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Imposing Indigence: Reclaiming the Qualified Right to Counsel of Choice in Criminal Asset Forfeiture Cases

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COMMENTS

IMPOSING INDIGENCE:

RECLAIMING THE QUALIFIED RIGHT TO COUNSEL OF CHOICE IN CRIMINAL ASSET FORFEITURE CASES

Matthew R. Lasky*

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INTRODUCTION

On January 19, 2012, the Department of Justice charged seven individuals and two corporations with organizing an international criminal enterprise through the website Megaupload.com.¹ Pursuant to these charges, at the U.S. Government's request, New Zealand law enforcement officials arrested Megaupload founder and CEO Kim Dotcom at his home.² The police raid on Dotcom's home involved over 70 officers armed with M-4 automatic rifles and body armor.³ Dotcom and Megaupload were not charged with any violent crime, but with "engaging in a racketeering conspiracy, conspiring to commit copyright infringement, conspiring to commit money laundering, and two substantive counts of criminal copyright infringement."⁴ The file-sharing site claimed that it complied with the law by obeying "notice and takedown" procedures in accordance with the Digital Millennium Copyright Act (DMCA) safe harbor whenever rights-holders notified it of infringing material posted on the site.⁵ Despite its compliance with these takedown requests, Megaupload.com was one of the most visited sites in the world.⁶ The source of the site's popularity was its reputation for permitting the posting of copyrighted materials.⁷

The Justice Department executed a number of arrest warrants, as well as twenty search warrants, in the United States and eight other countries.⁸ During the raid on Dotcom's home, the Megaupload servers were shut down.⁹ As a part of this action, the Justice Department seized \$50 million

¹ Press Release, U.S. Dep't of Justice, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement (Jan. 19, 2012), <http://goo.gl/F3ZjXf>.

² Greg Sandoval, *Guns, Body Armor, and Raids: The Piracy Fight Gets Dangerous*, CNET (Feb. 6, 2012), <http://goo.gl/czWdOs>.

³ *Id.*

⁴ Press Release, *supra* note 1.

⁵ The DMCA is a 1998 federal law that amended U.S. copyright statutes, *inter alia*, to create vicarious liability for those who facilitate the posting of infringing material on the internet. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. (2006)). It also established a safe harbor for alleged infringers: if they remove allegedly infringing materials upon request by the copyright-holder, they can immunize themselves from suit. *See generally* Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233 (2009) (discussing the efficacy of the DCMA safe harbors and when an Internet service provider (ISP) has a duty to remove infringing material, along with providing guidance to the courts and Congress for future amendments to the DMCA and its current interpretation).

⁶ Timothy B. Lee, *Civil Asset Forfeiture and Intellectual Property*, CATO UNBOUND (Jan. 9, 2013), <http://goo.gl/ZJU2uB>; *see also* Press Release, *supra* note 1.

⁷ Press Release, *supra* note 1.

⁸ *Id.*

⁹ Timothy B. Lee, *How the Criminalization of Copyright Threatens Innovation and the Rule of Law*, in COPYRIGHT UNBALANCED: FROM INCENTIVE TO EXCESS 55, 65 (Jerry Brito ed., 2012).

in assets and completely removed them from the defendant's control.¹⁰ Federal prosecutors subsequently objected to unfreezing a portion of these funds so that the defendant could hire attorneys.¹¹ The cumulative result of prosecutors' actions was clear: "[Kim Dotcom's] business has been effectively destroyed before he sets foot inside a courtroom."¹²

Of particular concern in this ordeal was that providing Megaupload.com a legal defense would require settling unresolved and complicated copyright questions—certainly ones that would demand the services of experienced copyright attorneys.¹³ Whether a party can be held criminally liable for inducing third parties to infringe copyright—known as secondary infringement—was central to the matter.¹⁴ Although the Supreme Court has established that secondary copyright infringement gives rise to civil liability,¹⁵ the Court has not yet extended this doctrine to criminal liability.¹⁶ Because the Government's case was on such shaky ground, it was clear from the beginning that the quality of Megaupload's legal counsel would be outcome-determinative.¹⁷ Aside from these novel questions of law, the facts of the case are "hugely complex" and involve petabytes of data.¹⁸

¹⁰ Nate Anderson, *Why the Feds Smashed Megaupload*, ARS TECHNICA (Jan. 19, 2012), <http://goo.gl/eS6kHS>; see also Indictment at 66–71, *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. Jan. 5, 2012) (listing all the defendants' assets subject to forfeiture).

¹¹ [Proposed] Motion to Challenge the Scope of Pretrial Restraint of Assets of Defendants Megaupload Limited, Kim Dotcom, Mathias Ortmann, Bram Van Der Kolk & Finn Batato and Memorandum of Law in Support Thereof at 4, *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. May 30, 2012) [hereinafter Defendants' Motion to Challenge the Scope] ("[T]he Government has also deprived Megaupload of its right to counsel by freezing all of its worldwide assets, then refusing to agree to unfreeze one penny to fund defense efforts. . . .").

¹² Lee, *supra* note 9, at 67.

¹³ Timothy B. Lee, *Government Trying to Deny Megaupload Fair Legal Representation*, ARS TECHNICA (Apr. 15, 2012), <http://goo.gl/xRJ0WP>.

¹⁴ Jennifer Granick, *Megaupload: A Lot Less Guilty than You Think*, CTR. FOR INTERNET AND SOC'Y (Jan. 26, 2012, 11:47 AM), <http://goo.gl/Woqjfi>.

¹⁵ *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 936–37 (2005) ("[T]he inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

¹⁶ See Granick, *supra* note 14.

¹⁷ *Id.* ("[P]rosecuting this case against Mega, especially if Defendants get good criminal lawyers who also understand copyright law, is going to be an uphill battle for the government.").

¹⁸ Defendants' Motion to Challenge the Scope, *supra* note 11, at 2. A single petabyte is a truly enormous amount of data, capable of storing 500 billion pages of printed text. *Megabytes, Gigabytes, Terabytes . . . What Are They?*, WHAT'S A BYTE?, <http://goo.gl/oJrpbn> (last visited Dec. 28, 2013).

Without the frozen \$50 million in assets, the company and the individuals indicted would be unable to afford a legal defense.¹⁹ Given the novel questions of law involved, it is counter to the public interest (and most certainly counter to Megaupload's interests) to have such an enormously complicated case be resolved by overworked and underpaid public defenders.²⁰ More bizarre is the idea that public defenders' already scarce resources should be redirected from indigent defendants to a defendant who has the means to pay for his own legal defense—that the Government should impose indigence upon Megaupload.

The law firm Quinn Emanuel Urquhart & Sullivan sought to represent Megaupload in the criminal trial.²¹ The attorneys argued that “[i]f the Government is to have its way, the only evidence available to the Court would be that [evidence] cherry-picked by the Government Megaupload will never get its day in Court and the case will effectively be over before it has even begun.”²² Megaupload's prospective attorneys further argued that the Government's imposition of secondary criminal liability was unprecedented and unlikely to succeed.²³ Still, the Government was able to successfully freeze Megaupload's assets.²⁴

The Megaupload case illustrates the burgeoning use of forfeiture law in the United States. In the 1970s, Congress passed as parts of other legislation the Racketeer Influenced and Corrupt Organizations Act

¹⁹ *Id.* at 12–13.

By the Government's design, all available assets for the defense have been seized and frozen, as the Government well knows. The limited allotments Mr. Dotcom is receiving (by order of a New Zealand court) are reserved for his living expenses and those of his family and cannot be used to cover legal expenses, as is already a matter of record before this Court. All of the legal work performed to date by the undersigned has gone without recompense. The Government has effectively acknowledged the Defendants' inability to pay for attorneys in proposing release of frozen funds for the narrow purpose of preserving servers. For present purposes, therefore, there should be no dispute that Defendants are in fact unable to fund their defense absent the requested relief.

Id. (internal citation omitted).

²⁰ See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2156 (2013) (“[T]he lawyer assigned to defend a poor person usually has little or no time and few resources to investigate the charges and mount a defense.”).

²¹ Lee, *supra* note 13.

²² Rebuttal Memorandum of Law in Further Support of Motion of Quinn Emanuel Urquhart & Sullivan LLP and the Rothken Law Firm for Leave to Enter Limited Appearance on Behalf of Megaupload Limited and Kim Dotcom at 1, *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. Apr. 12, 2012).

²³ *Id.* at 16.

²⁴ Timothy B. Lee, *Asset Forfeiture Abuse Threatens Fair Trial in Copyright Case*, CATO INST. (April 16, 2012, 8:26 AM), <http://goo.gl/ScGyEi>.

(RICO)²⁵ and the Continuing Criminal Enterprise (CCE) statute,²⁶ which both include criminal asset forfeiture provisions.²⁷ In order to bolster the effectiveness of these forfeiture provisions, Congress later passed the Comprehensive Forfeiture Act (CFA).²⁸ As a result of the CFA, the Justice Department was granted the power to seize forfeitable assets before trial, so long as there was “probable cause to believe that the property is subject to forfeiture.”²⁹ The statute itself provides for no adversarial hearing, pre- or post-restraint, to determine the propriety of the asset seizure.³⁰

While these forfeiture statutes were originally aimed at organized crime and the drug trade, the Megaupload case shows that the use of the tool has expanded. As time has gone by, more and more offenses have become forfeitable.³¹ The forfeiture device itself was originally expanded to combat the perception that organized crime was profitable.³² Today, it is used indiscriminately and in a way that deprives defendants of a meaningful legal defense.

Another critical element of this problem is financial. In 1986, the second year after the creation of the Department of Justice Asset Forfeiture Fund, the Fund received \$93.7 million.³³ In 2008, the Asset Forfeiture

²⁵ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 922, 941–48 (codified as amended as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2012)).

²⁶ Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265 (codified as amended at 21 U.S.C. §§ 848, 853 (2006 & Supp. 2009)).

²⁷ 18 U.S.C. § 1963(b); 21 U.S.C. § 848(a); *see also* Max M. Nelson, Note, *Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and the Canadian Crossroads*, 41 U. MIAMI INTER-AM. L. REV. 43, 47–50 (2009).

²⁸ 18 U.S.C. § 981; Nelson, *supra* note 27, at 48–49.

²⁹ 18 U.S.C. § 981(b)(2)(B).

³⁰ *United States v. Kaley*, 677 F.3d 1316, 1323 (11th Cir. 2012).

³¹ *See* Nelson, *supra* note 27, at 49–50. Originally applied to RICO cases, Congress expanded forfeiture to apply to money laundering and then any property “involved in” money laundering.

³² *See* S. REP. NO. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

Title III of the bill (Sections 301-323) is designed to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crimes facing the country: racketeering and drug trafficking. Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows. More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Id. (internal citation omitted).

³³ MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 11 (2010).

Fund exceeded \$1 billion in net assets.³⁴ This Comment demonstrates that financial incentives for investigating and prosecuting forfeitable offenses have the utterly predictable effect of increasing said investigations and prosecutions.³⁵

Part I of this Comment discusses the Supreme Court's firm rejection of an exception to the CFA for the payment of attorney's fees,³⁶ although the Court left open the possibility of courts using a pretrial procedure to help protect defendants from improper forfeiture.³⁷ Part II discusses the two main approaches the circuit courts take in formulating a pretrial procedure for determining the propriety of a forfeiture action. The D.C. and Second Circuits have taken the view that these hearings should encompass the questions of (1) whether the forfeitable assets are rightly traceable to illegal activity and (2) whether the government can prove that there is probable cause that an offense took place.³⁸ In contrast, the Eleventh Circuit has held that such a hearing can only address the former.³⁹ Part III introduces evidence and argument questioning the assumptions made by the Eleventh Circuit in denying defendants a full pretrial hearing.⁴⁰ Part IV then argues that the D.C. and Second Circuits' approach more adequately protects the serious interests involved in pretrial restraint of assets and that the increasing problem of the overuse of federal forfeiture statutes should be of paramount importance in these matters. On those grounds, Part IV argues that the Supreme Court should adopt the D.C. and Second Circuit's approach in *Kaley v. United States*.

I. ATTORNEY'S FEE FORFEITURE IN THE LATE 1980S

In 1989 companion decisions, the Supreme Court took up the question of whether a criminal defendant has the right to use forfeitable assets to pay attorney's fees.⁴¹ In *Caplin & Drysdale, Chartered v. United States*, the

³⁴ *Id.*

³⁵ None of the foregoing is intended to disparage law enforcement officials or prosecutors. To the contrary, it simply proves that they are subject to the same incentives as anybody else. The problem lies not with those carrying out the forfeiture but rather the incentive structure created by current forfeiture law.

³⁶ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 632 (1989) ("We therefore reject petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the Government's—assets adjudged forfeitable, as *Reckmeyer's* were—to pay attorney's fees . . .").

³⁷ *United States v. Monsanto (Monsanto III)*, 491 U.S. 600, 615 n.10 (1989).

³⁸ See *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417, 421 (D.C. Cir. 2008); *United States v. Monsanto (Monsanto IV)*, 924 F.2d 1186, 1196, 1203 (2d Cir. 1991).

³⁹ See *United States v. Kaley*, 677 F.3d 1316, 1317 (11th Cir. 2012).

⁴⁰ *Id.*

⁴¹ See *Caplin & Drysdale*, 491 U.S. at 619 (5–4 decision); *Monsanto III*, 491 U.S. at 602.

defendant, Christopher Reckmeyer, had been indicted for importing and distributing illegal narcotics.⁴² The indictment charged that Reckmeyer's activities constituted a continuing criminal enterprise in violation of federal law.⁴³ Pursuant to federal criminal forfeiture law,⁴⁴ the indictment authorized forfeiture of a range of Reckmeyer's assets.⁴⁵ Subsequently, the district court issued a restraining order freezing his potentially forfeitable assets.⁴⁶

By the time Reckmeyer was indicted, he had already retained an attorney, who subsequently moved for permission to use restrained assets for legal fees and to exempt his fees from postconviction forfeiture.⁴⁷ Unfortunately for Reckmeyer's attorney, Reckmeyer reached a plea agreement with the prosecutor before the question of the forfeitability of his fees could be resolved—Reckmeyer's assets were forfeited as a part of the agreement.⁴⁸

Reckmeyer's attorney, the petitioner in *Caplin & Drysdale*, argued, *inter alia*, that the lack of an exemption for attorney's fees in the federal forfeiture statute impinged upon Reckmeyer's Sixth Amendment right to counsel as well as his Fifth Amendment right to a balance of power between the government and the accused.⁴⁹ The Fourth Circuit affirmed the district court's finding that the forfeiture statute violated Reckmeyer's right to his counsel of choice, guaranteed by the Sixth Amendment.⁵⁰ However, the Fourth Circuit, sitting en banc, later reversed the panel decision, finding that the lack of an attorney's fee exception did not violate the Sixth Amendment.⁵¹ Specifically, the court found that "there is no established Sixth Amendment right to pay an attorney with the illicit proceeds of drug transactions."⁵²

The Supreme Court, upholding the Fourth Circuit's disposition of *Caplin & Drysdale*, held that neither the Sixth Amendment nor the Fifth

⁴² *Caplin & Drysdale*, 491 U.S. at 619.

⁴³ *Id.* (citing 21 U.S.C. § 848 (1982 & Supp. V)).

⁴⁴ See 21 U.S.C. § 853(a) (2006 & Supp. 2009).

⁴⁵ *Caplin & Drysdale*, 491 U.S. at 619–20.

⁴⁶ *Id.* at 620.

⁴⁷ *Id.* at 620–21.

⁴⁸ *Id.* at 621.

⁴⁹ *Id.* at 623–24.

⁵⁰ *United States v. Harvey*, 814 F.2d 905, 909 (4th Cir. 1987), *rev'd en banc*, 837 F.2d 637 (4th Cir. 1988).

⁵¹ *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 640 (4th Cir. 1988) (en banc).

⁵² *Id.*

Amendment prohibited the forfeiture scheme in question.⁵³ In his majority opinion, Justice Byron White was concerned that an attorney's fee exception would permit, for example, a robbery suspect to use stolen funds to retain an expensive attorney.⁵⁴ The majority opinion was built around this "bank robber" hypothetical, making several arguments in support. First, Justice White suggested that the bank robber in possession of some nonforfeitable assets is free to pay an attorney with those assets.⁵⁵ If a defendant lacks the resources to hire an attorney, he is free to rely on appointed counsel, but in any case, "[a] defendant may not insist on representation by an attorney he cannot afford."⁵⁶

Second, the majority opinion indicated that the federal government has a substantial interest in the property rights conveyed by the forfeiture statute.⁵⁷ The Court enumerated three particular government interests in the forfeited assets: (1) depositing them into the Justice Assets Forfeiture Fund, (2) permitting crime victims to make claims to forfeited assets under the statute, and (3) deflating the resources of organized crime.⁵⁸ In the Court's opinion, these resources "include[] the use of such economic power to retain private counsel."⁵⁹ Consequently, the Court found that the government's interest in the forfeitable funds overrode the defendant's Sixth Amendment interests.⁶⁰

Third, the majority opinion summarily dismissed concerns that the lack of an attorney's fee exception may give rise to prosecutorial abuse, as "[e]very criminal law carries with it the potential for abuse."⁶¹ Finally, Justice White expressed a concern that a constitutionally mandated exception for attorney's fees would give rise to additional exceptions to fund other constitutional rights.⁶² Underscoring the majority's hostility to the application of a qualified right to counsel of choice, Justice White echoed the appellate court's conclusion that "[t]he modern day Jean Valjean

⁵³ *Caplin & Drysdale*, 491 U.S. at 617.

⁵⁴ *Id.* at 626.

⁵⁵ *Id.* at 625.

⁵⁶ *Id.* at 624 (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

⁵⁷ *Id.* at 627 ("In § 853(c), the so-called relation-back provision, Congress dictated that [a]ll right, title and interest in property obtained by criminals via the illicit means described in the statute vests in the United States upon the commission of the act giving rise to forfeiture." (internal quotation marks and citation omitted)).

⁵⁸ *Id.* at 629–30.

⁵⁹ *Id.* at 630.

⁶⁰ *Id.* at 631.

⁶¹ *Id.* at 634 (quoting *In re Forfeiture Hearing as to Caplin & Drysdale*, Chartered, 837 F.2d 637, 648 (4th Cir. 1988)).

⁶² *Id.* at 628 ("If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel?").

must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money . . . entitles him to something more. We reject this contention. . . .”⁶³

In *Caplin & Drysdale*’s companion case, *United States v. Monsanto* (*Monsanto III*), the Supreme Court heard an appeal from the Second Circuit. Sitting en banc, the Second Circuit had ruled that a restraining order freezing the defendant’s assets be modified to allow the defendant to pay “legitimate (that is, non-sham) attorney’s fees.”⁶⁴ The court further ruled that fees paid to the defendant’s attorney would not be forfeitable in the event of conviction.⁶⁵

However, in *Monsanto III*, the Supreme Court reversed the Second Circuit’s decision.⁶⁶ The *Monsanto III* defendant argued that the forfeiture statute, as applied, violated his qualified right to counsel of choice established in the Sixth Amendment as well as his Fifth Amendment right to a “balance of forces” between the defense and the prosecution.⁶⁷ The majority opinion, also written by Justice White, applied the holding in *Caplin & Drysdale* and ruled that the freezing of assets needed to buy a legal defense offended neither of those rights.⁶⁸ The companion decisions *Monsanto III* and *Caplin & Drysdale* therefore firmly established that criminal forfeiture laws permit restraining funds that a defendant wishes to use for legal representation.

II. POST-1989 FEDERAL APPELLATE DEVELOPMENTS

After its disposition in the Supreme Court in 1989 as *Monsanto III*, the Supreme Court remanded the case, and it was ultimately reheard by the Second Circuit.⁶⁹ In deciding *Monsanto III*, the Supreme Court left the lower courts to determine a procedural matter: whether a pretrial restraining order freezing a defendant’s assets should require some sort of hearing.⁷⁰ When the case returned to the Second Circuit as *Monsanto IV*, the court ruled that a pretrial adversarial ruling was necessary to freeze the

⁶³ *Id.* at 630 (quoting *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d at 649).

⁶⁴ *United States v. Monsanto* (*Monsanto II*), 852 F.2d 1400, 1402 (2d Cir. 1988) (per curiam), *rev’d*, 491 U.S. 600 (1989).

⁶⁵ *Id.*

⁶⁶ *Monsanto III*, 491 U.S. 600, 616 (1989).

⁶⁷ *Id.* at 614.

⁶⁸ *Id.*

⁶⁹ *Monsanto IV*, 924 F.2d 1186, 1191 (2d Cir. 1991).

⁷⁰ *Monsanto III*, 491 U.S. at 615 & n.10 (“We do not consider today, however, whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed.”).

defendant's assets.⁷¹ The D.C. Circuit in *United States v. E-Gold, Ltd.* conformed to *Monsanto IV* and held that due process requires a pretrial adversarial hearing on the probable cause of the underlying indictment where asset access is necessary to hire an attorney.⁷²

In *United States v. Kaley*, however, the Eleventh Circuit created a circuit split by ruling that defendants subject to forfeiture may not challenge the evidentiary support for the charges against them before trial.⁷³ Instead, a defendant in a pretrial forfeiture hearing in the Eleventh Circuit would only be permitted to challenge the "traceability" of the frozen assets to the forfeiture offense and not the viability of the underlying claim.⁷⁴ This Part discusses these developments in more detail.

A. *MONSANTO IV*

On remand, the Second Circuit concluded that due process necessitated a hearing before a pretrial restraining order could be put in place, and the court indicated the form of the hearing:

We conclude that (1) the fifth and sixth amendments, considered in combination, require an adversary, post-restraint, pretrial hearing as to probable cause that (a) the defendant committed crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable, to continue a restraint of assets (i) needed to retain counsel of choice and (ii) ordered ex parte pursuant to 21 U.S.C. § 853(e)(1)(A)(1988); (2) consistent with 21 U.S.C. § 853(e)(3) (1988), the court may receive and consider at such a hearing evidence and information that would be inadmissible under the Federal Rules of Evidence; and (3) grand jury determinations of probable cause may be reconsidered in such a hearing.⁷⁵

In deciding that a hearing was necessary, the Second Circuit found particularly important that a defendant denied an opportunity to contest the restraint of assets is effectively deprived of hired counsel.⁷⁶

The Government agreed that due process requires a pretrial hearing during oral argument; however, the Government disagreed with the Second Circuit's determination of what the hearing must include.⁷⁷ Specifically, the Government wished to allow the defendant to question the grand jury's determination of which assets were forfeitable without questioning the determination of probable cause that the defendant committed an offense.⁷⁸

⁷¹ *Monsanto IV*, 924 F.2d at 1191.

⁷² *United States v. E-Gold, Ltd.*, 521 F.3d 411, 419 (D.C. Cir. 2008).

⁷³ *United States v. Kaley*, 677 F.3d 1316, 1330 (11th Cir. 2012).

⁷⁴ *Id.* at 1317.

⁷⁵ *Monsanto IV*, 924 F.2d at 1203.

⁷⁶ *Id.* at 1195.

⁷⁷ *Id.* at 1196.

⁷⁸ *Id.*

However, the Second Circuit concluded that, while the legislative history was skeptical of pre-restraint hearings,⁷⁹ it had little to say regarding the possibility of holding a post-restraint hearing to continue the restraining order until trial.⁸⁰

Giving further form to this adversarial, post-restraint, pretrial hearing, the court sought to limit the burden it placed on prosecutors.⁸¹ Specifically, the court indicated that the Federal Rules of Evidence would not be followed in these hearings thus permitting hearsay testimony.⁸² This modification catered to the Government's concern that a pretrial procedure would impose an undue burden on prosecutors.⁸³ The court further pointed out that prosecutors are always free to forego restraining assets pretrial to protect their cases; post-trial forfeiture is still a viable option.⁸⁴

B. *UNITED STATES V. E-GOLD, LTD.*

In another asset forfeiture case, the D.C. Circuit issued a ruling similar to the Second Circuit in *Monsanto IV*.⁸⁵ The *E-Gold* court agreed with *Monsanto IV*'s conclusion that, because criminal defendants subject to asset forfeiture may attempt to hide their assets, a pre-restraint hearing is simply not possible.⁸⁶ In determining the necessity of a post-restraint, pretrial hearing, the court applied the *Mathews v. Eldridge* test, which is used to determine whether an individual's due process rights have been violated.⁸⁷

The *Mathews* test involves a three-step analysis to determine: (1) the private interests that are affected, (2) the risk of erroneous deprivation of those interests and whether adequate safeguards can be imposed, and (3) the government's interests.⁸⁸ Weighing these factors, the court first determined the private interest affected by whether a pretrial hearing occurs.⁸⁹ In this regard, the court found that private interests weighed particularly heavily, affecting not only a defendant's ability to dispose of his property as he

⁷⁹ *Id.* at 1199; S. REP. NO. 98-225, at 196 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3379.

⁸⁰ *Monsanto IV*, 924 F.2d at 1199.

⁸¹ *Id.* at 1198.

⁸² *Id.*

⁸³ S. REP. NO. 98-225, at 196 (“[T]hese requirements may make pursuing a restraining order inadvisable from the prosecutor’s point of view because of the potential for damaging premature disclosure of the government’s case and trial strategy and for jeopardizing the safety of witnesses . . .”).

⁸⁴ *Monsanto IV*, 924 F.2d at 1208.

⁸⁵ *United States v. E-Gold, Ltd.*, 521 F.3d 411, 416–19 (D.C. Cir. 2008).

⁸⁶ *Id.* at 416–17.

⁸⁷ *Id.* at 417; see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁸⁸ *Mathews*, 424 U.S. at 335.

⁸⁹ *E-Gold*, 521 F.3d at 417.

pleases but also a defendant's qualified Sixth Amendment right to counsel.⁹⁰ This finding led the court to conclude that the first *Mathews* factor pointed decisively toward holding a hearing.⁹¹

In weighing the second factor, the court determined that forfeiture involved a high risk of erroneous deprivation.⁹² The court pointed out that a judge issued the original seizure warrant following an ex parte proceeding,⁹³ and the court further explained that an adversarial hearing could bring to light new evidence that makes restraint unnecessary or unwarranted. An ex parte proceeding is unlikely to produce opposing viewpoints.⁹⁴ Additionally, a hearing would fulfill a "fundamental requirement of due process[,] . . . the opportunity to be heard."⁹⁵

Finally, the court weighed the government's interests to complete the *Mathews* analysis.⁹⁶ In weighing the government's interests, the court did not find sufficient reason to set aside the defendant's due process rights.⁹⁷ Similar to the *Monsanto IV* court, the *E-Gold* court found that the "invasion of grand jury secrecy" could be avoided by holding *in camera* hearings and relaxing the applicability of the Federal Rules of Evidence.⁹⁸

C. UNITED STATES V. KALEY

In *United States v. Kaley*, the defendants were dissimilar from the defendants in *Monsanto* or *Caplin & Drysdale*; unlike the forfeiture defendants of the 1980s, the Kaleys were not accused of trafficking illegal narcotics. Instead, the defendants were a married couple accused of stealing prescription medical devices⁹⁹ from hospitals and selling them across state lines.¹⁰⁰ The Kaleys were handed a seven-count indictment, alleging, *inter alia*, that they had engaged in a conspiracy to transport prescription medical devices that they knew to be stolen.¹⁰¹ The indictment also listed forfeitable assets to be frozen, including a certificate of deposit

⁹⁰ *Id.*

⁹¹ *Id.* at 418.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁹⁶ *Id.* at 418–19.

⁹⁷ *Id.* at 419.

⁹⁸ *Id.*

⁹⁹ Prescription medical devices (PMDs) are FDA-regulated objects that run the gamut from artificial hearts to sutures to tongue depressors. *Does FDA Regulate Medical Devices?*, U.S. FOOD & DRUG ADMIN., <http://goo.gl/yLIFrm> (last visited Dec. 19, 2013).

¹⁰⁰ *United States v. Kaley*, 677 F.3d 1316, 1318 (11th Cir. 2012).

¹⁰¹ *Id.*; see 18 U.S.C. § 371 (2012).

that the Kaleys had purchased with the proceeds of a home equity line of credit.¹⁰²

In the district court, the Kaleys moved to vacate the asset-freezing restraining order that was issued as a result of the indictment.¹⁰³ The magistrate judge found probable cause that the Kaleys' residence and the certificate of deposit were "involved in" the violations of law and therefore ordered that those assets be restrained.¹⁰⁴ On appeal, the D.C. Circuit reversed the district court's denial of a pretrial evidentiary hearing and remanded the case to the district court.¹⁰⁵

In the pretrial hearing, the Kaleys challenged the Government's theory of the case, arguing that the facts could not support the charges.¹⁰⁶ In denying the motion to vacate the asset freeze, the district court reportedly held that "the only relevant inquiry at the hearing was whether the restrained assets were traceable to or involved in the alleged criminal conduct."¹⁰⁷

In its ruling, the Eleventh Circuit acted, at least partially, out of concern that allowing a full evidentiary hearing on the merits of the case would impermissibly set aside the grand jury's probable cause determination.¹⁰⁸ The court emphasized the grand jury's independence and the fact that it is not a part of the prosecutorial arm.¹⁰⁹ Along these lines, the court pointed out that defendants get a modicum of due process, because the prosecution must obtain a court order to freeze assets after the grand jury's indictment.¹¹⁰

The *Kaley* decision reflects an overarching judicial desire to avoid giving criminal defendants another route to delay their trials: "[A] defendant whose assets have been restrained will ultimately receive a thorough hearing—the trial itself—that goes to the merits of the underlying charge. . . . The question is simply whether the Due Process Clause requires that the defendant get *two* such hearings."¹¹¹ As further justification, the court expressed its enthusiasm for criminal forfeiture's objective of

¹⁰² *Kaley*, 677 F.3d at 1318.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1318–19.

¹⁰⁵ *Id.* at 1319.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1320.

¹⁰⁸ *Id.* at 1323 ("[T]he Court has shown a profound reluctance to allow pretrial challenges to a grand jury's probable cause determination.").

¹⁰⁹ *Id.* at 1325.

¹¹⁰ *Id.* at 1327.

¹¹¹ *Id.*

removing the incentives for crime.¹¹² Although this is a worthy objective, this Comment argues that the consequences of forfeiture's current implementation outweigh the need to disincentivize crime. The *Monsanto IV* and *E-Gold* decisions were correct in moving toward more protections for defendants, while *Kaley* was unforgiving in its strict applications of *Monsanto III* and *Caplin & Drysdale*, doing serious damage to the Sixth Amendment.

III. FLAWS UNDERPINNING *MONSANTO III* AND *CAPLIN & DRYSDALE*

Monsanto III and *Caplin & Drysdale* were decided before the explosion of forfeiture proceedings.¹¹³ This fact alone means that the courts deciding subsequent cases should account for the change in environment. But aside from the increased amount of forfeitures, the Supreme Court failed to anticipate the effects these decisions would have on the defense bar. Further, the Court decided *Monsanto III* and *Caplin & Drysdale* under the influence of an analogy that reverberates through the subsequent case law¹¹⁴: the question-begging proposition that forfeiture defendants are the same as bank robbers caught red-handed and can be presumed guilty for the purposes of forfeiture proceedings.

A. THE "EXPLOSION" OF FORFEITURE

In *Caplin & Drysdale*, the Supreme Court dismissed out of hand the defendant's concerns about abusive forfeiture practices.¹¹⁵ In light of recent evidence regarding the use of forfeiture statutes (both civil and criminal), this flippant attitude should be reconsidered. In the 1980s, after the passage of the CFA, federal use of the forfeiture power "exploded."¹¹⁶ Prior to the CFA, authorities deposited forfeiture proceeds into general government funds.¹¹⁷ However, the CFA amended the Comprehensive Drug Abuse and

¹¹² *Id.* at 1329.

¹¹³ See WILLIAMS ET AL., *supra* note 33, at 32 tbl.7. Much of the growth of forfeiture has occurred since 2000 with the Asset Forfeiture Fund doubling in size between 2000 and 2008 from \$536,500,000 to \$1,000,700,000. *Id.*

¹¹⁴ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) ("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."); *Monsanto III*, 491 U.S. 600, 614 (1989) ("We rely on our conclusion in [*Caplin & Drysdale*] to dispose of the similar constitutional claims raised by respondent here."); *United States v. Kaley*, 677 F.3d 1316, 1320–21 n.2 (11th Cir. 2012) (citing Justice White's bank robber analogy).

¹¹⁵ *Caplin & Drysdale*, 491 U.S. at 634 ("Petitioner's claim—that the power available to prosecutors under the statute *could* be abused—proves too much, for many tools available to prosecutors can be misused in a way that violates the rights of innocent persons.").

¹¹⁶ WILLIAMS ET AL., *supra* note 33, at 10.

¹¹⁷ *Id.*

Prevention Act to establish an Assets Forfeiture Fund, which would receive all forfeited funds.¹¹⁸

The Fund was subsequently opened up to allow law enforcement personnel to use the funds to outfit themselves with cars, laboratory equipment, communication equipment, and even aircraft.¹¹⁹ More disturbingly, funds also became available to pay law enforcement officers' overtime salaries.¹²⁰ Law enforcement officers thus have individual pecuniary interests in which crimes they choose to pursue. To further incentivize forfeitures, the Justice Department began cooperating with local law enforcement, offering a cut of the seizures to participating local agencies.¹²¹ This "equitable sharing" arrangement often operates to circumvent state laws prohibiting forfeiture funds from being used by state police.¹²²

If one thing is clear, it is what results from these policies. Forfeitures have increased from \$93.7 million in 1986 to a total of net assets in the Fund of over \$1 billion by 2008.¹²³ Law enforcement's desire to control these funds has created a perverse incentive for prosecutors to arrest for forfeiture offenses, and in particular, drug-related crimes.¹²⁴ In fact, some commentators have indicated that the push for the War on Drugs beginning in the 1970s is a direct result of the changes made to forfeiture laws.¹²⁵ Because forfeiture laws vary by state, it is simple to determine whether states with tough forfeiture laws also feature more drug arrests and prosecutions.¹²⁶ A study on this precise question concluded that law enforcement officers are far more likely to make drug arrests in jurisdictions where police can retain the assets they seize.¹²⁷ These results support the economic theory of bureaucracy, namely that "bureaucrats[]" desire increases in discretionary budgets, and that they also have a good deal of discretion in deciding how to allocate resources in the short run. In

¹¹⁸ *Id.* at 10–11.

¹¹⁹ 28 U.S.C. § 524(c)(1)(F)(i)–(iii) (2012).

¹²⁰ *Id.* at § 524(c)(1)(I).

¹²¹ Brent D. Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 287 (2000).

¹²² *Id.*

¹²³ WILLIAMS ET AL., *supra* note 33, at 11.

¹²⁴ *Id.*

¹²⁵ See Mast et al., *supra* note 121, at 287. See generally Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, THE ATLANTIC (Mar. 26, 2012, 12:04 PM), <http://goo.gl/C2DJjY> (detailing the inception of the War on Drugs during the Nixon Administration).

¹²⁶ See Mast, *supra* note 121, at 301–02.

¹²⁷ *Id.* at 301–03 (“Legislation permitting police to keep a portion of seized assets raises drug arrests as a portion of total arrests by about 20 percent and drug arrest rates by about 18 percent.”).

other words, like market entrepreneurs, entrepreneurial bureaucrats will respond to relative prices.”¹²⁸ In the case of forfeitures, the data support the theory that police officers and prosecutors have disproportionately pursued drug offenders to increase forfeiture funds.

More concerning, further research indicates that this approach distorts drug policy, unduly incentivizing drug interdiction over drug treatment.¹²⁹ Finally, a recent survey of law enforcement executives found that nearly 40% of the police agencies now see forfeiture proceeds as necessary to police operations.¹³⁰ The Justice Department, historically, has even asked its attorneys to step up forfeiture proceedings in order to meet budgetary targets.¹³¹ In *Caplin & Drysdale*, the Supreme Court saw no cause for concern about the abuse of asset forfeiture proceedings.¹³² One can only hope that more contemporary analyses of the issue will give rise to greater concern. The unique issue in asset forfeiture cases of the personal interests of law enforcement officers and prosecutors should give the Court reason to institute better safeguards for defendants.

B. SOCIALIZATION OF THE DEFENSE BAR

Another potential consequence of the rise of criminal forfeiture proceedings is the socialization of the criminal defense bar—criminal defense attorneys will be increasingly appointed, not hired. As discussed above, asset freezing can often prevent criminal defendants from hiring attorneys of their choice.¹³³ As more and more offenses become forfeitable, public defenders increasingly become the only options for criminal defendants. However, this is not the only effect that *Monsanto III* and *Caplin & Drysdale* have on the criminal defense bar.

In his dissent from *Monsanto III* and *Caplin & Drysdale*, Justice Harry Blackmun wrote, “Had it been Congress’ express aim to undermine the adversary system as we know it, it could hardly have found a better engine of destruction than attorney’s-fee forfeiture.”¹³⁴ Justice Blackmun was extremely concerned that attorneys would refuse to take on the defense of potential defendants who may be accused of forfeitable crimes.¹³⁵ Attorneys would be quite hesitant to take on a client whose fees could be

¹²⁸ *Id.* at 303.

¹²⁹ *Id.*

¹³⁰ WILLIAMS ET AL., *supra* note 33, at 12.

¹³¹ *Id.*

¹³² *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989).

¹³³ *Id.* at 648 (Blackmun, J., dissenting).

¹³⁴ *Id.*

¹³⁵ *Id.*

seized after the fact via the “relation-back” component¹³⁶ of the forfeiture statute.¹³⁷ Beyond the immediate issue of whether an attorney could be retained, criminal attorneys would also now be wary of whether their unindicted clients’ fees could be forfeitable in the future.

Further, in Justice Blackmun’s view, private attorneys, “so foolish, ignorant, beholden or idealistic as to take the business,” would have serious problems representing their clients.¹³⁸ To establish themselves as bona-fide purchasers under the CFA, they would have to remain intentionally ignorant of their clients’ potentially or allegedly illegal conduct so as to maintain that they were “reasonably without cause to believe that the property was subject to forfeiture. . . .”¹³⁹ Nor would a contingency fee arrangement solve these concerns. After all, such arrangements are a violation of ethical norms and are prohibited.¹⁴⁰

Aside from the direct effects on criminal defense attorneys and their potential clients, the socialization of the criminal defense bar has deleterious effects on the development of the law. In the prosecution of

¹³⁶ 21 U.S.C. § 853(c) (2006 & Supp. 2009) states in relevant part:

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

¹³⁷ *Caplin & Drysdale*, 491 U.S. at 648–49 (Blackmun, J., dissenting).

¹³⁸ *Id.* at 649 (quoting *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1987)).

¹³⁹ *Id.* at 655.

¹⁴⁰ MODEL RULES OF PROF’L CONDUCT R. 1.5(d) (2012) (“A lawyer shall not enter into an arrangement for, charge, or collect: . . . (2) a contingent fee for representing a defendant in a criminal case.”); *see also Caplin & Drysdale*, 491 U.S. at 649 (Blackmun, J., dissenting).

Perhaps the attorney will be willing to violate ethical norms by working on a contingent-fee basis in a criminal case. But if he is not—and we should question the integrity of any criminal-defense attorney who would violate the ethical norms of the profession by doing so—the attorney’s own interests will dictate that he remain ignorant of the source of the assets from which he is paid.

Id. (internal citation omitted).

Given the ethical rules against contingency fee criminal defenses, *any* non-pro bono defense of a forfeiture defendant could be considered a contingency fee defense. Even if funds are not yet frozen, it is unclear whether the specter of the “relation-back” provision as applied to attorneys converts a noncontingency fee legal defense into a contingency fee legal defense. This topic has been neglected as of late, and a reevaluation of the ethical rule against these arrangements may be merited. *See generally* Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699 (2001) (arguing that, with proper safeguards, contingency fee criminal defense can be ethically defensible). However, this interesting discussion is beyond the scope of this Comment.

Megaupload, for example, the defendant's case involved novel issues of copyright law, specifically whether there secondary criminal liability can be imposed for copyright infringement. These legal issues will not likely be adequately explored by public defenders with little experience with copyright law or the time to fully research the issues. Court-appointed attorneys often lack the time and resources to take on complex litigation.¹⁴¹ It seems counterproductive for a case involving \$50 million and the development of the broader copyright law to be decided by an attorney with little experience in the area. Even in the RICO and CCE cases to which the CFA was originally aimed, "[d]espite the legal profession's commitment to *pro bono* work, it is doubtful that attorneys would be willing to invest the many hours of legal work necessary to defend against these serious charges" ¹⁴²

C. BANK ROBBERS, THE FREEDOM OF SPEECH, AND THE QUALIFIED RIGHT TO COUNSEL OF CHOICE

The Supreme Court has established that, under the Sixth Amendment, criminal defendants enjoy the right to counsel of their choosing.¹⁴³ However, this right has been qualified in a few key ways.¹⁴⁴ For example, the Court has ruled that a client cannot choose an attorney who is not a member of the bar.¹⁴⁵ Additionally, the Court has ruled that a defendant is not entitled to counsel that the defendant cannot afford.¹⁴⁶

Pursuant to these limitations, the majority opinion in *Caplin & Drysdale* likened the forfeiture defendant to a bank robber.¹⁴⁷ Justice White pointed out that a bank robbery suspect, caught with funds stolen from a bank, would not be permitted to use those funds to hire an attorney.¹⁴⁸ The notion that the forfeiture defendant is analogous to a robber caught red-handed with stolen money underpins the Court's lack of sympathy for forfeiture defendants.¹⁴⁹ Like the bank robber, the forfeiture defendant has no legal claim over the suspect assets because of the "relation-back"

¹⁴¹ *United States v. Thier*, 801 F.2d 1463, 1476 (5th Cir. 1986); *Bright & Sanneh*, *supra* note 20, at 5.

¹⁴² *United States v. Bassett*, 632 F. Supp. 1308, 1316 (D. Md. 1986).

¹⁴³ *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.").

¹⁴⁴ *Wheat v. United States*, 486 U.S. 153, 159 (1988).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 625 (1989).

¹⁴⁸ *Id.*

¹⁴⁹ *See United States v. Kaley*, 677 F.3d 1316, 1320 n.2 (11th Cir. 2012).

provision of the forfeiture statute.¹⁵⁰ Justice White further justified this analogy by using the rationale of forfeiture laws to deprive organized crime of its economic power.¹⁵¹ Justice White's reasoning is also important to the *Kaley* decision.

Yet, this analogy is flawed for five reasons. First, as in *Kaley*, it is not entirely clear which funds are forfeitable and which funds are not.¹⁵² Justice White's analogy invokes a particular image in the reader's mind: a bank robber on the run, perhaps on the way back from the heist. His ill-gotten gains are bank-bags full of cash and gold bullion and are therefore conveniently marked for law enforcement confiscation. The reader knows immediately that these bags do not belong to the robber, and that they must be returned to the bank. In contrast, the defendants in *Kaley* allegedly used tainted funds to purchase a home and ultimately obtain a line of credit on the home.¹⁵³ The alleged ill-gotten gains became intermingled with the rest of the family's funds, making it no longer easy to discern the allegedly illegitimate and forfeitable funds from the family's legitimate lifetime savings.

Second, Justice White's analogy is question-begging. In establishing the hypothetical, he states: "A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney. . . ."¹⁵⁴ Of course, it is not uncontroversial that stolen money should be used for the robber's legal defense. However, Justice White's example has already declared the defendant guilty by assuming that he has stolen property in his possession. This assumption goes against the fundamental doctrine of American criminal law that every defendant "is presumed to be innocent until his guilt is proved beyond a reasonable doubt."¹⁵⁵

Third, unlike Justice White's bank robber, many forfeiture defendants have commingled their allegedly ill-gotten gains with their other property. What makes modern criminal asset forfeiture so troubling is that defendants rarely have easily marked property that clearly does not belong to them. Defendants subject to forfeiture are generally not accused of theft, so it is unclear what property of theirs constitutes ill-gotten gains. As was the case in *Kaley*, funds are often commingled with each other and used for large

¹⁵⁰ Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 625 (1989).

¹⁵¹ *Id.* at 618.

¹⁵² See *United States v. Kaley*, 677 F.3d 1316, 1318 (11th Cir. 2012).

¹⁵³ *Id.*

¹⁵⁴ Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 626 (1989).

¹⁵⁵ *Coffin v. United States*, 156 U.S. 432, 459 (1895).

purchases, such as cars or homes.¹⁵⁶ This commingling makes *all* of the defendant's property forfeitable, regardless of whether substantial portions of the property were purchased with untainted funds. In contrast, Justice White's bank robber may spend his savings or liquidate assets, which remain untainted.

This third argument, in particular, speaks to the need for an adversarial, post-restraint, pretrial hearing where a defendant can contest her charges. A hearing imposes little additional burden on prosecutors. It should not be difficult to show probable cause that a defendant in possession of large amounts of cash in bank bags has robbed a bank—a bank robber will not likely escape the reach of a forfeiture statute because of this pretrial hearing.

Fourth, Justice White's analogy does not account for the fact that, generally, forfeitable assets are not returned to crime victims, let alone the victims of the particular crime allegedly committed by the defendant.¹⁵⁷ Justice White's bank robber analogy assumes that the money taken from the robber goes right back into the bank vault—not to the Justice Department. In 2008, the Justice Department Fund had over \$1 billion in debt-free assets available for law enforcement,¹⁵⁸ making it clear that the vast amount of forfeiture funds are not returned to victims. In fiscal year 2012, approximately 17% of the total funds the Justice Department seized through civil and criminal forfeiture were spent on victim compensation.¹⁵⁹ At oral argument, the Government did not dispute Justice Stephen Breyer's claim that even less goes to victims: roughly 5% to 10%.¹⁶⁰

¹⁵⁶ See *Kaley*, 677 F.3d at 1318.

¹⁵⁷ Melinda Hardy, Comment, *Sixth Amendment—Applicability of Right to Counsel of Choice to Forfeiture of Attorneys' Fees*, 80 J. CRIM. L. & CRIMINOLOGY 1154, 1176 (1990) (“[I]n the case of forfeiture, however, no innocent victim will be denied his/her savings if a defendant uses tainted assets to pay the attorney.”).

¹⁵⁸ See WILLIAMS ET AL., *supra* note 33, at 6.

¹⁵⁹ See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 89 tbl.16 (2012), available at <http://goo.gl/MfAcUS>. Approximately \$426 million was seized in criminal forfeiture proceedings and almost \$9 billion was seized in civil forfeiture proceedings. By contrast, a total of approximately \$1.5 billion was spent on victim compensation.

¹⁶⁰ Transcript of Oral Argument at 43–44, *Kaley v. United States*, No. 12-464 (argued Oct. 16, 2013).

JUSTICE BREYER: [A] rough guess would be 5 or 10 percent goes to victims. Now do you have a better estimate?

MR. DREBEN: I don't, Justice Breyer. I do know that one of the main purposes in seeking funds for forfeiture, particularly in white collar cases like this, is to pay restitution.

Id.

Fifth and finally, Justice White's analogy fails to take into account the specter that forfeiture laws put over criminal defendants. Even before they become defendants, any attorneys they retain must be wary that their fees may become forfeitable in the future.¹⁶¹ This possibility works to prevent potential defendants from retaining counsel even before they are restrained from disposing of their assets, "strip[ping] the defendant of the right to retain counsel."¹⁶²

Justice White analogizes the generic forfeiture defendant who wants to use forfeitable funds to pay for an attorney to a bank robber wishing to do the same. For the above reasons, this analogy is inadequate. It paints a picture of a defendant who has clearly committed a crime, carries in his possession the clear proceeds of that crime, and is apprehended by a law enforcement officer who will return those proceeds to their rightful owner. In many cases, none of this is true.

The bank robber analogy is particularly damaging in the context of the pretrial, post-restraint hearing. If this analogy were an apt description of the facts, the *Kaley* approach (which cited this example) begins to make sense. There is no need for a pretrial, post-restraint hearing if the court already knows that the defendant is guilty and is in possession of forfeitable funds. However, the flaws in Justice White's bank robber analogy illustrate the importance of a pretrial proceeding.

IV. NEW ARGUMENTS IN *KALEY*

In *Kaley*, the Eleventh Circuit relied on the arguments made in the Supreme Court's rulings in *Monsanto* and *Caplin & Drysdale*. However, the Eleventh Circuit also introduced new arguments in favor of less-protective pretrial forfeiture procedures. Specifically, the Eleventh Circuit made the argument that a pretrial hearing on the merits of the underlying grand jury determination impermissibly intrudes on the grand jury's province.¹⁶³ In addition, the Eleventh Circuit was cautious that the hearing might become a "second trial."¹⁶⁴ Neither of these considerations adequately

¹⁶¹ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 654 (1989) (Blackmun, J., dissenting).

¹⁶² *Id.*

¹⁶³ *United States v. Kaley*, 677 F.3d 1316, 1323 (11th Cir. 2012) ("[T]his kind of pretrial challenge to the evidence supporting an indictment would be wholly inconsistent with the Supreme Court's repeated pronouncements in *Costello v. United States* and its progeny. In these cases, the Court has shown a profound reluctance to allow pretrial challenges to a grand jury's probable cause determination." (internal citation omitted)).

¹⁶⁴ *Id.* at 1327 ("[A] defendant whose assets have been restrained will ultimately receive a thorough hearing—the trial itself. . . . The question is simply whether the Due Process Clause requires that the defendant get *two* such hearings.").

addresses the plight of the forfeiture defendant whose assets have been frozen and who can no longer afford an attorney.

A. THE SANCTITY OF THE GRAND JURY

In deciding *Kaley*, the Eleventh Circuit was concerned that a pretrial hearing would contradict the grand jury's indictment, running afoul of the Supreme Court's "profound reluctance to allow pretrial challenges to a grand jury's probable cause determination."¹⁶⁵ This is a key sticking point on the road to a full, adversarial, pretrial, and post-restraint hearing. Such a hearing would require the prosecution to show with probable cause that an offense occurred and would therefore have the potential to reconsider the facts and law underlying the grand jury indictment.¹⁶⁶

Indeed, in *Costello v. United States*, the Supreme Court concluded that a defendant has no right to, in effect, try his case prior to the trial: "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."¹⁶⁷ The Eleventh Circuit thoroughly explained the Supreme Court's jurisprudence regarding the grand jury and the strictness with which the grand jury's determinations are usually protected.¹⁶⁸ At the end of its analysis, the court concluded, "a defendant cannot challenge whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination."¹⁶⁹ This result is problematic for a number of reasons.

First, such a stance is not mandated by the Supreme Court's grand jury jurisprudence. None of the decisions referenced in the Eleventh Circuit's decision relate to the application of a forfeiture statute.¹⁷⁰ This context is important because of the novelty of criminal forfeiture actions. In initiating forfeiture, prosecutors are seeking something "extra"¹⁷¹ beyond the traditional tools of imprisonment or fine—freezing assets before a determination of guilt or innocence. Because freezing funds implicates the

¹⁶⁵ *Id.* at 1323.

¹⁶⁶ *Id.*

¹⁶⁷ *Costello v. United States*, 350 U.S. 359, 363 (1956).

¹⁶⁸ *Kaley*, 677 F.3d at 1323–25.

¹⁶⁹ *Id.* at 1326.

¹⁷⁰ See generally *United States v. Williams*, 504 U.S. 36 (1992) (reversing the lower court's dismissal of an indictment where the prosecutor failed to disclose exculpatory evidence to the grand jury); *United States v. Calandra*, 414 U.S. 338 (1974) (reversing a lower court's application of the exclusionary rule to a grand jury proceeding); *Lawn v. United States*, 355 U.S. 339 (1958) (holding that defendants in a tax evasion case had no right to a preliminary hearing to question the grand jury's indictment).

¹⁷¹ *Kaley*, 677 F.3d at 1331 (Edmondson, J., concurring in the result).

defendant's ability to mount a legal defense, it is of an entirely different character than pretrial detention. When RICO was passed in 1970, it was the first criminal forfeiture law in the United States¹⁷²—it would be odd for the device to fit neatly into existing criminal procedure law. At oral argument in *Kaley*, even Chief Justice John Roberts was unsure that the “grand jury” argument was even relevant to this case.¹⁷³ Because the procedure itself is new, it justifies new procedural protections.

Second, it is important to note that pretrial restraining orders are discretionary—the statute does not require law enforcement officers to utilize forfeiture statutes.¹⁷⁴ Because prosecutors maintain discretion to seek forfeiture, they are not “forced” to undergo pretrial hearings. Prosecutors can instead choose not to pursue forfeiture as a strategy.¹⁷⁵

Nor will the imposition of a full pretrial hearing dramatically burden prosecutors. The “worst that will happen is that the pretrial restraint on property will not continue.”¹⁷⁶ Therefore, the stakes for prosecutors are relatively low because of the opportunities for full criminal trials, regardless of the outcome of the pretrial hearings.¹⁷⁷

Next, the legal and financial burden to hold pretrial hearings would not be severe. After all, the government would only be required to “establish probable cause a second time and in the presence of the defendant.”¹⁷⁸ This would not be a high hurdle—the only difference in the procedure is that it would be adversarial, giving the defendant a chance to present her story. Any concern that such hearings will make a prosecutor's job more difficult is somewhat circular. If the charges cannot be proven with a substantially lowered burden of proof, perhaps trials are warranted before defendants are impoverished. Moreover, applying the forfeiture device seems to be lucrative enough for law enforcement that the government will not discontinue its use, even if its costs increase. After all, the activity produces revenue.¹⁷⁹ As argued above, because the use of forfeiture is an incredibly helpful and new tool for law enforcement, it justifies new protections.

¹⁷² Terrance G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, CATO POLICY ANALYSIS, NO. 179, Sept. 29, 1992, available at <http://goo.gl/W3912n>.

¹⁷³ Transcript of Oral Argument at 31, *Kaley v. United States*, No. 12-464 (argued Oct. 16, 2013) (quoting Chief Justice John Roberts as saying “I don’t see what this case, frankly, has to do with the grand jury at all, or review of the grand jury determination”).

¹⁷⁴ *Kaley*, 677 F.3d at 1330 (Edmondson, J., concurring in the result).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1331.

¹⁷⁷ *Id.* at 1331–32.

¹⁷⁸ *Monsanto IV*, 924 F.2d 1186, 1209 (2d Cir. 1991).

¹⁷⁹ See *supra* text accompanying notes 115–31.

Nor should the safety of witnesses and victims be overriding concerns in formulating the hearings. The legislative history of the CFA indicated a concern that pretrial hearings would unnecessarily endanger witnesses testifying against criminals.¹⁸⁰ The *Kaley* court found this legislative history persuasive.¹⁸¹ However, this reasoning ignores two possible solutions to the secrecy problem. First, *in camera* hearings can be employed to protect witnesses.¹⁸² These proceedings would take place either in the judge's chambers or in a secured, empty courtroom.¹⁸³ This could prevent the public from gaining knowledge as to witnesses' identities.

Second and more importantly, the Federal Rules of Evidence would not apply in these pretrial hearings.¹⁸⁴ Sidestepping the Rules of Evidence would allow the court to keep witnesses anonymous by allowing hearsay testimony.¹⁸⁵ This is precisely the procedure the *Monsanto* court used on remand.¹⁸⁶ These standards would be able to adequately protect the government's interests in these hearings, even if they reconsider the probable cause determination made by the grand jury. At oral argument in *E-Gold*, the Government could not articulate any harmful consequences from using this standard in the Second Circuit,¹⁸⁷ illustrating that the only Government objection to the added procedure is that prosecutors would "prefer not to."¹⁸⁸ In oral argument at the Supreme Court in *Kaley*, the Government was evasive in articulating the impact of the *Monsanto/E-Gold* rule upon prosecutors in applicable circuits.¹⁸⁹

¹⁸⁰ S. REP. NO. 98-225, at 196 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3379.

¹⁸¹ *Kaley*, 677 F.3d at 1328.

¹⁸² *United States v. E-Gold, Ltd.*, 521 F.3d 419 (D.C. Cir. 2008).

¹⁸³ See BLACK'S LAW DICTIONARY 828 (9th ed. 2009) (defining *in camera*).

¹⁸⁴ See 21 U.S.C. § 853(e)(3) (2006 & Supp. 2009).

¹⁸⁵ *Monsanto IV*, 924 F.2d 1186, 1198 (2d Cir. 1991).

¹⁸⁶ *Id.*

¹⁸⁷ *E-Gold*, 521 F.3d at 419 n.1 ("We note that when asked directly at oral argument, the government could not identify any harm to its law enforcement efforts in the Second Circuit that has resulted from the *Monsanto* standard.").

¹⁸⁸ HERMAN MELVILLE, *BARTLEBY THE SCRIVENER: A STORY OF WALL STREET* 12 (Simon & Schuster ed., 1997) (1853). The Government's argument is not that added procedure is impossible or impractical, just that it is not preferable to them. See *E-Gold*, 521 F.3d at 419 n.1. This is an insufficient reason to compromise a litigant's rights.

¹⁸⁹ Transcript of Oral Argument at 39–41, *Kaley v. United States*, No. 12-464 (argued Oct. 16, 2013).

JUSTICE BREYER: In how many cases in those circuits has the government faced the serious risks that you're talking about?

MR. DREBEN: We do face them. I cannot quantify them --

JUSTICE BREYER: Can you give me a guess? You are -- I mean, you make a huge point of how this will put the government at a disadvantage, so someone in your office, probably you, asked people in the Justice Department, do you have any examples? Or how many cases have

Finally, it is important to note that the *Kaley* court may have oversold the “unique nature of the grand jury as an independent body, not an arm of the prosecution.”¹⁹⁰ The court put much emphasis on the idea that the grand jury “serves the invaluable function in our society of standing between the accuser and the accused.”¹⁹¹ The *Kaley* court used this proposition to conclude that defendants are protected because the prosecution cannot restrain assets without a grand jury’s probable cause determination.¹⁹²

However, the court never examined the original proposition that grand juries shield the populace from overzealous prosecution. Indeed, the idea that the grand jury is a “protective bulwark” is a long held, but ultimately unjustified, legal fiction.¹⁹³ This proposition is protected by the rules of secrecy that prevent the public from knowing its workings.¹⁹⁴ Since the early twentieth century, critics have referred to a grand jury as a “rubber stamp,” a “fifth wheel,” and a “total captive of the prosecutor.”¹⁹⁵ This

there been where serious problems arose? And you probably got some kind of answer. So you probably have some kind of idea.

MR. DREEBEN: You’re correct, I did ask, and I received anecdotal responses.

JUSTICE BREYER: How many anecdotes?

(Laughter.)

MR. DREEBEN: I received several specific anecdotes of instances in which the government elected not to proceed with a hearing.

JUSTICE BREYER: In a number of cases, several specific. Is that more like four or is it more like 24?

MR. DREEBEN: There are group numbers in which offices reported, we have encountered this a number of times.

Id. The Government’s vagueness on this point should not be construed in its favor.

¹⁹⁰ *United States v. Kaley*, 677 F.3d 1316, 1325 (11th Cir. 2012). The court also noted:

It’s worth emphasizing that the prosecution cannot unilaterally restrain a defendant’s assets between the time of indictment and trial. In the first place, a prosecutor may seek a pretrial restraint only because Congress has specifically authorized the government to proceed in this manner. . . . And the restraining order will issue only if a lawfully constituted grand jury has found probable cause

Id. at 1327.

¹⁹¹ *Id.* at 1325 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 687 n.23 (1972)).

¹⁹² *Id.* at 1327.

¹⁹³ Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 1–3 (2004); see also David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 226 (2011), <http://goo.gl/eZ9Cid>. See generally Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339 (2010) (arguing that the grand jury is an ineffective protection from arbitrary prosecution and proposing an overhaul of the grand jury to make it more formidable).

¹⁹⁴ Kuckes, *supra* note 193, at 2.

¹⁹⁵ *Id.* at 8 (collecting sources).

skepticism has become so widespread that the claim that a grand jury would “indict a ham sandwich” is now “cliché.”¹⁹⁶ At oral argument in *Kaley*, even Chief Justice Roberts threw cold water on the Government’s claim that the grand jury protects Americans from unreasonable prosecution.¹⁹⁷

Of course, although we refer to “grand jury investigations” and “determinations,” the reality is quite different.¹⁹⁸ It is, after all, the prosecutor who is in the driver’s seat.¹⁹⁹ It is the prosecutor who chooses which witnesses to subpoena and controls the process.²⁰⁰ Evidence is often delivered to the prosecutor, who then displays it for the grand jury.²⁰¹ Ultimately, a “grand jury hears evidence only to the extent the prosecutor finds it helpful in building her case for trial.”²⁰² The grand jury does not even have the power to ask direct questions of the court—its view is completely dictated by the prosecutor.²⁰³

And, of course, the pressures put on prosecutors to seize assets must play a role in these proceedings. Given that prosecutors are truly in control of a grand jury investigation, these bureaucratic pressures to increase forfeiture revenue may begin to skew the process of issuing indictments that restrain assets.²⁰⁴

B. DOES THE DEFENDANT GET TWO TRIALS?

The *Kaley* court also seemed wary of the concern that a criminal defendant might functionally get two trials if the court adopted an

¹⁹⁶ Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2335–36 (2008); see also TOM WOLFE, *THE BONFIRE OF THE VANITIES* 624 (Picador 2008) (1987) (quoting former Chief Judge Sol Wachtler from the New York Court of Appeals and immortalizing the expression).

¹⁹⁷ Transcript of Oral Argument at 25–26, *Kaley v. United States*, No. 12-464 (argued Oct. 16, 2013).

MR. DREEBEN: The grand jury is set up as an independent body to protect the defendant from unfounded prosecutions. It is structurally independent from the prosecution and the courts. And it’s composed of --

CHIEF JUSTICE ROBERTS: I understand the theory. In reality it’s not terribly -- it’s not great insulation from the overweening [sic] power of the government.

Id.

¹⁹⁸ See Michael B. Himmel & Matthew E. Power, *Grand Jury Practice*, 1994 *N.J. LAW* 16, 16.

¹⁹⁹ See Washburn, *supra* note 196, at 2353.

²⁰⁰ *Id.*

²⁰¹ Kuckes, *supra* note 193, at 26.

²⁰² *Id.* at 27.

²⁰³ *Id.* at 31.

²⁰⁴ See *supra* Part III.A.

alternative approach.²⁰⁵ Indeed, the court made clear that adopting the *Monsanto* and *E-Gold* approach would “effectively require the district court to try the case twice.”²⁰⁶ Specifically, the court did not want to allow the Kaleys a pretrial hearing on the question of whether their actions constituted a crime.²⁰⁷

However, the *Monsanto* approach does not truly allow the criminal defendant two trials. As explained above, an adversarial, pretrial, post-restraint hearing would not be a full trial. There would be no jury, proceedings would be *in camera*, and hearsay evidence would be permissible—this “trial” would lack many of the hallmarks of the American justice system. In addition, and perhaps more importantly, a forfeiture proceeding is something “extra” the government seeks.²⁰⁸ With this relatively novel practice, the government seeks not only to imprison the defendant and restrain assets post-trial, but it is also demanding that the defendant be adversely affected before a determination of guilt or innocence.²⁰⁹ This inverts the American presumption of innocence in criminal trials. It is therefore only logical that some sort of procedure be deployed to protect forfeiture defendants.

CONCLUSION

In *Monsanto*²¹⁰ and *Caplin & Drysdale*,²¹¹ the Supreme Court declined to strike down elements of the Comprehensive Forfeiture Act, which prevented defendants with frozen assets from hiring attorneys. Specifically, these decisions firmly limited the qualified right to counsel guaranteed by the Sixth Amendment²¹² as well as the Fifth Amendment Due Process right to a balance of power between the government and the accused.²¹³ However, the Court still left room for lower courts to use some sort of pretrial, post-restraint hearing. The development of such a process was left entirely to the lower courts.²¹⁴

In the intervening years, two chief approaches have developed. The first approach, established by the Second Circuit in *Monsanto IV*, allows a

²⁰⁵ *United States v. Kaley*, 677 F.3d 1316, 1327 (11th Cir. 2012).

²⁰⁶ *Id.*

²⁰⁷ *Id.* (explaining that the Kaleys “sought to argue that their actions did not constitute a crime because Ethicon did not have any ownership interest in the allegedly converted PMDs”).

²⁰⁸ *Id.* at 1331 (Edmondson, J., concurring in the result).

²⁰⁹ *Id.*

²¹⁰ *Monsanto III*, 491 U.S. 600, 602 (1989).

²¹¹ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619 (1989).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Monsanto III*, 491 U.S. at 615 n.10.

full adversarial hearing on both the question of whether the assets listed in the grand jury indictment are rightly forfeitable²¹⁵ and whether there is probable cause that a crime took place.²¹⁶ The Second Circuit therefore created procedures to protect forfeiture defendants without simply ruling the CFA unconstitutional.²¹⁷ The D.C. Circuit in *E-Gold* adopted the *Monsanto* approach to pretrial, post-restraint hearings,²¹⁸ finding little evidence that the *Monsanto* approach had unduly hampered prosecutorial flexibility in the sixteen years since *Monsanto*.²¹⁹ In 2012, however, the Eleventh Circuit followed the Tenth Circuit²²⁰ and held in *United States v. Kaley* that a pretrial, post-restraint hearing cannot include a questioning of the grand jury's probable cause determination that a crime occurred.²²¹

The second approach used in *Kaley* and *Jones* before it fails to recognize the vast impact that forfeiture laws can have on defendants who have not yet been proven guilty. Because law enforcement officers and prosecutors have a profit motive to pursue forfeiture crimes, forfeiture defendants are more likely to be adversely impacted, regardless of whether they are guilty. Both decisions subscribe to the fundamental, circular logic that indicted defendants are presumed guilty of the crimes for which they have been indicted.²²²

To a certain extent the criticisms of this Comment apply broadly to *Monsanto III* and *Caplin & Drysdale*. In both of these decisions, the Court held that the Government can prevent a defendant from hiring counsel by restraining their assets. Both of these decisions created serious complications for the criminal defense bar and have restrained criminal defendants from seeking counsel. Both decisions have created conditions that "allow[] the government to impose indigence and deprive RICO and CCE defendants of the opportunity to retain private counsel merely by obtaining an indictment."²²³ Candidly, this author would favor overturning *Caplin & Drysdale*. However, at oral argument in *Kaley*, Justice Antonin Scalia seemed to be the only Justice on the Court interested in this

²¹⁵ *Monsanto IV*, 924 F.2d 1186, 1188 (2d Cir. 1991).

²¹⁶ *Id.*

²¹⁷ *Id.* at 1202.

²¹⁸ *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417 (D.C. Cir. 2008).

²¹⁹ *Id.* at 419 n.1.

²²⁰ *United States v. Jones*, 160 F.3d 641, 648 (10th Cir. 1998).

²²¹ *United States v. Kaley*, 677 F.3d 1316, 1320 (11th Cir. 2012).

²²² Hardy, *supra* note 157, at 1169 ("[T]he relation-back clause gives the government a paramount interest in the defendant's assets because the relation-back clause gives the government title to the assets.").

²²³ *United States v. Monsanto (Monsanto I)*, 836 F.2d 74, 82 (2d Cir. 1987) (emphasis added).

approach.²²⁴ Therefore, it would seem that a more conservative solution is the most realistic.

Additionally, it is necessary to recognize the value of some sort of forfeiture provision. After all, Justice White's bank robber should probably not be permitted to use his ill-gotten gains to hire a legal team. It was Congress's intention to "lessen the economic power of organized crime and drug enterprises,"²²⁵ and that is certainly a worthy objective. The *Monsanto IV* approach still allows the government to freeze forfeitable funds and prevent them from being used for attorney's fees: it does not allow the bank robber to keep his ill-gotten gains. *Monsanto IV* creates a meaningful opportunity for defendants to be heard before their trials—the right to question the merits of their indictments at trial without their counsel of choice is simply not helpful. A pretrial, post-restraint hearing helps neutralize the "substantial risk of an erroneous deprivation of a defendant's significant property interest in the absence of an opportunity to be heard."²²⁶

As illustrated in the discussion above, the real trouble with forfeiture statutes is in discerning the kingpins of ongoing criminal enterprises from defendants who might actually be innocent. The *Monsanto IV* approach provides a middle ground that can help the courts distinguish Michael Corleones²²⁷ from Kerri Kaleys. It also does so without imposing undue burdens on prosecutors. Forfeiture statutes are permissive—prosecutors are not required to utilize them—so if prosecutors wish not to go through the process of pretrial hearings, they need only decline the opportunity to freeze assets. If they choose to utilize the asset forfeiture device, the pretrial hearings will require only a probable cause standard and will implement safeguards to prevent others from divulging information that the prosecutors wish to leave for trial.

²²⁴ Transcript of Oral Argument at 14–15, *Kaley v. United States*, No. 12-464 (argued Oct. 16, 2013).

JUSTICE SCALIA: To tell you the truth, I would prefer -- to save your client, I would prefer a rule that says you cannot, even with a grand jury indictment, prevent the defendant from using funds that are in his possession to hire counsel. Don't need a hearing. Just, just it's unconstitutional for the rule to be any broader than withholding money that the defendant does not need to defend himself.

Would you like that? I really prefer it to yours. I think yours leads us into really strange territory.

MR. SREBNICK: Justice Scalia, I believe that was the issue in *Monsanto* and *Caplin & Drysdale* where this Court held [in a] 5 to 4 decision that assets that are demonstrably tainted can be restrained over the objection of the defendant who needs those assets to retain counsel of choice.

Id.

²²⁵ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989).

²²⁶ *Monsanto IV*, 924 F.2d 1186, 1195 (2d Cir. 1991).

²²⁷ See *THE GODFATHER PART II* (Paramount Pictures 1974).

These hearings are not “mini-trials” for the defendants to get second bites at the apple. If a defendant is successful in the pretrial hearing, she merely receives control of her assets—the full trial still looms. When the Supreme Court decides *Kaley*, it should heed the words of Judge J.L. Edmondson, concurring in the judgment in *Kaley*:

The Constitution’s Bill of Rights, including the Fifth and Sixth Amendments, was intended by the Framers to protect citizens from the high power of the federal government. The Constitution is to guarantee each citizen a fair deal when the federal government takes aim at him. More specifically about property, we ought to bear in mind this fact: “*Liberty, property, and no stamps!*” It had been the first slogan of the American Revolution.” . . . For the Federal Executive, in effect, to seize a citizen’s property; to deprive him thereby of the best means to defend himself in a criminal case; and then, by means of the criminal case, to take his liberty strikes me as a set of circumstances about which our nation’s history and its Constitution demands that the process at each step be fully fair.²²⁸

Forfeiture has become a formidable and important tool in the prosecution of criminals. However, the prosecution’s interest in using this tool must be balanced against the defendant’s interest in due process and against the greatly increased probability of wrongful prosecution. As such, the analysis regarding the interests at stake must not rest on the initial assumption that the defendant is analogous to a bank robber caught red-handed with bags of the bank’s money. The Supreme Court and Eleventh Circuit’s starting point therefore flies in the face of the fundamental axiom of American criminal law: criminal defendants are innocent until proven guilty.

The ongoing Megaupload criminal case displays the flaws in this logic. Prosecutors chose to bring a criminal case based on a novel theory of criminal copyright infringement—that secondary infringement gives rise to criminal liability.²²⁹ Without an adversarial pretrial procedure on the merits of the indictment, Megaupload’s assets will remain frozen, leaving it unable to adequately defend itself in an extremely complex and expensive case.²³⁰ Where criminal forfeiture was originally used against organized criminals accused of drug offenses and racketeering, it is now used to push novel and complex criminal legal theories while depriving defendants the opportunity to defend themselves.

²²⁸ United States v. Kaley, 677 F.3d 1316, 1332 (11th Cir. 2012) (Edmondson, J., concurring in the judgment) (internal citation omitted) (quoting CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 70 (1966)).

²²⁹ Granick, *supra* note 14.

²³⁰ See Lee, *supra* note 24.