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THE PLIGHT OF THE MINORITY MOTORIST

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I. INTRODUCTION

On April 24, 1990, Selena Washington and her cousin were traveling on Interstate 95 through Volusia County, Florida.[1] At 3:15 a.m., a Volusia County Sheriff's officer, a member of the Volusia County Selective Enforcement Team, stopped Ms. Washington for driving seven miles over the speed limit. The officer gave Ms. Washington a warning and asked permission to search her car. After Ms. Washington consented, the officer searched the car and found $19,000 in cash. Ms. Washington explained that her Charleston, South Carolina, home had been damaged by Hurricane Hugo. Because the cost of building materials needed to repair her home had skyrocketed in South Carolina, Ms. Washington said, she was traveling to Miami to purchase the materials. The officer seized Ms. Washington's $19,000, claiming it was "drug money."

Ms. Washington, a forty-three-year-old African-American who had no criminal history, hired an attorney to get her money back. She also provided canceled checks and sworn affidavits to verify that her cash was not "drug money." The paperwork showed that the cash was from loans she obtained from a friend and two relatives while she was waiting for an insurance settlement for property damaged by Hurricane Hugo. Volusia County gave her the option of having $15,000 of the $19,000 returned to her or challenging the forfeiture in court. Because Florida law at the time

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1. Selena Washington's ordeal was reported in several newspaper articles. *See* Jeff Brazil & Steve Berry, *Deputies Take $19,000 and Leave a Woman in Despair*, ORLANDO SENTINEL, June 14, 1992, at A-16 [hereinafter Brazil & Berry, *Deputies Take $19,000*]; *see also* Steve Berry, *Woman Who Sued Vogel is Found*, ORLANDO SENTINEL, July 22, 1993, at B-4; Steve Berry, *Vogel Faces Bias Suit over Cash Seizures*, ORLANDO SENTINEL, June 18, 1993, at B-1, B-4; Jeff Brazil, *Congressman: Vogel's I-95 Forfeitures 'Tantamount to Extortion'*, ORLANDO SENTINEL, June 23, 1993, at A-1, A-6 [hereinafter Brazil, *Congressman*]; Jeff Brazil, *'Legalized Theft' or Crime-Fighting Tool?*, ORLANDO SENTINEL, June 20, 1993, at B-1, B-5 [hereinafter Brazil, *Legalized Theft*]; Steve Berry & Jeff Brazil, *FBI to Look at Vogel's I-95 Policy*, ORLANDO SENTINEL, July 16, 1993, at A-1, A-4 [hereinafter Berry & Brazil, *FBI*]; Blake Fontenay, *Vogel Lawsuit Might Mean a Tax Increase*, ORLANDO SENTINEL, Oct. 8, 1993, at B-3 [hereinafter Fontenay, *Tax Increase*]; Blake Fontenay, *Volusia Fears Costs for Cash-Seizure Suit*, ORLANDO SENTINEL, Oct. 7, 1993, at B-1, B-4 [hereinafter Fontenay, *Volusia Fears Costs*].

gave her little chance of recovering her costs and attorneys fees,[2] her attorney advised her that it would be less expensive to accept the county's offer than to pay the expenses involved in contesting the seizure in Florida state courts.[3] Accepting the advice, she signed an agreement with Volusia County, receiving $15,000 of the $19,000 taken,[4] and paid her attorney $1000.[5]

Selena Washington's story is merely one example of the abusive application of civil asset forefeiture. In fact, the Volusia County Sheriff's Office has repeatedly used the Florida forfeiture statutes[6] to seize cash from apparently innocent I-95 minority motorists, such as Selena Washington.[7] Unfortunately, the potential for abuse is not limited to local

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2. *See* FLA. STAT. ANN. §§ 932.701-932.704 (West 1985) (containing no provision for the award of attorney's fees). The Legislature has enacted a provision allowing claimants who prevail to receive attorney's fees. This statute now states:

> When the claimant prevails, the court may, in its discretion, award reasonable attorney's fees and costs to the claimant at the close of forfeiture proceedings and any appeal if the court finds that the seizing agency has not proceeded in good faith or that the seizing agency's action which precipitated the forfeiture proceedings or appeal was a gross abuse of the agency's discretion.

FLA. STAT. ANN. § 932.704(10) (West Supp. 1995); *see also* FLA. STAT. ANN. § 57.105(1) (West 1994) (providing attorney's fees to a prevailing party in a civil action only when "there [is] a *complete absence* of a justiciable issue of either law or fact raised by the complaint or defense of the losing party . . . .") (emphasis added).

3. *See* Brazil & Berry, *Deputies Take $19,000*, *supra* note 1, at A-16.

4. *See* Defendant's Answer and Affirmative Defenses to First Amended Complaint, Exhibit 1, Florida State Conference of NAACP Branches v. Vogel, No. 93-482-CIV-ORL-22 (M.D. Fla. filed June 18, 1993). For the text of the agreement, see *infra* note 231.

5. *See* Brazil & Berry, *Deputies Take $19,000*, *supra* note 1, at A-16.

6. Florida Contraband Forfeiture Act, FLA. STAT. ANN. §§ 932.701-932.707 (West 1985 & Supp. 1995).

7. On May 2, 1991, a Volusia County Sheriff's deputy stopped Jose Raposa and seized $19,000. *See* Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A-1, A-16 [hereinafter Brazil & Berry, *Tainted Cash*]. The deputy said he was suspicious of Mr. Raposa because Mr. Raposa appeared very nervous and the deputy spotted a small amount of marijuana in the car ashtray. *Id.* Mr. Raposa said the cash was from a home equity loan and he was taking it to Miami to purchase antique cars. *Id.* He had seen the cars in a car trader magazine and was carrying cash because he understood that car dealers require cash. *Id.* Six months later, Mr. Raposa agreed to a settlement in which the Volusia County Sheriff's Office gave Mr. Raposa back 75% of the money seized, of which Mr. Raposa paid his attorney $1000. *Id.*

On April 15, 1991, a Volusia County Sheriff's deputy seized $38,923 from Edwin Johnson, an African-American, after Mr. Johnson was stopped on I-95 for failure to

law enforcement. Federal authorities also are susceptible to similar misapplications because the same temptation for cash seizure is present under the federal Controlled Substances Act.[8] Given the possibility of

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signal when changing lanes. *See* Steve Berry & Jeff Brazil, *'I Could Win the Battle but Lose the War'*, ORLANDO SENTINEL, June 15, 1992, at A-6. The deputy said he was suspicious of Mr. Johnson because Mr. Johnson was nervous, did not have enough luggage, and did not know the exact dollar amount of the cash he was carrying. *Id.* Mr. Johnson said the money was the profit from two businesses Mr. Johnson had owned and he was carrying cash because he had previously had money garnished. *Id.* Six months later, Mr. Johnson agreed to a settlement in which the Volusia County Sheriff's Office returned him all but $10,000 of the money seized, of which Mr. Johnson paid his attorney approximately one-third. *Id.*

On February 4, 1991, a Volusia County Sheriff's deputy stopped Jorge Nater on I-95 for following too closely, a traffic violation. *See* Jeff Brazil & Steve Berry, *'How Could They Say They Treated Me Fairly?'*, ORLANDO SENTINEL, June 14, 1992, at A-17. The deputy seized $36,990 from Mr. Nater, a citizen of Puerto Rico. *Id.* The deputy said that he was suspicious of Mr. Nater because Mr. Nater was very nervous and had to look up the address of his destination. *Id.* Mr. Nater explained that he had sold an apartment complex in Puerto Rico a few days earlier and was headed to Pompano Beach with the money to buy a home near his four sons. *Id.* A hidden microphone recorded Mr. Nater telling his traveling companion that if they were allowed to leave with the money they should hide it "in a tire." *Id.* Nine months later, Mr. Nater agreed to a settlement in which the Volusia County Sheriff's Office returned all but $6000 of the amount seized, of which Mr. Nater paid his attorney approximately one-fourth. *Id.*

Also on February 4, 1991, a Volusia County Sheriff's deputy stopped Earl Fields, an African-American, and seized $37,970. *See* Jeff Brazil & Steve Berry, *Lottery Winner's Luck Runs out with Deputy's $37,970 Haul*, ORLANDO SENTINEL, June 16, 1992, at A-4 [hereinafter Brazil & Berry, *Lottery Winner's Luck Runs Out*]. The deputy said he was suspicious of Mr. Fields because Mr. Fields was very nervous and evasive, and his money was wrapped in rubber bands. *Id.* The Volusia County Sheriff's Office refused to return the cash even though Mr. Fields claimed the cash was from lottery winnings and produced "a canceled check signed by then-Lottery Commissioner Rebecca Paul for $213,698.48." *Id.* Mr. Fields' jury trial to contest the forfeiture was about to begin when Mr. Fields decided to accept a settlement instead. *Id.* When jury selection began, Mr. Fields got 'cold feet,' his attorney said, because every juror was white. *Id.* The Volusia County Sheriff's Office kept $14,970, and Mr. Fields got $23,000, of which he paid his attorney $8000. *Id.*

In March 1990, a Volusia County Sheriff's deputy stopped Joseph Kea, a 20-year-old African-American, for driving six miles above the speed limit and seized $3989 in cash. *See* Brazil & Berry, *Tainted Cash*, at A-16. The deputy said he was suspicious of Mr. Kea because Mr. Kea was very nervous, had no luggage with him, had his money in groups of $100, and wore a wrinkled Navy uniform and scuffed shoes. *Id.* Eight months later, Mr. Kea agreed to a settlement in which he got back all but $1000, of which he paid his attorney approximately one-fourth. *Id.*

8. Pub. L. No. 91-513, § 511, 84 Stat. 1242, 1276 (1970) (codified as amended at 21 U.S.C. § 881 (1988 & Supp. V 1993)); *see* Brazil, *Legalized Theft*, *supra* note 1, at B-1, B-5 (indicating that federal agencies have "pocketed" $2.8 billion since 1985).

abuse, there remains one critical question: What constitutional protection does an innocent minority motorist, who happens to be carrying cash, have against the immense power of law enforcement agencies?

The Fifth Amendment to the United States Constitution prohibits the federal government from depriving an individual of property without due process of law.[9] The Fourteenth Amendment makes that due process guarantee applicable against state action and prohibits a state from denying "equal protection of the laws."[10] Guided by these amendments, the role of the courts has been to safeguard the individual's constitutional rights by reviewing allegedly unconstitutional actions of public officials.[11] In *Tumey v. Ohio*[12] and *Ward v. Monroeville*,[13] the Supreme Court held that the defendants' due process right had been violated because of the "possible temptation" of the mayor/judge to convict when pecuniary benefits would flow from the conviction.[14]

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9. U.S. CONST. amend. V ("No person shall be deprived of . . . life, liberty, or property, without due process of law . . . .").

10. U.S. CONST. amend. XIV ("No State shall . . . deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

11. Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, 39 CLEV. ST. L. REV. 1 (1991). The author writes:

> From the town or village clerk, to the city fire or housing inspector, to the . . . many federal independent regulatory commissions, it is clear that these agencies *are* the government. . . . The ever-recurring question pertains to the individual who feels aggrieved because the very agency that was established to assure rights granted by law, has in fact denied the individual those rights that were guaranteed by the law.

Id. at 2. The author continues:

> [U]nder our Constitutional system, it is now basic that the courts may pass upon the constitutionality of statutes, and their meaning when they are applied to specific cases. As a consequence, it is also for the courts to say if any person has been deprived of any rights guaranteed by the Constitution and the laws enacted thereunder. Hence, any person who alleges a deprivation of due process or equal protection of the law may resort to the Courts for vindication of these constitutionally protected rights.

Id. at 5.

12. 273 U.S. 510 (1927).

13. 409 U.S. 57 (1972).

14. *Tumey*, 273 U.S. at 514-15. In *Tumey*, the Supreme Court had to decide:

> whether certain statutes of Ohio, in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which those statutes give the mayor in the result of the trial.

The pecuniary benefits flowing to law enforcement officers under state and federal forfeiture statutes are similar to those flowing to the mayor/judge in *Ward*. Like the officials in *Ward*, police departments are allowed to retain a portion of the proceeds seized through asset forfeiture.[15] The ability to share the proceeds of civil forfeitures may create an incentive for police officers to overzealously and, perhaps, unconstitutionally apply local seizure laws. Although judges are aware of this "possible temptation," federal and Florida courts seem unwilling to afford minority motorists any preseizure protection.[16] Until the legislative branch amends the forfeiture statutes to better protect the innocent motorist who chooses to travel with large amounts of cash, minority motorists like Selena Washington are protected only by adverse publicity[17] and lawsuits under 42 U.S.C. § 1983.[18]

Id.

Between May 11 and December 31, 1923, the village court collected "upwards of $20,000, from which the state received $8992.50." *Id.* at 521. Of the amount retained by the village, portions went to general uses, to the village safety fund, and to pay salaries and costs. During that period the mayor received $696.35 in addition to his regular salary. *Id.* at 521-22. In 1923 dollars, these were significant amounts. The Court held that the Ohio statutes violated the criminal defendant's due process rights because they gave the judge "a direct, personal, pecuniary interest in convicting the defendant." *Id.* at 523. The Court found that the temptation was twofold. Fines obtained for convictions would increase the mayor's compensation. The fines would also add to the village treasury and thus ease the mayor's responsibility for the financial condition of the village. *Id.* at 532-33. The test to determine the constitutionality of the statutes was whether the trial court procedure "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Id.* at 532.

In *Ward*, the Supreme Court was faced with an analogous situation. Ward had claimed "that trial before a mayor who also had responsiblities for revenue production and law enforcement denied him a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Ward*, 409 U.S. at 58. From 1964 through 1968, the money collected by the mayor of Monroeville in his court amounted to between one-third to one-half of total village revenues for those years. *Id.* The village argued that "unfairness" at trial could be corrected on appeal. The Court applied the "possible temptation test" from *Tumey* and held that when the defendant was not guaranteed due process at the trial court, that procedure was not "constitutionally acceptable." *Id.* at 61-62.

15. *See* 21 U.S.C. § 881(e)(1)(A) (1988 & Supp. V 1993); FLA. STAT. ANN. § 932.704(1) (West Supp. 1995).

16. *See infra* notes 74-94 and accompanying text.

17. *See infra* Part IV.C.

This article reviews proposed legislative changes to forfeiture statutes, the present status of case law concerning cash seizures from motorists, and other avenues of relief available to the minority motorist. Part II discusses Florida and federal forfeiture statutes currently in effect and proposed changes to the forfeiture statutes.[19] Part III explains the Supreme Court's current stance toward preseizure due process protection for cash-carrying motorists.[20] Specifically, it analyzes how such protections are affected by *United States v. Brignoni-Ponce*,[21] *United States v. Sokolow*,[22] *United States v. $8850*,[23] and *Calero-Toledo v. Pearson Yacht Leasing Co.*[24] Part IV examines cases involving Sheriff Robert Vogel and the effect adverse publicity has had on his Selective Enforcement Team operations.[25] Part V reviews § 1983 lawsuits filed by minority motorists contesting the constitutionality of cash seizures.[26] The article concludes that, although the immediate solution to the problem faced by the minority motorist may be adverse publicity and class action lawsuits under § 1983, the best remedy lies with appropriately drafted legislation.

II. FEDERAL AND STATE FORFEITURE STATUTES

A. *The Federal Forfeiture Statutes*

The federal Controlled Substances Act [hereinafter the Federal Act] allows a federal law enforcement officer to seize cash from a motorist if there is "probable cause" to believe the motorist intends to use the cash to purchase illegal drugs or the cash is the proceeds from selling illegal

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18. 42 U.S.C. § 1983 (1988). The statute reads, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

19. *See infra* text accompanying notes 27-94.
20. *See infra* text accompanying notes 95-143.
21. 422 U.S. 873 (1975).
22. 490 U.S. 1 (1989).
23. 461 U.S. 555 (1983).
24. 416 U.S. 663 (1974).
25. *See infra* text accompanying notes 144-249.
26. *See infra* text accompanying notes 250-97.

drugs.[27] After seizure, forfeiture proceedings are required to be "instituted promptly."[28] After paying the expenses of the forfeiture proceeding, the forfeited cash goes into the United States Treasury.[29] To contest the seizure, the claimant must file a claim and post a bond of "$5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250."[30] If the government prevails and the property is subject to forfeiture, the claimant must pay for costs and expenses of the action.[31] Once the government shows that probable

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27. *See* Controlled Substances Act of 1970, Pub. L. No. 91-513 § 511(a)(6), (b)(4), 84 Stat. 1242, 1276-77 (codified as amended at 21 U.S.C. § 881(a)(6), (b)(4) (1988 & Supp. V 1993)). The statute states, in pertinent part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (6) All moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter . . . .
>
> (b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General . . . without . . . process . . . when—
>
> . . . .
>
> (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

Id.

28. *Id.* § 511(b), 84 Stat. at 1277 (codified as amended at 21 U.S.C. § 881(b) (1988)) (when the Attorney General has probable cause to believe that the property is subject to civil forfeiture, "proceedings under subsection (d) of this section shall be instituted promptly").

29. *Id.* § 511(e), (f), 84 Stat. at 1277-78 (codified as amended at 21 U.S.C. § 881(e), (h) (1988)). The pertinent part of the statute states:

> (e)(2)(A) [A]ny moneys forfeited under this subchapter shall be used to pay—
> (i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, . . . advertising, and court costs . . .
>
> (B) The Attorney General shall forward to the Treasurer of the United States for deposit . . . any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) .
>
> . . .
>
> (h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Id.

30. 19 U.S.C. § 1608 (1988).

31. *Id.*

cause for forfeiture exists, the claimant must prove by a preponderance of the evidence that the seized item is not subject to forfeiture.[32] If the claimant is successful in the forfeiture proceeding, the court may award the claimant attorney's fees against the federal government.[33] The award of attorney's fees and costs to the claimant is mandatory "unless the court finds that the position of the United States was substantially justified."[34]

Although the Supreme Court generally has upheld the constitutionality of the Federal Act,[35] the Court has established certain limitations on asset forfeiture. The first limit is the allowance of the innocent owner defense. In *United States v. 92 Buena Vista Avenue*,[36] a plurality of the Court held that "an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding" under 21 U.S.C. § 881(a)(6).[37] The innocent owner defense[38] provides that, unless the government can prove that an owner had knowledge of the tainted purchase money, the government can not subject the property to forfeiture.[39]

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32. 19 U.S.C. § 1615 (1988) ("[T]he burden of proof shall lie upon such claimant [to prove by a preponderance of the evidence that the seized item is not subject to forfeiture]. . . . *Provided*, [t]hat probable cause shall be first shown for the institution of such suit or action, to be judged of by the court . . . .").

33. *See* 28 U.S.C. § 2412(a)(1) (Supp. V 1993). The statute provides, in pertinent part:

> Except as otherwise specifically provided by statute, a judgment for costs . . . may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

Id.; *see also* 28 U.S.C. § 2412(b) (1988). The statute states:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. . . .

Id.

34. 28 U.S.C. § 2412(d)(1)(A) (1988).

35. *See infra* text accompanying notes 95-143 (discussing Supreme Court cases interpreting the Federal Act as it applies to the seizure of personal property).

36. 113 S. Ct. 1126 (1993).

37. *Id.* at 1129. For the text of the statute, see *supra* note 27.

38. *92 Buena Vista Ave.*, 113 S. Ct. at 1131, 1134.

39. *Id.*

The second limitation derives from the Eighth Amendment's prohibition against excessive fines. In *Austin v. United States*,[40] Austin agreed to sell two grams of cocaine.[41] The next day, officers searched his body shop and mobile home pursuant to a search warrant.[42] The officers found "small amounts of marijuana and cocaine, a .22-caliber revolver, drug paraphernalia, and approximately $4,700 in cash."[43] Two months later, the United States filed an *in rem* action "seeking forfeiture of Austin's mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7)."[44] The Court held that the Excessive Fines Clause of the Eighth Amendment applied to the forfeiture and "remand[ed] the case for consideration of the question whether the forfeiture at issue here was excessive."[45] This holding indicates that courts must examine the amount of property seized by the government in relation to the alleged crime. Thus, there is a limit on how much property can be seized by forfeiture. When the forfeiture is excessive, it violates the defendant's Eighth Amendment rights.

The third limitation involves the defendant's Fifth Amendment right to procedural due process. The principle of due process requires that individuals are entitled to notice and an opportunity to be heard before the government can deprive them of real property.[46] In *United States v. James Daniel Good Real Property*,[47] officers searched Good's home on January 31, 1985, pursuant to a search warrant.[48] They found "89 pounds of marijuana, marijuana seeds, vials containing hashish oil, and drug paraphernalia."[49] Good pleaded guilty and was sentenced.[50] On August 8, 1989, the United States filed a forfeiture action against the four-acre parcel of real property on which Good's house was located.[51] The

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40. 113 S. Ct. 2801 (1993).

41. *Id.* at 2803.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2810.

46. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1, at 487-88 (4th ed. 1991).

47. 114 S. Ct. 492 (1993).

48. *Id.* at 497.

49. *Id.*

50. *Id.*

51. *Id.*

government seized the property thirteen days later without notifying Good or providing him with an adversary hearing.[52]

The primary issue in *Good* was "whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard."[53] In considering the issue, the Court distinguished the seizure of real property from other types of property subject to seizure. When property is transportable, seizure without prior notice or hearing is necessary to "establish the court's jurisdiction over the property" and to guard against the property leaving the jurisdiction.[54] However, unlike personalty, real property does not present a risk of flight. Thus, the Court held that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."[55]

The secondary issue in *Good* involved the timeliness of the forfeiture suit.[56] The statute of limitations for a forfeiture action is five years.[57] The statutes governing the forfeiture proceeding do not provide any penalty for the government's failure to file the forfeiture proceeding on Good's property in a timely manner after its seizure of the illegal drugs or his arrest. Even though the government did not file the forfeiture proceeding until approximately four-and-one-half years after it seized the illegal drugs, the Court held that the forfeiture proceeding could not be dismissed because it had been filed within the five-year statute of limitations.[58]

B. *The Florida Forfeiture Statutes*

The Florida Contraband Forfeiture Act [hereinafter the Florida Act] is similar in many respects to the Federal Act. The Florida Act, like its federal counterpart, allows a law enforcement officer to seize cash from a motorist if there is "probable cause" to believe the motorist intends to use the cash to purchase illegal drugs or the cash is the proceeds from

52. *Id.* at 498.

53. *Id.* at 497.

54. *Id.* at 502-03.

55. *Id.* at 505.

56. *Id.* at 497.

57. 19 U.S.C. § 1621 (Supp. V 1993).

58. *Good*, 114 S. Ct. at 506-07.

selling illegal drugs.[59] After seizure, forfeiture proceedings must be instituted "promptly."[60] According to the Florida Act, the agency that seized the cash must file a forfeiture complaint within forty-five days after the seizure.[61] The claimant must file a response "within 20 days after receipt of the complaint and probable cause finding."[62]

Despite the similarites, a variety of Florida's provisions are markedly different from those of the Federal Act. For example, the Florida Act does not require the claimant to post a bond. Also, in contrast to the Federal Act, the Florida Act places the burden of proof on the state agency rather than on the claimant.[63] Furthermore, the Florida Act departs from a preponderance of the evidence standard and incorporates the more onerous clear and convincing evidence standard.[64] These changes alter the entire scope of the forfeiture proceeding.

Under the Florida Act, the chances of a court awarding attorney's fees and costs to a claimant are very slim. Even if the claimant wins in the forfeiture proceeding, the claimant can be awarded attorney's fees and costs only if "the seizing agency has not proceeded in good faith or . . . the seizing agency's action which precipitated the forfeiture proceedings . . . was a gross abuse of the agency's discretion."[65] Should the cash be forfeited, the proceeds, except for the amount necessary to pay for the expenses of the forfeiture proceeding, go into "a special law enforcement trust fund."[66] The fund "shall be used for school resource officer, crime prevention, safe neighborhood, drug abuse education and prevention programs, or for other law enforcement purposes, which include defraying the cost of protracted or complex investigations, providing additional equipment or expertise and providing matching funds to obtain federal grants."[67]

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59. FLA. STAT. ANN. §§ 932.701-932.703 (West Supp. 1995); *see also* 21 U.S.C. § 881(a)(6), (b)(4) (1988); *supra* note 27.

60. FLA. STAT. ANN. § 932.704(4) (West Supp. 1995); 21 U.S.C. § 881(b) (1988).

61. FLA. STAT. ANN. § 932.703(3) (West Supp. 1995); FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims) ("[t]he claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed . . . .").

62. FLA. STAT. ANN. § 932.704(5)(c) (West Supp. 1995).

63. *See* FLA. STAT. ANN. § 932.704(8) (West Supp. 1995).

64. *Id.*

65. FLA. STAT. ANN. § 932.704(10) (West Supp. 1995).

66. FLA. STAT. ANN. § 932.7055(4)(a) (West Supp. 1995).

67. *Id.*; *see also* FLA. STAT. ANN. § 932.7055(4)(c)(3) (requiring that "any local law enforcement agency that acquires at least $15,000 pursuant to the Florida Contraband Forfeiture Act within a fiscal year must expend or donate no less than 15 percent of such

In *Department of Law Enforcement v. Real Property*,[68] the Florida Supreme Court upheld the 1989 version of the Florida Act as long as certain procedures were followed.[69] For personal property, the court required that there be notice and "the opportunity for an adversarial preliminary hearing . . . as soon as possible after seizure."[70] At the preliminary hearing, the state agency would be required "to establish probable cause to believe that the property was used in the commission of a crime pursuant to the terms of the [Florida] Act."[71] The claimant would have the right to a jury trial.[72] To obtain forfeiture of the cash, the state agency must bear the burden of proof "by no less than clear and convincing evidence."[73] The Florida Act presently includes the "procedures" required by the Florida Supreme Court in *Department of Law Enforcement v. Real Property*.

C. *Proposed Amendments to the Federal and Florida Forfeiture Statutes*

Bills have been introduced in both houses of Congress[74] and in both houses of the Florida legislature[75] to amend the federal and Florida

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proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program(s)").

68. 588 So. 2d 957 (Fla. 1991).

69. *See id.* at 968.

70. *Id.* at 965.

71. *Id.* at 966.

72. *Id.* at 967.

73. *Id.*

74. *See* H.R. 2417, 103d Cong., 1st Sess. (1993) (the Civil Asset Forfeiture Reform Act, introduced by U.S. Representative Henry J. Hyde, an Illinois Republican, on June 15, 1993); S. 1655, 103d Cong., 1st Sess. (1993) (a similarly worded bill introduced by Senator James M. Jeffords, a Vermont Republican, on November 10, 1993).

75. *See* H.B. 1755, 1994 Leg., 1st Sess. ("[a]n act relating to contraband forfeiture," introduced by Florida State Representative Bill Sublette on February 8, 1994, the first day of the 1994 regular, 60-day legislative session of the Florida Legislature); *see also* S.B. 2148, 1994 Leg., 1st Sess. (a similarly worded bill introduced by Florida State Senator Dennis Jones on February 21, 1994). Both bills died in the 1994 Florida legislative session.

On March 7, 1995, the first day of the 1995 legislative session, Representative Sublette introduced a similar bill to amend the Florida Act. H.B. 807, 1995 Leg., 1st Sess. However, unlike the 1994 version, the 1995 bill allows officers to seize property and money from motorists without making an arrest. Luz Villareal, *Legislators Target Cash-Seizure Law*, ORLANDO SENTINEL, Jan. 19, 1995, at C-3.

forfeiture statutes. However, none provide a motorist any preseizure protection. All the reform bills require the government to prove that the property is subject to forfeiture by clear and convincing evidence[76] and require that the claimant be given assistance with legal fees. The federal bills require the appointment of an attorney for the claimants who are otherwise unable to pay for an attorney.[77] The Florida bills would require the judge to award the prevailing claimant "reasonable attorney's fees and costs."[78] The federal bills lengthen the time period within which the claimant must file a claim from ten to sixty days following the first publication of the seizure notice.[79] Another significant change in the federal bills from the present statute is the removal of the requirement that the claimant file a bond before contesting the forfeiture in court.[80]

The Florida bills contain some additional protection not found in the federal bills. Certain language ostensibly takes care of the *Austin* excessive fines problem.[81] The Senate bill provides: "The value of the property forfeited under this section may not exceed the pecuniary gain

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76. The federal bills would place the burden of proof on the United States Government to establish, by clear and convincing evidence, that the property is subject to forfeiture. *See* H.R. 2417 § 4; S. 1655 § 5. The present wording of the statute places the burden on the claimant. 19 U.S.C. § 1615 (1988). Because no higher level of proof is stated in the present statute, the claimant must now prove the property is not subject to forfeiture by a preponderance of the evidence.

Under present law, "clear and convincing evidence . . . [of a] violation of the Florida Contraband Forfeiture Act" is required for forfeiture. FLA. STAT. ANN. § 932.704(8) (West Supp. 1995). Both proposed Florida bills would prohibit forfeiture unless "[t]he seizing agency establishes by clear and convincing evidence that the owner or other claimant knew, or should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity." H.B. 1755 § 1; S.B. 2148 § 1 (amending FLA. STAT. ANN. 932.703(6)(a)). The proposed language would make it very clear that the burden of proof is on the seizing agency. *Id.*

77. H.R. 2417 § 5; S.B. 1655 § 4 (amending 19 U.S.C. § 1608).

78. H.B. 1755 § 2; S.B. 2148 § 2 (amending FLA. STAT. ANN. § 932.704(10)). For the text of the statute, see *supra* note 2.

79. H.R. 2417 § 3; S. 1655 § 3 (amending FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims)).

80. H.R. 2417 § 6 (amending 19 U.S.C. § 1614). Another proposed amendment, found only in the House version of the bill, would amend 19 U.S.C. § 1614 to allow the subject property to be released to the claimant if otherwise the claimant would suffer "substantial hardship." *Id.*

81. *See* Austin v. United States, 113 S. Ct. 2801 (1993) (holding that there is a constitutional problem under the Excessive Fines Clause of the Eighth Amendment when the value of the seized property is greatly disproportionate to the severity of the underlying offense); *supra* text accompanying notes 40-45.

derived from the offense or the pecuniary loss caused by the offense."[82] Other language prohibits the use of drug courier profiles in which race is one of the factors: "Probable cause may not be supported in whole or in part by reliance on or use of a profile or list which includes race or ethnicity as any part of its criteria."[83] The bills would require, prior to forfeiture, probable cause to make a legal arrest, and that the arrest must be made, "as a result of the criminal activity in which the property was being employed or was likely to be employed."[84] The claimant may have possession of the seized property during the pendency of the forfeiture proceedings if the claimant posts a bond.[85]

Two more problems addressed by the Florida bills are settlements made without court supervision and use of the forfeited cash for law enforcement and investigation. To take care of the problem with settlements, the Florida Act would be amended as follows:

> When the claimant and the seizing law enforcement agency agree to settle the forfeiture action prior to the conclusion of the forfeiture proceeding, the settlement agreement shall be reviewed *by the court. No settlements may be made at the site of a vehicle stop and search*[, unless such review is waived by the claimant in writing, by the court or a mediator or arbitrator agreed upon by the claimant and the seizing law enforcement agency].[86]

To resolve the "possible temptation" of allowing the forfeited cash to be used to supplement regular law enforcement activities, the Florida Act would be amended as follows:

> If the seizing agency is a county or municipal agency, the remaining proceeds shall be deposited in a special law enforcement trust fund established by the board of county commissioners or the governing body of the municipality. Such proceeds and interest earned therefrom shall be used for school resource officer, crime prevention, safe neighborhood, drug abuse education and prevention program[s, or for other law enforcement purposes, which include defraying the cost of protracted or

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82. S.B. 2148 § 1 (amending FLA. STAT. ANN. § 932.703(1)(a)).

83. H.B. 1755 § 1; S.B. 2148 § 1 (amending FLA. STAT. ANN. § 932.703(2)(c)).

84. H.B. 1755 § 1; S.B. 2148 § 1 (amending FLA. STAT. ANN. § 932.703(6)(a)).

85. H.B. 1755 § 1; S.B. 2148 § 1 (amending FLA. STAT. ANN. § 932.703(8) to allow release of the property "unless the court determines that the nature of the property would allow it to be used as an instrumentality in the commission of another crime").

86. H.B. 1755 § 2; S.B. 2148 § 2 (amending FLA. STAT. ANN. § 932.704(7)). Note that deletions to the act are bracketed and additions are italicized.

complex litigations, providing additional equipment or expertise and providing matching funds to obtain federal grants].[87]

Of the proposed amendments to the federal and Florida forfeiture statutes, the most significant change concerns attorney's fees. Few of the Volusia County motorists who had cash seized went to court because they wanted to save costs by settling and getting a portion of the cash back.[88] If the Florida Act is amended as proposed to reimburse a prevailing claimant attorney's fees, a higher percentage of the seizures very likely would be challenged in court. Similarly, the proposed amendments to the federal statutes would probably lead to an increase in court challenges by motorists not otherwise able to afford an attorney.

Other significant proposed amendments to the federal statutes include eliminating the requirements that the claimant post a bond and then bear the burden of proof in the forfeiture proceeding.[89] Eliminating the bond requirement would allow motorists whose cash had just been seized to more easily afford to contest the matter in court. Shifting the burden of proof from the claimant to the government and raising the level of proof from a preponderance of the evidence to clear and convincing evidence also will favor the claimant.

The other proposed amendments to the Florida Act address additional problems with the tactics used by the Volusia County Sheriff's Office: insufficient proof for a forfeiture,[90] race as an unstated factor in the drug courier profile,[91] settlements reached without court supervision,[92] and use of forfeited cash for routine law enforcement activities.[93]

All the proposed changes to the federal and Florida forfeiture statutes would help the minority motorist whose cash is seized. However, the "possible temptation" of seizing ready cash and the hope that the action will go unchecked remains very real. The innocent minority motorist who happens to be carrying a large amount of cash is forced to jump through

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87. S.B. 2148 § 3 (amending FLA. STAT. ANN. § 932.7055(4)(a)). Note that deletions to the act are bracketed.

88. *See infra* notes 170-72, 231 and accompanying text.

89. *See* H.R. 2417 § 6 (amending 19 U.S.C. § 1614 concerning release of seized property); *see also id.* § 4; S. 1655 § 5 (amending 19 U.S.C. § 1615 concerning the burden of proof in forfeiture proceedings).

90. *See* H.B. 1755 § 1; S.B. 2148 § 1 (amending FLA. STAT. ANN. § 932.703(6)(a)).

91. *See* H.B. 1755 § 1; S.B. 2148 § 1 (amending FLA. STAT. ANN. § 932.703(2)(c)).

92. *See* H.B. 1755 § 2; S.B. 2148 § 2 (amending FLA. STAT. ANN. § 932.704(7)).

93. *See* S.B. 2148 § 3 (amending FLA. STAT. ANN. § 932.7055(4)(c)).

a number of procedural hoops to get the money back. The motorist will still lose possession of the cash, possibly for a lengthy time period.

A statutory change not proposed is requiring a judicial hearing shortly after the seizure. This would be similar to the requirement of a hearing after an arrest.[94] An officer may hesitate to seize an innocent motorist's cash if the officer's actions will be subject to judicial scrutiny within twenty-four or forty-eight hours. A postseizure hearing would allow the innocent motorist a realistic chance of having the cash returned within a more reasonable period of time. If the hearing were postseizure, the government would have *in rem* jurisdiction over the cash and would be assured that the cash would not "disappear."

III. UNITED STATES SUPREME COURT CASES APPLICABLE TO CASH SEIZURES

The United States Supreme Court has recognized the "possible temptation" for abuse of the federal forfeiture statutes because of the government's "direct pecuniary interest in the outcome of the proceeding."[95] As discussed above, the Court recently has provided some protection to the "innocent owner,"[96] has required preseizure notice and

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94. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44 (1991); Gerstein v. Pugh, 420 U.S. 103 (1975).

95. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 (1993). Justice Kennedy wrote for the Court that the extent of the government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeiture in order to meet the Department of Justice's annual budget target: "'We must significantly increase production to reach our budget target. . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.'" 114 S. Ct. at 502 n.2 (quoting 38 U.S. ATT'YS' BULL. 180 (1990)). Justice Thomas wrote:

> And like the majority, I am disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense. . . . A strong argument can be made . . . that § 881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents. . . . Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.

Id. at 515 (Thomas, J., dissenting) (footnotes omitted).

96. *See* United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993); *supra* notes 35-58 and accompanying text.

hearing for real property,[97] and has held that forfeiture of property may be unconstitutional when the forfeiture amounts to an "excessive fine."[98] These recent limitations on federal forfeiture all involved real property.

The "possible temptation" for abuse may be more immediate where an officer stops a motorist and seizes cash. When real property and cars are seized, the government likely has to bear upkeep or storage costs, and other incidental costs from the date of seizure until a court decides whether the property should be forfeited. If the property is forfeited, the government bears the expenses associated with its sale or continued maintenance. In contrast, the costs involved with cash seizures are minimal. In addition, there is always the "possible temptation" for a dishonest officer to "pocket" some of the cash in exchange for letting the motorist go or turn in less than the amount seized and "pocket" the difference.

The Court's recent limitations on federal forfeiture have not extended to personal property. There are two reasons for this reluctance. One reason is that each piece of real property is unique and the individual's "right to maintain control over [the] home, and to be free from governmental interference, is a private interest of historic and continuing importance."[99] The other reason is that the Court has been loath to interfere with the legislative branch by declaring a statute unconstitutional, even in part. Justice O'Connor, concurring in part and dissenting in part in *Good*, criticized the majority for holding that seizure of real property without prior notice or hearing does not comply with due process: "'If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.'"[100] Thus, it appears that the plight of the motorist will have to be addressed by the legislative, rather than the judicial, branch.

In addition to personal property interests, the minority motorist is particularly vulnerable to violations of liberty interests. Essentially, an overzealous enforcement officer has an incentive under forfeiture statutes to increase, perhaps unconstitutionally, the number of investigatory stops of minority motorists. The Supreme Court cases confronting investigatory stops and preseizure hearings of seized personalty indicate that the protection for motorists is minimal. The balance of this section will review four United States Supreme Court cases concerning both investigatory stops and the seizure of personal property.

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97. *See Good*, 114 S. Ct. at 505.

98. Austin v. United States, 113 S. Ct. 2801, 2803 (1993).

99. *Good*, 114 S. Ct. at 501.

100. *Id.* at 511 (O'Connor, J., concurring in part and dissenting in part) (quoting Springer v. United States, 102 U.S. 586, 594 (1881)).

In *United States v. Brignoni-Ponce*,[101] two border patrol officers were in a patrol car parked on the side of Interstate 5 south of San Clemente, California.[102] Because it was evening, the officers were shining their patrol car headlights on the interstate to observe northbound passing cars.[103] They followed and stopped Brignoni-Ponce's car based only on the fact that "its three occupants appeared to be of Mexican descent."[104] The officers arrested Brignoni-Ponce and the two other occupants because the two were illegal aliens.[105] Brignoni-Ponce filed a motion to suppress information the officers obtained after they stopped the car.[106] In deciding whether the stop was constitutionally permitted, the Court held "that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion."[107] Applying this reasoning the Court held that the stop of Brignoni-Ponce's car was unconstitutional because stopping the car based on the race of the occupants alone did not furnish "reasonable grounds to believe that the three occupants were aliens."[108]

The second case, *United States v. Sokolow*,[109] involved an airport rather than a highway stop. Andrew Sokolow and his companion flew from Honolulu to Miami and returned to Honolulu three days later.[110] Police officers and Drug Enforcement Administration agents observed Sokolow during the round trip.[111] Upon Sokolow's return to Honolulu, DEA agents stopped him.[112] Following two sniffs by a "narcotics detector dog," the dog "alerted" on two pieces of Sokolow's luggage, and

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101. 422 U.S. 873 (1975).

102. *Id.* at 874.

103. *Id.* at 874-75.

104. *Id.* at 875.

105. *Id.*

106. *Id.*

107. *Id.* at 881.

108. *Id.* at 885-86. Factors the officers could use to support the reasonable suspicion needed for an investigatory stop include "the characteristics of the area" ("proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic"), "erratic driving or obvious attempts to evade officers," and "persons trying to hide." *Id.* at 884-85.

109. 490 U.S. 1 (1989).

110. *Id.* at 4.

111. *Id.* at 4-5.

112. *Id.* at 5.

the agents obtained a search warrant and searched the bags.[113] The agents discovered 1063 grams of cocaine in one of the two pieces.[114] The stop was made based on the following factors: (1) Sokolow had paid $2100 for two airplane tickets from a roll of $20 bills that appeared to contain a total of $4000; (2) he traveled under an assumed name; (3) his original destination was Miami, a source city for illicit drugs; (4) although the round trip flight totalled twenty hours, "he stayed in Miami only 48 hours;" (5) he appeared nervous; (6) he checked no luggage; (7) "he was about 25 years old;" and (8) "he was dressed in a black jumpsuit and wore gold jewelry."[115]

The issue before the Court was "whether the agents had a reasonable suspicion that [Sokolow] . . . was engaged in wrongdoing when they encountered him on the sidewalk."[116] In reaching its decision, the Court considered "the totality of the circumstances—the whole picture"[117] and stated: "Any one of these factors [in the drug courier profile] is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."[118] The Court found that the stop was constitutional because the DEA agents did have the "reasonable" suspicion needed for an investigatory stop.[119]

In typical fashion, Justice Marshall disagreed with the *Sokolow* majority and criticized the magical transformation of the drug profile to mirror what the officer finds when making the stop. This ever-changing profile allows an officer to stop a suspect "on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race."[120]

> Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations."[121]

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113. *Id.*

114. *Id.*

115. *Id.* at 3-4.

116. *Id.* at 7.

117. *Id.* at 8 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

118. *Id.* at 9.

119. *Id.* at 11.

120. *Id.* at 12 (Marshall, J., dissenting).

121. *Id.* at 13 (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413, 1419 (9th Cir. 1987)).

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[122] the Court held that due process did not require preseizure notice.[123] Puerto Rico police officers found marijuana on a rented yacht in May 1972.[124] They seized the yacht on July 11, 1972.[125] The yacht owner did not learn of the seizure until forfeiture had already been declared.[126] The issue in the case was

> whether the Constitution is violated by application to appellee, the lessor of a yacht, of Puerto Rican statutes providing for seizure and forfeiture of vessels used for unlawful purposes when (1) the yacht was seized without prior notice or hearing after allegedly being used by a lessee for an unlawful purpose, and (2) the appellee was neither involved in nor aware of the act of the lessee which resulted in the forfeiture.[127]

The Court held that this seizure under a forfeiture statute was "an 'extraordinary' situation" in which due process does not require notice or hearing prior to seizure.[128] The first reason for the holding was to allow the government the necessary *in rem* jurisdiction over the yacht, and at the same time, ensure that the yacht would not continue to be used for further drug trafficking.[129] The second reason was to guard against the yacht disappearing.[130] This might occur if the persons renting the yacht discovered that the government was preparing to institute forfeiture proceedings. The third reason was that the seizure was "not initiated by self-interested private parties" but rather by the government after it had determined that seizure was "appropriate" under applicable statutes.[131]

United States v. $8850 involved a federal law that requires anyone carrying more than $5000 in cash when entering the United States to report the amount to customs.[132] If the amount is not reported, the

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122. 416 U.S. 663 (1974).

123. *Id.* at 679-80.

124. *Id.* at 665.

125. *Id.*

126. *Id.* at 668.

127. *Id.* at 664.

128. *Id.* at 679-80.

129. *Id.* at 679.

130. *Id.*

131. *Id.*

132. United States v. $8850, 461 U.S. 555, 557 (1983). The statute at issue was 31 U.S.C. § 1101 (1970). *Id.*

money may be seized.[133] In this case, Mary Vasquez declared that she did not have more than $5000 in cash when she passed through customs at Los Angeles International Airport upon her arrival from Canada on September 10, 1975.[134] A customs officer found that Ms. Vasquez was carrying $8850, and so the officer seized the cash.[135] In March 1977, the United States Attorney filed proceedings to have the cash forfeited.[136] During the eighteen months between the cash seizure and the filing of forfeiture proceedings, Ms. Vasquez filed a petition for mitigation and the United States investigated and obtained criminal indictments against Ms. Vasquez.[137]

The *$8850* Court reaffirmed its holding from *Calero-Toledo* that preseizure notice or hearing is not required when personal property is seized pursuant to a forfeiture statute:

> The general rule, of course, is that absent an "extraordinary situation" a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified. . . . [*Calero-Toledo*] clearly indicates that due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture. . . . [T]he seizure serves important governmental purposes; a preseizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than self-motivated private parties.[138]

However, the real issue in *$8850* was: "when [does] a postseizure delay . . . become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time"?[139] Although an eighteen-month delay was "quite significant,"[140] the Court held that the reasons for the delay were "substantial" under the circumstances.[141] During the eighteen months, the United States used "diligent efforts" to handle Ms. Vasquez' petition for mitigation and to bring criminal charges

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133. *$8850*, 461 U.S. at 557.

134. *Id.* at 558.

135. *Id.*

136. *Id.* at 560.

137. *Id.* at 558-60.

138. *Id.* at 562 n.12.

139. *Id.* at 562-63.

140. *Id.* at 565.

141. *Id.* at 568.

against her.[142] The Court reasoned that "Vasquez never indicated that she desired early commencement of a civil forfeiture proceeding, and she has not asserted or shown that the delay prejudiced her ability to defend against the forfeiture. Therefore the claimant was not denied due process of law."[143]

As shown in *Brignoni-Ponce*, *Sokolow*, *Calero-Toledo*, and *$8850*, the motorist and those similarly situated have been afforded little protection by the Supreme Court. Although a motorist may not be stopped because of race alone, the stop may be made on the reasonable suspicion that the motorist has committed, is committing, or will commit a crime. A motorist may even be stopped on the basis of a drug courier profile as long as the profile supports a reasonable suspicion of illegal activity. Once the motorist is stopped, cash may be seized because of a claimed connection with illegal drugs. The motorist has no right to preseizure notice or hearing. If there is an ongoing investigation of a motorist or other legitimate reasons for a delay, the government may wait more than a year after the seizure to file the forfeiure proceeding.

IV. How Sheriff Vogel Fared in Court and in the Newspapers

A. *History of the Vogel Highway Stops*

In 1985, a Florida Highway Patrol Trooper named Robert L. Vogel was assigned to I-95 to stop drug traffickers.[144] On that assignment, he made a number of highway stops on I-95, seven of which became the subject of appellate cases. The United States Court of Appeals for the Eleventh Circuit decided *United States v. Miller*[145] and *United States v. Smith*,[146] the Supreme Court of Florida decided *Cresswell v. State*[147] and *State v. Johnson*,[148] and the District Court of Appeal of Florida

142. *Id.* at 569.

143. *Id.* at 569-70.

144. Jeff Brazil, *Bob Vogel—Lightning Rod in U.S. Debate*, Orlando Sentinel, Dec. 20, 1992, at A-1 [hereinafter Brazil, *Lightning Rod*].

145. 821 F.2d 546 (11th Cir. 1987).

146. 799 F.2d 704 (11th Cir. 1986).

147. 564 So. 2d 480 (Fla. 1990).

148. 561 So. 2d 1139 (Fla. 1990).

decided *Velez v. State*,[149] *In re Forfeiture of $6003*,[150] and *Esteen v. State*.[151]

Vogel left the Florida Highway Patrol in 1988 to run for Volusia County Sheriff.[152] Soon after taking office, Sheriff Vogel placed a five-person Selective Enforcement Team on I-95. Using some of the same tactics Vogel had used as a highway patrol trooper, the Selective Enforcement Team stopped motorists, searched cars, and seized illegal drugs and cash.[153]

Officers on the Selective Enforcement Team stop cars traveling on I-95 for alleged traffic violations.[154] If an officer is suspicious that a stopped car contains illegal drugs or "drug money," the officer detains the motorist and searches the car. Most searches proceed after the officer obtains the driver's consent. If the driver refuses consent for the search, the officer calls in a drug dog.[155] The drug dog is trained to "alert" the officer to the presence of drugs by barking or wagging its tail if it smells

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149. 554 So. 2d 545 (Fla. Dist. Ct. App. 1989), *review denied*, 563 So. 2d 635 (Fla. 1990).

150. 505 So. 2d 668 (Fla. Dist. Ct. App.), *review denied*, 511 So. 2d 998 (Fla.), *cert. denied*, 484 U.S. 965 (1987).

151. 503 So. 2d 356 (Fla. Dist. Ct. App. 1987).

152. *See* Brazil, *Lightning Rod*, *supra* note 144, at A-10.

153. *See id.* (discussing the history of Sheriff Vogel and the Selective Enforcement Team).

154. *See* Jeff Brazil & Steve Berry, *Seizing Cash is No Sweat for Deputies*, ORLANDO SENTINEL, June 14, 1992, at A-17 [hereinafter Brazil & Berry, *Seizing Cash is No Sweat*] (describing the "alleged traffic violations" as minor infractions such as "failure to maintain a single lane, following too closely, defaced license tag or broken taillight").

155. *See id.* According to the newspaper, the same "script" was generally followed after a stop was made:

> What happened after cars were ordered to the roadside is the key. Once the deputy issued a warning—or in rare cases—a citation, he would turn and begin walking away, according to dozens of drivers interviewed.
>
> The deputy would then pause, return to the car and ask permission to search.
>
> In most cases, drivers consented.
>
> Records show that at least a handful of drivers initially refused to allow a search. They were told they would be detained until a drug-sniffing dog could be summoned. The drivers allowed the searches.
>
> If they hadn't, the dog would have been led around the outside of the car.
>
> If he barked or wagged his tail, deputies would have had "probable cause" to believe that drugs or drug money were inside, and they could search without the driver's consent.

Id.

a controlled substance. The dog can detect even trace amounts of cocaine clinging to paper currency.[156] If the dog "alerts," the officer has "probable cause" to believe the car contains illegal drugs or "drug money" and the officer will proceed with the search.

As a result of the Selective Enforcement Team's stops in the three years preceding June 1992, the Volusia County Sheriff's Office seized almost $8 million in cash.[157] No criminal charges were filed in 199 of

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156. *See* Jeff Brazil & Steve Berry, *You May Be Drug-Free, But Is Your Money?*, ORLANDO SENTINEL, June 15, 1992, at A-6. The problem with using a drug dog to detect cocaine-tainted money is that a very high percentage of the paper currency in circulation is "tainted" with minute traces of cocaine. The dog's sense of smell is so keen that it can detect these minute amounts clinging to the currency. A number of leading citizens in the Orlando area agreed to participate in a test done by *The Orlando Sentinel*. Currency from their wallets was tested as was currency from a local supermarket. "The results: Six of nine samples carried detectable amounts of cocaine." *Id.* The article explains this contamination:

> The reason: cocaine adheres to what it touches.
>
> The contamination spreads through a variety of means. Cocaine users roll up bills like straws to inhale the drug into their nostrils. Dealers hide money and drugs together. They "launder" cash profits by injecting the money into circulation. Seized money is deposited into banks, intermingled with other bills.

Id.; *see also* Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698 (M.D. Tenn. 1993):

> As the Drug Enforcement Administration's own chemists reported . . . currency in general circulation in this country is contaminated with traces of narcotics. . . . [The] Chief Toxicologist for Florida Dade County Medical Examiner's Office . . . found that 97% of the bills from around the country tested positively for cocaine, and . . . clean bills are contaminated in banks when they come in contact with contaminated ones. . . .
>
> It cannot be doubted that a narcotics detection dog's sense of smell is quite keen. Other courts have observed that a dog can detect narcotics even in the microscopic quantities in which it is present in contaminated currency. . . . [B]ills may contain as little as a millionth of a gram of cocaine, but that is many times more cocaine than is needed for a dog to alert. . . .
>
> The presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history. A bill may be contaminated by proximity to a large quantity of cocaine, by its passage through the contaminated sorting machines at the Federal Reserve Banks, or by contact with other contaminated bills in the wallet or at the bank.

Id. at 720 (discussing other federal cases).

157. *See* John C. Van Gieson & Sean Somerville, *Governor's Panel to Review Seizures*, ORLANDO SENTINEL, June 18, 1992, at A-1, A-14 [hereinafter Van Gieson & Somerville, *Governor's Panel*].

262 cash seizure cases.[158] Of those 199 cases, ninety-one percent involved African-American and Hispanic travelers and sixty-three percent involved seizures of $20,000 or less.[159] One-fourth of the 199 drivers made no attempt to get their money back,[160] all monies were returned to four drivers,[161] and the remaining drivers got back fifty to ninety percent of their money after agreeing not to contest the forfeitures.[162] The settlements were handled by the attorney for the Volusia County Sheriff's Office.[163] Of the nearly $8 million seized, the sheriff's office kept almost one half.[164]

Several factors, aside from the large amount of cash seized and the low number of arrests, indicate that the emphasis of the Selective Enforcement Team is confiscating cash rather than pressing criminal charges against drug traffickers. One factor is the direction or apparent destination of the vehicles. For example, a much higher percentage of cars were stopped in the southbound lanes, where the drug trafficker is likely to be carrying cash, than in the northbound lanes where the drug trafficker is likely to be carrying drugs.[165] Eighty-seven percent of the

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158. *See* Steve Berry & Jeff Brazil, *Blacks, Hispanics Big Losers in Cash Seizures*, ORLANDO SENTINEL, June 15, 1992, at A-1, A-6 [hereinafter Berry & Brazil, *Big Losers in Cash Seizures*].

159. *See id.* at A-6 (table). Of the I-95 stops in which cash was seized, 18% involved $5000 or less, 18% involved $5001 to $10,000, and 27% involved $10,001 to $20,000. *See id.* (table). *See also* Jeff Brazil & Steve Berry, *Seizure Law Review Will Begin Today*, ORLANDO SENTINEL, Sept. 16, 1992, at A-1, A-7 [hereinafter Brazil & Berry, *Seizure Review*]. The article reported:

> Paul Steinberg, who wrote the law and was the state Senate's chief sponsor . . . was outraged to read the *Sentinel* report that 36 percent of the Volusia cash seizures involved $10,000 or less.
>
> "That's not the drug-dealing profile we were talking about," he said.
>
> The law was designed to get at "mules" or drug couriers carrying $100,000 in the trunk of their cars, he said.

Id.

160. *See* Brazil & Berry, *Seizing Cash Is No Sweat*, *supra* note 154, at A-17.

161. *See* Brazil & Berry, *Seizure Review*, *supra* note 159, at A-7.

162. *See* Brazil & Berry, *Seizing Cash Is No Sweat*, *supra* note 154, at A-17.

163. *See id.*

164. *See* Berry & Brazil, *Big Losers in Cash Seizures*, *supra* note 158, at A-6.

165. *See* Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A-1, A-10 [hereinafter Brazil & Berry, *Color of Driver is Key*]. A 1991 article about Vogel implies that a major goal of the Selective Enforcement Team was to seize cash:

> [Vogel had] noticed, in all his time making drug arrests in the northbound lanes of I-95, that no matter how large the haul of dope or cocaine, he almost

cars were stopped when traveling in the southbound lanes of I-95, as compared with only thirteen percent traveling in the northbound lanes.[166] "A tally of roadside seizures shows that arrests for drug possession were highest in the beginning of the program in 1989 but have decreased significantly, while cash seizures have increased."[167] Another factor is the lack of arrests arising from subsequent investigations. Although the team investigated the drivers who contested the seizures, there were no arrests made as a result of these investigations.[168] A third factor is that the sheriff's office has reached settlements even with "drug trafficking" motorists against whom criminal charges were filed. Under the settlements, the "drug traffickers" got back a percentage of the cash seized and the sheriff's office kept the rest.[169]

Few of the drivers whose cash was seized by the Selective Enforcement Team have gone to court to contest the seizure because of the litigation costs involved.[170] As of June 14, 1992, only one of the 199 cash seizure-no-arrest cases had gone to trial. In that case, the trial judge awarded the Volusia County Sheriff's Office the entire $22,520 seized

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never found any significant amounts of cash. Where were the huge sums of money the drug trade required?

He raised his eyes and beheld . . . the southbound lanes of I-95. If the drugs were being piped north [from the Miami area], maybe the money was flowing south. And in the last two years, his deputies have used a modified version of his profile to harvest $6.5 million in cash from southbound cars.

Charles Fishman, *Sheriff Bob Vogel: He's the Mayor of I-95, and a Terror to Drug Smugglers*, FLORIDA MAG., Aug. 11, 1991, at 6 [hereinafter Fishman, *Mayor of I-95*].

166. *See* Brazil & Berry, *Color of Driver is Key*, *supra* note 165, at A-10; *see also* Brazil, *Lightning Rod*, *supra* note 144, at A-10 (graphic).

167. Brazil & Berry, *Tainted Cash*, *supra* note 7, at A-16.

168. *Id.*

169. *See* Steve Berry & Jeff Brazil, *...But Sometimes, Bad Guys Get off Easy*, ORLANDO SENTINEL, June 16, 1992, at A-4. A Volusia County Sheriff's officer seized nearly $190,000 from Douglas Harbert and Thomas Pasco after stopping their car on I-95. In addition to the cash, the officer discovered: "7 grams of cocaine, 15 grams of marijuana, cocaine sifters still powdered with residue, a roach clip and rolling papers." *Id.* The officer filed felony cocaine charges against the two men but the men later entered guilty pleas to misdemeanor drug convictions. The sheriff's office returned $28,685 to them and transferred another $58,545 to the Internal Revenue Service to pay back taxes owed by Harbert. *Id.*

170. *See* Jeff Brazil & Sean Somerville, *Judge Orders Sheriff's Office to Return $265,000 to Motorist*, ORLANDO SENTINEL, June 25, 1992, at A-1, A-10 [hereinafter Brazil & Somerville, *Judge Orders Return*]. The amount paid in attorney fees for negotiating an out-of-court settlement ranged from $1000 to one third of the money the client received from the Volusia County Sheriff's Office in settlement. Presumably the attorney's fees would have been significantly higher had the cases gone to court.

because the person contesting the seizure had a long criminal record.[171] In late June 1992, a second case went to trial. The Florida circuit court judge ordered the entire $265,000 returned to an African-American I-95 motorist.[172]

B. *How Vogel Has Fared in Court*

None of the contested seizures occurring since Vogel became Volusia County Sheriff have reached the appellate level of review, and no factual records exist from that time period. However, the seven appellate cases in which Vogel was involved as a Florida Highway Patrol trooper are worth reviewing because the tactics he used as a trooper to stop I-95 motorists are very similar to the tactics used by the Volusia County Selective Enforcement Team.[173]

In all but two of the cases, Vogel alleged that the match to a drug courier profile gave him reasonable suspicion for the stop.[174] The

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171. *See* Brazil & Berry, *Seizing Cash Is No Sweat*, *supra* note 154, at A-17.

172. *See generally* Brazil & Somerville, *Judge Orders Return*, *supra* note 170, at A-1. The facts of the Duncan seizure are as follows: On April 25, 1991, a Volusia County Sheriff's officer stopped Aubrey Marcus Duncan and his passenger because their car "swerved." They were traveling at the speed limit in a "4-door sedan" with out-of-state license plates. After asking a few questions, the officer turned to leave, and then asked permission to search the car. Duncan refused permission. The officer called in a drug dog, citing Duncan's "nervousness," his refusal to permit the search, and statements that conflicted with those of his passenger as support for his actions. The dog alerted the second time around Duncan's car "as if in response to a command." The officer seized the $265,000 he found in a bag in the trunk of Duncan's car. In the forfeiture proceeding, the circuit judge ruled that the stop had violated Mr. Duncan's Fourth Amendment right against unreasonable search and seizure. *Id.*

Duncan's subsequent arrest, in October 1992 by a New Jersey State Police officer who found four kilograms of cocaine and a pound of heroin in Duncan's car after pulling him over for speeding, raised questions regarding the validity of the Selective Enforcement Team's cash seizures. *See* Jeff Brazil, *Cash Seizure Target Faces Drug Charges*, ORLANDO SENTINEL, Oct. 29, 1992, at B-1.

On May 12, 1993, Duncan filed a 42 U.S.C. § 1983 claim against the Volusia County Sheriff's Office and Robert Vogel. Duncan v. Volusia County Sheriff's Office, No. 93-304-CIV-ORL-18 (M.D. Fla. filed May 12, 1993). That case was subsequently dismissed and refiled, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993).

173. *See* Brazil, *Lightning Rod*, *supra* note 144, at A-10 (describing Vogel's seizure tactics).

174. *See* Velez v. State, 554 So. 2d 545, 546 (Fla. Dist. Ct. App. 1989) (stating that certain factors were used for the stop but failing to specify them), *review denied*, 563 So. 2d 635 (Fla. 1990); Esteen v. State, 503 So. 2d 356, 357 (Fla. Dist. Ct. App. 1987) (noting many factors similar to the drug courier profile but not expressly stating the use

profile included the following ten elements: (1) the day of the week; (2) the time of day; (3) the type of vehicle; (4) the model year of vehicle; (5) whether the vehicle had two or four doors; (6) the license tag; (7) the presence of a CB or radar detector; (8) the number of occupants in the car; (9) the age group of the occupants; and (10) the destination of the vehicle.[175]

In *In re Forfeiture of $6003*,[176] the elements were: (1) a late model car with Florida rental tags; (2) two occupants; (3) a male driver approximately thirty-five years old; (4) a car traveling north on I-95, "a route frequently used by drug couriers"; (5) a car driven extremely cautiously; and (6) a driver not looking at Vogel as the driver passed by.[177] In *$6003*, there was no claim of a traffic violation: "although [the driver] had not broken any law, [Vogel] stopped him because in [Vogel's] experience persons who fit the profile sometimes carried drugs."[178]

In *United States v. Smith*,[179] the elements were: (1) a 1985 Mercury with out-of-state tags; (2) two occupants approximately thirty years old; (3) car traveling north on I-95 at 3:00 a.m.; (4) car driven "overly cautious" at fifty miles per hour; and (5) a driver not looking at Vogel as the driver passed by.[180]

After observing these factors, Vogel followed Smith and stopped him because Smith was "weaving." He stated:

> I observed the right side of the wheels of that vehicle cross over the white painted edge line approximately six inches into the emergency lane.
>
> The vehicle was then brought back into the center of the white [right?] north-bound lane. Then the car drifted over to the white painted center line. However, the wheels did not touch or cross over the center line.
>
> The vehicle then weaved an additional two times before it was stopped.[181]

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of the drug courier profile).

175. State v. Johnson, 561 So. 2d 1139, 1140 n.2 (Fla. 1990).

176. 505 So. 2d 668 (Fla. Dist. Ct. App.), *review denied*, 511 So. 2d 998 (Fla.), *cert. denied*, 484 U.S. 965 (1987).

177. *Id.* at 669.

178. *Id.*

179. 799 F.2d 704 (11th Cir. 1986).

180. *Id.* at 706.

181. *Id.*

In *Cresswell v. State*,[182] the elements were: (1) a full-sized car with a large trunk, Maine tags and registration, and New York state insurance and inspection stickers; (2) a Massachusetts licensed driver traveling alone; (3) a car traveling on I-95 at 1:55 p.m.; (4) a car registered to someone else; (5) the floor beneath the driver's seat held a steering wheel lock; (6) items normally stored in the trunk were on the back seat; (7) the ignition key was separate from the other keys; and (8) a CB radio.[183] The alleged motor vehicle violation was that the Cresswell car was following another car too closely.[184]

In *State v. Johnson*,[185] the elements were: (1) large model car with out-of-state tags; (2) driver alone; (3) a male driver approximately thirty years old wearing casual clothes; (4) a car traveling on I-95 at 4:15 a.m.; and (5) a car driven "overly cautious" at speed limit.[186] As in *$6003*, the drug courier profile was given as the only reason for the stop.[187]

In *United States v. Miller*,[188] the elements were: (1) a car with out-of-state tags; (2) male driver; (3) car traveling on I-95 at approximately 9:40 p.m.; (4) a car driven in an "overly cautious" manner; (5) a car driven just below the posted speed limit; and (6) the driver not turning his head to look at the patrol car's headlights.[189] Based on these factors,

> Trooper Vogel decided to pursue Miller's car in order to stop and search the car for drugs. After turning into traffic, Trooper Vogel observed Miller put on his turn signal and pass two slower moving vehicles. Trooper Vogel stated that Miller was driving

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182. 564 So. 2d 480 (Fla. 1990).

183. *Id.* at 481.

184. *Id.*

185. 561 So. 2d 1139 (Fla. 1990).

186. *Id.* at 1140.

187. *Id.* at 1141. The *Johnson* majority voiced its objections to the use of a drug courier profile to stop motorists on I-95:

> Indeed, the class of persons described by Trooper Vogel's profile is enormous. This profile literally would permit police to stop tens of thousands of law-abiding tourists, businessmen or commuters, just as the "profile" in *Brignoni-Ponce* would have authorized unrestrained stops of law-abiding Mexican-Americans. The resulting intrusion upon the privacy rights of the innocent is too great for a democratic society to bear. Were we to approve this profile, we might just as well approve a profile based on racial or ethnic characteristics, religious background, sex or any other completely innocent trait.

Id. at 1143.

188. 821 F.2d 546 (11th Cir. 1987).

189. *Id.* at 547.

> "overly cautious." After Miller had passed the vehicles, he changed lanes into the right lane and, in so doing, allowed his right wheels to cross over the white painted lane marker about four inches, in violation of Florida traffic laws. According to Trooper Vogel, Miller drove with his wheels across the line for about one tenth of a mile (or, at 55 miles per hour, approximately 6 1/2 seconds).[190]

When Vogel stopped Miller, Vogel told him that he was being stopped for "failure to drive in a single lane."[191]

As the above illustrations indicate, the information in Vogel's profile is not in any particular way related to drug traffickers any more than it is related to innocent motorists. The ten elements of Vogel's basic profile would form answers to the simple questions "who?," "what?," "when?," and "why?" It is information an observer of a car would give to describe the car to someone who had not been there to observe the scene. In reviewing the five profiles, it is difficult to determine which factors—or how all the factors of a profile together—could have given Vogel the "reasonable suspicion" required for investigatory stops. Rather, the various profiles appear to be descriptions of average motorists on I-95.

The only factor that appears in all five of the profiles is that the cars were driven by males on I-95. Additionally, the factor that appears in all of the profiles, except the one in *Cresswell*, is that the cars were being driven cautiously.[192] In addition, in *$6003*, *Smith*, and *Miller*, the driver did not look at the patrol car or at the patrol car headlights as the suspect passed by Vogel's patrol car.[193] In *$6003*, *Smith*, and *Johnson* either the driver or the occupants were in their thirties.[194]

In the *Johnson* and *$6003* cases, Vogel stopped the cars solely on the basis of the drug courier profile.[195] Accordingly, the courts found that there was no reasonable suspicion for the stops and held them invalid.[196] *Smith* and *Miller* are similar because Vogel claimed he stopped the drivers because they conformed with the drug courier profile and because their

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190. *Id.*

191. *Id.*

192. *Id.* at 547; *Smith*, 799 F.2d at 706; *Johnson*, 561 So. 2d at 1140; *$6003*, 505 So. 2d at 669.

193. *Miller*, 821 F.2d at 547; *Smith*, 799 F.2d at 706; *$6003*, 505 So. 2d at 669.

194. *Smith*, 799 F.2d at 706; *Johnson*, 561 So. 2d at 1140; *$6003*, 505 So. 2d at 669.

195. *Johnson*, 561 So. 2d at 1142-43; *$6003*, 505 So. 2d at 669-70.

196. *Johnson*, 561 So. 2d at 1142-43; *$6003*, 505 So. 2d at 669-70.

cars were "weaving."[197] In holding the stops invalid, the *Smith* and *Miller* courts found that the alleged "weaving" was merely a pretext for the stops.[198] The *Smith* court explained the standard for determining when a stop for an alleged traffic violation is pretextual: "[I]n determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer *would* have made the seizure in the absence of illegitimate motivation."[199] The court concluded that "a reasonable officer would not have stopped the appellants without an invalid purpose to obtain evidence of additional criminal activity."[200]

In *Velez*, the defendant was stopped for following too closely.[201] In *Esteen*, the defendant was driving "in an erratic fashion . . . consistent with the behavior of a person driving under the influence of alcohol or drugs, or of a person falling asleep at the wheel."[202] In *Cresswell*, the car was stopped for following too closely and because it fit the drug courier profile.[203] The *Velez*, *Cresswell*, and *Esteen* courts held that the stops were constitutional as legitimate traffic stops.[204]

Re-examining the seven Vogel cases reviewed in this section, it appears that an investigatory stop is permissible only if the officer has observed the driver commit a legitimate, albeit minor, traffic violation. None of the stops were upheld when the sole basis for the investigatory stop was the driver's conformity to the drug courier profile.

Although the Supreme Court upheld investigatory stops based on a drug courier profile in *Sokolow*,[205] Florida courts have rejected this criteria for traffic stops. This departure seems to arise from the factual distinctions between the Vogel and *Sokolow* stops. In *Sokolow*, the United States Supreme Court allowed DEA agents to make an investigatory stop

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197. *See Miller*, 821 F.2d at 547; *Smith*, 799 F.2d at 706.

198. *Miller*, 821 F.2d at 549; *Smith*, 799 F.2d at 708.

199. *Smith*, 799 F.2d at 708. Nationally, courts are divided as to what constitutes a legitimate traffic stop. In the Seventh Circuit, for example, a traffic stop is legitimate if "the police are doing no more than they are legally permitted and objectively authorized to do." United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989), *cert. denied*, 112 S. Ct. 428 (1991).

The Supreme Court of Florida has adopted the 11th Circuit's test as enunciated in *Smith*. *See* Kehoe v. State, 521 So. 2d 1094, 1096-97 (Fla. 1988).

200. *Smith*, 799 F.2d at 708.

201. Velez v. State, 554 So. 2d 545, 546 (Fla. Dist. Ct. App. 1989), *review denied*, 563 So. 2d 635 (Fla. 1990).

202. Esteen v. State, 503 So. 2d 356, 357 (Fla. Dist. Ct. App. 1987).

203. Cresswell v. State, 564 So. 2d 480, 481 (Fla. 1990).

204. *Id.* at 483; *Velez*, 554 So. 2d at 547; *Esteen*, 503 So. 2d at 358.

205. United States v. Sokolow, 490 U.S. 1, 9-10 (1988).

based on a drug courier profile.[206] On the day of his stop, agents observed the defendant in two airports.[207] In contrast, Vogel may have observed the motorists he stopped for only a few seconds.[208] It is hard to imagine a set of factors, even viewed together, which would give an officer reasonable suspicion of illegal activity when the officer observed a car for such a short time.

C. *How Vogel Has Fared in the Newspapers*

Prior to June 1992, the articles in the *Orlando Sentinel* and its Sunday magazine were favorable to Sheriff Vogel and the tactics of the Volusia County Selective Enforcement Team. The titles of the articles are indicative of this positive attitude: *Sheriff Bob Vogel: He's the Mayor of I-95, and a Terror to Drug Smugglers*[209] and *I-95 Deputy Racks up Numbers in Drug War.*[210]

In June 1992, things started to change when the *Orlando Sentinel* published a Pulitzer Prize-winning series of articles by Jeff Brazil and Steve Berry.[211] The series criticized the practices of Sheriff Vogel's five-man Selective Enforcement Team and described Selena Washington's ordeal.[212] Since 1992, the *Orlando Sentinel* has published a number of follow-up articles dealing with Sheriff Vogel and his Selective Enforcement Team. Several of the follow-up articles also have dealt with Selena Washington. This section of the article will review the newspaper accounts relating to Sheriff Vogel.

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206. *Id.* at 11.

207. *Id.* at 5.

208. *See* Brazil & Berry, *Color of Driver is Key*, *supra* note 165, at A-1, A-10. Many of the highway stops were made at night after the motorist was observed driving through the arc of the patrol car headlights shining across the highway. A "headlights specialist" has estimated that the suspect motorist may have crossed through the arc of the patrol car headlights in less than a second. *Id.* at A-10 (diagram). "Headlights on their [Volusia County Sheriff's officers'] 1990 Chevrolet Caprices cast a 40-foot-wide beam at 50 feet. At 72 mph, average interstate speed, cars cross the lighted area in .38 seconds." *Id.*

209. Fishman, *Mayor of I-95*, *supra* note 165, at 6.

210. Kevlin Haire, *I-95 Deputy Racks up Numbers in Drug War*, ORLANDO SENTINEL, Jan. 31, 1992, at B-1 (reporting that Volusia County Sheriff's Sergeant Bobby Jones set a "record" by seizing $697,599 in cash after stopping a van driver for swerving across the southbound lanes of I-95).

211. *See* Berry & Brazil, *Big Losers in Cash Seizures*, *supra* note 158, at A-1; Brazil & Berry, *Lottery Winner's Luck Runs Out*, *supra* note 7, at A-4; Brazil & Berry, *Deputies Take $19,000*, *supra* note 1, at A-16.

212. *See* Brazil & Berry, *Deputies Take $19,000*, *supra* note 1, at A-16.

The initial series of unfavorable press accounts was published June 14-16, 1992. On June 17, Florida Governor Lawton Chiles announced that he would create a panel to investigate cash seizures by the Selective Enforcement Team.[213] The same day, Sheriff Vogel announced two changes in the way the Team would operate: "[D]iscussions between squad members and [the head of the Selective Enforcement Team] will be put in writing and out-of-court settlements will be reviewed by his staff."[214] Governor Chiles' panel began its review on September 16.[215]

Even as the panel deliberated, Sheriff Vogel announced five new requirements in the cash seizure program:

> That the unit issue more tickets and written warnings. That deputies try to record the traffic infraction on the same dash-mounted video camera on which they record the subsequent search and seizure. That the squad leader, sheriff's attorney and department's second in command be consulted before money is seized. That the division commander review the videos weekly. That all out-of-court settlements be approved by the sheriff and his senior staff.[216]

On February 26, 1993, finding "nothing to warrant further action from Gov. Lawton Chiles," the governor's panel disbanded.[217] Panelists cited Sheriff Vogel's reforms and the striking drop in seizures since June 1992 as the reasons for their inaction.[218] In fact, the Team's seizures dropped from 260 in the three years preceding June 1992 to "just a handful" between June 1992 and February 1993.[219] In addition, the Florida Legislature adjourned its regular sixty-day session in early April 1992 without amending the Florida Contraband Forfeiture Act.

The unfavorable press and the governor's interest in Sheriff Vogel's forfeiture practices were followed by civil rights lawsuits against the controversial sheriff. On May 12, 1993, Aubrey Marcus Duncan filed a 42 U.S.C. § 1983 suit against Sheriff Vogel and the Volusia County

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213. *See* Van Gieson & Somerville, *Governor's Panel*, *supra* note 157, at A-14.

214. *See id.*

215. *See* Brazil & Berry, *Seizure Review*, *supra* note 159, at A-1.

216. *See* Craig Quintana, *Vogel Offers 5 Reforms for Cash Seizures*, ORLANDO SENTINEL, Jan. 30, 1993, at B-1, B-4.

217. Jeff Brazil & Craig Quintana, *Vogel Panel Disbands: 'He's Cleaned up His Act'*, ORLANDO SENTINEL, Feb. 27, 1993, at A-1.

218. *Id.* at A-11.

219. *Id.*

Sheriff's Office, alleging that the Selective Enforcement Team violated Mr. Duncan's constitutional rights when it seized his $265,000 during a 1991 traffic stop.[220] In the lawsuit, Mr. Duncan requested compensatory and punitive damages, and attorney's fees and costs.[221] About a month later, Selena Washington and the Florida State Conference of NAACP Branches filed a class action under 42 U.S.C. §§ 1981[222] and 1983 against Robert Vogel and Volusia County, alleging "[r]acially motivated, purposeful discrimination" and violations of the right to be free from unreasonable searches and seizures under the Fourth Amendment and the right to equal protection under the Fourteenth Amendment.[223] The

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220. *See* Duncan v. Volusia County Sheriff's Office, No. 93-304-CIV-ORL-18 (M.D. Fla. filed May 12, 1993). That case was subsequently dismissed and refiled; Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993). *See generally* Jeff Brazil, *Driver Sues, Says I-95 Seizure Biased*, ORLANDO SENTINEL, May 13, 1993, at B-1 [hereinafter Brazil, *Driver Sues*]; *see also supra* note 18 (text of 42 U.S.C. § 1983).

221. *See* Complaint at 9, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993). Regarding punitive damages, see generally Smith v. Wade, 461 U.S. 30, 56 (1983) (holding that punitive damages may be awarded against an individual defendant in a § 1983 action "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that punitive damages may not be awarded against a city "[a]bsent a compelling reason for approving such an award"). In *Newport*, the Court was concerned that allowing a jury to award punitive damages against a municipality or other governmental entity might be more punitive than necessary. The Court reasoned that the jury's knowledge of the governmental unit's "unlimited taxing power" might trigger disproportionately large punitive damages awards. *Id.* at 270-71.

Perhaps the three-year-long tactics of the Volusia County Sheriff's office in stopping a high percentage of minority motorists on I-95 and seizing cash without making arrests presents a "compelling reason" for an award of punitive damages.

Duncan's suit was dismissed after opposing counsel claimed Duncan had failed to furnish answers to interrogatories. *Lawyer Appeals Decision in Volusia Sheriff's Case*, ORLANDO SENTINEL, May 14, 1994, at D-3. On May 13, 1994, Duncan appealed the dismissal. *Id.*

222. This provison states, in pertinent part:

> All persons within the jurisdictions of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (Supp. V 1993).

223. *See* Complaint at 1, Washington v. Vogel, No. 93-482-CIV-ORL-18 (M.D. Fla. filed June 18, 1993) (on later pleadings, the case number is shown as "No. 93-482-CIV-ORL-22"). Robert Vogel was named "individually and in his official capacity as

lawsuit sought injunctive and equitable relief and compensatory and punitive damages.[224] Jorge Nater later joined the class action.[225]

Meanwhile, Sheriff Vogel attracted the attention of the nation's chief law enforcement offical and influential members of Congress. Attorney General Janet Reno announced that the FBI had been asked to investigate the Volusia County Selective Enforcement Team for a "prosecutable violation of federal civil rights statutes."[226] Representative Henry J. Hyde, an Illinois Republican, introduced "[a] bill to reform certain statutes regarding civil asset forfeiture."[227] An almost identical bill was introduced in the Senate by Vermont Republican James M. Jeffords.[228] Chairman John Conyers of the House Committee on Government Operations, had convened hearings on Capitol Hill to investigate abuse of forfeiture statutes,[229] and he invited Selena Washington to testify.[230] Ms. Washington told the committee how the Selective Enforcement Team seized $19,000 from her and why she later settled for $15,000 rather than

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Sheriff of Volusia County, Florida." *Id.*

224. *Id.* at 2. A number of significant rulings have been made in the case. On June 15, 1994, the federal judge denied class action status. *See* Mary Murphy, *Judge Refuses to Curb Drug Unit*, ORLANDO SENTINEL, June 16, 1994, at B-1. In August, a second motion for class action status was dismissed for failure to file the motion within 90 days of the initial complaint. Washington v. Vogel, 158 F.R.D. 689, 692 (M.D. Fla. 1994); Mary Murphy, *Class-Action Status Denied in Lawsuit Against Vogel*, ORLANDO SENTINEL, Aug. 13, 1994, at D-3. The case went to trial on January 6, 1995. *See* Steve Berry, *Drug Squad's I-95 Tactics Going on Trial*, ORLANDO SENTINEL, Jan. 6, 1995, at A-1. However, the court dismissed the suit after five days of testimony presented by the plaintiffs because they failed to show that the stops of Washington and Nater were pretextual. Washington v. Vogel, No. 93-482-CIV-ORL-22, slip op. at 4-5 (M.D. Fla. Jan. 26, 1994); Steve Berry, *Judge Throws out Suit Against Vogel*, ORLANDO SENTINEL, Jan. 14, 1995, at A-1, A-11 [hereinafter Berry, *Judge Throws out Suit*].

225. *See* Steve Berry, *Puerto Rican Joins Cash-Seizure Suit*, ORLANDO SENTINEL, Oct. 15, 1993, at B-3 [hereinafter Berry, *Puerto Rican Joins Suit*]; *supra* note 7 (stating the facts of Jorge Nater's case).

226. Berry & Brazil, *FBI*, *supra* note 1, at A-1.

227. H.R. 2417, 103d Cong., 1st Sess. (1993); *see supra* Part II.C. (discussing the proposed amendments to the Act).

228. S. 1655, 103d Cong., 1st Sess. (1993); *see supra* Part II.C. (discussing the proposed amendments to the Act).

229. *See* Brazil, *Legalized Theft*, *supra* note 1, at B-1.

230. *See Review of Federal Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 103d Cong., 1st Sess. 141-54 (1993); Brazil, *Congressman*, *supra* note 1, at A-1, A-6.

pay the costs and attorney's fees necessary to contest the seizure in court.[231]

Back in Volusia County, the lawsuits had a significant effect on the local political scene. By October 7, Ms. Washington's class action had cost Volusia County about $32,000 in attorney's fees and costs, but only

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231. *See* Brazil, *Congressman*, *supra* note 1, at A-6. Ms. Washington's attorney advised her that it would cost more than the $4000 kept by the Volusia County Sheriff's Office to challenge the seizure in court. *Id.* at A-6.

U.S. Representative Corrine Brown, an African-American Democrat from North Florida who was present during Ms. Washington's testimony, commented:

> I just don't see why I have to justify why I have cash money in my possession. You have to understand, . . . it is not uncommon for the people I come in contact with to deal in cash money. It's a cultural thing. . . . And if you're not in that culture, you may not understand that.

Berry & Brazil, *FBI*, *supra* note 1, at A-4.

Ms. Washington's settlement agreement was signed by Melvin Stack, "Attorney for County," Selena Washington, and Michael H. Blacker, "Attorney for Respondent(s)," and provides:

> 1. This Agreement is made between the COUNTY OF VOLUSIA (hereinafter called COUNTY) and SELINA [sic] WASHINGTON and JONATHAN WASHINGTON, (hereinafter called OWNER(s)).
> 2. The COUNTY and OWNER(s) acknowledge the benefits to each party by avoiding litigation and enter into this Agreement for the sole purpose of avoiding litigation.
> 3. The property that is the subject of this action is $19,000.00 U.S. currency.
> 4. COUNTY agrees to give possession of $15,000.00 to OWNER [sic].
> 5. OWNER(s) agree to give possession of $4,000.00 to COUNTY for placement in the Forfeiture Trust Fund.
> 6. OWNER(s) certify that they are legally entitled to possession of the above described currency.
> 7. OWNER(s) certify that they are freely and voluntarily entering into this Agreement and fully acknowledge the terms of said Agreement.
> 8. OWNER(s) fully acknowledge that this Agreement has no bearing whatsoever with [sic] the outcome of any criminal case that may have been filed as a result of the seizure of the property listed above.
> 9. OWNER(s) represent to COUNTY that all statements in this Agreement are true and further agree to hold harmless and indemnify the County or any of its employees, agents or servants from any and all damage, actions, suits, claims or demands of whatsoever kind, made by or on behalf of any person as a result of COUNTY giving possession of the described currency to OWNER(s) including but not limited to reasonable attorney's fees, travel and investigation expenses caused by said damage, actions, suits, claims or demands.
> 10. OWNER(s) agree to hold harmless the County or any of the County's agents for the actions surrounding this seizure of the aforementioned property and if applicable the arrest of OWNER(s) of said property.

$19,000 had been paid.[232] Several County Council members "acknowledged a tax increase might be needed to pay off a large judgment."[233]

In February 1994, petitions were circulated to change the Volusia County Charter.[234] The Volusia County Charter requires the sheriff, also the Director of the Department of Public Safety, to be elected.[235] The sheriff reports to the County Manager and the County Council.[236] The petitions sought to amend the charter to make the sheriff a constitutional officer, accountable only to voters.[237] The backers of the petition "insist the sheriff should have the autonomy to run his department without interference from outside administrators."[238] Sheriff Vogel personally delivered 2676 petitions to the county elections office.[239] About 10,000 petitions are required to place the proposed charter amendment on the November 1994 ballot.[240] Sheriff Vogel's critics, who claimed that the proposed amendment would give the sheriff too much power,[241] eventually won the battle. After Vogel's supporters came up with 11,000 signatures, a judge struck down the referendum

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232. *See* Fontenay, *Volusia Fears Costs*, *supra* note 1, at B-1; *see also* Fontenay, *Tax Increase*, *supra* note 1, at B-3.

233. Fontenay, *Tax Increase*, *supra* note 1, at B-3.

234. *See* Gary Davidson, *Sheriff Drops off Petition to County*, DAYTONA BEACH NEWS-J., Feb. 9, 1994, at 1-B.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*; *see also Changes Would Impede Volusia's Direction*, DAYTONA BEACH SUNDAY NEWS-J., Feb. 20, 1994, at B-1 (editorial):

> Under [the proposal, Sheriff Vogel] would not have to coordinate his budget with the rest of the county, his employees would not have county civil service protection, and he would take over the county's other public safety operations (except for jail operations).
>
> . . . .
>
> Volusia County's current system not only protects employees but forces the sheriff to coordinate his budget with the rest of county government. . . .
>
> Sheriff Vogel has shown himself to be an energetic lawman without such new powers. The current setup merely provides for checks and balances as well as coordination with the rest of county government, regardless of who holds the office.

Id.

because it unlawfully sought to repeal a "substantial portion" of the charter.[242]

More newspaper articles critical of Vogel were published during the petition drive. Two Volusia County Sheriff's deputies told reporters that Sheriff Vogel instructed the Selective Enforcement Team to target minorities.[243] Speaking out publicly against the head of a law enforcement agency is highly unusual for law enforcement officers. One of the deputies, a former member of the Selective Enforcement Team and a thirteen-year veteran of the Volusia County Sheriff's Office, stated: "Sheriff Vogel advised members of the team to look for blacks and Hispanics . . . ."[244] The second deputy, also a former member of the Selective Enforcement Team stated, "I concur with [the first deputy] . . . . That definitely did happen. He's not making that up."[245] Sheriff Vogel denied that he instructed Volusia County deputies to target

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242. Purvette A. Bryant, *Judge: No Vote on Vogel*, ORLANDO SENTINEL, Sept. 9, 1994, at C-3. The judge, Robert Rawlins, found that the petition was offered under the "guise" of an amendment and that the petition and its title, "We Want Our Sheriff Back," were vague, deceptive and misleading. *Id.* Vogel characterized the ruling as a sad day for Volusia County residents. *Id.*

243. *See* Steve Berry & Pat LaMee, *Vogel Squad Controversy Heats Up*, ORLANDO SENTINEL, Feb. 18, 1994, at C-1; Steve Berry & Mary Murphy, *2nd Volusia Deputy Says Vogel Ordered Minorities Targeted*, ORLANDO SENTINEL, Feb. 19, 1994, at A-1 [hereinafter Berry & Murphy, *Minorities Targeted*]; Pat LaMee, *New Charges of Bias Arise in Volusia Flap*, ORLANDO SENTINEL, Feb. 17, 1994, at C-1; Mary Murphy, *Drug Team: We Act Legally, Effectively*, ORLANDO SENTINEL, Feb. 20, 1994, at B-1 [hereinafter Murphy, *Drug Team*].

244. Berry & Murphy, *Minorities Targeted*, *supra* note 243, at A-7. In an affidavit, Frank Josenhans, the first deputy,

> describes how he once followed a dark-colored Bronco or Blazer carrying two black men. Although it was not speeding, weaving or breaking any laws, Deputy Bobby Jones pulled the car over, [and] searched it. . . .
>
> Josenhans said he told Garcia [the second deputy] about the incident and then confronted Jones.
>
> "I was later verbally reprimanded by Sgt. (Dale) Anderson for questioning his men's stops."

Id. In the same affidavit, Josenhans claims that Sheriff Vogel instructed the Selective Enforcement Team to look for "blacks and Hispanics, gave an age frame, advised them to look for rental cars and vehicles bearing South Florida, Georgia, South Carolina and North Carolina tags." Murphy, *Drug Team*, *supra* note 243, at B-8. Sergeant Jones, the leader of the Selective Enforcement Team, denies the allegations of the two deputies. "We have never been ordered to . . . nor have we ever targeted blacks, minorities or anyone other than lawbreakers . . . ." *Id.* at B-1.

245. *See* Berry & Murphy, *Minorities Targeted*, *supra* note 243, at A-1.

minorities. "I don't direct deputies to stop anyone based on race or ethnic background."[246]

Also in February 1994, a black police officer who worked in neighboring Seminole County told reporters that he was stopped in June 1990 by Volusia County Sheriff's deputies because he was black.[247] The deputy said: "I believe that the only reason I was stopped was because the deputies who shined the light in my face saw I was a black man, and because of my race, decided to pull me over."[248]

In Tallahassee, state legislators began working toward reforming the Florida Contraband Forfeiture Act. On the first day of the 1994 Florida Regular Legislative Session, a state representative from Orlando introduced a bill to amend the Florida Contraband Forfeiture Act.[249]

Thus, *The Orlando Sentinel* series of June 1992 led to the investigation by Governor Chiles' panel and the ongoing FBI investigation. As demonstrated by the February 1994 articles, Sheriff Vogel's actions continue to be scrutinized by the newspaper.

V. CIVIL RIGHTS LAWSUITS FILED BY MINORITY MOTORISTS

As explained above, two civil rights lawsuits were filed in 1993 in the United States District Court for the Middle District of Florida against Sheriff Vogel and Volusia County. The first was filed by Aubrey Duncan, an African-American.[250] A Volusia County Sheriff's deputy

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246. Steve Moore, *Deputy: Drug Stops Target Minorities*, DAYTONA BEACH NEWS-J., Feb. 17, 1994, at 1A, 22A (quoting Sheriff Vogel as saying: "I have never, and will never, direct a deputy sheriff, or any other individual, to disobey the Constitution and laws of the state of Florida that I am sworn to uphold.").

247. Steve Berry, *Officer's Statement Tells of 'Racially Motivated' I-95 Stop*, ORLANDO SENTINEL, Feb. 26, 1994, at D-3:

> Wynn [the black officer] said a Volusia deputy's cruiser was parked in the median, shining its lights across the highway and into his face as he passed.
>
> . . . .
>
> Wynn said the deputy did not give him any reason for the stop and let him go when he saw Wynn's badge.
>
> "If the guys are just doing their job, that's one thing. . . . But if they are targeting minorities, that's something we all should have a problem with."

Id.

248. *Id.*

249. Steve Berry, *Police Cash Seizures Head for State Debate*, ORLANDO SENTINEL, Feb. 9, 1994, at D-1; *see supra* Part II.C. (discussing the proposed amendments to the Florida Act).

250. *See* Complaint, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993); *see also* Brazil, *Driver Sues*, *supra* note 220, at B-1.

had seized $265,000 from Duncan.[251] Duncan's lawsuit was set for a jury trial in the trial term beginning on December 1, 1994,[252] but the court dismissed the case and Duncan is appealing the decision.[253] The second was a class action filed by Selena Washington and the NAACP.[254] Jorge Nater, a Puerto Rican from whom the Volusia County Sheriff's deputy had seized $36,990, joined as a plaintiff in the class action.[255] The trial began in early January 1995 and was dismissed five days later.[256]

A class action filed in the United States District Court for the District of Colorado may also give some indication of the results which may be reached in future civil rights cases cases. In *Whitfield v. Board of County Commissioners of Eagle County*,[257] seven named plaintiffs, as representatives of the class, sued the Board of County Commissioners, Sheriff A.J. Johnson, and various former and current sheriff's officers.[258] Five of the named plaintiffs were black[259] and one of the named plaintiffs was "a young white male with hair longer than shoulder length."[260] The race of the other named plaintiff was not apparent from the reported opinions.[261]

Between May and December 1988, the plaintiffs were stopped by the High Country Drug Task Force, "a multi-agency team led by the Eagle County Sheriff's office with the mission of intercepting drug traffickers along Interstate Highway 70."[262] The plaintiffs alleged that they were stopped solely on the basis of a drug courier profile that included the following elements: (1) rental vehicles; (2) vehicles owned by persons not in the vehicle; (3) vehicles with out-of-state license plates; (4) darkened

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251. *See* Brazil, *Driver Sues*, *supra* note 220, at B-1.

252. *See* Pretrial Procedure and Scheduling Order at 1, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. order filed Nov. 24, 1993).

253. *See supra* note 221.

254. *See* Complaint, Washington v. Vogel, No. 93-482-CIV-ORL-18 (M.D. Fla. filed June 18, 1993) (on later pleadings the case number is shown as "No. 93-482-CIV-ORL-22").

255. *See* Berry, *Puerto Rican Joins Suit*, *supra* note 225, at B-3.

256. *See* Berry, *Judge Throws out Suit*, *supra* note 224, at A-1, A-11.

257. 837 F. Supp. 338 (D. Colo. 1993).

258. *Id.* at 340.

259. *Id.*, at 340 n.2 (identifying Jhenita Whitfield, Janice Whitfield, Byron Boudreaux, Aguinaldo Ferriera and Sean Verne as black).

260. United States v. Laymon, 730 F. Supp. 332, 336 (D. Colo. 1990).

261. The other named plaintiff is Chad Demoss. There is no identification of his race in either *Whitfield* or *Laymon*.

262. *Whitfield*, 837 F. Supp. at 340.

windows or curtains; (5) temporary CB antennas; (6) radar detectors; (7) structural modifications; (8) welding burns; (9) absence of luggage; (10) air fresheners; (11) fast food wrappers on the floor; (12) and loose screws in the trim or lying on the floor.[263] In addition, the court noted that "there is no dispute that race was a consideration."[264]

The case came before the district court judge on the plaintiffs' motion for partial summary judgment as to whether the Task Force's policy of stopping motorists solely on the basis of the drug courier profile was constitutional.[265] The judge first reviewed the above elements and concluded that only half of them could even have been used as a basis for the initial stop of the vehicles. The factors that the officers could have observed as the cars passed were: race of occupants, rental vehicles (observable in some instances), vehicles with out-of-state tags, darkened windows or curtains, temporary CB antennas, and radar detectors.[266]

Applying *United States v. Brignoni-Ponce*,[267] the district court ruled that "race . . . is wholly inappropriate to define a class of suspects."[268]

> Without particularization as to specific person, transaction or incident, the naked inference would be that race correlates to criminal behavior. Such an equation of race with suspicious criminal activity would be nothing more than a racist assumption, and I have previously held that "profile stops may not be predicated on unconstitutional discrimination based on race, ethnicity or state of residence."[269]

Examining the other factors, the district judge found that none of them described anything out of the ordinary.[270] The judge held that highway stops made on the basis of a drug courier profile alone violated the Fourth Amendment.[271]

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263. *Id.*

264. *Id.* (footnote omitted).

265. *Id.* at 341.

266. *Id.* at 343.

267. 422 U.S. 873 (1975) (holding that race alone did not provide the reasonable suspicion needed for an investigatory stop when a roving border patrol stopped suspects solely on the basis of their observed Mexican ancestry).

268. *Whitfield*, 837 F. Supp. at 344.

269. *Id.* (quoting *Laymon*, 730 F. Supp. at 339).

270. *Id.*

271. *Id.*

The judge also considered the defendants' motion for summary judgment based upon the doctrine of qualified immunity.[272] Qualified immunity "shields government officials from civil liability provided their alleged conduct does not violate clearly established law of which a reasonable person would have known."[273] The judge denied the motion holding that "the plaintiffs have put forward evidence that, in instances where the defendants stopped them based on the indicators [of the drug courier profile] alone, clearly established law was violated."[274]

Although ending with opposite results, *Duncan*,[275] *Washington*[276] and *Whitfield* are useful in this forward-looking analysis because in each case the plaintiffs alleged that the highway stops were made based on race. In *Whitfield* and *Duncan*, the plaintiffs claim that race was one of the factors of the drug courier profile used to make the stop.[277] Although Ms. Washington does not claim a drug courier profile was used to stop her, a number of the common factors of the Vogel drug courier profiles were observable.[278] She and her companion are African-American, they were traveling on I-95 at 3:15 a.m., and the car was from South Carolina.[279]

Whitfield differs from *Duncan* and *Washington* because the *Whitfield* case involved highway stops made solely on the basis of a drug courier profile.[280] In contrast, the officers who stopped Mr. Duncan, Ms. Washington, and Mr. Nater claimed the stops were made because of

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272. *See id.* at 344-46. In addition, the judge considered the defendants' claim that summary judgment should be granted in favor of the Board of County Commissioners because stopping motorists solely on the basis of the drug courier profile was not a county policy. The judge denied the motion for summary judgment as to the Board of County Commissioners because there was a genuine issue of material fact whether there was a policy of stopping motorists only on the basis of the drug courier profile. *Id.* at 346.

273. *Id.* at 345.

274. *Id.* at 346.

275. Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993).

276. Washington v. Vogel, No. 93-482-CIV-ORL-18 (M.D. Fla. filed June 18, 1993) (on later pleadings the case number is shown as "No. 93-482-CIV-ORL-22").

277. *Whitfield*, 837 F. Supp. at 340; Complaint at 3, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993).

278. *See* Brazil & Berry, *Deputies Take $19,000*, *supra* note 1, at A-16.

279. *See supra* note 1 and accompanying text.

280. *Whitfield*, 837 F. Supp. at 341 & nn.4-5.

traffic violations. Mr. Duncan was stopped for weaving within his lane.[281] Ms. Washington was stopped for driving seven miles over the speed limit.[282] Mr. Nater was stopped for following too closely.[283] The *Duncan* and *Washington* plaintiffs would probably characterize "weaving," "driving seven miles over the speed limit," and "following too closely" as minor traffic violations. Presumably, the officers making the stops would characterize the same acts as traffic violations for which a reasonable officer would have made stops.

Duncan and *Washington* were resolved rather summarily after several years of newspaper scrutiny, criticism, and investigation of Sheriff Vogel's allegedly race-based targeting of I-95 motorists, and both suits failed. However, future plaintiffs may be able to use some of the data gathered by *The Orlando Sentinel* reporters to their advantage.

Such a case is pending. *Evans v. Vogel*[284] is a suit by two minority motorists who were stopped by the Selective Enforcement Team on I-95.[285] Victor Jerome Evans, an African-American, was a passenger in a car driven by another African-American when the car was stopped for a minor traffic violation on May 30, 1991.[286] No citation was issued.[287] The officer detained Evans and the other occupants of the car and searched the vehicle,[288] finding $5000 on Evans' person.[289] The officer confiscated the cash, believing it to be drug money.[290] The investigating officer said: "Evans and his companions acted suspiciously,

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281. *See* Complaint at 3, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993). The defendants claimed that Mr. Duncan was stopped "for a traffic infraction (i.e., crossing the center lane, causing another vehicle to swerve to avoid collision) which constituted a violation for which any reasonable law enforcement officer would have stopped the offending vehicle." Answer and Affirmative Defenses at 3, Duncan v. Volusia County, No. 93-478-CIV-ORL-22 (M.D. Fla. filed June 18, 1993).

282. *See supra* note 1 and accompanying text.

283. *See supra* note 7.

284. Evans v. Vogel, No. 94-962-CIV-ORL-22 (M.D. Fla. filed Sept. 7, 1994); *see* Steve Berry, *Another Suit Filed over I-95 Stops*, ORLANDO SENTINEL, Sept. 8, 1994, at C-3 [hereinafter Berry, *Another Suit Filed*].

285. Complaint, Evans v. Vogel, No. 94-962-CIV-ORL-22 (M.D. Fla. filed Sept. 7, 1994).

286. *Id.* at 2-3.

287. *Id.* at 3.

288. *Id.*

289. Berry, *Another Suit Filed*, *supra* note 284, at C-3. Vogel returned $3000 to Evans three months after the stop, after Evans' attorney protested. *Id.*

290. *Id.*

by showing excessive nervousness, telling inconsistent stories and not having enough clothing in the car for an overnight trip."[291]

Francisco Javier Muriel, who is Hispanic, was stopped for a minor traffic violation on February 4, 1991.[292] Even though he was not issued a traffic citation, the officer detained him and searched his vehicle.[293] No cash was confiscated.[294]

Both plaintiffs are suing Sheriff Vogel and Volusia County under 42 U.S.C. §§ 1981 and 1983, alleging that the county's search-and-seizure policies discriminate against African-American and Hispanic motorists and that stops are based on an unconstitutional race-based drug courier profile.[295] The plaintiffs seek an injunction and compensatory and punitive damages[296] and certification as a class action to represent all African-Americans and Hispanics who were stopped and searched on I-95 without being arrested.[297]

Evans' suit mirrors Washington and Nater's, which was dismissed. It thus appears likely that courts will reject Evans and Muriel's allegations as well. This strengthens the conclusion that the legislature must act to reform Florida's civil forfeiture laws if minority motorists' rights are to be protected on Interstate 95 in Volusia County.

VI. CONCLUSION

The federal and Florida forfeiture statutes were designed at least in part to take the cash profits out of illegal drug trafficking. Unfortunately, the broad wording of the statutes has allowed at least one Florida sheriff to seize cash from apparently innocent minority motorists.

Newspaper coverage has at times given hope that either the legislative or the judicial branch would step in and give the minority motorist needed protection. A review of newspaper articles since June 1992 tracks a continuing criticism of Sheriff Vogel's use of the Florida Contraband Forfeiture Act to seize cash from I-95 motorists. Like a wild fire spreading, the protest against Sheriff Vogel's tactics has moved spontaneously from one location to the next. The protest has gone from the local level, to the Florida governor, to federal court, to Capitol Hill,

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291. *Id.*

292. Complaint at 3, Evans v. Vogel, No. 94-962-CIV-ORL-22 (M.D. Fla. filed Sept. 7, 1994).

293. *Id.*

294. *Id.*

295. *Id.* at 2.

296. *Id.*

297. *Id.* at 3-4.

to the Department of Justice, and back to the Florida legislature and the local level. At each location, the protest burned bright briefly and then seemed to be extinguished.

Unaccountably, the protest has yet to result in any additional protection for the minority motorist. The federal and Florida courts thus far have been unwilling to afford minority motorists preseizure protection. Congress and the Florida Legislature have failed to even propose preseizure protection for the minority motorist. Some additional protection may come either as a result of the FBI and Department of Justice investigations or as a result of the pending civil rights actions.