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TAINTED ASSETS AND THE RIGHT TO COUNSEL—THE MONEY LAUNDERING CONUNDRUM*

KATHLEEN F. BRICKEY**

In today's law enforcement environment, sixth amendment right to counsel issues have as much to do with lawyers' fee arrangements as they do with the rights of lawyers' clients. If you asked criminal lawyers across the country what the major concern of the criminal defense bar is today, they would reply that the most pressing concern is an "intolerable Sixth Amendment crisis"¹ created by government intrusions into the attorney-client relationship. The government has at its disposal an expanding array of statutes and procedures that alter the attorney-client relationship and implicate the sixth amendment right to counsel, you would learn.

If you then asked these lawyers to catalog the offending practices, the litany would read as follows.

Item one: The practice of issuing subpoenas to attorneys, summoning them to provide the grand jury with financial information that relates to their clients.² The government wants to know the amount of the fee paid for the lawyer's representation, the manner in which it was paid (i.e., was it a large amount of cash), and the identity of the payor (i.e., is your

* The lecture upon which this article is based was delivered on September 15, 1987, at a Washington University School of Law conference on "Original Intent and the Sixth and Seventh Amendments." This conference was the seventh in a series of eight conferences, sponsored by the Center for Judicial Studies, exploring the original intent and current interpretation of key provisions in the Bill of Rights. The article is printed here with the permission of the Center for Judicial Studies, Washington, D.C.

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Since its presentation at the conference, this paper has been revised to reflect four significant 1988 federal court of appeals decisions on attorneys' fee forfeitures. Those decisions, however, compound rather than resolve the right to counsel problem explored herein. My sincere thanks to Frank Miller for his comments on the prior draft.

1. *NACDL to Congress: Reform § 1957*, Nat'l Ass'n of Crim. Def. Law. Washington Digest (May 20, 1987), No. 6 at 1, col. 2.

2. *See, e.g.*, *United States v. (Under Seal)*, 774 F.2d 624 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 1514 (1986); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26 (2d Cir. 1985); *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985); *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984); *In re Grand Jury Subpoena Duces Tecum (Shargel)*, 742 F.2d 61 (2d Cir. 1984); *In re Ousterhoudt*, 722 F.2d 591 (9th Cir. 1983).

client carrying around all of this cash, or did you obtain it from some third party benefactor).

The reason the government seeks fee information from the lawyer is item two: The Racketeer Influenced and Corrupt Organizations Act (RICO)³ and the Continuing Criminal Enterprise statute (CCE).⁴ These federal racketeering and drug laws require forfeiture of assets acquired directly or indirectly through specified criminal activity.⁵ Fee information the government obtains from lawyers may thus provide evidence that their clients have assets subject to forfeiture. To compound the problem, a prosecutor who decides to pursue forfeiture of those assets may seek a pre-trial restraining order to prevent the client from transferring them to anyone—including his lawyer. The prosecutor may also notify the lawyer that *all* tainted assets, including those already paid as a fee for legal services, may be forfeited upon the client's conviction.

Item three is a relatively new provision in the Internal Revenue Code, Section 6050I. Section 6050I requires every person who receives more than \$10,000 in cash in connection with a trade or business to file a report with the Internal Revenue Service.⁶ The implementing regulations make clear that lawyers are engaged in a trade or business for purposes of the reporting requirement.⁷ Thus, a lawyer may be required to inform the government that client X paid a \$100,000 fee in cash on the fourth of July.⁸

And what if the lawyer has reason to know that some or all of the fee is derived from the client's criminal activity? That brings us to item four. A new federal money laundering statute⁹ makes it a crime knowingly to engage in a monetary transaction with a financial institution if the amount of the transaction exceeds \$10,000 and the funds are derived from specified criminal activity.¹⁰ Thus, if the lawyer knows that the

3. 18 U.S.C. §§ 1961-68 (1982 & Supp. III 1985).

4. 21 U.S.C. § 848 (1982 & Supp. III 1985).

5. 18 U.S.C. § 1963 (1982 & Supp. II 1984 & Supp. III 1985 & Supp. IV 1986); 21 U.S.C. § 853 (Supp. II 1984 & Supp. III 1985 & Supp. IV 1986).

6. 26 U.S.C. § 6050(I) (Supp. III 1985).

7. 26 C.F.R. § 1.6050I-1 (1987).

8. See generally Du Mouchel & Oberg, *Defense Attorney Fees: A New Tool for the Prosecution*, 1986 DET. C.L. REV. 57.

9. 18 U.S.C.A. § 1957 (Supp. 1987).

10. The laundry list is lengthy, but it includes the racketeering and drug offenses discussed above. The offenses are listed in a companion money laundering statute, 18 U.S.C.A. § 1956 (Supp. 1987).

client's money comes from an illicit source, the lawyer cannot deposit the \$100,000 fee in the bank without committing a crime.

This money laundering statute provides a useful vehicle for bringing the right to counsel issues more sharply into focus. The constitutional controversy this particular law has generated revolves around the question whether the sixth amendment requires that legitimate attorneys' fees be exempted from its reach.

Those who argue that attorneys' fees must be exempted do so on the ground that otherwise, the statute would impermissibly chill the attorney-client relationship. If fees were not exempt, the argument runs, lawyers would be reluctant or even unwilling to represent entire categories of defendants whose alleged criminal activity could taint the money used to pay their legal fees. Lawyers would be exposed, in addition, to the risk that they might have to reveal client confidences in order to prove they did not know they were dealing with criminally derived property. Last, but not least, the statute would create conflicts of interest for criminal defense lawyers, whose fear of prosecution might inhibit thorough investigation of their clients' cases.¹¹

The money laundering statute may trigger these concerns in two distinct contexts: (1) the case in which a lawyer knows at the time of payment that the fee is paid in crime-related assets; and (2) the case in which a lawyer takes the fee not knowing that it is derived from criminal activity, but learns during the course of the representation that it has been paid with the fruits of criminal activity.

The sixth amendment issues will vary, depending on which of these two contexts confronts us. The second category of cases clearly raises a host of substantial constitutional and ethical concerns.¹² But we must first address the threshold questions that arise when a lawyer knowingly

11. See Franklin, *Fee Tale—Money Laundering Guidelines Worry the Defense Bar*, N.Y.L.J., May 14, 1987, at 5, col. 2; Tarlow, *RICO Report*, 11 THE CHAMPION 35 (Feb. 1987). At one point in time the House version of the bill contained a provision exempting bona fide attorneys' fees, see H.R. REP. NO. 855, 99th Cong., 2d Sess., pt. 1 at 1, 14, (1986), but that provision was eliminated by a conference committee. 132 CONG. REC. E3821, E3822 (daily ed. Nov. 6, 1986) (statement of Rep. McCollum).

12. Some of those concerns are addressed in recently issued Justice Department Guidelines. Under the Guidelines, an attorney who accepts tainted property as a bona fide fee for representation in a criminal matter should not be prosecuted under the money laundering statute unless the government has proof beyond a reasonable doubt that the lawyer actually knew the illegal origin of the specific asset and unless the evidence proving the lawyer's knowledge does not consist of confidential communications between the lawyer and the client during the course of the representation. United States Dept. of Justice, U.S. Attorneys' Manual § 9-105.400 (May 12, 1988).

accepts crime-related money as a fee, for the answers could well moot the remaining points. If criminal defendants were held to be constitutionally entitled to use tainted assets to pay their legal fees, for example, attorneys' fees would be exempt from the reach of the statute. In that event, it would make no difference whether (or when) a lawyer learned that a fee had been paid with the proceeds of crime. Hence, the threshold question of the right to use what both lawyer and client know are the fruits of crime to pay the lawyer's fee.

Hypothetical Case A illustrates how the issues may arise.

A lawyer reads in the newspaper that a local bank was robbed of \$45,000 the preceding day. The newspaper account indicates that the bank teller who handed over the bag of loot gave the robber more than he asked for—i.e., “bait” money treated with a chemical that would turn orange within a few hours.

The next day a new client comes to the lawyer's office, tells the lawyer that he is a suspect in the robbery, and asks the lawyer for help. The lawyer agrees to represent the suspect for \$15,000, but tells him that the fee must be paid in advance. “No problem,” says the client, who later produces a suitcase full of cash. Predictably, the bills have a distinctly orange tinge.

At this point the lawyer balks. “Look,” the lawyer says, “I don't want this money. You'll have to pay the fee with some other assets.” “You must be kidding,” replies the client. “If I had that kind of dough to begin with, I wouldn't have robbed a bank.”

May the lawyer accept the fee with impunity?¹³ The elementary question this case raises is whether the sixth amendment guarantees the suspect the right to use robbery proceeds to employ counsel to defend him.

In view of the way courts dealt with this issue before the forfeiture and money laundering laws appeared on the scene, the facts of this hypothetical pose an unappealing sixth amendment case. In less exotic contexts than those, courts have seemed less troubled by the notion that wrongdoers should not benefit economically from their wrongdoing. Courts have held that neither the attorney-client privilege, the fifth amendment privi-

13. Assuming the lawyer accepts the cash as a retainer, what will he do with it? The lawyer certainly would not go around town paying for groceries and buying gasoline with obviously marked money. Instead, at some point in time he would want to deposit the money in an escrow account and—if questioned about its source by law enforcement authorities—assert the attorney-client privilege. “You cannot require me to tell you about the money,” the lawyer would say, “because disclosing what I know might incriminate a client or reveal a client confidence.”

lege against self-incrimination, nor the sixth amendment right to counsel entitles a client accused of criminal wrongdoing to use his lawyer as a depository for fruits, instrumentalities and evidence of crime.¹⁴

The attorney-client privilege does not protect fruits and instrumentalities of crime because it extends only to confidential communications made for the purpose of obtaining legal advice.¹⁵ Despite the client's fear that disclosure of his fee arrangement may reveal incriminating information, courts have concluded that "[p]rofessionally competent and informed advice can be rendered by an attorney even though he or she must disclose that a fee was a gem suspected to have been recently stolen, currency with certain serial numbers, or a sum far in excess of the client's reported income."¹⁶ To erect a shield against disclosure of such information would, in the courts' view, create "considerable temptation to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money."¹⁷ Thus, delivery of criminal evidence to a lawyer does not place it beyond the reach of the law.¹⁸

Nor does the client's fifth amendment privilege against self-incrimination protect fruits and instrumentalities of crime possessed by the lawyer. A lawyer who obtains evidence from a client must comply with a sub-

14. See, e.g., *State v. Dillon*, 93 Idaho 698, 710, 471 P.2d 553, 565 (1970).

15. *Fisher v. United States*, 425 U.S. 391, 403 (1975).

Although payment of a fee is a necessary prerequisite to obtaining legal advice, disclosure of the fee does not inhibit communication of information the attorney needs to represent the client. *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247-48 (2d Cir. 1986). Cf. *State v. Olwell*, 394 P.2d 681, 684 (Wash. 1964) (criminal evidence does little, if anything, to aid the lawyer's preparation of the client's defense). Thus, even though a transfer of a fee to an attorney—including the fruits of the client's crime—is made for the purpose of employing the attorney to give legal advice, the fee information is generally not considered privileged.

16. *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984). See also *In re January 1976 Grand Jury (Genson)*, 534 F.2d 719 (7th Cir. 1976) (affirming lawyer's contempt citation for refusing to comply with subpoena ordering him to surrender money received as a fee from clients suspected of bank robbery).

17. *In re Shargel*, 742 F.2d 61, 64 (2d Cir. 1984).

18. *People v. Investigation Into a Certain Weapon*, 448 N.Y.S.2d 950, 963 (1982). See also *People v. Superior Court*, 192 Cal. App. 3d 32, 237 Cal. Rptr. 158 (1987) (defense counsel who obtains possession of physical evidence related to criminal charge against client must turn it over to police or prosecutor); *People v. Meredith*, 29 Cal.3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981) (attorney has duty not to remove or alter physical evidence so as to prevent prosecution from discovering it); *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970) (attorney-client privilege does not entitle attorney to act as depository for or to suppress criminal evidence); *People v. Nash*, 110 Mich. App. 428, 313 N.W.2d 307 (1981) (attorney has duty to turn evidence over to prosecution).

Once a lawyer obtains criminal evidence from his client, however, the lawyer may refuse to reveal its source on the ground that to do so would violate the attorney-client privilege. *People v. Nash*, 110 Mich. App. 428, 313 N.W.2d 307 (1981).

poena to produce the evidence unless the client could have refused to produce it on fifth amendment grounds *and* the evidence was transferred to the attorney for the purpose of obtaining legal advice—i.e., it was protected by the attorney-client privilege.¹⁹

And what about the sixth amendment? Does the client's sixth amendment right to counsel protect fruits and instrumentalities of crime possessed by the lawyer? No. A lawyer's refusal to accept robbery proceeds as a legal fee will not implicate a suspect's sixth amendment rights,²⁰ even if the suspect otherwise cannot retain private counsel. The sixth amendment grants the accused an absolute right to have counsel assist in his defense²¹ and a qualified right to counsel of his choice.²² The accused is entitled to employ counsel of choice if he can afford it, or to be represented by appointed counsel if he cannot.²³

In hypothetical Case A, our robbery suspect is financially unable to pay a lawyer to represent him. He has offered to pay not his money, but money that belongs to the bank. He has no property in the money that can lawfully pass to the lawyer.²⁴ If he has no other assets, he is indigent. If he is indigent, he is constitutionally entitled to appointed, but not retained counsel.

A second reason these facts pose an unappealing sixth amendment case

19. *Fisher v. United States*, 425 U.S. 391, 402 (1975). *Cf.* *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970) (defense lawyer in possession of criminal evidence must comply with motion to produce it; fifth amendment privilege applies to communications, not "real evidence").

Even if the evidence is not subject to subpoena because it is testimonial in nature, it nonetheless remains subject to seizure under the fourth amendment because neither attorney nor client is required to authenticate it or aid in its discovery. *Andreson v. Maryland*, 427 U.S. 463, 473-74 (1976).

20. *See*, *Clutchette v. Rusher*, 770 F.2d 1469, 1472 (9th Cir. 1985); *Morrell v. State*, 575 P.2d 1200, 1207 (Alaska 1978); *Anderson v. State*, 297 So.2d 871, 875 (Fla. App. 1974); *State v. Green*, 493 So.2d 1178, 1182, 1184 (La. 1986). *Cf. In re* January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976) (For purposes of this appeal from a lawyer's contempt citation, "[w]e express no opinion as to whether the suspects having chosen to make [the lawyer] a witness to their crime [by paying their fee with robbery proceeds], if such should subsequently prove to be the fact, may properly invoke the Sixth Amendment to bar his eyewitness testimony at trial.").

21. Under current Supreme Court interpretation, the right to counsel is absolute for all offenses except misdemeanors and petty offenses that do not result in the imposition of a sentence of imprisonment. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

22. *See, e.g., Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984); *United States v. Cicale*, 691 F.2d 95, 106 (2d Cir. 1982); *Linton v. Perini*, 656 F.2d 207, 209-12 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982). For a discussion of the origins of and limitations on the right to counsel of choice, see *Brickey, Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 506-10 (1986).

23. *See id.* at 504 n.49.

24. *In re* *Ryder*, 263 F. Supp. 360, 369 (E.D. Va. 1967).

is that federal and state laws uniformly criminalize the knowing receipt of stolen property—including robbery proceeds.²⁵ These statutes do not condone a lawyer's receipt of stolen property either to protect a client from the consequences of his crime²⁶ or to keep as payment of a legal fee.²⁷ Yet the legislatures' failure to exempt attorneys' fees under these statutes has never been thought to violate a robbery suspect's sixth amendment right to counsel. Indeed, knowingly taking or secreting fruits and instrumentalities of crime has long been recognized as both an independent criminal offense²⁸ and "an abuse of a lawyer's professional responsibility."²⁹ A lawyer may not accept stolen property as a fee because "[t]he privilege to practice law is not a license to steal."³⁰

That brings us to hypothetical Case B. In Case B, it will be harder for the lawyer to tell which of the client's assets are criminally derived because the client is under investigation not for robbery, but for trafficking in drugs. During the preceding year, however, the lawyer had repre-

25. *See, e.g.*, 18 U.S.C. § 659 (1982); 18 U.S.C. § 2113(c) (1982); 18 U.S.C. § 641 (1982); MODEL PENAL CODE § 223.6 (Proposed Official Draft 1962).

26. *In re Ryder*, 263 F. Supp. 360, 369 (E.D. Va. 1967) (lawyer took robbery proceeds with intent to return them to bank after client's trial).

27. *United States v. Scruggs*, 549 F.2d 1097 (6th Cir. 1977).

28. *See United States v. Scruggs*, 549 F.2d 1097 (6th Cir. 1977) (upholding conviction of lawyer for knowingly possessing, concealing and disposing of robbery proceeds accepted as a fee, and for obstruction of justice); *United States v. Cameron*, 460 F.2d 1394 (5th Cir. 1972) (reversing lawyer's conviction of receiving stolen property because of erroneous jury instruction; lawyer accepted robbery proceeds as a fee); *Laska v. United States*, 82 F.2d 672 (10th Cir.), *cert. denied*, 298 U.S. 689 (1936) (upholding conviction, as accessory to kidnapping, of lawyer who accepted ransom as a fee and advised client how to launder remaining ransom money); *State v. Wolery*, 348 N.E.2d 351, 362 (Ohio 1976) (upholding conviction of lawyer for receiving stolen property, where some of property appears to have been used to satisfy lawyer's fee); *State v. Harlton*, 669 P.2d 774 (Okla. 1983) (lawyer convicted of crime of concealing weapon used in a crime suspended from practice). *But see Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. 1986) (vacating lawyer's conviction for hindering prosecution and tampering with evidence on ground that statutes were unconstitutionally vague as applied to attorneys during representation of criminal defendants).

Cf. In re January 1976 Grand Jury (Genson), 534 F.2d 719 (7th Cir. 1976) (affirming lawyer's contempt citation for refusing to comply with subpoena ordering him to surrender money received as fee from client suspected of bank robbery); *State v. Olwell*, 394 F.2d 681 (Wash. 1964) (reversing attorney's contempt citation for refusing to produce material evidence of a crime because subpoena was defective in that it required attorney to testify about matters confided by client).

29. *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967) (suspending lawyer from practice for taking possession of stolen weapons with intent to conceal them until after client's trial). *Cf. People v. Laska*, 109 Colo. 389, 126 P.2d 500 (1942) (*per curiam*) (refusing to reinstate lawyer who was disbarred following conviction for accepting kidnapping ransom money); *People v. Laska*, 105 Colo. Rep. 426 (1940) (disbarring attorney in same case); *State v. Harlton*, 669 P.2d 774 (Okla. 1985) (suspending lawyer convicted of concealing evidence).

30. *Laska v. United States*, 82 F.2d 672, 677 (10th Cir. 1936) (lawyer accepted ransom as a fee).

sented another drug defendant and had learned that cocaine was the new client's only steady source of income. When the client comes to pay the retainer, he brings a suitcase full of \$20 bills.

What does the lawyer do in this case? Under these circumstances the lawyer would be charged with knowledge that the money is drug-related.³¹ But his receipt of the \$15,000 fee with that knowledge would not violate the money laundering statute, because the statute does not penalize the receipt of tainted assets. It limits, instead, what the receiver can do with them. Here the lawyer can spend \$15,000 in cash, or deposit the cash in the bank—but not all at once. It would be a crime under the money laundering statute to knowingly deposit more than \$10,000 in crime-related assets.³² So in this case we have inconvenienced the lawyer—perhaps not enough to keep him from representing the suspect, but perhaps so.

Now consider Case C. The same drug suspect wants to pay the lawyer not in cash, but with an airplane purchased (no doubt) with drug money. The suspect executes a power of attorney in favor of the lawyer for the purpose of transferring title to the plane, but demands that the transfer occur in the Bahamas.³³ After the title is transferred, the lawyer advertises the plane and ultimately sells it for \$140,000. The purchaser tenders a certified check for the full amount.

At this point, what should the lawyer do? He has no need for a \$140,000 airplane. But if he accepts the check, he cannot deposit it with knowledge that it is “derived from” proceeds of the client's drug-related activities. And it would be unseemly to demand that a legitimate buyer pay the purchase price in cash. Hence, the lawyer may decline to represent the suspect because the lawyer cannot lawfully obtain beneficial use of the fee. So until the prospective client is able to locate another buyer,

31. *Cf. United States v. Werner*, 160 F.2d 438, 441-42 (2d Cir. 1947) (“The receivers of stolen goods almost never ‘know’ that they have been stolen, in the sense that they could testify to it in a court room. . . . But that the jury must find that the receiver did more than infer the theft from the circumstances has never been demanded.”).

32. The money laundering statute also prohibits the lawyer from exchanging the \$20's for \$100 bills, or \$1,000 bills into \$50's in large quantities. Any transaction with a bank (or a money launderer) must be structured in amounts less than the jurisdictional amount. The lawyer must, in addition, report the receipt of the cash to the IRS under section 6050I.

Although structuring transactions in amounts of less than \$10,000 to avoid reporting requirements imposed under the Currency and Foreign Transactions Reporting Act is a crime, *see* 31 U.S.C.A. § 5324(3) (Supp. 1987), the money laundering law—which is not a reporting statute—does not expressly proscribe breaking up the deposits.

33. *See United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

or a lawyer who wants an expensive plane, or a dishonest lawyer, he will be unable to retain private counsel.

In a variation, Case D, the drug dealer/client finds a legitimate buyer for the plane. The client then offers to endorse over a check drawn payable to him by the buyer. The lawyer still cannot deposit the check, however, knowing that it is derived from the proceeds of a crime. Nor can the lawyer advise the client to cash the check, because that would be advising him to commit a money laundering offense. So once again, the lawyer will not accept the client's fee.

All four cases are similar. In each, the lawyer knows that the fee is criminally derived and his knowledge is gained from objective or external factors, not through the client's privileged communications. Unlike Case A, however, the lawyer in Cases B, C and D is permitted to take the fee. But the money laundering statute limits the manner in which the lawyer may dispose of the fee in Case B and prevents meaningful disposition of it in C and D. Thus, in each of these cases the statute may operate as an economic disincentive to represent the client and may stymie the client's efforts to retain private counsel.

The critical question is whether this statutory disincentive is constitutionally distinguishable from other kinds of financial embarrassment that may dissuade private counsel from taking the case. Although the issue has yet to be litigated under the money laundering statute, it closely parallels the basic question in attorneys' fee forfeiture cases arising under RICO and CCE. The root problem is that the client does not have sufficient untainted assets to pay counsel. When the reason for his inability to pay is that the assets are subject to forfeiture, should the court exempt an amount sufficient to pay a reasonable attorney's fee to protect the suspect's sixth amendment right to counsel of choice?³⁴

Courts in these cases are concerned about the possible *in terrorem* effect that attorneys' fee forfeitures will have on the availability of private counsel. Because lawyers will be reluctant or unwilling to represent a defendant with knowledge that at the end of the trial their fees may be

34. See *United States v. Thier*, 801 F.2d 1463, 1477 (5th Cir. 1986) (Rubin, J., concurring) (court should exempt from forfeiture "minimal funds, reasonable in amount and subject to the court's scrutiny, to employ counsel"), *modified*, 809 F.2d 249 (1987). See also *United States v. Monsanto*, No. 87-1397, slip op. (2d Cir. July 1, 1988); *United States v. Harvey*, 814 F.2d 905, 927 (4th Cir. 1987), *rev'd sub nom. United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637 (1988) (en banc); *United States v. Nichols*, 654 F. Supp. 1541, 1559 (D. Utah 1987), *rev'd*, 841 F.2d 1485 (10th Cir. 1988); *United States v. Estevez*, 645 F. Supp. 869, 871-72 (E.D. Wis. 1986).

forfeited, the argument runs, the defendant may be denied the right to counsel of his choice.³⁵

The right to counsel of choice is not, of course, absolute. It may be subordinated to important governmental interests—as, for example, the fair and efficient administration of justice.³⁶ Thus, the question in the forfeiture cases is the extent to which the government's interest in depriving wrongdoers of the economic base that enables them to engage in ongoing criminal activity justifies infringing their right to choose and retain private counsel.

In the view of some courts, the defendant's sixth amendment interests outweigh the government's interest in depriving drug dealers and racketeers of their economic power base, unless the transfer of assets to an attorney occurs as part of a sham or fraud.³⁷ When the assets are transferred in payment for legitimate legal services, according to these courts, the government's interests do not override the individual's right to use his property to retain private counsel, even if the assets ultimately prove to be tainted by the individual's criminal conduct.³⁸ Because the government cannot directly prevent drug and racketeering defendants from retaining counsel to defend them, it should not be permitted to accomplish indirectly—by threatening forfeiture—what it cannot directly do.³⁹

35. *Harvey*, 814 F.2d at 921; *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985); *United States v. Bassett*, 632 F. Supp. 1308, 1316-17 (D. Md. 1986); *United States v. Rogers*, 602 F. Supp. 1332, 1348, 1350 (D. Colo. 1985). *See also* *United States v. Monsanto*, No. 87-1397, slip op. (2d Cir. July 1, 1988) (en banc); *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987). *But see* *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988); *People v. Superior Court (Clements)*, — Cal. App. 3d —, 246 Cal. Rptr. 122 (1988).

36. *See supra* note 23.

37. *United States v. Monsanto*, No. 87-1397, slip op. at 4746 (2d Cir. July 1, 1988); *Harvey*, 814 F.2d at 924, 927; *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1984); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985). *But cf.* *United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987).

38. *Harvey*, 814 F.2d at 927; *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1984); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985).

39. *Harvey*, 814 F.2d at 924; *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985).

As a Fourth Circuit panel admonished in *United States v. Harvey*:

The right to counsel . . . [protects] the guilty as well as the innocent. It must certainly have been created, therefore, on the assumption—indeed with the sure knowledge—that in exercising the primary right to privately retained counsel, ill-gotten gains might be used by defendants who would ultimately be found guilty.

Harvey, 814 F.2d at 924-25. Curiously—or perhaps not so curiously—the court neglected to explain just what transforms an *expectation* that criminal defendants will pay legal fees with the fruits of their crimes into a constitutional *right* to do so.

In any event, let us consider the implications of the sixth amendment framers' "sure knowledge"

Although this has been the prevailing view in the district courts,

that, from time immemorial, criminal defendants have used ill-gotten gains to pay their lawyers' fees. Does this mean that the sixth amendment guarantees our hypothetical robber a constitutional right to pay counsel with the robbery proceeds? No, according to the court. And why not? Because, the court tells us, when the government seizes a bank robber's loot, "the government seizes property manifestly that of someone other than the accused and for preservative purposes." *Id.* at 926. "The financial plight that may result to an accused from sequestration of contraband," the court continues, "is simply of a piece with that resulting from other vagaries of life that may make it impossible to hire private counsel." *Harvey*, 814 F.2d at 926. But when the government attempts to sequester other ill-gotten gains to which "no third party has a superior claim," it is attempting to do indirectly what it cannot directly do—that is, to prevent the defendant from retaining counsel of choice. *Id.*

The distinction apparently rests, then, on title to the assets, not their unlawful acquisition. But query whether this is a rational base line to draw. What if the client was not a bank robber but was, instead, a bank teller who enriched himself at the bank's expense? If he has stolen the money out of the till, he has committed larceny. *See, e.g., United States v. Clew*, 4 F. Cas. 700 (C.C. Wash. 1827) (No. 14,819). He has unlawfully taken money from the bank's possession, but—like the robber—has acquired no title to the money. If, on the other hand, the teller has pocketed money handed over by a customer without first placing it in the till, he has committed embezzlement. *See, e.g., Kramer v. State*, 116 Ala. App. 456, 78 So. 719, *cert. denied*, 201 Ala. 700, 78 So. 990 (1918). He has, by misappropriating something lawfully in his possession, unlawfully acquired title to the property. For a more extensive discussion of larceny and embezzlement and of the distinctions between the offenses, see W. LAFAVE & A. SCOTT, *CRIMINAL LAW* §§ 8.1-8.6, § 8.8(a) (2d ed. 1986).

Are the embezzler and the thief on equal constitutional footing? Or is the embezzler—but not the thief—constitutionally entitled to retain counsel with the fruits of his crime because he wrongfully acquired ownership, and not mere possession? Surely the framers of the sixth amendment would not have entrusted the contours of so important a constitutional right to the vagaries of theft law.

So perhaps the court meant something else. Perhaps the opinion's reference to third parties who have a superior claim to the property related not so much to the concept of title as it related to the concept of entitlement. As between the robber and the bank, the bank is entitled to the property. The same would undoubtedly be true with respect to embezzled funds, irrespective of the question of title.

But consider the possibilities. Suppose the client has been running a profitable boiler room securities operation that specializes in selling worthless securities. He is charged with mail and wire fraud. 18 U.S.C. §§ 1341, 1343 (1982). As between the securities seller and his defrauded customers, the customers are entitled to their hard-earned money. Would the court have said that under these circumstances, the government could therefore seize the fraudulently obtained monies—"for preservative purposes"—without implicating the seller's constitutional right to counsel? Or would the court have been inclined to say that the government could sequester drug trafficking proceeds that have not been reported as income—even though as between drug dealer and government, the government is entitled to the taxes owed and wrongfully withheld—if that action would impair the dealer's efforts to retain private counsel? Although one cannot be sure of the outcome, the tenor of the panel's opinion suggests that the court would not have been receptive to seizure or sequestration of assets if that action would prevent the defendant from hiring counsel to defend him. *See Harvey*, 814 F.2d at 926.

The distinction drawn, then, is tenuous at best. Although the en banc opinion rejected the panel's distinction between illicit drug proceeds and the robber's loot, it did not fully address the implications of that distinction. The en banc opinion dismissed the distinction on the ground that it would not always be true that robbery proceeds were manifestly the property of someone other than the robber. Instead, "the robber may have deposited the proceeds in his own account or otherwise

whether it will withstand appellate scrutiny remains to be seen. Indeed, a review of the brief but tortuous history of the reported court of appeals decisions reveals that the law is in an unusual state of disarray.

The Fifth Circuit was the first to rule on the point. In *United States v. Thier*,⁴⁰ the court declined to rule on the constitutionality of attorneys' fee forfeitures but found, as a matter of statutory construction, that assets needed to pay reasonable and bona fide legal fees are exempt from forfeiture. *Thier* arose in the context of a pretrial restraining order that froze all of the defendant's monies. In a subsequent case, *United States v. Jones*,⁴¹ the court applied its holding in *Thier* to a post-conviction claim by Jones' attorneys, who were seeking payment of their legal fees from property that had been ordered forfeited. The court again held that assets to pay reasonable attorneys' fees are exempt from forfeiture. A portentous concurrence, however, noted the author's acquiescence only because he was bound by *Thier*. "If I were free to do so," the concurring judge wrote, "I would follow the recent en banc opinion of the Fourth Circuit," which reached a contrary conclusion.⁴² The Fifth Circuit subsequently agreed to reconsider *Jones* en banc.⁴³ At this writing, the en banc decision has yet to be announced.

The Fourth Circuit opinion to which the concurrence in *Jones* refers is *In re Forfeiture Hearing as to Caplin & Drysdale*.⁴⁴ A panel of the court had earlier held in *United States v. Harvey*⁴⁵ that the forfeiture statute applies to attorneys' fees, but that such application is unconstitutional because it violates the sixth amendment right to counsel of choice. Although agreeing that the statute applies to attorneys' fees, the en banc court reversed on the ground that the panel erred in finding a constitutional right to use illicit assets to pay attorneys' fees. A petition for certiorari has been filed and, at this writing, is pending a determination by the

disguised them. Similarly, the assets sought to be forfeited . . . may well be 'manifestly' illicit, as is the case where the defendant has piles of cash and no records of any legitimate income whatsoever." *Caplin & Drysdale*, 837 F.2d at 645. *But see* *United States v. Nichols*, 841 F.2d 1485, 1510 (10th Cir. 1988) (Logan, J., dissenting) (when bank and accused robber fight over ownership of funds, they do so under traditional common-law property concepts; government's interest in forfeitable assets differs in that it is grounded in public policy, not property rights).

40. 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987).

41. 837 F.2d 1332 (5th Cir. 1988).

42. *Id.* at 1337.

43. 844 F.2d 215 (5th Cir. 1988).

44. 837 F.2d 637 (4th Cir. 1988) (en banc).

45. 814 F.2d 905 (4th Cir. 1987).

Court.⁴⁶

The Second Circuit ventured into the fray in *United States v. Monsanto*. A panel of the court held that attorneys' fees are not exempt from forfeiture and that the sixth amendment does not require their exemption.⁴⁷ After rehearing the case en banc, the court reversed the panel and held, per curiam, that the defendant is entitled to "access to restrained assets to the extent necessary to pay legitimate (that is, non-sham) attorneys' fees" to defend the criminal charge and that such fees are exempt from forfeiture.⁴⁸ Unfortunately, however, no majority of the court could agree on a rationale for this holding. Thus, the Second Circuit points us to a result without a reason.⁴⁹ At this writing, the time for filing a petition for certiorari has not expired.

The Tenth Circuit has also fueled the controversy on this issue. In *United States v. Nichols*,⁵⁰ a three judge panel held that the forfeiture statute does not exempt attorneys' fees from forfeiture and that failure to exempt them does not deny the sixth amendment right to counsel of choice. Predictably, one judge dissented. Although he agreed that the statute does not exempt attorneys' fees from forfeiture, he would find the statute unconstitutional to the extent that it prevents a defendant from employing counsel to defend against the charge.⁵¹

And what accounts for such extraordinary judicial indecision on this point? Courts in the forfeiture cases are concerned that if threatened forfeiture of the means to pay counsel makes the defendant constructively indigent, he will be relegated to appointed counsel. The full impact

46. No. 87-1729, 56 U.S.L.W. 3821 (April 11, 1988).

47. 836 F.2d 74 (2d Cir. 1987).

48. No. 87-1397, slip op. at 4746 (2d Cir. July 1, 1988) (en banc) (per curiam).

49. Or, viewed differently, the court gave an abundance of reasons, none of which carried the day. In addition to the per curiam opinion of the court, eight separate concurrences and dissents were filed. See *id.* at 4746 (concurring opinion of Chief Judge Feinberg, joined by Judges Oakes and Kearse); *id.* at 4750 (dissenting opinion of Judge Mahoney, joined in part by Judges Cardamone and Pierce); *id.* at 4766 (opinion of Judge Cardamone, joined by Judge Pierce, concurring in part and dissenting in part); *id.* at 4768 (opinion of Judge Pratt, concurring in part and dissenting in part); *id.* at 4771 (opinion of Judge Pierce, joined by Judge Cardamone, concurring in part and dissenting in part); *id.* at 4772 (concurring opinion of Judge Winter, joined by Judges Meskill and Newman); *id.* at 4786 (opinion of Judge Miner, joined by Judge Altimari, concurring in part and dissenting in part); *id.* at 4788 (concurring opinion of Judge Oakes).

50. 841 F.2d 1485 (10th Cir. 1988).

51. *Id.* at 1509 (Logan, J., dissenting). Cf. *United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium*, No. 87-2499, slip op. at 3, 15 (8th Cir. Aug. 5, 1988) (holding, under facts of case, that government's effort to deprive defendant of assets needed to pay reasonable attorney's fee impermissibly conflicted with fifth and sixth amendments).

of this deprivation cannot be measured, the courts tell us, until we consider the difference between retained and appointed counsel.

First, there is the question of adequacy. Question: "Did you have a lawyer when you went to court?" Answer: "No, I had a public defender."⁵² Courts in the forfeiture cases are concerned that RICO and CCE defendants may be denied the *effective* assistance of counsel if they are required to forego the luxury of a privately retained lawyer.⁵³ This concern is not so much an indictment of the competency of public defenders as it is a recognition of the limited resources available to them.⁵⁴

Second, courts are concerned about the question of timing. Our hypothetical client is under investigation. He has not been formally charged with a crime. Indeed, the grand jury has yet to be convened. But he wants guidance from counsel *now*, during the early stages of the investigation, to ensure that his interests are protected throughout the entire process. If we relegate him to appointed, rather than retained counsel, he is not yet eligible for an appointed lawyer under the Criminal Justice Act. The Act grants him a statutory right to appointed counsel only upon the following conditions: (1) he must be charged with a felony or a misdemeanor; or (2) he must be arrested and entitled by law to representation by an attorney; or (3) the sixth amendment must require the appointment of counsel.⁵⁵

Now we are getting somewhere. Linger over the third condition, for it goes to the heart of the problem. Our hypothetical client will be eligible for appointed counsel under the Criminal Justice Act when the Constitution requires that counsel be made available to him.

And when will that be? The sixth amendment right to counsel provides the accused the assistance of an expert at confrontational stages of a prosecution to ensure the accused a fair trial. The right to counsel attaches at "critical"⁵⁶ or "trial like" stages of a "criminal prosecution,"⁵⁷ not at preliminary stages of an investigation. This constitutional right is enjoyed only by "the accused" and is provided "for his de-

52. See *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, Yale Rev. L. & Soc. Act., Spring, 1971, at 4.

53. See, e.g., *United States v. Rogers*, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985).

54. *Id.* at 1349 ("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 which is already overtaxed.").

55. 18 U.S.C. § 3006A(a) (1982).

56. See *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

57. See *Gerstein v. Pugh*, 420 U.S. 103 (1975); *United States v. Ash*, 413 U.S. 300 (1973).

fence.”⁵⁸ “Of course, . . . it may well be true that in some cases preindictment investigation could help a defendant prepare a better defense.”⁵⁹ But, as the Supreme Court observed, the controlling cases “have never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment investigator.”⁶⁰ The Court has found “no reason to adopt” such a “novel interpretation of the right to counsel.”⁶¹

Thus, notwithstanding the legitimacy of the concerns voiced in the forfeiture cases those concerns are not, by and large, addressed by the sixth amendment. A generalized concern that a suspect would be better off if he were represented by counsel while under investigation simply does not implicate sixth amendment rights.

To return, then, to the defense bar’s concern in the money laundering context, established sixth amendment principles do not support the call for a blanket exemption of attorneys’ fees from the reach of the statute. Although the statutory limitation on a lawyer’s ability to launder large amounts of tainted money through a financial institution may impede a prospective client’s efforts to retain private counsel, it does not inevitably implicate the client’s Sixth Amendment right to counsel. To invoke the right to counsel on the mere possibility of prejudice—as courts in some forfeiture cases have done—is, in truth, “to wrench the Sixth Amendment from its proper context.”⁶²

58. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

59. *United States v. Gouveia*, 467 U.S. 180, 191 (1984).

60. *Id.*

61. *Id.*

62. *Id.* (case involving unsuccessful argument for extension of the sixth amendment right to counsel) (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971) (referring to the sixth amendment right to speedy trial)).

