Pace Law Review

Volume 38
Issue 2 *Spring 2018*

Article 10

April 2018

The Federal Criminal Forfeiture Statute: Reining in The Government's Previously Unbridled Ability to Seize Pretrial Assets

Kristyn Fleming Francese
Elisabeth Haub School of Law at Pace University

The Federal Criminal Forfeiture Statute: Reining in The Government's Previously Unbridled Ability to Seize Pretrial Assets

By Kristyn Fleming Francese

Abstract

American organized crime movies are synonymous with a climatic raid and seizure of illegal assets – typically drugs and guns. But what is really encompassed within the Government's grasp; what are the "illegal assets"? The truth is that the Government has a wide reach and the criminal seizures don't end when the screen goes black and the credits roll. The Federal Criminal Forfeiture Statute, as applied to RICO and CCE cases, typically entails the forfeiture of any asset connected to the underlying crimes. Given that criminal forfeiture penalties have ethical and constitutional considerations, it is not surprising to learn that a recent United States Supreme Court decision has scaled back the Government's power over its ability to seize. This Note will provide an overview of the Federal Criminal Forfeiture Statute, as well as RICO and CCE in order to provide context, will detail the case law history of the statute in application, will examine the ethical and constitutional considerations, and will question the future of the controversially applied law.

I. Introduction

Movies like *American Gangster* provide the general public's foundation for what occurs when a crime organization gets taken down by the Federal Government. As such, Government raids and seizure of the illegal contents within criminal facilities are as commonplace as the injection of a mole within a crime ring. But the reality of the Government seizures, and the forfeitures that ensue, are not as widely understood. In the scene that depicted the raid on notorious gangster Frank Lucas' home in Teaneck, New Jersey, moviegoers watched as the Drug Enforcement Agency uncovered and seized large amounts of

hidden cash stashed in the home.[1] But what happened to the large estate that Lucas left behind? The Government seized $584,683 in cash just from the raid alone.[2] Eventually, Lucas was forced to forfeit it all – "[t]he properties in Chicago, Detroit, Miami, North Carolina, Puerto Rico – they took everything," including the money held in his offshore Cayman Island accounts.[3] Lucas himself estimated his offshore wealth alone to have been around $52 million at the time he was arrested.[4] Given the authority's unethical conduct that permeated the takedown of the Lucas empire, there is one major question that the general public is left with: who or what authorized the Government to legally[5] take Lucas' illegally-gained assets?

In 1970, Congress enacted 21 U.S.C. § 853[6] to provide the Government with a statutory vehicle to seize and secure a criminal defendant's assets pending trial. The Federal Criminal Forfeiture Statute applies to a laundry list of crimes that fall generally under, or include, the Federal Racketeer Influenced Corrupt Organizations and Continuing Criminal Enterprise statutes. The policy argument supporting the criminal forfeiture statute is a sound one: absent a pretrial asset seizure, a person facing criminal charges that often entail monetary penalties would have the ability to move assets during trial so that post-conviction, the assets are no longer in the defendant's possession to be seized. This, however, must be balanced against the serious constitutional and ethical implications, namely the

1. AMERICAN GANGSTER (Universal Pictures 2007).

2. Jill Gerston, *19 Indicted in Heroin Traffic in City*, N.Y. TIMES (Jan. 30, 1975), https://www.nytimes.com/1975/01/30/archives/19-indicted-in-heroin-traffic-in-city.html.

3. RON CHEPESIUK, SUPERFLY: THE TRUE, UNTOLD STORY OF FRANK LUCAS, AMERICAN GANGSTER (Street Certified Entertainment 2007).

4. Mark Jacobson, *The Return of Superfly*, N.Y. MAG. (Aug. 14, 2000), http://nymag.com/nymag/features/3649/.

5. The movie portrays many cops within the local police department as crooked, frequently extorting Lucas for some of his ill-gotten gains. Out of the total 70 Special Investigations Unit officers working for the NYPD at the time of Lucas' demise, 52 were eventually either jailed or indicted. Jake Coyle, *Original 'Gangster' Outshines Film*, ASSOCIATED PRESS (Nov. 7, 2007, 7:41 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/07/AR2007110701954_pf.html.

6. This statute, as the foundation of this Note, will hereinafter be interchangeably referred to as either 21 U.S.C. § 853 or the Federal Criminal Forfeiture Statute.

Sixth Amendment.

Since 1970, courts have broadly interpreted the statute so as to extend significant power to the Government. In 1989, the United States Supreme Court was faced with the decision of whether the statute included assets that would be used to pay for the defendant's attorney's fees.[7] The United States Supreme Court in *Caplin & Drysdale v. United States*, held that although the statute had no explicit exception pertaining to attorney's fees, the defendant's Fifth and Sixth Amendment rights were not violated.[8] That same day, the United States Supreme Court issued a near identical holding in *United States v. Monsanto*, reinforcing the principle that the Government's interest in seizing a defendant's assets does not violate a defendant's right to obtain and choose their own counsel.[9]

With the constitutionality of the statute initially resolved, a circuit split developed regarding the ability for a defendant to object to a pretrial seizure determination. The Federal Criminal Forfeiture Statute requires probable cause that the defendant be guilty of the crime in order to warrant a pretrial asset seizure.[10] Among many factors, one substantially determinative factor is a grand jury's indictment. By 2014, the circuit courts were split over whether a defendant, who was indicted by a grand jury, may object to, and essentially relitigate, the issue of their probability of guilt in regard to it being the basis for asset forfeiture. The split was reconciled in *Kaley v. United States*, where the United States Supreme Court held that a defendant is not entitled to question a grand jury's determination, and therefore, may not object to an asset seizure-probable cause determination.[11]

With the constitutional arguments against the statute quashed, it is important to consider other non-constitutional issues that the Federal Criminal Forfeiture Statute may pose. The Government's broad power to seize a defendant's assets has many ethical implications, such as the issue of criminal contingency fees, the ability for the Government to essentially

7. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).
8. *Id.*
9. *See generally* 491 U.S. 600 (1989).
10. 21 U.S.C. § 853(e)(2) (2012).
11. *See generally* 134 S. Ct. 1090 (2014).

control a defendant's choice of counsel, and potential pressure during plea negotiations.

This year, however, the United States Supreme Court curtailed the Government's previously expansive forfeiture power in its 2016 *Luis v. United States* decision. The *Luis* case stands for the proposition that only assets that can be sufficiently tied to the criminal activity of the defendant may be subjected to pretrial seizure.[12] This decision signals a significant halt to the previously expanding power of the Government in criminal asset forfeiture cases.

This Note analyzes the history of the Federal Criminal Forfeiture Statute and its future, given the recent United States Supreme Court decision, in five parts. Part II will describe the relevant provisions of the Federal Criminal Forfeiture Statute and its legislative history to provide a foundation for the analysis. Part III will delve into the notable case law referenced above. Part IV will discuss the ethical issues surrounding the Federal Criminal Forfeiture Statute and the Government's previously unbridled power. Part V will discuss the *Luis* case and its effects. Finally, Part VI questions the future of the Government's power regarding the Federal Criminal Forfeiture Statute given the United States Supreme Court's denial of the petition for a Writ of Certiorari in *Nacchio v. United States* – a case that was calling for a clarification of the underlying purpose of 21 U.S.C. § 853.[13]

II. History and Overview of the Criminal Forfeiture Statute

This Part will give a brief overview of the history of criminal forfeitures and define the two pertinent criminal statutes that will appear throughout this Note.

The United States Federal Criminal Forfeiture Statute that exists today can be traced back to Old English Rule.[14] Under the King's rule, inanimate objects causing an accidental death were forfeited to the crown,[15] as were a person's chattels for conviction

12. *See generally* Luis v. United States, 136 S. Ct. 1083 (2016).

13. *See generally* 824 F.3d 1370, 1373 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 2239 (2017).

14. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

15. *Id.* at 680-81.

of felonies and treason,[16] and for violations of customs and revenue laws.[17] The English concept of criminal forfeiture[18] survived the American Revolution, but existed throughout the eighteenth, nineteenth, and most of the twentieth centuries invisibly.

In 1970, Congress enacted the Federal Criminal Forfeiture Statute, 21 U.S.C. § 853, to further punish those involved in drug and organized crime by subjecting their property to forfeiture.[19] This statute opened the door to the Government's ability to ensure that any and all proceeds tied to the illicit activity would not be realized upon either preliminary, or final judgment. "Until 1970, American law did not often use the concept of 'criminal forfeiture.' . . . Today, federal prosecutors make criminal forfeiture a routine part of criminal law enforcement in federal cases."[20] In fact, some courts have noted that prior to the 1970 enactment of 21 U.S.C. § 853, criminal forfeiture was prohibited.[21]

It is worth noting that forfeiture authorized under the Federal Criminal Forfeiture Statute is an "*in personam* action against a defendant in a criminal case, and forfeiture in such a case is imposed as a sanction against the defendant upon his conviction."[22] This means that, as will be discussed in Parts III and IV, a defendant's exposure to forfeiture in terms of what can be seized is much greater than in a civil, *in rem* forfeiture action. Nonetheless, 21 U.S.C. § 853 provided a vehicle with which the Government could seize unlawfully gained assets, so long as the defendant had, or had likely, committed the predicate crime.

16. *Id.* at 682.

17. *Id.* at 681.

18. Criminal forfeiture, dating back to 1866, is defined as "[a] governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior. *Criminal Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

19. 21 U.S.C. § 853 (2012).

20. Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45, 45 (2008) (footnote omitted).

21. United States v. Schmalfeldt, 657 F. Supp. 385, 387 (W.D. Mich. 1987).

22. United States v. Certain Real Prop. Located at 2525 Leroy Lane, W. Bloomfield, Mich., 910 F.2d 343, 346 (6th Cir. 1990).

The list of crimes that satisfies the predicate offense requirement under the Federal Criminal Forfeiture Statute is not a short one. There are two criminal statutes that will be discussed in this Part, in conjunction, in order to provide a statutory foundation for the subsequent case law analysis.

A. Organized Crime Control Act – RICO

The first is the Organized Crime Control Act, passed on October 15, 1970,[23] and Title IX, commonly referred to as the Racketeer Influenced and Corrupt Organizations ("RICO"), in particular. The purpose of RICO's passage was for the "elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[24] Violators of RICO are subjected to a forfeiture penalty of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . ."[25] Specifically, RICO calls for the forfeiture of

> (1) any interest the person has acquired or maintained in violation of section 1962
> (2) any–
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962. has acquired or maintained in violation of section 1962[.][26]

23. 18 U.S.C. §§ 1961-68 (2012).

24. OFF. OF THE U.S. ATT'YS, U.S. ATTORNEYS' MANUAL 9-110.100 (citing S.REP. NO. 617, 91st Cong., 76 (1969)).

25. 18 U.S.C. § 1963(a)(3) (2012).

26. 18 U.S.C. §§ 1963(a)(1)-(2) (2012).

Further, the word "property" itself is defined as including "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities."[27] If not redundant, the statute is nearly all-encompassing.

RICO is often looked at by the public as one of the United States' "most powerful and sweeping laws[,]" because of the law's ability to "stitch together crimes" and make the Government's job of convicting those that are undetectably involved, easier.[28] The United States Department of Justice itself even characterizes RICO as providing for "powerful criminal penalties" that "broadly appl[y] to all criminal conduct within its ambit *regardless* of whether it involves organized crime."[29]

B. Continuing Criminal Enterprise – A Weighty Prong of the Comprehensive Drug Abuse Prevention and Control Act

The second statute is the Comprehensive Drug Abuse Prevention and Control Act of 1970,[30] pursuant to which Congress criminalized engagement in a Continuing Criminal Enterprise ("CCE"). CCE is often described as the "RICO drug statute[,]"[31] and "is commonly referred to as the 'kingpin' statute."[32] CCE makes it a crime for anyone to commit a predicate crime that violates a federal narcotics law, as part of a continuing series of three or more drug offenses, in concert with five or more persons, where the defendant acts as the organizer,

27. 18 U.S.C. §§ 1963(b)(1)-(2) (2012).

28. Nathan Koppel, *They Call It RICO, and It Is Sweeping*, WALL ST. J. (Jan. 20, 2011, 5:14 PM), https://www.wsj.com/articles/SB10001424052748704881304576094110829882704?mod=WSJEUROPE_hpp_sections_news.

29. U.S. DEP'T OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961-1968 A MANUAL FOR FEDERAL PROSECUTORS 1, 6 (6th revised ed. 2016), https://www.justice.gov/usam/file/870856/download (emphasis added).

30. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

31. Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL OF RTS. J. 239, 253 (1993) (citing 21 U.S.C. § 848 (1988) as the Continuing Criminal Enterprise statute).

32. Barbara Sicalides, Comment, *RICO, CCE, and International Extradition*, 62 TEMP. L. REV. 1281, 1288 (1989).

supervisor, or manager with respect to the persons involved, and the defendant gains substantial income as a result.[33] Violators of CCE are subjected to imprisonment, significant fines, and forfeiture pursuant to 21 U.S.C. § 853. In addition to the forfeiture authorized under 21 U.S.C. § 853, CCE sets out a list of seizable assets that is even more expansive. 21 U.S.C. § 881 provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> (2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this subchapter.
>
> (3) All property which is used, or intended for use, as a container for property. . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [illegal] property.
>
> (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all

33. 21 U.S.C. § 848(c) (2012).

> moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter.
>
> (8) All controlled substances which have been possessed in violation of this subchapter.
>
> (9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this subchapter or subchapter II of this chapter.
>
> (10) Any drug paraphernalia . . . .
>
> (11) Any firearm . . . used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.[34]

Both CCE and RICO are notable because they codified what is referred to as compound liability.[35] Other than the notable difference that CCE requires that the predicate crime involve illegal drug activity, the two criminal statues are very similar for the purposes of this Note.

34. 21 U.S.C. § 881 (2012). Although lengthy, a full transcript of the statute's forfeiture power is necessary to depict just how truly all-encompassing the statutes are and how the Government's broad power to seize appears to be backed by legislative support.

35. Brenner, *supra* note 31, at 241, 243 n.18.

C. Forfeiture Under RICO and CCE

Under both criminal statutes, through the 21 U.S.C. § 853 vehicle, in order for property to be forfeited, it must be considered "'tainted'" – sufficiently tied to the illegal activity, often considered "'proceeds'" of the crime or used to "'facilitate' a criminal activity."[36] Many courts use the "'but for' test . . . [where] property is considered proceeds and therefore deemed forfeitable if a 'person would not have [the property] but for the criminal offense.'"[37]

Pursuant to the Federal Rules of Criminal Procedure, Rule 32.2, the indictment must contain the charge of forfeiture upon judgment.[38] Thus, in order for assets to be seized, a jury must find probable cause that the defendant committed the underlying crime. Rule 32.2, however, does not require that the indictment identify the property which will be subject to forfeiture.[39] Upon a final judgment, or preliminary injunction, the Government must show the requisite nexus between the sought property and the predicate crime.[40]

Although enacted in 1970, initially, RICO and CCE provisions were not as readily enforced as the two 1970 statutes envisioned.[41] In fact, allegations of RICO and CCE violations were not commonplace in the courts until the 1980's when the "FBI and Department of Justice mounted a major offensive against organized crime."[42] The legislature's endorsement and subsequent "expansion of criminal forfeiture . . . made it possible for the government to seek forfeiture more aggressively and with a greater likelihood of success[.]"[43] Therefore, application of

36. Garretson, *supra* note 20, at 49.

37. United States v. Johnson, No. DKC 13-0294, 2014 WL 2215854, at *5 (D. Md. May 28, 2014) (citing United States v. Nicolo, 597 F. Supp. 2d 342, 346 (W.D.N.Y. 2009)) (citations omitted).

38. FED. R. CRIM. P. 32.2(a).

39. *Id.*

40. *Id.*

41. Referring to the Organized Crime Control Act and Comprehensive Drug Abuse Prevention and Control Act. *See* David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM L. & CRIMINOLOGY 328, 339 (1988).

42. David Witwer, *Mobsters, Unions, and Feds: The Mafia and the American Labor Movement by James B. Jacobs*, 60 INDUS. LAB. REL. REV. 302, 303 (2007) (book review).

43. Fried, *supra* note 41, at 330.

RICO and CCE gained traction and speed, and by 1986, the Government had RICO and/or CCE cases pending against seventeen of the nation's twenty-four notorious crime families.[44]

In order to fully comprehend the severity of the forfeiture statutes identified above, it is necessary to consider what is subject to forfeiture under 21 U.S.C. § 853. As mentioned, Federal Criminal Forfeiture Statute actions apply *in personam*, meaning that the judgments do not attach to the specific property, but to the *person* and, therefore, any subjectable property.[45] Subjectable property includes "property constituting, or derived from, any proceeds" obtained as a result of the violation or any "property used, or intended to be used, . . . to commit, or to facilitate . . . the violation."[46] "Property," for the purposes of this statute, is defined as real property,[47] as well as "tangible and intangible personal property, including . . . interests, claims, and securities."[48] Additionally, access to such an expansive list of potentially seized property is available, absent a court finding the charged individual guilty of the crimes with which the criminal forfeiture statutes were predicated on. 21 U.S.C. § 853(e) allows the Government to seek a preliminary injunction or restraining order to gain control of the assets prior to trial.[49] Although the purpose is to ensure that a defendant does not dispose of the assets in order to avoid forfeiture and to "preserve the availability of [the] property,"[50] it also indicates the vast authority the Government has against a purported RICO or CCE violator, which has been expanding up until the most recent United States Supreme Court decision.

44. Koppel, *supra* note 28.

45. United States v. Certain Real Prop. Located at 2525 Leroy Lane, W. Bloomfield, Mich., 910 F.2d 343, 346 (6th Cir. 1990).

46. 21 U.S.C. § 853(a)(1)-(2) (2012).

47. 21 U.S.C. § 853(b)(1) (2012).

48. 21 U.S.C. § 853 (b)(2) (2012).

49. 21 U.S.C. § 853(e)(1) (2012).

50. *Id.*

III. Case Law Review

As previously mentioned, and will be discussed in Part IV, the Federal Criminal Forfeiture Statute poses numerous issues that have the potential to infringe on a criminal defendant's rights. Case law decided over the last four decades, since its enactment, addressed some of these concerns, while others still remain unsettled. Despite the well-founded concerns surrounding the ethicality of the application of 21 U.S.C. § 853, courts have continuously not only looked past these concerns, but have interpreted the Federal Criminal Forfeiture Statute broadly, which has given the Government extensive power in application and reach.

This Part will provide a chronological analysis of United States Supreme Court decisions that interpret the Federal Criminal Forfeiture Statute in application through the RICO and CCE vehicles. Since the rendering of the foundational 1989 *Caplin & Drysdale v. United States*, and *United States v. Monsanto* cases, the United States Supreme Court has categorically interpreted the Federal Criminal Forfeiture Statute in a broad sense, so as to provide much power to the Government with little restrictions.

A. Criminal Forfeiture Statute and the Right to Counsel: *Caplin & Drysdale v. United States*

In *Caplin & Drysdale v. United States*, a man named Reckmeyer "was charged in a multicount indictment with running a massive drug importation and distribution scheme. The scheme was alleged to be a continuing criminal enterprise (CCE) in violation of . . . 21 U.S.C. § 848 . . . ."[51] The District Court granted a restraining order forbidding Reckmeyer from transferring any of his "listed assets that were potentially forfeitable."[52] To represent him in his pending criminal trial, Reckmeyer retained Caplin & Drysdale ("C&D") and paid the firm $25,000, in violation of the restraining order.[53] Reckmeyer

51. 491 U.S. 617, 619 (1989).
52. *Id.* at 620.
53. *Id.*

later moved to modify the restraining order so as to allow him to continue paying the firm – he needed to use some of the restrained assets in order to, essentially, afford C&D.[54] Shortly after moving to modify the restraining order, Reckmeyer entered into a plea deal with the Government.[55]

In lieu of the plea agreement the District Court considered the motion to modify moot, considering that, pursuant to the plea deal, Reckmeyer agreed to forfeit all of the specified assets.[56] Following the forfeiture of Reckmeyer's assets, C&D asserted that it had a claim to $170,000 worth of the seized assets, along with an additional $25,000 for the pre-indictment legal services.[57] The District Court granted C&D's claim.[58] On appeal, the Fourth Circuit affirmed, saying that a failure to do so violated Reckmeyer's Sixth Amendment rights.[59] The Court of Appeals, agreeing to hear the case en banc, reversed.[60] Ultimately, the United States Supreme Court heard the case and affirmed the Court of Appeals' en banc reversal, holding that the assets were improperly released to C&D.[61] The United States Supreme Court held that there is no specific exception in the statute for attorney's fees and that this non-exception does not violate a defendant's Sixth Amendment rights because the Sixth Amendment only guarantees the right to adequate representation, and not choice of counsel using money that is not "theirs."[62] This case set the precedent that the Federal Criminal Forfeiture Statute, which does not provide an exception for funds necessary to pay for an attorney, does not violate a defendant's Sixth Amendment right when a defendant is found guilty of the crime(s) that the forfeiture was predicated on.

54. *Id.* at 621.
55. *Id.*
56. *Id.*
57. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 621 (1989).
58. *See* United States v. Reckmeyer, 631 F. Supp 1191, 1198 (E.D. Va. 1986).
59. United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).
60. *See In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988).
61. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 622 (1989).
62. *Id.* at 625.

B. The Federal Criminal Forfeiture Statute and Pretrial Seizures: *United States v. Monsanto*

On the same day that the United States Supreme Court issued the *Caplin & Drysdale* decision, the Court revisited the increasingly problematic Federal Criminal Forfeiture Statute in terms of pretrial seizures.[63] In *United States v. Monsanto*, defendant Monsanto was indicted with running a large-scale heroin distribution enterprise – specifically, in violation of RICO and CCE.[64] Following the indictment, a restraining order was granted freezing the defendant's assets.[65] Monsanto then moved to vacate the restraining order so he could use a portion of the assets to pay for an attorney.[66] The District Court initially denied the motion to vacate.[67] The Second Circuit remanded the case for a hearing regarding Monsanto's Sixth Amendment argument.[68] The District Court, again, denied the motion to vacate, holding that the Government had "'overwhelmingly established a likelihood'" that Monsanto would ultimately be found guilty at trial, and that the assets would be permanently forfeited.[69] The Second Circuit, this time hearing the case en banc, modified the restraining order so as to permit Monsanto to use the assets to pay his attorney.[70]

In line with the *Caplin & Drysdale* decision, the United States Supreme Court reversed, reiterating the pronouncement that a criminal statute providing for 21 U.S.C. § 853 forfeiture, such as RICO and CCE, which contains no provisional exception for attorney's fees, does not interfere with a defendant's Sixth Amendment rights.[71] As stated in the *Caplin & Drysdale*

63. Avalyn Y. Castillo, Note, *Forfeiture of Attorneys Fees: The Rights Remaining to the Accused and His Attorney After Caplin & Drysdale and U.S. v. Monsanto*, 17 AM. J. CRIM. L. 123, 126 (1990).

64. 491 U.S. 600, 602 (1989).

65. *Id.* at 603-04.

66. *Id.* at 604.

67. *Id.*

68. United States v. Monsanto, 852 F.2d 1400, 1402 (2d Cir. 1988) (per curiam); *see also Monsanto*, 491 U.S. at 604.

69. United States v. Monsanto, 491 U.S. 600, 605 (1989).

70. *See* United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991); *see also* United States v. Monsanto, 491 U.S. 600, 604-06 (1989).

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

decision,

> The forfeiture statute does not impermissibly burden a defendant's Sixth Amendment right to retain counsel of his choice. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney even if those funds are the only way that that defendant will be able to retain the attorney of his choice. Such money, though in his possession, is not rightfully his.[72]

C. Reconciling a Split Within the Circuits: *Kaley v. United States* and Asset Forfeiture Hearings

Following the *Caplin & Drysdale* and *Monsanto* cases, the circuits began to diverge in terms of rigidity of application and interpretation of the concept that the Federal Criminal Forfeiture Statue does not violate a defendant's Sixth Amendment rights. Some of the circuits decided to impute constitutional reasoning in deciding whether to grant a defendant a hearing on the issue of probable cause in an indictment when it led to asset forfeiture. For example, in the Second Circuit, a defendant may, at the court's discretion, be entitled to a hearing reviewing the issue of probable cause, following a grand jury indictment.[73] In the Second Circuit, and in the circuits that sit on this side of the split, a defendant must show a genuine need to access the assets in order to retain counsel.[74]

Other circuits, however, have followed the *Caplin & Drysdale* and *Monsanto* cases strictly, holding that grand jury indictments are final and not reviewable via hearings to re-determine the issue of probable cause when it led to an asset forfeiture. A recent Eleventh Circuit case illustrates this side of the split. In *United States v. Kaley*, the defendants were indicted

72. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 618 (1989).

73. *See, e.g.*, United States v. Bonventre, 720 F.3d 126 (2d Cir. 2013).

74. *Id.* at 126.

for crimes relating to a scheme to steal prescription medical devices and resell them for profit.[75] Immediately after the indictment, the court granted an interim restraining order freezing the defendants' assets based on a finding of probable cause.[76] At a hearing following the indictment, the defendants attempted to contest the grand jury's determination that there was probable cause that they were guilty and that their assets would ultimately be forfeited as a result.[77] The Eleventh Circuit held that criminal defendants cannot challenge an evidentiary basis (such as a finding of probable cause) that supports an indictment and leads to an asset forfeiture.[78] This bright line rule contradicted Second Circuit precedent, and in order to resolve the circuit split, the United States Supreme Court took the *Kaley* case on appeal.

In *Kaley v. United States*, the United States Supreme Court affirmed, ruling in accordance with the Eleventh Circuit and against Second Circuit.[79] The United States Supreme Court proffered that the function of the grand jury is to make such evidentiary determinations, and that a defendant is not entitled to review or re-litigate the issues once they are determined.[80]

I generally agree with the proffered justification for a refusal to review evidentiary findings based on the grand jury's function. I disagree, however, with the outcome that these grand jury evidentiary determinations are not reviewable given the substantial ethical implications they carry and the general controversial considerations that still surround the Federal Criminal Forfeiture Statute.

IV. The Ethical Issues of Pretrial Asset Seizures

In 1989, the *Caplin & Drysdale* and *Monsanto* cases essentially disposed of any Constitutional arguments against criminal forfeiture statutes. Since then, especially following the United States Supreme Court's following of the Eleventh Circuit

75. 677 F.3d 1316, 1318 (11th Cir. 2012).
76. *See id.* at 1317.
77. *Id.*
78. *Id.* at 1330.
79. Kaley v. United States, 134 S. Ct. 1090, 1090 (2014).
80. *Id.* at 1097.

in *Kaley v. United States*, courts have strictly interpreted the statutes and applied the precedent, giving the Government significant power over criminal defendants. But what are the ethical issues that this line of interpretation poses? This Part will identify the issues, both constitutional and purely ethical, that the application of the Federal Criminal Forfeiture Statute poses in order to provide a framework of thinking when analyzing the evolution and future of relevant case law.

Although the Sixth Amendment issues surrounding the Federal Criminal Forfeiture Statute are well settled, it is worth fleshing out the ethical considerations behind the argument. The Federal Criminal Forfeiture Statute poses a theoretical restriction on a defendant's choice of counsel. The Sixth Amendment of the United States Constitution provides that a defendant in a criminal trial may "have the [a]ssistance of [c]ounsel for his defence [sic]."[81] Although the Sixth Amendment has been interpreted not to apply to scenarios where assets are no longer deemed to be a defendant's,[82] the ethical implication is still worth consideration because with pretrial seizures, there is the possibility that funds which *are* rightfully a defendant's may be wrongfully frozen, therefore unconstitutionally restricting a defendant's choice of counsel.

Aside from the constitutional implications, the Federal Criminal Forfeiture Statute inherently poses several ethical issues. First, criminal asset forfeiture may lead to criminal contingency fees, in application. A contingency fee is payment for services conditioned on a particular outcome, such as favorable judgment or successful settlement out of court.[83] In the case of a criminal defendant, a contingency fee would typically require the defendant to pay his or her attorney only if found not guilty. Although not illegal, criminal contingency fees have been deemed unethical.[84] The American Bar Association Model Rules of Professional Conduct specifically prohibits a

81. U.S. CONST. amend. VI.

82. *See, e.g.*, United States v. Monsanto, 491 U.S. 600, 600 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 617 (1989).

83. *Contingent fee*, BLACK'S LAW DICTIONARY (10th ed. 2014).

84. *See* MODEL RULES OF PROF'L CONDUCT r. 1.5(d)(2) (AM. BAR ASS'N 1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(C) (AM. BAR ASS'N 1979).

lawyer from arranging, charging, or collecting "a contingent fee for representing a defendant in a criminal case."[85] Now consider a situation where all of a criminal defendant's assets are deemed sufficiently connected to illegal activity and are forfeited to the Government pretrial. In this situation, said defendant would not have the funds to retain a lawyer that he or she could have afforded had he or she been able to use those assets.

Here, there are only two options for a defendant to be represented by counsel of their choice. First, the defendant could be represented by a Government-provided lawyer, or another lawyer on a pro bono basis. The other option would be for the defendant to retain a lawyer and postpone payment until the defendant regains access to his assets. When would that occur? Either after a verdict of not guilty or some other type of agreement to plea down to a lesser charge. This type of situation would not only present ethical issues for the lawyers involved, but there is also the possibility that such payment would lead to a lawyer encouraging their client to take a plea deal in order to be paid.

Further, what about the situation where certain assets are released in consideration for agreeing to plead guilty? It is not inconceivable to imagine a situation where a defendant facing a lengthy RICO or CCE sentence would want to ensure his or her family is provided for while they are gone, and in order to do so, they might agree to plead guilty. The Government's previously unbridled authority to seize all assets might pressure a defendant to plead guilty in order to secure the release of some assets. This exact situation was seen in *Caplin & Drysdale*, where Reckmeyer and the Government entered into a plea deal whereby Reckmeyer would plead guilty in return for, inter alia, forfeiture of only *specified* assets.[86] This, surely, poses a legitimate ethical issue to consider when examining the scope of the Government's power under the Federal Criminal Forfeiture Statute.

Yet another potential ethical issue is this: if a RICO or CCE defendant uses assets that are unfrozen, in consideration of a plea deal or some other arrangement whereby the assets are

85. MODEL RULES OF PROF'L CONDUCT r. 1.5(d)(2) (AM. BAR ASS'N 1983).

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

released, to pay a lawyer, then who is technically paying the attorney for his or her services? Under this scenario, one could argue that the Government is technically paying the attorney, as the assets were legally seized by the Government, and were only paid out to the attorney because the Government authorized the release.

Another thing to consider is the underlying legal theory that supports the Federal Criminal Forfeiture Statute. Is the purpose punitive or maybe rehabilitative or to serve as a deterrent? Of course, on its face, asset forfeiture does not have "any special rehabilitative or deterrent value[.]"[87] Moreover, "[i]n itself, forfeiture only requires the criminal to disgorge his ill-gotten gains if caught and convicted, thus restoring the *status quo ante*. Yet no child will be deterred from stealing cookies if the penalty is limited to putting the cookies back in the jar."[88] Further, what about the "cookies," or proceeds, already expended? A defendant cannot be forced to regurgitate that which he has already consumed. "At worst the child will be no worse off than before the theft."[89]

Then, is restitution the fundamental, underlying purpose? But what if there are no true victims to pay back, as with a drug dealing case tried under CCE? Then any non-punitive restitutive justification seems more like retribution by the Government – a unique type of vengeance-like punishment. Further, any argument that a dominant purpose of the Federal Criminal Forfeiture Statute is "'to divest the [criminal] association of the fruits of its ill-gotten gains,'"[90] must fail. As has been readily used, the Government has the ability to seek forfeiture of other property as a substitute asset if tracing the "tainted" asset proves impossible.[91]

87. Fried, *supra* note 41, at 358.

88. *Id.* at 371-72.

89. *Id.* at 372. "In reality, the immediate restoration of goods converted and consumed over time, for example, the forfeiture of substitute assets, may be experienced as a loss more severe than the original gain. This may have an incidental deterrent effect." *Id.* at 372 n.193.

90. Fried, *supra* note 41, at 343 (citing United States v. Turkette, 452 U.S. 576, 585 (1981)).

91. Garretson, *supra* note 20, at 52 (citing United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999)).

V. Reining in the Government: A *Luis* Case Analysis

This Part analyzes how a recent United States Supreme Court decision, *Luis v. United States*, has changed the way that 21 U.S.C. § 853 is applied through RICO and CCE, by reinforcing the nexus requirement, which had previously been applied lackadaisically.

Since 1989, as discussed earlier, application of 21 U.S.C. § 853, the Federal Criminal Forfeiture Statute, seems to have been expanding, giving more and more power to the Government each time an issue pertaining to a RICO or CCE case reached the United States Supreme Court. However, in March 2016, the United States Supreme Court essentially halted this trend. In *Luis v. United States*, defendant Luis was charged and indicted with, among other things, paying kickbacks and conspiring to commit fraud, totaling $45 million, most of which she had spent by the time of her indictment.[92] Following the indictment, the District Court issued a temporary restraining order preventing Luis from dissipating her remaining assets – $2 million – which were unrelated to the crimes.[93] Luis challenged the ability of the Government to legally seize assets that are not sufficiently connected to illegal activity.

On appeal, the United States Supreme Court held that pretrial forfeiture of assets, which are *unrelated* to the crimes listed on the indictment, that are necessary to retain counsel of choice, violate the defendant's Sixth Amendment right.[94] Further, the United States Supreme Court held that although the assets might, as the indictment proved, be ultimately subjected to forfeiture absent a connection to criminal activity – such as, upon a conviction, forfeited or seized to pay the statutory fines – this does not overcome the fact that the $2 million in this case is untraceable to Luis' illegal acts. Therefore, the Government's interest in preservation is outweighed by the defendant's constitutional right.

The requirement that the seized assets be sufficiently connected to the illegal activity has existed, on the face of the

92. 136 S. Ct. 1083, 1087 (2016).
93. *Id.* at 1088.
94. *Id.* at 1089.

statute, since its enactment in 1970.[95] It appears that up until the *Luis* holding, the Government was seizing certain assets without meeting their burden of establishing a nexus between the property and the crime. At first glance, this might seem like a simple error in judgment because of a failure by the Government to meet their burden and oversight as to this fact by the lower courts. This case, however, sets the precedent that although the Government may be given deference with regard to discretion in identifying seizeable assets, there must be a limit. As viewed from a macro level, this case establishes that, although previously 21 U.S.C. § 853 has been interpreted liberally so as to give the Government great authority and discretion; however, liberal interpretation will not, and cannot, override the plain language requirement of a sufficient nexus between the property and the underlying crime.

With a RICO or CCE indictment, and subsequent jury trial, a jury is to determine, post-conviction, if the Government met its burden of establishing the nexus requirement.[96] This results in the jury first returning a general verdict, as to the defendant's guilt of the underlying crime, and then returning a special verdict, so that "the jury hears evidence of the defendant's guilt for the underlying crime separately from hearing evidence about forfeiture[.]"[97] This bifurcated process is considered "fairer to the defendant, and it prevents the jury from considering the possibility of a large forfeiture in considering a defendant's guilt."[98] As seen in the *Luis* case, however, it is possible that the bifurcation of the verdicts actually lowers the burden on the Government to establish a nexus, thus making the application of 21 U.S.C. § 853 unfair.

It is plausible to imagine a situation where a jury, after convicting a defendant of significant criminal charges within the purview, or culminating to the level of RICO and CCE might seek to further punish, which is, in fact, one fundamental

95. *See* FED. R. CRIM. P. 32.2(b)(1)(A) (mandating that, in order to seize property, "the government [must] establish[] the requisite nexus between the property and the offense.").

96. Garretson, *supra* note 20, at 51 (citing FED. R. CRIM. P. 32.2(b)(4)).

97. *Id.* at 52 (citing United States v. Jenkins, 904 F.2d 549, 558-59 (10th Cir. 1990); HOWARD E. WILLIAMS, ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE 11 (2002)).

98. *Id.* at 52.

purpose of 21 U.S.C. § 853, by having his assets forfeited to the Government. It is further plausible to imagine that the same jury might overlook the statutorily imposed nexus requirement or not see it as the significant hurdle that it is, and return a verdict that the Government has met its burden when it simply has not, based on the facts. Without there being much more the judicial system can do to eliminate personal biases on the jury, the *Luis* holding is a rightful check on the Government's broad authority.

The hypothetical situation presented above poses a problem – the solution of which is simply the lesser of two evils: Do you leave the charges of the underlying crime and the Government's additional burden of establishing a nexus for forfeiture in one trial, where the jury is able to consider the potential magnitude of the allegedly illegal assets involved while determining overall guilt of the predicate crime, or do you bifurcate the processes and have the jury consider the connection between the assets and the crime after having determined that the person is guilty of such substantial criminal activity? The former has been formally deemed the better option through both case law and codification.[99] This, however, does not seem like a true 'solution' given that the statute has underlying ethical and constitutional concerns.

VI. The Future of The Federal Criminal Forfeiture Statute

Recently, another case involving the interpretation of the Federal Criminal Forfeiture Statute was before the United States Supreme Court. In *Nacchio v. United States*, defendant Nacchio was indicted on forty-two counts of insider trading.[100] Nacchio was ultimately found guilty on nineteen counts and was subsequently sentenced to seventy-two months in prison, was fined $19 million, and was ordered to forfeit $52,007,545.47 – the "tainted" income he derived from the insider trading.[101] Evidentiary issues eventually led to Nacchio's sentence being

99. *See* FED. R. CRIM. P. 32.2; United States v. Jenkins, 904 F.2d 549, 558-59 (10th Cir. 1990).

100. 824 F.3d 1370, 1373 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 2239 (2017).

101. *Id.* at 1373.

reduced to seventy months in prison and the forfeiture was reduced to $44,632,464.38.[102] The $19 million fine remained intact.[103]

The main question is whether or not a forfeiture is tax deductible. The argument for a deduction is based on the theory that asset forfeiture, in this case, was used for restitution, rather than punitive purposes. This theory is not without merit. The Internal Revenue Code provides for special relief to a taxpayer who is required to restore funds to a third party where the taxpayer included the funds in his income in a prior taxable year when it then "appeared that the taxpayer had an unrestricted right" to the funds.[104] In previous white collar crimes, some circuits have held that restitution is "a remedial measure to compensate another party, not a fine or similar penalty," and is thus deductible.[105]

The Federal Circuit ultimately held that Nacchio is estopped by his criminal conviction for seeking tax relief under § 1341.[106] Despite the fact that the prosecutor at trial advised the court that "the Government's intention is for . . . the forfeiture funds[] to be used to compensate victims,"[107] because the cumulative loss of the victims was less than the total forfeiture, the "economic reality is that Nacchio was punished through forfeiture" and the deduction of such a fine is disallowed.[108]

Nacchio subsequently petitioned the United States Supreme Court for a Writ of Certiorari. The petition posed two questions:

> (1) Whether funds forfeited pursuant to a criminal conviction are deductible in cases in which such forfeited funds (in contrast with a simultaneously

102. *Id.*
103. *Id.*
104. *Id.* at 1374; I.R.C. § 1341 (2012).
105. Nacchio, 824 F.3d. at 1379-80 (quoting Stephens v. Comm'r of Internal Revenue, 905 F.2d 667, 672-73 (2d Cir. 1990)) (internal quotation marks omitted).
106. *Id.* at 1382.
107. *Id. at* 1374.
108. *Id.* at 1381.

> imposed punitive fine) are earmarked and used to compensate victims of the underlying criminal offense; and (2) whether the U.S. Court of Appeals for the Federal Circuit's holding in this case that such forfeited funds are not deductible conflicts with the U.S. Court of Appeals for the 2nd Circuit's holding in *Stephens v. Commissioner of Internal Revenue* and the U.S. Court of Appeals for the 1st Circuit's holding in *Fresenius Medical Care Holdings, Inc. v. United States*.[109]

As the prosecution stated in *Nacchio*, the Government's purpose was to restore the victims. That would signal a restitutive purpose, which would require reversal. To the contrary, the Federal Circuit held that the Federal Criminal Forfeiture Statute acts more as a fine or penalty, thus identifying the primary underlying purpose as punitive. The *Nacchio* petition was denied on June 12, 2017,[110] meaning that the question as to what the true purpose of the Federal Criminal Forfeiture Statute is remains unanswered.

VII. Conclusion

Crime cinema's portrayal of raids on a crime organization's facilities have proven to be as dramatic and controversial as the real-life application of the Federal Criminal Forfeiture Statute. The seizure of illegal assets you see on the screen is typically accompanied by another seizure at a later date, this time of illegally-obtained assets. Pursuant to the Federal Criminal Forfeiture Statute, the Government may seize any assets of a criminal defendant that are sufficiently related to the predicate crime for which they are facing judgment. Further, these seizures are not postponed until final judgment – the Government may seek a preliminary injunction freezing certain

109. Kate Howard, *Petitions of the Day*, SCOTUSBLOG (Feb. 21, 2017, 11:23 PM), http://www.scotusblog.com/2017/02/petition-of-the-day-1097/.

110. Petition for Writ of Certiorari, Nacchio v. United States, 824 F.3d 1370 (Fed. Circuit 2016) (No. 16-810) (filed on December 21, 2016). However petition for Writ of Certiorari was subsequently denied on June 12, 2017. *See generally* Nacchio v. United States, 137 S.Ct. 2239 (2017).

assets after a finding of probable cause. This, of course, raises significant constitutional and ethical issues. Despite its initial slow and fruitless application, forfeitures pursuant to 21 U.S.C. § 853 became synonymous with major criminal charges such as RICO and CCE. As the Government began increasing its use of the Federal Criminal Forfeiture Statute, so too did the courts increase the Government's power in that application. United States Supreme Court cases such as *Caplin & Drysdale v. United States* and *United States v. Monsanto* stood for the powerful precedent that the Federal Criminal Forfeiture Statute, which does not include a carved-out exception for attorney's fees, does not violate a defendant's Sixth Amendment right to counsel. This includes the Government's right to a pretrial asset seizure, which necessarily has implications on a defendant's choice of counsel. These holdings strengthened, if not broadened, the Government's power in applying the Federal Criminal Forfeiture Statute. Following the *Caplin & Drysdale* and *Monsanto* holdings, a circuit split evolved regarding the power of the Government; the question: should evidentiary rulings that lead to the Government's authority to seize a defendant's assets at trial be reviewable? The United States Supreme Court ultimately answered that question in the negative in *Kaley v. United States*. Yet again, another ruling strengthening the Government's power in asset forfeiture cases.

Even with the constitutionality question settled, there remains ethical considerations that silently exist alongside every application of the Federal Criminal Forfeiture Statute. It is critical that these issues are considered when contemplating how much power the Government should be given to seize a defendant's assets. Contingency fees, conflicts of interest relating to payment, pressuring plea deals, and the contemplation of what the true purpose is underlying the Federal Criminal Forfeiture Statute are among the many. Given the serious ethical questions, it is no surprise that in 2016 the United States Supreme Court, in *Luis v. United States*, appeared to reign in the Government's power, by reiterating the need for and importance of the Government's burden of establishing a sufficient nexus between the assets and the underlying crimes. The future of the Government's authority in applying the Federal Criminal Forfeiture Statute is left to be

seen. With the *Nacchio v. United States* petition for a Writ of Certiorari denied, the question of whether the Criminal Federal Forfeiture Statute primarily serves a restitutive or punitive purpose remains undetermined. Clarification as to the Criminal Federal Forfeiture Statute's underlying purpose would have an effect on the Government's vast power in its ability to seize pursuant to 21 U.S.C. § 853, and the question continues to be ripe for consideration.