Maryland Law Review

Volume 47 | Issue 1 Article 36

10-11-2012

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Recommended Citation

Eric B. Easton, *United States v. Harvey: Are Criminal Defense Fees More Vulnerable Than Necessary?*, 47 Md. L. Rev. 226 (1987)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol47/iss1/36

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Note

UNITED STATES V. HARVEY: ARE CRIMINAL DEFENSE FEES MORE VULNERABLE THAN NECESSARY?

In *United States v. Harvey*[1] the United States Court of Appeals for the Fourth Circuit held that Congress may not constitutionally require convicted racketeers and drug traffickers to forfeit property used to pay legitimate defense attorney fees.[2] To the extent that such forfeitures and related pre-conviction restraints on transfer are authorized by provisions of the Comprehensive Forfeiture Act of 1984[3] (the Act), those provisions violate an accused's right to counsel of choice as secured by the sixth amendment.[4]

In so holding, the court repudiated the prevailing view among district courts that Congress never intended the Act's forfeiture provisions to apply to legitimate attorney fees.[5] The court also rejected arguments that the Act violates an accused's basic sixth amendment

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1. 814 F.2d 905 (4th Cir. 1987). The Fourth Circuit consolidated three cases for the purposes of this appeal: United States v. Harvey, No. CR-85-224-A (E.D. Va. Nov. 8, 1985); United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986); and United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986). After the three-judge panel issued its decision, the United States sought and was granted an en banc rehearing in *Reckmeyer*. Defendant Harvey was denied a similar petition in his case; no petition for rehearing was filed in *Bassett*. The Fourth Circuit sitting en banc reheard *Reckmeyer* on October 6, 1987. No opinion had been issued when this note went to press.

2. *Id.* at 926.

3. Pub. L. No. 98-473, Title II, ch. 3, 98 Stat. 1976, 2040 (1984) (codified at 18 U.S.C. § 1963 and 21 U.S.C. §§ 848, 853 (1982)). The Act was but one chapter in the massive Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1976 (1984), which was the result of years of work by both houses of Congress to improve and modernize federal criminal laws. In addition to changing the forfeiture provisions, this statutory overhaul reformed sentencing and bail laws, and amended drug penalty and insanity defense statutes. *See* S. REP. No. 225, 98th Cong., 1st Sess. 1-3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3184.

The forfeiture provisions have not been the only statutory changes to invite constitutional attack. The Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. 1, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-3150 and scattered other sections of 18 and 28 U.S.C. (Supp. III 1985)), recently withstood fifth and eighth amendment challenges in United States v. Salerno, 107 S. Ct. 2095 (1987). For a critical analysis of the Bail Reform Act, see Comment, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378 (1987) (authored by Kevin F. Arthur).

4. 814 F.2d at 926.

5. *Id.* at 914. Just four days before the *Harvey* decision was issued, the United States District Court in Utah also rejected this statutory interpretation. In United States v. Nichols, 654 F. Supp. 1541 (D. Utah 1987), Chief Judge Jenkins concluded that the Act's authors "clearly considered the effect of the bill on a defendant's ability to pay counsel

right "not to be denied *any* counsel"[6] or the "discrete right to the effective assistance of counsel."[7]

This note suggests that the court's holding in *Harvey* was more narrowly drawn than necessary, and that as a consequence criminal defense attorney fees now may be more vulnerable to forfeiture.

I. THE STATUTES

In an effort to "enhance the . . . sanction of criminal forfeiture, as a law enforcement tool in combatting . . . racketeering and drug trafficking,"[8] Congress enacted the Comprehensive Forfeiture Act in October 1984. The Act substantially strengthens the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)[9] and the Continuing Criminal Enterprise Statute (CCE)[10] in order to "strip . . . offenders and organizations of their economic power."[11]

Specifically, the Act expands the definition of property that may be subject to forfeiture upon conviction to include any real or per-

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of choice" and disagreed among themselves as to how that issue should have been resolved:

> The fact that there is no mention in the Act that attorneys' fees are exempt from the restraining order can only mean that those who favored no exemption for attorneys' fees prevailed. The literal language of the statute cannot be read to create a special category of transfers and thus to exempt attorneys' fees, whether legitimately paid or not. The only issue Congress left to the courts was whether or not the provision, as written to encompass attorneys' fees, is constitutional.

Id. at 1556 (footnote omitted). Judge Jenkins ultimately held that the forfeiture provisions violate a defendant's sixth amendment right to counsel of choice and are thus unconstitutional as applied to funds or property reasonably necessary to pay attorney fees. *Id.* at 1562. While the *Harvey* opinion makes no reference to *Nichols*, Judge Jenkins had the benefit of the briefs submitted by the parties in *Harvey*. *Id.* at 1550 n.12.

6. 814 F.2d at 922 (emphasis in original).

7. *Id.*

8. S. REP. No. 225, 98th Cong., 1st Sess. 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374.

9. 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985) (originally enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970)).

10. 21 U.S.C. §§ 848, 853 (1982 & Supp. III 1985) (originally enacted as part of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970)).

11. S. REP. No. 225, 98th Cong., 1st Sess. 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374. The Senate Report cited a 1981 General Accounting Office report entitled *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking* to show the inadequacies of then-existing forfeiture provisions. "This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." S. REP. No. 225, 98th Cong., 1st Sess. 192, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3375.

sonal, tangible or intangible property or interests "constituting, or derived from, any proceeds which the person obtained, directly or indirectly" from racketeering or drug trafficking.[12] Under the Act's "relation back" provision, the government's interest in property subject to forfeiture now arises when the charged offense is committed, rather than upon conviction.[13] The government is authorized to protect that interest through pre- or post-indictment restraining orders or injunctions prohibiting property transfers.[14]

Third parties claiming an interest in property subject to forfeiture are precluded from intervening in the trial or appeal, or from challenging in a separate action the government's interest.[15] Although the Act does provide an opportunity for third-party claimants to petition the court for post-conviction proceedings to adjudicate the validity of their claims,[16] Congress recognized only two justifications for exempting property from forfeiture. First, property is not subject to forfeiture if a third party demonstrates an interest superior to that of the defendant at the time of the crime.[17] Second, no property may be seized from a bona fide purchaser for value who, at the time of purchase, was reasonably without cause to believe the property was subject to forfeiture.[18]

Although attorney fees are not explicitly mentioned in the Act,[19] there seems to be no dispute that an attorney's paid representation would constitute a bona fide purchase for value[20] *but for* the attorney's special and necessary knowledge of both the forfeiture law and the sources of the client's property.[21] It is precisely this dilemma that gives rise to the controversy and the constitutional implications in the forfeiture cases. In each of the three cases consolidated for purposes of appeal in *Harvey*, the government invoked the forfeiture provisions in ways that could have prevented defendants from paying legitimate attorney fees, or prevented defense counsel from retaining fees already paid.[22]

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12. 18 U.S.C. § 1963(a)-(b), 21 U.S.C. § 853(a)-(b) (Supp. III 1985).
13. 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (Supp. III 1985).
14. 18 U.S.C. § 1963(e), 21 U.S.C. § 853(e) (Supp. III 1985).
15. 18 U.S.C. § 1963(j), 21 U.S.C. § 853(k) (Supp. III 1985).
16. 18 U.S.C. § 1963(m), 21 U.S.C. § 853(n) (Supp. III 1985).
17. 18 U.S.C. § 1963(m)(6)(A), 21 U.S.C. § 853(n)(6)(A) (Supp. III 1985).
18. 18 U.S.C. § 1963(m)(6)(B), 21 U.S.C. § 853(n)(6)(B) (Supp. III 1985).
19. 814 F.2d at 913.
20. *Id.* at 914-15 n.4.
21. *Id.* at 915.
22. *Id.* at 910.

II. THE CASES

In *United States v. Reckmeyer*[23] the United States District Court for the Eastern District of Virginia granted defense counsel's third-party petition to modify a post-conviction forfeiture order to permit the payment of attorney fees. Defendant Reckmeyer's assets had been frozen by a restraining order issued one day before his indictment under the CCE statute. Money to cover legal expenses incurred through indictment was placed in escrow. Upon conviction, a forfeiture order was entered encompassing virtually all of the assets that could have been used to pay attorney fees.[24]

The court directed the government to pay defense counsel out of forfeited assets on the ground that Congress did not intend the forfeiture provisions to include legitimate attorney fees, but only those fees that were "illusory and fraudulent transfers" designed solely to avoid forfeiture.[25] The court's conclusion was predicated on the Act's legislative history and was further supported by the court's concern that a contrary interpretation would violate a defendant's sixth amendment right to counsel of choice.[26]

In *United States v. Bassett*[27] the United States District Court for the District of Maryland granted a motion by defendants in a heroin trafficking case to exempt their attorney fees from forfeiture under the provisions of the CCE statute. The prosecutor had advised counsel by letter after the indictment was returned that the government would seek forfeiture of the fees upon conviction.[28] The court arrived at essentially the same conclusion, and for essentially the same reasons, as had the *Reckmeyer* court just days earlier.[29]

The government's appeals from these two decisions were consolidated by the court of appeals with the appeal of defendant Har-

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23. 631 F. Supp. 1191 (E.D. Va. 1986), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).

24. *Id.* at 1193.

25. *Id.* at 1196.

26. *Id.* at 1195-96.

27. 632 F. Supp. 1308 (D. Md. 1986), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).

28. *Id.* at 1309.

29. *Id.* at 1317. The *Harvey* court distinguished the *Bassett* and *Reckmeyer* decisions:

> Unlike the court in *Bassett*, which found that the Government could not reach assets held by *any* third parties unless the transfer was a sham or otherwise fraudulent, the district court [in *Reckmeyer*] found only that Congress did not intend for *bona fide* attorneys fees to be subject to forfeiture under the CCE.

814 F.2d at 912. Even if there is some basis in the district court decisions for drawing this distinction, it is a distinction without a difference. Both cases dealt only with legitimate attorney fees; no other third-party transfers were at issue.

vey from his 1985 conviction under both RICO and CCE statutes.[30] Harvey contended, *inter alia*, that the trial court's refusal to exempt attorney fees from forfeiture violated his sixth amendment right to counsel of choice.[31]

The court of appeals affirmed the exemption of attorney fees from forfeiture in both *Bassett* and *Reckmeyer*, although on constitutional rather than statutory grounds.[32] The court declined to reverse Harvey's conviction, however, despite the validity of his constitutional challenge, for reasons relating to the particular facts of his trial.[33]

III. STATUTORY INTERPRETATION

Before reaching the sixth amendment question, the court of appeals explicitly rejected the notion that Congress intended to exempt legitimate attorney fees from the reach of the Act's forfeiture provisions.[34] The court found the language of the Act so clear, and

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30. United States v. Harvey, No. CR-85-224-A (E.D. Va. Nov. 8, 1985), *aff'd*, 814 F.2d 905 (4th Cir. 1987).

31. 814 F.2d at 913. Harvey also argued that a pre-conviction restraining order prohibiting use of his assets to retain counsel of his choice violated his procedural due process rights under the fifth amendment. The court of appeals agreed, but it found that the violation implicated only the deprivation of property that Harvey suffered in the absence of an "adequate post-deprivation hearing within a meaningful time." *Id.* at 931. Consequently, reversal of Harvey's conviction would not be an appropriate remedy, the court said, adding that the subsequent jury determination of forfeitability rendered entry of the restraining order harmless error. Harvey would not be entitled to vacation of the order as long as the conviction and accompanying order of forfeiture stood. The court declined to consider whether Harvey might be entitled to a civil remedy for the temporary violation of his due process rights. *Id.* This note will not discuss the procedural due process question.

32. *Id.* at 929-30.

33. *Id.* at 930. After issuing a restraining order barring Harvey from using any of his property until the conclusion of trial and all appeals, and refusing to exempt attorney fees from that order, the trial court appointed substantially the same defense team as Harvey had retained before the order. The court of appeals found denial of counsel of choice "at least arguable" under these circumstances. *Id.* Recognizing, however, that Harvey might not have received the same legal *service* he would have received without the restraining order, the court affirmed the conviction without prejudice to Harvey's right to challenge the conviction on constitutional grounds in collateral proceedings. Such proceedings, the court said, would provide the proper context for deciding whether the reduced fees and support resources allowed under the appointment order significantly diminished the effectiveness of counsel. *Id.* at 930-31. The trial court had denied most of defense counsel's motions to increase the number of attorneys appointed and to retain various experts with public funds. As a result, the defense argued that its "preparation for trial bore no resemblance to the preparation that normally would and should, but could not, be undertaken prior to a trial of this magnitude." *Id.* at 912.

34. *Id.* at 913.

so plainly to the contrary, as to preclude any resort to legislative history for guidance in statutory interpretation.[35]

Acknowledging that most of the district courts addressing the issue believed otherwise,[36] the court undertook its own survey of the legislative history. While agreeing with *Bassett* and *Reckmeyer* that Congress primarily intended the Act to preclude "sham and fraudulent transfers,"[37] the court found nothing that would justify limiting the scope of the forfeiture provisions to such transactions. Quite the contrary, the court found a "clear congressional intent to make voidable a wider range of asset transfers."[38]

Finally, the court refused to find that merely raising serious constitutional questions justified a "saving" interpretation of the Act by the courts.[39] Although courts are bound to interpret ambiguous statutes in a way most consistent with constitutionality, the court found no ambiguity here.[40]

IV. THE SIXTH AMENDMENT

The court then turned to the sixth amendment questions raised by the parties and the various district courts:[41]

First and, in light of the court's ultimate decision, foremost, is the defendant's qualified right to counsel of choice violated by orders that restrain transfer of legitimate attorney fees or by the threat

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35. *Id.*

36. *Id.* at 913 n.3. The court cited United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985) (expressly disagreeing with *Payden*, cited *infra*, from the same district); and United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985). The court cited as contrary authority United States v. Harvey, No. CR-85-224-A (E.D. Va. Nov. 8, 1985) (affirmed on this appeal); and *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (*Payden*), 605 F. Supp. 839 (S.D.N.Y. 1985) (expressly disagreeing with *Rogers* analysis).

37. 814 F.2d at 916.

38. *Id.* at 917.

39. *Id.*

40. *Id.* at 918.

41. *Id.* at 918-19. The court also considered the substantive due process right to a fundamentally fair trial under the fifth amendment, but treated it as so closely related to the sixth amendment right to effective assistance of counsel as to present no truly separate issue. *Id.* at 922. As Justice O'Connor explained:

> The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Strickland v. Washington, 466 U.S. 668, 684-85 (1984).

of ultimate forfeiture, because private attorneys will decline such cases without some assurance that they will be paid?[42]

Next, is the basic sixth amendment right to counsel jeopardized if the potential for forfeiture renders a defendant unable to retain private counsel, yet not so indigent as to qualify for a court-appointed attorney?[43]

Finally, even when private counsel is retained, is a defendant's right to the effective assistance of counsel threatened by conditioning the attorney's payment upon ignorance of the source of the client's assets or their potential forfeitability?[44]

The court answered the last of these questions with a single paragraph endorsing the position of the government and others[45] that the effectiveness of counsel, and the corresponding fifth amendment right to a fundamentally fair trial, could only be determined after conviction, precluding any earlier constitutional challenge to the Act.[46] The court gave the second question equally short shrift by suggesting that a defendant's inability to obtain any counsel at all simply could not arise absent judicial abuse.[47] Only

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42. 814 F.2d at 921. The court cited Powell v. Alabama, 287 U.S. 45, 53 (1932), as exemplary authority for the right to counsel of choice. In *Powell*, the notorious "Scottsboro Boys" case, seven black defendants were convicted in Scottsboro, Alabama, of raping two white girls on a train. The United States Supreme Court reversed the conviction on the ground that the trial court's failure to give the defendants "reasonable time and opportunity to secure counsel was a clear denial of due process." *Id.* at 71. In his opinion for the Court, Justice Sutherland asserted that the opportunity to which a defendant is entitled is a "fair opportunity to secure counsel of his choice." *Id.* at 53.

Since *Powell* the right to counsel of choice has been refined primarily by decisions explaining just how fair that "fair opportunity" must be. Many such decisions have involved the denial of counsel of choice when exercise of that right would require a continuance. *See, e.g.*, Linton v. Perini, 656 F.2d 207, 211 (6th Cir. 1981) ("Every person has a constitutional right to retain at his own expense his own counsel so long as that right does not unreasonably interfere with the normal progress of a criminal case."); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) ("While the right to select a particular person as counsel is not an absolute right, the arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel.").

43. 814 F.2d at 921 (citing Johnson v. Zerbst, 304 U.S. 458, 463 (1938), for the "minimal or basic" sixth amendment right to counsel). Among the district court forfeiture decisions, *supra* note 36, the court singled out United States v. Badalamenti, 614 F. Supp. 194, 197 (S.D.N.Y. 1985), as raising this question in particular.

44. 814 F.2d at 921 (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)).

45. *See* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 529-32 (1986) (no sixth amendment right litigable before conviction).

46. 814 F.2d at 922.

47. *Id.* The court found the "worst possible effect" of the Act's application would only be to force indigence upon the defendant, creating a right to appointed counsel. Only a "follow-up refusal to appoint any counsel" would violate the "minimal" sixth amendment right. *Id.*

the defendant's qualified right to counsel of choice was found to be implicated by the forfeiture provisions.[48]

To reach this conclusion, the court asserted that the framers of the Constitution envisioned representation by private attorneys as the primary right secured by the sixth amendment against government encroachment.[49] It would therefore be patently unconstitutional for Congress to legislate direct restrictions on a defendant's selection of an attorney or on the amount of money that counsel could be paid. If Congress is forbidden to do so directly, the court reasoned, then it may not do so indirectly through unlimited freeze orders and the threat of forfeiture.[50]

Acknowledging that the right to counsel of choice may be limited by countervailing governmental interests,[51] the court nevertheless reached the same conclusion by balancing individual against governmental interests in the context of criminal forfeiture. Because the right to counsel was created to protect the guilty as well as the innocent, the court argued, it must have been created with the certain knowledge that ill-gotten gains would be used to exercise it.[52] Therefore, the government's interest in deterrence, in preserving its property, and in stripping racketeers of their economic base must yield to the defendant's interest in using assets to retain counsel, even if those assets are tainted by crime.[53]

V. ANALYSIS

To be sure, the *Harvey* decision substitutes a clear constitutional mandate for a rather strained statutory interpretation as the justification for courts' exempting legitimate attorney fees from RICO

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48. *Id.* at 922-23. The court suggested that the government, the defendants, and the parties all found the right to counsel of choice to be the sixth amendment component "most seriously drawn in issue by the forfeiture of attorneys' fees." *See id.*

49. *Id.* at 923. The court cited Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), in which the Sixth Circuit had declared:

> The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.

50. 814 F.2d at 924.

51. *Id.* Judge Phillips cited his own opinion in Sampley v. Attorney General, 786 F.2d 610, 613 (4th Cir. 1986), in which he had stated, "The limit of the right [to counsel of choice] is necessarily found in the countervailing [governmental] interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis. . . ."

52. 814 F.2d at 924-25.

53. *Id.* at 925.

and CCE forfeiture provisions.[54] Nevertheless, one is left with the uneasy feeling that the exemption is on a less secure footing than it might have been.[55]

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54. The court's rejection of the prevailing view that the Act's forfeiture provisions were never meant to touch legitimate attorney fees is quite compelling, whether the analysis is by rules of statutory construction or by recourse to legislative history. In the latter vein, the court might have added that the Act's authors cited with apparent approval United States v. Long, 654 F.2d 911 (3d Cir. 1981), in describing the "relation back" mechanism of the Act. S. REP. No. 225, 98th Cong., 1st Sess. 200 n.28, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3383 n.28. The *Long* court, in a pre-amendment recognition of the same underlying policy, held that property derived from a violation of CCE remained subject to criminal forfeiture although transferred to the defendant's attorneys before conviction, and that an order restraining the attorneys from transferring or selling the property was properly entered.

Other courts looking back at *Long* dismissed it as inapplicable here on the ground that the transaction between Long and his lawyers appeared to have been in the nature of a "sham transfer." United States v. Bassett, 632 F. Supp. 1308, 1318 (D. Md. 1986); *see also* United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985). These courts miss the point. The note about *Long* in the Senate Report makes no allegation of sham or fraudulent transfer. For the purpose of illustrating the principle involved, it apparently made no difference to the Act's authors whether the transfer was legitimate or otherwise. Had they intended to treat the two cases differently, the distinction would surely have been raised.

55. In part, this uneasiness must derive from the court's convincing demolition of the prevailing statutory interpretation. The court itself made the point that there is comfort in the notion that Congress could not have intended to do something that seems utterly contrary to our adversary system. 814 F.2d at 914-15. Perhaps, in its quest for a constitutional holding the court abandoned statutory interpretation prematurely, giving Congress less credit than it merited.

The greater cause of this discomfort may be the court's exclusion of all save one rather frail component of the sixth amendment right to counsel upon which to base the exemption of legitimate attorney fees. The United States Supreme Court just might accept the entire *Harvey* rationale, but then find that the government's interest in depriving racketeers and drug traffickers of their booty simply outweighs a right to counsel of choice that may be exercised only by those who can afford it and is, itself, riddled with exceptions and exclusions. For a discussion of the limitations on the sixth amendment right to counsel of choice, see *infra* note 67.

In Morris v. Slappy, 461 U.S. 1 (1982), for example, the Court clearly demonstrated its hostility to any expansion of the right to counsel of choice. In the majority opinion, Justice White concededly went far out of his way to reject what he saw as a "novel Sixth Amendment right" to a "meaningful attorney-client relationship" asserted by the Ninth Circuit to justify reversal of a conviction following denial of a continuance. *Id.* at 13-14. In so doing, he appeared to "balance" the defendant's interest against "the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case." *Id.*

Notwithstanding this language, the "relationship" test urged by the Ninth Circuit arguably was not a new right at all, but merely a factor to be weighed in balancing the defendant's right to counsel of choice against the government's interest in the orderly administration of justice. *Id.* at 16-17 (Brennan, J., concurring in the result). Seen in that light, Justice White's rejection of the doctrine can be fairly viewed as supporting the proposition that the *Harvey* decision is vulnerable to reversal on the facts even if the legal logic were found acceptable.

The *Harvey* court correctly determined, under Brennan's analysis, that the right to

The remaining sections of this note will discuss how the exemption of legitimate attorney fees from forfeiture might have been placed on a broader, stronger foundation by affirming that the statutory language itself provides some latitude for judicial exemptions, and by finding a defendant's right to effective assistance of counsel presumptively violated without an exemption.

A. Latitude for Judicial Exemptions from Forfeiture

The Fourth Circuit held that the literal import of the Act "contemplates the forfeiture of attorney fees in any circumstances where the attorney cannot establish that he was 'without reasonable cause to believe that the property [used to pay the fees] was subject to forfeiture.' "[56] But the decision offered no support for such a sweeping pronouncement beyond those arguments that directly refute the equally sweeping, and diametrically opposite, pronouncements of the *Bassett* and *Reckmeyer* courts.

On close examination of the statutory language, particularly as interpreted by the United States Court of Appeals for the Fifth Circuit in *United States v. Thier*,[57] judicial exemption of legitimate attorney fees appears to be justifiable on grounds that need not rise to the level of constitutional rights. By affirming the *Bassett* decision on these narrower grounds, the Fourth Circuit might have preserved the possibility of such exemptions against a constitutional reversal by the United States Supreme Court.

While the statute clearly mandates forfeiture of covered property upon conviction, it uses the permissive "may" to give trial courts discretion as to the pre-conviction restraints on property transfers that may be imposed at the government's request.[58] These provisions explicitly limit the availability to the government of pre-conviction restraints,[59] but place no limitations whatsoever on the discretion of the courts to deny, wholly or partially, the government's application. Nor does the statute discuss what criteria a trial court must use in making that decision.

Accordingly, the *Thier* court referred to traditional criteria for

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counsel of choice was violated. Given the inconclusive quality of this right, however, the court should not have been so quick to dismiss the other components of the sixth amendment right to counsel which may also have been implicated.

56. 814 F.2d at 918.

57. 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987). *See also* United States v. Rogers, 602 F. Supp. 1332, 1343 (D. Colo. 1985).

58. *See* 18 U.S.C. § 1963(e), 21 U.S.C. § 853(e) (Supp. III 1985).

59. *See id.*

issuing preliminary injunctions, which require, *inter alia*, a showing that the threatened injury to the plaintiffs must outweigh the harm the injunction might do the defendants.[60] In this context, the *Thier* court said, the trial court must weigh the "possible adverse effects of a pretrial refusal to exempt defense counsel's fee from forfeiture" against the government's interest in protecting potentially forfeitable property.[61]

The *Thier* court denied that such balancing compels any particular result;[62] hence, exemption cannot be considered a constitutional mandate. But the holding necessarily implies that the trial court has statutory authority to exempt legitimate attorney fees from pre-conviction restraint.[63] Any such exemption would be of little practical significance if those fees were then subject to forfeiture on conviction, so the exemption ought permanently to negate any government interest.

In *Bassett* there was no government motion for a pre-conviction restraining order, but the opportunity for the trial court to exercise its discretion arose with the government's pretrial notice to defense counsel of intent to seek forfeiture of attorney fees upon conviction. Both devices have precisely the same adverse effect on the attorneys' opportunity to receive legitimate payment under the third-party claims provisions of RICO and CCE.[64] It follows that defend-

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60. 801 F.2d at 1470.

61. *Id.* at 1474.

62. *Id.* In fact, *Thier* was decided solely on the ground that the trial court's refusal to grant the defendant any hearing at all before issuing a forfeiture order violated his fifth amendment right to procedural due process.

63. This may be the true import of the passage in the legislative history suggesting that no provision of the Act relating to pretrial restraining orders "is intended to interfere with a person's Sixth Amendment right to counsel." H.R. REP. No. 845, 98th Cong., 2d Sess., pt. 1 at 19 n.1 (1984). As long as trial courts have the discretion to exempt legitimate attorney fees from forfeiture, sixth amendment rights are not necessarily at risk. The passage continues: "The [House Judiciary] Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." *Id.* Unless one reads the second sentence as a willful abdication of the legislative responsibility to enact only constitutional laws, it must mean that the Act's authors saw no need to resolve the conflict because courts could readily avoid the problem. *See also* United States v. Rogers, 602 F. Supp. 1332, 1343 (D. Colo. 1985) (finding intent by Congress to permit trial courts to exercise discretion).

64. The government essentially concedes this point. *See Justice Department Guidelines on Forfeiture of Attorneys' Fees*, 38 Crim. L. Rep. (BNA) 3001 (Oct. 2, 1985) [hereinafter *Justice Guidelines*]. These guidelines make it somewhat more difficult for prosecutors to seize attorney fees by requiring actual knowledge by the attorney of the susceptibility of those fees to forfeiture.

> Under these guidelines . . . the only assets which an attorney conclusively would be held to have actual knowledge of forfeitability are those specifically named

ant Bassett should be entitled to the same judicial consideration that the statute affords to defendant Thier.

Although the *Bassett* court never explicitly conducted the balancing suggested in *Thier*, its decision leaves no room for doubt that it would find Bassett's interests to outweigh the government's.[65] The *Harvey* court thus could have affirmed *Bassett* on the ground that the trial court was merely exercising its statutory discretion.[66]

B. Sixth Amendment Right to Effective Assistance of Counsel

The exemption from forfeiture of legitimate attorney fees would be on much stronger constitutional grounds if the *Harvey* court had not so quickly dismissed the "effective assistance of counsel" component of the sixth amendment right.[67] Ironically, the

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> in the indictment or subject to a restraining order or civil forfeiture proceeding. . . . [T]he Department believes it is inappropriate to give written notice to an attorney that a particular asset or that all assets belonging to a defendant are from an illegitimate source or subject to forfeiture simply to meet the requirement of actual knowledge imposed by these guidelines.
>
> Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice. The argument could be made that if the notice is not based upon a probable cause determination that the assets are subject to forfeiture, it was sent only to harass the attorney or cause him to abandon the case and not because the asset is legitimately subject to forfeiture.

Id. at 3006.

65. Although the *Bassett* holding is based on a statutory interpretation, the court asserts that a contrary ruling would violate Bassett's constitutional rights. 632 F. Supp. at 1317-18. Thus, any balancing would pit a constitutional right against mere legislative policy.

66. Such a holding could be expanded, perhaps, to establish the availability under the statute of a discretionary exemption whenever the forfeiture of legitimate attorney fees is clearly threatened by any governmental action, including the indictment itself, that would automatically disqualify counsel from mounting a successful third-party claim. *Thier*, 801 F.2d at 1474 ("[T]he defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services."). While the remedy still falls short of the blanket exemption from forfeiture that a constitutional holding would provide, it might survive a possible reversal of the *Harvey* court's sixth amendment interpretation.

67. It is instructive to review, though unnecessary to dispute, the *Harvey* court's analysis of the sixth amendment right to counsel of choice in order to appreciate the fragility of the court's constitutional holding. The court concedes that the right is qualified by the government's countervailing interest in the orderly administration of justice, that it contemplates only the "fair opportunity" to choose one's counsel, and that it does not embrace any guarantee of a "meaningful attorney-client relationship." 814 F.2d at 923-24 (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932); Morris v. Slappy, 461 U.S. 1, 13-14 (1983)). The court also acknowledges that the right may be lost to an accused in several ways—among them, *in rem* forfeitures and jeopardy tax assessments—without

starting point for holding that the Act violates a defendant's right to effective assistance of counsel can be found within *Harvey* itself.

Conceding that specific applications of the Act could result in effectiveness violations, the Fourth Circuit insisted that such violations could only be determined after conviction.[68] The "mere possibility" of violation could not subject the Act to constitutional challenge before conviction.[69] Rather, such a challenge should be pursued in a collateral proceeding to determine whether counsel was actually ineffective and whether actual prejudice occurred under the test of *Strickland v. Washington*.[70]

Strickland does indeed provide the appropriate test for actual and prejudicial ineffectiveness of counsel.[71] But the *Strickland* Court went to some lengths to distinguish the facts of that case from others in which the ineffectiveness claim was "based on state interference with the ability of counsel to render effective assistance to the accused."[72] In such cases "the surrounding circumstances

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necessarily violating sixth amendment rights. *Id.* at 925-26. While the court distinguishes the criminal forfeitures at issue here, the distinctions in no way defeat the analogy.

68. 814 F.2d at 922.

69. *Id.* (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71 (1961), for the proposition that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated.").

70. 466 U.S. 668 (1984).

71. *See id.* at 687. The *Strickland* Court set forth a two-part test:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. The Court went on to clarify the relationship between the two prongs of the test: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Furthermore, the Court stressed that, although it had set forth the two components of the test in a particular order, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing of one." *Id.* at 697.

72. *Id.* at 683 (citing United States v. Cronic, 466 U.S. 648 (1984)). In *Cronic*, decided the same day as *Strickland*, the United States Supreme Court rejected a formulaic

[make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial."[73]

The *Harvey* court simply failed to consider the possibility that the conflict of interest between counsel and client established by the forfeiture provisions of the Act, particularly the "ignorance of forfeitability" test under the bona fide purchaser exception, could create precisely the kind of circumstances referred to in *Strickland*. If it does, there is no need to inquire into counsel's actual performance, no need to await conviction, and no need to attack collaterally.

Even the strongest supporters of the forfeiture provisions as applied to attorney fees concede there might well be a conflict of interest between attorney and accused.[74] Counsel might be tempted to plead a client guilty to a lesser offense not punishable by forfeiture, or reject a plea bargain that includes forfeiture, even though such action is contrary to the client's best interest. Although supporters have suggested various mechanisms by which such conflicts may be mitigated,[75] the conflict itself is inherent in the statute.

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approach developed by the United States Court of Appeals for the Tenth Circuit for determining the effectiveness of counsel by inference from the surrounding circumstances, without reference to errors made at trial. Significantly, however, the *Cronic* Court reaffirmed the proposition that circumstances could be present in which, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." 466 U.S. at 659-60.

73. *Cronic*, 466 U.S. at 661. Justice Brennan, who quoted this sentence from *Cronic* in his opinion in *Strickland*, 466 U.S. at 702 (Brennan, J., concurring in part and dissenting in part), had earlier characterized this class of cases as involving an impermissible interference with the discharge of a defense counsel's "normal functions." Morris v. Slappy, 461 U.S. 1, 26 (1982) (Brennan, J., concurring). Brennan sought to distinguish between impermissible interference and ineffective assistance as two varieties of sixth amendment violations. Only for the latter would a showing of prejudice have to be made at trial.

It now appears that Brennan's rather strained efforts were unnecessary. Several of the cases cited by Brennan to support his argument in *Morris* were noted by Justice Stevens in his majority opinion in *Cronic* as illustrative of "presumed ineffectiveness." *See Cronic*, 466 U.S. 648, 661 & n.28 (citing Holloway v. Arkansas, 435 U.S. 475 (1978) (court's failure to appoint separate counsel for jointly represented codefendants); Glasser v. United States, 315 U.S. 60 (1942) (court's appointment of one defendant's counsel as codefendant's attorney); Powell v. Alabama, 287 U.S. 45 (1932) (court's ineffective appointment of counsel)). Thus, "ineffective assistance" may either be demonstrated at trial or presumed from surrounding circumstances.

74. *See* Brickey, *supra* note 45, at 534.

75. *Id.* at 536-38 (suggesting adherence to the *Justice Guidelines*, as discussed at *supra* note 64). *See also In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (*Payden*), 605 F. Supp. 839, 849-50 n.14 (S.D.N.Y. 1985) (suggesting either a bifurcation of trial or use of civil forfeiture provisions).

The United States Supreme Court has already held that a conflict of interest can be sufficient grounds for finding ineffective assistance of counsel if the conflict has adversely affected counsel's performance.[76] The Court has also held that the government necessarily violates the right to effective assistance of counsel when it interferes with the ability of counsel to make independent decisions about how to conduct the defense.[77] In the conflict created by the prospect of forfeiture, counsel is forced to make decisions as to the conduct of the defense in an environment colored by a competing interest. When, as in this case, the government has caused the conflict to occur, the ineffectiveness of counsel's assistance must be presumed without inquiry into actual performance.

The *Harvey* court might have used such an argument, in addition to the counsel of choice theory, to affirm the *Reckmeyer* order. Reckmeyer pleaded guilty to violations of drug trafficking and federal tax laws, yet even so incurred legal fees of $170,512.[78] Had Reckmeyer stood trial on those counts, his legal fees—and the costs incurred by his counsel—presumably would have been far greater. With all of Reckmeyer's assets at risk of forfeiture, his attorneys clearly had an interest in limiting their exposure to loss. Surely such a conflict is constitutionally impermissible without any need to inquire as to whether counsel's representation of Reckmeyer was actually affected.[79]

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76. *Strickland*, 466 U.S. at 686 (citing Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980)). *Cuyler* is one of a line of conflict-of-interest cases involving defense counsel's representation of multiple clients whose interests do not coincide. Its direct antecedents are *Glasser* and *Holloway*, cited *supra* note 73. *Cuyler* held that "[i]n order to establish a violation of the Sixth Amendment, a defendant *who raised no objection at trial* must demonstrate [to a reviewing court] that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348 (emphasis added). But *Cuyler* did not disturb the holding in *Glasser* that a trial court's failure to remedy an actual conflict of interest, timely brought to its attention, constitutes a violation of the defendant's right to effective assistance of counsel without reference to the lawyer's conduct of the trial or prejudice to the defendant, 315 U.S. at 75.

77. *Cuyler*, 446 U.S. at 344. The Court cited Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (requirement that defendant be first witness); and Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961) (bar on direct examination of defendant).

78. United States v. Reckmeyer, 631 F. Supp. 1191, 1193 (E.D. Va. 1986), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).

79. It is at least arguable that the *Harvey* court did indeed find a violation of the sixth amendment right to effective assistance of counsel, but felt compelled to mislabel it, presumably to preserve the "tradition" of declining to hear such challenges on direct appeal. 814 F.2d at 930. Indeed, the court seems so bound to the doctrine that ineffec-

VI. CONCLUSION

The *Harvey* decision discarded a clearly strained statutory interpretation as the basis for exempting legitimate attorney fees from forfeiture under RICO and CCE statutes. Instead, the court predicated such exemptions exclusively on the qualified right to counsel of choice under the sixth amendment. In so doing, the court left the exemptions unnecessarily vulnerable.

A stronger constitutional argument for exempting attorney fees could have been made in the *Harvey* cases by relying additionally on the sixth amendment right to effective assistance of counsel. Moreover, there is ample justification for a statutory interpretation giving trial courts the discretion to exempt attorney fees from forfeiture before conviction. Either approach would have better protected the integrity of our adversarial process from the wholly unnecessary and unwarranted accretion of prosecutorial advantage represented by the actual or even threatened forfeiture of legitimate attorney fees.

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tiveness can only be attacked after conviction that it bends over backwards to link obvious effectiveness questions to the issue of counsel of choice.

> For example, the court explicitly finds that the Act jeopardizes the individual's interest in having effectively armed private counsel, which means at the very minimum counsel sufficiently informed to mount an effective defense or otherwise provide effective assistance. This necessary assumption of the adversarial system . . . is also effectively undercut—practically emasculated—by provisions of the Act which make counsel's very ability to retain legitimately contracted fees dependent upon his not being fully informed.

Id. at 925. But then, without further explanation, the court states: "This, it must be emphasized, goes not to the right to effective assistance of counsel, but to the primary right to representation by privately retained counsel of choice." *Id.*