Continuing Criminal Enterprise Statute: Effect of Forfeiture Provisions on Third Parties

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I. INTRODUCTION

In 1970, concerned with the problem of drug abuse in the United States, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act. In an effort aimed at discouraging large scale drug operations entered into for profit, Congress included a provision in the Act entitled "Continuing Criminal Enterprise" (CCE). Among other things, this section provides that any person who is found guilty of conducting a continuing criminal enterprise must forfeit any profits derived from the enterprise along with any other interest stemming from the enterprise.

4. See infra note 5 for the definition of continuing criminal enterprise.

§848. Continuing criminal enterprise
(a) Penalties; forfeitures
(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture provision in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States —

(A) the profits obtained by him in such enterprise, and
(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) Continuing criminal enterprise defined
For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a

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Problems of interpretation and application of the statute arise, however, when an individual who has been indicted under section 848 transfers property, which would have been subject to forfeiture, to a third party before the indictment and the imposition of a restraining order restricting the transfer of the property have been obtained. This comment will focus on the rights of all parties involved when such a chain of events occurs. However, before such an analysis can be undertaken, a proper foundation must be laid in order to understand the routine application of the statute. Thus this comment will first examine the CCE's purpose, its constitutional ramifications and the standard application of its forfeiture provisions. Finally, it will discuss the propriety of placing a restraining order on a third party.

II. THE PURPOSE OF CCE AND ITS CONSTITUTIONAL RAMIFICATIONS

Essential to an analysis of the CCE is the statute's general purpose. In enacting section 848, Congress intended to penalize the organizers of large scale drug operations which were entered into for profit. It is important to note that section 848 is only concerned with the organizers of the enterprise and not the partici-

supervisory position, or any other position of management, and
(B) from which such person obtains substantial income or resources.
(c) Suspension of sentence and probation prohibited
In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 - 24-207), shall not apply.
(d) Jurisdiction of courts
The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

6. Id. § 408(d), 21 U.S.C. § 848(d). See supra note 5 for the text of the statute. The United States district courts have jurisdiction to enter restraining orders against any property which may be subject to forfeiture. See infra note 58 and accompanying text.
pants. But, it is well recognized that there can be more than one organizer in a criminal enterprise.

Before a defendant can be convicted of violating section 848, the government must allege and prove that the defendant was engaged in a continuing series of narcotic sales in violation of federal law in concert with five or more people, that he occupied a management or supervisory position and that he received substantial income from such activity. In response to these prerequisites for conviction under section 848, many defendants have launched constitutional challenges against the CCE based on a void for vagueness challenge. To date, however, none have been successful. The typical attack by a defendant juxtaposes a constitutional void for vagueness argument in conjunction with an insufficiency of the evi-


10. See United States v. Lurz, 666 F.2d 69 (4th Cir. 1981), cert. denied, 102 S. Ct. 1642 (1982) (there can be more than one organizer in a criminal enterprise).

11. United States v. Samuelson, 697 F.2d 255, 259 (8th Cir. 1983). Defendant Jay Kenton Samuelson was convicted for violating 21 U.S.C. § 848. He was the organizer in a drug operation located in Fargo, North Dakota. The evidence indicated that his convictions on numerous counts charging Federal drug violations constituted a continuing criminal enterprise, that he acted in concert with five or more persons and that he occupied a supervisory or management position. 697 F.2d at 259.

12. See United States v. Webster, 639 F.2d 174, 182 (4th Cir.), cert. denied, 454 U.S. 857 (1981) (denying defendant's constitutional challenge based on the term "substantial income"); United States v. Valenzuela, 596 F.2d 1361 (9th Cir.), cert. denied, 444 U.S. 865 (1979) (upholding the constitutionality of the terms "continuous series of violations," "undertaken in concert," "organizers . . .," and "substantial income"); United States v. Craverio, 545 F.2d 406, 410-11 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977) (adopting the rationale that the statute is not unconstitutionally vague since the degree of violation required by the statute is such that the defendant has to be on notice); United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976), cert. denied, 430 U.S. 906 (1977); United States v. Sperling, 506 F.2d 1323, 1343-44 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975) (holding that section 848 is not on its face unconstitutionally void for vagueness and was not void as applied since evidence was produced to show that the defendant was a kingpin in a narcotics operation); United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974) (holding that section 848 was not vague on its face or as applied in this particular instance); United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974); United States v. Suquet, 551 F. Supp. 1194 (N.D. Ill. 1982) (holding that defendant's void for vagueness challenge must fail since he only made a blanket assertion that section 848 was vague and did not assert that section 848 was vague as applied to the facts of the particular case); United States v. Holman, 490 F. Supp. 755 (E.D. Pa. 1980) (holding that although the statute in some instances may be vague as applied, it was not vague on its face); United States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976); United States v. Collier, 358 F. Supp. 1351 (E.D. Mich. 1973), aff'd per curiam, 493 F.2d 327 (6th Cir.), cert. denied, 419 U.S. 831 (1974).

13. See supra note 12 and accompanying text.
dence claim.\textsuperscript{14} The courts have, however, foreclosed this method of attack.\textsuperscript{15} If a defendant, nevertheless, still contemplates a constitutional attack, in order to challenge the CCE as being vague, he must challenge section 848 in light of the specific facts of the case.\textsuperscript{16}

Many defendants have attempted to attack the statute’s facial validity and have failed.\textsuperscript{17} This is not to say, however, that the statute is immune from the possibility of being vague as applied.\textsuperscript{18} The leading case cited for authority as to the statute’s facial validity is \textit{United States v. Manfredi}.\textsuperscript{19} In \textit{Manfredi}, the defendant was indicted under section 848 for engaging in a continuing criminal enterprise. He was suspected of conducting one of the largest (hard) drug operations in New York.\textsuperscript{20} The defendant was subsequently convicted and received a 30-year prison sentence and a fine of one hundred thousand dollars.\textsuperscript{21}

In an effort to gain acquittal, on appeal, Manfredi attempted to assert that the CCE was unconstitutionally vague.\textsuperscript{22} In deciding the case, the court noted that before a person can be found to be engaged in a continuing criminal enterprise, he must be engaged in the business of trafficking large quantities of prohibited drugs on a continuing basis in a supervisory position for which he obtains substantial income.\textsuperscript{23} The court pointed out that the conduct required for a conviction is of such a nature that, from a practical point of


\textsuperscript{15} See supra note 12 and accompanying text.

\textsuperscript{16} “[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand.” \textit{United States v. Valenzuela}, 596 F.2d 1361, 1367 (9th Cir. 1979) (citing \textit{United States v. Mazurie}, 419 U.S. 544, 550 (1975) and \textit{United States v. Kirk}, 534 F.2d 1262, 1277-78 (8th Cir. 1976), \textit{cert. denied}, 430 U.S. 906 (1977)).


\textsuperscript{18} \textit{United States v. Holman}, 490 F. Supp. 755, 758 (E.D. Pa. 1980) (citing \textit{United States v. Valenzuela}, 596 F.2d 1361 (9th Cir.), \textit{cert. denied}, 444 U.S. 865 (1970)). In \textit{Valenzuela}, the defendant, Jose Valenzuela, asserted that he was not adequately notified of the illegality of his conduct based on the statute. After the court examined the statute as applied in the defendant’s unique set of facts, the court concluded that Jose had no valid constitutional claim.


\textsuperscript{20} \textit{Id.} at 590.

\textsuperscript{21} \textit{Id.} at 590, 591 n.2.

\textsuperscript{22} \textit{Id.} at 602.

\textsuperscript{23} \textit{Id. See also supra} note 12 and accompanying text.
view, a defendant must be on notice that his conduct is wrongful and illegal.\textsuperscript{24} Thus, the court stated that it is very difficult to assert that the statute should be declared unconstitutionally vague. The court in \textit{Manfredi} did, however, concede that the statute could have been more "artfully" drawn by Congress but noted that, as to date, no one has proffered a better proposal.\textsuperscript{25} The court's constitutional analysis of the statute has since become the standard for interpretation of the CCE by other courts.\textsuperscript{26}

In lieu of attacking the facial validity of the entire statute, many defendants have attempted to attack particular words within the statute on vagueness charges.\textsuperscript{27} The definitional section of the CCE\textsuperscript{28} utilizes various general terms to define what constitutes a continuing criminal enterprise.\textsuperscript{29} Within this section there are four phrases which are consistently under attack as being vague: (1) "part of a continuing series,"\textsuperscript{30} (2) "in concert,"\textsuperscript{31} (3) "position of organizer, a supervisory position, or any other position of management,"\textsuperscript{32} and (4) "substantial income."\textsuperscript{33} Although there are numerous decisions which uphold the constitutionality of each of these terms,\textsuperscript{34} the decision in \textit{United States v. Valenzuela}\textsuperscript{35} first points out that the words under challenge cannot be looked at in isolation, but rather must be analyzed in conjunction with each

\begin{enumerate}
\item 488 F.2d at 602.
\item \textit{Id.} at 603. See also United States v. Collier, 493 F.2d 327, 329 (6th Cir. 1974) adopting the exact text of \textit{Manfredi}. However, see infra notes 122-24 and accompanying text for a discussion of proposed changes.
\item See supra note 12 and accompanying text.
\item See infra notes 29-31 and accompanying text.
\item See infra notes 30-33 and accompanying text.
\item 596 F.2d 1361 (9th Cir.), cert. denied, 444 U.S. 865 (1979).
\end{enumerate}
other and in light of their statutory context. Keeping this in mind, the court construed the phrase "part of a continuing series" to mean three or more federal drug violations; "in concert" to mean any agreement in a plan to accomplish the prohibitions of section 848. "Position of organizer, a supervisory position, or any other position of management" was to be determined by the day-to-day connotation ascribed to it in the business community and general public. Finally, the court addressed the phrase "substantial income." The court did not attempt to define this term, but rather noted that the statute would be valid even if this term was totally omitted from the statute. The court stated that this term, in effect, protects small time operators from the reach of section 848 and, therefore, it is ludicrous for a defendant to challenge the phrase as being constitutionally vague.

In light of the foregoing judicial interpretation of the statute, it must be emphasized that when challenging a statute for vagueness, particularly this statute, not every ambiguity will render it void for vagueness. Further, to be convicted under section 848, the defendant must commit a series of felony violations, each of which involves specific intent. For a defendant to assert that he did not know that what he was doing was unlawful borders on the absurd.

36. Id. at 1367.
37. See supra note 30 and accompanying text.
38. 596 F.2d at 1367.
39. See supra note 31 and accompanying text.
40. 596 F.2d at 1367.
41. See supra note 32 and accompanying text.
42. 596 F.2d at 1367.
43. See supra note 33 and accompanying text.
44. 596 F.2d at 1368.
45. Id.
46. Id. Although this logic skirts the issue it is persuasive reasoning.
47. United States v. Collier, 358 F. Supp. 1351, 1353 (E.D. Mich. 1973), aff'd per curiam, 493 F.2d 327 (6th Cir.), cert. denied, 419 U.S. 831 (1974). The court expanded on this idea noting that just because a statute's "exact parameters" may be somewhat ambiguous, it does not mean that the statute cannot be constitutionally applied to conduct which is "clearly within the bounds of the statute." Id. In other words, one should not assert that there is a gray area until one is within that area.
49. See supra note 25 and accompanying text. The statute has also withstood various other constitutional attacks. See, e.g., United States v. Bergdoll, 412 F. Supp 1308 (D. Del. 1976) (section 848 does not deny a defendant equal protection nor does it constitute cruel and unusual punishment). Nor has the statute presented a due process problem because the courts construe the statute to avoid an unconstitutional outcome. Thus, as long as one is
III. TRADITIONAL APPLICATION OF CCE

In enacting section 848, Congress intended to create a criminal forfeiture statute. The categorization of the statute as a criminal forfeiture statute must be emphasized because criminal forfeiture statutes are different from civil forfeiture statutes. Civil forfeiture proceedings are *in rem* and the property itself is deemed to be the offender. Such property may be proceeded against for that

granted a timely adversary hearing regarding the imposition of a restraining order or forfeiture, there is no violation of due process. See United States v. Veon, 538 F. Supp. 237, 245 (E.D. Cal. 1982).


52. An excellent example of an *in rem* forfeiture statute is 21 U.S.C. § 881 (1976). The pertinent forfeiture subsections of § 881(a) read as follows:

§ 881. Forfeitures

(a) Property subject

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 in violation of this subchapter.

3. All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

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 property described in paragraph (1) or (2), except that—

   (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

   (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

5. All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

*Id.*

As will be noted, this statute is concerned with only the property itself and not the personal guilt or innocence of the individual defendant. This statement is not only verified by
reason alone and the guilt or innocence of the owner is of no consequence. Criminal forfeiture proceedings on the other hand are in personam. The personal guilt or innocence of the defendant is the main point of inquiry. The purpose of a statute of this type, and specifically section 848, is to penalize the defendant by requiring the forfeiture of all profits derived from the criminal enterprise. The statute specifically authorizes forfeiture of any profit or interest derived from a continuing criminal enterprise. Since the statute only speaks of the government's entitlement to forfeiture as of the date of conviction, Congress gave the district courts the power to impose pre-conviction restraining orders to prohibit the transfer of property which may be subject to forfeiture.

The statute only speaks in generalities regarding restraining orders and does not provide any guidelines for their issuance. Through judicial interpretation, however, certain guidelines have evolved. The government may initially seek, and the court may issue, an ex parte restraining order which restrains the property thought to be forfeitable. This order, however, can only be of brief duration and cannot be perpetuated until a defendant's trial unless the defendant is afforded an adversary hearing in which the propriety of the ex parte order can be examined. In examining the order at an adversary hearing, there are certain guidelines and


55. See cases cited supra note 54.


58. 21 U.S.C. § 848(d) (1976). See supra note 5 for the text of the statute. This section was designed to circumvent the possibility of frustrating the effectiveness of the statute's forfeiture provision by transferring the property before conviction. United States v. Long, 654 F.2d at 915.

59. United States v. Veon, 538 F. Supp. 237, 240 (E.D. Cal. 1982). Although the statute does not specifically authorize a restraining order, the courts have determined that such an order is necessary since a defendant who has been indicted will have notice that the government will seek forfeiture of certain property. Id. at 243. United States v. Long, 654 F.2d 911, 915 (3rd Cir. 1981). See also Fed. R. Crim. P. 7(c)(2).

60. United States v. Veon, 538 F. Supp. 237, 240 (E.D. Cal. 1982). See United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982) (it was error for a court to deny a defendant an adversary hearing after the issuance of an ex parte order). See also Rule 65 of the Federal Rules of Civil Procedure, which dictates that an immediate hearing be had whenever a court has granted a temporary ex parte restraining order. Fed. R. Civ. P. 65(b).
procedures which must be followed.\textsuperscript{61} Since Congress left unanswered questions such as what must be proven, who has the burden of proof, and what evidence may be admissible, the answers have had to evolve through the judiciary. The court in \textit{United States v. Long},\textsuperscript{62} pioneered the establishment of the appropriate standard for issuing a restraining order under section 848(d), stating that:

Before a court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute and two, that the profits or properties at issue are subject to forfeiture under the provisions of section 848(a)(2).\textsuperscript{63}

Although other courts have adopted this standard verbatim,\textsuperscript{64} the district court in \textit{United States v. Veon}\textsuperscript{65} added a very important caveat, cautioning that one should not confuse what the government must prove with its burden of persuasion.\textsuperscript{66} While the \textit{Long} standard is what the government must prove at the hearing, the government’s burden of persuasion for obtaining the issuance of a restraining order is only a preponderance of the evidence,\textsuperscript{67} a determination that the court in \textit{Long} failed to note. The court in \textit{Veon} added still another dimension to the procedural criteria of an adversary hearing under section 848. Since the court in \textit{Long} failed to address what evidence may be introduced at the hearing to obtain a restraining order, the court in \textit{Veon} reasoned that the Federal Rules of Evidence apply in such a proceeding and should be followed.\textsuperscript{68}

Thus, based on judicial interpretation, the procedures to be fol-

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\textsuperscript{61} The courts themselves note that there is a paucity of law on the guidelines to be followed under CCE third party forfeitures. \textit{United States v. Long}, 654 F.2d 911, 916 (3rd Cir. 1981); \textit{United States v. Veon}, 538 F. Supp. 237, 240 (E.D. Cal. 1982).

\textsuperscript{62} 654 F.2d 911 (3rd Cir. 1981).

\textsuperscript{63} \textit{Id.} at 915.

\textsuperscript{64} \textit{See, e.g., United States v. Crozier}, 674 F.2d 1293, 1298 (9th Cir. 1982).

\textsuperscript{65} 538 F. Supp. 237 (E.D. Cal. 1982).

\textsuperscript{66} \textit{Id.} at 246.

\textsuperscript{67} \textit{Id.} at 247.

\textsuperscript{68} \textit{United States v. Veon}, 538 F. Supp. 237, 249 (E.D. Cal. 1982). The court noted that since Rule 1101(b) of the Federal Rules of Evidence states that the rules “apply generally to all criminal cases and proceedings” they apply here also. There is no exception to the rule which would dictate their nonapplication. 538 F. Supp. at 249. It should be noted that, although the rule barring hearsay is applicable, the court in \textit{Long} relied almost entirely on hearsay in reaching its decision. Evidently the defendant’s counsel did not object to such evidence, so it was admitted. \textit{Id.}
ollowed in obtaining a restraining order are as follows. First, a court may issue an ex parte restraining order of brief duration. The defendant is then entitled to an adversary hearing governed by the Federal Rules of Evidence, in which the government has the burden of proof. At the hearing, if the government does not prove by a preponderance of the evidence that the defendant will be found guilty at trial of violating section 848 and that the restrained property is subject to forfeiture under section 848, the ex parte restraining order will be dissolved.

IV. Effect of CCE's Forfeiture Provision on Third Parties

An intriguing question arises when an individual, who has been indicted under section 848, transfers property, which might be subject to forfeiture, to a third party before the indictment and imposition of a restraining order. The consequences of such a transaction were examined by the Third Circuit in United States v. Long. That decision, however, can at best be said to be an erroneous interpretation of section 848.

In United States v. Long, the defendant, Thomas E. Long, transferred an aircraft to his attorneys for payment of past and future legal fees. Six months after the transfer, Long was indicted under section 848 and the district court issued an ex parte restraining order, pursuant to section 848(d), which in effect prevented Long and his attorneys from transferring the aircraft. In challenging the order at the subsequent adversary hearing, the at-

69. See supra note 59 and accompanying text.
70. See supra note 60 and accompanying text.
71. See supra note 68 and accompanying text.
72. See supra notes 66-67 and accompanying text.
73. Id.
74. See supra note 63 and accompanying text.
75. 654 F.2d 911 (3d Cir. 1981).
76. Ironically, the Long decision espouses the accepted standard for the issuance of restraining orders under section 848(d). See supra note 63 and accompanying text.
77. 654 F.2d at 913. The defendant Long sold the airplane to his attorneys pursuant to an oral contract in which the purchase price of the plane was $140,000. The terms of the sale were as follows: the attorneys gave defendant Long $31,000 in cash, $30,000 of past legal debts were expunged and $79,000 was credited to the defendant's account for his upcoming prosecution under section 848. Fifty thousand dollars of the $79,000 was a retainer and $29,000 was for future legal expenses. 654 F.2d at 913.
78. 654 F.2d at 916. See infra note 95 for further discussion about the transfer.
79. 654 F.2d at 912. The attorneys were also required to post a $400,000 interim bond. Id. Requiring a bond seems to be an excessive precaution since § 848(d) speaks of restraining orders and performance bonds as a "one or the other" type of remedy. See supra note 5 for the text of the statute.
torneys unsuccessfully asserted that such a restraining order was improper since they were neither indicted under section 848 nor connected with the illegal enterprise in which Long was allegedly involved. In upholding the restraining order, the Third Circuit noted that the “restraining order simply preserves the status quo pending Long’s eventual trial and final determination pursuant to Federal Rule of Criminal Procedure 31(e).” The court further theorized that the purpose of section 848 should not be frustrated by permitting a defendant to dispose of “illegal proceeds” which may be subject to forfeiture to a knowing third party. Although this rationale has superficial appeal, it is questionable if such a finding is logically sound in light of section 848, its purpose, and other case law interpreting the statute.

As a basic starting point in examining the propriety of the Long rationale, it is helpful to keep in mind just what interest the government possesses in property which may be found to be forfeitable. Under section 848(a)(2), conviction is the only time that the government has a right to forfeiture. It is a basic principle that the government has no right to assert a claim in a piece of property which may subsequently be held to be forfeitable, since the guilt of the defendant has not yet been determined. This is the situation in Long. The defendant is a fugitive from justice and a jury determination of his guilt or innocence, which would enable the government to seek forfeiture, is not in the foreseeable future. Thus, in Long, it can be concluded that the government had no legitimate interest in the airplane which would enable them to prohibit the transfer of the plane prior to the indictment.

80. 654 F.2d at 912.
81. Id. at 915. Federal Rule of Criminal Procedure 31(e) reads as follows: “If the indictment of the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.” FED. R.CRIM. P. 31(e).
82. 654 F.2d at 916. It must be remembered that under section 848 only the profits are forfeitable and not any specific piece of property as in in rem forfeitures. If the profits are no longer entangled in the property, but merely pass through the property, the government is not entitled to forfeiture. See infra note 119 and accompanying text.
83. See supra note 5 for the text of the statute.
84. “[T]he Government possesses an interest in a given piece of property only to the extent to which that property is the embodiment of illicit ‘profits,’ and that the Government’s interest does not arise until the personal guilt of the property’s owner has been established.” United States v. Veon, 549 F. Supp. 274, 280 (E.D. Cal. 1982).
85. See supra notes 81-82 and accompanying text.
86. As of July 25, 1983, the defendant Long is still a fugitive.
87. See infra note 94 and accompanying text for the Third Circuit’s subsequent explanation of this observation.
The statute by itself is of little help in examining such a complicated issue. In examining the propriety of the Long decision, it is most helpful to read the statute in light of the case law which interprets it to determine what effect section 848 has on a transferee when the property has been obtained from an indicted transferor and when the transfer took place prior to the indictment and imposition of a restraining order.

The facts of United States v. Veon, a case decided by the District Court for the Eastern District of California, have the same practical impact as the factual situation in Long. In Veon, the government obtained an ex parte restraining order pursuant to section 848(d). The government subsequently refused to submit admissible evidence during the adversary hearing which would support the restraining order, so the court ordered it dissolved. In an attempt to do indirectly what the court could not do directly, the government filed a notice of lis pendens. The court subsequently expunged the lis pendens notice filed by the government noting that, even if a transferee had notice, he would not be subject to the outcome of the defendant's trial. If this is accepted as true, the Long court's observation that the "punitive purposes [of the statute] should not be frustrated by allowing a defendant to transfer the illegal proceeds to a knowing third party" is an inaccurate application of section 848. In arriving at its decision, the court in Veon provided an in-depth analysis which substantially supplements and clarifies the Long court's pioneering efforts. The Veon decision even alludes to the fact that a different result could be

89. Id. at 275. See supra note 5 for the text of the statute.
90. 549 F. Supp. at 275.
91. Id. at 276. In effect a lis pendens serves a notice to the world that a defendant's real property may be subject to forfeiture. Id.
92. A transferee with notice of the filing of lis pendens is a purchaser pendente lite. Id.
93. Id. at 279.
94. United States v. Long, 654 F.2d at 916. See supra note 82 and accompanying text.
95. As the court in Veon points out, the Government does not have an interest in property which has been transferred legitimately. United States v. Veon, 549 F. Supp. at 282. If a transfer occurs, the profits are not longer embodied in the transferred property, they have taken some other form. Once the profits are no longer contained in a certain piece of property, the property is no longer subject to forfeiture by the government. Id. This is assuming, however, that there is a valid transfer of the property in question. In Long, although the court alluded to the possibility of the transfer being questionable, they never found explicit that the transfer was fraudulent. They instead relied on the unsound rationale that a defendant should not be able to "escape the penalty sought to be imposed by Congress simply by transferring his illgotten profits to a non-indicted third party." United States v. Long, 654 F.2d at 916.
reached in *Long*.\(^6\)

In light of section 848 and the *Veon* court’s analysis, it is illogical in *Long* to assume that the government has an interest in the aircraft which would supersede the interest asserted by Long’s attorneys, because the plane was transferred before the indictment and restraining order, regardless of the fact that the attorneys subsequently had notice of the indictment.\(^7\) This rationale is both logical and consistent with the purposes of section 848, but as evidenced in the *Veon* decision, the *Veon* court was momentarily stymied by the apparent opposite result of the court’s decision in *Long*.\(^8\) In an effort to rectify the *Long* court’s decision, the *Veon* court searched for the “latent holding” within the *Long* court’s literal holding in order to arrive at a consistent interpretation of section 848.\(^9\) The court was quick to caution that *Long* should not be read to hold that property which was owned by a defendant prior to his conviction but which is at the time of conviction wholly owned by an unindicted third party, may be subject to forfeiture under section 848.\(^10\) The court stated that such forfeiture would be “doctrinally unsound.”\(^11\) Although the court in *Veon* recognized the possible misinterpretation of *Long* by other courts, the practical result of *Long* in fact perpetuates the doctrinally unsound result cautioned against by the court in *Veon*.\(^12\) The attorneys were and have been the registered owners of the subject aircraft prior to the ex parte restraining order. Yet, they have been enjoined from transferring the aircraft for a period in excess of two

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97. A finding to the contrary would confuse the concept of profits versus product as discussed in *Veon*, 549 Supp. at 282. If the government were allowed to impose a restraining order on property which is sold prior to the indictment, the government could seek forfeiture of everything through which the profits once passed, a clearly “absurd” result. *Id.*

98. *Id.* at 281.

99. *Id.* at 282. The *Veon* court noted that the *Long* court’s observation that the “punitive purposes [of the statute] should not be frustrated by allowing a defendant to transfer illegal proceeds to a knowing third party,” *id.* at 282 (quoting United States v. Long, 654 F.2d 911, 916 (3d Cir. 1981)), should not be read to hold “that property which formerly belonged to the defendant—but which is wholly owned by uncharged third parties at the time of conviction—may be subject to forfeiture under section 848(a)(2).” 549 F. Supp. at 282. Although *Veon* cautioned against such an unsound interpretation, the unsound interpretation is, in effect, the holding which evolved from *Long* in light of the Third Circuit’s subsequent decision when the attorneys later sought modification of the restraining order. *See infra* note 115 and accompanying text.

100. 549 F. Supp. at 282.

101. *Id.*

102. *See infra* notes 116-17 and accompanying text.
years based on the dual rationale that the restraining order preserved the status quo pending Long's trial, and that the purposes of section 848 should not be frustrated by permitting a defendant to dispose of illegal proceeds which may be subject to forfeiture to a knowing third party.\textsuperscript{103}

It is difficult to reconcile the restraint on alienation which the Third Circuit perpetuates in the \textit{Long} decision. Utilizing the principles set forth in \textit{Veon}, the \textit{Long} court's decision can only logically be interpreted to mean that the court was operating under a misconception of the purpose and application of section 848 which is readily ascertainable from the court's opinion. For example, the \textit{Long} court explicitly rejected the attorneys' contention that section 848 can only apply to profits or properties in which a defendant maintains an interest at the time the restraining order is issued.\textsuperscript{104} This conclusion is contrary to the result reached in \textit{Veon}, the purposes of section 848,\textsuperscript{105} and the nature of \textit{in personam} forfeiture.\textsuperscript{106} It must be remembered that in \textit{Veon}, after dissolving the \textit{ex parte} restraining order, the court declared that even if a transferee acquired an interest in a defendant's property subsequent to the dissolved restraining order, the transferee would not be subject to forfeiture.\textsuperscript{107} Although \textit{Veon} and \textit{Long} seemed to be irreconcilable, the court in \textit{Veon} made an attempt to justify the \textit{Long} court's decision by asserting that the \textit{Long} court was operating under the assumption that the defendant still possessed an interest in the aircraft at the time of the restraining order, and that the court was fearful that if the aircraft were transferred, the profits which represented the defendant's interest would be transferred into an unreachable interest.\textsuperscript{108}

The court in \textit{Veon} stated that the attorneys could seek modification of the restraining order based on the terms of the transfer of the aircraft.\textsuperscript{109} The \textit{Veon} court, utilizing the principles of the California Rules of Professional Conduct,\textsuperscript{110} suggested that defendant

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\textsuperscript{103} See supra notes 81-82 and accompanying text. \\
\textsuperscript{104} United States v. Long, 654 F.2d 911, 916 (3d Cir. 1981). \\
\textsuperscript{105} See supra notes 8-9 and accompanying text. \\
\textsuperscript{106} See supra notes 51-58 and accompanying text. \\
\textsuperscript{107} United States v. Veon, 549 F. Supp. 274, 279 (E.D. Cal. 1982). It would logically follow then that even if Veon transferred property after his indictment but before the imposition of a restraining order, the transfer would be valid and not subject to forfeiture under section 848(a)(2). \\
\textsuperscript{108} 549 F. Supp. at 282. See supra note 77 for the breakdown of the sales transaction. \\
\textsuperscript{109} 549 F. Supp. at 284 n.20. \\
\textsuperscript{110} Id. at 283 n.18. 
\end{flushleft}
Long possessed an equitable interest of twenty-nine thousand dollars in the plane, which would be subject to forfeiture, thus entitling the government to restrain the entire plane.\textsuperscript{111} The court noted, however, that the plane could be sold, and twenty-nine thousand dollars of the purchase price—Long’s interest—could be placed in escrow subject to a restraining order.\textsuperscript{112} Such a modification would be consistent with the \textit{Veon} opinion and salvage the \textit{Long} court’s decision. The fact remains, nonetheless, that at no time did the \textit{Long} court attempt to establish the fractional interest that Long had in the plane. The court consistently referred to the plane as a “whole,” being subject to forfeiture.\textsuperscript{113} The court in \textit{Veon} gave the \textit{Long} court the benefit of the doubt and observed that the court in \textit{Long} was tacitly referring to the defendant’s interest in the plane.\textsuperscript{114} This rationale is a logical interpretation of the \textit{Long} court’s decision. However, in light of the attorneys’ subsequent attempt to modify the restraining order and the decision which resulted, the \textit{Veon} court’s observation is erroneous.\textsuperscript{115}

In an order denying modification of the restraining order, Judge Zeigler, sitting by designation on the Third Circuit, “rehashed the logic which the \textit{Long} Court’s decision was based upon.”\textsuperscript{116} In effect this patently revives the “doctrinally unsound” result that the \textit{Veon} court cautioned against.\textsuperscript{117} Judge Zeigler further contributed to the initial decision’s misinterpretation of section 848 by utilizing the logic of a civil \textit{in rem} forfeiture statute to arrive at his decision in a case which involved a criminal \textit{in personam} forfeiture.

\begin{footnotes}
\item[111] \textit{Id.} \textit{Rules of Professional Conduct of the State Bar of California, Rule 2-111(a)(3) reprinted in 23 pt. 2 Cal. Civil and Criminal Code Rule 2-111(a)(3) (West 1981), in effect states that a true retainer is not refundable but sums advanced for expenses are.} \textit{Id.}
\item[112] 549 F. Supp. at 284 n.20.
\item[114] United States v. Veon, 549 F. Supp. 274, 284 (E.D. Cal. 1982). The court in \textit{Veon} stressed that if the \textit{Long} opinion is read as assuming that the defendant still had a fractional interest in the plane, which was the embodiment of illegal profits, the \textit{Long} opinion presents no difficulties such as assuming that the government had an interest superior to the attorneys. \textit{Id.}
\item[115] In an Order of Court dated June 29, 1983, District Judge Zeigler of the Third Circuit, sitting by designation, made a specific finding that, “If the United States sustains its burden of proving that the aircraft is properly subject to forfeiture because it was purchased with profits from a continuing criminal enterprise . . . the alleged contractual claim of movants is subordinated to the right of the United States.” United States v. Long, Criminal Action No. 80-89-B, slip op. at 3 (3d Cir. June 29, 1983).
\item[116] \textit{See id. at} 2.
\item[117] \textit{See supra} notes 100-01 and accompanying text.
\end{footnotes}
It must be emphasized that the forfeiture provision of section 848 does not utilize the forfeiture of any specific piece of property, i.e., the aircraft, but only authorizes the forfeiture of profits which can be attributed to a convicted felon. The government does have a right, however, to trace the profits into whatever form in which they are embodied at the time they become forfeitable. If the property no longer constitutes profits of the criminal enterprise, the government has no claim to the property. This is apparently what the court in Long failed to recognize, and instead, treated the plane as if it were the offender.

V. CONCLUSION

In light of the subsequent decision handed down by Judge Zeigler of the Third Circuit, the Long and Veon decisions, which were previously reconcilable, are now at opposite ends of the spectrum.

The next court which confronts a situation in which an indicted transferor transfers property to a third party before the indictment under section 848 and imposition of a restraining order, must proceed cautiously in reaching a logical outcome. In deciding, it must be remembered that even though Long set forth the appropriate standard for a restraining order, it neglected to determine the proper burden of persuasion, and the proper evidence which can be admitted, and utilized an in rem civil forfeiture statute in an in personam criminal proceeding while failing to recognize a twin in

118. Judge Zeigler cited a case in his opinion which involved 21 U.S.C. § 881 (1976), an in rem forfeiture statute. United States v. Long, Criminal Action No. 80-89-B, slip. op. at 3 (3d. Cir. June 19, 1983). See also supra notes 51-58 and accompanying text. Utilization of the logic of this statute is not only inappropriate but perplexing in light of the Third Circuit's refusal to extend the logic of Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§ 1961-1968 (1976), a "brother" criminal forfeiture statute to CCE. United States v. Long, 654 F.2d at 915 n.6. The Long court would not recognize RICO since it applied only to the defendant's personal interest in an enterprise. The CCE statute applies to profits. Id. However, there is one case under RICO which holds that interest does include profits. See United States v. Martino, 681 F.2d 952 (5th Cir. 1982), cert. granted sub nom., Russello v. United States, 103 S. Ct. 721 (1983). Although the Supreme Court of the United States has granted certiorari to resolve the issue, it is still perplexing why a court would recognize an in rem civil forfeiture statute in an in personam criminal proceeding as opposed to a similar in personam criminal forfeiture statute. For an in-depth discussion of RICO, see Tarlow, RICO Revised, 17 GA. L. REV. 291 (1983).


120. Id. at 281.

121. See supra note 52 and accompanying text.
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personam criminal forfeiture statute. The Veon court, on the other hand, seems to be the more logical and persuasive of the two opinions. Comparing and contrasting these two cases, although helpful to analyzing section 848, does not provide the guidance which courts, defendant’s, and counsel would like to have in order to arrive at rational decisions under section 848. A Report of the Comptroller General of the United States advocated that Congress should take action to clarify and strengthen criminal forfeiture statutes, and even proposed new legislation which would amend certain sections of 848 to clarify the ambiguities which are now inherent in section 848. In light of the two divergent decisions handed down by the District Court for the Eastern District of California and the Third Circuit, such a recommendation would seem to be the only practical method to clarify section 848, unless the Supreme Court grants certiorari.

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122. See supra note 118.
124. The report recognized four problem areas in criminal forfeiture statutes:
1) The scope of forfeiture authority is too narrow.
2) Forfeitures under RICO are limited by some to not include profits.
3) The extent to which assets must be traced is unclear.
4) Transfers of assets prior to conviction limits the effectiveness of forfeiture (emphasis added).
125. The Comptroller General recommended that section 848(a)(2) be amended to read “(A) the profits obtained by him in such enterprise, including any profits and proceeds, regardless of the form in which held, that are acquired, derived, used, or maintained indirectly or directly, in connection with or as a result of a violation of paragraph (1)” GAO Report B-198-049, supra note 123, at 57. The Comptroller further proposed that a new section be added to read:

(E) To the extent that assets, interest, profits and proceeds forfeitable under this section (1) cannot be located; (2) have been transferred, sold to, or deposited with third parties; or (3) have been placed beyond the territorial jurisdiction of the United States, the Court, upon conviction of the individual charged, may direct forfeiture of such other assets of the defendant as may be available, limited in value to those assets that would otherwise be forfeited under sub-section (a) of this section. Upon petition of the defendant, the court may authorize redemption of assets forfeited under this subsection provided the assets described in subsection (a) are surrendered or otherwise remitted by such defendant to the juris of the court.

126. To date, the issue has not been petitioned to the Supreme Court.