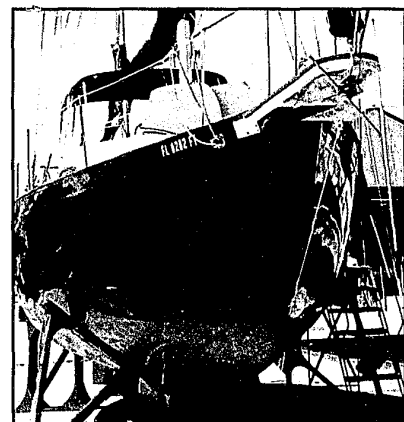
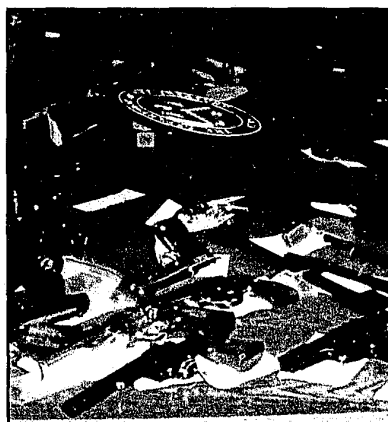
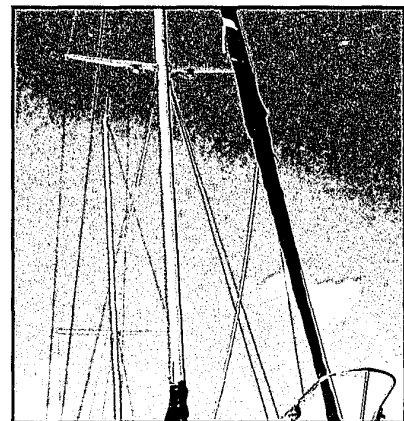
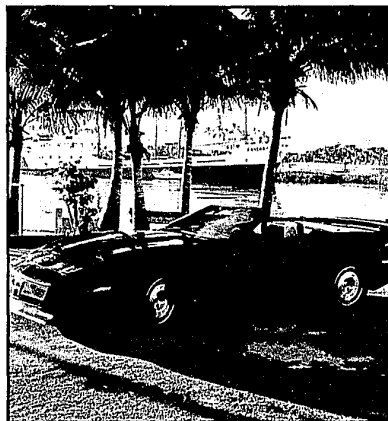
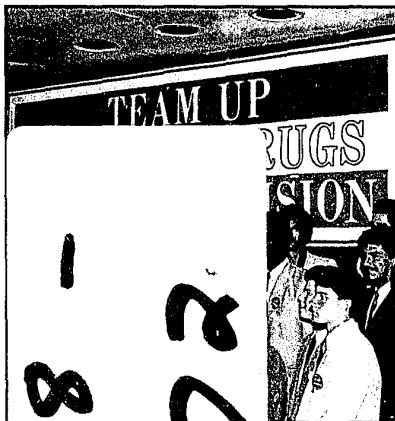
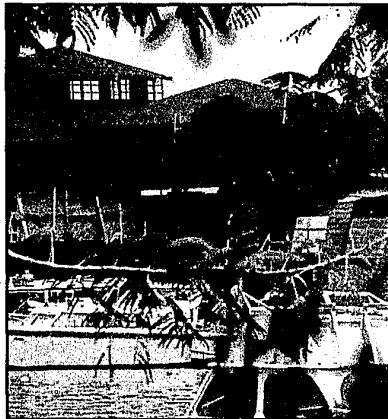
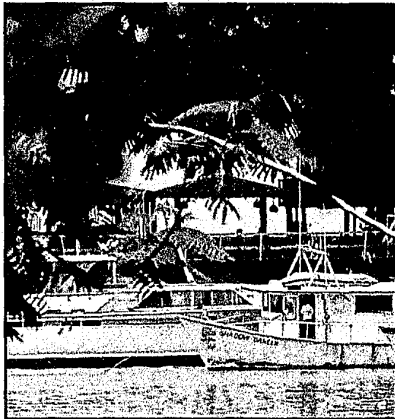




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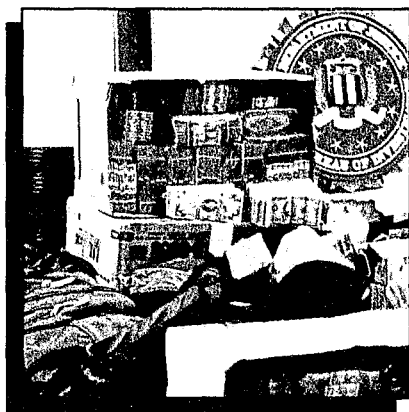
## Law Enforcement Bulletin



### Combating America's Drug Problem



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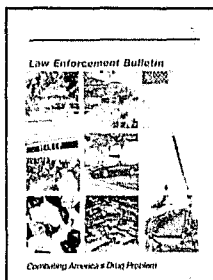
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**The Cover:** This issue focuses on law enforcement's efforts to combat the drug problem.

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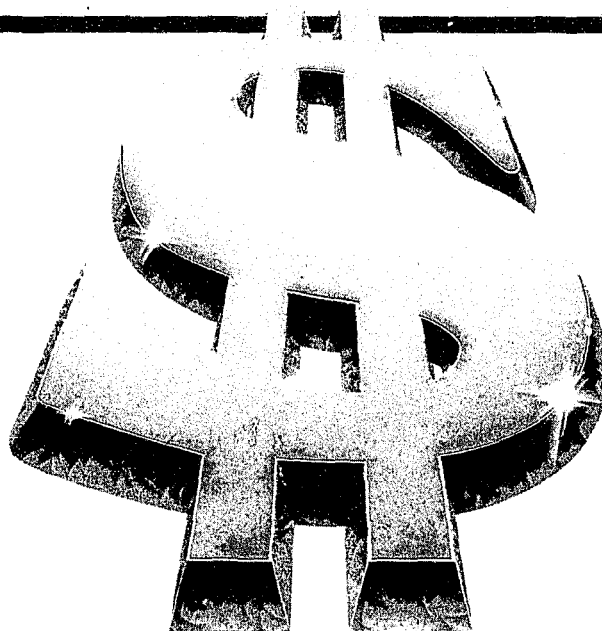
William S. Sessions, Director

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## ***Forfeiture of Attorney's Fees***

By  
KIMBERLY A. KINGSTON, J.D.

“A man may as well open an oyster without a knife, as a lawyer’s mouth without a fee.”<sup>1</sup>

It is no great surprise that drug traffickers earn several billion dollars each year in illegal profits. Equally unsurprising is the fact that a substantial portion of those profits end up in the pockets of high-priced defense attorneys hired to defend the drug traffickers in Federal prosecutions. This profitable partnership, however, may be coming to an end.

Through forfeiture statutes, Congress has given the Federal Government the opportunity to finance the war on drugs by seizing and forfeiting the drug traffickers’ illegally obtained assets. Moreover, in two recent decisions, *United States v. Monsanto*<sup>2</sup> and *Caplin & Drysdale, Chartered v. United States*,<sup>3</sup> the U.S. Supreme Court held that the government’s ability to forfeit extends to drug assets needed or used to pay attorneys’ fees. This article will briefly examine the history of these two cases and discuss

the reasoning behind these landmark decisions.

### **CASE HISTORIES**

In *Monsanto*, a Federal indictment was returned against the defendant alleging, among other things,<sup>4</sup> that he created a continuing criminal enterprise.<sup>5</sup> Additionally, the indictment alleged that a home, an apartment, and \$35,000 in cash were acquired by defendant as a result of drug trafficking and these assets were, therefore, subject to forfeiture under the provisions of

the Federal Comprehensive Forfeiture Act of 1984 (CFA).<sup>6</sup> On the day the indictment was made public, the government sought and obtained an order restraining the sale or transfer of the indicted assets pending trial.<sup>7</sup> The defendant subsequently moved to vacate that order on the grounds that the frozen assets were necessary to retain an attorney. The defendant's motion was denied by the district court,<sup>8</sup> and he proceeded to trial with the assistance of court-appointed counsel.

In the midst of defendant's trial, the Second Circuit Court of Appeals<sup>9</sup> reviewed the district court's restraining order and decreed that it be modified to permit the frozen assets to be used to pay attorneys' fees. The defendant was then offered the opportunity to hire private counsel. However, since final arguments were about to begin in the 4-month trial, the offer was declined. The defendant was ultimately convicted of the charges

against him, and the jury returned a special verdict finding the assets in question forfeitable beyond a reasonable doubt.

In separate actions, defendant appealed his conviction, and the government sought Supreme Court review of the order releasing defendant's assets to pay attorneys' fees. While defendant's appeal was pending, the Supreme Court agreed to hear arguments on the issue of forfeiture of attorneys' fees.<sup>10</sup>

On the same day the government argued its case in *Monsanto*, the Supreme Court heard oral arguments in the *Caplin* case. *Caplin* was initiated when the defendant, Christopher Reckmeyer, was charged in a multicount Federal indictment with running a massive drug importation and distribution operation as part of a continuing criminal enterprise. The indictment alleged that specific assets in Reckmeyer's possession<sup>11</sup> were forfeitable under the CFA as proceeds

of his drug trade. Consequently, the district court entered an order restraining the sale or transfer of any of the potentially forfeitable assets. Notwithstanding this order, Reckmeyer paid the law firm of Caplin & Drysdale \$25,000<sup>12</sup> for preindictment legal services and moved for the release of additional assets to pay post-indictment legal fees. However, before the district court had an opportunity to act on Reckmeyer's motion, a plea agreement was reached. Under the terms of the agreement, Reckmeyer pleaded guilty to the continuing criminal enterprise charge and agreed to forfeit all the assets named in the indictment. Subsequently, the district court sentenced Reckmeyer on the criminal charges and entered an order forfeiting virtually all of his assets.

Following the forfeiture order, the law firm of Caplin & Drysdale petitioned the district court to release the \$25,000 already paid to the firm and an additional \$170,000 of Reckmeyer's forfeited assets to compensate for legal services rendered. The district court granted the firm's petition, and that decision was affirmed by a panel of the Fourth Circuit Court of Appeals.<sup>13</sup> On review, however, the fourth circuit, sitting en banc, reversed the order granting the law firm a share of Reckmeyer's forfeited assets.<sup>14</sup> The Supreme Court subsequently granted the law firm's petition for review.<sup>15</sup>

When arguing before the Supreme Court, the parties opposing forfeiture of attorneys' fees in both *Monsanto* and *Caplin* raised a



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**...the right to counsel  
of one's own choice  
is not an absolute  
right.**  
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*Special Agent Kingston is a legal instructor at the FBI Academy.*

number of statutory, constitutional, and ethical issues.

## STATUTORY ISSUES

With respect to the statute, the Supreme Court was confronted with three questions:

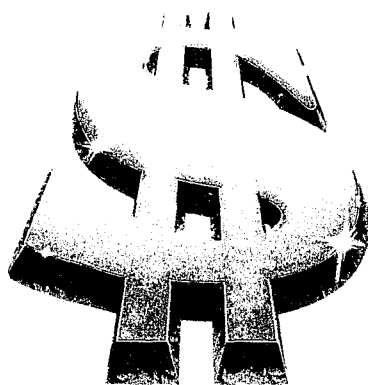
1) Did the wording of the CFA permit the forfeiture of funds needed to pay an attorney?

2) If the language of the statute does permit forfeiture of attorneys' fees, should a court-created exception be fashioned?

3) Did Congress intend the forfeiture of attorneys' fees?

To answer the first question, the Court looked to the actual language of the statute. Specifically, §853(a) of the CFA provides, in part, that "any property constituting, or derived from...proceeds...obtained directly or indirectly" from a felony violation of the Federal drug laws shall be subject to forfeiture upon conviction.<sup>16</sup> Additionally, §853(c) of the Act states that "any right, title or interest in [forfeitable] property...vests in the United States upon the commission of the act giving rise to [the] forfeiture."<sup>17</sup> This latter provision is often referred to as the "doctrine of relation back."

The combined effect of these two provisions is that the Federal Government's title to any asset derived from drug trafficking relates back to the moment those assets were illegally acquired. Any subsequent efforts on the part of the drug trafficker to avoid the effects of forfeiture by selling,<sup>18</sup> trading or giving away assets are futile because the trafficker no longer possesses lawful title to those assets.



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***'The privilege to practice law...is not a license to steal.'***

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After reviewing these provisions, the Court found that the language of the statute was "plain and unambiguous,"<sup>19</sup> and there was not even a "hint...that assets used to pay an attorney are not 'property' within the statute's meaning."<sup>20</sup>

Having determined that the language of the statute clearly permit the forfeiture of funds needed or used to pay an attorney, the Court next considered whether an exception should be created that would exempt attorneys' fees. Proponents of this position argued on the grounds that the statute did not specifically include attorneys' fees in its definition of property subject to forfeiture.<sup>21</sup> The Court, however, reemphasized its finding that the CFA provisions at issue are "broad and unambiguous"<sup>22</sup> and noted that "Congress' failure to supplement §853(a)'s comprehensive phrase—'any property'—with an ex-

clamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language."<sup>23</sup>

Finally, the Court looked behind the statute for any indication that Congress intended to exclude attorneys' fees from forfeiture. To the contrary, the Court discovered that Congress had refused repeated efforts on the part of the defense bar to create an exception for attorneys' fees. Congress' failure to act on these efforts, even though it had amended the CFA in other areas, belied any intent on the part of Congress to exclude attorneys' fees.<sup>24</sup> Rather, the Court found that Congress, when enacting the CFA, "decided to give force to the old adage that 'crime does not pay.'"<sup>25</sup> The Court found "no evidence that Congress intended to modify that nostrum to read 'crime does not pay, except for attorneys' fees.'"<sup>26</sup>

Having concluded that there were no statutory impediments to the forfeiture of attorneys' fees, the Court next considered whether such forfeitures would violate any constitutional protections.

## CONSTITUTIONAL ISSUES

Those opposed to forfeiture of attorneys' fees raised several constitutional arguments in support of their position. These arguments were grounded in both the sixth amendment's guaranteed right to counsel and the fifth amendment's due process protection.

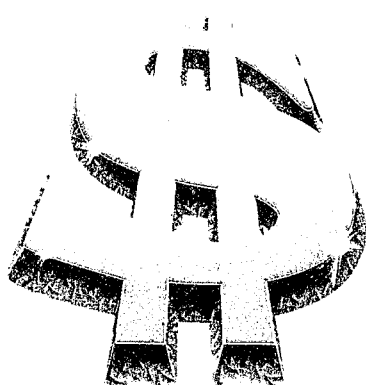
### Sixth Amendment Argument

The sixth amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to

have the assistance of counsel for his defense."<sup>27</sup> This amendment has been interpreted by the Supreme Court to give a defendant the right to an attorney of his own choosing.<sup>28</sup> It is this right to "counsel of choice" that opponents of forfeiture claimed was made "impossible, or at least impermissibly burdensome,"<sup>29</sup> by the forfeiture laws. Without access to their assets, defendants are unable to secure the services of their preferred attorneys.

Although recognizing the right to "counsel of choice" as one of its own progeny, the Supreme Court took a much more limited view of the scope of that right. According to the Court, the right to counsel of one's own choice is not an absolute right. Rather, a defendant has only the right to the assistance of counsel that can be secured with his own funds. If his own funds are insufficient, then he will be adequately represented by an attorney appointed by the court. In other words, "a defendant may not insist on representation by an attorney that he cannot afford."<sup>30</sup>

Applying these principles to the cases before it, the Supreme Court observed that there was nothing in the CFA that prohibits a defendant from hiring the attorney of his choice. The Court pointed out that under the statute, only forfeitable assets can be frozen. Accordingly, there is nothing to prevent a defendant from using his nonforfeitable assets to pay an attorney. Moreover, it is possible that defendants without nonforfeitable assets, like Reckmeyer, would be able to secure representation by attorneys willing to take the chance



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***...a defendant may not insist on representation by an attorney that he cannot afford.'***

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that their fees would be paid in the case of an acquittal.<sup>31</sup> Obviously, in such situations, there is no interference with the right to counsel of choice.

The real linchpin of the opponents' arguments, however, focused on those instances when a defendant is unable to retain the attorney of his choice because of the unavailability of his assets or due to the risk that any fees paid to the attorney would later be forfeited to the government. It is in these instances, argued the opponents, that the sixth amendment right to counsel is infringed.

Finding this argument "untenable,"<sup>32</sup> the Supreme Court compared the drug trafficker to a

common robbery suspect and made the following observations:

"Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of...counsel.' 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 defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended."<sup>33</sup>

Like the robbery suspect, the drug trafficker with no legitimate funds is entitled to court-appointed counsel. He is not, however, entitled to use the government's money to pay the attorney of his own choosing.

When putting the sixth amendment right to counsel issue to rest,<sup>34</sup> the Court took the opportunity to remind attorneys that they are not above the law; lawyers have no right to accept illegal proceeds in payment of their fees. "The privilege to practice law," noted the Court, "is not a license to steal."<sup>35</sup>

### **Fifth Amendment Argument**

With the sixth amendment right to counsel issue resolved, the Court next considered whether the forfeiture provisions of the CFA

violated the fifth amendment's due process clause.

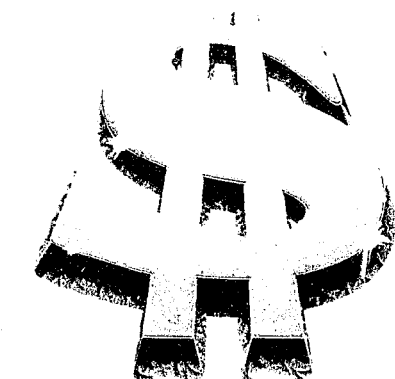
The fifth amendment guarantees, in part, that "[n]o person shall be...deprived of life, liberty, or property, without due process of law...."<sup>36</sup> The Supreme Court has held that the essence of the due process clause is "fair play."<sup>37</sup> It is this notion of fair play that opponents of forfeiture claimed could be violated by those portions of the CFA that permit forfeiture of attorneys' fees. Specifically, it was alleged that the power to forfeit assets needed to retain an attorney could be used by the government to "upset the 'balance of forces between the accused and the accuser'"<sup>38</sup> to such a degree that it would be a denial of due process.

Rejecting this argument, the Court noted that the forfeiture provisions of the CFA provided the government with a very powerful weapon. Just like any other weapon, its impact could be devastating if used unfairly.<sup>39</sup> However, the Court found no reason to declare the entire process unconstitutional. Instead, the Court assured those concerned that specific abuses of the forfeiture provisions could be dealt with by the lower courts when, and if, such cases arise.<sup>40</sup>

Having found all fifth and sixth amendment challenges to the forfeiture of attorneys' fees to be without merit, the Court next turned its attention to the ethical considerations.

### ETHICAL ISSUES

Three additional arguments were raised by the parties opposing forfeiture, all of which involved



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possible ethical conflicts confronting lawyers defending drug traffickers whose assets are potentially subject to forfeiture.

First, opponents pointed to a portion of the CFA that exempts from forfeiture transfers made to persons "reasonably without cause to believe that the property was subject to forfeiture."<sup>41</sup> This provision, it was argued, would encourage an attorney to be less than thorough when investigating his client's case so as to protect from forfeiture any fees he has received. However, the Court recognized that the only way an attorney could avail himself of this exemption would be to fail to read the indictment charging his client which, under the provisions of

the CFA, must list forfeitable assets. Concluding that this situation was never likely to occur, the Court rejected opponents' first argument.

Next, it was contended that an ethical conflict could arise during the plea bargaining stage. A lawyer might be tempted to encourage his client to accept a plea agreement that entailed a longer prison sentence, but no forfeiture, in order to protect the attorney's fee. Not persuaded by this argument, the Court stated that giving into this temptation would constitute ineffective assistance of counsel, which could be adequately dealt with under existing case law.<sup>42</sup>

Finally, it was posited that the forfeiture provisions of the CFA create a system "akin to 'contingency fees' for defense lawyers; only a defense lawyer who wins acquittal for his client will be able to collect his fees."<sup>43</sup> Such contingency fee systems, it was argued, are considered unethical in criminal cases by many States and the American Bar Association. In response, the Court expressed doubt that the CFA created such a contingency fee system and noted that many defense attorneys are unable to collect their fees unless they win acquittals for their clients. Moreover, the Court found that even if the CFA created a contingency fee system that is considered "at odds with model disciplinary rules or state disciplinary codes, [it would] hardly render the federal statute invalid."<sup>44</sup>

### CONCLUSION

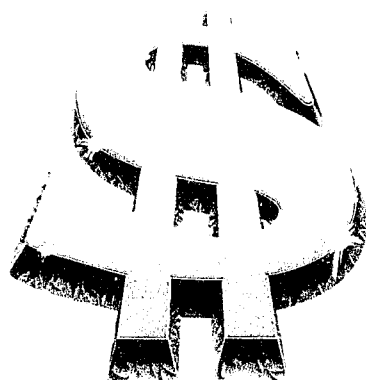
Having exhausted all opponents' arguments, The Supreme Court in *Monsanto* and



*Caplin* conclusively determined that there are no statutory, constitutional, or ethical impediments to the forfeiture of attorneys' fees under the criminal provisions of the CFA. Of course, there are numerous other statutes, both State and Federal,<sup>45</sup> that arguably permit the forfeiture of assets needed or used to pay attorneys' fees. Because the language of these statutes will undoubtedly differ from that of the CFA, there is some room for lower courts to determine that these other statutes, by their wording, do not allow for the forfeiture of attorneys' fees. There is, however, no longer any doubt that such forfeitures are both constitutional and ethical.

Law enforcement officers who are empowered to seek forfeiture under the provisions of the CFA or similar statutes should be encouraged by the decisions in *Monsanto* and *Caplin*. Legislators, by adopting forfeiture statutes, have given the government an effective weapon to use in the fight against illicit drugs. That weapon has become much more powerful as a result of the Supreme Court's decision in these two cases.

**LEB**



“**Like the robbery suspect, the drug trafficker with no legitimate funds is entitled to court-appointed counsel.**”

versarial hearing in which the government would have to demonstrate the likelihood that assets in question were forfeitable. On remand, a hearing was held and the government succeeded in overwhelmingly establishing the likelihood of forfeiture. *Monsanto*, supra note 2, at 2661.

<sup>9</sup> The second circuit vacated its earlier opinion and heard defendant's appeal en banc.

<sup>10</sup> 109 S.Ct. 363 (1988).

<sup>11</sup> The specified assets included valuable gems, \$200,000 in U.S. currency and several parcels of real property, one of which was valued at \$5.3 million.

<sup>12</sup> The law firm placed the \$25,000 in an escrow account pending the outcome of this case.

<sup>13</sup> *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987).

<sup>14</sup> 837 F.2d 637 (4th Cir. 1988).

<sup>15</sup> 109 S.Ct. 363 (1988).

<sup>16</sup> 21 U.S.C. §853(a).

<sup>17</sup> 21 U.S.C. §853(c).

<sup>18</sup> 21 U.S.C. §853(c) creates an exemption for the bona fide purchaser for value of forfeitable property who, at the time of purchase, was reasonably without cause to believe that the property was subject to forfeiture.

<sup>19</sup> *Monsanto*, supra note 2, at 2662.

<sup>20</sup> *Id.*

<sup>21</sup> 21 U.S.C. §853(b) defines "property" as follows:

(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.

<sup>22</sup> *Monsanto*, supra note 2, at 2663.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2663-64.

<sup>25</sup> *Id.* at 2665.

<sup>26</sup> *Id.*

<sup>27</sup> U.S. Const. amend. VI.

<sup>28</sup> *Wheat v. United States*, 486 U.S. 153 (1988).

<sup>29</sup> *Caplin*, supra note 3, at 2651-52.

<sup>30</sup> *Id.* at 2652.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, quoting *Walters' v. National Association of Radiation Survivors*, 473 U.S. 305, 370 (Stevens, J., dissenting).

<sup>34</sup> An additional sixth amendment argument was advanced by the American Bar Association as *Amicus Curiae*. This argument claimed that requiring a defendant in a CCE or RICO case to rely on court-appointed counsel would result in a type of ineffective assistance of counsel "per se" because of the complex nature of such cases. This argument was rejected by the Court when it recognized that such a position would preclude the prosecution of indigents on such charges because those persons would have to rely on appointed counsel. *Caplin*, supra note 3, at 2655 n. 7.

<sup>35</sup> *Id.*, at 2653, quoting *Laoka v. United States*, 82 F.2d 672, 677 (10th Cir. 1936).

<sup>36</sup> U.S. Const. amend. V.

<sup>37</sup> *Galvan v. Press*, 74 S.Ct. 737 (1954).

<sup>38</sup> *Caplin*, supra note 3, at 2656, quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

<sup>39</sup> *Id.* at 2657.

<sup>40</sup> *Id.*

<sup>41</sup> 21 U.S.C. §853(c).

<sup>42</sup> See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>43</sup> *Caplin*, supra note 3, at 2656, n. 10.

<sup>44</sup> *Id.*

<sup>45</sup> For other Federal statutes having forfeiture provisions, see Controlled Substances Act, 21 U.S.C. §881; Organized Crime Control Act of 1970, 18 U.S.C. §§1963 and 1955(d); Copyrights Act, 17 U.S.C. §§506(b) and 509(a); and Child Protection Act of 1984, 18 U.S.C. §§2253 and 2254.

*Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

#### Footnotes

<sup>1</sup> Barten Holyday, *Technogamia*, ii, 5.

<sup>2</sup> 109 S.Ct. 2657 (1989) [hereinafter cited as *Monsanto*].

<sup>3</sup> 109 S.Ct. 2646 (1989) [hereinafter cited as *Caplin*].

<sup>4</sup> *Monsanto* was also charged with violating the racketeering, tax and firearms laws in connection with his heroin operation.

<sup>5</sup> 21 U.S.C. §848.

<sup>6</sup> 21 U.S.C. §853(a).

<sup>7</sup> The restraining order was granted on an *ex parte* motion made by the government pursuant to 21 U.S.C. §853(e)(1)(A).

<sup>8</sup> The decision of the district court was reviewed by the Second Circuit Court of Appeals. On review, the court found no basis for defendant's statutory or constitutional challenges to the forfeiture. The court did, however, remand the case to the district court for an ad-