COLUMBIA LAW REVIEW
SIDEBAR

VOL. 112 **APRIL 23, 2012** **PAGES 108–118**

COMMENT—*CFTC V. WALSH*: DISTRICT COURT RELEASES FUNDS FROZEN IN CIVIL CASE TO PAY FOR ATTORNEY IN PARALLEL CRIMINAL CASE

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INTRODUCTION

The financial crisis has prompted an explosion of securities enforcement, with cases alleging an assortment of financial crimes from insider trading[1] to Ponzi schemes.[2] Increasingly, this enforcement activity has taken the form of parallel proceedings: civil enforcement actions brought by the Securities and Exchange Commission (SEC) and criminal actions brought by the local U.S. Attorney's Office.[3] Securities cases easily lend themselves to parallel proceedings because willful violations of federal securities laws violate both civil and criminal laws.[4]

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1. See David S. Hilzenrath, Hedge Fund Billionaire Raj Rajaratnam is Convicted of Fraud, Wash. Post, May 11, 2011 (describing Rajaratnam's prosecution as "the biggest insider-trading case in a generation"); Benjamin Wiser & Peter Lattman, U.S. Attorney Sends a Message to Wall Street, N.Y. Times DealBook (May 12, 2011, 9:21 PM), http://dealbook.nytimes.com/2011/05/12/u-s-attorney-sends-a-message-to-wall-street/ (on file with the *Columbia Law Review*) ("Over the last 18 months, [the U.S. Attorney's Office for the Southern District of New York] has charged 47 individuals with insider trading crimes, 36 of whom have pleaded guilty or been convicted.").

2. See Lawrence J. Zweifach & Sophia N. Khan, Recent Developments in Ponzi Scheme Litigation, *in* Auditor Liability in the Current Environment: How to Protect Yourself 99, 101 (PLI Corp. Law & Practice, Course Handbook Series No. B-1844, 2010) ("Within a period of one and one-half years, from September 2008 to December 2009, authorities discovered four of the largest Ponzi schemes in U.S. history.").

3. Telephone Interview with William P. (Trace) Schmeltz III, Partner, Barnes & Thornburg, LLP (May 12, 2011) [hereinafter Schmeltz Interview] (notes on file with the *Columbia Law Review*) (observing significant uptick in parallel proceedings in recent years with SEC and Department of Justice (DOJ) working together).

4. Thomas V. Sjoblom & Benjamin R. Ogletree, Primer: Parallel Proceedings in Securities Cases 2008, *in* Parallel Proceedings in Securities Cases 11, 15 (PLI Corp. Law & Practice, Course Handbook Series No. 1644, 2008). The Supreme Court has approved of the government's ability to bring parallel proceedings. See United States v. Ursery, 518 U.S. 267 (1996) (holding parallel criminal actions and in rem civil forfeiture proceedings do not violate Double Jeopardy Clause); United States v. Kordel, 397 U.S. 1 (1970) (holding information disclosed to government in civil case can be used against same defendants in criminal case as long as government does not act in bad faith).

Courts have long recognized, however, that the government can abuse its power by bringing unfair parallel proceedings.[5] This Comment addresses a new area of potential abuse in parallel proceedings: pretrial asset freezes. One tactical advantage for the government of filing simultaneous civil and criminal cases is that the SEC can easily obtain a pretrial ex parte forfeiture order in the civil case, which can freeze all of the defendant's assets—even those funds that are not traceable to the fraud alleged in the criminal case.[6] This freeze can deprive the defendant of sufficient funds to pay for the attorney of his choice in the parallel criminal case, potentially violating the defendant's Sixth Amendment right to counsel.[7]

Moreover, once the civil freeze order becomes permanent, the government has invariably moved to stay the civil proceeding until the criminal case is resolved.[8] This indicates that the government filed the civil case primarily to secure a civil forfeiture order and hamper the defendant's ability to defend himself in the parallel criminal case.[9]

A district court recently addressed this potential area of abuse in *CFTC v. Walsh*.[10] There, the defendants were able to convince the court to unfreeze some assets that were frozen in the civil case, in order to pay for an attorney in the parallel criminal case. This case and those that follow

5. Cf. SEC v. Oakford Corp., 181 F.R.D. 269, 270 (S.D.N.Y. 1998) (observing parallel proceedings can unfairly "place the defendant in the jaws of a pincers"). For example, many judges have been troubled by cases in which the U.S. Attorney's office hides its investigation and uses the SEC civil proceeding as an investigative tool for subsequent criminal action. See, e.g., United States v. Rand, 308 F. Supp. 1231, 1234 (N.D. Ohio 1970) (finding government's "knowing but not informing defendants that criminal proceedings were pending, [and] beg[inning] a civil proceeding in which it obtained information useful in a subsequent criminal action" amounted to "an obnoxious form of using parallel proceedings" and dismissing indictment). In addition, courts are starting to question the government's practice of bringing parallel proceedings and then almost immediately seeking a stay of the civil case. See, e.g. *Oakford*, 181 F.R.D. at 273 ("To use the federal courts as a forum for filing serious civil accusations that one has no intention of pursuing until a parallel criminal case is completed is a misuse of the processes of these courts."). This practice suggests that the SEC may be filing the civil case while having no desire to litigate it until after the criminal case has been resolved. And the stay has the effect of preventing the defendant from exercising his civil discovery rights.

6. See infra note 27 and accompanying text (discussing practice).

7. The Sixth Amendment right to counsel "guarantees more than the mere presence of a lawyer at a criminal trial. It protects, among other things, an individual's right to choose the lawyer or lawyers he or she desires and to use one's own funds to mount the defense that one wishes to present." United States v. Stein, 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006) (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989); Wheat v. United States, 486 U.S. 153, 164 (1988)), aff'd, 541 F.3d 130 (2d Cir. 2008).

8. See *Oakford*, 181 F.R.D. at 270 (noting in parallel proceedings U.S. Attorney's Office will "typically . . . intervene[] in the parallel civil proceeding to request a stay of all discovery pending completion of the criminal case").

9. One could argue that the government was primarily concerned with preserving the defendant's assets for distribution to the victims of the financial crime. But, if that were the reason, the government could freeze the defendant's assets in a criminal forfeiture proceeding, which would not present the same problems inherent in parallel proceedings.

10. Nos. 09 CV 1749(GBD), 09 CV 1750(GBD), 09 CR 722(MGC), 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010).

will in all likelihood force the government to reconsider the extent to which it employs pretrial forfeiture in parallel proceedings.

This Comment proceeds in three parts. Part I describes the recent *Walsh* decision and its implications for the relationship between civil and criminal pretrial asset forfeiture and a defendant's Sixth Amendment right to counsel. Part II then discusses how *Walsh*'s approach to the problem of a civil forfeiture order denying the defendant sufficient funds to pay for an attorney in the parallel criminal case may affect future cases and the government's strategic considerations going forward. Part III concludes by offering guidance to district courts in these types of cases. This Comment argues that the decision in *Walsh* suggests that courts will begin to provide defendants with an opportunity to prove that civil asset freezes infringe on their Sixth Amendment rights in the criminal case by restraining untainted assets that the defendants need to be able to hire criminal defense attorneys.

I. PRETRIAL ASSET FREEZES AND THE SIXTH AMENDMENT: *CFTC V. WALSH*

On February 25, 2009, Paul Greenwood and Stephen Walsh were arrested pursuant to a criminal complaint in the Southern District of New York charging securities and wire fraud. That same day, both defendants were served with two civil enforcement actions—one by the SEC and one by the Commodity Futures Trading Commission (CFTC).[11] Also on that day, the SEC and the CFTC succeeded in securing an ex parte temporary restraining order, freezing all of the defendants' assets.[12] Those cases were consolidated and assigned to Judge George B. Daniels. Thereafter, Judge Daniels held that all of the defendants' assets were to be frozen for the duration of the civil cases.[13]

That July, the defendants were formally indicted on six counts of conspiracy, securities fraud, commodities fraud, and wire fraud—all based on the same underlying conduct as in the civil cases.[14] The criminal case

11. Id. at *1.

12. Order Granting Motion for Statutory Ex Parte Restraining Order, for Expedited Discovery, and Order to Show Cause Re: Preliminary Injunction, *Walsh*, 2010 WL 882875 (No. 09 CV 1749 (GBD)), ECF No. 2.

13. Order of Preliminary Injunction Against Defendants, *Walsh*, 2010 WL 882875 (No. 09 CV 1749 (GBD)), ECF No. 108. The defendants had moved to unfreeze some assets to pay for attorney's fees but did not specifically contest the allegations, fearing that doing so would give the government too much information in any pending criminal case. See Memorandum of Law of Defendants Paul Greenwood and Stephen Walsh in Response to the Orders to Show Cause at 1, *Walsh*, 2010 WL 882875 (Nos. 09-CV-1750(GBD), 09-CV-1749 (GBD)), ECF No. 10, 2009 WL 1633171 (explaining defendants exercised Fifth Amendment rights against self-incrimination). Judge Daniels continued the freeze because the defendants did not specifically contest the allegations.

14. Indictment, *Walsh*, 2010 WL 882875 (No. 09 CR 722(MGC)), ECF No. 38. The government alleged that Greenwood and Walsh solicited and obtained over $7 billion from institutional investors ostensibly to invest in the commodities market. Instead, the government alleged, they misappropriated those funds for personal use. Memorandum of Law of the United States of America in Opposition to Defendants Paul Greenwood's and

was assigned to Judge Miriam Goldman Cedarbaum. As is the norm in these kinds of cases, the U.S. Attorney's Office then intervened in the civil case and moved for a stay of civil discovery.[15] The U.S. Attorney's Office typically moves for a civil discovery stay when there are parallel proceedings in order to preserve its discovery advantage in the criminal case without the risk that the defendant will use the expansive discovery rights in the civil case to bypass this advantage.[16] Judge Daniels granted the motion.[17]

With the civil case on hold, the defendants were left to focus on the criminal case but without any assets to pay for attorneys to defend themselves. The defendants filed motions before Judge Cedarbaum asking her to hold a so-called "*Monsanto* hearing" with respect to the asset freeze ordered by Judge Daniels in the civil cases.[18] In the criminal forfeiture context, if a defendant can show that a pretrial restraint of assets interferes with his ability to retain counsel of his choice, he is entitled to a *Monsanto* hearing where the government would be required to establish probable cause that the restrained assets were properly forfeitable.[19] The hearing is an attempt to balance the defendant's Sixth Amendment right to counsel of choice[20] and the notion that a defendant cannot use forfeitable funds to pay for an attorney because the money does not rightfully belong to the defendant.[21] At the hearing, the government would be required to

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Stephen Walsh's Motions for Release of Funds for Attorney's Fees and Costs at 3–5, *Walsh*, 2010 WL 882875 (No. 1:09-cr-00722(MGC)), ECF No. 62 [hereinafter U.S. Greenwood Op.].

15. See Notice of Motion, *Walsh*, 2010 WL 882875 (Nos. 09 Civ. 1749 (GBD), 09 Civ. 1750 (GBD)), ECF No. 197; Affirmation of John J. O'Donnell in Support of Motion to Intervene and Stay Discovery, *Walsh*, 2010 WL 882875 (Nos. 09 Civ. 1749 (GBD), 09 Civ. 1750 (GBD)), ECF No. 198. This procedure is "typical[]" in parallel proceeding cases. SEC. v. Oakford Corp., 181 F.R.D. 269, 270 (S.D.N.Y. 1998).

16. *Oakford*, 181 F.R.D. at 270.

17. Order, *Walsh*, 2010 WL 882875 (No. 09 CV 1749(GBD)), ECF No. 210.

18. Memorandum of Law in Support of Defendant Paul Greenwood's Motion for Attorneys' Fees and Costs at 1–4, *Walsh*, 2010 WL 882875 (No. 09-cr-722(MGC)), ECF No. 46 [hereinafter Greenwood Motion]; Memorandum of Law in Support of Defendant Stephen Walsh's Motion for Release of Funds for Attorney's Fees and Costs at 1–4, *Walsh*, 2010 WL 882875 (No. 09 Cr. 722(MGC)), ECF No. 56 [hereinafter Walsh Motion].

19. See United States v. Monsanto, 924 F.2d 1186, 1203 (2d Cir. 1991) (en banc) (describing "adversary, post-restraint, pretrial hearing" to determine probable cause).

20. See Wheat v. United States, 486 U.S. 153, 159 (1988) (holding Sixth Amendment includes "the right to select and be represented by one's preferred attorney" in criminal case). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

21. In *Caplin & Drysdale, Chartered v. United States*, the Supreme Court explained:

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

491 U.S. 617, 626 (1989).

prove that there is probable cause to believe the alleged fraud occurred and that the restrained property was tainted by the fraud.[22] Otherwise, the court would lift the asset freeze.

In support of their motions, the defendants in *Walsh* argued that several million dollars worth of assets had been frozen in the civil case but were untainted by the fraud alleged in the criminal case because they were purchased prior to 1996, the date at which the government claimed the fraud began.[23] However, *Monsanto* was decided in the criminal forfeiture context and neither the Supreme Court nor the Second Circuit addressed its application to civil freezes when there are parallel proceedings. Accordingly, the government opposed the motions on the theory that *Monsanto* hearings are limited to criminal forfeiture proceedings, not civil forfeiture.[24]

Judges Cedarbaum and Daniels convened a rare two-judge panel to consider the defendants' motions. The judges then granted the motions in part. Relying on *SEC v. Coates*, the judges held, "'[A]lthough a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights.'"[25] The judges were particularly concerned by the fact that the government had never shown probable cause to believe that the assets at issue were tainted by the alleged fraud in the criminal case[26]—although the government was not required to do so to obtain the civil forfeiture order.[27] The judges rejected the government's argument that "a defendant is not entitled to use untainted funds, frozen in a civil action, in order to pay legal fees for his counsel of choice in a parallel criminal action."[28] Accordingly, the judges ordered a "*Monsanto* type hearing" where the government would be required to demonstrate that "the assets in question are tainted."[29] Otherwise, the judges would release those untainted funds to the defendants to pay for lawyers "solely [for]

22. See *Monsanto*, 924 F.2d at 1203 (holding government must prove "(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").

23. Greenwood Motion, supra note 18, at 2; Walsh Motion, supra note 18, at 6–7.

24. U.S. Greenwald Op., supra note 14, at 11–21. The government also argued that the defendants should have filed the motion with Judge Daniels, not Judge Cedarbaum. Id.

25. CFTC v. Walsh, Nos. 09 CV 1749(GBD), 09 CV 1750(GBD), 09 CR 722(MGC), 2010 WL 882875, at *3 (S.D.N.Y. Mar. 9, 2010) (quoting SEC v. Coates, No. 94 Civ. 5361 (KMW), 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994)).

26. Id.

27. See infra notes 34–36 and accompanying text (describing civil forfeiture as more expansive in scope than criminal forfeiture); see also, e.g., SEC v. Forte, 598 F. Supp. 2d 689, 693 (E.D. Pa. 2009) ("[B]ecause it appears likely that the investor losses dwarf Defendant's remaining assets, even if Defendant could show that some of the frozen funds are from 'untainted' sources, I would not release those funds."); SEC v. Current Fin. Servs., 62 F. Supp. 2d 66, 68 (D.D.C. 1999) (refusing to release funds not traceable to fraud to pay legal fees because disgorgement amount exceeded total amount of frozen funds).

28. *Walsh*, 2010 WL 882875, at *3.

29. Id.

representation in the criminal action."[30] Because the judges limited the defendants to around $1 million each, the government decided not to pursue the *Monsanto* type hearing and the funds were released.[31]

II. *WALSH*'S IMPLICATIONS FOR FUTURE CASES INVOLVING PARALLEL PROCEEDINGS

The SEC routinely seeks pretrial asset freezes in civil enforcement actions.[32] It generally argues that the purpose of these freezes is to ensure that the defendant does not dissipate assets so that there will be enough money to "facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial."[33] Courts have adopted an expansive approach to pretrial asset freezes in civil enforcement actions, allowing asset freezes that are not even limited to funds that can be traced to the defendant's alleged illegal activity.[34] That is because civil forfeiture is considered an in rem proceeding and so "[t]he innocence of the owner is irrelevant."[35] Criminal forfeiture, by contrast, is an in personam proceeding and therefore requires a finding that the individual defendant, rather than the property, is culpable in a crime.[36] As a result, civil forfeiture proceedings can lead to more expansive asset forfeitures.

Often, as was the case in *Walsh*, the defendant's alleged disgorgement

30. Id.

31. Walsh, however, chose to appeal the $1 million cap. That appeal later was dismissed pursuant to a Rule 42.1 stipulation. See Order, CFTC v. Walsh, No. 10-1846 (2d Cir. Nov. 1, 2011), ECF No. 35.

32. See Nicole A. Baker, The Securities Enforcement Manual: Tactics and Strategies 217 (Kirkpatrick & Lockhart LLP ed., 2d ed. 2007) ("The SEC frequently seeks asset freezes, often ex parte, when it believes that the defendants are concealing fruits of a fraudulent schemes or are likely to dissipate assets belonging to investors upon notice that a Commission enforcement action is imminent."). Other enforcement agencies, like the CFTC, also pursue asset freezes with some regularity. See Enforcement, CFTC, http://www.cftc.gov/LawRegulation/Enforcement/OfficeofDirectorEnforcement (on file with the *Columbia Law Review*) (last visited Mar. 30, 2012) (noting CFTC has power to seek "freeze of assets").

33. SEC v. Unifund SAL, 910 F.2d 1028, 1041 (2d Cir. 1990); see also Craig Gaumer, A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law, U.S. Att'ys' Bull., Nov. 2007, at 59, 66–67 (discussing advantages to government of civil freezes).

34. See, e.g., SEC v. Sekhri, No. 98 Civ. 2320, 2000 WL 1036295, at *1 (S.D.N.Y. July 26, 2000) ("[A] freeze order need not be limited only to funds that can be directly traced to defendant's illegal activity."); SEC v. Grossman, 887 F. Supp. 649, 661 (S.D.N.Y. 1995) ("It is irrelevant whether the funds affected by the Assets Freeze are traceable to the illegal activity, as [defendants] are jointly and severally liable for the profits of their tippees."); SEC v. Glauberman, No. 90 Civ. 5205 (MBM), 1992 WL 175270, at *2 (S.D.N.Y. July 16, 1992) (rejecting argument that disgorgement is inappropriate because "the challenged transfers cannot be traced dollar for dollar to profits from insider trading").

35. United States v. Sandini, 816 F.2d 869, 872 (3d Cir. 1987); see also United States v. $734,578.82 in U.S. Currency, 286 F.3d 641, 657 (3d Cir. 2002) (explaining civil forfeiture not based "upon the culpability of the owner").

36. See United States v. Hall, 434 F.3d 42, 59 (1st Cir. 2006) ("[C]riminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself.").

liability exceeds his assets and so the asset freeze effectively freezes all of the defendant's assets. As a result, the defendant will ordinarily be unable to pay for an attorney. Courts have been unsympathetic to defendants' motions to unfreeze assets to pay for attorneys to defend the civil enforcement action, or for living expenses, mostly because there is no Sixth Amendment right to counsel in civil cases.[37] However, in *Walsh* the court unfroze some assets frozen in the civil case where that freeze affected the defendants' ability to retain counsel of their choice in the parallel criminal case, and those funds were not traceable to the fraud alleged in the criminal case. It dealt with the problem by extending the *Monsanto* doctrine from criminal forfeiture cases to civil asset freezes as well, at least where there are parallel proceedings. At least two other cases have followed *Walsh*'s approach.[38]

Another approach was adopted in *SEC v. Petters*, a case in which the government accused the defendants of orchestrating a "massive Ponzi scheme."[39] Like in *Walsh*, the criminal case was based on the same underlying conduct as was the civil case, and the SEC secured an ex parte forfeiture order in the civil case, freezing all of the defendants' assets. Upon a motion by one of the defendants, the court unfroze some of the assets at issue.[40] In contrast to the reasoning of the opinion in *Walsh*, the court in *Petters* relied solely upon its inherent discretion. Thus, the court did not make an inquiry into whether any of the funds were untainted by the alleged fraud.[41] Instead, the court balanced the interests of the victims in receiving restitution with the interest of the defendant in having a lawyer advise him in the criminal case.[42]

The dynamics of forfeiture in parallel proceedings indicate that courts will continue to confront motions to unfreeze assets in the civil case to pay for an attorney in the parallel criminal case. In both *Walsh* and *Petters*, the defendants were arrested and then had to answer the civil forfeiture preliminary injunction motion while in jail and encumbered by the temporary restraining order, which froze all of their assets. The

37. See, e.g., SEC v. Stein, 07 Civ. 3125(GEL), 2009 WL 1181061, at *1 (S.D.N.Y. Apr. 30, 2009) (refusing to release assets to pay for legal fees because "it appears unlikely that there are assets sufficient to cover the likely disgorgement and restitution obligations the Commission seeks"); see also SEC v. Roor, 99 Civ. 3372(JSM), 1999 WL 553823, at *3 (S.D.N.Y. July 29, 1999) ("[A defendant] may not use income derived from alleged violations of the securities laws to pay for legal counsel."). However, there is some authority for a court unfreezing some assets where the defendant shows both that the funds sought are not tainted by the fraud, and that sufficient funds will remain frozen to satisfy any disgorgement liability after trial. See *Stein,* 2009 WL 1181061, at *1 ("[T]he defendant must establish that the funds he seeks to release are untainted and that there are sufficient funds to satisfy any disgorgement remedy that might be ordered in the event a violation is established at trial.").

38. See SEC v. FTC Capital Mkts., Inc., No. 09 CV 4755(PGG), 2010 WL 2652405, at *7 (S.D.N.Y. Jun. 30, 2010); United States v. Hatfield, No. 06 CR 0550(JS), 2010 WL 1685826, at *2 (E.D.N.Y. Apr. 21, 2010).

39. Civil No. 09-1750 ADM/JSM, 2010 WL 4922993, at *1 (D. Minn. Nov. 29, 2010).

40. Id. at *2.

41. See id. (basing decision on what "is fair and equitable under the circumstances").

42. Id.

defendants did have the ability to contest the civil forfeiture order by proving by a preponderance of the evidence that the seized assets were not forfeitable. However, even if the asset freeze were overly broad, that would be very difficult for the defendant to prove while in jail and without funds to hire lawyers or accountants.[43] Moreover, anything the defendant says to contest the civil forfeiture order can be used against him in the criminal case.[44] And because of strict discovery rules in criminal cases, the defendant would not have access to very many details of the government's criminal case against him. Most defendants in this position, therefore, usually stipulate to a more permanent freeze and hope to get some of the assets unfrozen by filing motions for *Monsanto* type hearings later.[45] Thus, *Monsanto* hearing motions in parallel proceedings will likely take on additional importance.

After *Walsh* and *Petters*, there are new strategic considerations for the government to face as well. If the government were so interested in returning victims' money, it might conclude that bringing a criminal case in addition to a civil case—which may lead to some funds being unfrozen—would not be the best way to return those assets to the victims. If the government only brought a civil enforcement action, the defendant's Sixth Amendment rights would not be implicated and the government potentially could recover more money if it won the suit. On the other hand, the government might conclude that some financial crimes warrant jail time, perhaps because they are so immoral or because of deterrence considerations. If that is the case and the government chooses to bring parallel proceedings, it might have to accept that the money available to victims might be less because of the defendant's Sixth Amendment right to counsel. However, if the government is reasonably sure that all of the defendant's funds are tainted, it could then bring only a criminal action and use criminal forfeiture to seize the defendant's assets.

III. GUIDANCE FOR DISTRICT COURTS

This Part attempts to provide guidance to courts presented with motions to unfreeze funds frozen in the civil case to pay for an attorney in the criminal case. *Walsh* was correct: A defendant should have the right to a *Monsanto* type hearing in the civil case where the civil forfeiture order affected the defendant's ability to obtain counsel of choice in the parallel criminal case. As the court explained in *Coates*, "many of the reasons cited

43. See Schmeltz Interview, supra note 3 (noting burden on defendants to provide court with accurate accounting of assets while in jail and without funds to pay for professional assistance).

44. Cf. United States v. Kordel, 397 U.S. 1, 11–13 (1970) (information disclosed to government in civil case can be used against same defendants in criminal case as long as government does not act in bad faith).

45. See Schmeltz Interview, supra note 3 (noting most defendants do not want to put up a fight against civil forfeiture proceeding when testimony could negatively affect parallel criminal case).

for a hearing in *Monsanto* . . . seem equally applicable here."[46] While a defendant has no constitutional right to use other people's money to pay for an attorney, the defendant in the criminal case is nevertheless innocent until proven guilty. It would violate principles of fundamental fairness for a court to assume wrongdoing before judgment, thereby preventing the defendant from having the ability to defend himself.[47] That principle is especially pertinent here since, before trial, the "wrongdoing is not yet proven and the restrained property is a defendant's only means of securing counsel."[48] Moreover, it should not matter that the forfeiture order was secured in the civil case, not the criminal case, since the civil freeze clearly affects the defendant's rights in the criminal case. Courts should not be overly constrained by the formal separation of the two causes of action.

At a minimum, the *Monsanto* type hearing should give the defendant the opportunity to prove by a preponderance of the evidence that some assets frozen in the civil case are untainted by the criminal allegations and access to those funds would be necessary to attain counsel of his choice. The court should then release those funds, even if they would be forfeitable in the civil case. After all, it was the government's choice to bring the criminal case and so the government should be held responsible for the resulting Sixth Amendment consequences.

In addition, courts should retain some discretion to unfreeze assets if a defendant cannot afford to hire a criminal defense attorney even absent a showing of untainted assets. In appropriate circumstances, courts should follow the approach adopted in *Petters*, where the district court, in an exercise of its discretion, unfroze a small amount of money to allow the defendant to pay for a criminal defense attorney.[49] Preserving the defendant's ability to hire competent counsel in the criminal case makes it more likely that the proceeding will be fair and that justice will be served.

Finally, courts should be wary where it appears that the civil action is being used primarily to hamper the defendant's ability to defend himself in the criminal case.[50] A civil asset freeze followed immediately by a motion to stay until the parallel criminal case is over should not be so

46. SEC v. Coates, No. 94 Civ. 5361 (KMW), 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994).

47. Cf. Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 565 (5th Cir. 1987) ("[T]he court cannot assume the [defendants'] wrongdoing before judgment in order to remove the defendants' ability to defend themselves.").

48. United States v. Petters, Civil No. 08-5348 ADM/JSM, 2009 WL 803482, at *2 (D. Minn. Mar. 25, 2009).

49. Id. at *2.

50. Cf. SEC v. Saad, 229 F.R.D. 90, 91 (S.D.N.Y. 2005) (describing it as "strange" that "the U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously"); SEC v. Yuen, No. CV 03-4376 MRP (PLAx), slip op. at 13 (C.D. Cal. Oct. 28, 2003) (denying motion for stay and concluding that while allowing civil discovery to proceed "will probably provide the Defendants with broader discovery than they would otherwise be able to obtain, . . . this is a consequence of the Government's choice to proceed first with the civil case").

readily allowed.[51] The civil case could just as easily be filed after the criminal case is over, thereby avoiding this problem.[52] This kind of strategic manipulation of the federal courts—especially when it can have the effect of depriving the defendant of his Sixth Amendment rights—should not be so readily permitted.[53]

CONCLUSION

The problems caused by parallel proceedings and the lack of clear guidance, statutory or otherwise, on how to deal with them have long been known.[54] This Comment has explored the constitutional and equitable considerations when the government files parallel proceedings and secures an asset freeze in the civil case, which has the effect of depriving a defendant of sufficient funds to pay for an attorney in the criminal case. Since civil asset freezes can freeze even those funds that are untainted by the alleged fraud, the defendant can often be left with virtually no money after the freeze order goes through. This Comment finds that this practice unfairly deprives the defendant of his Sixth Amendment right to counsel of his choice in the criminal case, especially where the asset freeze includes untainted funds and the defendant has no other way to pay for an attorney. The approach taken by the court in *Walsh* may serve as a model for other courts that address this issue. In the end, while financial crimes can and should be vigorously prosecuted, the government must be more careful not to tread on defendants' constitutional and equitable rights.

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51. This problem could be rendered moot if the district court were to dismiss the civil case without prejudice and allow the SEC to refile after the criminal case is over. See, e.g., SEC v. Oakford, 181 F.R.D. 269 (S.D.N.Y. 1998) (dismissing civil case without prejudice under these circumstances).

52. Cf. SEC v. Sandifur, No. C05-1631 C., 2006 WL 3692611, at *3 (W.D. Wash. Dec. 11, 2006) (denying motion for stay after noting government could have avoided any perceived problems of affording defendant civil discovery "by waiting until after the criminal matter was resolved to institute civil proceedings" but, "[i]nstead, the United States worked directly with the SEC and voluntarily chose to institute both civil and criminal actions at the same time").

53. Cf. Gaumer, supra note 33, at 66–67 (stating "concern that each type of [forfeiture] proceeding be confined to its proper purpose, and that the processes of one type of proceeding not be improperly exploited to obtain an advantage otherwise unavailable, or to achieve goals more appropriately, and perhaps justly, accomplished through the other type of proceeding").

54. As the late Judge Milton Pollack explained, "[n]either criminal nor civil procedure, in the Federal Rules, has a provision that explicitly addresses the problems of parallel proceedings," leaving courts to rely on "ad hoc" remedies. Milton Pollack, Senior Judge, U.S. Dist. Court, S. Dist. of N.Y., Parallel Civil and Criminal Proceedings, Lecture to Transferee Judges' Conference (Oct. 17–19, 1989), in 129 F.R.D. 201, 212 (1990).

Preferred Citation: Michael R. Herman, Comment, CFTC v. Walsh*: District Court Releases Funds Frozen in Civil Case to Pay for Attorney in Parallel Criminal Cases*, 112 COLUM. L. REV. SIDEBAR 108 (2012), http://www.columbialawreview.org/assets/sidebar/volume/112/108_Herman.pdf