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# Of Defense Lawyers and Pornographers: Pretrial Asset Seizures and the Fourth Amendment

RICARDO J. BASCUAS\*

## I. INTRODUCTION

On February 7, 2008, lawyers packed a federal courtroom in Miami, Florida, in a show of support for Benedict Kuehne, who was to be arraigned on money laundering charges.<sup>1</sup> Mr. Kuehne, widely admired among his colleagues,<sup>2</sup> had served as a president of the Florida Bar and was among Al Gore's key legal advisors in the controversy that decided the 2000 presidential election.<sup>3</sup> At the arraignment, Kuehne proclaimed, "Since I am completely innocent of these charges, I am entering a plea of not guilty."<sup>4</sup>

The Department of Justice alleges that Mr. Kuehne laundered payments made by Colombian drug trafficker Fabio Ochoa Vasquez to his defense attorney, Roy Black.<sup>5</sup> Mr. Black had retained Mr. Kuehne to investigate and give an opinion as to whether the funds with which Mr. Ochoa paid roughly \$5 million in legal fees were drug proceeds.<sup>6</sup> The government contends that some funds that Mr. Ochoa used to pay Mr. Black "consisted of, or were at least commingled with, proceeds of drug trafficking"<sup>7</sup> and seeks to forfeit over \$5 million not from Mr. Black but from Mr. Kuehne and his codefendants.<sup>8</sup> According to the government's bizarre indictment, some of the money declared by Mr. Kuehne to be untainted by drug trafficking had in fact been provided by a federal undercover operation to track drug proceeds.<sup>9</sup> Thus, the government

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1. Jay Weaver, *Federal Court: Top Miami Lawyer Faces Money-Laundering Charges*, MIAMI HERALD, Feb. 8, 2008, at A1.

2. See, e.g., *Best Lawyer*, MIAMI NEW TIMES, May 11, 2000, available at <http://www.miaminewtimes.com/2000-05-11/city-life/best-lawyer/full>.

3. Weaver, *supra* note 1.

4. *Id.*

5. Superseding Indictment at 4, United States v. Velez, No. 05-20770 (S.D. Fla. Oct. 15, 2007) [hereinafter Indictment].

6. See Weaver, *supra* note 1; Indictment, *supra* note 5, at 2.

7. Indictment, *supra* note 5, at 3.

8. *Id.* at 13. The codefendants are Colombian nationals who allegedly provided Mr. Kuehne fraudulent information to support his opinion letters. See *id.* at 1-4.

9. Indictment, *supra* note 5, at 5-6.

charges, Mr. Kuehne's opinion mischaracterized the source of the funds. The only motive the indictment suggests for why Mr. Kuehne would risk his impeccable reputation and distinguished career was the payment of less than \$200,000 in fees—fees he would have earned even if his investigation had revealed that Mr. Ochoa's money was tainted.<sup>10</sup>

Mr. Kuehne's controversial prosecution represents the government's latest initiative in a decades-old campaign to keep criminal defendants from using contested assets to hire defense counsel.<sup>11</sup> Current law, as interpreted by the courts, effectively places the burden of establishing the source of a defendant's assets on the defense rather than on the government.<sup>12</sup> If defense counsel does not investigate his prospective client's finances, the government may take the lawyer's earned fees at the conclusion of the case.<sup>13</sup> Thus, the legal fees paid by Mr. Ochoa are, as the government points out, subject to civil forfeiture if the defense team "knew or should have known" they were tainted.<sup>14</sup> Mr. Black's firm, however, could use Mr. Kuehne's opinion letters to defend against such a civil forfeiture action.

By electing instead to bring a criminal prosecution against the author of the opinion letters, the government undertakes to meet a higher burden of proof than it would face in a civil forfeiture action. It must prove guilt beyond a reasonable doubt rather than proving liability by a preponderance of evidence. It also has to prove not only that the funds were illicit but that Mr. Kuehne actually knew they were.<sup>15</sup> The government cannot rely on the "should-have-known" negligence standard that suffices to prove civil claims.<sup>16</sup>

In light of these challenges, it is doubtful that the government brought the criminal case against Mr. Kuehne because it was the best or easiest way to recover \$5 million for the Treasury. The government will

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10. *Id.* at 5.

11. See Brian Fork, Comment, *The Federal Seizure of Attorneys' Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense*, 83 N.C. L. REV. 205, 224–25 (2004) (discussing similar prosecutions).

12. 18 U.S.C. § 1963 (2000); 21 U.S.C. § 853 (2000).

13. See 18 U.S.C. § 1963(c) (2000) ("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 . . . 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."); 21 U.S.C. § 853(c) (2000) (same).

14. Indictment, *supra* note 5, at 2.

15. See 18 U.S.C. § 1956 (2000).

16. See, e.g., *United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) (holding that "deliberate ignorance" instruction should rarely be given to avoid the risk "that juries will convict on a basis akin to a standard of negligence: that the defendant *should* have known that the conduct was illegal").

attain a valuable benefit and disturbing “victory” just by having the case proceed to trial, regardless of the outcome. The chilling effect this case will have (and perhaps has had already) will further the DOJ’s efforts to discourage privately retained counsel from defending—or, indeed, having any involvement whatsoever with—those accused of drug or racketeering crimes.<sup>17</sup> The government is able to accomplish this only because the muddled jurisprudence of forfeiture, in disregard of the Fourth Amendment, essentially treats assets that are alleged to be tainted as presumptively tainted.

To date, the cases examining pretrial restraining orders on an accused’s money have asked whether such restraints infringe the Sixth Amendment right to counsel and the Fifth Amendment right to due process. Framing the issue in terms of the right to counsel has produced a confused jurisprudence in which the United States Court of Appeals for the Eleventh Circuit is a curious outlier. That court’s decision in *United States v. Bissell*<sup>18</sup> is understood to hold that assets needed by a defendant to pay his counsel of choice can be restrained in advance of trial without an adversarial hearing.<sup>19</sup> Not surprisingly, then, the case has been universally criticized and followed in no other circuit.<sup>20</sup>

Ten years after *Bissell*, another Eleventh Circuit panel noted with apparent discomfiture that “in the appropriate case, we perhaps should re-examine *Bissell* . . . .”<sup>21</sup> At least one case pending before the court as of this writing, *United States v. Kaley*, offers the Eleventh Circuit the opportunity to revisit *Bissell* and provide some sort of pretrial hearing at

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17. See *United States v. Moya-Gomez*, 860 F.2d 706, 720 (7th Cir. 1988) (“Counsel inevitably will be reluctant or unwilling to accept private employment knowing that they may not be able to collect or retain agreed-upon fees.” (quoting *United States v. Harvey*, 814 F.2d 905, 921 (4th Cir. 1987))); *United States v. Monsanto (Monsanto II)*, 852 F.2d 1400, 1403 (2d Cir. 1988) (Feinberg, C.J., concurring) (“[T]he ‘relation back’ provision of 21 U.S.C. § 853(c) has the same effect as a restraining order when applied to attorney’s fees, since practical considerations will keep an attorney from accepting fees based upon the contingency of success at the criminal trial.”); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) (“By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of the RICO and CCE statute (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business.”); Fork, *supra* note 11, at 232; Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699, 1717–18 & nn.141–45 (2001) (collecting news stories on chilling effect of forfeiting legal fees and on attorneys charged with money laundering).

18. 866 F.2d 1343 (11th Cir. 1989).

19. See *United States v. Melrose E. Subdivision*, 357 F.3d 493, 500 n.4 (5th Cir. 2004) (“The Eleventh Circuit, on the contrary, holds that no pretrial hearing is required under 21 U.S.C. § 853(e) even when the restrained assets are needed to pay counsel.”); *United States v. Register*, 182 F.3d 820, 835 (11th Cir. 1999) (“We appear to be the only circuit holding that, although pretrial restraint of assets needed to retain counsel implicates the Due Process Clause, the trial itself satisfies this requirement.”).

20. See *infra* note 42.

21. *Register*, 182 F.3d at 835.

which an accused can challenge restraints on his property.<sup>22</sup> The Eleventh Circuit will likely afford in *Kaley* or a similar case some pretrial process to defendants seeking to use restrained assets to pay attorney's fees. *Kaley*, however—like virtually every federal case on this issue—frames the matter as an infringement of the Sixth Amendment right to counsel without due process.<sup>23</sup> A Sixth Amendment approach will do little to free criminal defense attorneys from having to prove conclusively that the money they earn is not tainted at the risk of working for free or, worse yet, being indicted for money laundering. It will not discourage the government from pursuing aggressive strategies like the prosecution of Mr. Kuehne to limit the availability of talented criminal defense counsel. A more fundamental reconceptualization of pretrial restraint of assets is needed to minimize the threat of such prosecutions and to protect an accused's right to defend against serious charges.

This article posits that the issue of whether a defendant may use money in his possession to retain an attorney must be examined primarily as a Fourth Amendment question rather than primarily as a Sixth Amendment question. Using established Fourth Amendment jurisprudence has several advantages over viewing a pretrial seizure of assets as an incursion on only the right to counsel. First, it leaves no doubt that the government has the burden of adducing specific facts to demonstrate that particular assets are traceable to particular crimes. This is consonant not only with the presumption of innocence, but also with recognition that affording talented and aggressive representation to those accused of even heinous crimes is a defining characteristic of the American adversarial system of criminal justice.<sup>24</sup>

Second, a Fourth Amendment approach still affords consideration of a challenged seizure's Sixth Amendment implications. However, because every seizure triggers Fourth Amendment scrutiny, defendants would no longer be required to demonstrate an impact on the right to counsel just to prove their entitlement to a hearing. Instead, a hearing would be presumptively required, just as it is when the government seizes expressive works that may be protected by the First Amendment.<sup>25</sup> A seizure of assets that an accused intends to use for his defense should be met with the same heightened judicial concern as a seizure of books or films. The Supreme Court, however, has been more willing to

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22. *United States v. Kaley*, No. 07-80021-CR, 2007 WL 1831151 (S.D. Fla. June 25, 2007).

23. *Id.* at \*2.

24. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 635 (1989) (Blackmun, J., dissenting) (noting "the devastating consequences of attorney's fee forfeiture for the integrity of our adversarial system of justice"); Fork, *supra* note 11, at 232–33 (discussing how forfeiture of attorney's fees thins ranks of skilled defense attorneys).

25. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989).

accept, in the name of the Constitution, the risk that pornographers will propagate obscenity than the risk that an accused would pay his attorney with tainted funds. Viewing pretrial asset seizures as raising Fourth Amendment issues ensures that the government will have to make some evidentiary showing to restrain money that a defendant might use for attorney's fees.

Lastly, a Fourth Amendment approach forces recognition of the fact that attorneys who are paid for legal services rendered before the government has made the required probable cause showing ought to be entitled to the money they earned. While the government cannot remove an allegedly obscene book from circulation before *proving* that it is obscene, under current law it can prevent an accused from using contested assets to fund his defense with little more than an allegation. A Fourth Amendment approach would expose this anomaly and dispel the unmerited cloud of ignobility and the spectre of criminal exposure that current law casts upon those who undertake to provide constitutionally guaranteed representation.

## II. SIXTH AMENDMENT CHALLENGES TO PRETRIAL RESTRAINTS

Two federal statutes provide for the criminal forfeiture of the proceeds and instrumentalities of crime. One is aimed at racketeers.<sup>26</sup> The other targets drug traffickers.<sup>27</sup> Because no one seriously argues that criminals are entitled to the fruits of their illicit labors, forfeiture is not a controversial penalty. But the statutes' provision that assets "subject to forfeiture" may be frozen before trial has been said to infringe upon the presumption of innocence and the right to retain counsel of choice.<sup>28</sup> In 1989, the Supreme Court rejected these contentions. It held that money used to pay for defense counsel is not exempt from the forfeiture statutes<sup>29</sup> and that assets needed for attorney's fees could be restrained pending trial.<sup>30</sup> The Supreme Court did not decide what process was necessary to effect a pretrial seizure of assets alleged to be forfeitable.<sup>31</sup>

That open question has caused a splintering among the circuits over what the rights to counsel and due process require in those circum-

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26. 18 U.S.C. § 1963 (2000).

27. 21 U.S.C. § 853 (2000).

28. See, e.g., *United States v. Monsanto (Monsanto III)*, 491 U.S. 600, 614–16 (1989); *Caplin & Drysdale, Chartered*, 491 U.S. at 650–51 (Blackmun, J., dissenting); *United States v. Moya-Gomez*, 860 F.2d 706, 720 (7th Cir. 1988) ("Pre-conviction restraining orders and, indeed, the mere threat of ultimate forfeiture without any such orders operate directly and immediately to inhibit a defendant's ability to retain private counsel for his defense.").

29. *Caplin & Drysdale, Chartered*, 491 U.S. at 619.

30. *Monsanto III*, 491 U.S. at 602.

31. *Id.* at 615 n.10.

stances. The split has resulted because the issue presented by a pretrial asset seizure has been poorly framed. Predicating a challenge to a freezing order on a right-to-counsel argument fundamentally misconceives the relief sought as being exceptional. In other words, it suggests, if not implies, that were the assets intended for something other than retaining counsel, the government would be entitled to freeze them. This tacit concession inspires exactly the rejoinder one would expect. Justice White, writing for the Supreme Court in *Caplin & Drysdale, Chartered v. United States*, inveighed against the notion that the right to counsel entitles (alleged) criminals to use illegitimate wealth to hire high-priced lawyers:

A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.<sup>32</sup>

Hyperbole notwithstanding, the reasoning is sound as far as it goes. Whatever the Sixth Amendment provides, it is not that one can keep or use ill-gotten assets merely because one is in possession of them. Nonetheless, litigants and courts have consistently and futilely framed cases concerning the forfeitability of funds that could be used to retain counsel as Sixth Amendment actions.<sup>33</sup> In *United States v. Monsanto (Monsanto III)*, in which the Supreme Court held that forfeitable assets could be restrained pending trial, this made sense.<sup>34</sup> The lawyers in that case were afforded "an adversarial hearing 'at which the government has the burden to demonstrate the likelihood that the assets are forfeitable.'"<sup>35</sup> Because the government met that burden, the only remaining argument was to claim a categorical exception from pretrial restraining orders for

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32. *Caplin & Drysdale, Chartered*, 491 U.S. at 626; see also *United States v. Register*, 182 F.3d 820, 835 (11th Cir. 1999) ("The right to counsel of choice belongs solely to criminal defendants possessing legitimate, uncontested assets . . . . The appellants here had no Sixth Amendment right to use assets to the extent that those assets belonged to the United States.") (quoting *United States v. Bissell*, 866 F.2d 1343, 1351 (11th Cir. 1989)) (emphasis added); David Orentlicher, *Fee Payments to Criminal Defense Lawyers from Third Parties: Revisiting United States v. Hodge and Zweig*, 69 *FORDHAM L. REV.* 1083, 1083-84 (2000) (arguing that attorney fee payments made by third-party criminal associates work to further criminal conspiracies).

33. See, e.g., Todd Barnet & Ivan Fox, *Trampling on the Sixth Amendment: The Continued Threat of Attorney Fee Forfeiture*, 22 *OHIO N.U. L. REV.* 1, 1-2 & nn.3-13 (1995).

34. *Monsanto III*, 491 U.S. at 600.

35. *Id.* at 605 (quoting *United States v. Monsanto (Monsanto I)*, 836 F.2d 74, 84 (2d Cir. 1987)).

assets earmarked for attorney's fees—a claim that only the Sixth Amendment could arguably support.<sup>36</sup> The Supreme Court held only that the Sixth Amendment does not exempt assets to be used for attorney's fees from being restrained pending trial once the government demonstrates probable cause to believe the assets are forfeitable.<sup>37</sup> It expressly did not decide whether any pretrial hearing on the question of forfeitability must be afforded the defendant.<sup>38</sup>

After *Monsanto III*, however, litigants continued to seek pretrial hearings on the basis of the Sixth Amendment right to counsel<sup>39</sup>—which makes a good deal less sense than it did prior to that decision. Perhaps this was the result of a tendency to want to build on *Monsanto III*'s and *Caplin & Drysdale*'s reasoning. Or the root of the confusion may be that the attorneys who frame these claims are predisposed to view the matter in somewhat self-interested terms, i.e., whether prospective clients have a right to hire *them*. In other words, a lawyer may be more immediately concerned with establishing *his* right to the money than with establishing his client's right to spend it as he will.<sup>40</sup> In actuality, of course, the question is simply whether the government has shown that the accused should be prevented from doing *whatever he wishes* with property that is in his possession and therefore presumably his. The fact that he wants to hire a criminal defense attorney is hardly irrelevant but neither does it drive the analysis.

Whatever the cause of the misconception, the result is that the circuits have splintered over what procedure to afford a defendant challenging a pretrial seizure of assets.<sup>41</sup> Only the Eleventh Circuit does not require any hearing before the government can have allegedly forfeitable

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36. *Id.* at 602.

37. *Id.* at 616.

38. *Id.* at 615 n.10.

39. See, e.g., *United States v. E-Gold, Ltd.*, 521 F.3d 411, 418 (D.C. Cir. 2008); *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005); *United States v. Jones*, 160 F.3d 641, 646 (10th Cir. 1998); *United States v. Michelle's Lounge*, 39 F.3d 684, 694 (7th Cir. 1994); *Barnet & Fox*, *supra* note 33, at 1–2 & nn.3–13.

40. A court decision that a defendant could spend his money *only* on attorney's fees would be of obvious benefit to that defendant's lawyer.

41. These seizures are typically effected by an ex parte warrant or ex parte restraining order issued pursuant to the forfeiture statutes. See, e.g., *E-Gold, Ltd.*, 521 F.3d at 412; *Jones*, 160 F.3d at 643; *United States v. Bissell*, 866 F.2d 1343, 1347 (11th Cir. 1989). Despite the failure of litigants and courts to treat challenges to these orders as Fourth Amendment claims, there is no doubt that they implicate the Fourth Amendment. "A 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); cf. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993) (holding that seizure of real estate in connection with civil forfeiture claim interfered with "valuable rights of ownership").



assets frozen.<sup>42</sup> Other circuits require the government to establish the likely validity of its claim in each individual case through a pretrial adversarial hearing. The particular procedure varies from circuit to circuit, with the Ninth imposing the most elaborate process.<sup>43</sup> To restrain assets before trial in the Ninth Circuit, the government must satisfy the requirements that Federal Rule of Civil Procedure 65 establishes for temporary restraining orders.<sup>44</sup> The Third Circuit similarly requires a full hearing where the government must demonstrate that it is likely to prove at trial both that the defendant is guilty of the charged offense and that the profits or properties are subject to forfeiture.<sup>45</sup> The Second and District of Columbia circuits require a pretrial hearing at which the defendant can contest not only that there is probable cause to believe the assets are tainted by crime but also that probable cause supports the underlying charges, even though an indictment ordinarily establishes

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42. *Compare Bissell*, 866 F.2d at 1354 with *E-Gold, Ltd.*, 521 F.3d at 421 (“[W]here the government has obtained a seizure warrant depriving defendants of assets pending a trial upon the merits, the constitutional right to due process of law entitles defendants to an opportunity to be heard at least where access to the assets is necessary for an effective exercise of the Sixth Amendment right to counsel.”); and *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475–77 (5th Cir. 2007) (holding that availability of adversarial hearing is resolved through *Mathews v. Eldridge* test); and *Jamieson*, 427 F.3d at 407 (approving district court’s application of the framework laid out by the Tenth Circuit in *United States v. Jones*, which allows a hearing provided the defendant can show that the seizure interferes with the right to counsel, and that the funds seized are not illegally derived); and *Jones*, 160 F.3d at 647 (“We think the proper balance of private and government interests requires a post-restraint, pre-trial hearing but only upon a properly supported motion by a defendant [demonstrating that the seizure precludes his ability to hire counsel].”); and *United States v. Monsanto (Monsanto IV)*, 924 F.2d 1186, 1191 (2d Cir. 1991) (“[A] pre-trial adversary hearing is required where the question of attorney’s fees is implicated.”) (quoting *United States v. Monsanto (Monsanto I)*, 836 F.2d 74, 82 n.7 (2d Cir. 1987)); and *United States v. Moya-Gomez*, 860 F.2d 706, 731 (7th Cir. 1988) (holding that denial of a hearing “violates the due process clause to the extent that it actually impinges on the defendant’s qualified sixth amendment right to counsel of choice”); and *United States v. Harvey*, 814 F.2d 905, 929 (4th Cir. 1987) (“We therefore hold that to the extent the Act authorizes the issuance of *ex parte* restraining orders after indictment without any post-deprivation hearing other than a criminal trial, it violates fifth amendment due process guarantees, and that as applied specially in Harvey’s case, it violated his fifth amendment rights to procedural due process.”) (second and third emphasis added); and *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985) (holding due process requires an adversarial hearing and that Federal Rule of Civil Procedure 65 will govern forfeiture hearings); and *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981) (“Before a court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the [charged offense] and two, that the profits or properties at issue are subject to forfeiture . . . . In addition, these determinations must be made on the basis of a full hearing; the government cannot rely on indictments alone.”) (citations omitted).

43. *Crozier*, 777 F.2d at 1384. The Fifth Circuit used to do this, but stopped last year. *Compare United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986) with *Holy Land Found. for Relief & Dev.*, 493 F.3d at 475–77.

44. *Id.*

45. *Long*, 654 F.2d at 915.

probable cause conclusively.<sup>46</sup> The Tenth and Sixth circuits require a hearing on whether there is probable cause to believe contested assets are tainted—but only after the defendant demonstrates that the assets are needed for attorney's fees.<sup>47</sup>

This divergence of views is not surprising given that framing the issue in Sixth and Fifth Amendment terms leaves each circuit to decide the amorphous and open-ended question of what process is due.<sup>48</sup> To achieve consistency across circuits and with closely related precedent, the question of whether the government can seize assets that could fund a criminal defense must be analyzed in the same way as *any* seizure. It is true that whatever protections the Fourth Amendment offers should be observed particularly scrupulously when a mistake would directly impact on another constitutional right, such as the right to counsel.<sup>49</sup> But the question of whether the government may seize property in any given circumstance must consistently be answered with reference to the same body of Fourth Amendment law if constitutional law is to make principled sense. Though the opinion is nothing like clear, *Bissell* hints at such an approach.

### III. *BISSELL'S* CONFUSED REASONING

*Bissell* evinces considerable confusion as to the source of the government's authority to seize allegedly forfeitable assets without a pretrial hearing.<sup>50</sup> The court's opinion emphasized a property rights theory, stating that it had to consider "the government's claim to title in the assets."<sup>51</sup> Relying on the statutes' relation-back provision, which provides that the government's title to forfeited assets vests at the time the crime was committed,<sup>52</sup> *Bissell* maintained that the government's claim simply trumps the defendant's in every case: "The reason for restricting the defendant's control over allegedly illicit assets is to preserve the government's claim of ownership to these assets and to protect its right

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46. *E-Gold, Ltd.*, 521 F.3d at 419; *Monsanto IV*, 924 F.2d at 1196–97.

47. *Jamieson*, 427 F.3d at 407; *Jones*, 160 F.3d at 647.

48. The Second, Fifth, Seventh, Tenth, and D.C. circuits all rely on the multi-factor approach of *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *E-Gold, Ltd.*, 521 F.3d at 416–20; *Holy Land Found. for Relief & Dev.*, 493 F.3d at 476; *Jones*, 160 F.3d 645 (10th Cir. 1998); *Monsanto IV*, 924 F.2d at 1193; *United States v. Moya-Gomez*, 860 F.2d 706, 726 (7th Cir. 1988).

49. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'"); *Nathan v. Lawton*, No. 487-223, 1989 U.S. Dist. LEXIS 1398, at \*23–24 (S.D. Ga. Jan. 18, 1989) (applying heightened scrutiny to a search of an attorney's office).

50. See *United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989).

51. *Id.*

52. 18 U.S.C. § 1963(c) (2000); 21 U.S.C. § 853(c) (2000).

to possession of the assets when and if its claim is vindicated at trial.”<sup>53</sup> The court disregarded the defendants’ competing claim and pressing need for the assets, repeatedly referring to the defendants’ lack of “uncontested assets” and even declaring that “the inclusion of appellants’ assets in an indictment is an assertion that these particular defendants, no matter what the appearances of wealth may be, are and have been paupers ever since their apparent assets were accumulated through criminal conduct.”<sup>54</sup>

Though *Monsanto III* had not been decided yet, the Eleventh Circuit concluded that the forfeiture statutes make no exception for attorney’s fees.<sup>55</sup> It further held that the Sixth Amendment does not entitle a defendant to use “contested assets” to pay attorney’s fees: “The correct position is that none of the defendants have ever owned any of these assets. All of the assets were the property of the government the moment they were derived from, or utilized in, the criminal activities condemned.”<sup>56</sup> This reasoning is flawed, not only because it assumes the defendant’s guilt, but more fundamentally because the matter of *when* title vests is irrelevant. The issue is *whether* the government will likely prevail on its claim.

*Bissell* ignored that by denying guilt, the defendants likewise claimed the contested assets and disputes that the government has any right to restrict his use of them pending trial. Other than the court’s evident antipathy for the defendants it characterized as “paupers,” the case offered no explanation for why, in the absence of any evidentiary showing, the government’s assertion of a right to freeze the assets is superior to the defendants’ assertion of a right to use the assets. To be sure, the court did say that the defendants failed to argue “that the government restrained non-forfeitable assets,” but it meant only that the defendants did not claim the assets were outside the scope of the forfeiture statute.<sup>57</sup> The defendants certainly argued that they were entitled to a hearing on the ultimate question of whether the government was likely to substantiate its forfeiture claim.<sup>58</sup>

Addressing the issue of procedure, the Eleventh Circuit deployed a Fourth Amendment analysis, faulting the defendants for the denial of

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53. *Bissell*, 866 F.2d at 1349.

54. *Id.* at 1351.

55. *Id.* at 1350 (“The language and legislative history of section 853 evidence Congress’ goal of reaching as many illegal assets as constitutionally permissible.”).

56. *Id.*

57. *Id.* at 1351.

58. *Id.* at 1352 (“They argue that when pretrial restraints are imposed on assets, the Fifth Amendment requires a hearing on the merits at which the government must prove the probability that the defendant will be convicted and that his assets will be forfeited.”).

any process. The court held that delaying consideration of the question of forfeitability until trial did not violate due process, given that the record disclosed no motion for a pretrial hearing or for the return of property pursuant to Federal Rule of Criminal Procedure 41.<sup>59</sup> That rule implements the Fourth Amendment's regulation of searches and seizures by providing, among other things, for the return of unlawfully seized property.<sup>60</sup> The court's premise that the government had already acquired a statutory property interest in the contested assets would have rendered any such motion an empty exercise because the defendants would have no right to demand the return of property that was not theirs. The court buttressed the government's ownership of the contested assets by noting that the trial court had found probable cause (on an *ex parte* basis) to issue warrants freezing the defendants' bank accounts.<sup>61</sup>

*Bissell* thus effectively held that no process was necessary to determine the validity of the government's claim because the claim established its own validity. The court treated "the government's claim to title," which derived from the forfeiture statute, as a fact separate and distinct from whether there was probable cause to believe the contested assets were forfeitable. The government's supposed property interest was a factor that weighed against finding a due process violation.<sup>62</sup> The *ex parte* probable cause finding was another.<sup>63</sup> Finally, the failure to bring a Rule 41 motion was yet another.<sup>64</sup> But these considerations are all one and the same. In the typical criminal forfeiture case like *Bissell*, any claim the government has to contested assets is only as good as the evidence showing those assets are derived from criminal activity.<sup>65</sup> Without some proof of its allegations, the government has *no* claim to the defendant's property. And probable cause for such a seizure cannot be reliably established *ex parte*.<sup>66</sup>

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59. *Id.* at 1353.

60. FED. R. CRIM. P. 41(g); *see also* *Zurcher v. Stanford Daily*, 436 U.S. 547, 558 (1978) (stating that Rule 41 "reflects '[t]he Fourth Amendment's policy against unreasonable searches and seizures'" (alteration in original)).

61. *Bissell*, 866 F.2d at 1354.

62. *Id.* ("[O]ur due process analysis must countenance not only the possible prejudice to appellants' Sixth Amendment rights, but also the government's claim to title in the assets.").

63. *Id.*

64. *Id.* at 1353.

65. The property interest and probable cause inquiries would be distinct only in the odd case, such as if the defendant engaged in a pattern of racketeering that involved stealing government property or sold drugs stolen from a Veteran's Administration hospital. Then, the government would have a property interest as the victim of the crime and a separate interest in forfeiting the proceeds as sovereign.

66. *See* Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. (forthcoming 2008) (arguing that Fourth Amendment probable cause determinations cannot be made reliable without adversarial testing of the government's claims).

Just as Justice White's majority would do in *Caplin & Drysdale*, the *Bissell* panel supported its holding with the seemingly indisputable observation that one accused of bank robbery could not use the stolen bank money to retain counsel.<sup>67</sup> Differences between the cases, however, made the hypothetical inapt in *Bissell*. In *Caplin & Drysdale*, the law firm petitioner sought payment for services rendered in major part *after* its client pled guilty to the underlying charges.<sup>68</sup> Because the forfeitability of all the client's assets was thus already established at the time it performed the pertinent legal work, the firm could distinguish the bank robbery hypothetical only with the strained argument that the bank enjoys "pre-existing property rights, while the [g]overnment's claim to forfeitable assets rests on . . . the fictive property-law concept of . . . relation-back and is merely a mechanism for preventing fraudulent conveyances of the defendant's assets, not . . . a device for determining true title to property."<sup>69</sup> The Supreme Court rejected the argument, stating that criminal defendants have no right "to use assets that are the Government's—assets adjudged forfeitable . . . —to pay attorney's fees, merely because those assets are in their possession."<sup>70</sup> *Bissell's* reliance on the bank robbery hypothetical to support a seizure of assets on the basis of little more than a government allegation, as opposed to a *judgment*, goes further than logic permits.

The bank robber hypothetical implicitly posits that the money discovered in the suspect's possession is in some way—by virtue perhaps of the bag it is in, the serial numbers on the bills, or marks from an exploding ink pack—identifiable as the very money stolen from the bank. Title to the money is never in doubt. *Caplin & Drysdale* presented such a case but *Bissell* did not. If police discovered that a person suspected of robbing \$50,000 from a bank had exactly \$50,000 in his own savings account, the police could hardly seize his account without first showing it constituted proceeds of the bank robbery. If the defendant could show he funded the account before the bank was robbed, nothing would prevent him from using the money to hire a lawyer.<sup>71</sup> But the alleged bank robber would not have the burden to demon-

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67. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989); *Bissell*, 866 F.2d at 1351 (relying on *In re Caplin & Drysdale, Chartered*, 837 F.2d 637, 645 (4th Cir. 1988) (en banc)).

68. See *In re Caplin & Drysdale, Chartered*, 837 F.2d at 641.

69. *Caplin & Drysdale, Chartered*, 491 U.S. at 626 (internal quotation marks omitted).

70. *Id.* at 632.

71. This implicates the doctrine of forfeiture of substitute assets. Most courts have held that substitute assets, i.e., assets of lesser or equal value to forfeitable proceeds of crime which may be forfeited when the actual proceeds have been dissipated, are not subject to pretrial restraint. See, e.g., *United States v. Gotti*, 155 F.3d 144, 147 (2d Cir. 1998) (holding that the RICO statute "does not authorize the pretrial restraint of substitute assets"). This is in keeping with the idea that,

strate any such thing. On the contrary, the Fourth Amendment provides that the property could not be seized unless the prosecution demonstrated at least a likelihood that the savings account represented the proceeds of the bank robbery.<sup>72</sup>

Thus, the reason that the hypothetical bank robber cannot use the money in his possession to pay his legal fees (or to buy anything) is embedded in the hidden premise that there exists some proof that the particular money he has is the very money taken from the bank. To the extent that the government can seize and retain the money, even though it belongs to the bank, it is only because the money is evidence of a crime.<sup>73</sup> The government's right to take it from the defendant is not dependent on the government having a superior interest like that embodied in the relation-back provision of the forfeiture statutes.<sup>74</sup> More importantly, the legality of the seizure does not depend on the defendant being guilty of the bank robbery. Even if he has an innocent explanation for how the marked bills came to be in his possession (perhaps his roommate is the thief), there is no doubt that the money does not belong to him, just as there was no doubt in *Caplin & Drysdale* that the defendant's money belonged to the government once he pled guilty.

*Bissell* failed to recognize that assets alleged to be forfeitable as proceeds of a crime differ from money robbed from a bank and assets already forfeited because the defendant's claim to the assets has not been resolved or extinguished. The government's right to possess those assets is necessarily tied to whether the defendant committed the underlying offense. The problem is exacerbated by the fact that depriving the

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absent probable cause to believe a particular item is the fruit, instrumentality, or evidence of a crime, the Fourth Amendment bars its seizure. The forfeiture of substitute assets is essentially another name for a criminal fine incurred upon conviction. The rationale of this article suggests that substitute assets should never be subject to pretrial restraint, but an extended discussion of this is beyond this work's reach.

72. If the government cannot establish at least probable cause to believe that contested assets will be forfeited, then there is no obvious reason why a defendant cannot, in fact, use those assets for whatever he wishes, whether it is to exercise a constitutional right or not. Viewed most favorably to the government, that situation presents a court with competing *unsubstantiated* claims to an asset. Presumably, the defendant's possession of the asset under color of title would be the salient factor to resolve the impasse. See *infra* note 136.

73. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 578–79 & n.5 (1978) (Stevens, J., dissenting) (discussing *Warden v. Hayden*, 387 U.S. 294 (1967)).

74. The Supreme Court dispensed with any need to predicate the government's right to seize on that particular legal fiction in *Warden v. Hayden*, in which police seized clothing worn by a suspected robber. 387 U.S. at 296–97. The Court recognized that “mere evidence” could be seized, even though the government could not claim a property interest in it, as long as there was probable cause “to believe that the evidence sought will aid in a particular apprehension or conviction.” *Id.* at 307. The hypothetical bank robber's money can be seized if there is probable cause to believe it is evidence of a crime, just as the identifying clothing worn by the robber in *Hayden* could be seized from the basement of the house to which the robber fled. *Id.* at 312.

defendant of use of the assets before trial increases the likelihood that he will (perhaps unjustly) be convicted and that the government will be awarded the assets. Failing to distinguish between a judgment of forfeiture and an allegation of forfeiture, *Bissell* failed to grapple with this problem. It leapt to the unsupported conclusion that an indictment alone might suffice to support the pretrial seizure of contested assets and that an indictment together with an ex parte probable cause finding certainly does.

#### IV. ESTABLISHING PROBABLE CAUSE TO FORFEIT CONTESTED ASSETS

*Bissell* is of course correct that the listing of assets in an indictment is an assertion of forfeitability, but it makes a great deal of difference whose assertion it is, what the nature of the assertion is, and what basis underlies it. If it is nothing but the untested claim of the prosecution, it lacks any legal significance. A bare assertion that assets are forfeitable is insufficient to demonstrate even probable cause to seize an individual's property. As courts routinely instruct jurors, an indictment is not evidence.<sup>75</sup>

An indictment, however, is taken to embody a grand jury's finding of probable cause to believe that the accused is guilty of the charged crimes.<sup>76</sup> Thus, it matters whether a forfeiture claim in an indictment is an assertion of the grand jury and, even if it is, whether that alone is sufficient to overcome an accused's right to use what is presumably his property. In *Monsanto III*, the Supreme Court declined to decide whether due process required an adversarial hearing to determine probable cause because the district court had conducted a four-day hearing at which the government prevailed.<sup>77</sup> After *Monsanto III*, the courts of appeals have remained divided over what significance to ascribe to an indictment when a pretrial restraint is challenged. The division reveals that the federal courts maintain a usually unarticulated but consistently evident discomfort with *Bissell's* syllogistic equating of an indictment with probable cause in the pretrial restraint context.

On remand from *Monsanto III*, the Second Circuit determined that, even assuming a forfeiture count in an indictment constitutes a grand jury's probable cause determination, due process requires that the accused be afforded an adversarial pretrial hearing to contest a seizure.<sup>78</sup> Because the DOJ agreed with that conclusion and six other courts of

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75. See, e.g., *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1035 n.28 (11th Cir. 2005).

76. See, e.g., *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1165 n.11 (11th Cir. 2005).

77. *United States v. Monsanto (Monsanto III)*, 491 U.S. 600, 615 n.10 (1989).

78. *United States v. Monsanto (Monsanto IV)*, 924 F.2d 1186, 1193–94 (2d. Cir. 1991).

appeals had ruled the same way, the Second Circuit reasoned that an indictment could not conclusively establish probable cause that listed assets were forfeitable.<sup>79</sup> The government maintained, however, that the indictment should be taken as establishing probable cause for the charges underlying the forfeiture.<sup>80</sup> Thus, the adversarial hearing should be limited to determining whether there was probable cause to believe the seized property constituted proceeds of crime.<sup>81</sup> The Second Circuit decided, however, that the indictment's effect should be the same as to both questions.<sup>82</sup> It ruled that a defendant could challenge the existence of probable cause for the charges underlying the forfeiture claim as well as for forfeitability itself.<sup>83</sup>

Without deciding what exactly a forfeiture claim in an indictment signifies, the Tenth Circuit adopted a more narrow view of due process in *United States v. Jones*.<sup>84</sup> Relying on legislative history and presuming that a forfeiture provision in an indictment entails a grand jury's probable cause determination, the court first held that there was no statutory right to a pretrial probable cause hearing.<sup>85</sup> It also held, however, that the Constitution requires that a defendant who demonstrates that she has no other assets "with which to retain private counsel and provide for herself and her family" is entitled to a hearing on the question of "traceability of the assets."<sup>86</sup> The indictment would serve as conclusive evidence of probable cause to believe the underlying offenses had been committed but not probable cause to believe the assets were forfeitable.<sup>87</sup>

The Tenth Circuit did not expressly address why the forfeiture claim should be treated differently than the charges. On the contrary, the court claimed that,

despite the fact that criminal forfeiture is ordinarily not a part of the substantive offense, but is instead a part of the sentence, a grand jury is necessarily called upon in this context to find probable cause to believe the assets named in the indictment are traceable to the underlying offense.<sup>88</sup>

Nonetheless, the court concluded that the Fifth Amendment required a

79. *Id.* at 1191 (collecting cases).

80. *Id.* at 1196.

81. *Id.*

82. *Id.* at 1196–97.

83. *Id.* at 1197.

84. 160 F.3d 641, 645–46 (10th Cir. 1998).

85. *Id.* at 644 (relying on S. Rep. No. 98-225, at 203, 213 (1984)).

86. *Id.* at 647, 648.

87. *Id.* at 648.

88. *Id.* at 645 (citation omitted).



hearing in some cases for a judge to make that same finding again.<sup>89</sup>

This unexplained difference in treatment must be grounded on the idea that grand juries do not, in fact, make reliable findings regarding the source of allegedly forfeitable assets.<sup>90</sup> The decisions of other courts reflect this same lack of confidence that grand juries give serious consideration to the forfeitability of assets. That is implicit in the Ninth Circuit's finding, for example, that "[t]he risk of an erroneous deprivation . . . is high" if assets are restrained without a prompt, adversarial hearing on probable cause.<sup>91</sup> The Fifth Circuit reached a similar conclusion in a case in which the government again conceded that an adversarial hearing should be provided to determine whether there is probable cause to believe restrained assets are forfeitable.<sup>92</sup>

Neither the DOJ nor any federal appellate decision (other than *Bissell*) maintains that an indictment with a forfeiture claim represents anything more than the government's allegation that certain assets are forfeitable. If it is true that an indictment does not constitute a probable cause determination as to forfeitability of assets, then the Fourth Amendment stands in the way of any pretrial restraint on property. It requires that the government adduce evidence demonstrating that the contested property is derived from crime. Furthermore, that showing must be tested at an adversarial hearing. This is because established law prescribes that, when a government seizure might directly compromise the exercise of another constitutional right, "the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'"<sup>93</sup> Further still, the fact that the seizure will preclude the exercise of another constitutional right argues, despite *Monsanto III*'s holding to the contrary, for a quantum of proof greater than probable cause.

## V. THE FOURTH AMENDMENT IN FIRST AMENDMENT CASES

*Monsanto III* and *Caplin & Drysdale* were not the only forfeiture decisions the Court decided in the 1989 term. Before he wrote the majority opinions in those cases, Justice White announced the Court's

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89. *Id.* at 649.

90. That an indictment signifies probable cause as to *anything* is widely considered to be nothing more than a convenient legal fiction. See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 & n.14 (9th Cir. 2005) (noting that the grand jury serves as a "rubber stamp" for the prosecution and would "indict a ham sandwich" if so implored and that federal grand juries returned only twenty-one no-bills in all of 2001) (citations and internal quotation marks omitted).

91. *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985); accord *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990).

92. *United States v. Melrose E. Subdivision*, 357 F.3d 493, 500 (5th Cir. 2004).

93. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

decision in *Fort Wayne Books, Inc. v. Indiana*.<sup>94</sup> That case concerned pretrial seizures of forfeitable assets made under Indiana's racketeering statute, an analogue to the federal RICO statute.<sup>95</sup> Despite its close relationship to these other cases, *Fort Wayne Books* is infrequently discussed together with them presumably because it is considered a First Amendment case while the others are considered Sixth Amendment cases. In fact, all three involve similar Fourth Amendment seizures that directly impact other constitutional rights. When viewed that way, *Fort Wayne Books* provides a compelling precedent for analyzing the issue left open in *Monsanto III*—how to decide whether the pretrial restraint of allegedly forfeitable assets requires an adversarial hearing. Examination of the two cases also reveals an irreconcilable conflict between them over the amount of evidence necessary to justify seizures frustrating the exercise of constitutional rights.

Indiana brought a civil racketeering complaint against Fort Wayne Books and two corporations operating pornographic book and video stores.<sup>96</sup> Following an ex parte determination of probable cause, the stores were padlocked and, a few days later, everything in them was impounded.<sup>97</sup> The trial court afforded the defendants an adversarial hearing shortly thereafter on the question of probable cause to believe the bookstores' contents were forfeitable as proceeds and instruments of racketeering crimes. The Indiana Supreme Court upheld the constitutionality of the seizure, reasoning that, because the books and films were found to be forfeitable, the First Amendment was not implicated.<sup>98</sup> Specifically, the court held that it was irrelevant whether the books and videotapes were obscene and therefore beyond the First Amendment's protection.<sup>99</sup>

The United States Supreme Court unanimously held that the seizure was unconstitutional,<sup>100</sup> even though the trial court conducted a post-seizure, pretrial adversary hearing.<sup>101</sup> Significantly, the Court assumed that the books and films were forfeitable like any other assets used in or derived from racketeering.<sup>102</sup> Nonetheless, Justice White's majority

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94. 489 U.S. 46 (1989).

95. *Id.* at 50.

96. *Id.* at 50–51. The predicate acts underlying the alleged racketeering were obscenity convictions. *Id.*

97. *Id.* at 52.

98. *See id.* at 64–65.

99. *Id.*

100. *Id.* at 66 (“Therefore, the pretrial seizure at issue here was improper.”); *id.* at 70–71 (“The Court correctly decides that . . . the pretrial seizures to which petitioner . . . was subjected are unconstitutional.”) (Stevens, J., dissenting on other grounds).

101. *See id.* at 52.

102. *Id.* at 65. Specifically, the Court stated that “we assume without deciding that bookstores

held "that the special rules applicable to removing First Amendment materials from circulation" applied because the purpose of the prosecution was to stop the dissemination of the seized works.<sup>103</sup> Consequently, the books and films could not be seized until they were adjudged obscene or forfeited.<sup>104</sup> Mere "probable cause to believe a legal violation has transpired" would not suffice.<sup>105</sup>

In other words, the entire Court agreed that, although "the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First Amendment are involved."<sup>106</sup> This aversion to the risk that potentially obscene works might be erroneously removed from circulation is in marked contrast to the little regard the same Court displayed for the risk that a criminal defendant might be erroneously deprived of his counsel of choice. Yet, the three 1989 forfeiture cases evince no sound reason for treating potential obscenity with greater constitutional reverence than potential attorney's fees.

The rationale for treating expressive materials differently than other property is the risk that their seizure will effect a "prior restraint"—an abridgment of speech made prior to a judicial determination that the speech is not constitutionally protected.<sup>107</sup> This means that seizures of large stores of books and films must be accompanied by proof positive of the seizure's ultimate legality so as not to compromise the dissemination of ideas. When the government seizes only one or two copies of an allegedly obscene work for use as evidence, however, the special First Amendment rules do not apply. In such instances, there is no serious threat to speech because other copies may continue to circulate until the trial is concluded.<sup>108</sup> Rather, probable cause to believe the work is obscene or otherwise illegal is then sufficient justification for the seizure.<sup>109</sup>

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and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the State's obscenity laws." *Id.*

103. *Id.*

104. *Id.* at 67 ("At least where the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding.").

105. *Id.* at 66; see also *Alexander v. United States*, 509 U.S. 544, 552 (1993) (holding that expressive materials found obscene at trial as well as property found to be proceeds at trial could be seized).

106. *Fort Wayne Books*, 489 U.S. at 63.

107. *Id.* at 63-64.

108. See *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874-75 (1986).

109. *Id.* This holding was unanimous as the dissenting justices argued only that the facts did

Undoubtedly, a defendant is entitled to a pretrial adversarial hearing to challenge any seizure with potential First Amendment ramifications. The Court made this clear in *Heller v. New York*, which upheld the seizure of a single copy of an allegedly obscene film for use as evidence.<sup>110</sup> *Heller* concerned a skin flick seized after a judge accompanied police to a Greenwich Village theatre, bought a ticket, sat through a screening, and then immediately issued a warrant.<sup>111</sup> The police, who helpfully also attended the viewing, seized the film and arrested the theatre manager as well as the projectionist and the ticket taker, though charges against these two were later dismissed.<sup>112</sup> The manager argued in the Supreme Court that the seizure was unconstitutional because he was not afforded an adversary hearing before the seizure.<sup>113</sup> Critical to the rejection of the petitioner's argument was the Court's repeated emphasis that an adversarial post-seizure hearing was available to the theatre manager:

Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired.<sup>114</sup>

In contrast to the approach it took in *Monsanto III*, the Court did not sidestep the question of whether a probable cause hearing was required. *Heller* emphasized the point that such a hearing *was* required and *would have been* granted.<sup>115</sup> In a footnote to the passage quoted just above, the Court expressly noted that New York represented it would have granted an immediate adversarial hearing had the theatre manager made a motion.<sup>116</sup> Summarizing its holding, the Court made the availability of such adversarial hearings a necessary condition for seizing even a single copy of an expressive work:

If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the

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not establish probable cause, not that a different standard should apply. *Id.* at 884 (Marshall, J., dissenting).

110. 413 U.S. 483, 492 (1973) (noting lack of any claim that seizure "prevented continuing exhibition of the film" pending trial).

111. *Id.* at 485.

112. *Id.* at 486 & n.3.

113. *Id.* at 487.

114. *Id.* at 490.

115. *Id.* at 490-91.

116. *Id.* at 490 n.6.

seizure is constitutionally permissible.<sup>117</sup>

*Heller* thus demonstrates that the mention of the pretrial adversary hearing afforded in *Fort Wayne Books* was not fortuitous. Rather, it emphasized that providing an adversarial probable cause hearing was insufficient when the contents of entire bookstores were seized. Justice White's *Fort Wayne Books* majority was in that way remarkably respectful of the defendant's right to distribute certainly pornographic and likely obscene materials—even though they were allegedly racketeering proceeds—until trial on the ultimate issue:

It is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint, and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here. This includes specifically the admonition that probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films.<sup>118</sup>

His *Caplin & Drysdale* majority, in noteworthy contrast, implied that the Republic can ill afford to allow criminal defendants to hire expensive attorneys possessed of sufficient skill to pose a meaningful challenge to the government's case:

[A] major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises. This includes the use of such economic power to retain private counsel. . . . The notion that the Government has a legitimate interest in depriving criminals of economic power, even insofar as that power is used to retain counsel of choice, may be somewhat unsettling. But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy."<sup>119</sup>

No reason is apparent for why pornographic books and films derived from racketeering are "presumptively protected" while other assets derived from racketeering (or trafficking) are presumptively the materialization of the "economic power of organized crime."

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117. *Id.* at 492 (footnote omitted); *see also id.* at 492 n.9 (defining "prompt" as "shortest period 'compatible with sound judicial resolution'").

118. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 65–66 (1988).

119. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)) (citations omitted).

Were it not for this difference in slant, *Fort Wayne Books* would supply the answer to the question left open in *Monsanto III*. When a government seizure of allegedly forfeitable property *might* frustrate the exercise of a constitutional right, *Fort Wayne Books* requires that the government show more than mere probable cause.<sup>120</sup> Rather, it requires that the government establish the forfeitability of the contested assets by the same quantum of evidence necessary to prove the forfeiture. If the mere risk of prior restraint suffices to keep potentially obscene materials in circulation until they are definitively ruled obscene, the risk that a defendant will be denied his counsel of choice and may be unfairly convicted likewise should require proof of forfeitability before assets are restrained.<sup>121</sup>

*Monsanto III*, of course, expressly forecloses this analysis and thereby creates a dichotomy in Fourth Amendment jurisprudence. Without once citing *Fort Wayne Books*, *Monsanto III* rejected the argument that the government should have to show more than probable cause to restrain assets, reasoning that the criminal defendant himself can be seized on a showing of only probable cause.<sup>122</sup> (Of course, the same was true of the bookstore employees charged in *Fort Wayne Books* but

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120. *Fort Wayne Books*, 489 U.S. at 66.

121. Preponderance of the evidence, rather than proof beyond a reasonable doubt, would be the appropriate standard because the courts of appeals require that criminal forfeiture be established by only a preponderance of the evidence, as forfeiture is a penalty and not a charge. See *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007); *United States v. Swanson*, 394 F.3d 520, 526 n.2 (7th Cir. 2005); *United States v. Garcia-Guizar*, 160 F.3d 511, 517 (9th Cir. 1998); *United States v. Elgersma*, 971 F.2d 690, 697 (11th Cir. 1992).

122. *United States v. Monsanto (Monsanto III)*, 491 U.S. 600, 615–16 (1989) (citing *United States v. Salerno*, 481 U.S. 739 (1987) (upholding constitutionality of Bail Reform Act of 1984 which allowed *inter alia* pretrial detention without bond in cases of serious felony)). Interestingly, the government recently used that same argument to contend that an accused should not be allowed to challenge whether there is a probable cause to believe that indicted crimes underlying a forfeiture claim were committed. *United States v. E-Gold, Ltd.*, 521 F.3d 411, 420 (D.C. Cir. 2008). Specifically, the government claimed that, as the grand jury's probable cause finding is sufficient to arrest and detain the defendant, it should likewise suffice to seize his property, assuming the government can show probable cause to believe the property is linked to the charged crimes. *Id.* The court of appeals rejected that claim on the basis that property rights were of a different nature than liberty rights:

This might perhaps be a more compelling argument if the interest invaded were not only lesser, but included. However, the interests of the defendants in their property stand independent of their interests in their freedom. Defendants deprived of liberty pending trial either by imprisonment or by limitation under bail bond normally have full property rights in whatever they owned before indictment and in many, if not most, cases will retain those interests even if convicted. And they may use that property to retain counsel. . . . The historic power, indeed the necessary power, of the state to limit liberty interests of those persons as to whom probable cause exists warranting a criminal trial are normally irrelevant to other constitutional or even statutory or common law rights.

*Id.*

their books nonetheless could be seized only with additional evidence.<sup>123</sup>) This suggests that the distribution of potentially obscene materials is more important than affording the best representation to the criminally accused. There is no explanation as to why the Court believed this or why it drew no connection between *Fort Wayne Books* and *Monsanto III*, although they were decided within a few weeks of each other.

Nor is the reason for affording greater solicitude to the right to distribute pornography than to the right to retain counsel so obvious that no explanation is necessary. Certainly, Indiana's legislators were at least as motivated to remove obscenity from circulation as Congress was to deprive criminals of "economic power." Justice White's opinions considered together, however, appear to view the sale of a potentially obscene movie as more tolerable than the sale of a high-priced legal defense to a potentially guilty defendant. The obvious, if cynical, explanation is that *Monsanto III* and *Caplin & Drysdale* echo the popular misconception that expensive attorneys win the release of guilty and dangerous criminals through trickery or "technicalities" and are therefore a greater evil than obscene works.<sup>124</sup> This pernicious idea is not rooted in an unflinching commitment to bring criminals to justice but, rather, reflects a fundamental lack of faith in our criminal justice system, unbecoming of anyone involved with it.

Even if one accepts the bizarre proposition that a robust market in pornography is more socially valuable than a robust market in criminal defense attorneys, *Fort Wayne Books* and *Monsanto III* remain fundamentally irreconcilable. This is true if only because controversial speakers, like the defendant pornography peddlers in *Fort Wayne Books*, need good defense lawyers as much as they need the First Amendment to safeguard their freedom of speech.<sup>125</sup> In other words, as the right to counsel is necessary to vindicate the right to free speech, the latter can-

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123. *Fort Wayne Books*, 489 U.S. at 50-51 ("On March 19, 1984, the State of Indiana and a local prosecutor, respondents here, filed a civil action against the three corporations and certain of their employees alleging that defendants had engaged in a pattern of racketeering activity by repeatedly violating the state laws barring the distribution of obscene books and films, thereby violating the State's RICO law.").

124. See Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 709-10 (1992) (characterizing the Court's view of high-priced criminal defense attorneys as reflecting the notion that the "power to buy fancy lawyers may in fact be worse than the power to buy fancy houses, because the latter does not facilitate the commission of further crimes as the former can").

125. If, for example, the government had seized enough of *Fort Wayne Books'* money to destroy its ability to retain counsel in the racketeering prosecution, that seizure would equally threaten its ability to continue selling its books and videos. Would *that* seizure have been required to meet the Court's "special rules" for seizures implicating the First Amendment?

not be said to be more valuable than the former.<sup>126</sup> It is also true because the Fourth Amendment's protection of property does not vary depending on whether the individual invoking it is alleged to be dealing in obscenity or dealing in drugs. Property is constitutionally protected from seizure until the government demonstrates that it has good reason to seize it. Where such a seizure would impact on the exercise of some constitutional right, whether it is the right to speak freely or the right to hire defense counsel, an adversary hearing should be conducted with the utmost care and with a healthy skepticism for the government's allegations.

## VI. THE FOURTH AMENDMENT IN SIXTH AMENDMENT CASES

Accepting for the sake of argument the different treatment that *Monsanto III* and *Fort Wayne Books* inexplicably provide for seizures impacting the right to distribute expressive works and those impacting the right to retain counsel, *Fort Wayne Books* is nonetheless instructive on the question left open in *Monsanto III*.<sup>127</sup> Understanding pretrial restraints of contested assets earmarked for attorney's fees as Fourth Amendment seizures that directly infringe upon the right to counsel rather than as direct violations of the Sixth Amendment clarifies the procedures and burdens that must be satisfied. *Fort Wayne Books*, relying on *Heller*, emphasizes that an adversarial hearing must be promptly provided whenever a defendant contests a seizure.<sup>128</sup> The government must present evidence substantiating both the underlying charges and the forfeitability of the assets.<sup>129</sup> Under *Monsanto III*, the government can

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126. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–52 (2006) (holding that denial of counsel of choice is structural error not subject to harmless-error review); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 644–48 (1989) (discussing importance of the right to retain private counsel of choice) (Blackmun, J., dissenting); *United States v. Lewis*, 759 F.2d 1316, 1326 & n.3 (8th Cir. 1985) (collecting cases on the rights of nonindigent defendants to counsel of choice).

127. It should be emphasized, however, that the inconsistency between *Fort Wayne Books* and *Monsanto III* is absurd. If allegedly obscene works cannot be removed from circulation without proof of their obscenity, then the government should not be able to restrain assets without proof of their forfeitability. It is difficult to believe that the Constitution provides that American society can *never* be deprived of any pornography—even temporarily until trial—but readily tolerates, despite the Sixth Amendment, convictions of some innocent people who were deprived of the means to defend themselves. The *Fort Wayne Books* rationale should be applied to require that assets intended for attorney's fees cannot be restrained without proof by a preponderance of the evidence that they will be forfeited.

128. See, e.g., *Fort Wayne Books*, 489 U.S. at 63 (discussing cases invalidating seizures of books “without a prior adversarial hearing on their obscenity”); *id.* at 67 (holding that the “presumption that expressive materials are protected by the First Amendment . . . is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding”).

129. *Id.* at 66 (“The elements of a RICO violation other than the predicate crimes remain to be



meet its burden by showing probable cause that the crimes were committed and that the contested assets are proceeds or instrumentalities. Just as a defendant in an obscenity case need not demonstrate a need to sell titillating books or videos,<sup>130</sup> a drug or racketeering defendant should not have to demonstrate that he needs contested assets to pay his attorney. It is enough that the defendant merely *wishes* to use the contested assets to fund his defense.<sup>131</sup> Only the Eleventh Circuit provides none of these protections.<sup>132</sup>

The presumption that the government cannot seize any property in one's possession without satisfying the Fourth Amendment is as venerable as the presumption that all expressive works are protected by the First Amendment. That the underlying purpose of government is to protect individual property rights is central to the notion of "unalienable Rights" upon which America's sovereignty was first rooted.<sup>133</sup> Indeed, the common law's regard for property predates American independence: "The great end, for which men entered into society, was to secure their property."<sup>134</sup> For this reason, the common law, even before adoption of the Fourth Amendment, provided that one whose property was seized was entitled to immediately challenge the seizure.<sup>135</sup> Moreover, the maxim that "possession is nine-tenths of the law" has been integral to the development of American property law, suggesting that a defendant's possession of property is entitled to consideration and ought to be decisive where the government offers no proof to support a forfeiture claim.<sup>136</sup>

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established in this case; e.g., whether the obscenity violations by the three corporations or their employees established a pattern of racketeering activity, and whether the assets seized were forfeitable under the State's CRRA statute. Therefore, the pretrial seizure at issue here was improper.").

130. A defendant in such a case, for example, would never be forced to demonstrate that the books or videos he is selling are not otherwise available to those wishing to buy them pending trial.

131. Not requiring any showing of need will ensure a healthy market in criminal defense attorneys in the same way that not requiring a showing of need to sell pornography ensures a healthy market of expressive works.

132. See *supra* notes 42-47 and accompanying text.

133. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); William Michael Treanor, *Taking the Framers Seriously*, 55 U. CHI. L. REV. 1016, 1020 (1988).

134. *Entick v. Carrington*, (1765) 19 Howell's State Trials. 1029, as reprinted in (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint).

135. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 82 (1969). Federal Rule of Criminal Procedure 41(g) now codifies this procedure. FED. R. CRIM. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."). The Eleventh Circuit, in *Bissell*, seemed to understand this, as it noted without elaboration that the defendants failed to make a motion pursuant to Rule 41. See *United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989).

136. See, e.g., *Bradshaw v. Ashley*, 180 U.S. 59, 63 (1900) ("Generally speaking, the presumption is that the person in possession is the owner . . . . If there be no evidence to the

The Fourth Amendment, which embodies the common law's solicitude for property rights, does not afford books and videos greater protection than other types of property.<sup>137</sup> Their seizure does not require a prompt, adversarial hearing because of their nature as expressive works but more precisely because seizing that type of property implicates another constitutional right, the right to free speech. (The seizure of a political blogger's computer, for example, would undoubtedly trigger the same protections even though the computer itself is not an expressive work.) In that sense, seized books are constitutionally indistinguishable from assets that may be used to exercise the Sixth Amendment right to counsel. Just as the law leaves no doubt that a bookseller is absolutely entitled to an adversary probable cause hearing if even one copy of a book is seized, so too must a criminal defendant be guaranteed a hearing to contest the seizure of any asset that might fund his defense. This is true regardless of whether he has other assets, just as the bookseller is entitled to a hearing even if he retains other copies of a seized book.

Following the Tenth Circuit's lead, some courts of appeals provide adversarial hearings to challenge a seizure only for defendants who show they need the contested assets to fund their defense.<sup>138</sup> This allows the government to seize relatively wealthy defendants' assets without a hearing, while relatively poor defendants are entitled to a hear-

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contrary, proof of possession, at least under a color of right, is sufficient proof of title."); Ricard v. Williams, 20 U.S. 59, 105 (1822) ("Undoubtedly, if a person be found in possession of land, . . . it is prima facie evidence of his ownership . . ."); see also OLIVER WENDELL HOLMES, THE COMMON LAW 241 (1881) ("The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights . . ."). But see *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989) ("Although we are familiar with the maxim, 'possession is nine-tenths of the law,' we prefer to apply the remaining one-tenth [in the context of an *in rem* forfeiture action] . . .").

137. See Bascuas, *supra* note 66 (arguing that Fourth Amendment protects property and protects all types of property equally).

138. See *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) ("As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family."). The Sixth Circuit recently affirmed a district court's use of the *Jones* test. Though neither the government nor the defendant disputed the validity of *Jones*, the Sixth Circuit expressly stated that a pretrial hearing was constitutionally required, noting "that the opportunity to be heard is non-existent when a district court grants a restraining order based only on the indictment." *United States v. Jamieson*, 427 F.3d 394, 407 (6th Cir. 2005). The Seventh Circuit has yet to decide whether a post-restraint, pretrial hearing is required but has held that none is required if a defendant's family can pay his lawyer. *United States v. Kirschenbaum*, 156 F.3d 784, 793 (7th Cir. 1998). The D.C. Circuit has not decided whether defendants should be entitled to a hearing even "when the assets are not necessary to obtaining counsel of choice." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 421 (D.C. Cir. 2008).

ing.<sup>139</sup> This is not an insignificant problem but a constitutional one. In effect, the government and the courts can dictate which assets a relatively wealthy defendant can transfer and which he cannot, potentially forcing the defendant to liquidate assets he would prefer to keep—such as his house, family heirlooms, or jewelry or art of sentimental value.<sup>140</sup>

The *Jones* requirement thus causes the Fourth Amendment's protections to vary according to wealth only to spare the government and the courts the trouble of a constitutionally mandated hearing. A relatively wealthy defendant should not be forced to liquidate uncontested assets based on the government's bare assertion that his other, more liquid, less sentimental assets are forfeitable. This is akin to seizing all copies of an allegedly obscene book and advising the bookseller that he is free to exercise his First Amendment rights by selling other books in his store.

Thus, a defendant's desire to use contested assets to fund his defense suffices to invoke the most scrupulous application of Fourth Amendment protections. Forcing a defendant to part with assets he would prefer to keep without requiring the government to so much as demonstrate probable cause in an adversarial hearing denigrates presumptive property rights while burdening the right to select counsel. The *Jones* court's denial of a hearing until a defendant demonstrates financial need for contested assets cannot be squared with the heightened Fourth Amendment procedures afforded purveyors of potentially obscene works.

Reconceptualizing pretrial asset seizures on the model prescribed by *Fort Wayne Books* leaves no doubt that, despite *Monsanto III*'s failure to reach the issue, a hearing must be provided. It also requires that the government adduce evidence to support the underlying charges and the forfeitability of the contested assets if the defendant wishes to use them for his defense. Furthermore, it leads to the conclusion that defense attorneys paid with assets that the government has not already shown to be forfeitable are bona fide purchasers for value. In other words, it relieves defense attorneys of the obligation to investigate the source of their legitimately earned fees and treats them just as other providers of goods and services are treated.

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139. *Kirschenbaum*, 156 F.3d at 792 (affirming denial of hearing where defendant did not demonstrate that wife or other family members would not fund defense).

140. It is worth noting that the *Fort Wayne Books* and *Monsanto III* dichotomy produces absurd results in this context. The defendants in *Fort Wayne Books* could continue selling the allegedly forfeitable books, absent proof from the government as to their forfeitability. They could thus fund their representation by continuing to deal in potentially obscene works. Under *Bissell*, however, other defendants cannot similarly fund their defense because the contraband they sell is not even arguably an expressive work.

## VII. DEFENSE ATTORNEYS AS BONA FIDE PURCHASERS FOR VALUE

A further Fourth Amendment problem with the prevailing interpretation of the forfeiture statutes is that it allows assets to be forfeited whenever they are transferred to someone who knew of the government's forfeiture allegations. This allows the government to take any contested assets paid to a defense attorney, who was naturally aware of the allegations, at the end of the case. Worse, nothing currently prevents the government from claiming those assets even in cases in which it failed to establish prior to trial probable cause to restrain the assets. Of course, few if any attorneys would do work in exchange for contested assets in such circumstances.<sup>141</sup> An accused can thereby be effectively precluded from retaining counsel with contested assets, even when courts afford an adversarial hearing and the government fails to meet its burden.<sup>142</sup> The flaw in this interpretation is that awareness of government allegations cannot be sufficient reason to disqualify an attorney, or anyone else, from being a bona fide purchaser of contested assets.

The Fourth Amendment requires, rather, that the government's failure to establish probable cause signify that individuals with actual knowledge of the government's unsubstantiated allegations can accept contested assets as payment for legitimate services without fear of having them later disgorged. This is so because the Fourth Amendment bars seizures of property without probable cause,<sup>143</sup> and preventing a defendant from using assets presumptively belonging to him to hire an attorney amounts to a seizure. Thus, until the government establishes its claim by a sufficient evidentiary showing, a defendant cannot be prevented from exchanging, nor an attorney from accepting, contested assets as payment for legitimate services. Requiring that probable cause be demonstrated before an accused is deprived of the use of his money will of course put some money that would otherwise have been forfeited into the pockets of defense attorneys.<sup>144</sup> But, under our system of justice, the consequences of postponing or failing to make the requisite

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141. See *supra* note 17.

142. See *United States v. McCorkle*, 321 F.3d 1292, 1295 n.4 (11th Cir. 2003) (suggesting in dicta that an attorney ceases to be even arguably a bona fide purchaser with regard to legal services rendered when he learns that his client is indicted and "learns additional information about his client's guilt"). While it suggests that an indictment alone will not suffice, *McCorkle*'s vague criteria begs the question of just what "additional information" would suffice to disqualify a creditor as a bona fide purchaser.

143. *Soldal v. Cook County*, 506 U.S. 56, 66 (1992) (holding that seizures of property "can be justified only if they meet the probable-cause standard and if they are unaccompanied by unlawful trespass") (internal citations omitted).

144. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (discussing Congress's intent to lessen the economic power of criminal enterprises, including the use of such power to retain private counsel).

probable cause showing must necessarily fall upon the government, not the lawyer providing legitimate advocacy.<sup>145</sup>

The racketeering and drug-crime forfeiture statutes can readily be interpreted to avoid any Fourth Amendment problem, but they have not been so interpreted. Both require that one to whom funds have been transferred establish 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 . . . ."<sup>146</sup> The phrase "subject to forfeiture" is ambiguous. In this context, it is susceptible of two interpretations. "Subject to" can denote a *potential* eventuality ("packages are subject to search") or a *necessary* eventuality ("animals are subject to aging").

Most circuits, including the Eleventh, adopt the former interpretation, contending that any assets that *potentially* might be forfeited must be preserved in case the jury finds guilt. This means that a criminal defense attorney can never be a "bona fide purchaser" under the forfeiture statutes because he is necessarily aware that the assets *might be* forfeited.<sup>147</sup> This interpretation of the statutes thus puts the onus of investigating a defendant's funds on the defense attorney rather than on the government, for example, prompting Roy Black to hire Ben Kuehne. So, without having to adduce even enough evidence to convince a judge that there is probable cause to believe the contested assets will be forfeited, the government by mere allegation prevents a defendant from using his assets to hire an attorney.

This result is every bit as much a "meaningful interference with an individual's possessory interests"<sup>148</sup> as the government's taking a representative copy of an allegedly obscene book. In fact, it is much more like the seizure of an entire store of books for the purpose of preventing their circulation. Seizing a representative copy of an expressive work at most chills speech by discouraging the defendant and perhaps other purveyors of controversial works from continuing to sell other copies. Preventing a defendant from hiring his counsel of choice does not merely chill the exercise of the right to counsel but totally frustrates it.<sup>149</sup> Like the bookstore seizures in *Fort Wayne Books*, it is an unconsti-

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145. This is equally true where the government makes the strategic decision to forego a pretrial restraint to avoid disclosing its evidence in an adversarial pretrial hearing.

146. 18 U.S.C. § 1963(c) (2000); 21 U.S.C. § 853(c) (2000).

147. *United States v. Bissell*, 866 F.2d 1343, 1349 n.5 (11th Cir. 1989) ("It is unlikely that an attorney will ever achieve [bona-fide-purchaser-for-value] status since he is the most likely person to appreciate the forfeitability of his client's assets.").

148. *Soldal*, 506 U.S. at 61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

149. The fact that the government will supply the defendant with a lawyer of *its* choosing, *see* *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963), is entirely beside the point. The Sixth

tutional interference with property rights that is only compounded by the fact that it is intended to foreclose the exercise of another constitutional right.

However, if “subject to” is interpreted in the stricter sense, then the government’s mere assertion of forfeitability would not suffice to render anyone aware of the charges ineligible for bona fide purchaser status. Assets that the government claims *might be* forfeited would not be “subject to” forfeiture. Rather, to satisfy the statutory condition, an independent, neutral judge would have to preside over an adversary hearing and find that there exists at least probable cause to believe the particular assets *will be* forfeited. Only then would a defense attorney cease to be “reasonably without cause to believe” that forfeiture will ensue. Ordinarily, any fees earned prior to that judicial determination would belong to the attorney as a bona fide purchaser for value.<sup>150</sup> This understanding relieves the defense bar of having to investigate client assets, a burden that the Fourth Amendment places squarely on the sovereign.

The stricter interpretation of “subject to forfeiture” is consistent with *Caplin & Drysdale* and *Monsanto III*. In *Caplin & Drysdale*, the defendant paid his attorneys with money that had been restrained.<sup>151</sup> Whether the law firm was entitled to be paid for work performed *before* the government established probable cause to believe the defendant’s assets were forfeitable was not at issue in either the Supreme Court or the Fourth Circuit.<sup>152</sup> On the contrary, the law firm conceded that the assets in question were forfeitable because it sought payment for work done *after* the defendant pled guilty.<sup>153</sup> Likewise, in *Monsanto III*, the

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Amendment protects the right of a defendant to hire whatever counsel *he* prefers. See *supra* note 126.

150. One can imagine extraordinary cases where a defense attorney or other creditor learns that he is being paid with tainted funds despite the government’s lack of evidence. Cf. *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665–66 (4th Cir. 1996) (affirming forfeiture from law firm that accepted \$103,800 in legal fees paid in cash under “to put it mildly, highly suspicious” circumstances). Accepting payment in such a situation would in any event likely expose the individual accepting the funds to money-laundering charges. See 18 U.S.C. § 1956 (2000). The point is that in our adversarial system a defense attorney has no more duty than any other creditor to investigate the source of his client’s money. That is the government’s responsibility.

151. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 620 (1989); see also *id.* at 640 n.7 (characterizing the majority holding as authorizing the seizure of assets on a showing of probable cause) (Blackmun, J., dissenting).

152. See *Caplin & Drysdale, Chartered*, 491 U.S. at 617–35; *In re Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

153. *In re Caplin & Drysdale, Chartered*, 837 F.2d at 642 (“The specific listing of the assets in the indictment and the payment of their fee in cash gave the attorneys representing Reckmeyer ample cause to know that the funds were forfeitable under 21 U.S.C. § 853. They have acknowledged that they have no claim to make under the clear terms of § 853(n).”) In fact, the

Court made it expressly clear that assets can be frozen only "based on a finding of probable cause to believe that the assets are forfeitable."<sup>154</sup> Thus, neither *Monsanto III* nor *Caplin & Drysdale* forecloses interpreting "subject to forfeiture" as requiring more than awareness of the government's allegations to disqualify a defense attorney as a bona fide purchaser.

Interpreting "subject to forfeiture" as calling for the constitutionally required probable cause finding is also consistent with the purpose underlying the statutes' exception for bona fide purchasers for value.<sup>155</sup> The statutes would still operate to keep the accused from transferring assets in exchanges that are not at arm's length—precisely those that are typically distinguished from bona fide transactions.<sup>156</sup> It would recognize, in contrast to current law, that defense attorneys undertake valuable work—indeed, constitutionally required work—in arm's-length transactions and are as entitled to compensation as anyone else.<sup>157</sup>

### VIII. CONCLUSION

Any statutory scheme that allows the government to prevent a criminal defendant's retention of counsel on the basis of untested allegations raises Fourth Amendment problems. It incorrectly presumes that the government can prevent the alienation of property, thereby seizing it, without making any evidentiary showing. This same problem persists when preclusive effect is not given to the government's failure to adduce evidence sufficient to justify a seizure at a pretrial adversarial hearing. Such asset seizures have a pernicious effect on the criminal justice system by introducing conflicts into the attorney-client relationship and, in turn, undermining the adversarial nature of our system of justice.<sup>158</sup>

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court of appeals' opinion arguably suggests that the law firm was treated just as any other third-party claimant, i.e., without ascribing significance to its awareness of the government's allegations. *Id.* at 641 ("The clear terms of the statute subject a defendant's assets to forfeiture without regard to whether he intends to use them to pay an attorney. Similarly, the statute exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys.").

154. *United States v. Monsanto (Monsanto III)*, 491 U.S. 600, 615 (1989).

155. 18 U.S.C. 1963(c), (l)(6)(B) (2000).

156. *See* S. REP. NO. 98-225, at 200-01 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3383-84 (stating that purpose of forfeiture provisions was "to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arm's length' transactions.").

157. This reading eliminates any need to craft differing rules for money to be used for attorney's fees as opposed to food, medicine, or housing. *See Fork, supra* note 11, at 234-37 (proposing statutory interpretation premised on asserted lack of congressional intent to expose attorney's fees to forfeiture).

158. Any statutory scheme that requires defense attorneys to investigate prospective clients to determine whether their attorney's fees are paid from criminal proceeds or are commingled with criminal proceeds raises the objection that it unconstitutionally undermines the adversarial

Finally, it discourages talented attorneys who would otherwise pursue criminal defense work from undertaking such representation, just as seizures of controversial books and videos can chill freedom of expression.

Less than two months after Ben Kuehne's indictment sparked outrage, the United States indicated that it was considering a voluntary dismissal of the charges.<sup>159</sup> As of this writing, the case remains pending. Even if the charges are eventually dismissed, the case already has shown how the courts' failure to put the government to the burden imposed upon it by the Fourth Amendment emboldens prosecutors to undermine the procedures of justice in pursuit of a desired end result.<sup>160</sup> Analyzing the seizure of contested assets earmarked for attorney's fees as potential Fourth Amendment violations equal in gravity to the seizure of potentially obscene works would make such tactical prosecutions impossible and harmonize the confused jurisprudence governing such seizures.

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process. The Supreme Court has held that the Constitution presupposes an adversarial system and that the Fifth Amendment right against self-incrimination is intended to guarantee that. *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 7 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay."). Allowing the government to co-opt the accused's counsel as an agent of its investigation via threat of taking the attorney's earned fees (to say nothing of potentially prosecuting the attorney for money laundering) represents a substantial step toward inquisitorial justice. *Cf. Garner v. United States*, 424 U.S. 648, 655–56 (1976) ("That [adversarial] system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures."). Development of this argument, however, is beyond the scope of this article.

159. John Pacenti, *New Prosecutors Consider Dropping Some Charges Against Attorney Accused of Laundering Drug Profits*, LAW.COM, Mar. 28, 2008, <http://www.law.com/jsp/article.jsp?id=1206614816222>.

160. The Kuehne prosecution shows that Justice Blackmun's grim predictions of how forfeiture would be used to undermine the availability of counsel fell short of what has occurred: "The Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf—the attorney who is better than what, in the Government's view, the defendant deserves." Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 650 (1989) (Blackmun, J., dissenting).