provided with trial transcript for appeal). See generally Note, *Criminal Procedure - Due Process and the Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 How. L.J. 609 (1986) (scope of indigent defendants' due process rights).

⁷¹ See *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir.) (Feinberg, C.J., concurring) (government's use of forfeiture enables it to get advantage by weakening defendant's ability to defend himself), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454); *Rogers*, 602 F. Supp. at 1350. The court asserted that an interpretation of the statute in a manner which would call for the forfeiture of attorneys' fees "would undermine the very principles underlying the adversarial system." *Id.* If such interpretations were allowed, the government would possess the "ultimate tactical advantage" in being able to eliminate skilled defense attorneys. *Id.* The court took this position in order to prevent prosecutorial manipulation. *Id.* See also *Cloud*, *supra* note 16, at 44-45 (forfeiture allows prosecution to inhibit defendant's right to counsel); Note, *supra* note 20, at 677 (application of forfeiture provision to attorney fees would leave adversarial system unbalanced).

⁷² See *Rogers*, 602 F. Supp. at 1350. Allowing attorney's fees to be forfeited would give the government the ability to decide whether a defendant will be able to be represented by competent defense counsel. *Id.* See also *United States v. Harvey*, 814 F.2d 905, 923 (4th Cir. 1987) (limiting defendant's funds through forfeiture would enable government to dictate defendant's choice of counsel), *rev'd on rehearing sub nom.* *United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988); *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986) (government's improper influence over defendant's choice of attorney could result from ability of government to "include a broad list of assets allegedly subject to forfeiture," including attorneys' fees, in indictment); *Cloud*, *supra* note 16, at 44-45 (by asking for forfeiture on indictment, government can exclude able defense attorneys which would most likely be attorney of defendant's choice).

⁷³ See *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (seizure of attorneys' fees would violate criminal defendant's right to choice of counsel). The court analogized the right to retain fees for an attorney to a necessity of life. *Id.* at 1348 n.5. Cf. *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984) (restraining order for forfeiture of assets excluded necessities of life); *United States v. Ianniello*, 644 F. Supp. 452, 459 (S.D.N.Y. 1985) (deprivation of attorneys' assistance would be deprivation of "necessity of

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order on a defendant's assets but merely notifies the defense of possible forfeiture upon conviction, not only will private counsel be deterred from taking the case,⁷⁴ but the defendant will probably retain sufficient funds to disqualify him from receiving an appointed counsel.⁷⁵ If the government does induce indigence upon the defendant, qualifying him for assistance from the public bar, the defendant may be deprived of effective assistance.⁷⁶

A prosecutor may also employ his control over the grand jury⁷⁷ to eliminate competent defense attorneys.⁷⁸ If the defense attorney is hired prior to the grand jury investigation the prosecution can learn the identity of the defense counsel,⁷⁹ and structure a broad indictment attaching all of the defendant's assets, including

life"). See also *Cloud*, *supra* note 16, at 35-36 ("potential loss of their earned compensation makes it financially impossible for attorneys to represent clients in complex and lengthy" litigation); Note, *supra* note 16, at 147-48 (defendant who had already hired lawyer would risk chance of losing representation if attorney's fee forfeiture appeared on indictment).

⁷⁴ See *supra* notes 23 - 27 and accompanying text (discussion of forfeiture's effect in repelling attorneys).

⁷⁵ See *United States v. One Parcel of Land*, 614 F. Supp. 183, 187 (N.D. Ill. 1985) (if all competent attorneys refuse to represent RICO defendant, counsel will be appointed as long as defendant is indigent); *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985) (defendant who has money to pay an attorney cannot apply for appointed counsel); 18 U.S.C.A § 3006A(a) (West Supp. 1988). The Criminal Justice Act requires all United States district courts to provide for appointed counsel when the defendant is financially unable, but not if he has assets with which to secure private counsel. *Id.* See generally *United States v. Jiminez*, 600 F.2d 1172, 1174 (5th Cir.) (if criminal defendant is able to pay, he is not entitled to appointed counsel), *cert. denied*, 444 U.S. 903 (1979); *United States v. Santarpio*, 560 F.2d 448, 455 (1st Cir.) (criminal defendant may have to repay appointed counsel if able to do so), *cert. denied*, 434 U.S. 984 (1977).

⁷⁶ See *supra* notes 23 - 27 and accompanying text (discussion of deficiencies in appointed counsel).

⁷⁷ See *Vaira, The Role of The Prosecutor Inside the Grand Jury Room: Where Is the Foul Line?*, 75 J. CRIM. L. AND CRIMINOLOGY 1129, 1131 (1984) (prosecutor has wide range of control over grand jury). See also *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.) (grand juries rely on prosecutors), *cert. denied*, 434 U.S. 825 (1977); *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (grand juries are part of prosecutorial arm of government).

⁷⁸ *Cloud*, *supra* note 16, at 45. Manipulation of the grand jury which can lead to the exclusion of specific attorneys by the prosecution is possible. *Id.* This is due to the secrecy surrounding grand jury proceedings and the strong influence of the prosecutor in these non-adversary proceedings. *Id.* See *Vaira*, *supra* note 77, at 1131 n.14 (dependency relationship between prosecutor and grand jury can be used for manipulation). See, e.g., *United States v. Kilpatrick*, 594 F. Supp. 1324, 1353 (D. Colo. 1984) (prosecutor's "inaccurate procedures" turned grand jury "into little more than a rubber stamp"), *rev'd*, *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987), *cert. granted*, 108 S. Ct. 693 (1988).

⁷⁹ See *United States v. Rogers*, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985) (defense counsel must be present at grand jury proceedings).

money which would be used to pay the attorney's fee.⁸⁰ Prosecutors can also seek to amend indictments to cover more assets if they wish to exclude a specific attorney after the initial indictment has been issued.⁸¹ Thus the threat of forfeiture of attorneys' fees shifts the balance the Supreme Court has sought to maintain between the prosecution and the accused to the side of the prosecution.⁸² The prosecution has clearly been given an unfair tool with which it can effectively exclude an adversary's counsel as it chooses. Courts which continue to follow this path may seriously infringe upon defendants' due process rights.

CONCLUSION

To resolve the inconsistencies among the circuits in their application of the forfeiture provisions of RICO and CCE, it is essential that they be construed as providing for an exemption of attorneys' fees. A defendant's sixth amendment right to counsel in such complex litigation is fundamental. Due to caseload and the lack of financial resources, a public defenders' office would be incapable of offering effective assistance in such complex litigation. Additionally, it is unlikely that competent counsel will be attracted by CJA rates.

The ethical violations that may arise from the potential forfeiture outweigh the government's interest in protecting the insignificant amount of assets allocated to legal fees. It is unfair to continue to compel attorneys to choose between refusing to take a case and the possibility of ethical conflicts arising.

In order to comply with the due process requirements, it is imperative that the RICO and CCE statutes provide defendants with an opportunity for a hearing once an indictment requesting forfeiture of attorneys' fees has been issued. At this hearing, it is also in keeping with due process to require the government to prove

⁸⁰ See *Vaira*, *supra* note 77, at 1131 (influence of prosecutor over grand jury enables him to structure indictment); *Cloud*, *supra* note 16, at 45 (prosecutor can turn to grand jury when he wants to amend indictment so that it says exactly what prosecutor wants).

⁸¹ *Cloud*, *supra* note 16, at 35 (prosecution can weigh its decision to attach all defendant's assets for forfeiture).

⁸² See *United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir.) (Oakes, J., concurring) (statute allowing attorney fee forfeiture permits prosecutor to undermine adversarial process), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 8, 1988) (No. 88-454).

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the likelihood of the defendant's guilt by clear and convincing evidence in order to allow the defendant to retain his assets, to pay an attorney of his choice and to preserve the balance of the adversarial system.

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