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be used as evidence in a criminal proceeding, a higher standard of review for the issuance of a warrant is not required.³⁶ Finally, it is suggested that the Supreme Court's reference to the *Gates* test does not lend support to the majority's view that the Supreme Court was reducing the required level of scrutiny in the warrant process, or applying anything other than the established rule in determining probable cause.³⁷

Edwin G. Oswald

CIVIL PRACTICE LAW AND RULES

CPLR 13-A: A district attorney may attach the personal assets of a defendant, prior to conviction, without establishing that the attached assets are the proceeds of a crime

Article 13-A of the CPLR was designed to "take the profit out of crime."¹ The article provides for a civil forfeiture action² by a

³⁶ See *Heller v. New York*, 413 U.S. 483, 491 (1973). In *Heller*, the Supreme Court held that the film in question was not subject to a prior restraint, as there was no threat of destruction, and the warrant was issued by a neutral magistrate; therefore, the seizure as evidence was permissible. See *id.* at 492. It is suggested that, although *P.J. Video* is not a prior restraint case, the Court of Appeals has improperly applied the Supreme Court's analysis for prior restraint cases to it.

³⁷ See *New York v. P.J. Video, Inc.*, 106 S. Ct. at 1615 n.6. The *Gates* test is in fact not applicable to *P.J. Video* where no informant is involved, inasmuch as such an informant is a necessary factor in the *Gates* analysis. See *P.J. Video, Inc.*, 68 N.Y.2d at 318-19, 501 N.E.2d at 571, 508 N.Y.S.2d at 922.

¹ Governor's Memorandum on Approval of ch. 669, N.Y. Laws (Aug. 1, 1984), reprinted in [1984] N.Y. Laws 3627 (McKinney). On approving article 13-A, Governor Cuomo stressed the importance of the bill as a weapon "against illicit drug trafficking, and other forms of organized crime." *Id.* at 3628. Article 13-A, which took effect August 1, 1984, repealed and replaced the prior article 13-A, which had been enacted the preceding year. See CPLR 1310-52 (McKinney Supp. 1987). The new article contains more detailed provisions on burden of proof, presumptions, and the claims of third parties to property associated with the commission of a crime. See Girese, *Forfeiture: A New, Comprehensive Legislative Tool in War Against Crime*, N.Y.L.J., Apr. 25, 1985, at 17, col. 1, col. 2.

² See CPLR 1311(1) (McKinney Supp. 1987). This section provides that "[a]ny action under this article . . . shall be civil, remedial and *in personam* in nature and shall not be deemed a penalty or criminal forfeiture for any purpose." *Id.* By labeling the action "civil," the Legislature has made available other elements of the CPLR, such as provisional remedies, which may be unavailable in a criminal prosecution. See CPLR 1350 (McKinney Supp. 1987).

A forfeiture action which is interpreted as criminal may run afoul of the double jeopardy clause. See U.S. Const. amend. V; see also Note, *A Definition of Punishment for Im-*

prosecutor, as "claiming authority,"³ against anyone possessing the proceeds, substituted proceeds or instrumentality of a crime.⁴ The claiming authority is also empowered to seek a money judgment against a criminal defendant in an amount equivalent in value to such crime-related assets.⁵ Conviction of a felony is generally a

plementing the Double Jeopardy Clause's Multiple-Punishment Prohibition, 90 YALE L.J. 632, 633 (1981) (action which results in imprisonment or fine is punishment for crime). The power of the Legislature to provide for forfeiture proceedings is subject to judicial review. See *Short Stop Indus. Catering Corp. v. City of New York*, 127 Misc. 2d. 363, 367, 485 N.Y.S.2d 921, 925 (Sup. Ct. New York County 1985) (citing 44 N.Y. JUR. *Forfeitures* § 32, at 229 (1965)). When the Legislature imposes a forfeiture that is punitive rather than remedial, courts sometimes interpret the proceeding as criminal, regardless of a "civil" designation. See, e.g., *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1921) (double tax on manufacture and sale of illegal beverages constitutes penalty).

³ See CPLR 1310(11) (McKinney Supp. 1987). "Claiming authority" means the district attorney or attorney general having criminal jurisdiction or "the appropriate corporation counsel or county attorney . . . with the consent of the district attorney or the attorney general, as appropriate." *Id.*

⁴ See CPLR 1310(2), (3), (4); 1311(1) (McKinney Supp. 1987). A forfeiture action may be commenced against a criminal defendant, "a person who has criminal liability for a [felony]," CPLR 1310(9) (McKinney Supp. 1987); or a non-criminal defendant, "a person, other than a criminal defendant, who possesses an interest in the proceeds . . . substituted proceeds . . . or an instrumentality of a crime." CPLR 1311(10) (McKinney Supp. 1987); see CPLR 1311(1) (McKinney Supp. 1987).

The practice of imposing forfeiture of estate on convicted felons, though part of the English common law, was never adopted into the American common law. See Hughes & O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613, 614 (1984). Forfeiture of estate is prohibited by the United States Constitution. U.S. CONST. art. III, § 3. However, the Confiscation Act of 1862 authorized the President to seize the life estates of confederate soldiers, see *Confiscation Act*, ch. 195, § 5, 12 Stat. 589 (1862); and the proceeds and instrumentalities of crime have always been subject to forfeiture. See Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 249-55 (1973).

In 1970, Congress passed two pieces of legislation authorizing forfeiture of assets not directly connected to the underlying crime: Title IX of the Organized Crime Control Act of 1970, known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1984); and the Continuing Criminal Enterprise portion of the Controlled Substances Act of 1970 ("CCE"), 21 U.S.C. § 848 (1981), which authorized *in personam* forfeiture for persons convicted of continuing criminal enterprises. Although there has been much debate as to the constitutionality of these statutes, see Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 292-95 (1980); Note, *Due Process in Preliminary Proceedings under RICO and CCE*, 83 COLUM. L. REV. 2068, 2069 (1983), they have consistently been upheld by the courts. See, e.g., *United States v. Grande*, 620 F.2d 1026, 1037-38 (4th Cir. 1980) (RICO action does not revive proscribed "forfeiture of estate").

⁵ See CPLR 1311(1) (McKinney Supp. 1987). "Criminal defendant" includes a defendant who has been convicted of any felony under New York law, or one whom "the claiming authority proves by clear and convincing evidence . . . has committed an act in violation of article two hundred twenty or section 221.30 or 221.55 of the penal law." CPLR 1310(9); see

condition precedent to forfeiture of assets not directly related to the crime.⁶ Recently, however, in *Morgenthau v. Citisource, Inc.*,⁷ the Court of Appeals held that a defendant under indictment, though not convicted, may be treated as a criminal defendant for purposes of commencing a forfeiture action, thereby enabling a claiming authority to attach unrelated personal assets pending resolution of the criminal action.⁸

In *Citisource*, defendants Marvin Kaplan, Stanley Friedman and others, had been indicted for, but not yet convicted of, committing various crimes in connection with a 22.7 million dollar contract awarded by the City of New York to Citisource for the development of a computerized parking violations summons issuance system.⁹ Manhattan District Attorney Robert Morgenthau brought a civil forfeiture action to recover 4.49 million dollars, allegedly obtained through the commission of those crimes.¹⁰ District Attorney Morgenthau obtained an *ex parte* order attaching approximately

CPLR 1310(6) (McKinney Supp. 1987). The sections of the penal law cited cover drug trafficking felonies, a particular target of the act. See N.Y. PENAL LAW §§ 221.30, 221.55; *supra* note 1.

⁶ See CPLR 1311(1)(a) (McKinney Supp. 1987). "A court may not grant forfeiture until . . . conviction has occurred." *Id.* Prior conviction is not a prerequisite, however, where a pre-conviction forfeiture crime is at issue. See CPLR 1311(1)(b) (McKinney Supp. 1987). If a defendant is charged with a "pre-conviction forfeiture crime," he is subject to forfeiture absent conviction, provided that the claiming authority proves, by clear and convincing evidence, that the defendant committed the underlying crime. See *id.*

An action for the provisional remedies of attachment, injunction, receivership, and notice of pendency available under article 13-A, see CPLR 1312(1) (McKinney Supp. 1987), may be commenced, and a court "may grant a provisional remedy provided under this article, prior to . . . conviction." CPLR 1311(1)(a) (McKinney Supp. 1987).

⁷ 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986).

⁸ See *id.* at 219, 500 N.E.2d at 853, 508 N.Y.S.2d at 155.

⁹ See *Morgenthau v. Citisource, Inc.*, N.Y.L.J., May 5, 1986, at 13, col. 3 (Sup. Ct. Spec. T. 1986). Friedman was "special counsel" to Citisource; the remaining individual defendants were officers, directors, and majority shareholders. *Id.* It was alleged that Friedman had been paid \$21,000 in attorney's fees, and that Kaplan had been paid \$8000 by Citisource. *Id.* at col. 4. Both the criminal indictment and the complaint in the forfeiture proceeding claimed that Friedman was issued shares of stock, which he held for his own benefit, and which were to be used to bribe Geoffrey G. Lindenauer, of the New York Parking Violations Bureau, and Donald R. Manes, Queens Borough President, for their efforts in procuring the contract. *Id.* at col. 3. Through false representations about the corporation, the defendants allegedly sold 736,000 shares of Citisource stock to the public at five dollars per share. *Id.* As a result, defendants were indicted for violating the Donnelly Act, N.Y. GEN. BUS. LAW § 340 *et seq.* (McKinney 1976), and the Martin Act, N.Y. GEN. BUS. LAW § 352-c(2), (5), (6) (McKinney 1976), covering antitrust and securities fraud respectively. See *People v. Kaplan*, Indictment No. 1913/86, filed by a N.Y. County grand jury, March 27, 1986. The 27 count indictment also alleged grand larceny, bribery, bribe receiving, and conspiracy. *Id.*

¹⁰ See *Citisource*, 68 N.Y.2d at 215, 500 N.E.2d at 851, 508 N.Y.S.2d at 153.

two million dollars in personal assets of Kaplan and Friedman, and a temporary order restraining the alienation of \$400,000 in an alleged ERISA trust, of which Kaplan was a beneficiary and sole trustee.¹¹ No attempt was made to connect these assets to the proceeds, substituted proceeds or instrumentality of the crime.¹²

The defendants opposed Morgenthau's motion to confirm the orders of attachment, claiming, *inter alia*, that they were non-criminal defendants, since they had not been convicted, and that the District Attorney was therefore limited to attaching assets related to the crime.¹³ Special Term denied the defendants' motion to vacate, confirmed the attachments, and issued a preliminary injunction against transfer of the trust assets.¹⁴

The Appellate Division, with one justice dissenting, vacated the orders, holding that the defendants were not criminal defendants as defined in CPLR 1310(9), since they had not been convicted.¹⁵ Rather, the court held, they must be treated as non-criminal defendants, potentially liable only for the proceeds, substituted proceeds or instrumentality of the crime.¹⁶ The case was presented

¹¹ *Id.* The orders authorized the attachment of \$1,430,000 belonging to Kaplan and \$615,000 belonging to Friedman. *Id.* The trust fund involved was the Desu Consulting and Leasing Co. Retirement Trust account. *Id.*

In addition to the personal assets of the defendants, the attachment of \$5,118,000 was authorized against Citisource; the corporation being named, alternatively, as a "non-criminal defendant," CPLR 1310(10) (McKinney Supp. 1987), and as the "instrumentality of the crime," CPLR 1310(4) (McKinney Supp. 1987). *Citisource*, 68 N.Y.2d at 215 n.2, 500 N.E.2d at 851 n.2, 508 N.Y.S.2d at 153 n.2. This attachment was not challenged on appeal. *Id.*

¹² *See Citisource*, 68 N.Y.2d at 214, 500 N.E.2d at 850, 508 N.Y.S.2d at 152.

¹³ *See id.* at 215-16, 500 N.E.2d at 851-52, 508 N.Y.S.2d at 153-54. The defendants also maintained that the statute, as interpreted, was unconstitutional because it violated procedural due process and deprived them of their right to counsel. *Id.* at 220, 500 N.E.2d at 854, 508 N.Y.S.2d at 156. Further, they contended that District Attorney Morgenthau had not sustained his statutory burden of showing that attachment was necessary or proper in the action. *Id.* at 216, 500 N.E.2d at 851, 508 N.Y.S.2d at 153. Finally, Kaplan claimed that the Desu trust was immune from alienation under federal law. *Id.*

¹⁴ *See Citisource*, N.Y.L.J., May 5, 1986, at 13, col. 6. Special Term allowed transfer of the assets of the Desu trust into "like short-term federal obligations." *Id.*

¹⁵ *See Morgenthau v. Citisource, Inc.*, 121 App. Div. 2d 353, 353, 504 N.Y.S.2d 108, 110 (1st Dep't 1986); *see also supra* note 5 (definition of criminal defendant).

¹⁶ *See Citisource*, 121 App. Div. 2d at 354, 504 N.Y.S.2d at 110. The court reasoned that, since the attachments were characterized as necessary to satisfy a money judgment equivalent to proceeds, substituted proceeds or instrumentality of the crime, they would be unrecoverable, and therefore unattachable, absent a prior conviction. *See id.* at 353-54, 504 N.Y.S.2d at 110; CPLR 1311(1) (McKinney Supp. 1987). The Appellate Division declared Kaplan's claim, that the Desu trust was immune from alienation, a moot point since it had not been shown that the trust was related to the crime. *See id.* at 354, 504 N.Y.S.2d at 110.

The First Department did not reach any of the other issues determined at Special

to the Court of Appeals on the certified question: "Was the order of this court, which modified the order of the Supreme Court, properly made?"¹⁷

Answering the certified question in the negative, the Court of Appeals reversed the Appellate Division.¹⁸ Judge Alexander, writing for a unanimous court, found that the Appellate Division had erred in its classification of Friedman and Kaplan as non-criminal defendants.¹⁹ The court indicated that the pending indictment made Friedman and Kaplan "putative" criminal defendants.²⁰ Judge Alexander noted that the statute explicitly authorizes the commencement of an action prior to conviction, and the use of provisional remedies therein.²¹ He asserted that it would be illogical and contrary to legislative purpose to allow the forfeiture action to begin without providing the power to secure the continued availability of assets needed to satisfy a potential judgment.²² Finally, the court determined that on its face the statute violates neither procedural due process,²³ nor the right to counsel.²⁴ The

Term, but remanded the case for a hearing to determine if any proceeds or substituted proceeds were chargeable to Friedman or Kaplan. *See id.* at 354, 504 N.Y.S.2d at 110. Justice Sandler wrote a forceful dissent praising Justice Stecher's opinion at Special Term, employing much the same rationale later relied upon by the Court of Appeals. *See id.* at 354-58, 504 N.Y.S.2d at 110-12. (Sandler, J., dissenting).

¹⁷ *Citisorce*, 68 N.Y.2d at 214, 500 N.E.2d at 851, 508 N.Y.S.2d at 153.

¹⁸ *See id.* at 215, 500 N.E.2d at 851, 508 N.Y.S.2d at 153.

¹⁹ *See id.* at 219, 500 N.E.2d at 853, 508 N.Y.S.2d at 155.

²⁰ *See id.*

²¹ *See id.* at 219-20, 500 N.E.2d at 854, 508 N.Y.S.2d at 156 (citing CPLR 1311(1)(a), 1312(1)).

²² *See Citisorce*, 68 N.Y.2d at 220, 500 N.E.2d at 854, 508 N.Y.S.2d at 156.

²³ *See id.* The court considered the relevant factors enunciated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 334-35; *Citisorce*, 68 N.Y.2d at 221, 500 N.E.2d at 855, 508 N.Y.S.2d at 157.

The Court of Appeals found that the instant use of government enforced forfeiture procedures involved a protected property or liberty interest, *see Citisorce*, 68 N.Y.2d at 220, 500 N.E.2d at 854, 508 N.Y.S.2d at 156, but determined that the statute contained sufficient safeguards to protect the defendant and additional safeguards were unnecessary. *See id.* at 223, 500 N.E.2d at 856, 508 N.Y.S.2d at 158. Judge Alexander also cited a significant government interest "in deterring criminal conduct [and] . . . preserving the assets for use in compensating the victims." *Id.* at 221, 500 N.E.2d at 855, 508 N.Y.S.2d at 157. Therefore, the court held, the statute does not violate due process. *See id.* at 223, 500 N.E.2d at 856, 508 N.Y.S.2d at 158.

²⁴ *See id.* at 223, 500 N.E.2d at 856, 508 N.Y.S.2d at 158. The court stated that, although a problem in regard to the right to counsel could arise, the statute addresses this

case was remitted to the Appellate Division to consider whether the District Attorney had sustained his statutory burden of proof.²⁵

The structure of article 13-A is quite complex. In *Citisource*, the Court of Appeals has promulgated a construction of the statute which is consistent with statutory purpose²⁶ and gives clear guidance to the lower courts.²⁷ It is submitted, however, that the attachment of personal assets, not traceable to the crime, should be permitted only where proceeds, substituted proceeds or the instrumentality of the crime are either unavailable, or likely to become so.²⁸ Article 13-A was formulated to serve the remedial purposes of

problem "by expressly requiring the claiming authority to prove that the need for the [attachment] outweighs the hardship on the [defendant]." *Id.*; see CPLR 1312(3) (McKinney Supp. 1987). Further, under section 1329, the defendant can move to vacate or modify, and under section 1311(4)(d)(1), the court may dismiss *sua sponte* in the interest of justice. *Citisource*, 68 N.Y.2d at 223, 500 N.E.2d at 856, 508 N.Y.S.2d at 158.

²⁵ See *id.* at 223-24, 500 N.E.2d at 856, 508 N.Y.S.2d at 158. In order to obtain a provisional remedy the claiming authority must establish that there is a substantial probability of obtaining a conviction; that failure to grant the provisional remedy will result in the proceeds becoming unavailable for forfeiture; and that the need to preserve the status quo outweighs the hardship on the defendants. *Id.*; see CPLR 1312(3) (McKinney Supp. 1987). Though some dissatisfaction had been expressed at Special Term with the "largely conclusory" nature of the papers on which attachment was granted, Justice Stecher accepted the proof offered by District Attorney Morgenthau on these points. See *Citisource*, N.Y.L.J., May 5, 1986, at 13, cols. 3-6. Since the Appellate Division had vacated based on an erroneous reading of the statute, they did not address the adequacy of District Attorney Morgenthau's proof. See *Citisource*, 68 N.Y.2d at 223-24, 500 N.E.2d at 856-57, 508 N.Y.S.2d at 158-59.

For some examples of the manner in which courts apply the proof requirements of section 1312(3) see *District Attorney of Queens County v. McAuliffe*, 129 Misc. 2d 416, 493 N.Y.S.2d 406 (Sup. Ct. Queens County 1985) (attachment of real property); *Holtzman v. Samuel*, 130 Misc. 2d 976, 495 N.Y.S.2d 583 (Sup. Ct. Kings County 1985) (attachment of bank accounts); *Dillon v. Neira*, 130 Misc. 2d 434, 495 N.Y.S.2d 622 (Nassau County Ct. 1985) (attachment of proceeds of cocaine sale).

²⁶ Cf. *supra* note 4 (statutory distinction between "criminal defendant" and "non-criminal defendant"). It is submitted that the "non-criminal defendant" provision in the statute was intended to apply to third parties, to whom a potential criminal defendant might transfer his assets in an attempt to avoid forfeiture. "Because criminal defendants might attempt to avoid the harsh consequences of forfeiture by disposing of their assets, an . . . action may be brought against any person who has an interest in the property subject to forfeiture." 2A WK&M ¶ 1310.03, at 13-A-9 (1984).

²⁷ At least one court had found the Appellate Division holding in *Citisource* problematic and had applied it reluctantly. See *Kuriansky v. Natural Mold Shoe Corp.*, 133 Misc. 2d 489, 496, 506 N.Y.S.2d 940, 946 (Sup. Ct. Westchester County 1986).

²⁸ In addition, the claiming authority may not recover an amount greater than the value of the substituted proceeds and instrumentality of the crime. See CPLR 1311(8) (Mc-

restitution and deterrence, not to provide a means of harassing defendants where recovery may be achieved without resort to personal assets.²⁹ It is urged, therefore, that the recoverability of the actual or substituted proceeds of the crime be explicitly considered in any motion for attachment of a defendant's unrelated personal assets.³⁰

In *Citisource*, the court authorized the attachment of corporate assets in an amount greater than the judgment sought.³¹ However, in light of the uncertainty expressed at Special Term as to the continued availability of corporate assets to satisfy a potential judgment,³² it is submitted that attachment of the defendants' personal assets was appropriate.³³

The legislature, in creating article 13-A, gave prosecutors a powerful tool, designed to have a disabling effect on criminal activity. The *Citisource* decision strengthens that tool by making it increasingly difficult for defendants to shelter assets from forfeiture. The courts, however, should not allow prosecutors to use pre-conviction attachment as a tool to harass defendants.

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Kinney Supp. 1987).

²⁹ See *Dillon v. Neira*, 130 Misc. 2d 434, 439, 495 N.Y.S.2d 622, 626.

³⁰ See CPLR 1312(3) (McKinney Supp. 1987). The claiming authority must demonstrate the necessity of obtaining the provisional remedy, and that such necessity outweighs any hardship imposed on the defendants. See *id.* It is submitted that neither of these requirements is satisfied where the actual proceeds, substituted proceeds or instrumentality of the crime are easily recoverable.

³¹ See *Citisource*, 68 N.Y.2d at 215 n.2, 500 N.E.2d at 851 n.2, 508 N.Y.S.2d at 153 n.2. District Attorney Morgenthau sought \$4.49 million; an attachment of \$5,118,000 was authorized against *Citisource*. *Id.*

³² See *Citisource*, N.Y.L.J., May 5, 1986, at 13, col. 6. Out of the \$4.49 million alleged to have been wrongfully garnered by *Citisource*, \$3 million had already been disposed by the time attachment was authorized. *Id.* The corporate bank account containing \$95,759.34 and \$700,000 worth of Treasury Bills were actually attached. *Id.*

³³ The litigation developing out of the basic factual setting of *Citisource* has continued. On November 25, 1986, Kaplan and Friedman, along with Lester N. Shafran and Michael J. Lazar, were convicted in a RICO action of racketeering, conspiracy, and mail fraud in the Federal District Court in New Haven (Whitman Knapp, J., presiding). See N.Y. Times, Nov. 26, 1986, at A1, col. 1. The state criminal action underlying the article 13-A forfeiture proceeding has been postponed pending the outcome of the federal action. *Id.*