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NOTES

Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It

In 1970 Congress drafted the Racketeer Influenced and Corrupt Organizations ("RICO") statute[1] and the Continuing Criminal Enterprise ("CCE") statute.[2] Congress drafted both statutes to attack a nationwide problem that the criminal justice system's laws failed to confront adequately.[3] That new problem was organized crime.[4] In addition to the conventional criminal penalties of fine and imprisonment,[5] RICO and CCE contained a new sanction aimed at organized criminal activities -

1 18 U.S.C. §§ 1961-68 (1982, Supp. III 1985 & Supp. IV 1986). RICO was enacted as Title IX of the Organized Crime Control Act of 1970. Pub. L. No. 91-452 § 901(a), 84 Stat. 941 (1970).

2 21 U.S.C. §§ 848, 853 (1982, Supp. III 1985 & Supp. IV 1986); 18 U.S.C.A. § 1956(c)(7)(C) (West Supp. 1987). The CCE provision was enacted as part of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970).

3 The Senate Judiciary report on the Organized Crime Control Act of 1970 stated:

> Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with a frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavors or organizations . . . .
>
> . . . What is needed here are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. REP. No. 617, 91st Cong., 1st Sess. 78-79 (1969) [hereinafter cited as S. REP. No. 617]. *See also*, S. REP. No. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3374 [hereinafter S. REP. No. 225].

4 *See* Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 1073; Webb & Turow, *RICO Forfeiture in Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404, 405 (1983). For a definition of organized crime, see Blakey, *Definition of Organized Crime in Statutes, and Law Enforcement Administration*, reprinted in THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY (1986).

These statutes are not, however, limited to organized crime. For example, one of RICO's goals clearly was "to address the infiltration of legitimate business by organized crime," United States v. Turkette, 452 U.S. 576, 591 (1981). But *Turkette* also stated: "In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law only to the narrow aspects of organized crime, and, in particular, under RICO, *only* the infiltration of legitimate business." *Id.* at 590 (emphasis in original). "[RICO applies to] 'any person'—not just mobsters . . . ." Sedima, S.P.R.L. v. Imrex Co., Inc.,, 473 U.S. 479, 495 (1985). "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* at 499 (citing Haroco, Inc. v. American Nat'l Bank & Trust Company of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)).

5 A RICO conviction subjects a defendant to a possible $25,000 fine and up to twenty year prison term. 18 U.S.C. § 1963(a). A CCE conviction is even more painful. That statute provides:

> Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may be not less than 10 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual . . . except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized

criminal forfeiture.[6] Congress substantially strengthened these forfeiture provisions in the Comprehensive Forfeiture Act of 1984 ("1984 Act").[7]

Especially after the 1984 amendments,[8] the Department of Justice began to assert that the forfeiture provisions permitted restraining orders that prevented defendants from transferring property subject to forfeiture to attorneys as payment for legal services.[9] Even if the government did not obtain a restraining order, it sometimes sought post-conviction forfeiture of property used to pay attorneys' reasonable fees.[10] The Department's argument has been that if the money used to pay criminal defense attorneys was derived from or used in a criminal enterprise, it represents forfeitable ill-gotten gains.[11] Congress did not intend to permit some defendants[12] to hire the most expensive lawyers with the fruits of crime, says the Department, while at the same time attempting to strip these defendants of their economic power.[13]

In contrast, the defense bar and most of the early commentary have argued that the 1984 Act never intended to subject attorneys' fees to

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in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual . . . .

21 U.S.C. § 848(a).

6 Criminal forfeiture is an *in personam* post-conviction divestiture of defendants' property interests used in connection with or derived from criminal enterprise activity. Governments have used criminal, or *in personam* forfeiture as a penalty in the form of punishment against persons as a consequence of judgments of conviction. An *in personam* action seeks judgment against persons as distinguished from a judgment against property. The government's right to property in an *in personam* forfeiture attaches only "by the conviction of the offender." The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827). In contrast, the more common civil or *in rem* forfeiture acts directly against property, taking no cognizance of owners or their culpability but determining rights in specific property against all, equally binding on all. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81, *reh'g denied*, 417 U.S. 977 (1974).

7 Comprehensive Forfeiture Act of 1984. Pub. L. No. 98-473, § 301, 98 Stat. 1837, 2040 (1984).

8 The Justice Department and other agencies have recently engaged in a "concerted effort to increase the use of forfeiture in narcotics and racketeering cases." S. REP. NO. 225, *supra* note 3 at 191-92. *See generally*, ABA CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION 90 n.95 (1985) (statistics on RICO and CCE forfeitures from 1970-80).

9 *See, e.g.*, United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd in part sub nom.*, In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) *en banc*.

10 UNITED STATES DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, §§ 9-111.000 - .700 (1986), reprinted in 38 CRIM. L. REP. 3001-08 (BNA) (Oct. 2, 1985) [hereinafter U.S. ATTORNEYS' MANUAL] (containing the "Justice Department's Guidelines on Forfeiture of Attorneys' Fees").

11 U.S. ATTORNEYS' MANUAL, *supra* note 10, § 9-111.220.

12 An honest discussion must recognize who the defendants are in the attorney fee forfeiture debate. The vast majority of criminal defendants are indigent and are already granted free representation. Attorney fee forfeiture has no effect on most white collar offenders, tax evaders, or antitrust violators. Those criminals will typically pay the market price for representation using untainted sources of funds. Attorney fee forfeiture affects professional criminals—pimps, gamblers, and drug dealers. It is the duty of our society to ensure that these criminals get fair trials; some argue that forfeiture of legal fees guarantees that the trials are not "too fair." *See infra* note 13.

13 U.S. ATTORNEYS' MANUAL, *supra* note 10, § 9-111.220. The guidelines cite United States v. Subpoena Duces Tecum dated January 2, 1985, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) [hereinafter *Payden*]. *Payden* stated: "[f]ees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds . . . . To permit this would undermine the purpose of forfeiture statutes, which is to strip offenders and organizations of their economic power." *Id.* at 849 n.14.

forfeiture.[14] This group has argued that such an interpretation of the amendments would effectively violate defendants' rights to counsel[15] and due process,[16] and the presumption of innocence.[17] Commentators have also argued that fee forfeiture undermines the institutional role that the defense lawyer plays in our adversarial system[18] and may force attorneys into situations that violate the ethics of the legal profession.[19] At least in the context of criminal representation, they believe that the statutes' attempts to restrain[20] or sterilize[21] "dirty" money are unconstitutional. Since the passage of the 1984 amendments, the courts[22] and commentators[23] have disagreed over whether Congress intended and constitutionally may subject attorneys' fees to forfeiture.

14 *See infra* note 23.

15 *See infra* text accompanying notes 74-116.

16 *See infra* text accompanying notes 122-33.

17 *See infra* text accompanying notes 119-21.

18 *See, e.g.*, Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1; Note, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary From the Adversarial System?*, 62 WASH. L. REV. 201 (1987).

19 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, 672-74 (1987) and cases cited therein.

20 S. REP. No. 225, *supra* note 3, at 196.

21 *See infra* text accompanying notes 41-44.

22 Many district courts have held that the statute must be read to exempt from forfeiture assets defendants use to retain attorneys. United States v. Truglio, 660 F. Supp. 103 (D. W. Va. 1987); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Col. 1985). *See also* United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982). On the other hand, the recent courts of appeal decisions, while dividing over the constitutional issues, have generally not read the 1984 Act to exempt attorneys' fees from forfeiture. The Fourth Circuit so ruled in In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), as did the Eighth Circuit in United States v. Unit No. 7 and Unit No. 8 of the Shop in the Grove Condominium, 853 F.2d 1445 (8th Cir. 1988), and the Tenth Circuit in United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988). The panel opinion in United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) was unanimous on this point, although en banc that court reached a different constitutional conclusion, 1988 U.S. App. LEXIS 9222, 1988 WL 68784 (2d Cir. 1988). Finally, in United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987), the court read the statute to authorize, although not mandate, an exemption for attorneys' fees. United States v. Jones, 837 F.2d 1332 (5th Cir. 1988) reaffirmed *Thier*; unfortunately the Fifth Circuit has since decided to reconsider *Jones* en banc, 844 F.2d 215 (5th Cir. 1988).

23 This article is also aided by a wealth of academic discussion on the application of the 1984 criminal forfeiture provisions to attorneys' fees. The commentators are as divided as the courts. Some have concluded that the statute should be read to exempt attorneys' fees from forfeiture because of various constitutional concerns. *See* Reed, *Criminal Forfeiture Under the Comprehensive Forefeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 776-81 (1985); Viles, *Criminal Procedure IV: Attorneys' Fees Forfeiture and Subpoenaing Defendants' Attorneys*, 1986 ANN. SURV. AM. LAW 335 (1986); Note, *Against Forfeiture of Attorney's Fees Under RICO: Reform Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. (1986); 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 (1987); Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees*, 19 U. MICH. J.L. REF. 1199 (1986). Other commentators have concluded that it would be unconstitutional to apply forfeiture provisions to attorneys' fees. *See* Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1; Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021 (1986); Note, *Attorneys' Fee Forteiture Under the Comprehensive Forfeiture Act of 1984: Can We ProtectAgainst Sham Transfers to Attorneys?*, 62 NOTRE DAME L. REV. 734 (1987); Comment, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary from the Adversarial System?*, 62 WASH. L. REV. 201 (1987). Some commentators have concluded that the forfeiture of attorneys' fees is not necessarily unconstitutional but recommend pretrial hearings to determine which assets are subject to forfeiture. *See* Pate, *Payment of Attorneys' Fees with Potentially Forfeitable Assets*, 22 CRIM. L. BULL. 326 (1986); Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 FORD-

This note begins with some background to the fee forfeiture problem. Part II argues that in the Comprehensive Forfeiture Act of 1984 Congress did not intend that attorneys should receive special treatment. Neither they nor their fees receive an outright statutory exemption from possible forfeiture. Part III argues that the forfeiture provisions are constitutionally valid, and that the government may use indictments as sole support for restraining orders. But the Act also recognizes that while not necessarily violating the Constitution, attorney fee forfeiture often implicates important constitutional interests. Thus, the Act does not mandate issuance of restraining orders. Part IV provides a principled interpretation[24] of the language of the forfeiture statutes that accommodates both individual defendants constitutional and society's legitimate law enforcement concerns.

I. Background

Prior to 1970, the absence of legislation making "organized crime" illegal impeded law enforcement officials' attempts to attack it.[25] These officials had in their arsenals only 19th century laws based on a common law felony view.[26] But the common law felonies—like murder, rape, and robbery—focused on one offender, one victim, one isolated criminal act. While the government could prosecute organized crime figures for specific federal offenses such as theft, extortion, loan sharking, union racketeering, interstate gambling, trafficking in drugs, and the like, there was no punishment for affiliation with a criminal enterprise.[27] The government was only finally able to incapacitate one famous racketeer using tax and liquor laws.

HAM L. REV. 1171 (1986); 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 (1986). Finally, several commentators have concluded that the statute reaches attorneys' fees and that it is not unconstitutional to require the forfeiture of assets that would otherwise be transferred to attorneys. *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1985); Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary*, 88 W. VA. L. REV. 825 (1986); Comment, *Today's RICO and Your Disappearing Legal Fee*, 15 CAP. U.L. REV. 59 (1985). *See generally*, *Government Intrusion into the Attorney-Client Relationship*, 36 EMORY L.J. 755 (1987) (symposium dedicated to the issue).

24 Four basic assumptions are integral to any principled effort to interpret a statute. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7-12 (1975): (1) legislative supremacy within the constitutional framework (U.S. CONST. art. I, § 1); (2) use of the statute as a means to exercise that supremacy; (3) reliance on accepted means of communication; and (4) reasonable availability of the statute to those it purports to govern, not only its text, but any other part of its legislative context that serves to give it meaning.

More than 100 years ago, the Supreme Court noted, "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed . . . [By such] a construction [a court] annuls . . . law and renders it superfluous and useless." Pillow v. Roberts, 54 U.S. (13 How.) 472, 476 (1851). But such an approach to statutory construction carries with it a heavy price. After a lifetime of legal scholarship, Dean Roscoe Pound concluded that such construction (1) "tend[ed] to bring the law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." III JURISPRUDENCE 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490. *See, e.g.*, *Voters in 3 States Reject Chief Justices*, Nat'l Law Journal, Nov. 17, 1986, p.3, col. 1.

25 S. REP. No. 225, *supra* note 3.

26 *See* Blakey, *Forfeiture of Legal Fees: Who Stands to Lose?*, 36 EMORY L.J. 781, 783 (1987).

27 *See supra* note 26; *infra* note 30.

The Organized Crime Control Act of 1970 was an attempt to fill the statutory void by providing "new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[28] These new laws revolutionized federal criminal law enforcement in at least three ways.

First, the laws focused not simply on individuals, but also on organizations.[29] Second, the laws authorized lengthier incarceration because of a perception that the old philosophy of deterrence and rehabilitation, like the old laws, did not work against organizational crime.[30]

Finally, Congress realized that a frontal assault on the power of organizational crime would not work if it only put the leaders away because leaders are fungible - they can easily be replaced. The laws had to strike at the motivation of the activity - at the profits.[31] Attempting to take the profit out of crime, Congress revived the sanction of criminal forfeiture in United States law.[32]

Congress had hoped that through the use of the new provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering. But the 1970 forfeiture provisions enjoyed limited success.[33] The original provisions failed to stop defendants from

28 Russello v. United States, 452 U.S. 576, 591 (1981).

29 Conviction under RICO requires that the defendant have engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962 (1982). CCE requires that a defendant have engaged in a "continuting criminal enterprise. . . . in concert with five or more other persons." 21 U.S.C. § 848(b) (1982).

30 *Organized Crime Control, 1970: Hearings on S. 30, and related proposals, Before Subcomm. No. 5 of the House of Representatives Committee on the Judiciary*, 91st Cong., 2nd Sess. 151 (1970) (statement of Attorney General John Mitchell); *supra* note 3.

31 *See* Statement of Findings and Purpose, Organized Crime Control Act of 1970, *supra* note 4.

32 Prior to the Crime Control Act of 1970, criminal *in personam* forfeiture was almost nonexistent in our history. Because of the severity of a punishment that denied heirs their inheritance, article iii, section 3, clause 2 of the U.S. Constitution prohibited forfeiture of estate for all convictions and judgments. 1 Stat. 117, ch. 9, § 24 (1790) (codified at 18 U.S.C. § 3563 (1982)). The current forfeiture provisions avoid a conflict with the 1790 statute because they limit criminal forfeiture to property connected to illegal activity or its value if the property is unavailable.

Before 1970, forfeiture as a form of punishment had not been seen in the United States since the Civil War. That war presented the dilemma of how to punish rebels *in absentia* for treason. The existing treason statutes, requiring personal jurisdiction of the defendant, proved to be an inadequate route for confiscating Confederate-owned property in the North. With the Confiscation Acts, Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589 (1862), Congress approved narrowly, over President Lincoln's objection, the use of *in rem* forfeitures for punitive purposes. After the Supreme Court of Kentucky held the Act unconstitutional in Norris v. Doniphan, 61 Ky. (4 Met.) 385 (1863), the U.S. Supreme Court upheld the constitutionality of the Act, despite a vigorous dissent arguing that this particular forfeiture actually punished offenders for treason, and therefore, could be used only pursuant to criminal proceedings. Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 355-56 (1871). That Congress's novel solution to a problem that the system's laws failed to address came to an end in 1886 when in Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court held that an act authorizing seizure of private papers to be used as evidence in the prosecution of an alleged crime was unconstitutional. The Court explained that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal," therefore entitling the defendant to the constitutional protections normally afforded a criminal defendant—including an *in personam* trial. RICO and CCE forfeiture occur within the context of an *in personam* criminal proceeding.

For a more complete history of forfeiture law in the United States *see* Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768 (1977); Note, *Criminal Forfeiture of Attorney's Fees Under RICO and CCE*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (1986).

33 In 1981, the General Accounting Office reported that the government's record in taking the profit out of organized crime was far below Congress's expectations. The major reasons for the disappointing forfeiture record were that federal law enforcement agencies did not pursue forfeiture

defeating forfeiture by removing, transferring, or concealing their potentially forfeitable assets prior to conviction.[34] Additionally, prosecutors often failed to add forfeiture counts to their indictments.[35] And when prosecutors did seek forfeiture, some courts gave the provisions a narrow construction[36]—despite clear congressional intent otherwise.[37] General congressional dissatisfaction with the application of criminal forfeiture led to the Comprehensive Forfeiture Act of 1984.

The 1984 Act's amendments to federal criminal forfeiture law were designed to "eliminate the statutory limitations and ambiguities that [had] frustrated active pursuit of forfeiture by Federal law enforcement agencies."[38] The amended sections provided for the same penalties that had existed before, but they now provided that all traceable proceeds of

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often and that the provisions were poorly drafted, containing limitations and ambiguities that impeded their use. COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE: A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING, 9-15 (1981), *noted in* S. REP. No. 225, *supra* note 3, at 191 [hereinafter GAO REPORT]. *See also* ABA CRIMINAL JUSTICE SECTION, *supra* note 8.

34 For example, before amendment the RICO forfeiture provision, 18 U.S.C. § 1963(a) (1982), provided:

> [w]hoever violates any provision of this chapter shall be fined not more than $25,000 or imprisoned not more than 20 years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Several circuits had held that forfeiture under the original act was mandatory. United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); United States v. L'Hoste, 609 F.2d 796, 809-12 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). But even if the statute mandated forfeiture, forfeitable property was not clearly defined. S. REP. No. 225, *supra* note 3, at 194. Futhermore, although the 1970 forfeiture provisions did authorize courts to issue orders restraining the post-indictment transfer of assets, neither RICO nor CCE provided any standards for the issuance of restraining orders. *Id.* at 195.

35 *In rem* forfeiture permits the goverment to seize property if it has probable cause to believe the property was used to commit an alleged offense. *E.g.*, United States v. One 56-foot Yacht Named Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983) (test is whether "information relied on by the government is adequate and sufficiently reliable to warrant the belief by a reasonable person that the vessel was used to transport controlled substances"); Fuentes v. Shevin, 407 U.S. 67, 90-93, *reh'g denied*, 409 U.S. 902 (1972) (Pre-hearing seizure is constitutional in extraordinary situations when (1) seizure necessary to secure important governmental or general public interest, (2) special need for prompt action, and (3) goverment official initiates seizure after determining under the statute's standards that seizure necessary and justified.). Because of the lower burden of proof and less intricate procedure prior to the 1984 Act, law enforcement officials were using civil forfeiture measures more often than the RICO or CCE criminal provisions. (For example, Congress has authorized civil *in rem* forfeiture of controlled substances and the articles used to transport controlled substances, 21 U.S.C. § 881; obscene materials, 18 U.S.C. § 1465; money used in bribery schemes, 18 U.S.C. § 3612; articles not registered for customs, 19 U.S.C. § 1497; unlicensed firearms, 18 U.S.C. § 924(d); adulterated foods and drugs, 21 U.S.C. § 334.).

36 Several courts interpreted the 1970 Act to exclude the profits (proceeds) of the criminal enterprise from forfeiture, holding that the forfeiture provisions only attacked defendants' interests in enterprises. *See, e.g.*, United States v. Marubeni America Corp., 611 F.2d 763, 765-70 (9th Cir. 1980) (§ 1963(a)(1) forfeiture limited to interest in an enterprise); United States v. McManigal, 708 F.2d 276, 283-87 (7th Cir.) (same holding), *vacated*, 464 U.S. 979, *aff'd as modified*, 723 F.2d 500 (7th Cir. 1983), *overruled by* United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977). *But see* Russello v. United States, 464 U.S. 16 (1983) (holding proceeds forfeitable).

37 Section 904(a) of RICO, 84 Stat. 947 directs that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." *Turkette*, 452 U.S. at 587. See also 21 U.S.C. § 853(o). These are the only such instructions in substantive federal criminal law. *Russello*, 464 U.S. at 27.

38 S. REP. No. 225, *supra* note 3, at 192.

racketeering[39] and drug[40] activity were potentially subject to forfeiture and made it easier for the government to obtain extensive forfeiture by making it more difficult for defendants to avoid it.

Probably the most significant change affecting criminal defendants and their attorneys was the amendment vesting title to forfeitable property in the United States upon the commission of the illegal acts giving rise to forfeiture.[41] This "relation-back" provision,[42] adapted from civil

39 18 USC § 1963(a) as amended provides:

(a) 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.

40 21 U.S.C. § 853(a) now provides:

(a) Any person convicted of a violation . . . 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.

41 18 U.S.C. § 1963(c), 21 U.S.C. § 863(c). The identical language in the two statutes states:

(c) All rights title and interest in property . . . 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 . . . 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.

The relation back taint theory has been the basis for the government's claim that fees paid to an attorney may be forfeited upon conviction of the client.

42 The relation back concept has long standing application in civil forfeiture proceedings. The Supreme Court permitted forfeiture upon the commission of an offense in 1814 in United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 389, 404-05 (1814). Apparently by 1890 the relation back concept was well established. In United States v. Stowell, 133 U.S. 1, 16-17 (1890), the Court said:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

Today courts continue to accept the legitimacy of a relation back civil forfeiture provision vesting title in the govenment at the time of the offense. *See, e.g.*, United States v. "Monkey," 725 F.2d 1007, 1012 (5th Cir. 1984); United States v. $84,000 U.S. Currency, 717 F.2d 1090 (7th Cir. 1983), *cert. denied*, 469 U.S. 836 (1984); Simons v. United States, 541 F.2d 1351, 1352 (9th Cir. 1976). Courts have recently upheld application of relation back vesting in criminal forfeiture cases as well. *See, e.g.*, Ramaria Familienstiftung v. United States, 643 F. Supp. 139, 145 (S.D. Fla. 1986); United States v.

in rem forfeiture law, voids all transfers made subsequent to the crime[43] and allows the government to take possession of property transferred to parties who themselves had no involvement in criminal activity.[44] Relation-back helps to sterilize forfeitable property in the hands of present or future defendants because third parties may not be willing to accept property that they may not be able to keep. Dealing in drugs and other organized criminal activities may be highly profitable, but the economic profit will provide considerably less power if the forfeiture provisions can sterilize the profits.

Although similar to civil *in rem* forfeiture in the use of relation back, the criminal *in personam* forfeiture of RICO and CCE does not rely upon the legal fiction that the property itself is guilty of wrongdoing.[45] Rather, *in personam* forfeiture results from a finding of personal guilt.[46] The criminal conviction can only establish that the government's property interest is superior to the convict's. It cannot divest the property rights of innocent non-party transferees.[47] Thus, the RICO and CCE statutes provide that if a third party transferee establishes in a post-trial[48] hearing that "he is a bona fide purchaser for value . . . who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture,"[49] he or she may keep tainted property.

The nature of legal representation means that attorneys, more than most others selling goods or services to defendants, will be in a position to know of the tainted origin of assets. Both sides of the fee forfeiture debate have therefore concluded that attorneys can seldom qualify for the bona fide purchaser protection that the statute provides.[50]

A second significant impact on defendants and the criminal defense bar arises as a result of the 1984 Act's attempts to ease the government's burden for obtaining restraining orders used by the government to prevent defendants from dissipating assets in which the government alleges

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Ginsburg, 773 F.2d 798, 802 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); U.S. v. Nichols, 841 F.2d 1485 (10th Cir. 1988). .

43 *See* United States v. United States Coin & Currency, 401 U.S. 715, 719-20 (1971); United States v. Stowell, 133 U.S. 1, 16-17 (1890). Though courts have read relation back into *in rem* forfeiture actions, some civil forfeiture statutes also explicitly provide for it. *See, e.g.*, 21 U.S.C. § 881(h).

44 Such an application of forfeiture leads to harsh results at times. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685-90 (1974), and cases cited therein.

45 Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 232-33 (1982); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 784 (1977).

46 The Palmyra, 25 U.S. (12 Wheat.) 1, 13-14 (1827).

47 Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 285 (1980) states:

> This "relation back" principle is inapplicable to RICO *in personam* forfeitures because the doctrine is grounded in the essential nature of *in rem* forfeiture actions. In those actions, the innocence of the owner is irrelevant because the thing to be forfeited is considered the offender. Thus, the "relation back" doctrine cannot be employed in an *in personam* action in which forfeiture is dependent on the guilt of the former owner. Accordingly, because RICO established an *in personam* forfeiture procedure, the innocence of the present owner must control if the defendant does not retain an interest in the property.

(citations omitted); *see also* S. REP. No. 225, *supra* note 3, at 208.

48 Both statutes bar third party intervention before conclusion of the criminal proceedings. 18 U.S.C. § 1963(i); 21 U.S.C. § 853(k).

49 18 U.S.C. § 1963(l)(6)(B); 21 U.S.C. § 853(n)(6)(B).

50 U.S. ATTORNEYS' MANUAL, *supra* note 10, at § 9-111.511.

an interest.[51] Before the 1984 amendments, court decisions adopted civil procedures for the granting of restraining orders.[52] These decisions allowed defendants to challenge pretrial the validity of any indictment to which the government attached a forfeiture count before the government was prepared to try the case.[53] In effect this required the government to prove the merits of the underlying criminal case and forfeiture counts well in advance of trial in order to obtain an order restraining defendants' property alleged to be forfeitable in the indictment. The government seldom sought forfeiture.[54]

The 1984 amendments significantly change the procedure for obtaining restraining orders. They permit the government to rely on the probable cause established in indictments to obtain restraining orders.[55] If the government seeks to restrain assets before obtaining an indictment, however, defendants have the right to hearings,[56] but in these hearings the government may rely on hearsay.[57] Witnesses need not be produced before trial.

Two important questions arose almost immediately after enactment of the forfeiture amendments: (1) Did Congress intend to subject attorneys' fees to possible forfeiture, and (2) Does the Constitution permit the government to use relation-back and restraining orders to prevent defendants from transferring assets to attorneys as fees? The language of the statutes answers the first question; answering the constitutional issue is more difficult. The timing of the forfeiture order causes the alleged constitutional problem. Because RICO and CCE forfeitures are *in personam*, the question of defendants' property interests in allegedly forfeitable assets is intimately connected with the question of their guilt. A finding that property is in fact subject to forfeiture occurs only at the conclusion of criminal trials resulting in convictions.[58] Yet the govern-

51 S. REP. No. 225, *supra* note 3, at 202.

52 *See infra* note 116.

53 S. REP. No. 225, *supra* note 3, at 196.

54 *Id.* at 191; *see generally* GAO REPORT, *supra* note 33.

55 The issuance of the indictment or information establishes probable cause. *See* S. REP. No. 225, *supra* note 3, at 202-03 ("Since a warrant for the arrest of the defendant may issue upon the filing of an indictment or information, and so the indictment or information is sufficient to support a restraint of the defendant's liberty, it is clear that the same basis is sufficient to support a restraint on the defendant's ability to transfer or remove property alleged to be subject to criminal forfeiture in the indictment.") Because an indictment or information alleging a RICO or CCE violation establishes probable cause, the government is not required to produce additional evidence regarding the merits of the prosecution when seeking a post-indictment restraining order. *See* S. REP. No. 225, *supra* note 3, at 202. *But see* cases cited *infra* note 116.

56 The 1984 Act authorizes courts to issue pre-indictment restraining orders if the government establishes at an adversary hearing a substantial probability of prevailing at trial on the forfeiture issue. 18 U.S.C. § 1963(e)(1)(B)(i); 21 U.S.C. § 853(e)(1)(B)(i). In the limited category of cases in which the government may obtain an *ex parte* restraining order prior to indictment, the government must establish probable cause to believe that the property in question would be subject to forfeiture. 18 U.S.C. § 1963(e)(2); 21 U.S.C. § 853(e)(2).

Property need not even be restrained for forfeiture to impact on defendants' ability to retain attorneys. *See infra* text accompanying notes 41-50.

57 18 U.S.C. § 1963(d)(3); 21 U.S.C. § 853(e)(3).

58 *See supra* note 6.

ment, on a showing of probable cause, may prevent defendants from disposing of restrained property although they have not been convicted.[59]

Needless to say, for the judiciary fee forfeiture has raised challenging questions of statutory and constitutional interpretation. Before confronting constitutional questions, it makes sense to determine whether the statute was even intended to apply to attorneys' fees.[60]

II. The Statute

No general rule exists confining the scope of legislation to the particular intent or state of mind of the enacting legislature.[61] Nor need the legislative history delineate a statute's every meaning.[62] Rather, the words of a statute, read in light of its general purpose, are usually held to control, at least in the absence of clear evidence in the legislative history to the contrary.[63]

With the preceding principles in mind it is clear that the broadly drafted provisions of the 1984 Act include attorneys' fees in the category of potentially forfeitable assets. The plain, categorical language of the statute contains no exception for attorneys' fees: "Any person convicted of a violation . . . shall forfeit to the United States . . . (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation . . . ."[64] The clear terms of the statute subject defendants' tainted assets to forfeiture without regard to whether they intend to use them to retain attorneys. The statute only exempts tainted assets from forfeiture if third parties have claims vesting prior to the government's or are bona fide purchasers — without regard to whether they are attorneys. Where a statute's language is unambiguous, a court's task of statutory construction ends unless enforcement of the literal language would contravene a clearly expressed legislative intention.[65]

Some courts,[66] however, have mistakenly attempted to limit the forfeiture provisions specifically to one of the purposes expressed in the legislative history: the need to prevent defendants from avoiding forfei-

59 S. REP. No. 225, *supra* note 3, at 202. *But see*, United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium, 853 F.2d 1445 (8th Cir. 1988).

60 "In determining the scope of a statute, we look first to its language." Rusello v. United States, 464 U.S. 16, 20 (1973) (citing United States v. Turkette, 452 U.S. 576, 580 (1981) (interpreting RICO)).

61 *See, e.g.*, Diamond v. Chakrabarty, 447 U.S. 303, 315-16 (1980) (The "Court frequently has observed that a statute is not to be confined to the particular application[s] . . . contemplated by the legislators.").

62 Albernaz v. United States, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction which may arise."); Standefer v. United States, 447 U.S. 10, 20 n.12 (1980) (need not mention in committee report).

63 *See, e.g.*, Consumer Product Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.").

64 *See supra* notes 39, 40.

65 *See supra* note 63.

66 *See* United States v. Truglio, 660 F. Supp. 103, 105 (D. W. Va. 1987); United States v. Ianniello, 644 F. Supp. 452, 458 (S.D.N.Y. 1985). *But see* United States v. Harvey, 814 F.2d 905, 917-18 (4th Cir. 1987).

ture through sham transactions.[67] From these few passages these courts have concluded that forfeiture applies to attorneys' fees only if the funds were given to the attorneys — not in return for services — but in order to harbor them from forfeiture.[68] The bona fide purchaser limitation of the forfeiture provisions and language in the legislative history do indicate a concern with preventing sham or fraudulent transfers and provide a remedy. But congressional disapproval of a specific type of conduct cannot legitimately be used to restrict unambiguously broader statutory language to the one specifically mentioned purpose.[69] That the statute does not mention attorneys' fees does not mean that the language is ambiguous; rather, it suggests that Congress did not mean to treat assets earmarked for attorneys differently than other assets.

In fact, to limit the statute to fraudulent transfers would seriously violate the purposes of the 1984 Act's forfeiture provisions. One important purpose of forfeiture is to take the incentive out of crime, by taking away the profitability.[70] Additionally, the government has a strong deter-

67 Courts have cited several statements in the Senate report as evidence that Congress intended to limit the forfeiture provisions to sham transactions. First, the Senate report contains a footnote that reads: "The provision [18 U.S.C. 1963(m)] should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. 1963(c), as amended by the bill." S. REP. No. 225, *supra* note 3, at 209 n.47. Second, the Senate report's discussion of the third party transfer provisions says, "The purpose of this provision is to permit the voiding of certain preconviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not arms' length transactions." S. REP. No. 225, *supra* note 3, at 200-01. Courts limiting the operation of the third party forfeiture provisions to sham or fraudulent transactions have cited the first passage — footnote 47 in the Senate report. *See e.g.*, United States v. Thier, 801 F.2d 1463, 1471 (5th Cir. 1986); *Ianniello*, 644 F. Supp. at 455-56; United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Colo. 1985). Also, courts rely on the passage of the Senate report evincing a purpose of voiding transfers that were not at "arms length" to support the view that only sham transactions concerned Congress. United States v. Figueroa, 645 F. Supp. 453, 456-57 (W.D. Pa. 1986); *Rogers*, 602 F. Supp. at 1347. Thus, because lawyers representing criminal defendants are not usually engaged in sham transactions, some courts have held that assets paid to them cannot be forfeited.

68 These courts have relied on Court language stating that if there are "two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). There must, however, be at least two plausible readings of the statute for this principle to apply. *Harvey*, 814 F.2d at 917-18.

69 Only if the language of the act is ambiguous should courts examine the legislative history surrounding its enactment. They may not use the legislative history to create an ambiguity, however, for the words of the statute are usually the best indication of congressional intent. "Most formal statements of purpose in bills or committee reports tend to be innocuous generalities designed to offend the least number of people, a fact that destroys most of their usefulness for resolving specific uncertainties in meaning." R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 91 (1975). Furthermore, "Striking down a law approved by the democratically elected representatives of the people is no minor matter." Edwards v. Aguillard, 107 S. Ct. 2573, 2600 (1987) (Scalia, J., dissenting).

Limiting forfeiture to third parties engaged in sham transactions ignores the contrary words of § 853(c) requiring the forfeiture of assets held by third parties unless the transferee was "reasonably without cause" at the time of the purchase to believe that the property was subject to forfeiture. A third party can obtain assets through a non-sham transaction but with the knowledge that the assets are subject to forfeiture. The statute as written by Congress establishes that third party transfers are subject to forfeiture on the basis of the purchaser's knowledge of the possibility of forfeiture, not on the basis of whether the transaction was fraudulent.

70 *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 205-12 (3d ed. 1986) (proposing that removing part of the profit incentive through fines may deter better than jail sentences).

rent interest that fee forfeiture and restraining orders serve.[71] While it is true that no one engages in crime solely to be able to retain the finest legal talent, drug kingpins' and racketeers' certain knowledge that they can afford almost any lawyer's fee may make them less apprehensive about continuing criminal activity. Another congressional purpose is to strip these criminals of their undeserved power, part of which is the ability to command high-priced legal talent with money that they probably did not legally acquire.[72] Part of the power these organizations command derives from the ability to purchase corrupt lawyers willing to pervert the law.[73]

III. The Constitution

Much of the current commentary considers the constitutional questions to be the most important aspect of the forfeiture problem. Commentators and defendants have asserted that both the sixth amendment and the fifth amendment are violated if courts apply the 1984 Act to attorneys' fees.[74] The Supreme Court has not specifically addressed this question. The only way, then, to consider whether the Constitution is violated by attorney fee forfeiture is to apply analysis developed up to this point in other contexts.

A. *Sixth Amendment*

The sixth amendment provides, in pertinent part, that "in all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[75] The right to counsel embodies three distinct but related rights. These are the absolute right to representation by counsel in criminal proceedings,[76] the qualified right of nonindigent defendants to counsel of their choice,[77] and the right to effective assistance of counsel.[78]

Much of the sixth amendment concern with criminal forfeiture arises from the belief that defendants will not be able to select attorneys, or even obtain attorneys, if the government can restrain enough of their assets. Sixth amendment interference may occur even without a restraining order because the threat of forfeiture may dissuade qualified attorneys from accepting cases at the outset.[79]

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71 In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 644 (4th Cir. 1988).

72 U.S. v. Monsanto, 836 F.2d 74, 79 (2d Cir. 1987).

73 *See Staff Report on Mob Lawyers: President's Commission on Organized Crime*, 37 CRIM. L. RPTR. 201820 (1985) (corrupt "mob" attorneys constitute significant threat to the Bar's integrity disproportionate to their numbers).

74 *See supra* note 23.

75 U.S. CONST. amend. VI.

76 *See infra* text accompanying notes 80-86.

77 *See infra* text accompanying notes 87-107.

78 *See infra* text accompanying notes 108-16.

79 *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 510-15 (1985); Cloud, *supra* note 18, at 6-7.

1. The Comprehensive Forfeiture Act of 1984 Does Not Implicate the Absolute Right to Representation.

The absolute right of criminal defendants to be represented by counsel, first recognized in *Powell v. Alabama*,[80] guarantees counsel in any proceeding involving possible imprisonment.[81] The government must provide indigent defendants with appointed counsel and nonindigent defendants with a reasonable opportunity to retain counsel.[82] This absolute right may not be denied on the basis of any countervailing government interest.

Because constitutional jurisprudence requires that indigent criminal defendants receive government financial representation, Congress has granted courts statutory authority to appoint counsel based on a showing of financial inability.[83] This requirement would not exclude defendants unable to retain attorneys willing to accept money subject to possible forfeiture from qualifying for appointed representation.[84]

What the Constitution does not grant, however, is an absolute or unconditional right to counsel of choice. In a novel factual setting *Powell* established a due process right to effective appointed counsel, yet courts consistently cite it for the proposition that the right to counsel of choice is a fundamental sixth amendment guarantee.[85] But the right to choose the representative has never been as inviolate as the right to be represented. Rather, the courts have repeatedly permitted government inter-

80 287 U.S. 45 (1932).

81 Argersinger v. Hamlin, 407 U.S. 25 (1972).

82 Chandler v. Fretag, 348 U.S. 3 (1954); Powell v. Alabama, 287 U.S. 45, 66 (1932).

83 18 U.S.C. § 3006A (1982, Supp. III 1985 & Supp. IV 1986) (counsel appointed when defendant "financially unable to obtain counsel"). The Criminal Justice Act imposes maximum rates for the compensation of appointed attorneys. 18 U.S.C. § 3006A(d)(1) (hourly rate); 18 U.S.C. § 3006A(d)(2) (compensation in one case). However, the chief judge of each circuit is authorized to waive the limit on total compensation in complex cases. 18 U.S.C. § 3006A(d)(3).

84 Undoubtedly some defendants will not have access to any untainted assets that they could use to retain attorneys. In such cases the courts must appoint attorneys. But some district courts have reasoned that defendants whose assets have been frozen are not elegible for appointed counsel. United States v. Ianniello, 644 F. Supp. 452, 457 (S.D.N.Y 1985); United States v. Badalamenti, 614 F. Supp. 194, 197 (S.D.N.Y 1985). These courts have misconstrued the scope of the statutory availability of appointed counsel.

"Indigency" is not a requirement for qualification of appointed counsel, and the fact that defendants may have "access" to funds is not determinative. Rather, defendants need only be "financially unable to obtain counsel." 18 U.S.C. § 3006A(b). *See* United States v. De Hernandez, 745 F.2d 1305, 1310 (10th Cir. 1984); United States v. Kelly, 467 F.2d 262 (7th Cir. 1972), *cert. denied*, 411 U.S. 933 (1973). Financial inability is a lesser standard than indigency. United States v. Harris, 707 F.2d 653, 660 (2d Cir.), *cert. denied*, 464 U.S. 997 (1983). A broad range of considerations is relevant to whether defendants are financially unable to obtain counsel. United States v. Barcelon, 833 F.2d 894, 897 (10th Cir. 1987). For example, the courts may consider whether they have assets available for their use. *Id.* But because the court has not determined in whom title to property subject to possible forfeiture lies, those assets do not contribute to the financial ability of defendants to obtain representation. *See* United States v. Nichols, 654 F. Supp. 1541, 1552 n.15 (D. Utah 1987).

85 *See, e.g.*, United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Col. 1985); *Payden*, 605 F. Supp. 839 (S.D.N.Y. 1985). *Powell* did state that "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." 287 U.S. at 53. However, *Powell's* facts are unique. *See* Brickey, *supra* note 79, at 506.

ference with defendants' choices when the interests at stake tipped the scale in the state's favor.[86]

2. Restraining Orders And The Threat of Fee Forfeiture Implicate, But Do Not Violate, the Qualified Right of Nonindigent Defendants to Counsel of Choice.

Although until recently the Supreme Court has faithfully attempted to avoid addressing a right to counsel of choice,[87] lower federal courts have indicated that a qualified right to counsel of choice is an implicit sixth amendment guarantee.[88] Yet in numerous factual situations the judiciary has qualified the right to counsel of choice, permitting the government to act in ways that adversely affect criminal defendants before trial when necessary to protect important public interests.[89]

For example, defendants may not insist on representation by attorneys who are not members of the bar[90] or by attorneys who cannot ethi-

86 *See infra* text accompanying notes 88-107.

87 Until recently the Supreme Court had never decided a case clearly on the basis of the right to choose counsel. Opinions discussing the importance of defendants' ability to select their attorneys were invariably decided on grounds other than a constitutional right to counsel of choice. *See Powell*, 287 U.S. at 71 (due process violated when court effectively denied indigent defendants in a capital case were effectively denied counsel); Glasser v. United States, 315 U.S. 60 (1942) (sixth amendment right to effective assistance of counsel violated where court appointed an attorney with a conflict of interest); Chandler v. Fretag, 348 U.S. 3 (1954) (due process violated by failure to provide reasonable opportunity to obtain counsel); Crooker v. California, 357 U.S. 433 (1958) (voluntary confession in the absence of an attorney does not violate due process), *overruled*, Miranda v. Arizona, 384 U.S. 436 (1966); Faretta v. California, 422 U.S. 806 (1975) (defendants have constitutional right to conduct their own defenses); Flanagan v. United States, 465 U.S. 259 (1984) (pretrial disqualification of defense counsel not immediately appealable). Justice Brennan's concurrence in Morris v. Slappy, 461 U.S. 1, 19-26 (1983), contained one of the most extensive discussions of the right to choose counsel.

Recently, however, the Court decided Wheat v. United States, —U.S. —, 108 S. Ct. 1692, 56 U.S.L.W. 4441, 1988 U.S. LEXIS 2306 (May 23, 1988). In *Wheat* the Court held that while a trial court must recognize the sixth amendment's presumption in favor of defendants' counsel of choice, the government may overcome that presumption not only by a demonstrating actual conflict of interest, but also by showing the serious potential for a conflict.

88 *See e.g.*, United States v. Cicale, 691 F.2d 96, 106 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); Linton v. Perini, 656 F.2d 207, 208 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

89 A court may restrict a defendant's choice when allowing the defendant to be represented by a particular attorney would adversely affect an important public interest. United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983). A court may not, however, "arbitrarily refuse to allow the defendant to retain the lawyer of his choice." Ford v. Israel, 701 F.2d 689, 692 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983); *see also* United States v. Rankin, 779 F.2d 956, 958 (3d Cir. 1986) (choice may not be "hindered unnecessarily"); Birt v. Montgomery, 725 F.2d 587, 592 (11th Cir.) (en banc) (improper if "unreasonably denies" choice), *cert. denied*, 469 U.S. 874 (1984); *Linton*, 656 F.2d at 209 (may not "arbitrarily and unreasonabley interfere" with choice).

90 While accused do have the right to conduct their own defenses even if they are not licensed attorneys, Faretta v. California, 422 U.S. 826, 835-36 (1975), that right does not allow them to select some other person who is not a licensed attorney to represent them at trial. *See, e.g.*, United States v. Tedder, 787 F.2d 540 (10th Cir. 1986); United States v. Gigax, 605 F.2d 507 (10th Cir. 1979); United States v. Afflerbach, 547 F.2d 522 (10th Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977). Nor may defendants insist on being represented by attorneys who have been disbarred. United States v. Grismore, 546 F.2d 844 (10th Cir. 1976). Also, a court may properly deny defendants their choice of counsel if their attorney of choice is licensed to practice only in a different state. Williams v. Nix, 751 F.2d 956, 959-60 (8th Cir.), *cert. denied*, 471 U.S. 1138 (1985); *Ford*, 701 F.2d at 692-93. *But see* United States v. Panzardi Alvarez, 816 F.2d 813, 815-18 (1st Cir. 1987) (local rule limiting out-of-state attorneys to one *pro hac vice* appearance annually fails to advance interest in regulating conduct of attorneys).

cally represent them in particular cases.[91] And a court's refusal to reschedule trials or to grant the continuances necessary to allow the chosen attorneys to participate in particular cases is permissible even though it may deny defendants their counsel of choice.[92] The issue these decisions generally confronted was whether the trial court actions "arbitrarily and unreasonably interfere[d] with a client's right to be represented by the attorney he has selected."[93] Resolving the issue merely required balancing the interest of the government and society in the efficient administration of justice against the defendant's qualified right to retain counsel of choice.[94] No sixth amendment violation exists in any of these situations, yet one is claimed where fee forfeiture produces the same result. But in none of these cases did the courts question the financial ability of the defendants to retain counsel. The forfeitability of attorneys' fees raises a slightly different problem for the financial ability of the accused is the issue in an analysis of the forfeitability of fees.

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91 If there are conflicts of interest between the attorneys chosen by defendants and people involved in the trial, the attorneys usually may be excluded unless the likelihood and severity of the conflict are minimal compared to the defendants' interest in obtaining their counsel of choice. *See* United States v. Ditommaso, 817 F.2d 201, 219-20 (2d Cir. 1987) (attorney disqualified because he had previously represented a codefendant); United States v. Wheat, 813 F.2d 1399, 1401 (9th Cir. 1987) (request for substitution denied because of attorney's representation of codefendants), *aff'd*, —U.S. —, 108 S. Ct. 1692, 56 U.S.L.W. 4441 (1988); United States v. James, 708 F.2d 40 (2d Cir. 1983) (attorney disqualified because of his prior representation of a witness); United States v. Phillips, 699 F.2d 798 (6th Cir. 1983) (attorney disqualified because he had represented the person defendant named as his supplier in a drug prosecution); Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981) (attorney disqualified because he had represented the company whose assets defendant was being tried for converting); United States v. Provenzano, 620 F.2d 985, 1004-05 (3d Cir.) (attorney disqualified because of his prior representation of government's chief witness), *cert. denied*, 449 U.S. 899 (1980); United States v. Kitchin, 592 F.2d 900 (5th Cir.) (attorney disqualified because law firm associate had previously worked with the prosecution in the case), *cert. denied*, 444 U.S. 843 (1979). *But see* United States v. Washington, 797 F.2d 1461, 1464-67 (9th Cir. 1986) (error to disqualify attorney who had previously worked with Justice Department Strike Force simply because of an appearance of impropriety); United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), *appeal after remand*, 723 F.2d 217 (1983), *cert. denied*, 466 U.S. 951 (1984) (error to disqualify one attorney because he had previously represented a witness, but partial disqualification of a second attorney for similar reasons permissible). Defendants' counsel of choice has also been denied when their preferred attorney has been implicated in the crime, United States v. Garrett, 727 F.2d 1003, 1007-08 (11th Cir. 1984), *aff'd*, 471 U.S. 773 (1985), or when the attorney was scheduled to be called as a witness, In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1108 (1986). The government's interests in avoiding unethical practices and in maintaining the integrity and the appearance of integrity of the judiciary have justified the denial of selected counsel in these cases.

92 This issue has arisen when defendants had not obtained attorneys by the time of trial, United States v. Kelm, 827 F.2d 1319, 1320-21 (9th Cir. 1987); United States v. Leavitt, 608 F.2d 1290, 1293-94 (8th Cir. 1979); when a chosen attorneys claimed that they had inadequate time to prepare for trial, *Birt*, 725 F.2d at 591-92; United States v. LaMonte, 684 F.2d 672 (10th Cir. 1982); *Linton*, 656 F.2d at 208; when chosen attorneys were unavailable because of illness, Giacelone v. Lucas, 445 F.2d 1238, 1241-42 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); or a scheduling conflict, Sampley v. Attorney General of North Carolina, 786 F.2d 610, 611-12 (4th Cir.), *cert. denied*, 106 S. Ct. 3305 (1986); *Rankin*, 779 F.2d at 956-58; when counsel withdrew, United States v. Padilla, 819 F.2d 952, 954-56 (10th Cir. 1987); United States v. Burton, 584 F.2d 485, 488 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); or when defendants sought to obtain new attorneys immediately before trial, Urquhart v. Lockhart, 726 F.2d 1316 (1984).

93 *Linton*, 656 F.2d at 209. The Supreme Court has held that there is no constitutionally protected right to a "meaningful attorney-client relationship." Morris v. Slappy, 461 U.S. 1, 13 (1983).

94 *See, e.g.*, *Kelm*, 827 F.2d at 1322 n.2 (listing five factors); *Burton*, 584 F.2d at 490-91 (listing eight factors).

Although unfortunate, the harsh reality of our system of justice is that "the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy."[95] Defendants' right to counsel of choice is so obviously limited by their financial ability to retain desired attorneys that most courts mention it if at all, only in passing.[96] Criminal forfeiture requires that courts now perform a more substantial analysis of this issue. This analysis is not, however, without some guidance.

The flexibility that the Supreme Court has afforded the government in other areas of pretrial interference with criminal defendants indicates that the goverment may properly contest defendants' use of allegedly tainted assets to retain their chosen attorneys. For example, in *United States v. Salerno*,[97] the Supreme Court allowed the government to detain defendants pretrial in certain instances because pretrial detention is a regulatory measure necessary to protect the public's interest in community safety and in preventing crime.[98] Because society's interests would be threatened if no action could be taken prior to trial, the Court allowed the imprisonment of a limited class of defendants prior to trial — even though this may greatly impact on the trial outcome because detained defendants can do little to aid their defenses.

The requirement that defendants post bail[99] also allows the government to affect the rights of criminal defendants before trial. Any assets that defendants must use to post bail are no longer available to retain

95 Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., dissenting).

96 *Burton* stated: "An accused who is financially able to retain counsel must not be deprived of the opportunity to do so." 584 F.2d at 489; United States v. Inman, 483 F.2d 738 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974) (expressed right to counsel of choice as the "right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by the attorney of his choosing."); U.S. v. Harvey, 814 F.2d 905 (4th Cir. 1987) (right to counsel of choice out of one's private resources, free of government interference); *see also Wheat*, 813 F.2d at 1401; *Wilson*, 761 F.2d at 280; *Urquhart*, 726 F.2d at 1319. In affirming *Wheat* the Supreme Court said:

> The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, *a defendant may not insist on representation by an attorney he cannot afford* or who for other reasons declines to represent the defendant.

108 S. Ct. at 1697 (emphasis added) (citations omitted).

Defendants are not denied the right to choice of counsel if they are unable to afford the best attorneys and must settle for some other attorneys. Nor are indigent defendants denied the right to choice of counsel because they are unable privately to retain any attorney at all. Indigent defendants must be provided with appointed counsel at state expense. But indigent defendants do not have a right to choose appointed counsel. *See, e.g.*, United States v. Allen, 789 F.2d 90, 92-93 (1st cir.), *cert. denied*, 107 S. Ct. 164 (1986); United States v. Mitchell, 788 F.2d 1232, 1236 (7th Cir. 1986); *Williams*, 751 F.2d at 959-60; *see also Morris*, 461 U.S. at 23 n.5 (Brennan, J., dissenting). In fact, a court may refuse to appoint the defendant's counsel of choice even if that attorney is willing to represent the defendant. United States v. Ely, 719 F.2d 902, 904-05 (7th cir. 1983), *cert. denied*, 464 U.S. 1037 (1984). Similarly, indigent defendants do not have a right to attorneys who share their beliefs about the validity of the laws under which they are being prosecuted. *See* United States v. Grosshans, 821 F.2d 1247, 1251 (6th Cir.), *cert. denied*, 108 S. Ct. 506 (1987); United States v. Udey, 748 F.2d 1231, 1242-43 (8th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); United States v. Weninger, 624 F.2d 163, 166-67 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980). *See generally*, Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

97 107 S. Ct. 2096 (1987).

98 *Id.* at 2102-03.

99 18 U.S.C. § 3142(c)(1)(B)(xii).

attorneys. Nevertheless, federal courts may require defendants to "execute bail bond[s] with solvent sureties in such amount as is reasonably necessary to assure [their] appearance"[100] in court. Bail serves the obvious public interest of securing defendants' presence in court.[101]

The Internal Revenue Service ("IRS") and the Securities and Exchange Commission ("SEC") also have the ability to interfere financially with defendants investigated for possible tax or securities law violations. For example, two Internal Revenue Code procedures, "jeopardy assessment"[102] and "termination of the taxable year,"[103] authorize the IRS to seize taxpayer assets before they have an opportunity to challenge the validity of the seizures in court.[104] And courts have granted the SEC freeze orders to prevent defendants from dissipating, concealing or disposing of assests until profits derived from illegal activity have been disgorged.[105]

No different from the preceding examples, an order securing an *in personam* judgment by restraining defendants from transferring potentially forfeitable property is also a regulatory measure necessary to protect an important public interest. As Justice Brennan has said, a restraint of property that is subject to forfeiture is an appropriate means of "fostering the public interest in preventing continued illicit use of the prop-

100 *Id.*

101 Likewise, "[t]he sole purpose of the bill's restraining order provision . . . is to preserve the status quo, i.e., to assure the availability of the property pending disposition of the criminal case." S. REP. No. 225, *supra* note 3, at 204.

102 I.R.C. § 6861 (1982). This 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. *Id.* at (a). The act of assessment creates a lien on the taxpayer's property and allows the IRS summarily to levy upon it and sell it. I.R.C. §§ 6321, 6331 (1982). Through these procedures the IRS may deprive taxpayers of the use of property with which they might have retained lawyers in order to contest the validity of the assessments. *See* Human Eng'g Inst. v. Commissioner, 61 T.C. 61 (1973) (lien on property remained valid through six years of pretrial negotiation despite challenge on right to counsel grounds); I.R.C. § 6322 (1982) (The lien remains "until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time.").

103 I.R.C. § 6851 (1982). This procedure enables the IRS to demand immediate payment of taxes for the current or preceding taxable year if it finds that taxpayers are about to leave the United States, conceal themselves or their assets, or "do any other act . . . tending to prejudice" the collection of the tax. *Id.* at (a)(1). As is true under the jeopardy assessment procedure, property is subject to an immediate levy that may freeze it through protracted litigation.

104 Levies on property have preceded and followed indictment and arrest and reached assets assigned to criminal defense attorneys in return for their services. *See, e.g.*, United States v. Allied Stevedoring Corp., 138 F. Supp. 555, 556 (S.D.N.Y. 1956) (government filed tax liens on corporate assets two months before indictment for tax fraud); O'Connor v. United States, 203 F.2d 301, 302-03 (4th Cir. 1953) (government filed tax liens on defendant's assets almost two years post-indictment); United States v. Marshall, 526 F.2d 1349, 1352-53 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976) (jeopardy assessment instituted post-arrest; no sixth amendment violation); Freistak v. Egger, 551 F. Supp. 238, 240 (M.D. Pa. 1982) (same). For an expanded discussion of assets subject to tax liens and additional case authority *see* Brickey, *supra* note 79, at 525-29. For a discussion of the effect of summary assessment procedures on criminal defendants *see generally* Tarlow, *Criminal Defendants and Abuse of Jeopardy Assessment Tax Procedures*, 22 UCLA L. REV. 1191 (1975).

105 SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105-06 (2d Cir. 1972); SEC v. Paro, 468 F. Supp. 635, 651 (N.D.N.Y. 1979); SEC v. Aminex Resources Corp., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,352, at 93,207-08 (D.D.C. 1978); SEC v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1388 (S.D.N.Y. 1975); SEC v. General Refractories Corp., 400 F. Supp. 1248, 1260 (D.D.C. 1975); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 870, 881 (S.D. Fla. 1974). *Manor Nursing* noted that district judges should be wary of freezing defendants' assets, not because it would be a hardship to the defendants, but rather because the freeze may destroy their businesses and thereby leave them unable to pay their victims. 458 F.2d at 1105-06.

erty and in enforcing criminal sanctions."[106] Similarly, the refusal of otherwise interested attorneys to accept a case because of threatened forfeiture absolutely violates the sixth amendment right to counsel of choice only if such a qualified sixth amendment right is greater than the government's interests in preserving assets subject to forfeiture and taking the profit out of criminal activity.[107]

3. The Right to Effective Assistance of Counsel is not Violated by the Comprehensive Forfeiture Act of 1984.

Because the absolute right to be represented by counsel is now firmly established in our jurisprudence, most recent sixth amendment cases in the courts have addressed the quality of representation received by criminal defendants.[108] After all, at least in theory defendants represented by attorneys can no longer claim that their trials are fundamentally unfair — the right to representation is meant to avoid that. Rather, they are limited to attacking the quality of their representation.

Much of the fee forfeiture debate has focused on the quality of representation available to defendants rendered indigent under the forfeiture provisions.[109] Again, the Supreme Court's guidance in this area is illuminating.

After years of refusing certiorari in a quality of representation case, the Supreme Court in *Strickland v. Washington*[110] held that claims of actual ineffective assistance of counsel should be resolved by a two-part test.[111] First, defendants must establish that their attorney's particular conduct was deficient as measured by the objective standard of reasonableness

106 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677 (1974).

107 United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988) (finding that the government's interest is superior); In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (same); United States v. Monsanto, 836 F.2d 74, 80-81 (2d Cir. 1987).

108 Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AMER. CRIM. L. REV. 181, 187-88 (1984).

109 The argument is not unusual. Even before the right to representation was extended to criminal defendants, courts and commentators were concerned about the quality of representation received by the poor. Expanding the right to counsel to indigents would require a substantial influx of attorneys to handle criminal cases. *See, e.g.*, Lombard, *The Adequacy of Lawyers Now in Criminal Practice*, 4705 AM. JUD. SOC'Y 176, 178 (1964); W. BEANGY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955). Commentators did seriously consider the availability and quality of attorneys in the aftermath of *Gideon's* expansion of the right. *See, e.g.*, Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW.U. L. REV. 289 (1965) (concluding that only reasonable staffing and reasonable compensation can begin to remedy ineffective assistance problems); Grand, *Process*, 54 MINN. L. REV. 1175, 1247 (1970) (system must overcome shortage of appointed attorneys to maintain equal justice); Calkins, *Criminal Justice for the Indigent*, 42 U. DET. L. J. 305, 322-27 (1965) (*Gideon* creates quality of representation problems because inadequate funding, bias towards prosecutors, and disincentives to practicing criminal law persist); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L. J. 260, 280 (1968) (*Gideon* challenges operation of adversary system; legal education must meet increased demand for quality defense counsel).

Similar concerns over the integrity of the public defender system are being voiced by critics of criminal forfeiture. *See supra* note 23. But as *Nichols* stated: "It is hard to conceive of a legal system in which appointed counsel is routinely adequate in a death penalty case, but is somehow inadequate in a case involving the career criminal millionaire who purchases cars, businesses, and real estate with cash delivered to banks in suitcases.' " 841 F.2d at 1507.

110 466 U.S. 668 (1984).

111 *Id.* at 687.

under "prevailing professional norms."[112] Second, defendants must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[113]

Strickland has important implications for the legal fee forfeiture debate. *Strickland* looks retrospectively at the actual representation given at trial before declaring it constitutionally inadequate. The commentators urging that the 1984 Act is unconstitutional have not shown that any particular representation is inadequate. Rather, they argue for a dangerous constitutional precedent that the representation necessarily will be because RICO and CCE cases are complex. Apparently they believe that only the free market can do an adequate job,[114] that courts should rule public defenders, as a matter of constitutional law, always inadequate to defend complex cases.[115] The Supreme Court has never been willing to do this.

In fact, *Strickland* already provides for the protection that the bar has been requesting — although the bar insists on a constitutional exemp-

112 *Id.* at 687-88, 690. The Court's opinion repeatedly stresses that, when reviewing claims of ineffective assistance of counsel, courts must apply a "presumption" of competency. *Id.* at 689, 690.

113 *Id.* at 694. The Court stated that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In Chapman v. California, 386 U.S. 18 (1967), the Court had held that where there is constitutional error the state bears the burden of proving that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. *Strickland* changed the burden on an ineffectiveness claim because the Court believed that in those cases defendants are in a superior position to assume the burden of proving prejudice. *But see* Genego, *supra* note 108, at 200-01 (arguing that defendants are in no better position).

114 Such a prophesy may be self-fulfilling. If public defenders are seldom permitted to handle complex cases, representation in the few they are required to handle probably will be less than spectacular.

115 Numerous objections have been raised to reliance upon appointed counsel and public defenders in criminal forfeiture cases. First, it is said that public defenders have neither the resources nor the expertise necessary to represent defendants charged with CCE or RICO violations. *See* United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985); *see also* Comment, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary from the Adversarial System?*, 62 WASH. L. REV. 201, 224-25 (1987). Cases involving criminal forfeiture are also especially complex, lengthy, and expensive. *See* United States v. Gallo, 668 F. Supp. 736, 754 (E.D.N.Y. 1987); G. Lefcourt & E. Horwitz, *The RICO Era: Megatrials, Mega Problems, Megabucks*, N.Y.L.J. P. 1 col. 2 (Jan. 21, 1988). Furthermore, public defenders are often overworked, *Rogers*, 602 F. Supp. at 1349, and the compensation provided appointed counsel under the Criminal Justice Act has been viewed as inadquate to persuade attorneys to take these kinds of cases, *see Estevez*, 645 F. Supp. at 871. Finally, appointed counsel is not available until an indictment has been handed down. As the Criminal Justice Act is administered, assigned counsel typically is appointed by the court upon arraignment on the complaint or upon indictment. *See* 18 U.S.C. § 3006A(a) (listing the cirumstances under which counsel may be appointed).

See generally, N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR (1982). After surveying public defender systems around the country, Professor Lefstein concluded:

> The decision to furnish counsel to the accused in criminal and juvenile cases is a matter of federal constitutional right, not simply of grace. Yet, as documented in this report, meaningful compliance with the Constitution is often absent due to inadequate funding. Indeed, public defender and assigned counsel programs experience virtually every imaginable kind of financial deficiency. There are neither enough lawyers to represent the poor, nor are all the available attorneys trained, supervised, assisted by ample support staffs, or sufficiently compensated.

Id. at 56 (citation omitted). *See also* Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees*, 19 U. MICH. J.L. REF. 1199, 1211 (1986); *but see* U.S. DEPARTMENT OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 1 (1986) ("[T]he adversarial nature of the legal system requires a strong and independent defense bar without regard to the defendant's ability to pay for legal services. These services . . . *are being provided* . . . in every jurisdiction in the United States." (emphasis added)).

tion. As *Strickland* states, the standard for evaluating particular representation in these highly complex cases remains the objective standard of reasonableness under prevailing professional norms. Since the legal profession sets its own required standards, why does it worry? If the profession sets attainable standards for representation in these complex cases that public defenders were always to fall below, defendants would always win their *Strickland* appeals. It would be in the governments interest, then, either to release assets so that defendants could retain private attorneys or to raise the rates paid public defenders in these complex cases[116] in order to attract competent counsel. Otherwise, no conviction would stick. Recognizing that the Constitution grants to all the right to competent representation is quite different than arguments that constitutionally everyone deserves the finest lawyer.

B. *Due Process*

According to the 1984 Act, if a court grants to the government a preindictment order restraining any person's assets, the person affected must be granted a hearing within ten days.[117] If an indictment has been filed, however, the 1984 Act permits courts to grant orders restraining defendants from disposing of assets alleged to be forfeitable in the indictment without mandating the same due process hearing.[118]

The defense bar has argued that by applying the forfeiture statute to restrain payment of attorneys' fees, the government deprives defendants of the use of property which must be presumed to be theirs because they are presumed innocent until proven guilty.[119] At least in the postindictment situation, where no adversary hearing is statutorily granted, by depriving defendants of the use of "their" property without an adversarial hearing, they argue, the government effectively takes property without due process of law in violation of the fifth amendment.[120] This argument is flawed for two reasons.

First, the presumption of innocence is not violated — it does not even apply to this situation. The presumption of innocence has never meant that defendants are innocent or must be treated as if they are until conviction. Rather:

116 *See supra* note 83.

117 18 U.S.C. § 1963(d)(2); 21 U.S.C. § 853(e)(2).

118 *See supra* text accompanying notes 55-57.

119 *See, e.g.*, Taylor & Strafer, *Attorney Fee Forfeiture: Can It Be Justified?*, 1 CRIMINAL JUSTICE 8, 43 (A.B.A. Spring 1986).

120 *See* United States v. Monsanto, 836 F.2d 74, 83 (2d Cir. 1987) ("we conclude with *Harvey* that notice and a hearing are constitutionally required (*i.e.*, as a matter of fifth amendment due process) with respect to post-indictment restraining orders, but are not statutorily required"); United States v. Their, 801 F.2d 1463 (if Rule 65 hearing applicable to CCE, not violative of due process); United States v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (*ex parte* TRO under § 853 violated due process; Rule 65 read into provision; hearing required to restrain property of defendant and third party); United States v. Lewis, 59 F.2d 1316, 1324-27 (8th Cir. 1985) (*ex parte* TRO under § 848 violated due process; Rule 65 read into provision; must find irreparable injury; solvent defendant may not be denied choice of counsel, citing United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984)); United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981) (government cannot rely on indictment alone to establish the likelihood that assets are subject to forfeiture). *But see* United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988); United States v. Musson, 802 F.2d 384 (10th Cir. 1886); United States v. Draine, 637 F. Supp. 482 (S.D. Ala. 1986); S. REP. No. 225, *supra* note 3, at 195-96.

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. It is "an accurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; . . .' 'an assumption' that is indulged in in the absence of contrary evidence." Without question, the presumption of innocence plays an important role in our criminal justice system . . . [b]ut it has no application to a determination of the rights of [an accused] before his trial has ever begun.[121]

Second, the due process argument focuses on the wrong amendment. It is undisputed that in a civil "taking" situation, where the government deprives a person of the use of property, the due process requirement of the fifth amendment requires that the individual be given the opportunity to be heard at a meaningful time and in a meaningful manner.[122] But while the 1984 Act adopts the idea of a restraining order from the civil law, the restraint now operates in a criminal context that focuses instead on the fourth amendment. The fourth amendment changes the rules.

In *Gerstein v. Pugh*,[123] the Supreme Court stated that it is the probable cause requirement of the fourth amendment, not the due process requirement of the fifth amendment, that defines the procedure or process due for seizure of persons or property in a criminal case.[124] In deciding what procedural safeguards are required in making a probable cause determination under the fourth amendment the Court held that "whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint . . . ."[125] A grand jury indictment provides a fair and reliable determination of probable cause in the federal system.[126]

It may at first seem odd that in a civil context the due process of the fifth amendment might invalidate an *ex parte* restraining order, while in a

121 Bell v. Wolfish, 441 U.S. 520, 533 (1978) (citations omitted).

122 Fuentes v. Shevin, 407 U.S. 67, 80-90 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969).

123 420 U.S. 103 (1975).

124 *Id.* at 122-25 n.27 ("civil procedures are inapposite and irrelevant in the wholly different context of the criminal justice system"). *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-80 (1974) (Fuentes v. Shevin, 407 U.S. 67, 93-94 n.30 (1972) inapplicable to forfeitures); Pierce v. United States, 255 U.S. 398, 401-02 (1921) (Brandeis, J.) ("The corporation cannot disable itself from responding [to a prospective fine] by distributing its property among its stockholders and leaving remediless those having valid claims.").

125 *Id.*

126 The Supreme Court has been reluctant to sustain challenges to the validity of grand jury findings and indictments. In Costello v. United States, 350 U.S. 359 (1956), the Court stated that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.* at 363 (footnote omitted). *Costello* held that an indictment is not invalidated by the grand jury's consideration of credible hearsay. In United States v. Morrison, 449 U.S. 361 (1981), the Court refused to dismiss an indictment where the government interfered with the defendant's sixth amendment right to counsel. Finally, in United States v. Calandra, 414 U.S. 338 (1974), the Court denied a fourth amendment challenge to the validity of an indictment.

criminal proceeding the defendant need not be given the same right to an adversarial hearing.[127] But in a criminal matter the state must establish probable cause before any seizure. Probable cause is, in effect, either the due process or a compelling interest permitting state seizure. Furthermore, the deprivation cannot endure for an unreasonably long period because the government must bring defendants quickly to trial.[128] Finally, the government has the highest burden of proof in a criminal matter—proof of guilt beyond a reasonable doubt. The Constitution mandates no greater protections.

While constitutional jurisprudence shows that the government may rely solely on an indictment in its application for a restraining order, the language of the 1984 Act does not require that courts grant restraining orders on a showing of probable cause.[129] In contrast is Rule 4 of the Federal Rules of Criminal Procedure which *requires* a judge or magistrate to issue an arrest warrant if the government has shown probable cause.[130] The 1984 Act operates in an area where civil property interests and procedures begin to blend with necessary criminal procedures. Recognizing this, the statutes permit courts to accommodate both interests.

In *United States v. Their*,[131] for example, while properly refusing to find attorneys' fees absolutely exempt from forfeiture, the court ruled that "the defendant's interest in obtaining counsel of his choice and the possible adverse effects of a pretrial refusal to exempt defense counsel's fees from forfeiture are factors that the district court must consider in exercising its discretion to grant a pretrial injunction that restrains the defendant's assets until conclusion of trial."[132] The court correctly recognizes that under the 1984 Act it retains discretion to deny or modify a request for an injunction. In its discretion it may look to factors besides the government's interest. In cases where all of the defendants' assets are subject to forfeiture so that not just their fourth amendment, but also their fifth and the sixth amendment interests enter the picture, it may be appropriate in the interest of justice, for courts to inquire into these interests implicated—at least to ensure that probable cause could exist as

127 *See* Justice Stewart's concurring opinion in Gerstein v. Pugh, 420 U.S. 103, 127 (1975). *But see id.* at 125 n.27.

128 The Federal Speedy Trial Act requires dismissal of the indictment (with prejudice in the judge's discretion) if deadlines are not met. 18 U.S.C. §§ 3161, 3162 (1982, Supp. III 1985 & Supp. IV 1986).

129 The 1984 Act sets forth specific criteria for the issuance of restraining orders both before and after indictment. A court may issue a pre-indictment restraint if the court is satisfied that there is a substantial probability that the government will prevail at trial on the forfeiture issue; that if a restraining order is not entered the property will be destroyed, placed beyond the court's jurisdiction or otherwise made unavailable; and that the need to maintain the property's availability outweighs the hardship that issuance of a restraining order would have on any party against whom the order is sought. 18 U.S.C. § 1963(e)(1)(B)(i)-(ii); 21 U.S.C. § 853(e)(1)(B)(i)-(ii).

130 FED. R. CRIM. P. R. 4(a) provides, in pertinent part: "If it appears from the complaint or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant *shall* issue to any officer authorized by law to execute it." (Emphasis added.)

131 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987).

132 801 F.2d. at 1474.

to the taint of the assets identified in the indictments.[133] In these provisions, the Congress, in its war against organized crime, provides to law enforcement only procedures that the Supreme Court has already sanctioned. As Part IV shows, the pretrial flexibility that the statute affords the judiciary provides courts with a means to solve the alleged fee forfeiture problems.

IV. The Statutory Solution

Among other things, the defense bar has been concerned that subjecting attorneys' fees to forfeiture will chill the attorney-client relationship because attorneys will want to know as little as possible about their clients in order to qualify as bona fide purchasers.[134] In fact, if courts apply literally the government's argument, attorneys never could qualify as bona fide purchasers because indictments would give them notice of forfeiture.[135] Their clients would have to win in order for attorneys to get paid. Either scenario might violate professional legal ethics.[136] Fortunately, both the language and the purpose of the statutes grant attorneys reasonable bona fide purchaser protection.

For example, in *United States v. Jones*,[137] the Fifth Circuit took away the government's discretion to deny bona fide purchaser protection to attorneys based on the necessary knowledge of their clients' criminal conduct. Almost remaining faithful to the language and intent of the statute,[138] the court ruled that it would be unreasonable to allow attorneys to suffer less bona fide purchaser protection under the statute than granted to the rest of the world just because attorneys are most likely to see the indictments.[139]

In *Jones*, the court ordered that the convicted defendant forfeit certain property.[140] The attorneys who represented the defendant at trial filed a petition requesting a hearing to determine the status of their interest in property that Jones pledged to them as compensation for legal

133 In discussing *Costello* and *Calandra*, the Ninth Circuit, in United States v. Zielezinski, 740 F.2d 727, 732 (9th Cir. 1984), asserted: "These cases suggest that challenges to indictments will not be heard where they rest on objections to the evidence gathering process. They leave open the possibility, however, of hearing challenges to indictments where improprieties occurred within the grand jury process itself." In United States v. Their, 801 F.2d 1463 (5th Cir. 1986), the court correctly concluded that the indictment itself constitutes a "strong showing" for continuing a freeze order, although "the grand jury's finding of probable cause that the defendant should be tried for the crime and its determination that certain assets are potentially forfeitable . . . are not irrebutable." *Id.* at 1470.

134 *See* Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees*, 19 U. MICH. J.L. REF., 1199, 1213 (1986).

135 U.S. ATTORNEYS' MANUAL, *supra* note 10, at § 9-111.511.

136 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983) provides: "A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case." It is not clear, however, that the arrangement would be considered a contingent fee agreement if the system imposes it.

137 837 F.2d 1332 (5th Cir.), *reh'g granted*, 844 F.2d 215 (1988).

138 The Fifth Circuit apparently still believes that Rule 65 of the Federal Rules of Civil Procedure is necessarily applicable to criminal forfeiture. 837 F.2d at 1334. *See also* United States v. Monsanto. 836 F.2d 74, 83 (2d Cir. 1987). *But see supra* note 133.

139 837 F.2d at 1334.

140 *Id.* at 1333.

services rendered in connection with his defense.[141] In the post-conviction hearing the district court, relying on *United States v. Their*,[142] exempted the property from forfeiture to pay the attorneys' reasonable and legitimate legal fees.[143]

The Fifth Circuit affirmed, reasoning:

> [D]efense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services. We see no indication in the statute or the legislative history that Congress intended to exclude attorneys from bringing a third-party claim for a reasonable attorney's fee against potentially forfeitable assets in a post-conviction hearing. This is not to say that a defendant's payment of fees will always immunize such fees from post-trial forfeiture, only that a defense lawyer's knowledge of the charges against the client does not ipso facto disqualify the attorney's claim to be a bona fide purchaser under the RICO and CCE forfeiture provisions.[144]

Through a principled, objective interpretation of these statutes' "*reasonably* without notice" language, the court permits attorneys to qualify for bona fide purchaser status although they know the government also claims an interest in the asset(s). The language of the opinion permits the reasonable conclusion that information defense attorneys acquire within the scope of the particular criminal trial representation would not invalidate a bona fide purchaser claim against forfeitable assets.[145] Assuming that the transfer of assets occurs when defendants retain attorneys, which is also when the attorney-client relationship begins,[146] the Fifth Circuit's approach would permit most legitimate attorneys to keep their fees. If, however, they knowingly participated in or otherwise facilitated a client's criminal conduct (e.g., "mob" attorneys), they probably will know that assets might be subject to forfeiture independent of the indictment. And the attorney-client privilege would not help these lawyers qualify for bona fide purchaser protection under the statute.[147] In either case, the government still would be permitted, because it may have a vested, although unperfected interest in the assets used to pay the fee,

141 *Id.*

142 801 F.2d 1463 (5th Cir. 1986).

143 837 F.2d at 1333.

144 *Id.* at 1334.

145 Such a treatment would be similar, although not identical, to the treatment of the attorney-client privilege. The purpose of the attorney-client privilege is to provide those seeking legal counsel an opportunity to communicate freely in confidence with a lawyer without fear of reprisal or apprehension of compelled disclosure. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888); Chirac v. Reinicker, 24 U.S. (11 Wheat.) 288, 294 (1826). But the scope of the privilege is limited by the scope of the legitimate representation. *See* Fisher v. United States, 425 U.S. 391, 403 (1975). *See generally* VIII J. WIGMORE, EVIDENCE §§ 2290-2329 (3d ed. 1940); C. McCormick, MCCORMICK ON EVIDENCE §§ 87-90 (3d ed. 1984); Note, *Attorney-Client Communications of Criminal Defendants: Evidentiary and Constitutional Protections*, 82 WASH. U.L.Q. 739 (1985).

146 *But see* U.S. ATTORNEYS' MANUAL, *supra* note 10, at § 9-111.501.

147 In Clark v. United States, 289 U.S. 1, 15 (1932), the Court said: "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."

to inquire into the reasonableness of the fee in order to ensure that assets are not transferred fraudulently to attorneys.[148]

If the court does not grant a pretrial restraining order, honest attorneys should have no fear of losing their reasonable fees. If, on the other hand, the government has been able to restrain all of a defendant's assets, the defendant may still retain an attorney by pledging or assigning his claim.[149]

Best of all, at their discretion courts may properly provide attorneys *who would have qualified for post-conviction bona fide purchaser protection* a pretrial guarantee that they will receive reasonable fees. Neither the language nor the intent of the statutes prohibit attorneys from having their clients petition courts to set aside some reasonable portion of their assets at an early stage of the proceeding.[150] These pretrial hearings, which would effectively protect attorneys' interests, do not violate the language of the 1984 Act because the language only prohibits third parties from asserting their interests pretrial.[151] Defendants—parties to the action—would be the actual petitioners for pretrial forfeiture exemption. A pretrial hearing also would not violate the intent of the RICO and CCE statutes because the only attorneys to whom courts can grant pretrial exemption are those who also would have qualified under the statutes' bona fide purchaser post-conviction protection. It is true that defendants may retain attorneys with tainted money—money not theirs. But Congress recognized and was willing to live with this "loophole" when it wrote the necessary bona fide purchaser exemption into the 1984 Act.

V. Conclusion

The current uproar over criminal forfeiture indicates that forfeiture works—it hurts. Certainly creative, forfeiture has become one of the most effective attacks against the organized criminal activity currently plaguing our society. Unfortunately, judges and attorneys, learned in common law tradition that they believe provides insufficient precedent here, and apparently worried that even the possibility of fee forfeiture catastrophically upsets the adversarial balance of the criminal justice system, have approached this new body of law with hostile confusion.

148 *See supra* text accompanying notes 41-50.

149 The statutes protect bona fide purchasers. Black's Law Dictionary defines purchase as the "[t]ransmission of property from one person to another by voluntary act and agreement, founded on valuable consideration." H. BLACK, BLACK'S LAW DICTIONARY 1110 (5th ed. 1979). It includes taking by sale, discount, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property. U.C.C. § 1-201(32). The term purchase includes any contract to purchase or otherwise acquire. Securities Exchange Act § 3. The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. I.R.C. § 6323(h). Thus, attorneys may qualify for bona fide purchaser status before their services are actually rendered. *But see* U.S. ATTORNEYS' MANUAL, *supra* note 10, at § 9-111.501.

150 *See, e.g.*, United States v. Monsanto, 836 F.2d 74, 84 (2d Cir. 1987); United States v. Their, 801 F.2d 1463, 1474-75, (5th Cir. 1986), *modified*, 809 F.2d at 249 (5th Cir. 1987).

151 18 U.S.C. § 1963(i); 21 U.S.C. § 853(k).

In reality, the bar's concerns have been exaggerated. In two ways, the text of the forfeiture provisions provides enough flexibility for the judiciary to implement the law in a constitutional manner.

First, aside from the fact that the Criminal Justice Act provides free representation to those unable to retain attorneys, the language of the statute only *permits* courts to grant restraining orders—it does not mandate their issuance. While it is clear that in the criminal context the probable cause supporting the indictment is sufficient to permit restraint of person or property, the courts have always had the authority to balance hardships with respect to the scope and therefore the effect of the restraint. In this context, just as a court might be expected to exclude from restraint sufficient assets to purchase necessities such as food, it might also conclude that a privately retained attorney is a necessity in a complete RICO or CCE prosecution. Unfortunately for the elite of the private defense bar and their clients, the expensive attorneys are hardly necessities if others will work for smaller fees. Still, such an approach survives constitutional challenge.

A better approach permits the more qualified attorneys to continue to make a sufficiently attractive income to remain in the criminal defense field. While the Constitution does not guarantee a free market bar, as a society in fear of totalitarianism we ought not eliminate an incentive for bright individuals to engage in criminal defense work by making it relatively unprofitable. These statutes do not. Fortunately, the criminal forfeiture statutes only attempt to take the profit out of crime. Neither their language, nor their intent precludes honest (noncriminal) attorneys from qualifying for bona fide purchaser protection. Because, as the preceding paragraphs argue the courts retain discretion to grant or modify restraining orders, *defendants* may petition courts pretrial to set aside a reasonable fee (depending on the attorney) in order to guarantee payment. The language of the statutes only prohibits nonparties from petitioning pretrial. And no purpose of the statutes is frustrated because any bona fide purchasing attorney would have qualified for the fee post-conviction anyway.

Common sense, not the Constitution, solves this problem.

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