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Criminal Procedure: *United States v. Noriega*: Criminal Forfeiture of Attorney Fees and Due Process Requirements

A person suspected of violating federal drug laws suddenly finds that all of his assets have been frozen. He has received no hearing, and the court has shown no connection between his assets and any illegal activity. He has not been convicted of any crime, but his home, his car, his bank account, and all his personal property have been taken by the government. Having no assets, he is not even able to choose a lawyer to assist with his defense.

Until recently, the law was unclear as to the rights of a person unable to retain counsel because his assets were frozen under federal criminal forfeiture provisions¹ without notice or a hearing. In *United States v. Noriega*,² the District Court for the Southern District of Florida held that assets needed to retain counsel of choice could not be placed beyond the reach of a criminal defendant without showing at an adversarial hearing that the assets were linked to some illegal activity.³

This note will briefly trace the history of the current federal criminal forfeiture statutes and show how they apply to assets used as attorney fees. Next, the note will examine the type of procedure necessary under *Noriega* to deprive a defendant of assets needed to retain counsel. Finally, this note will address the meaning and probable impact of the *Noriega* decision.

Background to Criminal Forfeiture

In 1970, Congress adopted the Continuing Criminal Enterprise (CCE)⁴ sections of the Controlled Substances Act⁵ and the Racketeer Influenced and Corrupt Organization (RICO) sections of the Organized Crime Control Act of 1970.⁶ Both statutes contained provisions allowing for criminal forfeiture of property.⁷ However, until the early 1980s, these provisions were rarely used.⁸ Once the United States Department of Justice began

1. 28 U.S.C. § 853 (1988); 18 U.S.C. §§ 1961-1968 (1988).

2. 746 F. Supp. 1541 (S.D. Fla. 1990).

3. *Id.* at 1542.

4. See 21 U.S.C. § 848 (1988).

5. Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265-66 (1970) (codified at 21 U.S.C. § 848 (1988)).

6. Pub. L. No. 91-452, § 901, 84 Stat. 922, 941-48 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

7. Criminal forfeiture provisions are rare in American law. Prior to the Continuing Criminal Enterprise statutes and the Comprehensive Forfeiture Act, the most recent criminal forfeiture statute was enacted by Congress in 1862. For a discussion of the history of criminal forfeiture provisions and the distinctions between civil and criminal forfeiture, see Comment, *Caplin & Drysdale v. United States and United States v. Monsanto*, 39 CATH. L. REV. 269 (1989).

8. See COMPTROLLER GENERAL OF THE UNITED STATES, ASSET FORFEITURE—A SELDOM

invoking forfeiture more often, the ineffectiveness of these provisions became apparent.⁹ Consequently, in an effort to provide an effective means of obtaining forfeiture under RICO and CCE,¹⁰ Congress adopted the Comprehensive Forfeiture Act of 1984 (CFA).¹¹

The CFA modified the CCE forfeiture provisions in several important ways.¹² The CFA's forfeiture provisions encompass a broad array of property. The CCE allows the forfeiture of "any property consisting, or derived from, any proceeds which the person obtained, directly or indirectly, as a result" of a violation of the CCE¹³ or any property used in the commission of such a violation.¹⁴ Forfeitable property under the CFA includes real property as well as tangible and intangible personal property.¹⁵

Perhaps the most significant CFA provision is that which provides that the right and title to the forfeitable property vest in the government at the time of the act which gives rise to forfeiture.¹⁶ Borrowing a taint concept

USED TOOL IN COMBATting DRUG TRAFFICKING (1981) (General Accounting Office report no. GCD-81-51).

9. Procedural limitations and ambiguity in the statutes were cited as the cause of both provisions' ineffectiveness. S. REP. NO. 225, 98th Cong., 1st Sess. 192-95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3375-78.

10. The forfeiture provisions in RICO and CCE as amended by the CFA are virtually identical, and the interpretation of one is freely applied to the other. *See* United States v. Reckmeyer, 631 F. Supp. 1191, 1195 (E.D. Va. 1986); United States v. Nichols, 654 F. Supp. 1541, 1546 (D. Utah 1987). The primary focus of this note will be on the CCE forfeiture provision, 21 U.S.C. § 853 (1988).

11. Pub. L. No. 98-473, §§ 302-303, 98 Stat. 1837, 2040-57 (1984) (codified at 18 U.S.C. § 1963 (1988) and 21 U.S.C. § 853 (1988)).

12. For an in-depth discussion of the CFA, see Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1985).

13. 21 U.S.C. § 853(a)(2) (1988). Section 853(a) provides:

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of state law

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a 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.

14. 21 U.S.C. § 853(a)(3) (1988).

15. 21 U.S.C. § 853(b) (1988). Section 853(b) defines property to include: "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities."

16. 21 U.S.C. § 853(c) (1988). Section 853(c) provides:

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture

from civil forfeiture, this relation back doctrine employs the common law fiction that the forfeitable property itself is guilty of the crime.¹⁷

Thus, according to this theory, the government obtains title to the property immediately upon the commission of the wrongful act. A defendant is thereby prevented from defeating the government's interest by transferring the property to a third party prior to his conviction.¹⁸

In addition to the substantive modifications to the CCE, the CFA incorporated important procedural changes in the law of criminal forfeiture.¹⁹ In order to preserve the availability of forfeitable property, the CFA allows the government to request a court to issue restraining orders covering potentially forfeitable assets, either before or after an indictment has been returned.²⁰ Under the CFA, a court may issue a restraining order without notice or hearing, if there is a showing of probable cause that (1) the property is subject to forfeiture and (2) notice to the defendant would jeopardize the availability of the property for forfeiture.²¹ Innocent third parties are permitted to retain property which they have obtained as bona fide purchasers, providing there was no cause for the purchaser to believe the property was subject to forfeiture.²²

CFA and Attorney Fees

Given the broad scope of the CFA and its relation back clause, important constitutional questions arise when the act is applied to require the forfeiture of assets used to retain counsel.²³ Some courts were concerned that forfeiture of attorney fees under the CFA would improperly impinge a defendant's sixth amendment right to counsel.²⁴ Requiring the postconviction forfeiture of attorney fees under the CFA would, the Seventh Circuit feared, discourage attorneys from representing RICO and CCE defendants, and thus

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

17. See Comment, *supra* note 7, at 279.

18. *Id.*

19. *Id.* at 280-81.

20. 21 U.S.C. § 853(e)(2) (1988).

21. *Id.*

22. *Id.* § 853(n).

23. See Recent Development, *Criminal Forfeiture-Comprehensive Forfeiture Act of 1984-Forfeiture of Attorney Fees*, 57 TENN. L. REV. 385 (1990).

24. The sixth amendment provides, "In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Supreme Court has interpreted the sixth amendment to include both a right to the assistance of counsel and to the choice of counsel. See *Powell v. Alabama*, 287 U.S. 45 (1932).

deprive them of their right to counsel of choice.²⁵ Nevertheless, the Tenth and Second Circuit Courts of Appeal found no violation of constitutionally protected rights and upheld the forfeiture of attorney fees.²⁶ On June 22, 1989, the Supreme Court resolved the inter-circuit conflict over the forfeitability of attorney fees by deciding two cases: *Caplin & Drysdale v. United States*²⁷ and *United States v. Monsanto*.²⁸

Caplin & Drysdale v. United States

Caplin & Drysdale involved a defendant charged with running a massive drug importation scheme in violation of the CCE. Invoking the CFA, the government sought forfeiture of specific assets of the defendant under 21 U.S.C. § 853. Following the indictment, the district court entered a restraining order to prevent the transfer of any of the potentially forfeitable assets. However, before the court issued the restraining order, the defendant retained the law firm of Caplin & Drysdale as legal counsel. Notwithstanding the restraining order, the defendant paid Caplin & Drysdale \$25,000 for preindictment services. Eventually, the defendant pleaded guilty, and the district court entered an order forfeiting almost all of his assets as part of sentencing.²⁹

Caplin & Drysdale requested an adjudication of their rights to the property under section 853(n) as bona fide purchasers for value. Caplin & Drysdale argued that either attorney fees were exempt under section 853, or, if these fees were not exempt, that section 853 violated their client's constitutional rights. The district court granted Caplin & Drysdale's claim to that portion of the forfeited assets that had been paid to them as attorney fees.³⁰

On appeal, the Fourth Circuit Court of Appeals affirmed.³¹ According to that court, the lack of a provision in section 853 exempting attorney fees from forfeiture rendered the statute violative of a defendant's sixth amendment rights.³² The Fourth Circuit granted a rehearing and reversed the decision of the panel.³³ This time the full Fourth Circuit held that the language of the CFA allowed for no exceptions to forfeiture such as that claimed by Caplin & Drysdale.³⁴ A majority of the judges agreed that the

25. See Recent Development, *supra* note 23, at 390-93; see also *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985).

26. See *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988); *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd* on other grounds, 767 F.2d 26 (2d Cir. 1985).

27. 491 U.S. 617 (1989).

28. 491 U.S. 600 (1989).

29. *Caplin & Drysdale*, 491 U.S. at 621.

30. *Id.*; see also *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986) (the district court opinion in *Caplin & Drysdale*).

31. *Caplin & Drysdale*, 491 U.S. at 622.

32. *Id.*; see also *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987) (the appellate court opinion in *Caplin & Drysdale*).

33. *Caplin & Drysdale*, 491 U.S. at 622; see also *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988); *supra* note 24.

34. *Caplin & Drysdale*, 491 U.S. at 622.

CFA did not violate the sixth amendment.³⁵ The United States Supreme Court granted certiorari³⁶ and affirmed.³⁷

The Supreme Court began its analysis³⁸ by rejecting the proposition that a district court has discretion under section 853(e) to allow a defendant to retain assets to pay attorney fees.³⁹ The Court also rejected the notion that the exercise of a judge's discretion protects assets not restrained prior to trial from subsequent forfeiture under section 853(c).⁴⁰ Addressing the constitutional claims, the Court held that the CFA does not improperly interfere with a defendant's right to counsel of choice.⁴¹ Although the Court recognized that defendants have a right to adequate representation and to choose their own counsel,⁴² it concluded that the sixth amendment does not allow a defendant to insist on representation by counsel which he cannot afford.⁴³

Pursuant to the relation back provision, all rights to the property vest in the government at the time of the violation.⁴⁴ According to the Court, these rights, once vested, cannot be impaired by subsequent acts of the possessor.⁴⁵ Notwithstanding a defendant's interest in retaining counsel of his choice, the Court refused to recognize a constitutional principle that would give one person a right to give away the property of another.⁴⁶

Recognizing the strong interest in obtaining full recovery of assets, the Court held that any sixth amendment interest in allowing criminals to pay for their defense with assets adjudged forfeitable is subordinate to the overriding interests of the government in recovering forfeitable property.⁴⁷ One of the purposes of the CFA was to reduce the amount of financial resources available to organized crime and drug enterprises and, thus, lessen the economic power of these entities.⁴⁸ According to the Court, the CFA's purposes would include an attack on the power to retain high-priced private counsel.⁴⁹

Finally, the Court held that the CFA does not violate the fifth amendment.⁵⁰ Caplin & Drysdale claimed that the CFA could be abused when

35. *Id.*

36. 488 U.S. 940 (1988).

37. *Caplin & Drysdale*, 491 U.S. at 622.

38. The reasoning and analysis in this case are closely tied to that in its companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), discussed at length *infra* notes 52-82 and accompanying text.

39. *Caplin & Drysdale*, 491 U.S. at 623.

40. *Id.* See *supra* note 16.

41. *Caplin & Drysdale*, 491 U.S. at 624.

42. *Id.* at 625.

43. *Id.* at 626.

44. *Id.*

45. *Id.* at 627.

46. *Id.*

47. *Id.* at 631.

48. *Id.*

49. *Id.* at 630.

50. The fifth amendment provides that no person shall be deprived of life, liberty or property without due process of law. U.S. CONST. amend. V. *Caplin & Drysdale* argued that

applied to defendants who are wrongfully subjected to the statute. This improper application could upset the balance of power between the government and the accused.⁵¹ While admitting that the CFA, like all criminal laws, carries the potential for abuse, the Court rejected the claim that this potential misuse makes the statute facially invalid.⁵² Concluding, the Court observed that the Constitution does not forbid the imposition of otherwise valid criminal sanctions, such as forfeiture, merely because prosecutors may abuse those procedures in some cases.⁵³

United States v. Monsanto

*United States v. Monsanto*⁵⁴ involved facts and issues very similar to those in *Caplin & Drysdale*.⁵⁵ In *Monsanto*, a defendant accused of directing a large-scale heroin distribution enterprise was charged with violations of both RICO and CCE. After the indictment, the district court granted the government's ex parte motion under section 853(e)(1)(A) for a restraining order freezing certain of the defendant's assets pending trial.⁵⁶ Claiming that the order impinged his sixth amendment right to counsel of choice, the defendant moved to vacate the order to permit him to use frozen assets to retain counsel.⁵⁷ He also sought a declaratory judgment directing that the third party transfer provision of section 853(c)⁵⁸ not be used to reclaim assets used to pay attorney fees. The district court denied the motion.⁵⁹

the forfeiture statute allowed the government to upset the balance of power between the defendant and the government and was therefore unconstitutional. *Caplin & Drysdale*, 491 U.S. at 633; see also *Wardius v. Oregon*, 412 U.S. 470 (1973). Although the Court recognized that the Constitution guarantees a fair trial in part through the due process clause of the fifth amendment, the Court held that the Constitution largely defines the elements of a fair trial through the various provisions of the sixth amendment. *Caplin & Drysdale*, 491 U.S. at 633. Having previously addressed the petitioner's sixth amendment claims, the Court proceeded in a summary fashion with its analysis of *Caplin & Drysdale*'s fifth amendment claims. *Id.* at 633.

51. *Caplin & Drysdale*, 491 U.S. at 634.

52. *Id.* at 639.

53. *Id.*

54. 491 U.S. 600 (1989).

55. 491 U.S. 617 (1989).

56. *Monsanto*, 491 U.S. at 603; see also 21 U.S.C. § 853(e)(1)(A) (1988), which provides that the court may take action to preserve the availability of property for forfeit are:

[U]pon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; . . .

Id.

57. *Monsanto*, 491 U.S. at 604.

58. 21 U.S.C. § 853(c) (1988). See *supra* note 16 for text of § 853(c). Note that attorneys retained to defend an action under the CCE would not qualify under the bona fide purchaser exception to § 853(c).

59. *Monsanto*, 491 U.S. at 604.

Eventually, the Second Circuit Court of Appeals, sitting en banc, ordered the district court to modify its restraining order to allow the defendant to use assets that had been frozen pending trial to pay attorney fees.⁶⁰ The Supreme Court granted certiorari⁶¹ and reversed.⁶²

In *Monsanto*, the Supreme Court held that there is no exception in the CFA for assets used to pay attorney fees.⁶³ Finding the language of section 853 to be unambiguous, the Court held that the CFA clearly demands the forfeiture of all assets which fall within its scope.⁶⁴ Congress, the Court noted, could not have used stronger words than those in section 853(a). That section provides that upon conviction a person “shall forfeit . . . any property.”⁶⁵ A legislative failure to specifically mention property to be used for attorney fees could not, according to the Court, provide a basis for an exception from forfeiture.⁶⁶

After declaring that sections 853(a) and 853(e) are independent of one another, the Court held that section 853(e) does not provide a district court with the discretion to exempt attorney fees from the forfeiture provision under section 853(a).⁶⁷ Section 853(e) is merely aimed at implementing the commands of section 853(a), which requires the forfeiture of all covered property.⁶⁸ Any discretion that exists under section 853(e) must be exercised only for the purpose of preserving property for forfeiture.⁶⁹

Next, the Court rejected the petitioner’s claims that the CFA interfered with the fifth amendment due process guarantee of a balance of forces between the accused and the government and his sixth amendment right to counsel of choice.⁷⁰ Neither the fifth nor the sixth amendment requires Congress to allow a defendant to use assets adjudged to be forfeitable to pay legal expenses.⁷¹ In support of this holding, the court cited *Caplin & Drysdale*.⁷²

Next, the Court ruled that freezing the petitioner’s assets prior to a conviction, and thus before they had been finally adjudged forfeitable, did not violate petitioner’s constitutional rights.⁷³ A pretrial restraining order does not arbitrarily interfere with a defendant’s opportunity to retain counsel.⁷⁴ In support of its reasoning, the Court analogized to seizures under other provisions of the criminal law. Several criminal statutes permit the

60. 852 F.2d 1400 (2d Cir. 1988).

61. 488 U.S. 940 (1988).

62. *United States v. Monsanto*, 491 U.S. 600 (1989).

63. *Id.* at 611.

64. *Id.* at 609-11.

65. *See* 21 U.S.C. § 853(a) (1988).

66. *Monsanto*, 491 U.S. at 611.

67. *Id.* at 613.

68. *Id.* at 612-13.

69. *Id.* at 613.

70. *Id.* at 614.

71. *Id.* *See supra* note 50 and accompanying text.

72. *Monsanto*, 491 U.S. at 614.

73. *Id.* at 615. *See supra* notes 40-50 and accompanying text.

74. *Id.* at 616.

seizure of property upon a probable cause showing that the property will ultimately be proven forfeitable. No reason exists to prohibit a court from freezing property under circumstances which would justify a more intrusive interference, such as seizure.⁷⁵

Indeed, upon probable cause to believe that the accused has committed a serious offense, the government may even restrain persons via an arrest.⁷⁶ Compared with the considerable intrusion on a defendant's rights that accompanies seizures, the intrusion resulting from the freezing of assets which may later be returned seemed minimal to the Court.⁷⁷ Concluding this analogy, the Court reasoned that probable cause considerations that would support seizures would certainly also support the restraint of potentially forfeitable property.⁷⁸

Finally, the Court evaluated the nature and relative weight of the interests of the government and the accused.⁷⁹ Relying on *Caplin & Drysdale*,⁸⁰ the Court concluded that the government's interests allow the forfeiture of property that a defendant may have wished to use to retain counsel, without violating the fifth or sixth amendment.⁸¹ If the government may forbid the use of assets to pay an attorney after trial, a pretrial restraining order calculated to prevent a defendant from frustrating that end does not constitute a constitutional violation.⁸²

In *Monsanto*, the Court specifically declined to decide whether the due process clause of the fifth amendment requires that a hearing be held before a pretrial restraining order can be imposed.⁸³ Because the Second Circuit did not address the due process issue, the Court did not inquire into whether a hearing was required or whether the hearing that took place was an adequate one.⁸⁴ As discussed below, in *United States v. Noriega*,⁸⁵ the District Court for the Southern District of Florida did address the timing of and conditions under which a pretrial hearing is required.

United States v. Noriega

In *Noriega*, the defendant, former Panamanian dictator Manuel Noriega, was apprehended in Panama and brought to the United States following a military invasion of Panama by United States forces. Noriega was charged with various drug-related offenses, including conspiring to distribute and import cocaine, distributing and aiding and abetting the distribution of

75. *Id.* at 615-16.

76. *Id.*

77. *Id.* at 616.

78. *Id.*

79. *Id.*

80. See *supra* notes 41-53 and accompanying text.

81. *Monsanto*, 491 U.S. at 616.

82. *Id.*

83. *Id.* at 615 n.10.

84. *Id.*

85. 746 F. Supp. 1541 (S.D. Fla. 1990).

cocaine, manufacturing cocaine, and using interstate commerce to promote an illegal act.⁸⁶

In the course of the Panamanian invasion, American troops seized from Noriega's home \$5.8 million in cash which they turned over to the new Panamanian government. Additionally, Noriega's home, automobiles, and personal possessions were seized, and some twenty-seven bank accounts containing approximately \$20 million were frozen by foreign governments at the request of the United States. As a result of the government's seizure efforts, Noriega was left with only "the clothes on his back and . . . in possession of no other property."⁸⁷

Noriega filed a motion to compel the government to identify frozen assets which it believed either belonged to or were controlled by him.⁸⁸ He also filed motions for the return of his property pursuant to rule 41(e) of the Federal Rules of Criminal Procedure,⁸⁹ and to dismiss the indictment as a result of governmental action which denied him due process of law and effective assistance of counsel. Claiming that Noriega was unable to pay his attorney fees because of the freezing of his assets by the government, Noriega's lawyers filed a motion to withdraw as defense counsel.⁹⁰

Adversarial Hearing Required

In *Noriega*, the District Court for the Southern District of Florida considered the constitutional implications of freezing a defendant's assets which were needed to retain counsel. The court held that a defendant must be granted a pretrial hearing concerning the forfeitability of allegedly drug-tainted assets before placing them beyond the reach of the defendant when those assets are necessary to retain counsel of choice.⁹¹

The district court noted that due process traditionally requires that a criminal defendant not be deprived of liberty or property without adequate notice and an opportunity for a hearing.⁹² Nevertheless, the court recognized that the particular procedural protections due a defendant could vary, and

86. *United States v. Noriega*, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990).

87. *United States v. Noriega*, 746 F. Supp. 1541, 1542 (S.D. Fla. 1990).

88. *Id.*

89. Rule 41 of the Federal Rules of Criminal Procedure is concerned with searches and seizures and with motions for the return of seized property. Subsection (e) of rule 41 provides:

A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court . . . for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

FED. R. CRIM. P. 41(e).

90. *Noriega*, 746 F. Supp. at 1542.

91. *Id.*

92. *Id.* at 1542-43.

are dependent upon the circumstances and interests involved in a particular case.⁹³

The district court enumerated three interests that should be considered in deciding what process should be afforded a criminal defendant.⁹⁴ First, the court must consider the private interest of the defendant which will be affected by the government's action.⁹⁵ Second, the court must consider the chance of erroneously depriving the defendant of his interest through the procedures used and the probable value, if any, of additional procedural safeguards.⁹⁶ Finally, the court must consider the interests of the government.⁹⁷ This third interest includes an analysis of the functions involved and administrative and monetary burdens that an additional or substitute procedure would entail.⁹⁸

Applying the first consideration, the court recognized that the interest at stake was Noriega's sixth amendment right to his counsel of choice, an interest which the court held to be unquestionably substantial and compelling.⁹⁹ After conceding that the right was not absolute, in that it did not entitle a defendant to the services of an expensive lawyer, the court went on to hold that when a defendant seeks to retain counsel with his own assets, his choice of counsel clearly warrants constitutional protection.¹⁰⁰

Turning to the second consideration, the court found a great risk exists that the defendant might be erroneously deprived of this important interest if pretrial restraining orders were implemented without an opportunity for the defendant to contest those orders.¹⁰¹ Of special concern to the court was the increased risk of erroneous deprivation in cases where attorney fees are at issue. Freezing attorney fees, unlike freezing other assets, constitutes a permanent deprivation because the attorney fees are needed immediately if they are to be of any benefit to a defendant.¹⁰² In contrast, the court observed that in other cases assets may be returned to a defendant after a trial, thus constituting a lesser interference with the defendant's interests.¹⁰³

Moreover, the court found that the lack of procedure in this case was particularly onerous.¹⁰⁴ Not only was the defendant denied a hearing, but also the government had not made any showing that the assets were tainted by illegal activity.¹⁰⁵ By proceeding as it did, the government violated the well-settled rule that the government cannot seize a person's assets without

93. *Id.*

94. The court derives these considerations from *Matthews v. Eldridge*, 424 U.S. 319 (1976) and *Wofford v. Wainwright*, 748 F.2d 1505 (11th Cir. 1984).

95. *Noriega*, 746 F. Supp. at 1543.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

probable cause.¹⁰⁶ In the forfeiture context, there must be probable cause to believe that the assets to be forfeited are substantially linked to the particular criminal activity.¹⁰⁷

In this case, probable cause was not established by indictment or by an ex parte finding of forfeitability by a magistrate under 21 U.S.C. § 853(e).¹⁰⁸ Government accusations that Noriega's assets were the fruits of illegal drug activities provided the only basis for the seizure of Noriega's assets. Consequently, what the government believes about the assets is not alone sufficient to constitute probable cause.¹⁰⁹ Considering the absence of probable cause, the court determined that the lack of an adversarial hearing at which the government's contentions could be challenged would deprive the defendant of his constitutional rights.¹¹⁰

Turning to an examination of the government's interest in the procedures used, the court looked first at 21 U.S.C. § 853(e).¹¹¹ Section 853(e) provides authorization for the issuance of an ex parte restraining order upon potentially forfeitable assets. By allowing an ex parte order, the court can prevent the government from being forced to litigate the merits of a case prior to trial.¹¹² Although recognizing the government's interest in avoiding possibly damaging pretrial disclosure of its case and trial strategy, the court nevertheless held that this interest was not so strong as to overcome a defendant's interest in using his nonforfeitable assets to mount the most effective defense possible.¹¹³ Pointing out that a judicial finding of probable cause was not made in this case, the court declared that, absent a finding of probable cause, the ex parte order contemplated by section 853(e) could not be issued.¹¹⁴

In the district court's view, the danger of an innocent person being convicted because of the unfair restraint of assets he would have used to retain counsel of his choice is too great to allow a freeze to go unchallenged.¹¹⁵ The court dismissed as circular reasoning the government's assertion that Noriega could not insist on representation that he could not afford.¹¹⁶ "A defendant cannot be forced into indigency without due process and then be told that he has no right to representation he cannot afford."¹¹⁷ Basic concepts of fairness require that no one, not even the government, can take and hold the property of another when they have no legal right to do so.¹¹⁸ To hold otherwise would render the constitutional guarantees of due process and right to counsel empty words.¹¹⁹

106. *Id.*; see also *United States v. \$8,850*, 461 U.S. 555 n.12 (1983).

107. *Noriega*, 746 F. Supp. at 1544.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* See *supra* note 56.

112. *Noriega*, 746 F. Supp. at 1544.

113. *Id.* at 1545.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See U.S. CONST. amend. VI. See also *supra* note 24.

119. *Noriega*, 746 F. Supp. at 1545.

Having considered the government's interest in the procedures used to obtain forfeiture, the court next considered the government's interest in combating the drug problem in the United States. Although the court recognized that this interest is strong, the court declared that the effort to fight the drug epidemic must never be at the expense of the constitutional rights of an accused.¹²⁰ "Neither Congress nor the people intended that the Bill of Rights be a fatality in the war on drugs."¹²¹

The court carefully reconciled its holding with prior case law. The court distinguished *Caplin & Drysdale*¹²² on the ground that the case had merely rejected the assertion of a constitutional right to retain counsel with the proceeds of a crime. Also the rule in *Caplin & Drysdale* applied only to assets which have been adjudged forfeitable.¹²³ Further, in *Monsanto*,¹²⁴ the Supreme Court explicitly left open the question of whether due process requires a hearing before a defendant is unilaterally deprived of his assets.¹²⁵ The *Noriega* court concluded that a hearing is required where the restrained assets are a defendant's only means of securing counsel of his choice.¹²⁶

In footnote two of its opinion, the court clarified its holding and set forth the proper timing for a hearing.¹²⁷ Specifically, due process requires a post-restraint, pretrial hearing whenever sixth amendment concerns are implicated.¹²⁸ However, in order to protect its interest in preventing a defendant from escaping forfeiture, the government is permitted, prior to a hearing, to freeze assets believed to be forfeitable.¹²⁹

Despite the fact that the assets in question were not restrained pursuant to any forfeiture statute, the court applied due process requirements of notice and an opportunity to be heard.¹³⁰ According to the court, the informal manner in which the government froze assets¹³¹ did not protect the government's conduct.¹³² Whether or not forfeiture statutes are invoked, the government is always bound by the minimum constitutional requirements imposed by the fifth amendment.¹³³ Further, the court declared that the power of the executive in dealing with foreign nations, though unquestion-

119. *Noriega*, 746 F. Supp. at 1545.

120. *Id.*

121. *Id.* (quoting *United States v. 4880 S.E. Dixie Highway*, 612 F. Supp. 1492, 1497 (S.D. Fla. 1986)).

122. 491 U.S. 617. See also *supra* notes 39-53 and accompanying text.

123. *Noriega*, 746 F. Supp. at 1545. See also *supra* note 76.

124. 491 U.S. 600 (1989).

125. *Id.* at 615 n.10. See also *supra* note 76.

126. *Noriega*, 746 F. Supp. at 1545.

127. *Id.* at 1545 n.2.

128. *Id.*

129. *Id.*

130. *Id.* at 1542.

131. Letters rogatory and informal requests to foreign governments were the primary means employed. See *id.*

132. *Id.* at 1546.

133. *Id.*

ably great, cannot extend so far as to deprive a defendant of his right to due process.¹³⁴

Finally, the court considered the government's claim that it was powerless to unfreeze assets located in foreign countries.¹³⁵ Noting that these assets had originally been restrained at the request of the United States government, the court found these claims unpersuasive.¹³⁶ Despite the court's admitted lack of jurisdiction over these foreign accounts, the court stated that its jurisdiction over the parties was clear and that it would use this jurisdiction to ensure the government's compliance with its orders.¹³⁷ In its pursuit of truth, the court must protect, to the fullest legal extent, the defendant's right to selection of counsel.¹³⁸

Nature of the Hearing

In *Noriega*, the court held that when the only assets available to a criminal defendant for retaining counsel have been seized by the government prior to trial, due process requires the government to show the probable nexus between the seized property and the illegal activity.¹³⁹ In order to fully afford the defendant an opportunity to test the government's case, the government must make its required showing in the context of a limited adversarial hearing.¹⁴⁰

Moreover, as part of an evidentiary hearing, the government must satisfy certain requirements. First, the government must identify all properties and assets seized or frozen which it believes belong to or were controlled by the defendant.¹⁴¹ Second, the government must provide information as to the extent of the assets, their location, and the identity of the party in control of the assets and property.¹⁴² Third, the government must identify all assets over which it currently has exclusive control and those assets which have been restrained by other parties or governments at the request of, or upon the suggestion of, the United States government.¹⁴³

Fourth, the government must specify the nature of the actions taken to effect the freezing of the defendant's assets and the authority, if any, which

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. The court stated:

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

Id. at 1545-46.

141. *Id.* at 1545.

142. *Id.* at 1545-46.

143. *Id.*

supported those actions.¹⁴⁴ Finally, the government is required to state whether any efforts were made to differentiate between those assets allegedly tainted by illegal activity and those acquired by some other means.¹⁴⁵ To the extent the government is willing to concede its inability to isolate tainted from untainted funds, the court will not require evidence and will order that property freed from restraint.¹⁴⁶

Because due process requires an adversarial hearing under these circumstances, the defendant should be allowed to testify as to all aspects of his assets. This testimony will aid the court in ensuring that the defendant is not unfairly deprived of his property.¹⁴⁷ Should the government be unwilling to proceed with an evidentiary hearing, the court may direct the government to unfreeze those assets which, in the court's view, are necessary to ensure payment of reasonable attorney fees.¹⁴⁸

Implications of the Noriega Decision

Noriega provides the procedures necessary to safeguard a criminal defendant's rights to due process and to counsel of choice. In light of these paramount interests, the *Noriega* court's decision is well founded and should be followed. Other courts are likely to follow *Noriega* when faced with a situation that threatens to deprive a defendant of his ability to retain counsel of choice without a proper showing that his assets are criminally tainted. Indeed, prior to the adoption of the CFA, several courts had ruled that a post-restraint, pretrial hearing was required under the CCE.¹⁴⁹

For example, *United States v. Veon*¹⁵⁰ held, in a case involving an alleged continuing criminal conspiracy, that the court could properly issue an ex parte order temporarily freezing the defendant's assets. The restraining order was deemed necessary to preserve the court's jurisdiction and prevent defendants from transferring their assets before trial, thereby thwarting Congress' intent that tainted assets be forfeited.¹⁵¹ After noting that the strength of the government's interest permitted an ex parte order to issue, the court held that the interests of the defendant required that an adversarial hearing be held shortly thereafter to determine the propriety of continuing the order until trial.¹⁵²

Like the *Noriega* court, the *Veon* court required the government to present proof of the defendant's criminal activities and the connection of the frozen

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. See *United States v. An Article of Device Theramatic*, 715 F.2d 1339 (9th Cir. 1983); *United States v. Crozier*, 674 F.2d 1293 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Beckham*, 562 F. Supp. 488 (E.D. Mich. 1983); *United States v. Veon*, 538 F. Supp. 237 (E.D. Cal. 1982).

150. 538 F. Supp. 237 (E.D. Cal. 1982).

151. *Id.* at 242-43.

152. *Id.* at 243.

assets to the criminal enterprise.¹⁵³ As a procedural safeguard of the defendant's rights, the *Veon* court made the Federal Rules of Evidence applicable to the hearing.¹⁵⁴ By applying these rules, the court made clear its intention that the government not be allowed to restrain a defendant's assets on the mere assertion by the government that the assets are related to some prohibited activity.

Similar concerns over the infringement of rights accompanying an ex parte restraining order were voiced by the Ninth Circuit in *United States v. Crozier*.¹⁵⁵ Like *Veon*, *Crozier* involved the issuance of an ex parte restraining order under the CCE prior to the enactment of the CFA. Exigent circumstances, including a high probability that a defendant might evade forfeiture by transferring his assets prior to trial, provided an adequate basis for allowing the court to issue a pretrial restraining order without affording the defendant an opportunity to be heard. Like the district court in *Veon*, the Ninth Circuit recognized the strong interest in carrying out Congress' intent that large scale criminal enterprises be deterred and punished by forfeiting their drug-tainted assets.¹⁵⁶ Similarly, the Ninth Circuit recognized that attention had to be given to the rights of the criminal defendant as well.¹⁵⁷

Prompted by due process concerns, the Ninth Circuit held that even when exigent circumstances permit an ex parte restraining order to issue, the government may not wait until trial to come forward with adequate grounds for forfeiture of the assets.¹⁵⁸ According to the Ninth Circuit, an adversarial hearing is necessary after the restraint and prior to trial.¹⁵⁹ Moreover, a grand jury determination is not an adequate substitute for an adversary proceeding at which a defendant may cross-examine witnesses, and at which the government has the burden of proof.¹⁶⁰

In *Crozier*, the Ninth Circuit based its holding on the strong interest of criminal defendants in not being deprived, without due process of law, of control of their property for the lengthy period preceding their trial.¹⁶¹ A criminal defendant's interest in having sufficient assets to retain his counsel of choice is an even stronger interest than that recognized in *Crozier*, and is surely deserving of at least as much protection.

Conclusion

United States v. Noriega recognized the fundamental importance of a criminal defendant's right to retain counsel of choice. By requiring a post-

153. See *supra* notes 106-07 and accompanying text.

154. *Veon*, 538 F. Supp. at 248-49.

155. 674 F.2d 1293 (9th Cir. 1982).

156. *Id.* at 1297.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

restraint, pretrial hearing whenever assets needed by a defendant for retaining counsel have been frozen, the court prevented the government from infringing this right. A person's right to control his own property should not be infringed without due process of law, and a defendant's sixth amendment right to counsel should not be subordinated to the government's effort to combat crime. *Noriega* provides procedures adequate to accommodate the government's need to protect forfeitable assets from fraudulent transfers while at the same time protecting the defendant's basic right to counsel of choice.

Certainly organized criminal enterprises and large drug cartels pose a real threat to our nation. Indeed, the "War on Drugs" has inspired a zealous crusade across the entire nation. However, in dealing with this threat, we must carefully avoid reacting with hysteria by passing laws that trample the important individual rights guaranteed by the Constitution. A serious drug problem can never be an excuse for making bad law.

In the past, courts have provided procedures similar to those in *Noriega* for granting pretrial restraining orders under the CCE.¹⁶² In the future, courts should continue to provide for an adversarial hearing as delineated in *Noriega* whenever assets needed to retain counsel have been placed beyond the reach of a criminal defendant. Both the sixth amendment and the due process guarantees of the Constitution clearly demand this result.¹⁶³

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162. See *supra* notes 149-61 and accompanying text.

163. Subsequent to the writing of this note, the issues left unsettled in *Monsanto* were decided on remand to the Second Circuit. *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991). See *supra* notes 81-82 and accompanying text. In its en banc opinion the court held that the fifth and sixth amendments, considered in combination require a post-restraint, pretrial adversarial hearing in order to continue the restraint of assets needed to retain counsel of choice. *Monsanto*, 924 F.2d at 1197. At the post-restraint hearing, the government would be required to show probable cause to believe that the defendant committed the crimes that would provide a basis for forfeiture and that the assets specified for seizure were indeed forfeitable. *Id.* at 22.

Like the *Noriega* court, the Second Circuit employed the three-factor balancing test set out in *Mathews v. Eldrige*. See *supra* notes 91-118 and accompanying text. The court found that the defendant's interest in obtaining counsel of choice was a particularly strong one that outweighed the government's interest in obtaining forfeiture. The court also found that the risk of erroneously depriving the defendant of his right to counsel of choice outweighed any possible advantages that might accompany less strict procedural requirements. *Monsanto*, 924 F.2d at 1195.