REVIEW OF FEDERAL ASSET FORFEITURE PROGRAM

HEARING

BEFORE THE

LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JUNE 22, 1993

Printed for the use of the Committee on Government Operations

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REVIEW OF FEDERAL ASSET FORFEITURE PROGRAM

TUESDAY, JUNE 22, 1993

HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:40 a.m., in room 2154, Rayburn House Office Building, Hon. Corrine Brown (acting chairwoman of the subcommittee) presiding.

Present: Representatives Corrine Brown, Glenn English, Al McCandless, and Jon L. Kyl.

Also present: Representative John L. Mica.

Subcommittee staff present: James C. Turner, associate counsel; and Robert J. Kurz, deputy staff director.

Full committee staff present: Carol Bergman, associate counsel; Carolyn Donnelly, clerk; and Jane Cobb, minority professional staff.

OPENING STATEMENT OF ACTING CHAIRWOMAN BROWN

Ms. BROWN. Good morning. Will the Subcommittee on Legislation and National Security officially come to order?

Unfortunately for the chairman, he could not be here; but, fortunately, for me, I am here, Congresswoman Corrine Brown. He was detained with important events in his district.

Last September, the subcommittee held its first oversight hearing on the Department of Justice's Asset Forfeiture Program. The subcommittee learned some important lessons from the rather poignant testimony:

From Willie Jones we learned that it is not OK for an African-American man to carry large sums of cash in this country.

He had $9,000 in cash seized in a Nashville airport because he bought a round-trip ticket to Houston with cash to buy shrubbery for his nursery. His behavior was considered suspicious and corresponding to a profile of drug courier activity. He could not afford to post bond to secure his right to his property. But he was represented pro bono, and in April won his case.

From Mary and Carl Shelden, we learned that now you have to investigate the person who wants to buy your house.

They sold their house in California and took back a mortgage on it from the buyer. The buyer was later indicted on criminal charges, and the house was seized. The Sheldens were never given official notice and were not allowed to foreclose their property.

Meanwhile, the Federal Government permitted the purchaser to live rent free in the house. The house was not properly maintained, resulting in a large crack through the foundation. The case has cost the Sheldens over $500,000.

Today we are going to continue this hearing. And in the intervening months, we have learned of many other people who have been victimized by the program. The new Attorney General has agreed to a comprehensive review of the Asset Forfeiture Program, Janet Reno.

Drug courier profiles are not imaginary. Last week the NAACP filed a civil rights suit against the sheriff's department of Volusia County, FL alleging that it uses a racially oriented drug courier profile to target African-American and Hispanic motorists traveling along Interstate 95. The lawsuit contends that over 90 percent of the hundreds of motorists who have had their property seized since 1989 are African-American or Hispanic.

Payments to informants are big business with dangerous consequences.

Lawsuits are huge. We have a videotape showing Florida State troopers driving south along Interstate 95 with cash and almost never stopping those drivers going north with the drugs. This will get the cash off the streets and into the Asset Forfeiture Program, but it will not do much to get the drugs out of our neighborhoods.

A law designed to give cops the right to confiscate and keep the luxury possessions of major drug dealers mostly ensnares the modest homes, cars, and hard-earned cash of ordinary citizens.

This hearing will examine problems with the program, but this is not a trial. We are not here to determine if the individuals testifying today are innocent or guilty. We want to hear their stories to consider the changes necessary to ensure that the program works.

At this time I would like to recognize the ranking Republican, Representative McCandless, from California.

[The prepared statement of Mr. Conyers follows:]

OVERSIGHT HEARING ON THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM

JOHN CONYERS, JR., CHAIRMAN

OPENING STATEMENT

Subcommittee on Legislation and National Security

Committee on Government Operations

June 22, 1993

10:00 a.m.

Last September the Subcommittee held its first oversight hearing on the Department of Justice's Asset Forfeiture Program. The Subcommittee learned some important lessons from the rather poignant testimony of those who have been victimized by the asset forfeiture program.

From Willie Jones we learned that it is not okay for an African American man to carry large sums of cash in this country.

He had $9,000 in cash seized in a Nashville airport because he bought a roundtrip ticket to Houston with cash to buy shrubbery for his nursery. His behavior was considered suspicious, and corresponding to a profile of drug courier activity. He couldn't afford to post bond to secure his right to his property. But he was represented pro bono, and in April won his case.

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And from Harlan Vander Zee we learned that banks should never accept large sums of cash, and that the federal laws requiring the filing of Currency Transaction Reports are meaningless.

Mr. Vander Zee was a bank officer in San Antonio, Texas who was indicted on money laundering charges after accepting several large sums of money from a depositor who was later convicted of drug smuggling. He followed all of the required reporting steps for depositing large sums of money, and in fact had taped his conversations with a Treasury Department official who assured him

that everything was in order. His indictment was thrown out of court for lack of evidence; yet he lost his job and continues a long, expensive struggle with the IRS, the FBI and his bank.

In September, President Bush's Justice Department told us that we weren't getting the whole story. That these people aren't as innocent as they appear, and even if they are -- the cases are aberrations.

Today we are going to continue that hearing. In the intervening months we have learned of many more people who have been victimized by the Asset Forfeiture Program. And in the interim, a new Attorney General has promised a comprehensive review the asset forfeiture program.

An investigation that began with a lengthy series in the Pittsburgh Press, has now been replicated around the country, in the Houston Chronicle, and in the Orlando Sentinel -- for which they were recently awarded a Pulitzer Prize. These stories document hundreds of cases of innocent victims caught up in a judicial nightmare -- people who lost their homes, their businesses, and their livelihoods,

but were never found guilty of any criminal conduct.

Clearly these hundreds of people are not all aberrations. In fact, these stories seem to point to a pattern and practice of abuse. Abuse by state and local enforcement that is fostered by a federal program with a built-in financial incentive that cannot help but impact law enforcement priorities.

Drug Courier Profiles are not imaginary: Last week, the NAACP filed a civil rights suit against the Sheriff's department in Volusia County, Florida alleging that it uses a racially-oriented drug courier profile to target African-American and Hispanic motorists travelling along Interstate-95. The lawsuit contends that over 90 percent of the hundreds of motorists who have had their property seized since 1989 are African-American or Hispanic.

Payments to Informants are big business with dangerous consequences: Don Carlson was shot in the middle of the night because law enforcement agents relied upon faulty information from an informant, who was paid a percentage of assets to be seized.

Law Enforcement priorities are skewed: Video tapes show Florida state troopers stopping motorists driving South along Interstate-95 with cash and almost never stopping those driving North with the drugs. This will get the cash off the streets and into the asset forfeiture program, but it will not do too much to get the drugs out of our neighborhoods.

Under the rules of Equitable Sharing, a community involved in the drug bust gets back a part of the seized assets, but can only spend these funds on law enforcement. However, no one monitors what that spending actually is. In fact, we now know that the basic rule of thumb for the Justice Department in providing spending guidance is whether it can pass two tests: (1)The Straight Face Test, which asks: Can you tell me this with a straight face? And (2)The Washington Post Test, which asks: If taken out of context and put on the front page of the Washington Post, will it still look good?"

Little Compton, Rhode Island, population 3,340, received $3.8 million in a hashish bust and purchased $1,700 video cameras and body detection devices for their police force of 7 while there are social service programs in the state desperate for funds. Fortunately the

town has had sufficient remaining funds to purchase a woodchipper and fireworks displays. In Lakewood, Colorado, they have lavished their $1.3 million on Christmas parties, amusement park tickets and a $12,000 banquet to honor officers. Do these expenditures meet the Laugh test, or the Washington Post test?

In 1984, Congress expanded the asset forfeiture laws to allow the government to take property without even charging the owner of any crime. The intent was to strike at the heart of major drug dealers for whom prison time is just a cost of doing business. Seizing profits and property would hurt, and the proceeds would pay for more investigations, so that criminals would actually finance their own undoing. Every crime bill since has expanded the use of forfeiture.

A law designed to give cops the right to confiscate and keep the luxury possessions of major drug dealers mostly ensnares the modest homes, cars and hard-earned cash of ordinary, law-abiding people. This was not the way it was supposed to work.

The cornerstone of our system of justice is supposed to be a presumption of innocence until one is proven guilty. As far as I know

this is the only part of our criminal justice system that ignores the presumption of innocence. It would appear that the time has come to change the law.

I introduced H.R. 2774 in the last Congress which would redirect 50 percent of the proceeds in the DOJ Asset Forfeiture Program to community-based crime control efforts, drug education and treatment programs. I intend to introduce legislation in this Congress that will be far more comprehensive in scope and responsive to the various due process and oversight problems that have come to light during these hearings.

This hearing will examine problems with the Asset Forfeiture Program. This is not a trial. We are not here to determine if the individuals testifying today are innocent or guilty. We want to hear their stories, and to consider the changes necessary to ensure that the asset forfeiture program is a tool of law enforcement, and not of injustice.

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Mr. MCCANDLESS. Thank you, Madam Chairwoman.

For years now, finding ways to combat drug-related crime has been at the top of the American agenda and, therefore, at the top of Congress' agenda. In our struggle to give law enforcement the tools needed to do a better job, Congress is constantly striving to reform existing programs or otherwise come up with new ones.

We are here today in such an exercise: To evaluate the changes we have made to our asset forfeiture laws over the past 10 years. In particular, we will look at the effect of incentives built into the program in 1984 in an effort to promote better coordination among Federal, State, and local law enforcement agencies in forfeiture cases. The 1984 law allowed the Attorney General to transfer forfeited property to the Federal, State, or local law enforcement agency that had participated in its seizure. The agency could then devote those resources to law enforcement purposes such as purchasing equipment and supplies. In addition to stripping the criminal of his ill-gotten gains, the participating agency could enjoy additional resources without having to go to the American taxpayers.

The legislation has proven an enormously effective weapon for fighting crime and has succeeded in the goal of strengthened cooperation among the different law enforcement agencies. Unfortunately, however, the profitability of forfeitures leave the program ripe for abuse and, in the end, may be distorting the priorities of our law enforcement agencies.

It has become obvious that certain reforms are necessary if we are to maintain the Federal Asset Forfeiture Program as an effective tool. Abuses that are left to grow unchecked will only undermine the public's trust in our law enforcement agencies to protect law-abiding citizens and effectively fight and deter crime.

I thank the chairman for holding a second hearing on this important issue and commend both he and Congressman Hyde for their legislative efforts to improve the Federal Asset Forfeiture Program.

[The prepared statement of Mr. McCandless follows:]

Statement of

THE HONORABLE AL MCCANDLESS

Subcommittee on Legislation and National Security

Oversight Hearing on the DOJ Asset Forfeiture Program

June 22, 1993

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I thank the Chairman for holding a second hearing on this important issue and commend both he and Congressman Hyde for their legislative efforts to improve the Federal asset forfeiture program.

Ms. BROWN. Representative Kyl.

Mr. KYL. No comments, Madam Chairwoman.

Ms. BROWN. Representative Mica.

Mr. MICA. Although I am not a member of this subcommittee, I am a member with you on the Government Operations Committee.

I came today because I represent Volusia County which is one of the counties where we have particular questions about activities.

I did want to say I will submit for the record a commentary after these witnesses have submitted and delivered their testimony, a comment from our local sheriff which we both represent, Sheriff Vogel.

Also, I come to the hearing with an open mind. First of all, if the drug asset forfeiture law is effective in catching drug-related activities, I am supportive of it. If it does need attention where it does discriminate or have problems, then I would be glad to work with you as you correct and find corrective measures through legislation.

Thank you for letting me join you this morning.

Ms. BROWN. The ranking member would like to add additional comments.

Mr. MCCANDLESS. Madam Chairwoman, I would like to ask unanimous consent that Congressman Machtley's statement and a transcript of the public hearing in the town of Little Compton, on how to spend asset drug forfeiture money, dated June 3, 1993, be made a part of the record.

Ms. BROWN. Without objection.

The chairman's full statement will be placed in the record.

[The prepared statement of Mr. Machtley follows:]

STATEMENT SUBMITTED BY THE HONORABLE RONALD K. MACHTLEY

HEARING ON THE U.S. DEPARTMENT OF JUSTICE
ASSET FORFEITURE PROGRAM
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

JUNE 22, 1993

Thank you Mr. Chairman and Ranking Member McCandless for calling these hearings to review the Department of Justice's Asset Forfeiture Programs.

I support the concept behind the asset forfeiture program which was established in 1984. Under this program, funds and property which were created from the profits of illegal drug trafficking were seized and transferred to federal, state, and local law enforcement officials. Since the program's inception, billions of dollars in cash and property have been seized and returned to law enforcement officials to assist their collective efforts in the war against drugs.

I would like to submit for the hearing record the transcript of a public hearing conducted by the Town of Little Compton, Rhode Island on June 3, 1993. As you may know, the Little Compton Police Department has received $1.9 million in asset forfeiture funds stemming from a major drug arrest. This transcript provides many ideas and concepts from the town's residents on the use of asset forfeiture funds which I feel should be considered by this subcommittee during its review of the asset forfeiture program.

I also look forward to reviewing the testimony of my colleague from Illinois, Rep. Hyde, who has introduced civil asset forfeiture reform legislation. I support many of the concepts contained in Mr. Hyde's bill which proposes to modify current laws in order to prevent the occurrence of abuses and to enhance protections for citizens everywhere.

Town of Little Compton
P.O. Box 523
Rhode Island

JUN 16 1993

June 11, 1993

The Honorable Ronald K. Machtley
U.S. House of Representatives
326 Cannon House Office Building
Washington, D.C. 20515-3901

Dear Congressman Machtley,

The Town Council sponsored a hearing on how to spend Drug Asset Forfeiture funds. The Council voted to send you a transcript (enclosed) of this hearing without additional comment.

Sincerely,

Jane P. Cabot

Jane P. Cabot
President, Town Council

TOWN OF LITTLE COMPTON

A Public Hearing for Suggestions on How to Spend the Asset Drug Forfeiture Money.
June 3, 1993

Moderator: Elmer Comwell

Franklin Pond:

I address this message to the Council:

I believe that any drug forfeiture money that exceeds the needs of the Police Department as outlined by the current guidelines should be allocated to worthwhile Town causes. The renovation of the Grange Building into a Community Center would be an extremely good use because it is a project that will be of use to the whole community. People of all ages, sexes and faiths will use this facility. It will be available for all Town organizations. It will not only be a social center where young people can enjoy themselves in a wholesome atmos-phere, but also a center where they can learn the effects of drug use. What better use for the money than for a project that will benefit the whole town.

Gerald Humphrey:

I do want to talk about the future of the use of drug forfeiture money in this town. I think, however, we have to review a little bit where we have been in order to look at the future because I am going to make a specific proposal for the future based on what has happened thus far. The guide for that is the most recent audit which was done by Cayer Prescott Associates and which there is a copy of in the town, and it is what is reported to the Department of Justice for them to look at and make some decisions about. And some of you have copies of the end picture, which perhaps could circulate for those who would like to look at it. I don't want to spend a lot of time on it, only to say that the there are questionable amounts in the audit but some of what the audit says is important.

What I'm really concerned about is the process from here forward, not just how we use the money but what the process is and how the town deals with the problems and opportunities that this presents. And I would remind you that since the 1st of February 1988, we have been receiving drug forfeiture money; we have a history of four years and it is interesting to me that in the most recent audit, that the audit addresses itself to the Honorable Town Council, Town of Little Compton, and indeed, most of what is being said here is being addressed to the Council rather than particularly to the Police Department. And to remind you that it is the Town Council which bears the ultimate responsibility for what happens with the drug forfeiture money. Presently, if you remember, there is a way in which the Police Chief authorizes a sum of money and the Council also authorizes, at which time the treasurer is directed to pay the sum, Is that correct? The liability which seems to be in the audit would suggest that the liability is really with the Town Council and not with the Police Department, so that, to me the correct way of looking at it, is that it is the Town and the Town Council and us taxpayers who bear the ultimate responsibility for what happens with the drug forfeiture money. Now we have a law which has been passed by the Congress of the United States signed by the President, which authorizes the use of this money. In turn, with federal guidelines. We have had guidelines through all these four years. It is now said that these guidelines are inadequate, that they are being revised; but there have always been federal quidelines for the use of the money. It is to the matter of accountability that I am going to speak because that I think that one of the things we are going to see is that the drug forfeiture money is going to be with us for a long time, not just with this Chief of Police, but the next chief of police, not with the last Town Council or with the present Town Council. It's going to be here for many years, so I would suggest that part of what I hope that will come out of this meeting is some agreement that we look at the local procedures of how we handle drug forfeiture money, and what process we use and indeed to consider whether we should have an ordinance in the town which covers how we deal with the drug forfeiture money. There is an instance in

here which caught my eye which has to be addressed at some point and that is in terms of talking about the recommendations; it makes the point that under our present procedure there is no reconciliation, "the revenue and expenditure logs maintained by the chief of police are not reconciled with the accounting records maintained by the treasurer". That is something which we should be concerned about and which we should have some procedure about locally.

The drug forfeiture money process is obviously going to change over the next few years due to whatever happens in the federal government. The amount of money that has been applied for is $4,578,000; the amount of money that has been received to this point has been $1,932,000. So the Town has applied for double what we either have used or is being held in the bank. Presently reserved in the fund balance is $741,000 for police/fire complex. And $393,000 designated for law enforcement for a total of $1,134,000. We have spent thus far of forfeiture funds $798,000. One of the things that we have not discussed is the budget the Town votes to the police department and specifically the budget that comes from the drug forfeiture money, which is another $128,000. We have never reviewed whether the kind of money that we have been spending in the police department over the last four is years is the kind of money that the town as a whole would like to have spent. Are the things that the Police Department has bought the things that we wanted to have money spent for. We have never had any jurisdiction over this whatsoever. We do not have any ordinances dealing with this. Whether we do in the future, again, is something we have to look at and decide. I would suggest that it is not only a wish list that we are dealing with but it is a process which does not depend on the action of who happens to be appointed or elected at the time; one that would give us the townspeople some comfort in the process, one that gives us some sense of continuity and some sense of responsibility. However we design this tonight, whatever our wish list is, whatever we think we should give money to, or how it should be spent or what we may do in terms of the guidelines. These are all things that we have to look at. It seems to me that somehow as a community we need to

get a hold of this procedure.

Abigail Brooks:

I'm Abigail Brooks and on behalf of the children of this community and parents I would like to say that a tremendous of money in our culture goes toward enforcement, and not very much for prevention. In the community we have the unique situation in terms of taking control of prevention in the sense that what goes on in our schools, what goes on in the Grange Building, the potential for a community center, the kind of community we have here has a tremendous impact on the self-confidence that our children have and the activities that they engage themselves in. I would like to see us really focusing on building a sense of community with the money that we have. As we know, for a family, a money situation can be extraordinarily divisive; it would be a tremendous asset to this town if this money were used to build community rather than divide it.

Larry Anderson:

In general, I support the idea that the Justice Department and Congress should permit the use of drug asset forfeiture funds for purposes other than law enforcement. It seems sensible, for instance, to allow that a substantial portion of such funds be used for purposed related to substance-abuse prevention and rehabilitation.

But I am not as concerned about the specific purposes for which drug asset forfeiture funds have been or will be spent in Little Compton as I am about the process by which the town reviews, selects, and approves the projects and programs paid for with these funds. Clearly, the federal law and regulations did not anticipate a situation such as ours, where the funds potentially available through the program far exceed the reasonable requirements of local law-enforcement authorities. Federal officials may have failed to provide guidelines that adequately addressed our own unique circumstances and the distinctive governmental structure of a small New

England town. But the shortcomings of federal administration do not excuse what I view as Little Compton's failure to administer these funds by a process consistent with both the town's real needs and the town's established procedures for accountability in the use of public funds.

Unfortunately, our Police Department has at times been embarrassed by the failure of other town authorities and officials to ensure such financial accountability.

The confusion surrounding the use of these funds also highlights several important principles of political accountability. In a democracy such as ours, civil authorities are not and should never be accountable to the police department. The police must always be accountable to civil and civilian authority. All of us are accountable to the law, which the police have the responsibility of enforcing. But under no circumstances should other town departments, agencies, or officials be in the position of seeking the police department's approval of funds used for non-police purposes, however worthy those purposes may be.

Another principle of political accountability is that the federal Justice Department should not determine the size and operation of the Little Compton Police Department. That responsibility must remain the authority of Little Compton town officials, within a budget authorized by the citizens of Little Compton. Once the drug money arrives in Little Compton it does not belong to the police department. It belongs to the town. If these funds remain available for law enforcement purposes we should use them thoughtfully to support a well-equipped, well-trained Police Department sufficient for the needs of our small community -- but not a Police Department larger than we need or equipped for purposes exceeding local needs.

One more principle -- which Judge Pfeiffer's decision concerning the police/fire complex made clear -- is that the established and lawful local governmental procedures for the appropriation of public funds cannot be circumvented. To do so raises the potential for abuses -- and, has been demonstrated, invites the skepticism, cynicism, and anger of town citizens. Judge Pfeiffer was explicit about the ultimate level of accountability for these funds. "The Town of Little Compton," he wrote, "must

seek taxpayer approval at a financial town meeting prior to expending funds acquired from the federal government."

But as we consider how to spend whatever additional funds may become available through this program, we should be trying to do so within a framework that provides for financial and political accountability at every step of the way. One approach would be the establishment of a separate advisory committee, solely for the purpose of reviewing and recommending uses of these funds, under the applicable federal regulations and guidelines in effect at the time. Such a committee might include: the police chief; a member of the town council; a member of the budget committee; and two other citizens, appointed perhaps by the town moderator. This committee might establish guidelines, schedules, priorities, and procedures for evaluating requests for the use of these funds. Meeting regularly and publicly, the committee would evaluate the funding requests of various town departments and officials. Throughout the process, the public would be able to learn about and comment on such requests. The committee would then make recommendations to the town council, the budget committee, and the voters about the uses of the funds. Eventually, proposed expenditures using the drug funds would appear on the warrant of a financial town meeting, where, as with other town expenditures and as the court has determined, the town's voters would have the ultimate authority over the appropriation of these funds. Such a process would provide ample opportunities for citizen input and the possibility of developing a genuine public consensus for a project, as an example, like a new police/fire building.

Presumably, under this procedure, the town's legitimate law-enforcement needs would remain a top priority. But such a system of review and evaluation would remove pressures and responsibilities from the police chief's shoulders that really shouldn't have been put there in the first place.

Finally, the decisions made now about the use of these funds will have financial consequences in the future, in terms of the operational and capital requirements of various town departments. We will have to decide whether to

replace equipment or to continue programs now funded by drug money -- a source of funds that may not be available in the future. Then the costs may fall directly on town taxpayers, who were in some cases excluded from the original spending decisions.

Any uses of the drug asset forfeiture funds must occur only according to an open process which ensures that the citizens of Little Compton, within the limits of the federal law and guidelines, retain the ultimate authority over and accountability for those uses.

Eileen McDermott

I respectfully request a portion of the drug forfeiture money be channeled to the renovation of the Grange Building, currently leased to the Little Compton Community Center Corporation. This corporation is a non-profit entity, whose sole purpose is to make useful the Grange Building on the town commons for the direct use of every one of the townspeople in a wide variety of educational, cultural, social, and health-directed ways.

Darryl Harvey

Wish list. First of all I would suggest the possibility of setting up a trust fund from which interest income could be derived for the purchase of police patrol cars in the future.

It seems that perhaps in the future town would need some additional land for recreation, office buildings, for administration or whatever. Perhaps another possibility would be to utilize the moneys to purchase some land that could be put in the bank, so to speak, for future use for recreation, town expansion, or whatever the case may be.

Community Center renovations I would also agree with.

A Fire Department pump is something that I also at this moment in time, agree could be utilized and perhaps this would be another additional use.

And I would have as a suggestion the potential needs of the town dump re: environmental needs.

Sheila McIntosh

The Asset Forfeiture Law rewards the state and local law enforcement agencies for their cooperation with the federal government, hoping to put a halt to the national and international drug trafficking. The result has been billions of dollars in seized assets to be spent on law enforcement and prisons as well as serious concerns about fairness and due process. My concern....

Cary Copeland, Executive Director of the Asset Forfeiture Office, said that historically there have been three (3) sanctions for crimes: incarceration, parole/probation and fines. He sees Asset Forfeiture as a new 4th sanction. All four (4) of these are powerful tools used to manage the drug problem as it already exists. While billions and billions are being spent to affect a change in our national epidemic, there has been no improvement. The drug problem is costing money and it is costing lives, the lives of abusers, law enforcement personnel and innocent bystanders.

The Attorney General has ordered a review of asset forfeiture procedures and new guidelines are expected in several months. I hope that the new guidelines will broaden the use of the funds to allow their use for treatment and prevention programs.

In Newport County today, a person seeking treatment must wait at least two (2) months for an opening in a treatment program. Prevention programs are struggling for funds. As a society, we have been more than willing to pay for the consequences of crimes (e.g. $60,000 to build a prison cell and $18,000 a year to keep a prisoner there for a year), or the consequences of drug abuse (e.g. crack babies, AIDS, TB) than to pay the programs that curtail their use.

A balance of interdiction and incarceration PLUS prevention and treatment will go a long way to help us solve this HUGE problem. Let's use ALL the resources

available to us because we do need them.

Henry LaFerriere

I would like to reiterate what has already been covered.

My first concern is that of the process with which the drug forfeiture money is used. For us to anticipate what the best of that money might be in the future is difficult, in terms of specific details. However, I think a process that takes all ideas into consideration and lays them before the public, that there ought to be latitude in the law that allows for a multitude of uses, especially in the case of a small town, with a limited police budget.

My first and immediate thought about the most practical use of the money reiterated what others have said, for the use of the community center, for all educational and recreational purposes that could be attached to that community center.

I can think specifically of one program in the schools which is the Future Problem Solving, which at least in the past has involved discussion of weighing alternatives with regard to the use of drugs and the effect upon young children. I think when applications are made by this group which is outside the school budget for funding, money from the drug forfeiture account ought to be capable of being used for those purposes as well.

Betty Chase

I wanted to clarify the use of the drug forfeiture money, which I realize in this town, some people have considered "dirty money". It is not "dirty money". It is money that we have a acquired as a way of curtailing criminal persons and actions. And it is to be used in a "civil way". We have a perfect right to use it, in a civil way. A municipality, to me, is civil.

The other thing is that I agree about using the money for prevention, for the kids to have places to go. I do know that the Agricultural Conservancy Trust, at one

time, was looking for land that they could earmark for a neighborhood group could go to play ball; that was on Long Highway, that would work well, perhaps another in Adamsville, one on north Long Highway, one on south Long Highway, another at north West Main Road, and one at Sakonnet would take in a lot of the kids who are not able to drive cars and their parents have to take them where they go unless they can ride their bikes. But something that would take care of the youth as well as the teen center. That would take care of a whole group as well as adults.

Gerald Humphrey

I want to report on a telephone conversation that I had probably almost two years ago when some of us were feeling that the forfeiture money was not being used in the light of prevention. As I was talking to the then U.S. Attorney here in Rhode Island, Lincoln Almond, he made this comment. One of that has to happen is for your police chief to be happy, because he meets with the police chiefs from the State of Rhode Island. If your police chief is unhappy, then the police chiefs of the State of Rhode Island are unhappy, and those are the people that I have to work with. If, however, your police chief is in agreement with the proposals that come along in the town, he can then sell them, as it were, and then the police chiefs will be happy, and then the U.S. Attorney will be happy. I'm not saying this in terms of talking about particular individuals, as much as I am talking about how it is the process works. And it is a concern to all of us as to the relationship of the forfeiture money to the police chief, and I think that's an interesting insight from Mr. Almond. If we were to give money to a treatment facility in Newport County, could we do that, with the money. And his response to that was, that if we gave the money to a treatment center, and everybody was in agreement about it, that would be a possibility.

Ransom Griffin

I'm just a little bit curious to hear from out council members, what their response is, if there is one, with regard to the process, if it has been violated, or that

the drug money needs to be spent, politically first, before departmentally.

Moderator

Is there a council member who would like to comment?

Jack McKinnon

As to how the drug forfeiture money is being spent, the chief is one who sometimes, or most times, recommends it, and then it is sent to the council, as a result the council weighs it, for example, one year they suggested fireworks; for example the truck that was bought - the chief had a boat that was situated back, and the question was how was he going to get the boat to Sakonnet Point. The maintenance crew would take the boat and put it in the water. Another example, the Problem Solving group at Wilbur School didn't have transportation to Wisconsin, so the chief said drug forfeiture money could be used because they probably would discuss drug prevention there. I think the chief has followed everything strictly to the letter of the law, and the council has done so also.

Alex Goulart

I believe the council is here today to listen and observe, for that purpose, to observe rather than give our opinions. That is my feeling.

Johanna McKenzie

There are lots of potential uses down the road for forfeiture funds, and I think its very much contingent on our supporting the community agenda, would be to somehow be able to get either the help of a psychiatric social worker, possibly through a liaison, through an already existing organization such as Newport County Mental Health, that would have office hours and would have availability to the Town of Little Compton. We have problems in this town, which all of us know of, every time we have them one way or another, and I think we have a tough time dealing

with them. We have a tough time dealing with domestic problems, domestic abuse, we have problems with the issues our police force deals with and I think we need some services in this town. And I think all of those things are very much allied to substance abuse.

Joan Dennis

I feel that prevention is very important, which includes the substance abuse, which has already been mentioned, and the community center, and I hope what Johanne brought up is a part of it, where they come in for a few hours a week. The community center is important because the whole community is involved in it.

Senator Enos

I came here to here to hear the pulse of the community. It's a very interesting subject and we may set the standard for the nation. I'd like to see what the people of Little Compton feel about the subject.

Moderator

You are not too late. We have just run out of speakers, but we do have a tape that will be available to the council and for other purposes and certainly you can get briefed that way.

Brett McKenzie

Fools rush in where angels fear to tread, and I'm going to rush in like a fool, but I think that this meeting has taken on the tone of a wake. And I think the reason it has taken on the tone of a wake is we have had an opportunity at one time in the Town of Little Compton to work with the Federal government in a very loosely organized program, but with some broad brush guidelines and for some reason or another we kicked up our heels a lot and we have essentially killed the golden goose. I think this meeting is trying to breathe life into that and that's the reason we've had

such a small response. I think if we can admit that and move on, we can get a lot further.

Henry Laferriere

I would like to ask if anybody has a sense of where this goes next. I understand there are some hearings in Washington; are those still going to be held.

Moderator

They have been scheduled a couple of times, I think they are scheduled for a date later this month -- June 22nd.

Henry Laferriere

Can I ask if these comments will be read or presented to Congress as evidence?

Moderator

I can't answer your question except speculatively, I assume that a contact could be made with those who planning the list of witnesses for that hearing and request an opportunity for individuals from Little Compton to appear and speak. They may approach us, the town, I don't know. I got one call just get some thoughts about who might be available, and I gave him some ideas. I didn't hear again from him. I'm not really sure what's going on, except they are apparently planning a hearing and assembling a list of witnesses and I'm sure it doesn't pertain exclusively to Little Compton, because it is a matter of the legislation and whether Congress wants to do anything to change it in any fundamental ways. That is the subject matter of the hearing. That is all I can say.

Attendee:

You might explain why this meeting is being held.

Moderator:

It was suggested by Gerald Humphrey that it would be a good idea to allow members of the community to come forward and express their views, the timing of it certainly was related to the upcoming hearings in Washington and primarily to inform the council and each other of what people are thinking about.

Attendee:

Specifically, because Ron Machtley wrote the council, asking them what their druthers were and if the drug forfeiture money could be used for something.

Moderator:

I have not seen that communication. But I guess I did hear about it.

Attendee:

That's why it came up on the council agenda, and the council was open to receive Mr. Humphrey's suggestion.

Dennis Riley:

Resident of the town and member of Senator Pell's staff. I cannot speak for Congressman Machtley, but I think it is entitled an informational hearing, on the house side. I don't know their rules, the house and senate, but if it is an informational hearing and conducted the way they do in the senate, I think the transcript probably could be submitted. I believe Congressman Machtley who is on the committee would be more than happy to do that. I think he will do whatever he can to achieve that goal.

Moderator:

I think if he could be contacted and asked how he would like to receive it for presentation.

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Attendee:

If the letter was addressed to the council, and the council responded by having this meeting, may I ask if the council members who are present will, in fact, be responsible for forwarding these comments in their entirety to Mr. Machtley for testimony at the hearing.

Jane Cabot:

Mr. Machtley's letter is on the agenda for a week from tonight. I talked with Mr. Machtley himself; he wants a consensus of the council before he makes any recommendations. I have no idea what the council will do with tonight's meeting. We will have this on the 10th. Congressman Machtley is not on this specific subcommittee that is having the hearings. He told me they are strictly informational hearings. There is no guarantee that the law is going to be changed or that anything is going to happen. It is strictly informational at this point.

Attendee:

Are these a matter of public record. Can I get a copy of these so that I can be assured that Mr. Machtley gets a copy in his hands.

Jane Cabot

If we have them at the council meeting, yes.

Attendee:

They have to be accepted at the council meeting first?

Jane Cabot

Normally, they are accepted at the council meeting. They will be at the council meeting, once Marilyn gets them to us.

Attendee:

My concern is the date and timing. The Council meeting is on the 10th.

Jane Cabot

Now they tell me the hearings are on the 22nd. And that's the third time they've been postponed.

Moderator

Any further comments?

Attendee:

In answer to Henry's concern, I will be happy if they get copies of this.

Moderator

I will declare the meeting adjourned.

Ms. BROWN. In addition, we want to hold, for 7 days, the record open for subcommittee members that would like to make additional statements.

At this time, we will show several minutes of videotape before the hearing begins, a segment of 60 Minutes in April of this year and a segment from the news with Peter Jennings. These highlight the cases of two of the witnesses who will be testifying today.

[Videotape shown.]

Ms. BROWN. Thank you. At this time, I would like to introduce panel 1, U.S. Representative Hyde and Representative Martinez of Florida.

Our first panel this morning includes my distinguished colleague and my former colleague of 10 years in the Florida house.

At this time, will you stand so we can give you the oath?

[Witnesses sworn.]

Ms. BROWN. Mr. Hyde.

STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. HYDE. Thank you, Madam Chairwoman, for inviting me to speak before your subcommittee.

Our musty civil asset forfeiture laws, enacted at the dawn of our republic to protect the Nation's customs revenues from the depredations of smugglers, have been recruited in the war against drugs, taking in hundreds of millions of dollars a year in cash intended for drug buys, from the sale of cars and boats and homes used by drug traffickers in their business dealings, and in the proceeds of drug sales. This money is being ploughed back into law enforcement. It is, indeed, a delicious irony that, as former Attorney General Dick Thornburgh said, "it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation."

Unfortunately, our civil asset seizure laws are being used in terribly unjust ways, are depriving innocent citizens of their property with nothing that can be called due process. This is wrong, and it must be changed.

Please enter with me the Kafkaesque world of civil asset forfeiture. I advise you never to buy an airplane ticket at an airport with cash. This behavior will likely cause the ticket agent to alert police as to a possible "drug dealer." You will be searched, and if you are carrying large amounts of cash it will be confiscated. Unfortunately for you, you fit a "drug profile." And be very careful how you leave a plane. As the Pittsburgh Press reported:

> DEA agents in Illinois are told it is suspicious if their subjects are among the first people off a plane, because it shows they are in a hurry. In Michigan, the DEA says that being the last off the plane is suspicious because the suspect is trying to appear unconcerned. And in Ohio, agents are told suspicion should surface when suspects deplane in the middle of a group because they may be trying to lose themselves in a crowd.

But say you are carrying no drugs. The money was to be used at an auction of antique cars where business is done in cash only. It doesn't matter. Agents can seize your money based on "probable cause" that it is intended for use in a drug transaction. Don't

worry, you will be courteously sent on your way, but without your cash. If you want to get it back, your troubles have just begun.

Civil asset forfeiture is a relic of a medieval English practice whereby an object responsible for an accidental death was forfeited to the king, who would provide the proceeds for masses to be said for the good of the dead man's soul. It is the inanimate object itself that is "guilty" of wrongdoing. Thus, you never have to be convicted of any crime to lose your property. You never have to be charged with any crime. In fact, even if you are acquitted by a jury of criminal charges, your property can be seized.

In attempting to get your property back, you have available none of the procedural safeguards of the criminal law, since you are not being threatened with a deprivation of liberty. All the government need show to justify a seizure is probable cause that the property is subject to forfeiture. Probable cause can be provided by hearsay and innuendo, evidence of insufficient reliability to be admissible in a court of law. Then you must prove, a negative, that the property is "innocent."

What are some of the other roadblocks you will face in getting your property back? You are not entitled to an attorney if indigent. You must provide a 10 percent bond for the privilege of contesting the government's seizure of your property. You have an absurdly period of time to file a claim. In some jurisdictions, you can't get your property back despite doing all you can to prevent its illegal use by others, if you knew of the illegal use by others. And even if you somehow prevail, the government is not liable for any damage caused by its negligent handling or storage of property. This is terribly unjust.

In a democracy, means can be as important as ends. If more money is needed for the war on drugs, Congress should appropriate it. I am certainly prepared to. However, we cannot continue to unjustly take assets from property owners unlucky enough to be caught up in civil forfeiture proceedings. This is unjust; this is abusive; and it must be addressed.

I have, therefore, introduced H.R. 2417, the Civil Asset Forfeiture Reform Act. It proposes seven common sense changes in current asset seizure laws: One, it puts the burden of proof where it belongs, with the government; two, it provides for appointment of counsel for indigents; three, it makes clear that property owners who take reasonable steps to prevent others from using their property for drug transactions can get their property back; four, it eliminates the 10 percent bond requirement; five, it gives a property owner 60 days from seizure to contest a forfeiture, not today's 10 days; six, it allows property owners to sue the government for negligence in its handling or storage of property; seven, it allows property to be returned to the owner pending final disposition of a case as long as conditions are put on the release that preserve the government's ability to eventually carry out a forfeiture.

Now, I know some advocate going further, for instance doing away with civil asset forfeiture altogether or outlawing the Reagan/Bush era "zero-tolerance" policy that allowed for the forfeiture of a yacht because one marijuana cigarette was found on board. I am not now prepared to do so. I think that we can derive great societal benefits from civil asset forfeiture, if it is fairly applied. But in any

event, it is the purpose of hearings such as this one to document the case for reform and to suggest its needed scope. I will be paying careful attention.

Madam Chairwoman, I look forward to working with you and the other members of this committee in reforming our civil asset forfeiture laws. Thank you very much for allowing me to testify.

Ms. BROWN. Thank you very much.

[The prepared statement of Mr. Hyde follows:]

STATEMENT OF THE HONORABLE HENRY J. HYDE
BEFORE THE HOUSE GOVERNMENT OPERATIONS COMMITTEE'S
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

JUNE 22, 1993

Our musty civil asset forfeiture laws, enacted at the dawn of our republic to protect the nation's customs revenues from the depredations of smugglers, have been recruited in the war against drugs. This I find wholly proper. The federal government is taking in hundreds of millions of dollars a year in cash intended for drug buys, from the sale of cars and boats and homes used by drug traffickers in their business dealings, and in the proceeds of drug sales. This money is being ploughed back into law enforcement. It is indeed a delicious irony that, as former Attorney General Dick Thornburgh said, "it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation."

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practice whereby an object responsible for an accidental death was forfeited to the king, who would provide the proceeds for masses to be said for the good of the dead man's soul. It is the inanimate object itself that is "guilty" of wrongdoing. Thus, you never have to be convicted of any crime to lose your property. You never have to be charged with any crime. In fact, even if you are acquitted by a jury of criminal charges, your property can be seized.

In attempting to get your property back, you have available none of the procedural safeguards of the criminal law, since you are not being threatened with a deprivation of liberty. All the government need show to justify a seizure is probable cause that the property is subject to forfeiture. Probable cause can be provided by hearsay and innuendo, evidence of insufficient reliability to be admissible in a court of law. Then you must prove that the property is "innocent"!

What are some of the other roadblocks you will face in getting your property back? You are not entitled to an attorney if indigent. You must provide a 10% bond for the privilege of contesting the government's seizure. You have an absurdly short period of time to file a claim. In some jurisdictions, you can't get your property back despite doing all you can to prevent its illegal use by others, if you knew of the illegal use. And even if you somehow prevail, the government is not liable for any damage caused by its negligent handling or storage of property.

This is terribly unjust. In a democracy, means can be as important as ends. If more money is needed for the war on drugs, Congress should appropriate it. I am certainly prepared to. However, we cannot continue to unjustly take assets from property owners unlucky enough to be caught up in civil forfeiture proceedings. Nothing less than the sanctity of private property is at stake here. How can we continue to urge the dispossessed, the so-called underclass, to become entrepreneurs, to buy into the American Dream, if their property so painfully acquired can be so cavalierly taken away? This is unjust -- this is abusive -- and it must be addressed.

I have therefore introduced H.R. 2417, the Civil Asset Forfeiture Reform Act. It proposes seven commonsense changes in current asset seizure laws. 1) Its puts the burden of proof where it belongs -- with the government. 2) It provides for the appointment of counsel for indigents. 3) It makes clear that property owners who take reasonable steps to prevent others from using their property for drug transactions can get their property back. 4) It eliminates the 10% bond requirement. 5) It

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Mr. Chairman, I look forward to working with you and the other members of this committee in reforming our civil asset forfeiture laws. Thank you very much for allowing me to testify.

Ms. BROWN. Representative Martinez.

STATEMENT OF ELVIN MARTINEZ, CHAIRMAN, FLORIDA HOUSE COMMITTEE ON CRIMINAL JUSTICE

Mr. MARTINEZ. Thank you Madam Chairwoman and members of the committee.

I am Elvin Martinez. I represent the 58th district in Florida which includes part of Tampa. I currently chair the Florida House Criminal Justice Committee and have served as chairman or vice chairman for 8 of the past 12 years. I also served 2 years as the chairman of the Criminal Justice Subcommittee of the House Appropriations Committee.

I am a member of the Florida bar and am honored to have been chosen Florida Department of Law Enforcement "Honorary Special Agent" for 1986 and their "Crime Fighter of the Year" in 1990.

I mention these honors because I want to address the issues surrounding the Asset Forfeiture Program both as a State legislator and as a strong defender of law enforcement on the State and Federal level.

I was involved in the initial crafting of Florida's contraband forfeiture law as well as subsequent efforts to reform it. I remember well our hopes and intentions at the inception of this process.

In our long struggle against drugs and crime in Florida, the legislature sought, at last, a tool for law enforcement to hit the big-time criminals at the source of their power: Their wealth. We sought a way to take the assets wherewith they committed their crimes with seeming impunity.

The original 1974 act provided for seizure of vehicles, vessels, and aircraft used in transporting contraband. In 1980, we broadened it to include personal property used in any felony. Rights to seized property vested immediately in the State, subject to a court order of forfeiture.

In 1989, real property was added to the list in our State. Real property could already be seized under RICO if there was prolonged criminal activity. But under the Contraband Forfeiture Act, one criminal episode was enough.

Although we had made the act a powerful and flexible tool for law enforcement, our earnest expectation was that it would be used to target the criminal hierarchy that had so long evaded criminal sanctions.

We knew we were filling our jails and prisons with the easily replaceable foot soldiers of crime—many little more than slaves to the culture of drugs and crime—while those at the top were scarcely inconvenienced by our efforts.

We felt we were, to paraphrase Henry David Thoreau, hacking at the branches of crime instead of the roots.

And the early fruits of the act were tantalizing. We saw drug lords dispossessed of their estates. We saw some of the navies and air forces of the drug trade dismantled. And we saw law enforcement agencies using the money to enhance their own capacity to fight crime.

We had given law enforcement a powerful tool, indeed. But before long, we began to see the operation of Lord Action's famous axiom: That power "tends to corrupt."

Too often, law enforcement agencies seemed to use harassment, intimidation, and delay to frustrate the legal efforts of those with claims as innocent owners or lienholders of seized property, and to continue to deprive the owner of its use even after their legal arguments had failed.

Some agencies even hired attorneys on a contingency basis to beat back efforts to retrieve property.

Furthermore, law enforcement agencies have apparently abused property in their hands and refused to make good on the loss to the owner even after the property was returned.

For example, a $325,000 boat belonging to a Mr. Robert Roseioli of Fort Lauderdale suffered $60,000 in damage at the hands of the Broward County Sheriff's Department. They have refused to even discuss the damages with him.

To many individuals and business owners, these kinds of tactics have been financially ruinous even though the owners were ultimately found innocent of any wrongdoing.

We had built protections into the 1980 changes. We protected the property rights of innocent owners and lienholders but also gave them the burden of proving they "neither knew nor should have known" of illegal use.

In 1985, we created protections for innocent spouses who owned property jointly. We allowed owners to sue to regain property if forfeiture actions weren't initiated within 90 days.

Those who were sophisticated in the law, who had access to able attorneys, who had hundreds of thousands of dollars at stake and perhaps hundreds of thousands more to fight with, took full advantage of the protections of the law.

But those with little means, little sophistication, and perhaps most importantly, little faith in eventual justice, often saw themselves without recourse.

And, perhaps, predictably, those who laced the real capacity to fight back became targets of opportunity in a system that seemed to lose sight of its original goal and begin to see forfeiture as a source of agency funding rather than a crime-fighting tool.

Florida's Contraband Forfeiture Act became a casualty of something I call the "Sheriff of Nottingham Syndrome."

The sheriff of Nottingham, as every child knows, funded his substantial treasure primarily by squeezing the poor and using pretexts to seize the estates of the politically powerless for the benefit of himself and his friends.

Who knows? In the beginning, he may have taken his law enforcement duties seriously, but in the end, he was corrupted by his dependence on seizures and fines.

Perhaps we could just as well call it "the Judge Roy Bean Syndrome" after the notorious 19th century magistrate who dispensed whiskey and frontier justice from his West Texas bar, paying himself with the fines he collected.

But wherever and however the sheriff of Nottingham syndrome appears, its eventual cost is in a loss of respect and support for our law enforcement and justice systems in the hearts of ordinary citizens.

I strongly believe that nothing is more dangerous to law enforcement in this nation.

Some abuses of the Florida law have been dealt with. In 1992, the legislature amended the act in response to a Florida supreme court decision finding the forfeiture law facially constitutional but procedurally deficient.

Under the 1992 reforms, owners of personal property are entitled to notice of an adversarial preliminary hearing to determine whether there was probable cause for the seizure.

The amendment prohibits seizure of real property until a hearing. Until final disposition, the seizing agency can do nothing more with the property than is necessary to keep it safe and prevent its use for criminal purposes.

The reforms put the burden on the seizing agency to prove by clear and convincing evidence that the use of the property violated the act.

And no one with an interest in the property would lose that interest if they could show by a preponderance of evidence that he or she neither knew nor should have known that the property was used in a crime.

If the seizing agency loses and appeals, it may be assessed loss of income and value for property held during the appeal. If the court decides the agency showed bad faith or abuse of discretion, it may have to pay attorney's fees and costs as well.

The seized property must be returned immediately without any charge for towing, storage, or maintenance.

When a seizing agency and a claimant settle a forfeiture action, the settlement must be reviewed by the court if a forfeiture proceeding has been initiated or by a mediator or arbitrator if it has not.

Not all the victims of abuse of the forfeiture law are poor and powerless. Law enforcement agencies have also struck institutions that make loans to buy property allegedly used in subsequent criminal offenses. Banks are put in the unhappy position of having to run criminal checks on loan customers, delaying approval by up to 2 weeks. They must also either call in loans to customers charged with offenses and be sued by the customers or fail to call them in and lose their innocent lienholder status in a forfeiture action.

In one case, a bank was forced to repossess a car owned by a woman whose son was caught with marijuana, at a loss to the bank of $5,000 plus attorney's cost. In another case, a bank was charged with knowledge of an offense before an arrest had even been made. In a third case, a bank was asked to sign an agreement to relinquish its innocent lienholder status in case a certain car was seized in the future.

All this represents costs, delays, legal liabilities and record-keeping tasks that would render consumer loans prohibitively costly and slow. In 1993, the regular session, reforms to correct this problem were passed in the Florida House of Representatives but died in the State senate.

One amendment would have required the seizing agency to bear the burden of proof by clear and convincing evidence that the lienholder had actual knowledge at the time of the loan that the intended use was criminal. Another proposed reform would have inserted in the act a policy statement that the principal objective

of the act is law enforcement and that a desire to maximize revenues must not override law enforcement considerations.

Nowhere has the perversion of law enforcement goals become more apparent than on Florida's interstate highways. Cash seizures on I–95 in Volusia County in the east central part of this State are especially troubling.

This is the drama that has replayed itself thousands of times on Florida roadsides: A law enforcement officer targets a driver, often from out of State, pulls the car over on a pretext, and after issuing a friendly verbal warning, suddenly asks to search the car for contraband.

Rarely do drivers resist. Sometimes they smile and joke with the officers. Little do they know the cash they brought to shop bargains at collector shows and auctions or for some equally legitimate purpose is about to be separated from them subject only to the mercy of an unfamiliar court system in an unfamiliar part of the country.

Unsurprisingly, most are willing to strike any deal to get even a part of their money back without having to hire a lawyer and risk everything on a court proceeding in which they bear the burden of proof—not merely that the money was theirs, but that they planned nothing illegal with it.

An illuminating series of articles in the Orlando Sentinel has provided some statistics on the Volusia County seizures. Three out of four drivers are never charged with any offense. Of those, from whom cash is seized without charges, 9 out of 10 are African-American or Hispanics.

In those approximately 200 stops, officers took $626,000 from whites and $3.8 million from minorities.

One driver was deemed suspicious because he carried too much luggage; another because he carried too little. The deputies routinely said bills in denominations of $1, $5, $10, $20, $50, $100 were suspicious because they were typical of the denominations that drug dealers carry.

What else is there?

In one case a Hispanic man headed to Miami with $19,000 in cash to look at antique cars. Deputies decided it was drug money. He showed bank documents for a loan, had no criminal past, but only got part of his money back.

I recently met with a young man who lost $524 in tips he earned as a sky cap at Tampa International Airport when deputies arrested his roommate for possession of a small amount of marijuana. There was no connection between the roommate's arrest and the money, but it would have cost more than the money lost to retrieve it in court.

A judge in Florida's Eighth Circuit recently granted a claimant attorney's fees and costs against the Alachua County Sheriff's Department finding that the deputies use a race—or ethnic—based profile to make stops on a pretext and violate fourth amendment rights.

Madam Chairwoman, we will continue to work for reforms in Florida's forfeiture law. But there is also a need for change at the Federal level. The asset sharing provision of the Federal forfeiture statute allows agencies to "adopt" forfeiture actions to circumvent certain State restrictions.

Under this scheme, the Federal agency adopts a case for a small percentage of the proceeds. I would emphatically welcome the attention of this subcommittee to this problem.

Respect for law enforcement and faith in the legal system at the State and Federal levels make the firmest foundation of support and defense for a society based on law.

We have eroded that foundation badly.

Our law enforcement agencies can buy the fastest cars, the most sophisticated electronics, the most awe-inspiring weapons, and still remain naked and defenseless if they don't also have the respect and goodwill of the community they are pledged to serve.

I know many Floridians, many people of goodwill, across the Nation, are afraid of the threat of drugs and crime and want us to do what is necessary to keep them safe. And we must do our best to protect them.

But each time an honest and well-intentioned man or woman is stopped on a race or ethnic-based profile under an insultingly clear pretext, subjected to close interrogation, bullied into submitting to a search and, all too often, stripped of hard-earned property, each time the legal process is used to frustrate rather than answer the just demands of our citizens, the law has turned a potentially good friend into a resentful enemy.

And nothing can more quickly undermine our Nation's safety.

Thank you so very much for inviting me. I will be happy to answer any questions.

[The prepared statement of Mr. Martinez follows:]

BACK-UP INFORMATION FOR THE
TESTIMONY OF STATE REP. ELVIN MARTINEZ
BEFORE THE CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

The Honorable John Conyers, Chairman
House Government Operations Committee
Washington, DC 20515

Re: Asset Forfeiture

Congressman:

My name is Elvin Martinez, and I currently serve in the Florida House of Representatives. I represent the citizens of the 58th district, which includes a portion of the Tampa, Florida area. I began my legislative service in the House of Representatives in 1966 and served until 1974. I was elected again in 1978 and have been reelected subsequently. I have been Chairman of the Criminal Justice Committee since 1990. In addition to my current assignment, I have served as Chairman of the Elections Committee (1970-1974), Vice-Chairman of the Criminal Justice Committee (1978-1980), Chairman of the Criminal Justice Committee (1982-1986), Chairman of the Retirement, Personnel and Collective Bargaining Committee (1986-1988), and Chairman of the Criminal Justice Appropriations Committee from 1988 to 1990. I have the distinction of having been selected as the Florida Department of Law Enforcement's Honorary Special Agent in 1986, and was selected as their 1990 Crime Fighter of the Year. In addition to my responsibilities as a legislator, I am a practicing member of the Florida bar.

I am pleased that you have elected to undertake a review of the Asset Forfeiture Program and I am grateful for the opportunity to share my concerns regarding asset forfeiture with you and the members of your committee. As Chairman of the Committee on Criminal Justice, I have been integrally involved in the creation and subsequent reform of the Florida Contraband Forfeiture Act, and remain committed to insuring that asset forfeiture continues to be a viable and responsible law enforcement tool.

Florida's original contraband forfeiture law was introduced in 1974 as the "Florida Uniform Contraband Transportation Act", Ch. 74-385, Laws of Florida. That law focused on the manufacture, possession, or transportation of contraband and allowed for the seizure and forfeiture of contraband articles.

In 1974 the definition of "contraband articles" only included controlled substances, gambling paraphernalia, lottery tickets, equipment and substances used in violation of the beverage or tobacco laws, and motor fuel upon which taxes had not been paid. The 1974 Act also provided for the seizure and forfeiture of vessels, vehicles and aircraft used to transport contraband articles.

In 1980, the Uniform Contraband Transportation Act was significantly reformed to provide law enforcement officials with broader forfeiture authority. The Act was renamed the "Florida Contraband Forfeiture Act", Ch. 80-68, Laws of Florida. The 1980 reformation expanded the authority of local law enforcement agencies to seize and forfeit a much broader range of property involved in illegal activities. The definition of "contraband article" was expanded to include any personal property used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony. The 1980 Act provided that the rights to seized property vested immediately in the state. Additionally, the Act required the court to enter a final order of forfeiture on seized property and mandated that law enforcement agencies account for the accumulation and disbursement of forfeiture proceeds.

The 1980 Act required that if the seizing agency was a local law enforcement agency, the proceeds from contraband forfeitures had to be deposited into a special law enforcement trust fund established by the governing body of the county or municipality. If the seizing agency was a state agency other than the Florida Department of Law Enforcement (FDLE), the Department of Highway Safety and Motor Vehicles (DHSMV), or the Department of Natural Resources (DNR), the proceeds from the forfeiture were to be deposited into the General Revenue Fund. In the case of FDLE, DHSMV, and DNR, special law enforcement trust funds were established in those agencies to receive and disburse forfeiture monies.

The 1980 Act also provided protection for the property rights of innocent owners and lienholders, however, because forfeiture proceedings are in rem, the burden of proving innocence was placed on the lienholder or innocent owner. In other words, the Act required innocent owners and lienholders to prove that they "neither knew, nor should have known after reasonable inquiry, that the property was employed or was likely to be employed in criminal activity."

In 1985 the Act was amended to allow property owners to initiate proceedings to regain their property if a forfeiture action had not been brought by the state within 90 days. The 1985 changes also created a protection against forfeiture of property jointly owned between husband and wife.

Florida's Contraband Forfeiture Act was amended in 1989 to permit the forfeiture of real property, or any interest in real property, when that property was used in the commission of a felony or when it was obtained in violation of the Contraband Forfeiture Act. Until 1989, real property was not subject to forfeiture under the contraband forfeiture statute, but was forfeitable under the Racketeer Influenced and Corrupt Organization Act (RICO). However, RICO requires evidence of prolonged criminal activity, unlike the Contraband Forfeiture Act, which requires only one criminal episode to trigger forfeiture.

The latest amendments to the Contraband Forfeiture Act were passed during the 1992 legislative session, Ch 92-54, Laws of Florida. The most significant of the 1992 amendments was to section 932.703, F.S. This amendment provides that personal property may be seized at the time of the violation or any time subsequent thereto, provided that the persons entitled to notice are informed of their right to an adversarial preliminary hearing to determine whether there was probable cause for the seizure. This amendment further provided that real property could not be seized until persons entitled to notice were afforded the opportunity to attend an adversarial hearing to determine whether probable cause for a seizure exists. If probable cause is established, the court is required to limit the restraint of seized property to the least restrictive means to protect such property from disposal, waste, or continued criminal use. The seizing agency is prohibited from using seized property for any purpose, other than for reasonable maintenance, until all rights to, interest in, and title to the property are perfected in the law enforcement agency.

The amendments affecting the disposition of real property were made largely as a result of a ruling by the Florida Supreme Court. On August 15, 1991, the Florida Supreme Court issued its decision in Department Of Law Enforcement v. Real Property, 16 F.L.W. S-497 (Fla. Aug. 15, 1991), in which it considered whether the Contraband Forfeiture Act, as it was amended in 1989, was constitutional on its face and as applied. In a unanimous decision the Court held that the statute was not unconstitutional. However, to correct deficiencies it found in the act, the Court issued a set of due process guidelines for circuit courts conducting contraband forfeiture proceedings. The Court held that in contraband forfeiture cases the following due process procedures must be followed in the circuit courts of this state:

A. The agency seeking forfeiture may file its complaint by applying for the issuance of a rule to show cause in the circuit court. The petition must be verified and supported by an affidavit.
B. The rule to show cause also shall require that responsive pleadings and affirmative defenses be filed within twenty days (20) of service of the rule to show cause.

C. During both real and personal property forfeiture actions, the state should use the least restrictive means to preserve the availability of potentially forfeitable assets. Short of a physical seizure of property, the state should consider either lis pendens, restraining orders, or property bonds.

D. In real property forfeiture actions, the state shall give notice to interested parties as to the time and place for the adversarial preliminary hearing. The Court anticipates that such hearing will take place within ten (10) days of the filing of the petition. Preliminary hearings shall be held prior to any initial restraint on real property, except for lis pendens.

E. In personal property forfeitures, the state must notify interested parties that they have a right to an adversarial hearing upon request. Such hearing should be held as soon as possible after seizure.

F. The Florida Rules of Civil Procedure shall otherwise control contraband forfeiture proceedings.

G. The ultimate issue of forfeiture must be decided by jury trial unless claimants waive that right.

H. "Due proof" under the Act means that the government may not take an individual's property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime.

I. Forfeiture must be limited to the property or the portion thereof that was used in the crime.

J. Any interest that a person has in property which is subject to forfeiture shall be preserved if that person establishes by a preponderance of the evidence that he had no knowledge that the property was being used in criminal activity.

Another significant change made in 1992 required that after July 1, 1992, any local law enforcement agency which acquires more than $15,000 of proceeds within a fiscal year under the Florida Contraband Forfeiture Act must expend or donate no less than 15 percent of such proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program. Additionally, every law enforcement agency in the state must submit semiannual reports, by April 10, and by October 10, to the Florida Department of Law Enforcement (FDLE) indicating whether that agency has received or forfeited property under the Contraband Forfeiture Act. The report, submitted on a form designed by FDLE, must specify the type, approximate value, court case number, type of offense, disposition of the property, and the amount of proceeds received or expended.

The remainder of the 1992 amendments are as follows:

- The definition of "contraband article" was changed to provide that personal or real property which was used, is being used, was intended to be used, or was attempted to be used in violation of any provision of the Contraband Forfeiture Act. Such contraband article is subject to forfeiture whether or not it is an element of the underlying felony offense. For instance, in a forfeiture case arising from the felony of vehicular homicide, the vehicle used to commit that offense, although it is an element of the crime, is subject to forfeiture under the Contraband Forfeiture Act. The bill defines the terms "bona fide lienholder", "promptly proceed", "complaint", "person entitled to notice", "adversarial preliminary hearing", "forfeiture proceeding", and "claimant."

- No action to recover any interest in the seized property may be maintained in any court unless forfeiture proceedings are not initiated within 45 days of the seizure. This 45-day limitation may be extended to 60 days if the court determines that there is good cause to extend the time. Additionally, no individually owned property, no lienholder's interest in property, no property jointly held or titled between husband and wife, and no rental or leasing company's interest in a seized vehicle may be forfeited if such owner or lienholder establishes by a preponderance of the evidence that they neither knew, nor should have known, that the property was employed or likely to be employed in criminal activity. Any seized vehicle which is rented or leased from a company which is in the business of renting or leasing vehicles shall be made available for the company to take possession as soon as practicable after it is seized.

- Any interest in, title to, or right to property which is held by a culpable co-owner, other than the interest held between husband and wife, may be forfeited if such co-owner cannot prove by a preponderance of the evidence that they neither knew, nor had reason to know that the property was used in violation of the Act. The seizing agency shall afford the remaining co-owner the opportunity to purchase the forfeited interest. If the forfeited interest is not purchased by the remaining co-owner, the seizing agency may either hold, sell, or dispose of such interest.

- If the seizing agency and claimant decide to settle a forfeiture action prior to the conclusion of the forfeiture proceeding, the settlement agreement must be reviewed by the court. When the forfeiture action has not been filed with a court, the agreement must be reviewed by a mediator or arbitrator.

- If the forfeiture action proceeds to trial, the seizing agency has the burden of proving by clear and convincing evidence that the intended use, attempted use, or use of the property was in violation of the Contraband Forfeiture Act. The court's final order of forfeiture shall perfect all rights to, title in, and interest to the forfeited property in the seizing agency. These perfected rights shall be subject only to the interest of bona fide lienholders.

- When the claimant prevails at trial and the seizing agency does not appeal, the seized property must be released immediately to the person entitled to possession. No towing charges, storage fees, or maintenance costs may be assessed against the claimant. The seizing agency's decision to appeal must be made by the chief administrative official of the agency.

- When the seizing agency loses at trial and then retains the seized property during the appellate process, the agency may be required to pay for the reasonable loss of value to the seized property, if it loses on appeal. Additionally, when the seizing agency loses at trial and then continues to hold income producing property during the appellate process, if the seizing agency loses on appeal it may be required to pay for the loss of income resulting from the continued holding of the seized property. When the seizing agency loses on appeal, it must immediately release the seized property to the person entitled to possession. No towing charges, storage fees, or maintenance costs may be assessed.

- When the claimant prevails at the close of the forfeiture proceeding or of any appeal, the court may, in its discretion, order the seizing agency to pay attorney fees and costs to the claimant if the court finds that the seizing agency did not proceed in good faith or exercised a gross abuse of discretion.

- FDLE is required to submit an annual report to the Criminal Justice Committees of the Florida House of Representatives and the Florida Senate. The annual report consists of a compilation of the information and data submitted in the semiannual reports of the law enforcement agencies.

The annual report by FDLE must also disclose all law enforcement agencies which have failed to comply with the reporting requirements.

- Section 932.706, F.S., was created to require the Criminal Justice Standards and Training Commission to develop a course of standardized training for basic recruits on the seizure and forfeiture of contraband articles under the Contraband Forfeiture Act.

- Section 932.707, F.S., was created to provide that a $5,000 civil fine, payable to the General Revenue Fund, is to be assessed against any law enforcement agency which fails to substantially comply with the reporting requirements of the Contraband Forfeiture Act. FDLE must report any noncomplying agency to the Office of the Comptroller, which is responsible for enforcing this section.

- Section 895.09, F.S., provides for the distribution of funds obtained through forfeitures under the RICO Act.

- Section 328.07, F.S., was amended to provide that no vessel shall be forfeited pursuant to the Contraband Forfeiture Act when the owner unknowingly, inadvertently, or neglectfully destroyed, removed, altered, covered, or defaced the vessel's hull identification number.

The amendment to section 328.07, F.S., was intended to eliminate abusive situations like that suffered by Mr. Robert Roseioli. Mr. Roseioli is a resident of Ft. Lauderdale, Florida and has been in business there since 1963. He has no criminal record and has never been arrested. Mr. Roseioli's 53 foot boat, valued at $325,000 was seized by the Coast Guard because the hull number was painted over and not clearly visible, a felony under Florida Law. On the same day the boat was seized, Mr. Roseioli provided the coast guard with the proper documentation on the boat and showed them where the numbers were located on the boat. The boat was released by the Coast Guard and the DEA. However, the boat was then seized by the Broward Sheriff's Office. Nineteen months later on the order of judges located in Broward and Palm Beach Counties, the Broward Sheriff's Office returned the boat.

While the boat was in the possession of the Broward Sheriff's Office it was alleged that people were living on the boat, fishing from the boat, and abusing the boat. During that period a fire caused $60,000 worth of damage to the boat. After 19 months and $300,000 worth of expenses, including $60,000 worth of attorney fees, the boat was returned to Mr. Roseioli. The Broward County Sheriff's Office refused talk to Mr. Roseioli.

Mr. Roseioli had recourse to sue for damages, however that course of action involved more time and legal expenses. The 1992 amendment to section 328.07, F. S., addressed this problem by providing that no vessel can be forfeited when the owner unknowingly, inadvertently, or negligently destroyed, removed, altered, covered, or defaced the vessel's hull identification number.

During this past legislative session, the Florida House Criminal Justice Committee introduced House Bill 807; a bill amending the Florida Contraband Forfeiture Act. The bill passed the House of Representatives by a vote of 112 to 0, but died in the Senate Committee on Criminal Justice.

The proposed amerdments incorporated recommendations made by the Governor's Task Force on Forfeiture, along with a recommendation by the Florida Banker's Association.

The Governor's Task Force on Forfeiture was specially empaneled to investigate reports that minority drivers were being unfairly targeted for drug stops on Interstate 95 by the Volusia County Sheriff's Department. The Governor was concerned that officers were stopping citizens on the basis of a profile --a car driven by an African American or Hispanic--and searching those cars without a legal basis for the stop. Although the Task Force made recommendations for changes to the Contraband Forfeiture Act, it chose not to address the issue of the profile stops.

The proposed amendment to subparagraph (6)(a) of section 932.703, F. S. provided that no bona fide lienholder's interest which has been perfected in the manner prescribed by law prior to seizure shall be forfeited unless the seizing agency established by clear and convincing evidence that the lienholder had actual knowledge, at the time the loan was made, that the property was being used in a criminal activity. This amendment was intended to address problems identified by the Florida Banker's Association. Illustrative of the problems are the following cases presented by the Barnett Bank of Florida, a member of the Florida Banker's Association.

CASE NO. 1
This case was recently settled. It involves the son of the Bank's customer who was arrested for possession of marijuana while driving his mother's car. The customer's vehicle was seized by Seminole County Sheriffs Department and turned over to the bank. The bank repossessed the vehicle and sold it and incurred a deficiency of $5,000. At that point Barnett sued the owner for the deficiency and the owner countersued the bank for wrongful repossession claiming the bank did not give proper notice. The bank entered into a stipulation and waived the deficiency note.

The loss to the bank was $5,000 for the deficiency and $4,000 in attorneys fees and costs. Here, there was no notice provided to the bank by the Sheriff's office, but the bank signed a receipt that it had knowledge of the arrest. To further complicate matters, the mother of the individual involved in the drug arrest purchased another car, in her name, with every intention of allowing the son use of the vehicle. Barnett purchased the paper, not realizing that this woman was the mother of the person involved in the earlier case. The mother later contacted the bank to let them know she was indeed that person. The bank asked her to sign a form providing assurances that the son would not be allowed to use the car. Her attorney would not allow her to sign the assurances and relinquish what he considers her civil rights to allow her son to drive the car.

CASE NO. 2
This forfeiture case arose out of a determination by the City of Miramar Police Department that the bank was not an innocent lienholder because it had an obligation to make a reasonable inquiry into the customer's criminal record prior to making the loan. This inquiry, according to the Miramar Police Department included a check with the Clerk of the Court, the Florida Department of Law Enforcement and other law enforcement or public records repositories to determine whether a criminal record exists.

It takes at least 10 days to get an FDLE report and 2 weeks to obtain a criminal record from a court clerk. The fees, time and labor involved in such activity are prohibitive. In addition, customers simply will not tolerate such delays in the approval of automobile loans. A further complication is that in a situation where a seizure occurred and there was no conviction, as often is the case with contraband actions, there would be no record even in the unlikely event the lender could conduct such an exhaustive search prior to approving a loan. In this case, however, the Miramar Police Department continued to press the issue and the bank had to go through the discovery process, depositions and the cost of litigation before the matter was ultimately settled.

CASE NO. 3
This case in Palm Bay involves a customer who was arrested and whose car was seized on February 26, 1993. He was released and the car returned to him. He was subsequently re-arrested and charged with a drug buy that occurred prior to February 26. The Palm Bay Police Department originally sought to forfeit the vehicle but was dissuaded from doing so by the loan officer who pointed out that the bank could not possibly have known about the prior event since that arrest did not occur until after the February 26th incident.

The bank, however, now is on notice for any future seizures pursuant to notice from the City of Palm Bay (Attachment A). The City has indicated that it plans to return the vehicle to the owner by the end of April 1993, and the bank plans to accelerate. The problem is that this payoff will be reflected in the records as a payoff rather than as a forfeiture action. Any loan officer who reads the file in the future will have no way of knowing a seizure or forfeiture was involved. Even if the same loan officer were at the same bank several years later and the same customer came in for a loan so that the loan officer did indeed have knowledge that at some point in the past this customer was involved in a seizure and forfeiture incident, if this customer's credit otherwise meets lending criteria, can the loan officer refuse to make the loan? Would he subject himself and the bank to a discrimination suit? If he did make the loan, would the bank automatically lose its collateral to forfeiture should the customer be involved in a seizure?

CASE NO. 4
This case is currently under review. Here, the Sheriff's Office seized a 1989 Chevrolet S-10 because the owner's son had used the vehicle to attempt to purchase a small amount of cocaine. The Sheriff's Department released the vehicle to the mother upon obtaining assurances that the mother would not allow her son to drive the vehicle again.

A few days later, the son was arrested on the same charges while driving the vehicle and the Sheriff's Office seized the vehicle once again. This time, the Sheriff's Office decided to return the car to Barnett Bank on the condition that the bank execute an indemnification agreement which requires the bank to acknowledge that if the vehicle were to be seized again, the bank would relinquish its innocent lienholder status. Barnett Bank has refused to sign the agreement. The case remains in limbo. The Sheriff's Office has refused to return the vehicle to the bank or to the owner, although the Sheriff's Office is not pursuing any forfeiture action.

As customers and their counsel become increasingly aware of the bank's vulnerability, they do not hesitate to sue or threaten suit when lenders attempt to repossess or accelerate. On the other hand, if the lender does not repossess or accelerate, the statute virtually sets up the lender for successful forfeiture action whereby law enforcement may obtain clear title to the property. Banks should not be bullied or conscripted into performing law enforcement work, particularly when they are offered no protection for the effort. The amendment proposed during the 1993 legislative session was designed to provide greater protection against this kind of law enforcement activity.

The proposed amendment to subsection (8) of section 932.703, F. S., provided that when an agency has seized personal property, the claimant may post a bond or other adequate security equivalent to the value of the property--unless the law enforcement agency determined that the nature of the property would allow it to be used as an instrumentality in the commission of another crime.

Subsection (1) of section 932.704, Florida Statutes, would have been amended to include a statement of policy which provided that law enforcement is the principal objective of asset forfeitures and that potential revenues from forfeitures must not be allowed to override fundamental law enforcement considerations such as public safety, the safety of law enforcement officers, or the investigation and prosecution of criminal activity.

The following amendments to section 932.704, Florida Statutes, were proposed by the Governor's Forfeiture Task Force:

Subsection (4) of section 932.704, Florida Statutes, would have been amended to provide that if the value of the seized property is $15,000 or less, the complaint must be filed in the county court in the county in which the seizure or the offense occurred.

Subparagraph (d) of subsection (5) of section 932.704, Florida Statutes, would have been amended to provide that neither law enforcement agencies nor claimants may be represented in forfeiture proceedings on a contingent fee basis.

Subsection (7) of section 932.704, Florida Statutes, would have required that only in situations where all seized property is returned in the same condition or amount as at the time of seizure can the required review of a settlement agreement be waived.

The amendment to subparagraph (a) of subsection (11) of section 932.704, Florida Statutes, would have required the Department of Law Enforcement to develop, in consultation with local law enforcement, model policy guidelines and training procedures to be used by state and local law enforcement agencies and state attorneys in the implementation of the Contraband Forfeiture Act.

Every law enforcement agency which files civil forfeiture actions would have been required to file, with the Department of Law Enforcement, a notarized statement evidencing compliance with the model policy guidelines. Additionally, every law enforcement agency which seizes property for the purpose of forfeiture would have been required to conduct periodic reviews of asset seizures to determine whether such seizures and forfeitures are in compliance with the provisions of the act and the model policies.

> Subparagraph (b) of subsection (11) of section 932.704, Florida Statutes, would have required the determination of whether or not to seize currency to be made by supervisory personnel, and the seizing officer's commanding officer, and the agency's legal counsel.

A strong lobbying effort by the Florida Sheriff's Association prevented any of the 1993 amendments from becoming law.

Mr. Chairman, somehow the intent of forfeiture laws, i.e., removing the profit motive from criminal activity, has taken on a new twist. We seem to be encouraging law enforcement agencies to supplement their budgets with questionable roadside stops of citizens. Increasingly, even when a criminal offense has occurred, we arrest the money and let the wrongdoer go free.

I have heard much testimony in my role as chairman of the committee that innocent citizens are being stopped on highways based upon a so-called "drug smuggler's profile". Volusia County, Florida, located in the central part of the state, has had a particularly nasty reputation for using this so-called profile. The vast majority of citizens victimized by this profile are either Hispanic or Black. One wonders whether the central component of the profile is skin color.

Typically, a Volusia County Sheriff's Deputy is parked in the median of the Interstate, on the pretext of working traffic detail, when the stop is made. The driver, usually an African American or Hispanic, is told that he or she failed to signal while making a lane change, had a broken tail light, or was weaving slightly in the lane. The driver is rarely cited for an infraction. Always, the deputy releases the driver from the traffic stop and then, as the driver walks back to his or her car, the deputy asks the driver whether he or she is carrying any weapons, drugs or contraband in the car and whether the deputy can search the car. Typically and predictably, the driver acquiesces.

In one case, an Hispanic man was headed to Miami with $19,000 in cash to look at antique cars. Deputies decided his money was drug money. He had no criminal past and there was nothing to suggest the commission of a crime. More importantly, he produced bank documents for the loan he had made, yet he only got part of his money back.

A most egregious example of how the Volusia County Sheriff's Department conducts these stops can be seen on the video tape which I forwarded to your staff person.

In this instance, when the vehicle owner, an African-American male, advised the Sheriff's Deputy that he did not have any weapons, drugs, or contraband, and that he would not consent to a search of his car, he was made to stand outside his car while the Volusia County Sheriff's Department conducted a complete and thorough search of the car and its contents with the aid of a drug sniffing dog. No drugs, weapons, or contraband were found. The only thing which resulted from this stop was the severe inconvenience to and unnecessary and unwarranted harassment of the motorist.

This same scenario plays in other Florida Counties due in no small part to the fact that the Volusia County Sheriff's Office now trains other Sheriff's Departments in the use of this so-called profile. I have attached a copy of a order of the Alachua County, Florida Circuit Court as evidence of the spread of this patently offensive conduct (Attachment B).

Often these roadside stops result in seizures of cash when there is not even a hint of wrongdoing. Once stopped, these citizens are intimidated, harassed, and stripped of their property based upon determinations of probable cause that likely would not withstand judicial scrutiny. These citizens are being denied the procedural safeguards that we have a right to expect as citizens of a democracy. The high cost of contesting seizures and the time constraints involved (a significant number of these persons reside in other states and do not have the resources to do battle with these uniformed highwaymen), result in citizens being coerced into accepting lopsided settlements which result in financial windfalls to law enforcement agencies at the expense of persons whose only crime is traveling on the nation's highways. Moreover, the procedures for securing the return of seized property are unduly burdensome, and often result in waste to non-monetary assets.

This past year, a young man called my law office asking for assistance in securing the return of $534.00 in tips he received as a skycap at Tampa International Airport. He had the misfortune of being the roommate of a young man who was stopped by the Tampa Police Department and arrested for being in possession of a small amount of marijuana. The officers conducted a search of the apartment occupied by these young men. They asked for and received permission to examine the contents of the safe where my client kept his tips. Although he was not implicated in any criminal wrongdoing and there appeared to be no connection between the arrest of the roommate and the search of the apartment, the tips were taken. Although it is likely that he would have prevailed in a forfeiture action, the expense involved in securing the return of the tips would have exceeded their value. The end result is that the skycap lost his money.

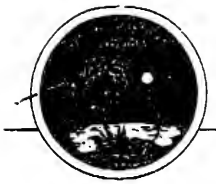
In addition to the issues I have outlined thus far, I am concerned that, through the asset sharing provisions of the federal forfeiture statute, state law enforcement agencies are allowing federal agencies to "adopt" their seizure cases to circumvent state laws which place restrictions on the use of seized proceeds (under this scheme the federal agency takes the case for a small percentage of the seizure proceeds and the state agency is free to spend its portion as it chooses). I would request that your committee address this issue and fashion a remedy that would not allow local law enforcement agencies to thwart state law.

Again, I am fully committed to fighting and winning the drug war in Florida, and I view asset forfeiture as a powerful weapon in this war. This war cannot be won, however, at the expense of innocent citizens.

Respectfully submitted,

Elvin L. Martinez
State Representative

Attachment A



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CITY OF
PALM BAY
FLORIDA

120 MALABAR ROAD, S.E. • PALM BAY FLORIDA 32907-3009 • (407) 952-3400

HS60180
9001

Barnett Bank of Central Florida
950 S. Apollo Blvd.
Melbourne, Fl 32901

RE: 89 Honda Civic 4D 1HGED3548KA090732 - Hengehold

Attention Consumer Loan Department:

We are preparing to release the above mentioned vehicle to your lienee for an out of court settlement.

Per Florida State Statute 923.703(3), when a vehicle is seized due to use in a first time felony offense, the lienor is notified. If forfeiture is granted to the law enforcement agency through civil court procedure, the lien may be satisfied through various avenues. However, if the vehicle is returned to the lienee, the lienor, after being forewarned, will lose their interest in the lien balance should the identical vehicle be subsequently used again by your lienee in a felony offense and seized for forfeiture.

Please contact me at (407) 952-3464 between the hours of 9:00 A.M. and 5:00 p.m., Monday through Friday, if I can be of any assistance.

Sincerely,

Robert A. Rossman
Chief of Police

Commander Mark Beard
Forfeiture Manager
PALM BAY POLICE DEPARTMENT

MB/dp

Attachment B

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA
DIVISION J

IN RE: FORFEITURE OF
Forty-four Thousand, Six Hundred
and Forty-Five Dollars,
($44,645.00) in U.S. Currency.

CASE NO. 92-2477-CA

AMENDED ORDER GRANTING CLAIMANTS' MOTION TO TAX COSTS AND ATTORNEY'S FEES

This forfeiture action is before the Court on Claimants' Motion to Tax Costs and Attorney's Fees, following a January 14, 1993, hearing. This Court has previously found that the Petitioner, Alachua County Sheriff's Office, did not establish probable cause to maintain this forfeiture action and, by Order dated October 22, 1992, entered judgment for the Claimants'. Accordingly, the Claimants are entitled to legal costs pursuant to Section 57.041, Fla. Statutes (1991). The prevailing Claimants are also entitled to an award of reasonable costs and attorney's fees pursuant to Section 932.704(10), Florida Statutes (1992 Supp.). In support of this disposition of the Claimants' motion, the Court supplements its findings at the January 14, 1993 hearing with the following:

1. This is not the first occasion that this Court has encountered a nighttime Interstate stop by the Alachua County Sheriff's Office of an out-of-state vehicle, driven by a person of a minority race or ethnic background, for a minor traffic infraction that inevitably results in a forfeiture seizure following a thorough, prolonged search, allegedly for drugs or weapons. Typically, the Alachua County deputy is parked in the median of the Interstate, ostensibly working traffic detail, when he makes the stop. The driver is not cited for an infraction, or arrested for any criminal activity, by the deputy. The deputy "releases" the driver from the traffic stop and then, as the driver walks back to his vehicle, accusingly asks the driver whether he or she is violating the law by carrying weapons, drugs or "contraband" in the vehicle and whether the deputy can search the car. Typically and predictably, the drivers acquiesces.

2. In this case, Claimant Carlos de la Puente is a Cuban-born black male who was driving a vehicle with a Georgia license plate on Interstate 75 at night in Alachua County. He was stopped for no tag light and issued a traffic warning by Deputy James Troiano, who saw Mr. de la Puente's car from the deputy's position on the Interstate 75 median. The deputy ran driver's license and vehicle registration computer checks; both were valid. The deputy issued a warning to Mr. De la Puente, then "released" him from the traffic stop. As the driver returned to his vehicle, Deputy Troiano called

out to him: "Mr. De la Puente, do you have any guns, any weapons, any drugs or contraband in your vehicle" and then immediately asked him for consent to search the car. Not surprisingly, Mr. De La Puente acquiesced, and a full-scale search of the vehicle ensued, yielding the currency at issue. Mr. De la Puente and his wife, who is African American, were asked to sit in the deputy's patrol car during the search. They clearly were not free to leave; they could not exit the patrol car, they could not leave unless they wished to do so without their car and belongings, and as Deputy Troiano testified, if they attempted to leave without their vehicle he would have arrested them because it is against the law for a person to walk roadside on the Interstate. The deputy found no drugs, no illegal paraphernalia and no weapons. Neither Mr. De la Puente nor his wife were arrested, but their property was seized.

3. Deputy Troiano is no stranger to this or other Courts in the Eighth Judicial Circuit. Most recently, he appeared before this Court as the seizing officer In Re: Forfeiture of Six Thousand Dollars ($6,000.00) in United States Currency, Case No. 92-1083-CA (Circuit Court, Eighth Judicial Circuit, Alachua County, Florida). This Court takes judicial notice of that proceeding, in which this Court also found no probable cause for the Alachua County Sheriff's Office to maintain a forfeiture action on facts virtually identical to those in the instant case. Deputy Troiano received training for this type of Interstate stop in Volusia County, where Sheriff Vogel and the Volusia County Sheriff's Office have received a good deal

of notoriety for forfeiture interdiction efforts. The deputy admits that he has used the exact same pattern of stopping and searching motorists "numerous times".

4. The Court further finds:

a. The traffic stop technique employed by Deputy Troiano is in fact used by him and other deputies at the Alachua County Sheriff's office in a patently pretextual pattern, designed to further the Petitioner's forfeiture efforts; and,

b. The Alachua County Sheriff's Office uses the race or ethnicity of motorists as a profile factor in conducting the pattern of stops, searches and seizures exemplified by this case.

5. Each finding in paragraphs 4a and 4b, individually and together, violates not only the Claimants' Florida and Federal constitutional rights to property and privacy, equal protection, due process and freedom from unreasonable searches and seizures, but also constitutes a lack of good faith and an abuse of the Alachua County Sheriff's Office's discretion under the Florida Contraband Forfeiture Act, as contemplated by Section 932.704(10), Fla. Statutes (1992 Supp.), justifying an award of reasonable costs and attorney's fees herein.

The Florida Legislature's recent amendment to the Florida Contraband Forfeiture Act, providing such an award of fees and costs to prevailing claimants under certain circumstances, accompanied an extensive statutory revision of the Act that was in response to public outcry over perceived abuse of Florida's

forfeiture laws. The award of reasonable attorney's fees and costs is designed to help protect the public from the inherent harshness of forfeiture seizures and to help correct abuse in appropriate cases. The circumstances of this case well demonstrate the need for such a remedy. Accordingly, it is

CONSIDERED ORDERED AND ADJUDGED that the Claimants' Motion to Tax Costs and Attorney's Fees is granted. The Claimants' are awarded attorney's fees in the total sum of $4,265.00 and costs in the total sum of $246.50, which shall be paid by the Petitioner to the Claimants' forthwith.

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida, this 5 day of March, A.D., 1993.

CHESTER B. CHANCE
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished this 8 day of March, A.D., 1993, upon the following:

Robert S. Driscoll, Esquire
P.O. Box 508
Gainesville, FL 32602

Cynthia Weygant, Esquire
Alachua County Sheriff's Office
P.O. Box 1210
Gainesville, FL 32602

Alvin Kendall. Esquire
134 Peach Street, NW
Suite 1105
Atlanta, GA 30303

JUDICIAL ASSISTANT

Ms. BROWN. Thank you very much.

Mr. Hyde, I want to thank you first for your leadership in this area.

I have just a couple of questions.

We all know there are problems with the drug courier's profile, payment of information, and earmarking money for law enforcement.

Will you work with this committee in these areas to improve the bill?

Mr. HYDE. I certainly will. With pleasure.

Ms. BROWN. Are there any questions for Mr. Hyde?

Mr. MCCANDLESS. Yes, ma'am.

You two gentlemen are intimately familiar with the subject of the hearing here. I would like to pose to you, collectively, a couple of questions, maybe on a devil's advocate basis, but to get your response, your thoughts, your ideas.

Two of the main drug corridors leading out of Mexico into the Los Angeles basin go through my district. These things are somewhat uncharacteristic of the law enforcement people that I do business with. But I realize problems are out there, and that is not the issue.

The question I pose to you is that if you find a large sum of money because of some other reason you stop the individual or individuals for probable cause, how can we establish some kind of a criteria in the law that would assist law enforcement if this is actually drug money.

How can we better get a handle on this and prevent what we have and what we have been talking about and yet give law enforcement some tool to work with?

Henry.

Mr. HYDE. I will try to answer it.

Mr. MCCANDLESS. The point here is it is an exception rather than a rule of a person's lifestyle to take large sums of money somewhere and buy building materials, not that the individual wasn't going to do that; and that is not the issue here.

Conversely, the gentleman provided evidence that he had withdrawn this money or borrowed it to buy the foreign car which gave the officer a means by which to say, all right, this money you obtained legally. Do you see the frustration here of an officer in trying to do his duty legitimately and yet his need for some guidance or criteria?

Mr. HYDE. The difficulty with using a profile system—and I am not saying we shouldn't use a profile system—but there has been no crime committed that they know of. Somebody looks suspicious or is acting suspiciously and, all of a sudden, whatever assets they have are confiscated and they do not get them back, whether or not you are charged with a crime. That is clearly wrong.

Now, it may well be that someone traveling with a lot of cash who can't explain why they have it or what they are going to do with it would create a reasonable suspicion; and there may be some justification for maintaining the status quo until you can verify that. Although I, frankly, am troubled with that.

If you do not know a crime has been committed but you arrest people and punish them because of the way they look, I think we

are in real trouble. But I would like to know more about how successful the profile method is in apprehending criminals and drug dealers. I suspect it is successful. I have been present at drug busts in airports in New York, and I have watched them work. They work well.

But regardless of the propriety or impropriety of the apprehension, the stopping of somebody, if that person is not charged with a crime, if that person has not done anything, that person's property ought to be returned to him or her promptly and in the same condition in which it was taken.

Mr. MCCANDLESS. Henry, I don't disagree with you at all on what you are saying. What I am looking for is a solution to the problem I tried to outline in my brief comments.

Mr. MARTINEZ. Congressman, if I may attempt to help?

I think the one curse there is is that it has become an industry for law enforcement, in getting the money.

Second, at least in the case in Florida, the individual officer out on the street is the one that makes all of the decisions. He decides whether the forfeiture is going to happen. I think there should be at least, minimally, a supervisory review of that decision, perhaps legal counsel. And, as the supreme court in Florida said, the burden of proof should be at least more than a preponderance of the evidence. It should be clear and convincing evidence to establish probable cause.

The very fact that you have large sums of cash should not, in my opinion, in America, deem you suspicious of being a criminal. I had one sheriff tell a committee of mine that, ain't nobody got any business in his county with more than $3,000 cash unless he's coming back from market after selling his products.

That obviously is not what America is all about.

But I think that the mere fact that someone has cash should not arouse suspicion. That is what it has come down to, the fact you have cash, nothing more.

I invite you to spend half an hour looking at some of the tapes. You will see an instance where a family—they happened to be black—with a 6-month-old child, was made to stand by the roadside for over an hour while they cajoled them into searching the car. If you are not searched, then they detain you. They have a dog come and sniff. If the dog barks, wow; that is it.

So I think there are ways. I think part of the problem is that law enforcement has been reluctant to try and solve this image problem that they have. Their attitude has been, to me, that this is our tool; you got no business messing with it. I think that that is wrong.

Mr. HYDE. If I may just add one comment more, abuse of power, in my judgment, by a government or law enforcement official, is every bit as heinous as the criminal act itself, and maybe more. Because it destroys confidence in government. If you cannot trust your own government, there is no appeal from it.

The abuse of power from whence there is no appeal, visited on usually little people—not always but usually—is something that we, in our search for justice, ought to be sensitive to and try to correct. Now probable cause is a many splendor thing. It calls for judgment, prudence, and experience. It can be abused, easily abused.

My concern is once the property has been seized and the person who owns it has no legal connection to the crime, isn't even charged with something, that person ought to get his property.

I hate the term "sanctity of property," because I don't know that property is holy; but I think in our Ten Commandments, "Thou shalt not steal" implies there is a right to own property. When a State takes it from you with no good basis, that is wrong.

That is what we are here to correct; at least the purpose of my bill is.

Mr. MCCANDLESS. I could not agree with you more. In fact, in my comments, I tried to address that issue. I guess my concern here is that we, as a society, tend to overreact sometimes.

If you are involved in one of these cases, obviously, you would disagree to the nth degree. We got to the point where we lost sight of society, and the rights of the individual were so great that society lost. Now we are beginning to come back, as a general rule, in terms of our laws and address a little bit more of the majority's rights and privileges than the individual's.

So I just hope that we do not go too far here.

Mr. HYDE. I do not want to abolish the asset forfeiture laws. There are those that do. Some of the people supporting my bill—I believe the ACLU—would like to abolish civil asset forfeiture. I don't go that far. I just want it administered fairly with due process for everybody. I hope that is a middle ground that is sustainable. I hope you agree.

Mr. MCCANDLESS. Thank you, Congressman.

Thank you, Representative Martinez.

Ms. BROWN. Mr. Martinez, it seems we have a real serious problem in Florida. The Orlando paper brought out a lot of major abuses by the State troopers and others.

Did your committee, in their initial investigation, turn up such abuses? What were the recommendations? I know this is not just a Florida problem.

Mr. MARTINEZ. Madam Chairwoman, yes, we did. We held hearings in Fort Lauderdale, Tampa, other areas. We find that essentially one of the things we think might solve some of the abuses, if you took the profit motive out of it and you required that these forfeited funds be turned over to the general revenue.

Under the current law, each agency has the right to use this money under prescribed uses. That is for uses that are not replacing the appropriated general revenue from whatever legislative body.

If the profit motive were to be eliminated, I think you would probably see some more expeditious use of this. That is one thing.

The other thing that disturbs it is the burden of proof, particularly with innocent owners. I can cite case after case of situations that have really developed with ugly results. I think that the seizing agency has to have more than just—for example, on the I–95 stops, none of those stops, or an overwhelming majority of those stops, are noncustodial stops. The officer couldn't keep custody even if he wanted to. All they can do is give you a ticket, if you are following too close. He cannot put you in the back seat of his car and coerce you and intimidate you into letting him search the car.

And so if the individual were to walk right off and drive away, the officer would have to find some other devices in order to detain him. But people are intimidated by that power. So that is the kind of thing we would like to stop.

What we tried to do was get all of the agencies in Florida to adopt guidelines where they would have to submit that they would all promise to adhere to these guidelines.

Well, we met a last. There was a lot of resistance from all of them. They didn't want guidelines. They see no problem with what they are doing.

So as long as we have that attitude, I think it is going to take just legislation that will probably result in neither side winning. And so I hope that we will be able to reach some kind of understanding.

Ms. BROWN. Mr. Mica.

Mr. MICA. Thank you, Madam Chairwoman.

Representative Martinez, good to see you again. We served together in the Florida legislature many years ago. I appreciate your being here today.

Just a quick question.

The Governor did put together a panel that looked at the Volusia County incidents. Was that beyond Volusia County, or was that just Volusia County? And were there any specific recommendations to the legislature or to changing Federal statutes that came as a result of that?

I noticed that from your testimony you said that certain attempts to modify the law failed in Florida in 1993. I guess it was this recent session.

Could you give us some background?

Mr. MARTINEZ. Yes, sir. As a result of the Orlando Sentinel series of articles which focused on Volusia County—and I am here to tell you that it is—it may be the most prevalent place because the sheriff is a particularly strong individual who has a record of fine law enforcement and a record of being able to detect drug smuggling and so forth; so he is very forceful.

But that is what keyed the interest. It is happening all over the State, happening on I–75, I–95, the turnpike, everywhere you have traffic going north and south.

But, yes, the Governor empaneled a task force composed—tried to make it composed of all sections. I believe there was a public defender—most of them were law enforcement, however, those dealing with forfeiture.

They made several recommendations. I have provided the committee—because it is rather lengthy, I have provided the committee with backup material. You will find that on page 11 of that backup material. Most of those recommendations were incorporated in the proposal of 1993 which did not go through the senate.

But essentially, guidelines—we wanted them to adopt guidelines and have the Federal—the Florida Department of Law Enforcement receive reports of what they are doing with the money, how much money they are collecting, and that sort of thing, and change the procedural thing.

Mr. MICA. You felt a key to the problem is the discretion that they have in keeping those funds, say, the motivation of going after just additional funding for their agencies?

Mr. MARTINEZ. I feel that that motivation to find an additional source of income is——

Mr. MICA. Something that needs——

Mr. MARTINEZ [continuing]. Something that needs to be looked at. If the idea is to punish the criminal—and that is what the object should be—it should not be to fund a government function. It might be a nice effect of that; but the primary situation should be to punish the criminal.

Mr. MICA. Just one final question.

Mr. HYDE. May I comment on that, just briefly?

Mr. MICA. Yes.

Mr. HYDE. I agree that there is a built-in conflict of interest. It is like the justice of the peace whose salary and expenses are paid out of the fines he levies with the people unlucky enough to be brought before him. Your chance of being found not guilty are slim to none.

But one of the motives for providing the ill-gotten gains of the drug traffic to law enforcement, to a widow's fund, to something like that, is to provide a disincentive to the corruption that is always present when you are dealing with enormous sums of money.

You are asking a policeman who is making a pittance to perform the most dangerous job in the country and deal with people who have hundreds and hundreds of thousands of dollars or more. It may be wise to provide some incentive to get them to turn that money in, and not be corrupted by it—maybe using it for law enforcement functions or for the families of people killed in action and that sort of thing.

So you have these two competing notions. One is to take away the incentive for them to overreach; and the other is to provide an incentive not to be corrupted by the big money that is involved.

So it is not an easy problem. I did want to mention that other aspect of it, too. Thank you.

Mr. MICA. Thank you, Madam Chairwoman.

Thank you.

Ms. BROWN. In closing, do you have any final statements either one of you would like to leave with us?

Mr. MARTINEZ. No, Madam Chairwoman. The only thing, looking at Congressman Mica, yourself, I feel like I am back in the Florida House of Representatives. I appreciate the invitation.

Ms. BROWN. Thank you so much, both of you, for your leadership in this area.

Mr. HYDE. It is reassuring to know this problem is getting attention at this level. We are all hopeful.

Thank you.

Ms. BROWN. Thank you.

Panel 2 will be Mr. Copeland.

Mr. Copeland, will you stand?

Mr. COPELAND. I have with me this morning on my left Laurie Sartorio, Assistant Director for Policy and Operations; on my right Mike Perez, our Assistant Director for Financial Management.

[Witnesses sworn.]

Mr. MCCANDLESS. May I, for the record, ask for the spelling of the names of the parties involved that are with Mr. Copeland?

Mr. COPELAND. Yes. Laurie Sartorio, S-A-R-T-O-R-I-O; Mike Perez, P-E-R-E-Z.

Ms. BROWN. Mr. Copeland is Director and chief counsel for the Executive Office of the U.S. Department of Justice.

STATEMENT OF CARY H. COPELAND, DIRECTOR AND CHIEF COUNSEL, EXECUTIVE OFFICE FOR ASSET FORFEITURE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY LAURIE J. SARTORIO, ASSISTANT DIRECTOR, POLICY AND OPERATIONS; AND MIKE PEREZ, ASSISTANT DIRECTOR, FINANCIAL MANAGEMENT

Mr. COPELAND. Yes, ma'am.

Thank you very much. I appreciate the opportunity to be here this morning to tell you our perspective on the Asset Forfeiture Program.

What I would like to do is file my prepared statement for the record and attempt to summarize it very quickly for the subcommittee, and then we will attempt to respond to any questions you may have this morning.

Ms. BROWN. Without objection.

Mr. COPELAND. We think at the Justice Department that asset forfeiture is one of the most effective weapons we have to deter crime by removing the profit from crime and immobilize crime syndicates by stripping them of the instrumentalities of crime.

We use a process, primarily civil forfeiture, which is 204 years old. It is tried and true. Congress has, over the years, added additional protections to the basic civil forfeiture law, most significantly the innocent owner defense. We think the system at the Federal level is working very well.

We think also that, at this time, we need to be looking at asset forfeiture and other alternatives to incarceration.

As the members of this subcommittee are aware, we are about capped out in terms of our ability to incarcerate people. Today, in the United States, 542 of every 100,000 adult Americans are in prison or in jail. That is the highest per capita incarceration rate in the world. I think the closest competition is South Africa which has about 318 of every 100,000 of its citizens in jail or prison.

Of course, it is very expensive, costing us about $70,000 to build prison space for one Federal prisoner. It costs us $18,000 a year to keep a prisoner incarcerated once we have the prison space built.

In sum, we need to be looking at alternatives to incarceration, and I would suggest to you this morning that asset forfeiture is the most promising alternative we have to incarceration and other conventional criminal remedies.

Beyond that, we also, through the forfeiture program and through our ability which the Congress gave us in 1984 to share forfeiture proceeds with the cooperating State and local law enforcement agencies, we have, over the last 8 years shared, now, in excess of $1.2 billion in Federal forfeiture proceeds with more than 3,000 State and local law enforcement agencies throughout the country.

We hear the concerns voiced that this creates a conflict of interest and that it leads law enforcement officers to run amok. I think the simple statistics themselves belie that.

Last year, 1992, we shared about $250 million in Federal forfeiture proceeds with State and local law enforcement agencies. During the same 1 year, State and local expenditures on law enforcement exceeded $75 billion.

So we are sharing about one-third of 1 percent of total State and local law enforcement budgets. I think one-third of 1 percent is not a sufficiently high level to raise these conflict concerns across the board. That is not to say there may not be specific law enforcement agencies that have problems.

As you know, there are over 16,000 State and local law enforcement agencies in this country, many of them very small. On average, on the whole, I think State and local law enforcement agencies, as we do, see this as a powerful tool; and they are trying to use it responsibly and prudently.

My office was created in 1989 to try to make sure we had the best possible management of the forfeiture program and that we had consistent and prudent procedures and policies in place. We have issued numerous policies over the years.

January 15, since I testified last before this committee, we issued six additional policies; and I have described those in my testimony. We are providing—have provided since January—expedited notice to owners to try to speed up the process, make sure we are not holding property for an undue length of time.

We have created a new procedure to provide expedited payments to innocent lienholders, intangible property cases; we already have that in place for real property. We have expanded that. That ameliorated any effect on innocent bankers and others who lent money on property subsequently seized.

We have provided for preforfeiture payments to lienholders and used that new authority twice. It helps us in essence to go in where there is a private individual perhaps holding a second mortgage on a house that has been seized and is suffering some hardship as a result of the seizure. It enables us, in essence, to go in and buy out the interest of that individual so that we are not hurting people unnecessarily.

We have established new policies with respect to in forma pauperis petitions. Of course, that is the process with respect to the bond requirement for seeking to have that bond waived if you are indigent. We have tried with the January issuance to make sure that we are looking at those petitions fairly and completely and granting them where appropriate.

We issued a model code of professional conduct for asset forfeiture, also popularly known as the "Ten Commandments" of asset forfeiture as part of our effort to provide leadership to the State and local law enforcement agencies throughout the country which are doing seizures and forfeitures. And we established greater restrictions on our adoption of State and local seizures for purposes of Federal forfeiture, another topic that has been mentioned this morning. There has been some concern voiced about that.

We have now in place a much more rigorous internal review of those cases. And I think to the extent that there were concerns 1

year ago or 2 years ago, those have been addressed with the new policies.

We are constantly looking for ways to improve our operations and to ensure that this program is one that is being operated in such a manner that the Congress and the public generally can have confidence in it.

To the extent, for example, that there have been concerns voiced about the value or probity, if you will, of a drug dog alert on currency, we are in the process of acquiring new state-of-the-art equipment which will allow us to back up the detector dog alerts in currency seizure cases with a scientific test that I think will be more reliable than the dog hits.

We are also engaged, as the chairwoman mentioned, in an internal comprehensive review of the Asset Forfeiture Program within the Department looking for ways to improve. We expect that that will result in new policies that will be issued hopefully this summer that will provide for more rigorous review throughout the Federal system of our cases, to strengthen the integrity of the equitable sharing program by requiring new audit accounting and certification procedures, to enhance our preseizure planning procedures, and that will provide for consistent regulations governing petitions for remission and mitigation of forfeitures.

Petitions for remission mitigation are the special "pardon process" built into the law for asset forfeiture cases. They are designed to minimize the harshness of forfeiture in specific cases. We are moving to make sure that the regulations we have in place are clear, understandable, and consistent across the government.

Now, in summary, we all down at the Justice Department take the same oath to support and defend the constitution that the members of this committee do. We take that oath very seriously. In this area, particularly, where we are using an old mechanism in a somewhat new way—the program is still, by comparison with incarceration and criminal fines, quite new—we are moving to make sure that not only are we doing right, but that we are seen and perceived as doing right.

So you may ask, well, why do we keep getting the criticism of the forfeiture program? I think that there are several parts to that.

First, it is still somewhat new; to some people, somewhat novel.

Second, we are becoming quite efficient and effective with the program. We are taking a lot of the profit out of crime. The criminals are not happy about that.

I think, certainly, it is a powerful weapon. Therefore, everyone wants to make sure that this powerful weapon is being used prudently. Any power can be abused.

I think, quite frankly, too, that the defense bar is very concerned in part because it makes them nervous to see the government separate criminals from their money because that is what they are accustomed to doing with their attorney's fees. I think to that extent, there is natural competition, if you will, between prosecutors and the defense bar.

In terms of the cases that we see mentioned in the press, a lot of these—I hope you will keep in mind—are State and local cases over which we have, at the Justice Department, no control.

In addition, there are cases cited as standing for the proposition that there are problems with the forfeiture program that have nothing to do with the forfeiture program.

In the Carlson case, for example, there was no seizure; there was no information that there was money at the premises. It was a straight case where the informant information was that there were 500 kilos of cocaine. That is what the agents were going after.

In the Volusia County case, again keep in mind, there was no Federal involvement whatsoever in that case. I am not here to endorse the Volusia County sheriff or criticize him. Quite frankly, I do not know the facts. To his credit, the Governor appointed a task force. I testified before the task force. I think the Governor will be moving to take appropriate action with respect to those problems.

In sum, we are always, Madam Chairwoman, trying to improve this program. We want to satisfy you. We want to satisfy everybody on this committee. If there is ever any Federal forfeiture case that you are concerned about, if you will give me a call, we will get up here and brief you in detail so that you have all the facts and can make up your own mind as to whether you think that particular case was an abuse or not.

I am persuaded we can convince you with respect to Federal cases, which are the ones we are responsible for, that our conduct is always carefully managed, carefully supervised. I am not saying we are perfect or have achieved some infallible state. To the extent we have looked at claims of abuse, we have not found them.

Again, I would be glad to share any information with you. We do run an open program.

That concludes my remarks. I would be glad to try to respond to any questions you have.

[The prepared statement of Mr. Copeland follows:]

Department of Justice

STATEMENT OF

CARY H. COPELAND

DIRECTOR AND CHIEF COUNSEL

EXECUTIVE OFFICE FOR ASSET FORFEITURE

OFFICE OF THE DEPUTY ATTORNEY GENERAL

BEFORE THE

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

GOVERNMENT OPERATIONS COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

CONCERNING ASSET FORFEITURE

June 22, 1993

Mr. Chairman and Members of the Subcommittee --

I welcome this opportunity to appear once again before the Subcommittee and appreciate your continuing interest in the Department of Justice Asset Forfeiture Program.

Asset forfeiture has become the principal legal mechanism by which the Government recovers money and property derived from or used to facilitate designated federal felony offenses. I have yet to meet any person who believes that criminals should be allowed to keep the profits and instrumentalities of their crimes. And although there are some who question the legal procedures of asset forfeiture, and particularly civil forfeiture, the civil forfeiture procedures we use today are substantially the same as those established by our Founding Fathers who enacted the first United States civil forfeiture law in 1789 -- and Congress has enacted statutes over the years which have added additional protection for innocent owners. It is often overlooked that civil forfeiture procedures have been examined by the Supreme Court on several occasions from the time of Chief Justice John Marshall to the time of Chief Justice William Rehnquist and that the constitutionality of civil forfeiture has been upheld on each occasion.

When I appeared before you last year, I noted that, in forfeiture, we are building a new remedy to strike at the economic underpinnings of criminal enterprises by removing the

profits, proceeds, and infrastructure which support criminal organizations. The ability to take the profit out of crime and to remove the instrumentalities of crime are the keys to forfeiture's enormous potential as an adjunct and alternative to conventional criminal remedies.

The Members of this Subcommittee are familiar with the limitations of incarceration as an anti-crime sanction: the United States has the highest per capita incarceration rate in the world; approximately 542 of every 100,000 people in the United States are in jail or prison; incarceration is also extremely expensive; it costs about $70,000 to build federal prison space for one prisoner and another $49.07 per day -- almost $18,000 a year -- to keep a prisoner incarcerated once we have built the space. Not only is incarceration expensive, but it does nothing whatsoever to attack the economic foundations of crime. Without forfeiture, the infrastructure of a criminal enterprise remains in place to be taken over by a subordinate. Offenders can continue to operate their syndicates while in prison, or, once released from prison, can enjoy their ill-gotten gains or use them to finance new criminal enterprises.

Criminal fines are also largely ineffective in attacking the economic base of crime as they cannot be enforced when the wrongdoer is a fugitive from justice or resides outside our territorial boundaries. Moreover, fines can only be imposed at the end of the criminal justice process by which time most criminals have dissipated their assets or placed them beyond the

reach of the Government. Despite substantial efforts, our criminal fine collection rate is about 6%. By contrast, asset forfeiture enables us to freeze or seize assets before formal criminal proceedings are initiated with the result that the assets are in place at the end of the legal process.

Without asset forfeiture we would be virtually powerless to stop the flow of tainted wealth from American streets to the foreign drug cartels and other international crime syndicates. As you know, foreign crime kingpins are often indicted in United States courts but cannot be extradited to the United States for prosecution. Through civil forfeiture, we were recently able to forfeit over $10 million in Cali Cartel assets despite our inability to secure custody of the Cartel Kingpins for purposes of criminal prosecution. Recent dramatic achievements on the international forfeiture front hold out the potential for attacking the economic base of drug trafficking globally.

Asset forfeiture -- and particularly civil forfeiture -- serves a vital social purpose which is distinct from and goes beyond conventional criminal justice sanctions. Like environmental superfund laws, it shifts a portion of the enormous social and economic costs of criminal activity -- which is measured in the tens of billions of dollars per year -- from law-abiding citizens to those directly responsible for the harm.

The proceeds of federal forfeitures help fund a portion of the expense of law enforcement at no cost to the taxpayer. Since the Department of Justice Assets Forfeiture Fund was created in

FY 1985, we have transferred an aggregate of over $1.2 billion in federal forfeiture proceeds to more than 3,000 State and local law enforcement agencies, have applied over $540 million in forfeiture proceeds to federal prison and jail construction, and reinvested over $400 million in federal investigative and prosecutive efforts. Other programs have benefitted as well: pursuant to the Anti-Crime Abuse Act of 1988, we have transferred $310 million in forfeiture proceeds to the Office of National Drug Control Policy of which Congress has appropriated $52.7 million for drug treatment.

Of course, forfeiture cannot compensate for all the economic costs of drug trafficking and other crime. It is, however, serving a laudable social purpose in shifting at least a significant portion of the cost of crime to the perpetrators and away from hard-pressed taxpayers.

Last year, I noted that, although forfeiture is an historic remedy, the modern forfeiture program dates from the Comprehensive Crime Control Act of 1984. Asset forfeiture is still in its relative infancy, therefore, as a law enforcement program. We are working to see that the Department of Justice Asset Forfeiture Program is conducted in such a way as to merit the confidence and support of Congress and the public generally.

Let me describe some of the steps we have taken since last year to strengthen the forfeiture program. On January 15, the Department of Justice announced six initiatives designed to strengthen quality control in the program and to minimize any

adverse effects of forfeiture on innocent persons: (1) expedited notice to owners of seized property; (2) expedited payments to innocent lienholders; (3) pre-forfeiture payments to lienholders in exceptional circumstances; (4) more careful review of petitions to contest seizures without payment of a cost bond; (5) a Model Code of Professional Conduct for Asset Forfeiture; and (6) new requirements for adopted seizures. I would like to briefly summarize these new policies.

1. Expedited Notice to Owners of Seized Property. Property is sometimes seized as evidence during the course of an investigation and no decision is made on whether to seek the forfeiture of the property until the investigation is complete. This is necessary in some cases but it can be unfair to innocent owners of the property in some circumstances. We believe that there should be reasonable limits on the period of time during which property can be held in limbo. Accordingly, we issued a new policy on January 15 which requires that property owners be notified whether a forfeiture will be initiated within 60 days of seizure in the absence of exceptional circumstances justifying a waiver of the 60-day rule. Waivers must be documented and approved by an accountable official within the federal seizing agency.

2. Expedited Payments to Innocent Lienholders. In the early years of the program, we received occasional complaints from financial institutions that held mortgages on real property seized for purposes of forfeiture. In 1990, we adopted a policy

that provided for expedited settlement and payment of claims by mortgage holders. This policy proved highly successful in reducing the burden of forfeiture on mortgage holders and, on January 15, we extended this policy beyond mortgages on real property to encompass institutions and persons holding liens on any tangible property. We believe that this provides fairer treatment to lienholders.

3. Pre-Forfeiture Payments to Lienholders in Exceptional Circumstances. Our prior policy of paying mortgage holders only after a final order of forfeiture is secured can work a hardship on lenders, such as where private citizens took back a second mortgage on a home and subsequently discovered that the purchaser made the purchase with the proceeds of crime. On January 15, we announced a new policy whereby we will, in effect, buy out the interest of a mortgage holder prior to final forfeiture. We have already used this new authority to avoid hardship in two cases where private individuals unsuspectingly sold property to criminals.

4. In Forma Pauperis Petitions. Persons claiming seized property may petition to contest a seizure in court without posting the statutorily required cost bond upon a showing of indigence. The various federal agencies (and the various federal courts, for that matter) have not established consistent policies and procedures for reviewing such indigence petitions. On January 15, we issued a new policy establishing standards for

such petitions, including centralized review in the Department of all denials of such In Forma Pauperis petitions.

5. Model Code of Professional Conduct for Asset Forfeiture. Questionable seizures by State and local agencies can jeopardize public confidence in all forfeiture actions and we have sought to provide leadership to the thousands of State and local law enforcement agencies engaged in asset forfeiture by issuing a Model Code of Professional Conduct for Asset Forfeiture, popularly known as "The Ten Commandments of Asset Forfeiture." I believe the Code is particularly significant and am appending a copy to my prepared testimony.

6. "Adopted Seizures." Finally, on the quality control front, we issued a new policy governing the adoption for purposes of federal forfeiture of seizures made by State and local law enforcement agencies. Among other things, this new policy requires documentation of each such adoption, provides for more rigorous internal review of such cases by the adopting federal agency, increases the dollar thresholds for such cases, and establishes a general rule that forfeitures follow the prosecution, i.e. if a district attorney is criminally prosecuting the owners of seized property under State law, then that district attorney will also be responsible for any related forfeiture action. This new adoption policy may prove to be the most important step which we have taken to enhance the quality of federal forfeitures as it requires documentation and careful review of the State and local seizures accepted for federal

forfeitures. Although I believe State and local law enforcement agencies recognize the necessity of proceeding prudently in conducting seizures, there are literally thousands of such agencies involved in seizure and forfeiture with the result that it is incumbent upon federal agencies to proceed cautiously in adopting their seizures.

These various actions announced on January 15 were highly significant in their scope and effect. We have provided Subcommittee staff with the January policy directives.

The Department of Justice is committed to further improvements in the Asset Forfeiture Program. For example, with respect to currency seizures, we are in the process of purchasing five Ionscan devices: state-of-the-art analytical devices capable of detecting all types of controlled substances and -- more importantly -- of measuring the extent to which currency or other property is contaminated with controlled substances. We will be deploying these devices as part of a pilot program under the Federal Bureau of Investigation's Laboratory Division to strengthen the Government's probable cause in currency seizure cases. We believe these devices will produce more scientifically reliable evidence than alerts by drug detector dogs and that their use will reduce the possibility of errors in seizures of currency from money couriers.

In sum, we recognize the tremendous potential of asset forfeiture as a law enforcement weapon but also recognize its potential for abuse. In addition to the initiatives I have

described, we have undertaken a comprehensive review of the Asset Forfeiture Program which will result in further changes to the program. In this regard, we are considering a series of measures including proposals to ensure more rigorous internal review of asset forfeiture cases, to strengthen the integrity of the equitable sharing program, to require more careful internal planning and evaluation prior to the seizure of property, and to ensure more consistent handling of petitions for remission and mitigation of forfeiture including provisions for the return of forfeited property to crime victims in appropriate cases. I anticipate that we may have final decisions on a number of policy initiatives this Summer.

Mr. Chairman, the significant policy initiatives announced on January 15 and the further initiatives that are currently under development are substantial efforts to strengthen and improve the Department of Justice Asset Forfeiture Program. Quite frankly, we believe the federal program is working well but we recognize that there is room for improvement in any program and will continue to search for ways to enhance public confidence in asset forfeiture.

That concludes my general remarks and I will be pleased to respond to any questions you may have about the Department of Justice Asset Forfeiture Program.

Thank you.

NATIONAL CODE OF PROFESSIONAL CONDUCT FOR ASSET FORFEITURE

I. Law enforcement is the principal objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.

II. No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves.

III. Whenever practicable, and in all cases involving real property, a judicial finding of probable cause shall be secured when property is seized for forfeiture. Seizing agencies shall strictly comply with all applicable legal requirements governing seizure practice and procedure.

IV. If no judicial finding of probable cause is secured, the seizure shall be approved in writing by a prosecuting or agency attorney or by a supervisory-level official.

V. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures.

VI. The manual shall include procedures for prompt notice to interest holders, the expeditious release of seized property where appropriate, and the prompt resolution of claims of innocent ownership.

VII. Seizing entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.

VIII. Unless otherwise provided by law, forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.

IX. Seizing agencies shall strive to ensure that seized property is protected and its value preserved.

X. Seizing entities shall avoid any appearance of impropriety in the sale or acquisition of forfeited property.

Ms. BROWN. Thank you, Mr. Copeland, for your testimony. I think we all would agree your office has taken some very, very valuable first steps to addressing the problem.

Particularly, we want to point out the "Ten Commandments" of asset forfeiture—without objection, we are including the new directions that your Department is making; but we do have a couple of questions.

First of all, I noted in your prepared testimony, you stated that since 1985, the program has transferred over $1.2 billion to State and local government enforcement, $540 million in prison construction, and over $400 million in Federal law enforcement; yet, in the same period, only $53 million has been transferred for drug treatment programs.

And is it feasible to use more of this money for drug prevention and treatment efforts, because I think part of this is the core of the problem?

Do you believe that devoting a fair proportion to drug treatment money from your office of administration will assist the program?

Mr. COPELAND. I think we certainly are very supportive of all the treatment prevention programs. We do want to support them.

I think, quite frankly, I am here today answering for the Appropriations Committees of the Congress. We have transferred $310 million to the special forfeiture fund which Congress created in 1988. All $310 million could have been put into prevention and treatment. Rather, the bulk of that was appropriated for law enforcement uses.

So we will continue to make the transfers to the special forfeiture fund as the statutes require. But, obviously, we cannot control the congressional appropriations process.

Ms. BROWN. Mr. McCandless, do you have questions?

Mr. MCCANDLESS. Thank you, Madam Chairwoman.

Mr. Copeland, if I understand correctly, for purposes of getting our ducks in a row, your laws on forfeiture of property, do not preempt State law when it comes to the forfeiture program; is that right?

Mr. COPELAND. It depends upon the context. No.

Normally, we are operating hand in hand with the State and local law enforcement agencies.

Mr. MCCANDLESS. Let's take the testimony of Representative Martinez from Florida in which he talked about the drug courier profile and this kind of thing—which is totally foreign to me and my knowledge of law enforcement in southern California—where you have seizures that ultimately end up as a part of the pool. From those kind of activities, is it possible for the Attorney General, the Department of Justice, to set specific regulations that would address these issues as it relates to local law enforcement?

Mr. COPELAND. I think our power, Congressman, is limited to the cases that we adopt, in those situations where there is a State or local seizure. And the way the adoption program works is they are seizing for a violation of State law.

But in the drug area, most State law violations are also Federal law violations. In some instances they bring that State or local seizure over to the Feds and say, hey, would you adopt this seizure for purposes of Federal forfeiture? There are many instances where

we have done that. To the extent we adopt that seizure, we become responsible and accountable for it. If there was something wrong with that seizure, we have to answer for it.

One of the things that we have done in looking at press accounts, for example, of Federal cases that are criticized, a grossly disproportionate number of those have been cases where we have adopted State or local seizures, which is one of the reasons in January we tightened up on our adoption process.

To the extent, then, that we have adopted the State or local seizure, it is in the Federal system. So there is—we are playing pursuant to the Federal statutes, working consistent with the Federal statutes. For example, maybe the question is this: If it would be that under State law, there is some defense to forfeiture that doesn't exist at the Federal level; then when we proceed in the Federal system, then, of course, the State law does not apply because of the supremacy clause. We are operating in the Federal system. I think that is one of the concerns some folks have voiced. You take the case into the Federal system to avoid some restrictive provision of State law.

I have to say, though, this is larger than just forfeiture. As you know, there are many cases where State or local officials arrest people. In discussing the case between the State prosecutors and the Federal prosecutors, they decide this case should go through the Federal system rather than the State. So it is a feature of our Federal system of government.

There are circumstances where we take cases for any one of a number of reasons; but I am not sure I am responding to your question. It is because I am not sure I understand it.

Mr. MCCANDLESS. Let me go back then and revisit the question. I didn't really phrase it the way I had intended to.

Let's take the specific issue of Ms. Washington from Charleston, SC. She was stopped by a county official according to what we heard here this morning. She explained the reason she had the money, as I understand it, and showed a list of building materials that were going to be purchased with the money. That list didn't seem to have mean anything in the way of validity to the officer in question.

Now if I understand further, that officer could not have arrested her at that point even if the money had been determined by some reason to be illegal. So it is a harassing type of activity to try to find resources under the guise of the forfeiture law.

That may be a harsh statement, but that is what it appears to be since they kept $4,000, as I understand it, and gave her only $15,000 of her $19,000. There was nothing there to begin with that they could have arrested her for.

There is nothing there, then, under the laws of that county or State which address what I would consider the equity of the situation as it relates to the person who obviously was innocent.

And I want to tell you that one of the things that I am concerned about is the abuse of power on the part of law enforcement. I have a great deal of respect for law enforcement. But when we talk about the abuse of law enforcement, who have been sworn, as you and I have, then they lose me.

Let's go back to this case then. Is there a way—where you might have these situations to any abusive degree—that laws currently on the Federal books could address this issue and bring equity to the individuals involved?

Mr. COPELAND. OK. I think—again, you are asking me a question that maybe someone else in the Department is better able to answer in terms of the limitations on the authority of Congress to enact laws to restrict State and local activities. I would assume without looking at the issue very much that you could probably enact laws restricting State activities. Again, the case you are talking about was a seizure conducted by a county sheriff pursuant to State law. There was no Federal involvement whatsoever. There is no way under the current state of affairs that we at the Justice Department could deal with that unless we show there was a violation of some Federal civil rights statute.

With respect to the Volusia County cases, for example, Governor Chiles sent us the complete task force report and specifically asked us to look to see if there were any Federal civil rights violations involved in those stops. We did duly refer that report to the Civil Rights Division of the Department for investigation.

So I think, without knowing the facts of the case, that if they had some basis for the seizure—and I would suggest generally in my experience there is a lot more basis for the seizure than you see reported in the news media—there would probably not be a civil rights violation. The basic issue was, was there probable cause to make that seizure. Generally, in that type of stop we look at what we refer to as the totality of the circumstances. Normally, there are about 14 different factors you can look for in those money courier stops. Generally, we would have 12 or 13 of the 14 present.

I don't know the case, so I don't know what the officers had.

Mr. MCCANDLESS. Let me go back to another issue here.

Last January the U.S. Department of Justice issued a series of reforms to improve the administration of the Asset Forfeiture Program. In the press release highlighting those changes Deputy Attorney General George Twillinger states, "Modern forfeiture is still in its infancy and we are continually looking for ways to maintain the integrity of the Department's program." He continues, "No government program can long endure—much less thrive—without public confidence and support."

My question is, do you think the changes made last January will alleviate the concerns about the Asset Forfeiture Program, or do you envision more changes to come? If you think more changes are forthcoming, could you elaborate on what you might expect?

Mr. COPELAND. Yes. I think the January changes were very important. I think there is much more that we can do. We are moving in that direction pursuant to the mandates from our Attorney General and our Deputy Attorney General to try to make sure this program is above reproach. As I indicated, right now the things we are looking at are, first, a more rigorous internal review process related to particularly sensitive types of cases. I would identify sensitive cases as those involving the seizure for purposes of forfeiture of a family home based on a facilitation theory where the owner of the home is not being criminally prosecuted.

In addition, another type of case that frequently results in criticism is the money courier case where money is being seized from an individual but the individual is not being arrested or prosecuted. With respect to those cases, and two other categories we have identified, we expect we will be requiring a lot more documentation, a paper trail, high-level supervisory review of each and every case to ensure that those types of seizures are carefully reviewed all the way up the chain.

In the equitable sharing area, I think we agree with the critics who say we do not have adequate safeguards in place today with respect to the use of that money once it reaches the State or local law enforcement agencies. As I indicated in the testimony, I expect we will be establishing—and hopefully this summer—detailed auditing, accounting, and certification requirements. We will be setting out in much more detail specifically what the permissible uses of those moneys are and what the impermissible uses are.

I think, in fairness to our State and local colleagues, we have not been very precise in our instructions in the past, and we want to remedy that.

Again, we have in the works and nearing completion a new set of petition for mitigation or mitigation regs we will be putting out. We have other things that I think at this point I probably, in fairness to the Attorney General and Deputy Attorney General, should not discuss because they are still under their review; and until they act, I probably should not say more.

Yes, sir, we are looking at a number of things that I think are going to be very dramatic. I am looking forward to announcing those in the near future.

Mr. MCCANDLESS. Representative Henry Hyde, who testified prior to you, introduced a bill which he considers to be addressing some of the problems he sees with respect to the Asset Forfeiture Program. Have you had an opportunity to review or look at that legislation yet?

Mr. COPELAND. We have looked at it quickly. It is in the process of being carefully reviewed within the Department. At this point, we do not have a formal Department position on the bill. In due course, we will have something formal to say.

But for my own personal reaction, I think in the Congressman's defense, he is attempting to make some rather modest and discreet changes in the basic procedure. I think he recognizes the validity of the basic procedure. He is, I think, trying to show some restraint.

On the other hand, I think in light of some of the things that we have done, some of the things we are in the process of doing, I think in many respects the bill is probably unnecessary, and in a couple of respects probably ill advised.

Again, in due course, we will be commenting formally and in detail on the bill. I just wanted to try to be somewhat responsive today.

Mr. MCCANDLESS. I would appreciate having any response you might provide to the minority of the committee if you wouldn't mind.

Mr. COPELAND. Yes, sir.

[The information follows:]

As of July 9, 1993, the Department has not issued a bill report on the Hyde bill.

Mr. MCCANDLESS. Another area is the preponderance-of-evidence aspect of the forfeiture laws as they relate to property during the trial phase in which the party involved must provide evidence that he not only didn't know, but that the property was not used and the burden of proof is on him or her.

What is your response to reforms that would have government prove with clear and convincing evidence that the property was subject to forfeiture?

Mr. COPELAND. Well, again, I think that one of the things we need to make clear is that the burden is always on the government in the first instance to show probable cause. I know there are a lot of folks who say probable cause doesn't mean a whole lot. Yet probable cause is what stands in the way of anyone in this room being arrested and put in jail pending trial.

Under our constitution, for the last 204 years people can be arrested and put in jail subject to bail, of course, pending their trial; and we think probable cause, to the extent it can support arresting a human being, is adequate to seize and detain property.

Once we get to trial, the basic procedure in the civil forfeiture is that we do make our probable cause showing before the court. Only if we satisfy the court that we have probable cause do we go to the next phase, which is the claimant's opportunity to rebut probable cause to show why some of the circumstances that looked so suspicious were not suspicious.

If they fail in that, then they have, in essence, an affirmative innocent owner defense they can make, claiming, in essence, yes, the property is subject to forfeiture; but you cannot forfeit it in this case because I did not know or consent to or have reason to know of the criminal use of the property.

There is, in addition, as I indicated, a special pardon process by which the Attorney General is authorized to say the property was forfeitable, the person had no innocent owner defense, and yet the effect of the forfeiture in this case would be harsh, and therefore, I am going to remit the forfeiture—that is, give the property back, or mitigate, perhaps give the property back upon the payment of some civil penalty that may be provided for in the law.

So there are abundant, I think, procedures in place that protect against abuse. And I think this suggestion that forfeiture is an area where the government can seize—and again it is usually suggested we seize willy-nilly—that is not the case. We have to have probable cause to show the property was either derived from or used in a specified Federal felony offense. Forfeiture is not a remedy at the Federal level for any misdemeanors. It requires a felony offense.

Of course, we can quibble about the level of proof; should it be probable cause, preponderance of the evidence, clear and convincing evidence? But what I would suggest to you today is, the system has been working for over two centuries. We have done over the last 9 years something on the order of 175,000 seizures at the Federal level. Fewer than 50 of those have been criticized—of those criticized, most of them based on gross misrepresentations of the facts of the case.

So I think it gets back to the question of necessity. Do we need to change the statute? I would like very much to work with you and your staff to try to go through specific cases and see if there is an empirical basis for believing that some change in Federal forfeiture law is needed.

Mr. MCCANDLESS. Thank you. I have one more, Madam Chairwoman.

In the case of Mr. Carlson, who was part of our videotape, my understanding is that his home, the involvement in his home was a joint operation on the part of DEA and Customs.

Mr. COPELAND. That is my understanding, yes.

Mr. MCCANDLESS. They were acting on the basis of a paid informant's tip, and I assume the payment was an authorization under the forfeiture fund for rewards to informants in illicit drug cases?

Mr. COPELAND. That is not the case, sir. We have general award authority.

Mr. MCCANDLESS. Clear this up for me then in terms of information you have on the Carlson case.

Mr. COPELAND. As I understand the case, there was a paid informant who provided information to the agents to the effect that Mr. Carlson had 500 kilograms of cocaine in his home. Based on that informant information, the agents got a Federal search warrant—not a seizure warrant—to go out and try to find the drugs.

They had also been told by the informant there were individuals in the home protecting the cocaine armed with fully automatic weapons. When they knocked on the door and announced they were Federal agents executing a search warrant, Mr. Carlson fired a weapon through the door and then, ultimately, when the officers gained entry, he was shot.

I think—certainly it is a tragic case. It is one I think where people can legitimately say, does this suggest we need to take another look at the Federal effort to suppress drugs? I think it is certainly a drug-related case; but there was no seizure, there was no forfeiture. None was contemplated. We had no information that there was money or anything else of value in the home with the exception of the contraband cocaine.

Mr. MCCANDLESS. There is an article I have here talking about the fact that the informant who provided the tip was later convicted for providing false information.

We are a little off the track here really regarding forfeitures.

Mr. COPELAND. I think so.

Mr. MCCANDLESS. Yet this case was part of the opening comments or activities of this subcommittee. So I think it needs to be cleared up.

If I understood your response to my question, it was on the action of an informant that the following activities ensued as it relates to Mr. Carlson. There was no investigation or anything relative to Mr. Carlson and his activities as a businessman or as a resident of the house or how long he lived there, anything like that.

Mr. COPELAND. I don't know the facts to that extent. I would say, Congressman, there is an old rule that our agents do not rely exclusively on informants. They seek to corroborate the informant information to the extent possible. So I would assume, given the fact

we had both Drug Enforcement Administration and Customs agents working that case, they were engaged in other investigative activities and not relying 100 percent on the informant information.

It did prove to be inaccurate information. We did proceed to prosecute and convict, I believe, the informant in that case.

Mr. MCCANDLESS. I don't want to take too much of the rest of the subcommittee's time available here, but I would ask unanimous consent that I be able to submit to you in writing questions that would normally have been answered here. How long would it take you to respond? There are not too many of them; they are not too detailed.

Mr. COPELAND. We would turn them around as quickly as possible. I hope we can do it within 2 weeks. We need, of course, to clear everything through the Department. That sometimes takes longer than for me to draft the responses.

In addition, let me offer again, certainly we want to respond formally to all the formal questions of the committee or the subcommittee members. But to the extent, informally, you would like to probe any of these issues, then we are available to come up and meet with you.

Mr. MCCANDLESS. Madam Chairwoman, I ask unanimous consent that my additional questions be submitted to the Justice Department for response and that they be given 2 weeks in which to respond.

Ms. BROWN. Without objection.

[The information follows:]

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 12, 1993

The Honorable John Conyers
Chairman
Subcommittee on Legislation and National Security
Committee on Government Operations
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This responds to your letter submitting questions on behalf of yourself and Representatives McCandless following up on your June 22, 1993, hearing on asset forfeiture.

As the Department is conducting a comprehensive review of that asset forfeiture program, we will not be in a position to respond fully to some of the questions posed pending completion of that review. We have attempted, however, to respond to all questions as completely as possible given the circumstances and we will update the response when the comprehensive review is completed.

To the extent that you have further questions or require additional information, please do not hesitate to let me know. In the meantime, we appreciate your continuing interest in the asset forfeiture program.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

Enclosures

cc: Representative Alfred A. McCandless
Ranking Minority Member

RESPONSES TO QUESTIONS OF CHAIRMAN CONYERS

1. Use of Forfeiture Funds for Drug Treatment and Prevention.

Answer. The Department strongly supports drug abuse education, prevention and treatment; and the use of forfeiture proceeds to compensate victims. We are, therefore, reviewing a range of options for enhancing financial support for such programs. However, since the Assets Forfeiture Fund is an operating account, with expenses as well as revenues, any diversion of deposits to these new uses must be derived from Fund surpluses. Pending completion of this ongoing review, the Special Forfeiture Fund (hereinafter, the SFF) which is financed from the Department's forfeiture surpluses, is available for drug abuse education, prevention and treatment programs as well as for law enforcement.

The Department has transferred $310 million in forfeiture surpluses to the SFF, and, through FY 1993, the Congress has appropriated only $52.7 million from the SFF for drug treatment. For FY 1994, the Conference Committee proposes the appropriation of $25 million from the SFF to the Department of Health and Human Services for drug prevention and treatment. The Congress, therefore, has an opportunity to devote more forfeiture proceeds to drug treatment programs in the FY 1994 appropriations process.

2. Tracking Expenditures of Sharing Monies.

Answer: Current guidelines limit the use of sharing monies to law enforcement purposes as set out in the Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies (December 1990). Law enforcement agencies are, however, permitted to spend such monies on drug prevention and education programs that they themselves sponsor and conduct. Under current guidelines, state and local law enforcement agencies receiving federal equitable sharing transfers are not required to report expenditures.

We are reviewing a new sharing guide which would require summary reporting of sharing fund uses by category of activity, mandate periodic audits of such monies, and expand guidance regarding permissible and impermissible uses of such monies. We expect to issue this new guide in the near future.

3. Uses of Shared Monies.

Answer: The Inspector General's audit of the expenditures of equitable sharing monies by the Town of Little Compton, Rhode Island, identified $83,918.86 of $798,502 in municipal expenditures that were for proper governmental purposes but were not for law enforcement purposes as set forth in Department guidelines. We are moving to recover that amount by off-setting against an upcoming sharing transfer. About $77,000 in sharing funds have been used

for planning and design work related to construction of a police/fire complex. However, no fire stations have yet been constructed with sharing funds.

With respect to Lakewood, Colorado, the Department asked the Police Department to secure an independent financial audit of all equitable sharing monies. The audit report was received on September 28 and is under review.

Regarding sharing generally, the Department has now transferred over $1.2 billion in federal forfeiture proceeds to more than 3,000 state and local law enforcement agencies over the past eight years. Reviews of 15 state and local law enforcement agencies performed by the General Accounting Office (GAO) and 10 additional agencies by the Department's Office of Inspector General (OIG) in connection with their national audits of the equitable sharing program did not reveal any pervasive pattern of abuse. Copies of the 1992 GAO audit report (GAO/GGD-92-115) and the 1993 OIG report (93-7) have been supplied to Subcommittee staff.

4. Keeping Forfeiture in Proper Perspective.

Answer: With respect to the two memoranda mentioned as evidence of a prior Department of Justice focus on revenue, there was, in fact, no memorandum from Attorney General Thornburgh. Rather, Acting Deputy Attorney General Dennis issued a memorandum on June 21, 1989 and Acting Deputy Attorney General Barr issued a memorandum on July 18, 1990. Both memoranda focussed upon processing the backlog of pending forfeiture cases and were timed to issue toward the end of the federal fiscal year to ensure that the message was clearly to expedite processing of pending cases and not to conduct more seizures.

Use of the forfeiture sanction merely to generate revenue is indefensible. The Department has always stressed that revenue is merely a by-product of the two principal goals of the forfeiture program: law enforcement and improved law enforcement cooperation through sharing. The Department is committed to ensuring that asset forfeiture is employed prudently as a law enforcement tool. We must do a better job communicating our position.

At the state and local level, sharing in FY 1992 was less than $250 million which represents about 1/3 of 1% of the $75 billion per year that state and local governments spend on law enforcement. We are unaware of any objective basis for suggesting that state or local law enforcement agencies are generally placing undue emphasis on the revenue potential of forfeiture. The Department has sought to provide leadership to state and local agencies through issuance of the National Code of Professional Conduct for Asset Forfeiture, and is working with national law enforcement organizations to enhance forfeiture training for state and local prosecutors and officers.

5. Cost of Forfeiture Litigation.

Answer: The suggestion implicit in the question is that forfeiture should be abandoned if it appears that the cost of litigation may equal or exceed the value of the property seized. We believe, however, that the relationship of cost of litigation to forfeiture program revenues is irrelevant. The purpose of forfeiture is to achieve law enforcement ends by depriving wrongdoers of the proceeds or instrumentalities of crime. Asset forfeiture is not a collections or revenue program.

We project that U.S. Attorneys' Offices will devote about 442 workyears to asset forfeiture in FY 1993. This figure represents Assistant United States Attorney, paralegal, and secretarial activities devoted to all aspects of asset forfeiture litigation. These workyears were not financed from the Assets Forfeiture Fund but are estimated to have consumed in excess of $24 million in appropriated funds.

The attached breakdown of attorney and agent hours devoted to the Jones case was furnished to Subcommittee staff on June 22. In response to your question as to costs, these hourly figures translate into approximately $25,600 in salary and overhead costs.

6. Update on Status of the Shelden Case.

Answer: The Shelden case was decided favorably to the Sheldens on October 15, 1993, by the Court of Appeals for the Federal Circuit in Carl and Mary Shelden v. United States, 92-5154. The Court of Appeals overruled the June 24, 1992, decision of the United States Claims Court which had found that the Sheldens had suffered no "taking" compensable under the Fifth Amendment.

We do not plan to contest the Circuit Court decision and are moving to comply with the court order. In the meantime, we would note that the Shelden case is a very old case. Under policies and procedures put into effect in recent years, it is very unlikely a similar case would arise today.

7. Priorities of State and Local Law Enforcement Agencies.

Answer: It was the Department's understanding of Rep. Martinez' testimony before the Subcommittee that he was critical of the activities of one local law enforcement agency: a county sheriff's department in Florida. No federal officials were involved in those seizures or resulting forfeitures. Governor Lawton Chiles convened a task force last year to review asset forfeiture activities in Florida. That review was seen by some observers as exonerating the sheriff's department, but has, regardless of how it is characterized, reportedly resulted in dramatically reduced seizures by that sheriff's department.

The Department of Justice testified before and provided technical assistance to the Governor's task force. We will continue to support efforts of all state and local governments in ensuring that state asset forfeiture laws are used properly at the state and local levels. In addition to issuing the National Code of Professional Conduct for Asset Forfeiture mentioned above, we are also working with national law enforcement organizations to enhance asset forfeiture training for state and local law enforcement officers with an emphasis on forfeiture ethics.

8. The Hyde Bill, H.R. 2417.

Answer: As part of its comprehensive review of asset forfeiture, the Department is developing a complete package, consisting of policy initiatives and legislative measures, that will address concerns about the fairness of forfeiture procedures without undermining law enforcement effectiveness. Once we have completed our review, we will provide the Subcommittee with our views on H.R. 2417.

RESPONSE TO QUESTIONS OF REPRESENTATIVE McCANDLESS

1. The Hyde Bill, H.R. 2417.

Answer: As noted in our response to Chairman Conyers, we are conducting a comprehensive assessment of the forfeiture program and will apprise the Subcommittee of our views on H.R. 2417.

2. Civil Trial Procedure and The Burden of Proof.

Answer: One of the issues presently under consideration in connection with our review of asset forfeiture is burden of proof.

3. Drug Courier Profiles.

Answer: The issue of profiles is much broader than asset forfeiture, and claims of law enforcement bias against minorities have at various times been raised in all enforcement areas. Some observers point to incarceration rates, for example, and contend that the percentages of minorities in prison prove bias on the part of law enforcement. Research on the subject, however, suggests that complex sociological and economic factors are at work.

To compile data on the race or national origin of money couriers would not, in our view, assist in ensuring equal application of the laws. The Department is absolutely committed to seeing that all elements of law enforcement are conducted without regard to race, creed, or national origin. The Department strives to achieve this goal through diversity among its law enforcement

personnel, rigorous selection and training, and careful oversight and management of enforcement operations.

4. Specific Ideas for Forfeiture Reform.

Answer: The Department's review of asset forfeiture will address three of the four ideas set forth in the question. We will report to the Subcommittee on these matters once our review is complete.

With respect to caps on payments to informants, this issue is much broader than asset forfeiture. Although we understand the concern over large payments to informants, many of whom have unsavory backgrounds, to establish an arbitrary ceiling on informant payments would ignore the fact that informant information varies widely in its value to law enforcement officials and that some informants are able to assist law enforcement officials in multiple cases. In the forfeiture area, current law caps the amount which may be paid to an informant in any individual forfeiture case at 25% of monies recovered or $250,000, whichever is lower. We do not expect to propose any change in this area.

5. Safeguards Against Abuse of Civil Forfeiture.

Answer: Current civil forfeiture laws as interpreted by the courts incorporate multiple safeguards against abuse. First, no seizure may occur except where the Government can show probable cause to believe the property was derived from or used in a designated federal felony offense.

Second, there must be a connection between the criminal conduct and the property. The popular notion, for example, that smoking a marijuana cigarette in a residence will support the forfeiture of the home is unfounded.

Third, federal law provides express statutory defenses to civil forfeiture. Even if the Government can show, for example, that an automobile was used to transport a large amount of heroin, the owner can defeat forfeiture by showing that he was not aware of and/or did not consent to such illegal use and that he was not willfully "blind" to the illegal activity.

Fourth, even after forfeiture is ordered, federal law establishes a special "pardon" process under which the owner of the forfeited property may petition the Attorney General for remission or mitigation of forfeiture upon a showing that the forfeiture would be unduly harsh given the underlying conduct.

And, fifth, the Supreme Court has recently ruled that a forfeiture can be set aside as disproportionate if a court finds it to be an "excessive fine" under the Eighth Amendment.

We recognize that these protections are not deemed sufficient by many observers. As indicated above, we are considering legislative and administrative measures to enhance public confidence in the fairness of the forfeiture process without unduly undermining the ability of law enforcement to deprive criminals of the fruits of their crimes.

6. "CATS" and the Tracking of Forfeiture Proceeds.

The Department is in the process of final development of the Consolidated Asset Tracking System ("CATS") which will track all federal seizures from point of seizure to disposition. This system, which will be installed and implemented nationally in FY 1994, will dramatically enhance our ability to track, manage, oversee, and account for federally seized property.

While CATS will record the level of federal forfeiture proceeds shared with state and local law enforcement agencies, the uses made of those funds will not be tracked in CATS. As indicated in response to the questions of Chairman Conyers, we do expect to put enhanced accounting, audit, and certification requirements in place to govern such monies. As part of the certification process, we will require state and local law enforcement agencies to report annually on their use of federal sharing monies by category of activity and to certify to the accuracy of that report.

7. "Windfalls" and Uses of Sharing Monies.

Answer: We are unaware of any state or local government's receiving a "windfall" of federal sharing money other than Little Compton, Rhode Island. We expect that the new sharing guide will provide measures to deal with any such "windfalls" that occur in the future.

With respect to the question of permissible uses of sharing monies, the Department has traditionally limited sharing funds to conventional law enforcement purposes. We have permitted the use of such monies for such programs as "officer in the classroom" (DARE), and other police-sponsored drug and crime prevention programs. The Department strongly supports drug and crime prevention programs, and the Department is considering options to expand the permissible uses of shared forfeiture proceeds. We will notify the Committee of our proposals in this regard upon completion of this ongoing review.

Attachment

U.S. Department of Justice

United States Attorney
Middle District of Tennessee

110 9th Avenue South, Suite A-961
Nashville, Tennessee, 37203-3870

615/736-5151

June 21, 1993

Cary Copeland
Director
Executive Office for Asset Forfeiture
Department of Justice
901 E. Street, N.W.
Washington, D. C. 20530

RE: Documentation of Time Involved in
Willie L. Jones v. U. S. Drug Enforcement
Administration, Claude Byrum, Stephen A. Wood,
and one additional unknown officer.
Case No. 3:91-0520

Dear Mr. Copeland:

The following is a list of the estimated time spent by individuals in this office on the Willie Jones matter. The time reflected in this memorandum is only an estimate, as this office does not keep time sheets on each individual case.

NAME	GRADE & STEP	POSITION	TIME
Ernest W. Williams		U.S. Atty.	20 hrs
Robert Watson Chief, Civil Division		AUSA	10 hrs
Michael Roden Lead Trial Attorney on Case		AUSA	150 hrs
Van Vincent Second Chair Trial Counsel		AUSA	80 hrs
Ruth Frick	7/5	Legal Secretary	20 hrs
Judy Joines	8/6	Paralegal Asst	2 hrs

With regards to court time, the trial in this case lasted one week.

The Agency information (DEA) is attached in a separate letter. Vincent Morgano, the resident Agent In Charge, prepared the DEA information.

If you have any questions or need any further information, please give me a call.

Sincerely,

ERNEST W. WILLIAMS
United States Attorney

BY: _____
VAN S. VINCENT
Assistant U. S. Attorney

VSV/
Enclosure

U. S. Department of Justice

Drug Enforcement Administration
Nashville Resident Office
801 Broadway, Room A909
Nashville, TN 37203

Washington, D.C. 20537

June 18, 1993

Van S. Vincent
Asst. U. S. Attorney
U.S. Attorney's Office
Middle District of Tenn.
110 9th Avenue South
Suite A-961
Nashville, TN 37203

Dear AUSA Vincent:

Reference is made to your letter dated June 17, 1993, requesting this office to provide you with an itemization of the hours spent on the Willie Jones investigation for each agent and support staff personnel.

Below is a breakdown by agent name, grade/step, and hours expended for each Special Agent that worked on the Willie Jones investigation:

Vincent C. Morgano	GM-14	86 Hours
Thomas J. Stafford	GS-13/6	60 Hours

It should be noted that Task Force Officers and Support Personnel, to include EBON employees, do not document their work hours to particular investigations and therefore that information is unretrievable.

Sincerely,

Vincent C. Morgano
Resident Agent-in-Charge

Ms. BROWN. I have one followup to the last question. The money that the informant was paid, where did this money come from?

Mr. COPELAND. I don't know in that specific case. Let me say, we get appropriated money each year for informant payments. We also use some money from the forfeiture fund.

Ms. BROWN. Would you research that question in the Carlson case and let us know where that money came from to pay the informant?

Mr. COPELAND. I would be glad to check that for you.

[The information follows:]

The Drug Enforcement Administration [DEA] paid the informant a total of $1,300 in three payments of $400, $400, and $500. These were appropriated informant funds and were not paid from the Forfeiture Fund. DEA advises that the U.S. Customs Service paid the same informant equivalent amounts; I do not know the source of the Customs Service payments to the Informant but assume the Treasury Department could furnish that information.

Ms. BROWN. I understand you made some comments pertaining to recordkeeping. I want to again commend you, because I understand at this time we do not have a tracking system, that the $1.2 billion we transferred to State and local government, we have no way to find out how that money was spent.

Mr. COPELAND. That is correct.

Ms. BROWN. We have no followup. I want to commend you on your efforts. I understand you said this summer you are going to do some followup?

Mr. COPELAND. We hope to have them out, the new guidelines this summer, yes, ma'am.

Ms. BROWN. When you get that, would you please inform us, the committee?

Mr. COPELAND. Certainly will.

Ms. BROWN. I have a question pertaining to cash and people with large sums of cash. There are over 10 million households, 120 million people in the United States that do not have checking accounts. They—primarily, they are poor, maybe minorities; they do a lot of transactions with cash money. Is there—they automatically are targets because they are transacting their business in cash. Is this cause for suspicious behavior?

Mr. COPELAND. Again, I think the possession of a large amount of cash is not inherently suspicious. I think it depends on the facts and circumstances. For example, if an individual is traveling with a large sum of cash, I think that that may be suspicious, particularly depending upon how it is carried. If it is attached to the body with duct tape, which is something we find sometimes in the airport, somebody with $200,000 or $300,000 duct taped to their torso or legs, then I think that that is highly suspicious. If an individual has in his or her wallet $3,000 in hundred dollar bills, that is not particularly suspicious.

If they have on them $3,000 in tens, twenties, fifties, if the money is bundled in one thousand dollar increments with rubber bands, as drug traffickers normally handle their money, that may be suspicious; that alone is never going to be enough to justify a seizure, I don't think. I think we need additional circumstances, that we need to tie the money to a specific offense. That is why we have the detector dogs to check the money, to see if they are going

to alert the money, to see if there is some evidence of a drug connection. There are other factors we look at.

As I indicated, many of the money courier cases—there are a total of 14 different factors. Not a profile, but these are factors we commonly find in those cases. I think when you have all 14 or even 12 or 13 of those factors present, everyone in this room would agree this is a highly suspicious situation.

Again, we think in most of those cases that it reaches the probable cause level; and at the Federal level, we are working very hard to ensure that our people are applying the probable cause standard properly.

Ms. BROWN. In the Willie Jones case, how much did the Justice Department spend on litigation of this particular case?

Mr. COPELAND. I don't have that information yet. Staff did ask for that. I did get yesterday the number of hours. I will supply that to the staff. I am sorry. I have been running so fast.

[The information follows:]

The U.S. Attorney's Office in Nashville has reported federal salaries, litigation expenses and witness fees totalling almost $20,000 (for both the U.S. Attorney's Office and the Drug Enforcement Administration) associated with the Willie Jones case. The figures submitted by the U.S. Attorney's Office represent a good faith effort to go back in time and account for all expenses associated with the litigation.

Mr. COPELAND. Let me certainly submit for the record, it is going to be many times the amount of the money seized. I think that there was something like 250 or 300 hours of attorney time at the Federal level involved in that case. Certainly that case cost us much more than the amount of money involved in the seizure.

Ms. BROWN. You have a letter from the chairman dated May 25. He will submit additional questions pertaining to this particular case. But we would like the answers to those particular questions.

[The information follows:]

ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY—(202) 225-5051
MINORITY—(202) 225-5074

May 25, 1993

Mr. Cary Copeland
Director
Executive Office for Asset Forfeiture
Department of Justice
901 E Street N.W.
Washington, D.C. 20530

Dear Mr. Copeland:

As you may recall, Mr. William Jones of Nashville, Tennessee was one of the witnesses at the Legislation and National Security Subcommittee's hearing on asset forfeiture last September. It has been brought to my attention that Mr. Jones has recently prevailed in his court action contesting the Federal government's taking of his assets.

I am writing to request a full accounting of costs incurred by the Federal government in this case. Please include an itemization of the attorney, paralegal and support staff hours devoted to this matter along with the grade and step for each Federal employee who worked on this matter. In addition, please provide the same information for court and law enforcement personnel involved.

I would appreciate hearing back from you at your earliest convenience, and look forward to your testimony at the Subcommittee hearing on June 9, 1993.

Please contact Carol Bergman at (202) 225-5051 with any questions you may have. Thank you for your attention to this matter.

Sincerely,

John Conyers, Jr.
Chairman
Legislation and National Security
Subcommittee

U.S. Department of Justice

Federal Bureau of Investigation

DRAFT

Office of the Director

Washington, D.C. 20535

Honorable John Conyers, Jr.
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C.

Dear Mr. Chairman:

This letter is in response to your inquiry of May 26th, concerning the Department of Justice's Asset Forfeiture Program from which funds were provided to individuals who have assisted the FBI.

In response to your questions, please be advised that the FBI spent $6,200,000 from the Asset Forfeiture Fund that was provided to about 2,800 individuals for their assistance during Fiscal Year 1992. The 20 individuals provided the largest amounts of funds during the same time period received the following funds:

$250,000	150,000	92,317	72,744	60,751
200,000	100,000	83,916	69,779	59,796
175,000	100,000	80,000	65,885	56,869
150,000	100,000	75,000	63,411	56,500

The 20 individuals receiving funds most often during the same time period received funds the following number of times:

51	39	35	30	25
47	38	35	30	24
44	37	30	28	23
44	37	30	27	23

DRAFT

DRAFT

Honorable John Conyers, Jr.

There should be no assumptions made concerning any correlation between the 20 individuals receiving the largest amounts of funds and the 20 individuals receiving funds most often during the same time period. Therefore, no comparison or conclusions should be made or drawn from these two criteria.

The FBI considers individual cooperation to be an important and invaluable investigative tool in fulfilling its investigative responsibilities. Due to the more than 270 Federal criminal statutes enforced by the FBI and the increasing sophistication of some crimes committed, it has become imperative for the FBI to rely upon the information provided by cooperating individuals to help resolve many of the complex cases under our jurisdiction.

Individuals assisting the FBI are not allowed by the FBI to circumvent legal or ethical restrictions. They are given specific instructions not to participate in acts of violence, use unlawful techniques to obtain information, or initiate a plan to commit criminal acts. They receive funds on a cash-on-delivery basis for information provided in authorized investigative activities. The amount of the FBI funds is determined by the FBI based on the value of the information provided by the individual. We weigh the value of that information by evaluating it against a criteria checklist of more than a dozen items the FBI has established to assure equitability in funds to the individual versus the Government's return.

If I can be of any further assistance to you, please contact me or the staff of the Office of Public and Congressional Affairs at (202) 324-2727.

Sincerely yours,

William S. Sessions
Director

DRAFT

Mr. COPELAND. Today, I can get you the number of hours. Maybe tomorrow I can get you hours translated into dollars.

Ms. BROWN. Was this an in-house case or did you subcontract this out to additional attorneys?

Mr. COPELAND. No. It was handled entirely by Justice Department attorneys.

Ms. BROWN. Are there any final statements that you would make?

Mr. COPELAND. No. Again we welcome the attention of this subcommittee to asset forfeiture. We think it is a very effective tool. We think we are using it properly. We are concerned when we see criticism of the program, particularly where we think there is no factual basis for it. We are always trying to do better.

We want to answer your questions, work with you and your staff to make sure that you know everything that we are doing in the asset forfeiture area, so you can make up your own minds about what you think about the program.

So again I appreciate the opportunity and your very cordial and courteous hearing this morning.

Ms. BROWN. I want to again thank you for your leadership. Of course, the new direction of Janet Reno is to be commended.

Mr. COPELAND. We all have high regard for the Attorney General, yes, ma'am.

Thank you.

[Witnesses sworn.]

Ms. BROWN. Be seated, please.

Mr. Carlson.

STATEMENT OF DONALD L. CARLSON, SAN DIEGO, CA, ACCOMPANIED BY R. J. COUGHLAN, JR., ESQ., ATTORNEY

Mr. CARLSON. I am Donald Carlson. I am employed by a Fortune 500 Co. My current position is vice president—operations of our domestic magnetics manufacturing plant in Omaha, NE, where I recently transferred.

In August 1992, I was assistant vice president in the Anacomp office located in Poway, CA near San Diego. I have been employed with Anacomp for over 12 years. I obtained a bachelors degree in finance from San Diego State and subsequently, a masters in business administration.

My job duties have grown over the years and include overall responsibility for our 200-person manufacturing facility in Omaha.

I was born in Iowa and lived on a farm until I was 18. I graduated from high school in 1969 and served 6 years in the U.S. Navy and reached the rank of petty officer second class.

After work on August 25, 1992, I spent the early evening with an associate from Anacomp who was in town from another office. I returned home at about 10:30 that evening. I then spent a few minutes getting ready for bed and went to sleep.

Sometime later—I now know the time to be around midnight—I was awakened from a deep sleep by a loud banging at my front door. I put on a pair of shorts and walked from my bedroom down a short hallway to a place approximately 20 feet from my front door. I could hear the loud banging at the door and muffled voices outside.

I called out in a loud voice several times, asking who was there. I received no response to my inquiries. I believed that robbers or burglars were attempting to break into my home, and I was extremely frightened, especially when I received no response.

At some point I picked up a portable phone which was on the kitchen counter near the end of the hallway and attempted to dial 911 in the dark. I also returned to my bedroom and retrieved my revolver, which had three bullets in it. I was unable to successfully dial 911, and I returned with my gun to the end of the hallway, again approximately 20 feet from the front door. I again called out in a loud voice, asking who was there and what they wanted. Again, I received no response.

The exact sequence of the events which occurred next is not completely clear to me, but I will do my best to describe them. I continued to hear muffled voices outside the house and the banging continued on the front door. I heard glass break in a window in the den, immediately to the right of the front door.

However, it was outside my line of vision. I also heard a thunderous explosion go off, which I believed to be behind me in the rear of the home. I believe someone yelled, "He's got a gun," at about this point. In the midst of that confusion, fearful for my life, I fired my revolver twice toward the front door, which was still closed, hoping whoever was trying to break in would be discouraged by my firing.

As I was shooting at the door, or immediately afterwards, I was hit in the right thigh by a bullet. I then retreated toward my bedroom, and as I approached my bedroom, I tossed my gun down the hallway away from me, and I turned into the bedroom and fell to the floor.

When I threw my gun down in the hall, I had only been hit once in the right thigh. After getting rid of the gun, I was shot two more times, once in the right shoulder and once in the upper right back. I believe I was shot both times after I was lying down on the floor of my bedroom and after I was disarmed.

As I lay in my bedroom on the floor, a silhouette appeared in my bedroom door. He or they were dressed all in black. They did not identify themselves as law enforcement, but screamed obscenities at me and threatened to shoot me more than once.

At two points they rolled me over, causing extreme pain to my right shoulder. No one offered me medical assistance while I lay on the floor of my bedroom. I had gradually gathered that they were agents or police from the totality of circumstances, although they never identified themselves as such. Eventually, paramedics arrived and they took me to the hospital.

I was kept in custody under armed guard and shackled for several days at the hospital. During that time, I was aware of hospital personnel referring to me as a criminal, of police officers and agents coming into my room, and the like. I was bewildered and confused by this treatment, and I felt extremely degraded.

I had been shot three times, once in the right thigh, once in the right shoulder, and once in the upper right back. The bullet to my thigh, I later learned, had severed the femoral vein. The doctors were not able to reconstruct it. I will suffer permanent circulatory loss and nerve damage to that leg.

The bullet to my right shoulder had shattered the large bone of the upper arm, the humerus. I was in traction for much of the time that I was in the hospital in an effort to repair the shattered humerus. It appears that despite substantial physical therapy after release from the hospital, I will always have some loss of range of motion in my right arm.

In addition, my right shoulder is permanently deformed. The bullet which entered my back traveled through my body, fragments hit a lung, and came to rest near my spine. Either because of this bullet or the combination of traumas, my respiratory system ceased to function; this condition is known as acute respiratory distress syndrome. Because of this, I could not breathe on my own for approximately 7 weeks.

I was placed on a respirator with a tube down my mouth during part of that time and through an incision in my throat for the balance. Through a computerized respiration system, the machine breathed for me. Needless to say, this meant that I could not eat and was fed through a tube in my nose for 7 weeks.

I have a paralyzed diaphragm as a result of these events and have limited lung capacity as a result. I also have had an accelerated heart rate as a result of the trauma and have just recently stopped taking medication to control it.

I spent from August 25 until October 12 in the hospital. As I believe you know from the publicity surrounding this case, my home contained no drugs or any other contraband or evidence of any illicit conduct whatsoever. Nor was I personally ever a suspect or target in any way of a drug investigation, although my home was apparently targeted and newspapers reported, based on agents' statements after the raid, that I was a narcotics suspect.

Apparently, the Drug Enforcement Administration and Customs, acting as part of "Operation Alliance" and in concert with local law enforcement, relied virtually exclusively on the largely uncorroborated word of a paid informant, Ronnie Bruce Edmond.

Mr. Edmond, as I understand it, told Customs and DEA agents that he was part of a large drug conspiracy working between Florida and San Diego. Over a period of several months during 1992, he was paid by one or both of those agencies or by Operation Alliance to provide them with information and tips. Apparently, his information and tips did not lead to any arrests, but did lead to what the agents believed were several near misses.

In essence, as I understand it, Mr. Edmond claimed that shortly before the raid on my house, he had helped deliver two truckloads of cocaine in such a large quantity that they had to be unloaded by a forklift into the garages of two vacant homes.

I have since reviewed the affidavit which a Customs agent swore was the truth to a Federal magistrate in order to obtain a nighttime search warrant for my home, as well as for the other home.

The government kept the affidavit secret from us for many months, purporting to conduct an investigation which has led to no charges of any agents, nor disciplinary action against any agents, to our knowledge; no reform of any procedures, to our knowledge; no apology to me whatsoever, and no effort by the government to make me whole in any fashion.

To our knowledge, this investigation has led only to criminal charges being filed against the informant and a statement by the U.S. attorney that the informant is exclusively to blame for what happened. The affidavit, however, contains obvious inaccuracies.

The premise of the affidavit is that the two houses to be searched that night were vacant and were being used, because they were vacant, as drop houses for large quantities of drugs. My understanding now is that Federal agents and local law enforcement personnel were in my neighborhood for several hours on the afternoon and evening of August 25—before I arrived home—and spoke with many of my neighbors.

They learned through that process that my home was not vacant and that there had never been any suspicious traffic in or out of my home.

I understand that local police authorities observed my arrival and my entry into the garage. In doing so, they were able to observe that there were no drugs in the garage, contrary to what was supposedly reported by the informant. They observed me arrive home in my car, they had to have observed that I was wearing a business suit, and they would have observed that I was carrying a briefcase, that I disarmed the alarm system to my home, and that I placed my golf clubs in my car in preparation for the next day and entered my home.

It had to be obvious to them that a light went on only briefly while I was in the house, and then the light went off and I went to sleep.

The agents and the police knew from all the circumstances that this was not a vacant drop house, as had apparently been reported to them and as was sworn to the U.S. magistrate in the affidavit. To our knowledge, no report of this information was made to the Federal judge.

Worse yet, rather than making an immediate entry or arresting me as I was entering the house, which would have been simple under the circumstances, they allowed me to go into the house and to go to sleep so that the surprise would be all the more extreme.

When I was awakened from my sleep around midnight by the banging at my door, they did not identify themselves as police or Federal officers in any fashion at any time. Had they done so, needless to say, I would have immediately opened the door and allowed them in. To this day, I do not understand why they would not and did not respond to my cries asking who was there and what they wanted.

My house was riddled with bullet holes and the carpets were ruined from the blood, and walls were destroyed. My medical bills exceed $350,000 and I will have lifetime medical expenses related to this horrible shooting. But, to date, the government has made no offer whatsoever to compensate me for these damages.

Notwithstanding extraordinary publicity in San Diego and, in fact, nationwide over this misguided raid, the names of the agents who shot me have never been revealed. The procedural failings that could have allowed this to happen have never been revealed nor, to our knowledge, even studied by the involved agencies.

It is my goal and my attorney's goal to exhaust every avenue through civil discovery procedures to get to the bottom of the insti-

tutional problems which allowed this to happen and to root out the culprits who caused it.

I am a very loyal American citizen, a veteran, and a strong believer in appropriate law enforcement; but I am amazed, shocked, and saddened by the failings of the Federal Government in participating and apparently encouraging the raid on my house that night, in the callousness with which it was conducted, and in the lack of any accountability for these actions. I am afraid that I now agree with many people who believe that there are—there is some insidious motivation permeating the war on drugs which causes agents and their supervisors to feel that they can conduct themselves in any manner they see fit in the name of the war on drugs.

Our case raises numerous issues related to those questions, including the misguided motivation to raid my house that may have come from the Federal asset forfeiture laws. In addition, we understand informants are offered a commission on properties seized on drug busts. To this date, we do not know if that was the case in this situation or not, but we intend to find out.

Clearly, however, two houses were raided that night by agents in a most outrageous fashion. Both houses turned out to be devoid of any drugs or anything related to drugs. Luckily, the other house was, in fact, vacant and no human being was harmed. From the reports given to us by neighbors of that house, however, the agents conducted themselves in what can only be described as a cowboy fashion and, to date, the government has failed to compensate the owner of that house for the damages to it.

There must have been some extraordinary incentive to the agents in my case to cause them to act with such total disregard for my rights and in disregard to obvious red flags that their mission was misguided.

I suspect that behind the kind of conscious disregard for the truth that leads to these horrible events are multiple motivations. I suspect that one of the incentives was indeed the possibility of forfeiting my house and the other house which was raided that night.

The market value of my home was approximately $260,000. I understand the other house is a similar home, approximately a mile away. That kind of financial incentive may well have played a real role in the conduct of Federal agents in raiding my home and in ignoring every sign that day that they were in the wrong place.

Since this event, I have learned that what happened to me is not unique. Almost without exception, everyone I speak to has their own personal story of some kind of similar issue. The obvious financial incentives provided by the asset forfeiture laws in these cases, both to the informants and to the agents and agencies involved, must be carefully examined and curtailed.

Can you even begin to comprehend what happened to me? Before August 25 last year, my life was consumed with trying to handle business obligations, finding a few hours to hold my golf game together, and trying to be a good father to my 13-year-old daughter. I have had varying degrees of success on those fronts. In my wildest imagination, I could not have foreseen going through what I have and sitting here before you talking about the asset forfeiture laws.

I now know more about the war on drugs than I ever cared to. Unfortunately, as unlikely as it seems, this is a reality today.

How can you and I, as citizens of the greatest Nation on Earth, allow laws to exist that encourage reckless and willful incompetence by our Federal law officials? This has to stop. It must stop before it happens to another innocent citizen, maybe your own family.

My pain is personal; the pain that people who love me have endured can never be justified. We must effect changes in the way we wage this so-called war on drugs.

I wish you success in your efforts. I hope that you will recommend the enactment of legislation that will reduce the likelihood of similar abuses by agents and law enforcement officers in the future.

Time is critical. You must act now. I hope that my testimony before you will have been of some assistance in your work.

I am open to questions from you at this time.

Thank you.

[The prepared statement of Mr. Carlson follows:]

TESTIMONY OF DONALD CARLSON

My name is Donald Lee Carlson. I am employed as a Vice-President for Anacomp Incorporated. My current position is Vice President - Operations of our domestic Magnetics Manufacturing Plant in Omaha, Nebraska, where I recently transferred. In August 1992, I was Assistant Vice-President in the Anacomp office located in Poway, California, near San Diego. I have been employed with Anacomp for over 12 years. I obtained a B.S. in finance from San Diego State in 1981, and a Masters in Business Administration from San Diego State in 1985. My job duties have grown over the years and include overall responsibility for our 200 person manufacturing facility in Omaha.

I was born in Iowa and lived on a farm until I was 18 years old. I graduated from Sioux Rapids High School in 1969 and then served six years in the United States Navy and reached the rank of Petty Officer Second Class.

After work on August 25, 1992, I spent the early evening with an associate from Anacomp who was in town from another office. I returned home at about 10:30 that evening. I was wearing a business suit and had a briefcase in my car. As I approached my house, I used a remote control device to open the garage door. When the garage door opens, the light in the garage goes on and anybody observing the garage can easily see inside. The garage was mostly empty, but there was a lawn mower, some tools, my golf clubs, miscellaneous furniture and garbage cans inside. I pulled my car into the garage, got out

of the car, took my coat and briefcase out of the car and started to go into my house. Before going from the garage into the house, I deactivated the security alarm. I then went inside my house, returned shortly to the garage to put my golf clubs in the trunk of my car, shut the garage door and went back into the house. I then spent a few minutes getting ready for bed and went to sleep.

Sometime later -- I now know the time to be around midnight -- I was awakened from a deep sleep by a loud banging at my front door. I put on a pair of shorts and walked from my bedroom down a short hallway and stood at the end of the hallway approximately 20 feet from my front door. I could hear the loud banging at the door and muffled voices outside. I called out in a loud voice several times asking who was there. I received no response to my inquiries. I believed that robbers or burglars were attempting to break into my home and I was extremely frightened, especially when I received no response. At some point I picked up a portable phone which was on the kitchen counter near the end of the hallway and attempted to dial 911 in the dark. I also returned to my bedroom and retrieved my revolver which had three bullets in it. I was unable to successfully dial 911, and I returned with my gun to the end of the hallway, again approximately 20 feet from the door. I again called out in a loud voice asking who was there and what they wanted. Again I received no response.

The exact sequence of the events which occurred next is not completely clear to me, but I will do my best to describe them. I continued to hear muffled voices outside the house and the banging continued on the front door. I heard glass break in a window in the den immediately to the right of the front door. However, it was outside my line of vision. I also heard a thunderous explosion go off, which I believed to be behind me in the rear of the house. I believe someone yelled "he's got a gun" at about that point. In the midst of that confusion, fearful for my life, I fired my revolver twice towards the front door which was still closed, hoping whoever was trying to break in would be discouraged by my firing. As I was shooting at the door, or immediately afterwards, I was hit in the right thigh by a bullet. I then retreated towards my bedroom, and as I approached my bedroom, I tossed my gun down the hallway away from the bedroom. I turned into my bedroom and fell to the floor. When I threw my gun down the hall, I had only been hit once in the right thigh. After getting rid of the gun, I was shot two more times, once in the right shoulder and once in the upper right back. I believe I was shot both times after I was lying down on the floor of my bedroom and after I was disarmed.

As I lay in my bedroom on the floor, a silhouette appeared in my bedroom door. He or they were dressed all in black. They did not identify themselves as law enforcement, but screamed at me "don't move, mother-fucker, or I'll shoot." The figures were silhouetted, behind the glare of flashlight(s) in my face. When

I tried to move my arm which was in extreme pain, they screamed at me again, "don't move, mother-fucker, or I'll shoot." At two points, they rolled me over, causing extreme pain to my right shoulder. I later learned the humerus, the large bone in the upper right arm, had been shattered by the bullet. The pain in the arm was excruciating and aggravated in the extreme by them rolling me over and handcuffing me.

No one offered me medical assistance while I lay on the floor of my bedroom. I had gradually gathered that they were agents or police from the totality of circumstances, although they never identified themselves as such. Eventually, paramedics arrived, and took me to the hospital. I was kept in custody under armed guard and shackled for several days at the hospital. During that time, I was aware of hospital personnel referring to me as a criminal, of police officers and agents coming into my room, and the like. I was bewildered and confused by this treatment and I felt extremely degraded. However, I was also in extreme pain.

I had been shot three times, once in the right thigh, once in the right shoulder and once in the upper right back. The bullet to my thigh, I later learned, had severed the femoral vein. The doctors were not able to reconstruct it. I will suffer permanent circulatory loss and nerve damage to that leg. The bullet to my right shoulder had shattered the large bone of the upper arm, the humerus. I was in traction for much of the time that I was in the hospital in an effort to repair the

shattered humerus. It appears that despite substantial physical therapy after release from the hospital, I will always have some loss of range of motion in my right arm. In addition, my right shoulder is permanently deformed. The bullet which entered my back travelled through my body, fragments hit a lung, and came to rest near my spine. Either because of this bullet or the combination of traumas, my respiratory system ceased to function. This condition is known as Acute Respiratory Distress Syndrome. Because of this, I could not breathe on my own for approximately seven weeks. I was placed on a respirator with a tube down my mouth during part of that time, and through an incision in my throat for the balance. Through a computerized respiration system, the machine breathed for me. Needless to say, this meant that I could not eat and was fed through a tube in my nose for seven weeks. I have a paralyzed diaphragm as a result of these events, and have limited lung capacity as a result. I also have had an accelerated heart rate as a result of the trauma and have just resently stopped taking medication to control it.

I spent from August 25th until October 12th in the hospital. For virtually all of that time I was in the critical care unit. During much of that time I was unable to speak at all because of the tube in my mouth, and subsequently only with great difficulty because of a mechanical device that irritated my throat. I was constantly punctured for insertion of various tubes and other devices as part of the medical treatment. In

addition, I suffered horrible indignities and what I felt to be invasions of my personal life and privacy.

I was eventually released from the hospital on October 12, 1992. After that I was unable to return to work for about 10 weeks. Initially, I walked with a limp, was unable to move my arm without pain, and had severe shortness of breath. In addition, I suffered emotional distress. I woke up at night fearful, and spent many sleepless nights. I had loss of memory and an inability to concentrate, and I was trying to piece together what had happened that night and why.

As I believe you know from the publicity surrounding this case, my home contained no drugs or any other contraband or evidence of any illicit conduct whatsoever. Nor was I personally ever a suspect or target in any way of a drug investigation, although my home was apparently targeted, and newspapers reported, based on agents' statements after the raid, that I was a "narcotics suspect". Since that night, I have learned through the investigation conducted by my attorney, of some of the things which led to this horrible nightmare.

Apparently, the Drug Enforcement Administration and Customs, acting as part of Operation Alliance and in concert with local law enforcement, had relied virtually exclusively on the largely uncorroborated word of a paid informant, Ronnie Bruce Edmond. Mr. Edmond, as I understand it, told Customs and DEA agents that he was part of a large drug conspiracy working between Florida and San Diego. Over a period of several months

during 1992, he was paid by one or both of those agencies, or by Operation Alliance, to provide them with information and tips. Apparently, his information and tips did not lead to any arrests, but did lead to what the agents believed were several near misses. In essence, as I understand it, Mr. Edmond claimed that shortly before the raid on my house, he had helped deliver two truck loads of cocaine in such a large quantity that they had to be unloaded by forklift into the garages of two vacant homes.

I have since reviewed the Affidavit which a Customs Agent swore was the truth to a federal magistrate in order to obtain a nighttime search warrant for my home, as well as for the other home. The government kept the Affidavit secret from us for many months purporting to conduct an investigation which has led to no charges of any agents, no disciplinary action against any agents, to our knowledge, no reform of any procedures, to our knowledge, no apology to me whatsoever, and no effort by the government to make me whole in any fashion. To our knowledge, this investigation has led only to criminal charges being filed against the informant, and a statement by the U.S. Attorney that the informant is exclusively to blame for what happened. The Affidavit, however, contains obvious inaccuracies.

The premise of the Affidavit is that the two houses to be searched that night were vacant, and were being used because they were vacant, as drop houses for large quantities of drugs. My understanding now is that federal agents and local law

enforcement personnel were in my neighborhood for several hours on the afternoon and evening of August 25th -- before I arrived home -- and spoke with many of my neighbors. They learned through that process that my home was not vacant and that there had never been any suspicious traffic in or out of my house. To my knowledge, this was not reported to the United States Magistrate. The Affidavit itself reflects that the gas and electric bills were checked by the agents, and they would have known through that process that my house was not vacant. In fact, my house had a "For Sale by Owner" sign in the yard with my home phone number listed on it, which is directly contradictory to a claim by the agents that the house had a "sold" sign in a window.

Finally, I understand that local police authorities observed my arrival home and my entry into the garage. In doing so, they were able to observe that there were no drugs in the garage, contrary to what was supposedly reported by the informant. They observed me arrive home in my car, they had to have observed that I was wearing a business suit, and they would have observed that I was carrying a briefcase, that I disarmed the coded alarm system to my home, and that I placed my golf clubs in my car in preparation for the next day and entered my home. It had to be obvious to them that a light went on only briefly while I was in the house, and then the light went off and I went to sleep.

The agents and the police knew from all the circumstances that this was not a vacant drop house, as had apparently been reported to them, and as was sworn to the U.S. Magistrate in the Affidavit. To our knowledge, no report of this information was made to the federal judge.

Worse yet, rather than making an immediate entry or arresting me as I was entering the house, which would have been simple under the circumstances, they allowed me to go into the house and go to sleep so that the surprise would be all the more extreme. When I was awakened from my sleep around midnight by their banging at my door, they did not identify themselves as police or federal officers in any fashion at any time. Had they done so, needless to say, I would have immediately opened the door and allowed them in. I had absolutely nothing to hide. To this day I do not understand why they would not and did not respond to my cries asking who was there and what they wanted.

We have been forced to conduct an expensive investigation of the underlying facts of this nightmare. The government has refused to share their knowledge of the events with us. We fear that this can cause loss of evidence or aid in a cover-up. In addition, my house was riddled with bullet holes and the carpets were ruined from the blood. Walls were destroyed, apparently as part of the government's investigation. Those repairs have had to be made. My medical bills exceed $350,000 and I will have lifetime medical expenses related to this horrible shooting. But to date, the government has made no offer whatsoever to

compensate me for these damages. We have had administrative claims on file with the federal government since the beginning of December, and have received no response. We will be filing a lawsuit in federal court in San Diego in the near future. I expect that we will be forced to litigate in the federal courts in a very expensive manner in order to obtain appropriate compensation for the damages done to me, and at this point I have given up ever expecting the federal government to apologize for their conduct. Indeed, notwithstanding extraordinary publicity in San Diego and in fact nationwide over this misguided raid, the names of the agents who shot me have never been revealed. Apparently, that will only happen through my and my attorney's efforts in litigation.

The procedural failings that could have allowed this to happen have never been revealed nor, to our knowledge, even studied by the federal government. It is my goal and my attorney's goal to exhaust every avenue through civil discovery procedures to get to the bottom of the institutional problems which allowed this to happen, and to root out the culprits who caused it. I am a very loyal American citizen, a veteran and a strong believer in appropriate law enforcement, but I am amazed, shocked and saddened by the failings of the federal government in participating and apparently encouraging the raid on my house that night; in the callousness with which it was conducted; and in the lack of any accountability for these actions. I am afraid that I now agree with many people who believe that there

is some insidious motivation permeating the war on drugs which causes agents and their supervisors to feel that they can conduct themselves in any manner they see fit in the name of the war on drugs. Our case raises numerous issues related to those questions, including the use and misuse of informants; the use and misuse of affidavits in support of search warrants; the failure to follow guidelines and procedures with respect to informants, search warrants and corroborating information; the lack of any common sense in gathering corroborating information; the gross over-reaction of agents in handling a search situation; competition among agencies; the extreme over-zealousness with which this entire affair was conducted without any consideration of the possibility that I and others whom they brought into their net were innocent, everyday citizens; and, finally, the misguided motivation to raid my house that may have come from the federal asset forfeiture laws. In addition, we understand that informants are offered a commission on properties seized in drug busts. At this date we do not know if that was the case in this situation or not, but we intend to find out through the discovery process.

Clearly, however, two houses were raided that night by agents in a most outrageous fashion. Both houses turned out to be devoid of any drugs or anything related to drugs. Luckily the other house was in fact vacant and no human being was harmed. From the reports given to us by neighbors of that house, however, the agents conducted themselves in what can only

be described as a "cowboy" fashion, and to date the government has failed to compensate the owner of that house for the damages to it. There must have been some extraordinary incentive to the agents in my case to cause them to act with such total disregard for my rights, and in disregard for obvious red flags that their mission was misguided. I suspect that behind the kind of conscious disregard for the truth that leads to these horrible events are multiple motivations. I suspect that one of the incentives was indeed the possibility of forfeiting my house and the other house which was raided that night. The market value of my home was approximately $260,000. I understand the other house is a similar home, approximately a mile away. That kind of financial incentive may well have played a real role in the conduct of federal agents in raiding my home and in ignoring every sign that day that they were in the wrong place.

When I was interviewed by Morley Safer of 60 Minutes, he asked me if I was bitter about this event. It is amazing even to me, but I do not feel bitterness. I have absolutely felt tremendous pain, both physically and emotionally, and I will suffer physical and perhaps emotional consequences my entire life. In the ambulance that night I asked God to let me die but just like Garth Brooks, "sometimes I thank God for unanswered prayers". I have now returned to work. I have a new position in the company which is every bit as challenging as the position I held before the shooting. Anacomp stood by me throughout these events, demonstrating their firm belief in me. My friends

and relatives also stood by me throughout these events and from the earliest moments told anyone who would listen that I was not a criminal. Those challenges and support have helped me greatly in trying to put behind me the terrible events of that evening. Work has been the antiseptic for my wounds. I do not continue to brood over them.

However, I am determined to learn why these events happened and to seek appropriate compensation for the damages done to my life and to my property. I am determined not to rest until those goals are achieved. My lawyer is equally determined to get at the truth and focus the public's attention in an appropriate fashion on this obvious crisis in law enforcement in order to cure the problems which led to these horrible events. He was a former federal prosecutor for approximately 10 years, and he is as devoted to these goals as I am. It was for these reasons that we decided to appear voluntarily before your Committee to assist you in looking into one aspect of this problem, to wit, the abuses in the asset forfeiture area.

Since this event I have learned that what happened to me is not unique. A short while after my home was raided, a man in the Los Angeles area was shot to death in front of his wife while agents stood nearby with a forfeiture warrant to take his ranch. I have learned of and heard of many other similar incidents around the country as I have begun to follow the news more closely as it relates to such activity. There is clearly a very, very serious problem afoot affecting American citizens who

are at the mercy of federal drug agents essentially running free, without any apparent controls, on what they believe to be some form of holy war. The obvious financial incentives provided by the asset forfeiture laws in these cases, both to informants and to the agents and agencies involved, must be carefully examined and curtailed.

Each of you consciously chose to lead public lives. I decided many years ago not to. Subjecting myself to public scrutiny has been very difficult. Reporters, 60 Minutes, constant questions from associates and now speaking before you. I would not do this except for the deeply seated belief that my rights as a citizen obligate me to do so.

Can you even begin to comprehend what happened to me? Before August 25 last year, my life was consumed with trying to handle business obligations, finding a few hours to hold my golf game together and trying to be a good father to my 13 year-old daughter. I have had varying degrees of success and failure on those fronts. In my wildest imagination, I could not have foreseen going through what I have and sitting here before you, talking about the asset forfeiture laws. I now know more about the War on Drugs than I ever cared to! Unfortunately, as unlikely as it seems, this is reality today. How can you and I, as citizens of the greatest nation on earth, allow laws to exist that encourage reckless and willful incompetence by our federal law officials? This has to stop. It must stop before it happens to another innocent citizen, maybe your own family.

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My pain is personal, the pain that people who love me have endured can never be justified. We must effect changes in the way we wage this so-called "War on Drugs." I wish you success in your efforts, and I hope that you will recommend the enactment of legislation which will reduce the likelihood of similar abuses by agents and law enforcement officers in the future. Time is critical, you must act now. I hope that my testimony before you will have been of some assistance in your work.

I am open to questions from you at this time.

Ms. LOCKLEAR. Madam Chairperson, if I may introduce Ms. Washington, I am Melanie Locklear, one of the attorneys representing Ms. Washington. I would like to inform this subcommittee that on this past Friday, a class action lawsuit against Volusia County was filed by Ms. Washington, individually and on behalf of other similarly situated, and on behalf of the Florida State Conference of the NAACP branches.

There are three counts to this lawsuit. The first count alleges that Volusia County has intentionally discriminated against minority motorists, specifically African-Americans and Hispanics, and we allege this violates section 1981 of the Civil Rights Act.

The second count of this lawsuit is brought pursuant to section 1983 of the Civil Rights Act and alleges that Volusia County has violated the fourth amendment rights of these motorists to be free from unreasonable searches and seizures.

The third count of this lawsuit is also brought pursuant to section 1983 of the Civil Rights Act and alleges that Volusia County has violated the equal protection clause of the 14th amendment by utilizing a race-based drug courier profile; specifically, this lawsuit alleges that Volusia County utilizes a race-based drug courier profile to stop motorists traveling along Interstate 95 and search their cars and seize any money or other valuable property they may have.

The documents and the evidence that was uncovered by the Orlando Sentinel reporters reveals that more than 90 percent of the persons who have been stopped by Volusia County are either African-American or Hispanic and that over 75 percent of those people who have had property seized from them have not been arrested on any criminal charges whatsoever.

At this point, we believe Selena Washington to be one of the best people to represent this class of plaintiffs. Her story is truly compelling, and she is here to tell you exactly what happened to her.

[The information follows:]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SELENA WASHINGTON and
FLORIDA STATE CONFERENCE
OF NAACP BRANCHES, individually
and on behalf of all other
persons similarly situated,

Plaintiffs,

v.

Case No. 93-484-CIV-ORL-18

ROBERT VOGEL, individually
and in his official capacity
as Sheriff of Volusia County,
Florida, and VOLUSIA COUNTY,
FLORIDA,

Defendants.
_____/

COMPLAINT

Come now the plaintiffs, Selena Washington ("Washington") and the Florida State Conference of NAACP Branches ("NAACP"), on behalf of themselves and all other persons similarly situated, and sue the defendants Robert Vogel, individually and in his official capacity as Sheriff of Volusia County, Florida ("Vogel"), and Volusia County, Florida ("Volusia County"), and for cause of action allege the following:

Jurisdiction and Venue

1. Jurisdiction is founded on the provisions of 28 U.S.C. §§ 1331 and 1343. This action arises under 42 U.S.C. §§ 1981 and 1983.

2. Venue of this action lies in the Middle District of Florida in that each of the defendants resides or is located in

that federal judicial district and all of the actions complained of occurred within that federal judicial district.

Nature of the Case

3. The plaintiffs seek injunctive relief, equitable relief and compensatory and punitive damages against Vogel and Volusia County to remedy the unlawful property seizure practices committed by the Volusia County Sheriff's Department ("VCSD").

4. The VCSD maintains property seizure policies and practices that unlawfully target and discriminate against African-American, or black, and Hispanic motorists who travel on Interstate 95 through Volusia County.

5. Specifically, the VCSD utilizes a race-based drug courier profile to target African-American and Hispanic motorists. Agents of the VCSD stop the vehicles of persons matching the profile and conduct searches of their vehicles. If any substantial amount of cash or other valuable property is found, it is seized. Then, with no evidence of criminal wrongdoing and no criminal charges filed, the VCSD retains all or part of the cash and other valuable property.

Parties

6. Washington is African-American. She is a resident of Charleston, South Carolina. On April 24, 1990, Washington was travelling on Interstate 95 through Volusia County and was stopped by the VCSD allegedly for a minor traffic infraction. However, Washington was not issued a traffic citation. During a search of Washington's vehicle, agents of the VCSD found a substantial amount

of cash, which they seized. The VCSD found no evidence of any criminal wrongdoing and Washington was not charged with any drug-related or other criminal offense. Nevertheless, the VCSD confiscated all of her cash.

A copy of an article from The Orlando Sentinel describing the seizure of Washington's cash is attached hereto as Exhibit A.

7. The NAACP is composed of the county and city branches of the National Association for the Advancement of Colored People in Florida. The NAACP is a membership organization whose goals include securing the equal treatment of African-Americans and other citizens without regard to race or color. The NAACP sues on its own behalf, and on behalf of its branches and members.

8. Vogel is the elected Sheriff of Volusia County. He holds office pursuant to the provisions of Article VIII, Section 1(d) of the Constitution of the State of Florida.

9. Volusia County is a political subdivision of the State of Florida.

Class Action Allegations

10. The plaintiffs bring this action on behalf of themselves and all other persons similarly situated. The class consists of:

(a) all African-American and Hispanic motorists who were stopped by the VCSD on Interstate 95 utilizing a race-based drug courier profile, had their property seized, but were not arrested for any criminal charges, from January 1, 1989 to the present; and

(b) all African-American and Hispanic motorists who were

stopped by the VCSD on Interstate 95 utilizing a race-based drug courier profile, from January 1, 1989 to the present, and all African-American and Hispanic motorists who anticipate and reasonably can be expected to use public highways in Volusia County in the future.

11. The number of class members who have been or could be affected by the VCSD's unlawful and discriminatory policies and practices is indeterminate, but is larger than can be addressed by joinder.

12. This action presents questions of law and fact that are common to and affect the rights of all class members.

13. The plaintiffs will fairly and adequately represent the interests of the class. The plaintiffs have retained counsel who are experienced in litigating class action and civil rights claims.

14. This class action is brought pursuant to the provisions of Fed.R.Civ.P. 23(a) and 23(b)(2).

General Allegations

15. During the period from January 1, 1989 to the present, Vogel and other agents of the VCSD have utilized subjective, race-based criteria to stop motorists travelling along Interstate 95 in Volusia County, and have seized any substantial amount of cash and other valuable property that the motorists have in their possession.

16. In more than 1,000 traffic stops made along Interstate 95, the VCSD issued a citation to less than one percent of the motorists.

17. Approximately 262 property seizures were made by the VCSD between March 1989 and June 1992. Approximately ninety percent of these seizures were from African-American or Hispanic motorists.

18. Additionally, no charges were filed against approximately seventy-five percent of the motorists from whom property was seized.

19. As Sheriff of Volusia County, Vogel is the final policymaker regarding the policies and procedures utilized by the VCSD in its law enforcement activities.

20. Since the VCSD's property seizure practices began in 1989, it has seized approximately $8,000,000.

21. The property seizure practices utilized by the VCSD are conducted pursuant to a widespread custom and policy of Volusia County.

COUNT I -
42 U.S.C. § 1981
(Racially-motivated, purposeful discrimination)

22. The plaintiffs repeat and reallege all of the allegations set forth in paragraphs 1-21, above.

23. The VCSD has utilized subjective, race-based criteria to stop African-American and Hispanic motorists for alleged traffic violations and subsequently to search their vehicles and seize their cash and other valuable property.

24. These stop, search and seizure practices constitute purposeful discrimination on the part of Vogel and Volusia County against African-Americans and Hispanics.

25. As a direct and proximate result of the aforementioned unlawful, stop, search and seizure practices, the plaintiffs and other members of the plaintiff class have been deprived of their civil rights as guaranteed by 42 U.S.C. § 1981.

WHEREFORE, plaintiffs and other members of the plaintiff class request that this Court:

(a) certify this lawsuit as a class action under the provisions of Fed.R.Civ.P. 23(a) and 23(b)(2);

(b) enjoin the defendants from continuing to use subjective, race-based criteria in carrying out law enforcement activities against African-American and Hispanic persons travelling on Interstate 95;

(c) award compensatory damages for the value of the cash and other valuable property seized from the plaintiffs and other members of the plaintiff class;

(d) award compensatory damages for the mental anguish and interruption in travel suffered by the plaintiffs and the other members of the plaintiff class;

(e) award punitive damages to the plaintiffs and other members of the plaintiff class; and

(f) award litigation costs and expenses, including reasonable attorneys' fees, to the plaintiffs and other members of the plaintiff class.

COUNT II
42 U.S.C. § 1983
(Fourth Amendment Claim)

26. The plaintiffs repeat and reallege all of the allegations set forth in paragraphs 1-21, above.

27. The aforementioned unlawful law enforcement practices deprived the plaintiffs and the other members of the plaintiff class of rights secured to them by the Fourth Amendment to the Constitution of the United States, namely, the right to be free from unreasonable searches and seizures.

28. At all times relevant to this action, Vogel was acting under the color of his official capacity as Sheriff of Volusia County and the acts of the VCSD were performed under the color of the statutes, regulations, customs, policies and usages of Volusia County and the State of Florida.

29. At all times relevant to this action, Vogel had absolute decision-making authority regarding the law enforcement policies and practices utilized by deputy sheriffs in Volusia County and, therefore, the actions of Vogel and his deputy sheriffs constitute the custom and practice or official policy of Volusia County.

30. The aforementioned actions of the defendants were undertaken willfully and knowingly, or with reckless indifference to the protected rights of the plaintiffs and the other members of the plaintiff class under the Constitution of the United States.

31. As a direct and proximate result of the aforementioned unlawful law enforcement practices, the plaintiffs and other members of the plaintiff class have been deprived of their rights

secured by the Fourth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs and other members of the plaintiff class request that this Court:

(a) certify this lawsuit as a class action under the provisions of Fed.R.Civ.P. 23(a) and 23(b)(2);

(b) enjoin the defendants from continuing to utilize law enforcement policies and procedures that deprive African-American and Hispanic motorists of the rights secured to them by the Fourth Amendment to the Constitution of the United States;

(c) award compensatory damages for the injuries suffered by plaintiffs and the other members of the plaintiff class as a direct and proximate result of the unlawful searches and seizures;

(d) award punitive damages to the plaintiffs and the other members of the plaintiff class; and

(e) award litigation costs and expenses, including reasonable attorneys' fees, to the plaintiffs and the other members of the plaintiff class.

COUNT III
42 U.S.C. § 1983
(Fourteenth Amendment Claim)

32. The plaintiffs repeat and reallege all of the allegations set forth in paragraphs 1-21, above.

33. The aforementioned unlawful law enforcement practices deprived the plaintiffs and the other members of the plaintiff class of rights secured to them by the Fourteenth Amendment to the

Constitution of the United States, namely, the right to equal protection of the laws.

34. At all times relevant to this action, Vogel was acting under the color of his official capacity as Sheriff of Volusia County and the acts of the VCSD were performed under the color of the statutes, regulations, customs, policies and usages of Volusia County and the State of Florida.

35. At all times relevant to this action, Vogel had absolute decision-making authority regarding the law enforcement policies and practices utilized by deputy sheriffs in Volusia County and, therefore, the actions of Vogel and his deputy sheriffs constitute the custom and practice or official policy of Volusia County.

36. The aforementioned actions of the defendants were undertaken willfully and knowingly, or with reckless indifference to the protected rights of the plaintiffs and other members of the plaintiff class under the Constitution of the United States.

37. As a direct and proximate result of the aforementioned unlawful law enforcement practices, the plaintiffs and other members of the plaintiff class have been deprived of their rights secured by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, the plaintiffs and other members of the plaintiff class request that this Court:

(a) certify this lawsuit as a class action under the provisions of Fed.R.Civ.P. 23(a) and 23(b)(2);

(b) enjoin the defendants from continuing to utilize law enforcement policies and procedures that deprive African-American and Hispanic motorists of the rights secured to them by the Fourteenth Amendment to the Constitution of the United States;

(c) award compensatory damages for the injuries suffered by plaintiffs and the plaintiff class as a direct and proximate result of the unlawful searches and seizures;

(d) award punitive damages to the plaintiffs and other members of the plaintiff class; and

(e) award litigation costs and expenses, including reasonable attorneys' fees, to plaintiffs and other members of the plaintiff class.

PLAINTIFFS DEMAND A TRIAL BY JURY AS TO ALL ISSUES SO TRIABLE.

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June 19, 1993

PRESS RELEASE

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MINORITY MOTORISTS FILE CLASS ACTION LAWSUIT AGAINST VOLUSIA COUNTY SHERIFF

Dr. Benjamin Chavis, the newly-appointed Executive Director of the national NAACP, and T. H. Poole, Sr., the President of the Florida State Conference of NAACP Branches, have announced their support for a civil rights lawsuit that was filed in federal court in Orlando yesterday against Sheriff Robert Vogel of Volusia County. The class action lawsuit alleges that Sheriff Vogel's department has used a racially-oriented drug courier profile since 1989 to target African-American and Hispanic motorists travelling along Interstate 95 in Volusia County.

According to the lawsuit, African-American and Hispanic motorists are stopped on the basis of the profile, and have their cash and other property taken from them, even though no criminal charges are filed. The lawsuit alleges that among the hundreds of motorists who have had their property seized since 1989, over ninety percent are African-American or Hispanic.

The lawsuit is based on the Civil Rights Act of 1870, as amended, and the Fourth and Fourteenth Amendments to the United States Constitution. The plaintiffs are seeking the recovery of their seized cash and property, as well as compensatory damages for mental anguish and punitive damages.

The individual plaintiff in the lawsuit, who is suing on behalf of herself and other class members, is Selena Washington of Charleston, South Carolina. Ms. Washington was one of the persons featured in a series of stories about Volusia County's asset seizure practices written by The Orlando Sentinel in 1992. That series of newspaper stories was awarded a Pulitzer Prize.

The plaintiffs are being represented by the General Counsel's Office of the NAACP in Baltimore; civil rights attorneys Charles Burr and Melanie Locklear from Tampa; Harry Lamb, Jr., an Orlando attorney who serves as counsel to the Florida State Conference of NAACP Branches; and E.E. "Bo" Edwards, a criminal defense attorney from Nashville who is a nationally-recognized authority on asset seizure laws.

Mr. Poole stated that "Florida's asset seizure law is bad enough even when it is applied fairly and even-handedly. But when African-Americans and Hispanics find themselves singled out for enforcement of the law, it is intolerable. People of all races need to feel free to travel the highways of this state, and to know that their property will not be taken from them simply because of the color of their skin."

Ms. BROWN. Ms. Washington.

Mr. MCCANDLESS. Maybe you can pull the microphone closer. It is difficult to hear.

STATEMENT OF SELENA WASHINGTON, CHARLESTON, SC, ACCOMPANIED BY MELANIE LOCKLEAR, ESQ., ATTORNEY

Ms. WASHINGTON. OK. I am Selena Washington, originally from Colleton County, which is Walterboro. I moved to Charleston in 1968 to go to college.

After going to college, I worked at a law firm, funeral home, and then became one of the first women welders since the world war. That was at World Southern, making gas lines which—we then had a major mass layoff because they wanted to change groups; after that, going to Radziwell Shipyard, working with government contracts.

After that, going back to school, learning a little about different things, because I fell and tore the ligaments in my knee, which meant I could not teach welding anymore or weld anymore.

After that, Hugo came to Charleston. When Hugo came to Charleston, we had a guy in the neighborhood who was mostly—had the first contract with a guy from Florida. He was doing the contracts, right? So we was waiting on—when he left one spot, I asked him to come on and do mine. What he said, if we would get the material, it would be cheaper. They would do—discharge us for the repairs, OK.

We had a list, a list of everything. I took the money, was going to Florida. We got—I didn't know where we was at the time, but then it was a little dark stretch along there. A light came on, a blue light, and then a real bright light, a real bright light. I stopped. We pulled over to the side.

When the officer came up to the car, you know, like he backed off from the car. Then I said to myself, "Maybe he can't see, you know, because it was real dark." I reached up to turn on the top, the light in the top of the car, so he could see. Then he said, "Step out of the car."

And then we stepped out of the car. He said, "May I search this car?" And it seemed quite weird because, you know, he didn't ask for anything during the time. So I know there was the car there, he was dressed, everything. So I said, "Well, maybe he's just frightened because it's late at night." I said, "Yes."

Then I said—"Well, what happened;" he said, "was you—was you all speeding?" I said, "Speeding?" He said, "Yes." He said, "Well, may I search the car?" I said, "Yes." I said, "No problem." He said, "Well, what are those bags in the back?" I said, "Well, one is a briefcase and the other is my pocketbook, you know, because I put it on the seat down on the floor."

So he said, "Could you open that briefcase for me?" I said, "Yes, I can." Then after I opened the briefcase, he said, "What's in that Royal Crown bag?" I said, "It is money for building supplies. You know?"

He said, "Well, just hold on a minute." Then he—the other policeman was already there. One was—5 minutes, wasn't 5 minutes, he was there, too. They smiled. I said "You know, it was weird." So I said, "Well"—he said, "Well, I will tell you what, you come sit in

the car, in my car." So we went and sat in the back of his car. He locked the car.

He came back to the car, and they said it was drug money. I asked him, you know, drug money, what do you mean, drug money? I said in wrappers? All you have to do is look on it; my paper is there, look and see who I am. I said, either call somebody, take me back to the station, whatever, just take me back to the station, let's get that squared away. Take me to—you know, to whatever you want to do, but just go back to the station and clarify this.

He said to me like this: He told me no. He actually told me no, he would not even take me back to the station. He told me if I wanted to follow him for a receipt, I could. He said if you want to follow me back to the station for a receipt, I could; and he did not take my briefcase, but all—with everything there. He did not take my name. He did not take any information at the scene, but he took the money. He took the money.

I said, well, I am not going to let you just take that money like that. I am going to follow you. The other one said, well, you will be stupid to do that. And I said, well, I'm going to follow you. And I followed him. That was—then I got frightened. I am going to be honest. It was very frightening. It was dark. The roads he was going down was dark. He was going so fast.

When we got to the station, he said, you are one out of a few to follow someone.

And so then I asked him, could they just let me have some money, you know, and whatever. And one said, give you back drug money?

And I said to him, well, just look, just look, look at the papers, just look or call some, you know, call somebody. He cannot want to hear none of that.

But the little fellow who they took the money to, he was very decent. He was very decent. I couldn't even make a phone call. They did not allow me to make a phone call. They told me the best thing I could do was to go back, but it was too late at night, and have myself an attorney because they would have theirs. No money.

And then I told them I want—just give me a receipt. And he told me it was going to take a while to count the money and I wanted to count the money, I could wait. And I sat there and they I asked one could they show me the way back out of there. Because I didn't know the way out of there.

And he said you found your way in, find your way out. And I said I didn't find my in. I followed you. And then I went on to Florida. And found a lawyer right then and there.

And then he told me that he would try and recover my money and he must have talked to someone in Volusia County. I don't know who he talked to and he called me back on several occasions and told me that they offered me 15 of it back. And then I should accept that. Because by the time they would try to fight the case, it would cost me more than my $19,000. So I took the $15,000.

And that was the end of that. My house is still tore down because the insurance company, it took so long for me to get that case cleared away. The insurance company took the money and applied it toward my balance on my house. So I am stuck with the tore up

house, because I didn't know in the clause with a house that you had a certain amount of time to repair your house after you go. And they said I took too long so they applied the money to the house mortgage.

Ms. BROWN. Have you finished, Ms. Washington?

Ms. WASHINGTON. I beg your pardon?

Ms. BROWN. Have you finished?

Ms. WASHINGTON. Yes.

Ms. BROWN. Thank you very much. Both of these cases sound hard to believe. It doesn't sound like America. It sounds very un-American. I have heard of many cases like this to happen to African-Americans and poor people, but never to a white, middle-class American that clearly if there was just any kind of a check, what happened to you would not have happened. Do your friends and co-workers believe that this happened to you?

Mr. CARLSON. There are a lot of very dumbfounded people by this incident. And it's been interesting talking to some of them and getting their initial reactions. Frankly, quite a few of them have reacted by saying, you know, I really thought I knew you, Don, or I really thought I knew you, and because obviously the government wouldn't make a mistake like that. So obviously I didn't know you and you were involved in drug activity.

Ms. BROWN. So just getting accused, some people think that you could possibly be guilty.

Mr. CARLSON. That is right.

Ms. BROWN. Have you learned any additional information about the evidence against you or how they received that first search warrant?

Mr. CARLSON. I don't know what to say.

Mr. COUGHLAN. Maybe I could respond to that briefly. I am Jerry Coughlan, his attorney.

It was fascinating to listen to Mr. Copeland speak about certain facts which have never, ever been enunciated by the U.S. attorney or the Department of Justice. For example, claiming that Mr. Carlson's name was used by the informant, that is absolutely untrue. The little that we do know is that the informant simply said that there were houses that were supposedly vacant.

Also Mr. Copeland indicated that this informant had been convicted. As far as I can tell, he hasn't even been brought back to San Diego. He has been charged in Georgia with some kind of crime and the U.S. attorney has made no attempt to bring him back to San Diego.

More importantly they have absolutely refused to tell us in fact what happened. I wrote them a letter months ago that we didn't want to sue individual officers or agents who were not involved in this. Could we find out the names of the people who were involved, could we get some indication of why you did this? We have received no response whatsoever to our inquiries. We had to fight for months to get the affidavit released and unsealed. The government fought that to the court of appeals and finally released it only after they had indicted the informant. So our information has come solely from our limited ability to seek out facts informally. And I in fact interviewed the informant under oath before the U.S. attorneys office did through my own search.

We do not know that the agents knew his home was not vacant. From all the things they knew before they went into the house and for some reason they chose to perpetrate that raid in any event.

I would ask you to ask Mr. Copeland one more question. If the agents knocked and announced, why wouldn't Mr. Carlson just answer the door? It is pretty obvious that he had no contraband in his home. No criminal record. He had no problem whatever. Had they knocked and announced, he would have answered the door; ask Mr. Copeland that question for us.

Ms. BROWN. Can the committee receive a copy of your letter for the record that you sent to the U.S. Department of Justice?

Mr. COUGHLAN. Be glad to.

[The information follows:]

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January 26, 1993

William Q. Hayes, Esq.
John F. Neece, Esq.
U.S. Attorneys' Office
940 Front St., Room 5-N-19
San Diego, CA 92189

Re: Donald Carlson

Dear Messrs. Hayes & Neece:

As you know we have filed administrative claims with the Drug Enforcement Administration and U.S. Customs on behalf of Mr. Carlson. In addition, we felt compelled to file a claim against the County of San Diego because of the lack of information that local authorities were not involved in the investigation and/or shooting of Mr. Carlson. Given that same lack of information, I will be compelled to file claims against the City of Poway and the City of San Diego in the near future.

After filing the claim against the County, I received certain information which led me to believe that in fact Sheriff's Deputies were on the scene of the raid. I am enclosing herewith a copy of the Amended Claim which I filed with the County specifying the information I have. I understand that the County Counsel is specifically looking into that information at this time.

Needless to say, we have no interest in filing claims and/or, when timely, civil complaints against parties who had no involvement in these incidents. Unfortunately, given the government's wall of secrecy which has been set up surrounding this entire matter, I am unable to exclude anyone from our claims at this stage.

Similarly, we do not know what agents actually broke into Mr. Carlson's house, what agents were on the scene or who shot him. As we do not know the names of any of the

agents involved or their roles, we will have to file Bivens claims against all unknown agents involved.

In order to avoid unnecessary litigation, I request a statement of any role played by any local or non-federal law enforcement agents or agencies in the investigation leading up to the raid, the events surrounding the raid that day or evening, and/or the shooting. I further request the names of all agents, police officers, deputy sheriffs or other personnel involved in any of these activities and the roles they played.

Clearly we will be entitled to learn this information through discovery after lawsuits are filed. It seems to me that your office can perform a great service in sparing unnecessary work for everyone involved and reducing litigation, if it is improper, by supplying this information promptly. I, therefore, specifically request an answer from your office to this request as quickly as possible.

As I reach the point where we will have to file lawsuits, it would be extremely helpful, in addition, to review the evidence. In that regard, I request access to all evidence surrounding the shooting, including but not limited to, all physical evidence collected on the scene, all photographs taken at the scene, all scientific reports or studies done concerning the incident, all tapes of any kind or records of communications connected the investigation and raid (for example, 911 tapes, or records of radio transmissions among the agents). Clearly, such evidence will be discoverable after the filing of lawsuits. It seems to me likely that my access to such information now, again could make the entire litigation process more efficient, saving the taxpayers dollars in the discovery process, and allowing us to approach the case in a more intelligent and selective fashion.

In Court I have previously requested access to the Affidavit in support of the search warrant. Your office contended that an investigation was ongoing and that the warrant needed to be maintained sealed while that was ongoing. It has now been 5 months since Mr. Carlson was shot in his home by agents of the federal government. Had he been shot by ordinary citizens under similar circumstances, it is absolutely clear that charges would have been brought by now and the evidence made public. Given this extraordinary delay, I again request that the Affidavit immediately be

unsealed and provided to us so that we can approach the case, and in particular the filing of complaints, in an intelligent fashion.

Finally, I request the statements of all witnesses interviewed by any investigative agencies in this matter. Mr. Carlson made himself available to the Sheriff's Department for interview as part of their investigation. I believe it only fair that we be provided with the interviews of any and all witnesses to this tragic event.

I would appreciate a prompt response to this letter. Thank you.

Very truly yours,

COUGHLAN, SEMMER & LIPMAN

R. J. Coughlan, Jr.

RJC:st
Enclosure

/u/c/476/letters/hayes

Ms. BROWN. Ms. Washington, why do you think the State trooper stopped you? Was it because you were going 7 miles over the speed limit?

Ms. WASHINGTON. We wasn't going 7 miles over the speed limit. It might have been one. Maybe I didn't have the controls adjusted right. I said it could have been a little bit over. A little, but not 7. And then he didn't say anything about a ticket until after the fact.

Ms. BROWN. Did he ask you for your license or anything?

Ms. WASHINGTON. I give all that information when I get back to the station.

Ms. BROWN. When the officers initially stopped you——

Ms. WASHINGTON. No, ma'am.

Ms. BROWN. They didn't ask you to show a driver's license?

Ms. WASHINGTON. No, ma'am. The first one that came up; no, ma'am.

Ms. BROWN. How much of the fee—of the $15,000 to negotiate this settlement—the $15,000 on lawyer's fees?

Ms. WASHINGTON. Well, I give back $1,000.

Ms. BROWN. So you actually received $14,000?

Ms. WASHINGTON. Right, well, it was $14,200. So it was $13-something.

Ms. BROWN. The $19,000 that you were carrying in cash, do you often carry large amounts of money?

Ms. WASHINGTON. No, I don't. I had cashiers checks. What I did, I went to the bank, cashed them. I even told them to call back to the bank. It still had the bank stamps on it and the wrappers. I asked them to please do that for me. Don't make me go through all that. Just to call back even if it took me to the next day to try and get that squared away, would someone do that for me. And he said it was too late in the night and they took the money off the wrappers and put it in the machine and counted it up.

Ms. BROWN. Where were you exactly? Do you know where you were located at that time?

Ms. WASHINGTON. No, I don't know the area.

Ms. BROWN. You didn't know the area; it was dark. What would you recommend that this committee do to redress this problem or maybe your attorney would like to make——

Ms. WASHINGTON. This is honest. When someone is stopped, be—let them identify themselves. Let them go to the police department in the car with the patrolman. You know, to stop this problem. You know, let them know who the person is, ask for identification. If they feel like the money is wrongdoing or whatever, take them into the police department. Take them in. Don't set them free. Take them in.

Ms. BROWN. I would think this would be standard procedure.

Ms. WASHINGTON. No, ma'am. They didn't do that. They absolutely told me. Hey, it was my choice, I could go to the police department or I could——

Ms. BROWN. Just leave your $19,000 there.

Ms. WASHINGTON. And he didn't take the papers. And I said, you know, take the briefcase. You know, take my identification. Take these things with you. He said, we don't need that. We have the money. And if you—if you choose to follow me—but he did say this,

now, if I choose to, you know that is the law. If I choose to, I could. But I didn't have to.

I didn't have to. And I said, you know, then I got frightened. I am going to be honest. I was real frightened. I was saying they don't have any paperwork on me. And I did remember the police number on the car. And I said they don't have any paperwork on me. And how can they just take my money, do me later? And then when I followed him in, the other one turned around. And the other one had the money in the car.

And he went on, you know, going in a lot of directions. And he went on to the station. And when he went on to the station, he told me, very few people follow us back.

Ms. BROWN. Thank you, Ms. Washington.

Mr. Hailes, you are here with the NAACP. Would you like to make some——

STATEMENT OF EDWARD A. HAILES, COUNSEL, WASHINGTON BUREAU, NAACP

Mr. HAILES. What I would recommend to this committee on behalf of the NAACP is that the committee seek a status report from the Justice Department on what Mr. Copeland testified earlier was a pending investigation of some of these claims. The Nation learned a hard lesson from the videotape beating of Rodney King. We understand there have been videotapes of cheating of law abiding citizens on Interstate 95. And if it is a fact that the Civil Rights Division of the Justice Department now is investigating some of those claims, we think it is in the interest of this committee to see the status of that investigation.

Ms. BROWN. I have one question. Your complaint alleged that 90 percent of the people stopped, from whom cash is seized on Interstate 95, are African American or Hispanics and that the reason why is the drug profile in this particular area of Volusia County. The Department of Justice has indicated that there is no drug profile to be used as far as race is concerned. How would you respond to that?

Mr. HAILES. I would defer to Ms. Locklear on that. I think that we may see an unwritten policy in practice. That would be my general statement.

Ms. LOCKLEAR. Although the Justice Department and Federal law enforcement agencies may not have a specific written drug courier profile, we believe that the Volusia County Sheriff's Department is acting under a very specific drug courier profile based upon race. The numbers, the very statistics bear that out.

Experts and statisticians have told us that because Interstate 95 is a major artery to travel to south Florida and to travel to Disneyworld, Daytona Beach, Miami, that if you stand out by Interstate 95 in Volusia County for any significant period of time, the population that would drive by will mirror the population of the United States. In other words, only 12 to 15 percent of the people driving by will either be African-American or Hispanic.

Ms. BROWN. OK. Mr. McCandless.

Mr. MCCANDLESS. Thank you, Madam Chairwoman. Mr. Carlson, what happened to you physically is very unfortunate, as well as emotionally, and you have my deep sympathy. The hearing today

deals with the forfeiture program, so that is what I would like to concentrate on, if we may.

In the concluding remarks of your statement you said we must effect changes in the way we wage this so-called war on drugs. I wish you success in your efforts and hope that you will recommend the enactment of legislation which would reduce the likelihood of similar abuses by agents and law enforcement officers.

Previously you referred very briefly to the forfeiture program as being a possible payment for the individual that was involved in this case. Could you expand or amplify this in the terms of the purpose of our hearing here today?

Mr. CARLSON. Well, I would say that maybe to echo some of the comments that were made earlier, I think that some of the things that are wrong with the asset forfeiture laws are the profit incentive that is in it, both to the State and local agencies, the use of paid informants and their profit incentive under these laws. I think that—and the power issue.

Power does corrupt absolutely. And I think that the way that this area of law enforcement has developed has—doesn't have necessary controls, checks, and balances in place. Like I say, I do speak with—I have spoken with hundreds of people and they have all their own personal story.

So, I think you have to get the profit incentive out of it. I don't believe, like some others, that carrying cash should be a crime, no matter what. I think that is a basic right that we have. So I think the other thing that needs to be done within the context of a law in this area is to make the forfeiture contingent on proving some criminal activity.

Mr. MCCANDLESS. Let me just go back to a part of your comment earlier to power corrupting. Is there some feeling in your mind that the Drug Enforcement, Customs agents that were involved in your case were in some way going to benefit financially from what they were hoping they were going to be able to do?

Mr. CARLSON. We don't have any specific knowledge of that. But when you look at the events of my situation, all you can really do—again like my attorney has stated, they won't share any information with us. They won't tell us what happened. All I remember is that brief few moments in time of darkness and pain and suffering.

So when you search for the motives without being provided any information of what the motives were, it's not hard to come to the conclusion that the seizure of the property was a specific motive in this case.

Mr. MCCANDLESS. Thank you.

Ms. Washington, you were in Florida at the time, as I understand it, when you were stopped by the officer.

Ms. WASHINGTON. Yes, sir.

Mr. MCCANDLESS. And you were in one of the counties represented by Mr. Mica that was with us earlier.

Ms. WASHINGTON. Yes.

Mr. MCCANDLESS. I find it rather difficult to put together something where a law enforcement officer takes $19,000 but you only get $15,000 back, when there was nothing involved that for any size, shape, or reason, would justify that kind of action.

Could you share with me, or could those representing you share with me, what that county said, at the time they gave you the money back to justify keeping the amount of money that they did?

Ms. WASHINGTON. No one said any justification to me. All they said, the lawyer said that is like a payment. You know, they take that portion.

Mr. MCCANDLESS. Your lawyer said that is like a payment? So if we are going to get the rest of your money back, we are going to have to go to court? And I suggest, if you understood your statement correctly, that if we go to court, we are going to spend more money than what you are going to get back. So take this and be satisfied?

Ms. WASHINGTON. Yes.

Mr. MCCANDLESS. It is a payment.

Ms. WASHINGTON. To me, to me, it's like a payment. A payment for something I didn't do. Because they sent me a little piece of paper, right, and told me to sign it, that they were going to take out $4,000.

Mr. MCCANDLESS. Was this attorney practicing in this general area?

Ms. WASHINGTON. He was Michael Blacker from Miami.

Mr. MCCANDLESS. So, you were from South Carolina, as I remember.

Ms. WASHINGTON. Right.

Mr. MCCANDLESS. Did you ever talk to anybody in the county government, the administrative officer or some of those who are legislatively responsible for the actions of the county? Did your attorney ever talk to anybody there?

Ms. WASHINGTON. No, sir. No one told me about anybody. No one responded to me about anything until they got in touch with me.

Mr. MCCANDLESS. Your attorney didn't contact any of these people?

Ms. WASHINGTON. No, sir, not as I know. He didn't tell me anything about it. All I knew was that I had to give Volusia County $4,000.

Mr. MCCANDLESS. I think the lady sitting next to you might have the same understanding that I am getting here—and if you would wish to comment a little bit on this—one could use the word "extortion."

Ms. LOCKLEAR. Absolutely. We did not represent Ms. Washington at the time her money was taken or at the time she recovered the $15,000 that she did recover. However, it is extortion.

The Volusia County Sheriff's Department in the past 3 years has seized over $8 million. As far as we know, there are only two individuals who have ever received all of their money back from the Volusia County Sheriff's Department. The Volusia County Sheriff's Department realizes that it is going to cost these people money to go to court and attempt to retrieve all of the money that was taken from them. And that because of that they can make these deals and keep a certain sum of money without any questions being asked.

Mr. MCCANDLESS. Do I understand for the record that she was never charged or booked or in any way placed in a position of having to answer for anything, including a traffic ticket?

Ms. LOCKLEAR. That is right. She was never issued a traffic ticket. She was never issued a written warning. She was never arrested.

Mr. MCCANDLESS. Thank you.

Ms. BROWN. I guess I have a couple of followup questions, but let me say that I am the other Congressperson who represents Volusia County for the record.

Mr. MCCANDLESS. Maybe she should have gone to her Congresswoman. They wouldn't be bashful in California about that.

Ms. BROWN. You mentioned that your money was put into a money counting machine?

Ms. WASHINGTON. Yes, ma'am.

Ms. BROWN. I have never heard of a money counting machine in a sheriff's office.

Ms. WASHINGTON. It was a money counting machine. They put the money in and it don't take but a minute. It feeds—it's like a bank uses. You know, they put the stack in there and it totals it up.

Ms. BROWN. OK. And for the record, you have already said that you didn't receive any speeding tickets or any kind of a warning whatsoever?

Ms. WASHINGTON. No, I had to beg to go to the station.

Ms. BROWN. Yes, ma'am. Let me say in closing that I want to thank both of you for coming. And you certainly have the attention of this committee. What has happened to you is unconstitutional, un-American, and is just hard to believe that this happened in America and, you know, this is not a police State. I want to congratulate you both, and know that this committee will pursue remedies to alleviate what has happened to you and make sure that this does not happen to any other American.

Ms. WASHINGTON. Thank you.

Ms. BROWN. Thank you very much for coming. The entire panel.

Mr. HAILES. Thank you.

Mr. CARLSON. Thank you.

Ms. BROWN. We have one other panel. Panel 4. Please. OK. We have Mr. Marshall, Ms. Hollander, and Mr. Edwards. Mr. Marshall is the chairman of the board, DAWN for Children, and director, Stopover Services of Newport County; Ms. Hollander is the president of the National Association of Criminal Defense Lawyers; and Mr. Edwards is the chairman of the Federal Forfeiture Task Force, National Association of Criminal Defense Lawyers.

Would you please stand for the oath?

[Witnesses sworn.]

Ms. BROWN. Please be seated.

Mr. Marshall.

STATEMENT OF PETER MARSHALL, CHAIRMAN OF THE BOARD, DAWN FOR CHILDREN, AND DIRECTOR, STOPOVER SERVICES OF NEWPORT COUNTY

Mr. MARSHALL. Madam Chairman, and other members of the Subcommittee on Legislation and National Security, thank you for this opportunity to speak at this oversight hearing to review the Department of Justice's Asset Forfeiture Program. My testimony will look at the social services funding needs in Rhode Island relat-

ed to youth and children, alternative expenditures for funds and recommendations.

Little Compton, RI will serve as an example. Little Compton is known all the way from Rhode Island to England for perhaps the best moneyed police force—best police force that money can buy. They have a police force of about seven and they have a potential of $4.5 million of asset forfeiture funds coming into it. And they—the last murder occurred in this town about 27 years ago.

And the population of this town is 3,340. They did receive—they were audited, and in an initial audit, they found out that about 73 percent of the expenditures were inappropriate. We have things that I mentioned in my written testimony, such as a wood chipper for the maintenance department, a $16,000 computer for the town treasurer to use, which obviously you need in a town that size, $15,000 for truck maintenance. They did do some substance abuse prevention by spending $484 on teddy bears for their drug awareness program. They also spent some money on baseball caps and T-shirts and they spent some money on a 4th of July celebration for fireworks.

I do believe that a town like this that has already received $1.9 million and could receive $2 million more, deserves the attention that it has received. I think we need to take a look at funds being used not just for law enforcement but funds for crime prevention. Prevention—meanwhile, while this is happening and while there is new police cars and more running police cars than the police can use in Little Compton, there is a 100 percent cut in the State budget of Rhode Island for all crime prevention funds.

The State's funds total $428,000 for a youth diversionary program to divert youth from the criminal system. Their cost for the training school is about $92,000 a year and another $100,000, according to the Governor's Justice Committee, goes into crime prevention, so it is about $500,000.

And we are watching kids—last week I was going to graduation for kids that would have wound up in the training school had not my program existed. At Stopover Services we have a 93 percent success rate of keeping kids out of the court system.

Yet, we receive 100 percent cut and the mayor of Providence drives a Jaguar—white Jaguar paid for under asset forfeiture funds only to be used when the regular mayor's car is in need of repair. Or the case in Pawtucket what Brian Suralt, the past mayor, was driving a Crown Victoria under asset forfeiture funds. And there aren't any more moves to help keep the kids out the training school and there is no money for drug treatment.

So, as you can see, as part of my testimony, I have included DAWN for Children's first budget which details more all the social service needs and funding needs that happened in Rhode Island. And I don't feel as though there is a purpose of going more and more into that.

I think the people are aware of the needs of youth across this country. Youth are the forgotten population. You see it seems as though some people feel as though if you catch them at Head Start—age kind of thing that things can change dramatically. Well, they can, but the family continues and without the assistance to youth, we watch things from a Head Start take a big drop back.

And in my mind this is the age, the adolescence is the age when youth are beginning to enter into the criminal system.

I work with youth who carry beepers and the younger kids who don't carry beepers yet carry fake beepers because they want to look like the older kids and the kids that carry beepers make more money than I do. And people in my profession of youth services in general, we make about $15,000 less in Newport County, at least, than teachers. So you can tell how well we are paid. So where do we put the value of things and how do they relate to drug forfeiture funds?

I think that we really need to look at alternative expenditures for the funds; that they should include crime prevention. A comprehensive system of law enforcement is crime prevention. While seizures are made, the next generation to be involved in crime is learning the business.

Currently, you know, it's—I think it's important to look at recommendations. And I don't want to take time to fill you with facts, figures, et cetera, so I came up with some brief recommendations that are in my testimony.

One, law enforcement includes crime prevention. Change the guidelines to allow crime prevention programs for children and youth to be appropriate expenses. This would include substance abuse prevention and treatment.

Two, allow 10 percent of the funds in each State to be spent statewide in funding crime prevention programs for children and youth. The potential group to administer this would be the Juvenile Justice and Delinquency Prevention Act State Advisory Groups. They are already handle the Juvenile Justice Drug Prevention Act funds which could complement forfeiture funds.

The real reason why this is extremely important is most funding for programs for youth is only available for 3 years' startup period. And then the programs are killed, because there is no ongoing funding for it. OK. I have to relabel and call it something different and apply under a different category to start a new program for 3 years to keep alive. It is ridiculous. The forfeiture funds could make a change in that.

Three, establish local community plans and implementation councils to plan and monitor expenditures. I know that we talked about expenditures are being monitored elsewhere, but within the community all you have to do is see the letters that I receive from people in Little Compton on how the funds could be spent and you know that there are people in that community to help monitor the funds. I would recommend a composition of these committees to be 25 percent government, including schools, 25 percent community based organizations, social service agencies, churches, and 50 percent community members, including a designated seat for youth.

I thank you for the opportunity come here and testify and appreciate the attention that you have given to these matters.

Ms. BROWN. Thank you.

[The prepared statement of Mr. Marshall follows:]

S.O.S.

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Addressing the Needs of Adolescents and Their Families

Testimony of Peter W. Marshall
before the
House Subcommittee on Legislation and National Security
on June 22, 1993

Chairman Conyers and other members of the subcommittee on Legislation and National Security. Thank you for this opportunity to speak at this oversight hearing to review the Department of Justice's Asset for Forfeiture Program. My testimony will look at the social services funding needs in Rhode Island related to youth and children, alternative expenditures for funds and recommendations. Little Compton, Rhode Island will serve as a case example.

Little Compton is a rural ,coastal community with a population of 3,340. The Asset Forfeiture Program has brought attention to this community from places as close by as Boston to as far away as England. In an investigation, an estimated 5 million in assets was seized. Little Compton has received 1.9 million and, according to an article on Wednesday, January 13,1993 in the *Providence Journal* , could receive about 2 million more under the Asset Forfeiture Program. Current program guidelines state that money has to be spent on law enforcement. Little Compton's case has received national and international attention. In a report by Federal auditors, many expenses under the program were questioned. Seventy-one expenditures were reviewed and it was determined that 73% were questionable. These expenditures included $16,000 for a computer used by the town treasurer, $15,000 for a truck for the maintenance department and $17,000 for a wood chipper. Funds for crime prevention programs that deal with youth are currently only minimal, and the state has proposed a 100% cut.

Social service funding needs in Rhode Island are extreme. The poor economy, state budget deficits and no growth in public giving contribute to a situation where needs are greater but resources are less. (see attachments) Foundation and charity resources mainly go towards implementing programs or will only provide support for three years maximum. The major ongoing program in the state for juveniles delinquency and crime prevention has a current budget of $428,000. This Youth Diversionary Program Funding is slated to be cut by 100% as of July 1, 1993. Last year it was not in the budget, but

was funded by discretionary funds from the Department for Children and Youth and Families. Another $100,000 is spent by the state on crime prevention.

Other needs which are slated to be cut are all services to youth above the age of 17 and prevention programs, including those for child abuse and neglect. Education and welfare cuts that effect children also loom. Drug Abuse prevention and treatment programs are struggling.

Alternative expenditures for the funds in the Asset Forfeiture Program should include crime prevention. A comprehensive system of law enforcement is crime prevention. While seizures are made, the next generation to be involved in drug-related crime is learning the business. Children carry beepers, make deals and learn about making money. Programs to prevent and treat youth are under-funded at best, while enforcement agencies in Rhode Island have received over 5 million in cash and more than $750,000 worth of automobiles. Currently, under this program, a Ford LTD Crown Victoria and a Jaguar are appropriate expenditures, but working with a youth who is headed to the training school is not. Prevention and enforcement are both key. How can this be changed?

Recommendations

I. Law enforcement includes Crime Prevention! Change the guidelines to allow crime prevention programs for children and youth to be appropriate expenses. This would include substance abuse prevention and treatment.

II. Allow 10% of the funds in each state to be spent statewide in funding crime prevention programs for children and youth. A potential group to administer this would be the Juvenile Justice and Delinquency Prevention Act State Advisory Groups. They already handle JJDPA funds which could compliment forfeiture funds.

III. Establish Local Community Planning and Implementation Councils to plan and monitor expenditures. I recommended the composition of these to be 25% government (including schools), 25% community-based organization (social service agencies, religious groups etc.), and 50% community members including a designated seat for a youth.

IV. Monitor, Evaluate and Audit The system needs better accountability. A monitor should require evaluation and effectiveness of the programs. All funds need to be audited using set standards such as A-133.

To sumarize, the use of Asset Forfeiture Program Funds should be expanded to include crime prevention. Activities should be planned and implemented state wide and on the local community level including outreach to youth involving substance abuse prevention and treatment. Finally there must be ongoing monitoring, evaluation and auditing. Thank you for this opportunity to speak.

Children First!

V-1

NO BUDGET CUTBACKS TO CHILDREN

6,000 RHODE ISLAND CHILDREN HELPED!
(Children in DCYF custody)

is time that our country formulates and implements a national policy which addresses the issues of accessible, affordable, quality services for children and their families. We don't need any more discussion or study. We need legislation and funding with requirements and contingencies for the receipt of the money. Just do it!"

- Ann Stanford
Chapel Hill, N.C.

225,690 children under 18 year old in Rhode Island
124, 220 families with children

CHILDREN BIRTH TO TWO: 40,326
CHILDREN THREE TO FIVE: 39,70
CHILDREN BIRTH TO FIVE. 80,000

14,000 children born each year in Rhode Island
3,000 babies go home without a father (21%)
2,000 go home to poverty (14%)
1,000 go home drug exposed (7%)

V-2

COMMUNITY BASED
PREVENTION AND EARLY INTERVENTION

- 6,218 children/youth in the care of Rhode Island Department For Children. Youth and Families (6/30/91). 1,772 birth to 5 years old, 1,777 12 to 16 years old. Over 2,000 of these children were in out of home placement. 36% were minority children

- Over 7,000 children are abused or neglected each year

3000 teenparents per year.

47,500 children live in single parent families

59% of Rhode Island women with children under six years old are in the labor force.

13,000 RHODE ISLAND CHILDREN HELPED!

"If we can't get serious about prevention, we are going to be pouring more and more of our resources into a black hole. And we are going to have less and less of a chance that the next generation of children will grow up and be the kinds of parents that we hope they will become."

- Judy Carter, Ex. Director
The Ounce of Prevention Fund

V-3

HEAD START

"Parents are the key to the healthy growth of children."

- Jack Shonkoff, M.D.
University of Massachusetts
Medical School

10,000 RHODE ISLAND CHILDREN HELPED!

21,000 Students receive special education services - 83% are diagnosed as "learning disabled" or "speech disordered"

"Focusing on the children of America is the best strategy for preparing for the 21st century. It will require not only the will, but the resources to implement what we know leads to educational success. The money spent in early childhood, the years between birth and eight or nine, will all come back in savings on education, on social services, on special education, on career development in a variety of ways."

- Barbara Bounan
Erickson Institute for Early
Childhood Education

V-4

HEALTH CARE

10,000-30,000 children & teens have no health coverage

6.3% of children under 6 had not seen a doctor in the past year

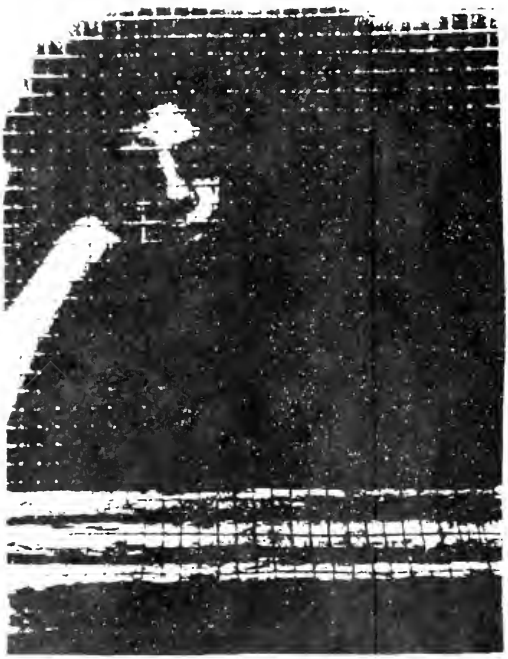
43% of all children in poverty live in Providence, the Capital City

"The hearts of small children are delicate organs. A cruel beginning in the world can twist them into curious shapes. The heart of a hurt child...may fester and swell until it is a misery to carry within the body, easily chafed and hurt by the most ordinary things."

80,000 RHODE ISLAND CHILDREN HELPED!

V-5

MENTAL HEALTH



27,000 to 34,000 children/ youth have some form of mental health problem

27,000 RHODE ISLAND CHILDREN HELPED!

"We must return to our fundamental cultural values and traditional beliefs. We must recapture the spirit of family, the spirit that nurtures, protects, and strengthens our children. We must re-establish a sense of community, a sense of belonging and purpose, that prepares the way for individual achievement and independence."

- Louis Sullivan, M.D.

V-6

CHILDREN OF COLOR

30,000 children are non- white (13%)
Another 15,000 are Hispanic

"The solution of adult problems tomorrow depends in large measure upon the way our children grow up today. There is no greater insight into the future then recognizing when we save our children, we save ourselves."

- Margaret Mead

15.2% of minority children under five have no health insurance

2,256 minority children in DCYF care (36%)

Over 60% minority youth in the training school

21.8% of minority youth, 15-18, have no health insurance

Hispanics Increased 132% (1980-1990) 45,572

Asians Increased 245% (18,325)

45,000 RHODE ISLAND CHILDREN HELPED

V-7

POVERTY

Carla Hotvedt / The Gainesville Sun

33% of school are children below 185% of poverty

40,000 RHODE ISLAND CHILDREN HELPED!

"When you look at the people who will constitute our front line work force now and in the future for as long as the eye can see, somewhere between one third and one half are being brought up in poverty."

- Marc Tucker
National Center on Education and the Economy

- Over 30,000 children are growing up in poverty (13.5%) in about 15,000 families
- Over 38,000 children are on the AFDC public welfare caseload (92/93 est)
- 10,000 children receive Supplemental Security Income (SSI)

Children First!

V-8

WOMEN AND INFANTS HEALTH AND NUTRITION

20% are eligible for free or reduced price lunches
At least 33,000 school age children came from families below 185% of poverty

"He who has health, has hope; and he who has hope, has everything."

- Arabian Proverb

17,500 RHODE ISLAND CHILDREN HELPED!

V-9

SUBSTANCE ABUSE PREVENTION

"Just who are these children at risk? They are our children. Yours, mine, our neighbors. Their parents are white collar, and professionals. They live in cities, suburbia, towns, and yes, even on farms. All youth today are at risk."

- Pamela Robbins, Home Economist

1 of 40 newborns exposed to cocaine
1 out of 14 babies exposed to illegal drugs

12,000 RHODE ISLAND CHILDREN HELPED!

Children First!

V-10

EDUCATION REFORM

135,000 RHODE ISLAND CHILDREN HELPED!

11% Youth 16-19 drop out of school

Helen M. Stummer

158,825 children go to primary & secondary schools-
over 135,000 in public schools (86%)

"The development and education of all our children from the earliest stages of their lives must be made a national priority, and throughout the process, the needs of the whole child, from conception through adolescence, must be addressed. Children must be better prepared for school and motivated to take advantage of educational opportunities. At the same time, the nation's schools must be restructured so that they respond more effectively to the changing developmental and educational needs of children."

- Committee on Economic Development

The Unfinished Agenda: A New Vision For Child Development and Education

STATEMENT OF NANCY HOLLANDER, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ALBUQUERQUE, NM, ACCOMPANIED BY E.E. "BO" EDWARDS, CHAIRPERSON, FORFEITURE ABUSE TASK FORCE

Ms. HOLLANDER. Thank you, Chairperson Brown and members of the subcommittee.

On behalf of the National Association of Criminal Defense Lawyers, I want to thank you for inviting us to share our comments on asset seizure forfeiture programs. Accompanying me today is E. E. "Bo" Edwards, who is the chairperson of NACDL's forfeiture abuse task force.

At your first hearing, NACDL filed extensive testimony through Mr. Edwards regarding current problems with the law of forfeiture. That testimony included problems with law enforcement and prosecutorial practices relating to civil forfeiture. We particularly focused then, as we do now, on the war on drugs which has become a war on the constitution.

We included in that testimony some specific examples of how the government's use of forfeiture in drug cases has lead to conflicts of interest with law enforcement agencies. We have also suggested changes in the law. We stand on that testimony and request that it be included in the formal hearing record, along with our written testimony that we offer today.

I want to highlight just some of the important parts of that testimony and discuss another forfeiture area that we haven't discussed here this morning.

The first problem with forfeiture is that a person does not have an automatic right to contest a seizure in court. To preserve that right to contest a government seizure, an individual must post a bond in the amount of 10 percent of the value of the property, even when the property seized is itself money.

Many people lose their property at this stage because they are unable to post the cost bond within the time limit. Presently the government can seize a home and, on the basis of an ex parte warrant, summarily evict the owner before trial. Many innocent people lose their property at this stage because they cannot afford to fight the government.

The government also has a great procedural advantage the current statutory framework of the burden of proof. That statute requires the government only to make the mere showing of probable cause which may be based entirely upon hearsay, and then it shifts the burden of proof to the claimant to show that the property is not subject to forfeiture. This turns the criminal presumption of innocence until proven guilty up side down and puts the claimant in the totally untenable position of trying to prove a negative.

Also, the government generally is under no time restraints to initiate a forfeiture action after seizing the property. The new government regulations that Mr. Copeland talked about give them time limits for notice, but there is still no time limit under which they must initiate the forfeiture.

Except in very limited circumstances, most of the Federal statutes still lack any innocent owner defense. In those cases, the owner is forced to meet a much more onerous standard to prevail. Innocent owners need protection when illegal acts are committed

on their real property without their consent. These problems could be corrected legislatively, and we ask that Congress do so.

The most serious problems with forfeiture are the grave problems of proportionality and substantial nexus that must be resolved. The broad reach of the statutes allows forfeiture of expensive assets for very trivial offenses and does not require any connection between the unlawful action and the property seized. These gaps have led to manifest injustice. There are abundant examples.

There are cases where sales of amounts as small as 1 gram of cocaine have led to the loss of homes. There are cases where telephone calls regarding the possibility of selling cocaine have led to the loss of homes. There are cases where growing a few marijuana plants on a small corner of a parcel of land have led to the forfeiture of hundreds of acres of land.

We also wish to raise two other related issues. The policy of seizing large sums of cash simply because it is currency must be totally reevaluated. Government studies have shown that 80 to 90 percent of the currency available in the United States today will test positive for some kind of drug.

Therefore, the practice of having a drug dog alert on the money is meaningless. Adding a drug dog alert to the presence of cash does not add any probable cause. And adding some sophisticated scientific method to detect cocaine or marijuana residue on the money still does not add any probable cause, given the vast quantity of money in this country that is contaminated.

Also the frequent practice of targeting minorities in airports and along interstate routes, which is occurring all over the country, not just in Florida, is based on racism. It is morally, not to mention legally, bankrupt.

We further can no longer ignore the conflicts of interest and the policy problems that arise when law enforcement and prosecutorial agencies benefit financially from the forfeiture decisions they make.

Michael Zeldin, who is the former Director of the Asset Forfeiture Office at the Department of Justice conceded that the government has been guilty of overreaching.

And I would maintain that the government is still overreaching. And it is not just in Florida that we see this. In a recent Iowa criminal forfeiture case, the jury granted partial forfeiture of a defendant's seized assets and specifically delineated which assets should be returned to him. I should add that this verdict followed a ruling that the government meet only a preponderance of the evidence standard in a criminal trial.

However, the government has, to this day, refused to accept the jury's verdict and continues, in that case, to refuse to return to the defendant those assets which the jury found should not be forfeited. I would like to quote one paragraph that the assistant U.S. attorney said in Iowa.

He said:

> From the outset of this case, we have told the defendant that he is not going to have anything left when this case is done, because there are a bunch of different theories that we're going to go after the assets on has farm. As a practical matter, he is going to be divested of the assets of his farm, and that is no surprise.

The Federal district judge who heard this was clearly troubled. And he said:

What right does the U.S. Government have to come in and tell a person "We're going to take every single asset you have," even a drug dealer, and then go to trial and when you lose on a few assets say, "Well, gee, I guess we were wrong. We weren't able to divest them of every single asset, so now we are going to come up with alternative theories A, B, C, D, E?"

The judge went on to say:

I don't think that is a very commendable attitude.

I think it's one of the problems that the U.S. Government is having right now with the whole forfeiture statute, it is this attitude that we're going to strip this person down to their last nickel, and we're going to do everything within our power to do so.

Madam Chairperson, we have given the committee the entire transcript of that hearing and asked that it be considered along with our written testimony.

I am also concerned about another forfeiture problem that hasn't been discussed here and that is the breadth of offenses that carry a forfeiture sanction. These laws have nothing to do with the forfeiture provisions of 1789 that Mr. Copeland talked about. That had to do with customs at a time when the government had only that means of raising revenue.

Now there are 200-odd forfeiture provisions that have been attached to nondrug, nonmoney related criminal statutes, all through the criminal statutes. All too often, in my practice in Albuquerque, I see cases where someone loses, for instance, a family pickup truck at time of arrest for a nonmoney, nondrug related crime. These persons frequently give up the criminal case or plead it out very quickly, even when the prosecution has little merit, to negotiate the release of a vehicle that provides their livelihood.

A few examples provide some insights. There are civil forfeiture penalties attached to offenses involving the possession of obscene material. One can lose a home. To illegal alien statutes: If one gives a ride to an illegal alien, that is against the law, one may lose a vehicle. To bringing altered coins into the United States. It even applies to prosecutions for selling or offering to sell archaeological resources, prehistoric items that are found on public lands.

Someone negotiates for that, and the vehicle that the negotiation is made in is seized at the time of the arrest. Before the government has ever had to prove to a grand jury that the prehistoric item is, in fact, prehistoric and did, in fact, come from public land. But at that time of the arrest, the vehicle is lost.

The reach of forfeiture is tremendous. If Congress modifies forfeiture laws to make them more fair, the modification should apply to all of these statutes, almost all of which have no innocent owner defense. We're happy to note that the process began when Representative Henry Hyde introduced the Civil Asset Forfeiture Reform Act. We did support that act, and we continue to. It addresses some of the most serious flaws in the Federal forfeiture law. It is an important first step.

However, there are additional substantive issues that must be addressed if we are to bring forfeiture laws into harmony with the American ideals of fairness and due process. We must eliminate the conflict of interest inherent in law enforcement's role in seizure and forfeiture. We must break the direct link between an agency's seizures and its financial remuneration.

Congress should mandate that all proceeds from forfeitures go directly into Federal or State treasuries to be disbursed according to legislatively developed priorities. This will not, in any way, prohibit law enforcement from sharing in the profits from legitimate forfeitures; but it will eliminate the direct financial incentive which distorts law enforcement priorities and which, in some ways, as we have seen here today, leads to tragedy.

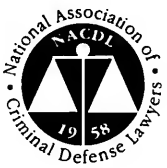
We must also address the main reasons why innocent people are so easily victimized by civil forfeiture laws, because the government is not required to charge or convict them with a crime in order to forfeit their property. Congress should authorize that forfeiture occurs only after the owner of the property is convicted of a crime. Forfeiture is a criminal sanction, and it should be treated as such.

Congress must also adopt parameters concerning the types of forfeitures to be allowed so that forfeitures are not permitted when they are severely disproportionate to the criminality involved or when the property being forfeited was not connected in any way to the illegality.

We thank you. And we thank Chairman Conyers. And we thank you for your leadership on this issue. We look forward to working with you and with the committee to complete the task of civil forfeiture reform.

We also thank you and the subcommittee for inviting us here today. And Mr. Edwards and I will answer any questions that you may have. Thank you.

[The prepared statement of Ms. Hollander follows:]



STATEMENT OF

NANCY HOLLANDER, ESQUIRE

ON BEHALF OF THE

NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

REGARDING

THE FEDERAL ASSET FORFEITURE PROGRAM

JUNE 22, 1993

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE: On behalf of the National Association of Criminal Defense Lawyers (NACDL), I thank you for inviting us to share our comments on asset seizure and forfeiture programs.

Accompanying me today is E.E. "Bo" Edwards, chair of NACDL's Forfeiture Abuse Task Force. At your first hearing, NACDL filed extensive testimony through Mr. Edwards regarding current problems with the law of forfeiture. That testimony included problems with law enforcement and with prosecutorial practices relating to civil forfeiture. We particularly focused on the "war on drugs", which has become a war on the Constitution. We included in that testimony specific examples of how the government's use of forfeiture in drug cases has lead to conflicts of interest with law enforcement agencies. NACDL also suggested changes in the law. Chairman Conyers, we stand on that testimony and request that it be included in the formal hearing record. I will highlight the most important parts of that testimony and discuss another forfeiture concern of ours.

What are the Major Problems with Forfeiture?

The first problem with forfeiture is that a person does not have an **automatic right** to contest a seizure in court. To contest a government seizure of property, an individual must post a bond in the amount of 10% (up to a maximum of $5,000) of the value of the property to preserve the right to contest the forfeiture. Many people lose their property at this stage because they are unable to post the cost bond within the time limit.

Procedures exist for claimants to proceed *in forma pauperis* (without paying the cost bond). The seizing agency has jurisdiction to rule on the IFP petition. If the agency rules adversely, the decision is subject to judicial appeal; however, the time and cost necessary to do so presents another obstacle to challenging a seizure and no doubt precludes some valid claims.

The seizure of real property poses another problem. Presently, the government can seize a home and, on the strength of an *ex parte* seizure warrant, summarily evict the owner before trial. The better approach would be to codify the holding in the *Livonia Road* case,[1] which held that due process requires notice and an opportunity to be heard before the seizure of real property. Similarly, provisions authorizing the warrantless seizure of property, absent exigent circumstances, should be eliminated.

Even when a claimant contests a seizure in court, procedural advantages afforded the government make it very difficult for the claimant to win. Many innocent people lose their property because they cannot afford to fight the government, or because the government wears them down with years of litigation, rather than because the government has a good case.

The single greatest procedural advantage afforded the government within the current statutory framework is the burden of proof provision.[2] The statute requires the government only to make a mere showing of probable cause — hearsay is allowed — and then shifts the burden of proof to the claimant to show that the property *is not* subject to forfeiture. This turns the criminal presumption of "innocent until proven guilty" upside down and puts the claimant in the untenable position of trying to prove a negative. The Florida Supreme Court has ruled that the government is constitutionally required to prove its case by "clear and convincing evidence"; however, none of the federal circuit courts have so held. Congress can alter the statutory requirements concerning burden of proof. We ask that you do so.

Also, presently the government is under no time restraints to initiate a forfeiture action after seizing the property. A claimant can force the issue by filing a Motion for Return of Property pursuant to Federal Rule of Criminal Procedure 41(e), but once the government serves a Notice of Seizure and Intended Forfeiture, the court is divested of jurisdiction under the criminal rules.[3] Except in cases involving seized conveyances [See 21 U.S.C. Section 888] no time limit exists for the government to file the action in district court after receipt of the claim and cost bond. We suggest that Congress amend federal forfeiture statutes to require the government to commence the action (by providing notice to the owner

of the seizure and intended forfeiture) within *thirty* (30) days of the seizure. [Current DOJ policy is sixty (60) days.] The statute should also require the government to commence the action in district court within *sixty* (60) days of receipt of the claim.

"Innocent owners" experience several problems with forfeiture law. An innocent owner defense, as defined statutorily, requires the claimant to establish that he or she lacked "...knowledge or consent"[4] that the property was subject to forfeiture. In *United States v. 92 Buena Vista Avenue*,[5] the Supreme Court held that innocent owners have statutory protection from civil forfeitures under 21 U.S.C. Section 881(a). Specifically, the Court held that an individual contesting a forfeiture proceeding may claim as a defense that he was *unaware* that a gift of money used to buy property came from drug trafficking.

An even more significant problem for innocent owners is that most federal statutes *lack* an innocent owner defense. In these cases, the owner is forced to meet the more onerous *Calero-Toledo*[6] standard of "all reasonable steps" to prevail in a forfeiture action.

Innocent owners also need protection under 21 U.S.C. Section 881(a)(7) when illegal acts are committed on their real property *without their consent*. This problem could be corrected legislatively, and we ask that you do so. The federal circuits are split regarding this defense: the majority of circuits have held that an owner may avoid forfeiture by establishing *either* lack of knowledge or lack of consent, a literal interpretation of the statute. However, a minority of circuits have held that to prevail, an owner must establish *both* lack of knowledge and lack of consent.[7] *Buena Vista* does not decide this question. Congress should establish that it is the literal interpretation of the statute, either knowledge or consent, that is controlling.

The most serious problem with forfeiture is that current statutory law leaves grave problems of proportionality and substantial nexus that must be resolved. The broad reach of the statutes allows forfeiture of expensive assets for trivial offenses and does not require a substantial nexus, or connection, between the unlawful activity and the property

seized. These gaps in the law have led to manifest injustice in some forfeiture cases.

Examples of this manifest injustice are abundant: sales of amounts as small as a gram of cocaine have led to the loss of homes; similarly, growing a few marijuana plants in a small corner of a large parcel of land has led to the forfeiture of the entire parcel, even where the parcel consists of hundreds of acres.

The courts are in conflict regarding the need to prove substantial nexus and whether to allow proportionality defenses. Even the courts that purport to apply a "substantial nexus" test do not define and require the test. In an egregious case in the Seventh Circuit,[8] the court affirmed the forfeiture of a residence based on two telephone calls the informant made to the homeowner at the residence. During these calls, the sale of cocaine was negotiated. No drugs were ever stored at the residence and no sales took place there. Despite the lack of substantial nexus in this case, the home was forfeited. This case exemplifies problems Congress could rectify by specifically delineating the parameters of "substantial" nexus.

The Court has just heard arguments in *Richard Lyle Austin v. United States of America*,[9] which raises the question of whether the Eighth Amendment's protection against cruel and unusual punishment applies to civil forfeiture. We think it does and hope the Court will so rule. But a legislative solution to the problem of disproportionately severe forfeitures is preferable. In the *Austin* case, the Eighth Circuit urged Congress to enact a proportionality requirement for cases under Section 881(a)(7).

Concerning law enforcement practices in this area, we wish to raise two related issues with you. The policy of seizing large sums of cash simply because it is currency must be totally re-evaluated for comportment with constitutional protections. Studies have shown that 80-90% of the currency available today will test positive for some kind of drug; therefore, the practice of having drug dogs "alert" on the money is meaningless. The frequent practice of targeting minorities in airports and along interstate routes is based on racism[10] — pure and simple — and is morally, not to mention legally, bankrupt.

We can no longer ignore the conflicts of interest and policy problems which arise when law enforcement and prosecutorial agencies benefit financially from the forfeiture decisions they make. Too often these agencies decide which property to seize based on the profit to be realized from the seizure.

Michael F. Zeldin, former acting director of the Money Laundering Office at DOJ and former director of the Asset Forfeiture Office at DOJ, concedes that the government has been guilty of some overreaching in the forfeiture program. "The intelligent thing to have done would have been to pick our cases carefully and not overreach." said Zeldin." **We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law enforcement objectives."**[11] This overreaching is reflected in the prominent forfeiture cases now reaching the Supreme Court and some lower courts, Zeldin thinks.

The extreme results these conflicts can provoke are evident from the death of Donald Scott in Ventura County. Scott, age 61, owned and lived on a 200-acre property known as the Trails End Ranch, 35247 Mulholland Highway, in the Ventura County portion of Malibu, California. On October 2, 1992, while serving a search warrant at the ranch, Los Angeles County Sheriff's deputies shot and killed Scott.

The District Attorney for Ventura County thoroughly investigated the case and concluded that the L.A. County Sheriff's Department, in pursuing a drug case against Mr. Scott and in executing a search warrant for drugs, was motivated, at least in part, by a desire to seize and forfeit the ranch for the government. The ranch was valued at $3-5 million dollars. After the shooting, law enforcement personnel [including both local law enforcement and federal agents] searched the buildings and grounds for the evidence listed in the warrant. No marijuana was found growing and no evidence was found to indicate that marijuana had been growing or cultivated on the property.

It was later learned that Sheriff's Deputies had mislead the judge in seeking the search warrant for the property. No law enforcement offi-

cer had ever seen drugs on the property. The D.A. found that the warrant was invalid and the agents had no right to be on Donald Scott's property. None of which changes the fact that Mr. Scott is dead.

Mr. Chairman, situations such as this, with such tragic results, must not be repeated. With forfeiture revenues going back to the law enforcement agencies that seize them, the financial incentive proves far too seductive for many to resist. As written, the laws create fiscal incentives that distort law enforcement priorities. As the Donald Scott case shows, law enforcement efforts sometime place an emphasis on seizing property to raise money.

Exemplifying this trend, an August, 1990 Attorney General Bulletin warned U.S. Attorneys that "the Department was far short of its projections of $470 million in forfeiture deposits...:

> "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."[12]

In June, 1989, Acting Deputy Attorney General Edward S. G. Dennis Jr. advised all U.S. Attorneys that they must make all forfeiture cases "current", meaning doing everything necessary to prepare the case for judicial action.

> "If inadequate forfeiture resources are available to achieve the above goals, you will be expected to divert personnel from other activities or to seek assistance from other U.S. Attorney's offices, the Criminal Division, and the Executive Office for United States Attorneys."[13]

Mr. Chairman, the attitudes expressed in these government directives accurately portray the distortion of law enforcement priorities

we now experience. The desire to fairly enforce the laws is eclipsed by the desire to amass forfeiture funds for budgetary purposes. This distortion of priorities is manifested daily in our courts in a "mean-spirited" manner of pursuing forfeiture cases. This approach, which has appalled judges hearing these cases, has been documented in court transcripts around the country. I will share one such example with you, and ask that this transcript be accepted into the full record of this hearing.

In an Iowa *criminal* forfeiture case, the jury granted partial forfeiture of a defendant's seized assets and specifically delineated which assets should be returned to him. I should add that this verdict followed the judge's ruling that the government meet only a *preponderance of the evidence* standard of proof on the forfeiture in a *criminal* trial. However, in spite of the lowered standard of proof, and in spite of a ruling which forfeited the *real* property which had been seized, the government refused to accept the jury's verdict and refused to return to the defendant those assets which the jury found should not be forfeited. The government argued that it should hold those assets while the government searched for some other theory by which it could proceed civilly.

> *The Government:* [F]rom the outset of this case...we have told the defendant that he is not going to have anything left when this case is done because there are a bunch of different theories that we're going to go after the assets on his farm. As a practical matter, he's going to be divested of the assets on his farm, and that's no surprise.

The judge was clearly troubled by the government's approach:

> *The Court:* But Mr. Murphy, what right does the United States Government have to come in and tell a person, "We're going to take every single asset you have," even a drug dealer, and then go to trial and when you lose on a few assets, say, "Well, gee, I guess we're wrong. We weren't able to divest them of every single asset, so now we're going to come up with alternative theories A,B,C, D, E"? I don't think that's a very commendable attitude. I think it's one of the problems the United States Government is having right

now with the whole forfeiture statute, it's this attitude that we're going to strip this person down to their last nickel and we're going to do everything within our power to do so.

The Government: I didn't state it perhaps as well as I could have.

The Court: You may have stated it too accurately.[14]

Mr. Chairman, judges have expressed such dismay in many cases around the country. Such actions on behalf of the government ultimately result in a lowered respect for our country's laws and a belief held by our citizens that they will not be treated fairly in our country's courts. This stems from the distortion of law enforcement priorities and practices occasioned by the huge financial incentives built into the system.

We do not suggest that forfeiture is not a legal and/or acceptable manner of punishing those who transgress the law. We *do* argue strenuously that when those who control the seizures and prosecute the forfeitures benefit financially from their actions, gross distortions of priorities and practices result.

Mr. Chairman, I cannot stress enough that Congress must address the issue of financial incentives and conflict of interest for law enforcement and prosecution offices in the seizure and forfeiture of assets. We also ask that you narrow the use of "adoptive seizures." Through adoptive forfeitures, law enforcement agencies avoid *state* forfeiture laws that establish *state* priorities [other than law enforcement] for the use of forfeiture revenues. This procedure allows law enforcement agencies to maintain the financial incentives which distort their law enforcement priorities, and, not inconsequentially, circumvent state law.

Although I share the concerns of others regarding the issues of forfeiture recently before the Supreme Court, I am concerned with another forfeiture problem -namely, the breadth of offenses that carry a forfeiture sanction. Most discussions of forfeiture problems focus on drug

offenses and cash/money laundering offenses. However, many other offenses also include forfeiture as a penalty.

Specifically, I am concerned with the 200-odd forfeiture provisions that have been attached to non-drug and non-money criminal statutes. All too often, in my practice back in Albuquerque, I see cases where someone loses the family pick-up truck at the time of arrest for a non-money related, non-drug federal crime. These persons frequently give up the criminal case, even when the prosecution has little merit, to negotiate the release of a vehicle which provides their livelihood.

The federal statutes are replete with civil forfeiture provisions. A few examples should provide some insight into the breadth of this new penalty. In addition to the criminal penalties each of these statutes provides upon conviction of the crime, the forfeiture provisions begin to exact their toll upon arrest. For example: civil forfeiture penalties are attached to offenses involving obscene material.[15] Not only may the material itself be seized but the home in which it was produced, bought or sold may be seized. In other words, if one buys or sells a dirty book in one's home, in addition to the criminal penalties, the home is at risk.

Forfeiture also applies to illegal alien statutes. Law enforcement authorities may seize a vehicle in which an illegal alien rode or in which the conversation took place in which he was encouraged to enter the United States, in addition to charging the owner or driver of the vehicle with bringing in and harboring aliens in violation of the law.[16] In border areas such as New Mexico, California and Texas, this is a potent source of revenue.

A little known fact for most people is that forfeiture also applies to archeology: one may be prosecuted for selling or offering to sell archeological resources removed from public lands.[17] The statute also provides forfeiture provisions for the vehicle in which the "offer" was made. The vehicle may be seized at the time of arrest before the government must establish to the grand jury that probable cause exists to believe the "resources" were ancient and were taken from public land.

The statutes also provide for civil forfeiture of property used in violation of prohibitions against gambling;[18] implements or equipment used in the manufacture of items which violate copyright laws;[19] any vessel used in violation of the federal law making it a crime to transport illegal drugs, illegal firearms or illegal (i.e. counterfeit or altered) coins,[20] and many, many more. Very few of these statutes provide a defense for innocent owners.

The reach of forfeiture is tremendous. The media normally focuses on the drug and money violations which bring forfeiture sanctions. Many citizens are subjected to forfeiture sanctions which are unrelated to drug and cash offenses. A comprehensive look at forfeiture must take this into consideration. If Congress modifies forfeiture laws to make them more fair, the modifications should apply to all forfeiture statutes, thereby aiding all the persons subject to forfeiture sanctions.

Mr. Chairman, we have highlighted our concerns with the forfeiture program and have advanced our proposals concerning needed changes. It is imperative that the Department of Justice reevaluate the asset forfeiture program. Lee Radek, current director of the Asset Forfeiture Office, says he has "drafted changes [in the law] that would make asset forfeiture more fair."[21] So even DOJ now recognizes the need for reform. We'd like to know what changes DOJ has in mind.

At your first hearing, the Department witness asserted that "everything is fine" with the forfeiture program and the "horror stories" the victim witnesses told were simply "aberrations." It appears that the Department is now taking a different position. We applaud this change.

The evidence is overwhelming that many problems exist in forfeiture law and in law enforcement and prosecutorial practices. We are most interested in the reform that is envisioned by DOJ. However, this change in attitude at DOJ must be translated into legislation. Congress should intervene to implement the necessary changes.

We are happy to note that the process has begun. Last week, Representative Henry Hyde (R-IL) introduced the Civil Asset Forfeiture Reform Act, which proposed several substantial changes in civil forfeiture. Specifically, the bill would:

- Require the government to prove by clear and convincing evidence that an asset was purchased with the profits of crime or was used in committing a crime.

- Give property owners 60 days — instead of the present ten days — to file a claim challenging a forfeiture.

- Eliminate the requirement that a property owner post a "cost bond" of ten percent of the property's value in order to challenge a forfeiture.

- Provide court-appointed lawyers to represent property owners who cannot afford a lawyer to challenge a forfeiture.

- Pay appointed lawyers with funds from the Justice Department's Asset Forfeiture Fund.

- Make it clear that owners qualify for th "innocent owner" defense as long as they had no knowledge or did not consent to, alleged criminal conduct.

- Allow property owners to sue if the government damages their property in an unsuccessful forfeiture.

- Authorize the judge, in appropriate hardship situations, to allow the claimant to regain possession and use of the seized asset during the pendency of the forfeiture hearings.

Rep. Hyde's bill addresses some of the most serious flaws in federal forfeiture law and is an important first step in this process. However, as you - our first champion on the issue of forfeiture - understand, Chairman Conyers, other substantive issues must be addressed if we are to bring forfeiture laws into harmony with the American ideals of fairness and due process.

To eliminate the conflict of interest inherent in law enforcement's role in seizure and forfeiture, we must break the direct link between an agency's seizures and its financial remuneration. Congress should mandate that all proceeds from forfeitures go directly into federal or state treasuries, to be disbursed according to legislatively developed priorities. This will not prohibit law enforcement from sharing in the profits from forfeiture; but it will eliminate the direct financial incentive which distorts law enforcement priorities and, in some cases, leads to tragedy.

We must also address the main reason why innocent people are so easily victimized by civil forfeiture laws: the government **is not** required to charge or convict them with a crime in order to forfeit their property. Congress should authorize the forfeiture of property only after the owner is convicted of a crime. Forfeiture is, in actuality, a criminal sanction. It should be treated as such.

However, even in cases where forfeiture is warranted and/or justified, the right to counsel is essential. Property owners facing forfeiture proceedings should be entitled to an attorney; if indigent, an attorney should be appointed for them. Attorney's fees should be exempt from forfeiture, in order to preserve the integrity of the attorney/client privilege. Forfeiture sanctions are sufficently severe so that these constitutional protections must be maintained.

Congress should also adopt some parameters concerning the types of forfeitures to be allowed. Some seizures are severely disproportionate to the criminality involved, as when substantial assets are seized for rather trivial acts. These forfeitures should be prohibited. A "substantial nexus" provision should be added. This would require a connec-

tion between the seized asset and the criminal activity that forms the basis of the seizure. Much of the manifest injustice now perpetrated in the name of civil forfeiture would be eliminated if the laws were modified in these ways.

We thank you for your leadership on this issue, Chairman Conyers, and we look forward to working with you to complete the task of civil forfeiture reform.

We also thank you and the subcommittee for inviting us here today. Mr. Edwards and I will be happy to answer any questions you might have.

Notes

1. *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2nd Cir. 1989). This issue is currently before the Supreme Court in *United States v. James Daniel Goo Property*, 971 F.2d 1376 (9th Cir. 1992), cert. granted, 113 S.Ct. 1576 (1993)

2. 19 U.S.C. Section 1615

3. *See*, e.g., *Shaw v. United States*, 891 F.2d 602 (6th Cir. 1989); *United States v. Elias*, 921 f.2d 870 (9th Sir. 1990); *United States v. U.S. Currency*, 851 F.2d 1231 (9th Cir. 1988); *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989); *United States v. Price*, 914 F.2d 1507 (D.C. Cir. 1990)

4. 21 U.S.C. 881 (a)(7)

5. 113 S.Ct. 1126 (1993)

6. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)

7. *See*, e.g., *United States v. One Parcel of Land Known as Lot 111-B*, 902 F.2d 1443 (9th Cir. 1990)

8. *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue*, 906 F.2d 490 (7th Cir. 1990).

9. 113 S.Ct. 1036 (1993)

10. *See, Willie L. Jones v. United States Drug Enforcement Administration, et.al*, MDTenn, No. 3:91-0520 (1993). *See also*, "Tainted Cash or Easy Money", Orlando Sentinel, June-August, 1992; "Presumed Guilty - The Law's Victims in the War on Drugs", The Pittsburgh Press, August 11-16, 1991.

11. BNA Criminal Practice Manual, Vol 7 No.8, April 14, 1993 p. 191.

12. Executive Office for U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin 180 (August 15 1990)

13. Executive Office for U.S. Attorneys, U.S. Dept. of Justice, 37 U.S. Attorney"s Bulletin 214

14. *See* Partial Transcript of *United States of America vs. Eugene Meyers*, No. CR 92-1007 (N.D.Iowa) (1993) at pp 30-31.

15.18 U.S.C. Section 1467

16. 8 U.S.C. Section 1324

17. 16 U.S.C. Section 470

18. 18 U.S.C. Section 1955

19. 17 U.S.C. Section 506

20. 49 U.S.C. Section 781

21. BNA Criminal Practice Manual, Vol 7 No.8, April 14, 1993 p. 191.

(end)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR 92-1007
vs.	)	PARTIAL TRANSCRIPT OF HEARING ON MOTIONS
EUGENE MYERS, Defendant.	)	

Courtroom
United States Courthouse
Cedar Rapids, Iowa
April 27, 1993

The above-entitled matter came on for hearing, pursuant to assignment, commencing at 9:08 a.m.

BEFORE: HON. MICHAEL J. MELLOY, Chief Judge.

APPEARANCES:

RICHARD L. MURPHY and MARTIN J. McLAUGHLIN, Assistant United States Attorneys, 425 Second Street S.E., Suite 950, The Center, Cedar Rapids, Iowa 52401, appearing for the Government.

NINA J. GINSBERG, Attorney at Law, DiMuro, Ginsberg & Lieberman, P.C., 908 King Street, Suite 200, Alexandria, Virginia 22314, appearing for the Defendant.

Reported by:
Daniel J. Shaw, C.S.R.
United States District Court Reporter
Cedar Rapids, Iowa

(Partial transcript of hearing.)

THE COURT: Let me first of all apologize for the delay. I was getting ready to walk in right at nine o'clock when I got a phone call I had to take. I apologize.

This is in the matter of United States of America vs. Eugene Myers, Criminal No. CR 92-1007.

First of all, let me ask counsel to enter their appearance, please. Mr. Murphy, let's start with you.

MR. MURPHY: Richard Murphy and Marty McLaughlin on behalf of the United States, Assistant United States Attorneys.

MS. GINSBERG: Good morning, Your Honor. Nina Ginsberg on behalf of Mr. Myers.

THE COURT: All right. We're here today to try to sort out the forfeiture issues in this case. The defendant has some pretrial motions that were never finally disposed of which we need to take care of. I have never entered the forfeiture order that resulted from the jury findings as to what property was forfeitable, and so we need to take care of that. We need to take care of the Government's contention that it's entitled to continued possession of the property that the jury determined was not subject to forfeiture, and I guess take up any ancillary issues that go along with that.

Now, at the last hearing we had on this the parties were going to try to come to at least some resolution as to

some of this property. Has there been any resolution to any of this property?

MR. McLAUGHLIN: Your Honor, if I could speak to that issue? Miss Ginsberg has made an offer to the United States about how the property would be disposed of. In the time since the pendency of the hearing, I've had extensive conversation in an attempt to rent the property --

THE COURT: Are you talking about the real estate?

MR. McLAUGHLIN: Yes, sir. In fact, we have negotiated what we believe to be a very good settlement as far as the rental of the real estate is concerned. As a preliminary matter I would like the authority from the Court to enter into a lease arrangement. I've discussed the matter with Miss Ginsberg and Joe Rhomberg, who is the contract holder on the property. We asked for as many bids as we could and we received approximately seven bids, and we accepted the highest per-acre bid. We had extensive conversations with the people at Soil Conservation Service about putting the program -- or putting the soil conservation plan into effect which had some impact on our abilities to rent the property.

As far as the personal property is concerned, what Miss Ginsberg has proposed, and please correct me if I misstate --

THE COURT: Maybe before we get on to that, let me

ask this, do you have a written lease you're prepared to enter into --

MR. McLAUGHLIN: Yes, we do.

THE COURT: -- as to the realty?

MR. McLAUGHLIN: Yes, we do.

THE COURT: Have you shown the lease to Miss Ginsberg?

MR. McLAUGHLIN: I have not yet.

THE COURT: Let me ask this, I understand you haven't seen the written lease, Miss Ginsberg, but assuming it's the usual and customary form of lease, do you have a problem with the tenants or the rental?

MS. GINSBERG: Your Honor, I don't, as long as it's with the understanding that Mr. Rhomberg is going to be the recipient of the rental income.

MR. McLAUGHLIN: Absolutely.

THE COURT: All right. So assuming that the lease is in proper form and you don't have a problem with the form of the lease, I'll authorize both parties to enter into the written lease agreement.

Who is the tenant, by the way?

MR. McLAUGHLIN: The tenant is someone working with a fellow by the name of Merl Gruber. He and this individual whose name I can't recall at this point have a partnership arrangement, and this particular individual is renting the

property from the United States. He has offered a hundred twenty dollars per acre on the tillable acres on this particular farm, which was considerably more than the other offers that we had received.

I would also point out to the Court, for whatever it's worth, that there is considerable work that has to be done under the soil conservation plan in order for the farm to be in compliance with the program in 1995. Significant progress has to be made in that regard between now and 1995 in order for the farm itself to be eligible for the ASCS benefits.

As a part of that, a considerable amount of cropland is going to have to be no-tilled during this particular farm year, and so the payment, as per ordinary practice, first payment, half the payment is going to be made as soon as the lease is finalized; then the second half is planned to be made on October 1st, and the lease will so contain that information.

THE COURT: Does Mr. Myers know who the tenants are?

THE DEFENDANT: I've heard the Gruber name, but I don't know who the other person is they're talking about.

MR. McLAUGHLIN: Mr. Gruber is from Monona and farms widely throughout that area.

THE COURT: Do you have the lease with you?

MR. McLAUGHLIN: I don't have a finalized lease with me at this point, but I would have one prepared yet today.

THE COURT: Well, maybe before Miss Ginsberg leaves town today and before Mr. Myers is returned to Benton County you can get a copy to he and Miss Ginsberg to go over and make sure --

MS. GINSBERG: If I could just ask, has Mr. Rhomberg approved the tenant for renting the property?

MR. McLAUGHLIN: Mr. Rhomberg calls me about every day to ask me about it -- Yes.

THE COURT: All right. Then let's turn to the personal property.

MR. McLAUGHLIN: As far as the personal property is concerned, the defendant has basically made an offer to the United States to try and dispose of the property by selling it to individuals who he understands have an interest or have an interest in buying the property. We are somewhat concerned about that because we weren't certain that the values that Mr. Myers was placing on the property were accurate, and we're trying to get some of the verifications on those numbers before we go ahead and agree to the sale, leaving as a practical matter what she's asked us to do is basically sell the property and convert it to cash. I think she's also included in those list of items of property that

the jury awarded or forfeited to the United States. I don't have any problem with that basic concept. It's just the numbers I'm concerned about at this point.

THE COURT: What about the question of the property the jury decided was not forfeitable, is the Government still making a claim for that?

MR. McLAUGHLIN: Well, I think in this instance, Your Honor, our -- the approach that we're taking in this case, some of the questions still need to be answered about what property is included in M and M Enterprises --

THE COURT: Well, put that aside --

MR. McLAUGHLIN: Okay.

THE COURT: -- the jury verdict was very specific, down to the VIN numbers on vehicles; I mean, is there any question as to those items where the jury made specific factual findings as to vehicles for which there was a VIN number attached to the vehicle or to the combine, is there any question about those items?

MR. McLAUGHLIN: The question being whether or not the United States at this point is willing to turn that property back over to the defendant?

THE COURT: Basically, yes.

MR. McLAUGHLIN: Well, I guess when I approached this matter in my brief, I asked the Court to consider the fact that until the order of forfeiture was entered --

THE COURT: Assuming an order of forfeiture is entered, let's cut to the bottom line here, is the Government willing to live by what the jury decided in the criminal forfeiture case, and you can get an order of forfeiture that says that the property that was forfeitable is forfeited and the property that the jury says is not forfeited is not forfeited; is the United States Government willing to live by what the jury said in the criminal case?

MR. McLAUGHLIN: I think as it relates to the specific issue of forfeiture, I believe at this point we can concede the fact that, of course, the jury has entered the verdict as they saw appropriate and, therefore, there is no valid basis under the criminal forfeiture statute for us to ask this Court to seize and forfeit that property. The only thing that we're asking by the entry of the order is that the Court allow us to seize the property --

THE COURT: Just a second. Seize what property?

MR. McLAUGHLIN: The property that the jury awarded forfeited.

THE COURT: What about the property the jury said was not subject to forfeiture?

MR. McLAUGHLIN: In that instance, at this point as far as it relates to the criminal, we're no longer claiming to have an interest in that property, except as it might relate to the ability for us to come back in later and file

an appropriate civil forfeiture proceeding on the property that the jury has decided that's not subject to forfeiture. So as far as the criminal part is concerned, no. As far as the ability for us to file a potential civil forfeiture, I don't think at this point we want to waive that right.

Further, we've also made the argument as to the availability of these assets, the Harvestore, the business known as Gene Myers Trucking, the weapons that were found, and I believe the four vehicles, as well as the combine, using that money to satisfy what we believe are valid interests that the United States has in the payment -- or using those monies that are generated from that to pay the court-appointed attorney's fees in this case.

THE COURT: Well, could we do this -- I think Miss Ginsberg had indicated she would be agreeable with this at one point -- set aside or escrow the approximately $15,000 in court-appointed fees, the Government can make a claim for reimbursement, and we can litigate that issue and then turn the rest of the money over to the defendant if there is any money in excess of the 15,000?

MR. McLAUGHLIN: I suppose as long as we can include, in addition to the attorney's fees, the fines and the costs of incarceration. I believe also, in addition to that, we understand that the State of Iowa has sought to proceed against some of this property for a violation of the

Iowa tax stamp laws and, in addition to the claim that we may have to the property, we understand that --

THE COURT: Well, I mean, we can make -- we can come up with all kinds of hypotheticals of people who might have a claim against the property, but does the Government, United States Government have a legitimate claim to the property that the jury specifically found was not subject to forfeiture beyond a possible claim under the reimbursement statute for the court-appointed attorney fees at this point?

MR. McLAUGHLIN: And for fines and other expenses -- Under the criminal forfeiture, no. Under the availability of a civil forfeiture, that would be the sole basis, at least under the forfeiture statute, civil forfeiture statute. Certainly we would be precluded from somehow seeking a criminal forfeiture of this property --

THE COURT: I don't see how you're going to get a civil forfeiture either, quite frankly.

MR. McLAUGHLIN: I understand, and the last time that I was in front of you, Judge, I argued what I thought were the different burdens of proof --

THE COURT: As I understand what you're arguing is that the Government -- just a second, Mr. Murphy -- the Government in the criminal case got an instruction at the Government's request, they only had to show a preponderance, which as we all know from law school means you got to just

tip that scale one percent, 51-49, and you're saying that maybe what the jury found was an equipoise, it was 50-50 and the defendant can't tip it to 51-49 the other way in a civil forfeiture -- that seems to be your argument, that you can't get 51-49 -- the defendant can't get to 51-49, so it must be 50-50, totally equal in terms of evidence.

MR. McLAUGHLIN: I guess what I'm trying to tell you, Your Honor, is I'm not stating at this point that there -- the Court has also not ruled on the issues concerning motions for new trial as it relates to the forfeiture issue. Now, if the Court does decide that for some reason that the forfeiture was inappropriate in this case, and I think Miss Ginsberg has raised several arguments in her pleadings having to do with proportionality, Eighth Amendment, excessive fines, and in those instances if the Court should decide that that property is not subject to forfeiture and not enter the order of forfeiture, then I think we're left with the position of can we re-litigate all the issues as they relate to forfeiture or only re-litigate those issues as they relate to items the jury decided were forfeited to the United States.

THE COURT: Well, what's the bottom line of what you want me to do today?

MR. McLAUGHLIN: I think basically what we've asked for in this instance is the opportunity to proceed on a civil

forfeiture on this property if we deem it appropriate. We've asked for a very short turnaround time from the time that you enter the order of forfeiture in ten days.

THE COURT: Why can't you start the civil forfeiture now?

MR. McLAUGHLIN: Well, part of the reason we declined at this point to file a civil forfeiture proceeding is because of what's taking place in the criminal case. In the criminal case, until the order of forfeiture is entered, I don't really know for certain if the Court is ready to enter the order of forfeiture. Then we'll be ready to proceed on the other issues --

THE COURT: Well, are you going to do a civil forfeiture?

MR. McLAUGHLIN: On some of the items, I would say so.

THE COURT: Which items?

MR. McLAUGHLIN: At this point there are several items I think that we can say were involved or may have been involved in the illegal activity or may have been purchased with illegal proceeds that were not named in the forfeiture indictment. In this instance we also have a civil proceeding that had been filed by Mr. Myers as it related to the administrative forfeiture the DEA attempted in this case.

THE COURT: Well, I guess I'm totally at loss as to

what the Government wants in this case. Quite frankly, I mean, we're here, let's go ahead --

MR. McLAUGHLIN: I think first of all we need a ruling on the forfeiture order and we need a ruling on the new trial, and once we're at that point, then we're going to know better as to how we're going to proceed. If the Court wants us to piecemeal this litigation and --

THE COURT: Well, what do you mean, "piecemeal the litigation"? You want three hearings on whether you can forfeit certain property. We've had a trial and you got the instruction you asked for, a preponderance, and you lost on a few items of property and you're not willing to accept that fact. We're going to be here all day today, as I understand it, and now you're telling me you want a third trial on civil forfeiture and you raise judicial economy as an argument.

MR. MURPHY: Can I respond, Your Honor?

THE COURT: Go ahead.

MR. MURPHY: Your Honor, I think all we're asking for is the order of forfeiture and the ruling on the motions for new trial. We don't know, you know, if we are -- for instance, if a motion for new trial is granted, we could go back, get a superseding indictment, we could do whatever, and maybe we would add some of these specific items back into the case -- I mean, that's part of the uncertainty in the case --

THE COURT: I guess what I want, Mr. Murphy, is

straight answer from the Government, yes or no, if I deny the motion for new trial, give you the forfeiture of the property that the jury said is subject to forfeiture, do you have any problem with me then telling the United States Marshal to give back to Mr. Myers all the property that the jury specifically found was not subject to forfeiture, but holding back the $15,000 that you have a claim against for attorney fees?

MR. MURPHY: Well, we do to the extent that there is an ability to then pay fines and pay costs of incarceration, that those assets not be dissipated. The statute requires if a defendant has assets, that they be used to pay those particular items, and so if the order allows him to get the assets back, yes, we have an objection.

THE COURT: What statutory authority do you have to hold the property at that time, to say that the -- in essence it's a pre-judgment replevin-type action.

MR. MURPHY: I'm not -- I guess I would look at it the other way, what statutory authority or what authority says that we can't hold it?

The other thing is that there are going to be appeals in this case, Judge, and if something should happen on appeals and in some way, shape or form it should get reversed or modified on appeal, of course, we would want that property and I think we're entitled to hold the property as

evidence or whatever need we would see fit in connection with the next criminal case.

THE COURT: But you just told me you're willing to have it converted to cash. That destroys your evidence argument. Can't you take a picture of the combine? You didn't bring it into the courtroom at trial.

MR. MURPHY: We've done that. I mean, evidence in the sense if it's then going to be a specific item that would be subject to the forfeiture, I mean, if we convert it to cash, that's fine, but convert it to cash and put it in an escrow account. What we're fighting about, I don't think there's any dispute about what we're fighting about is not necessarily items as we want that combine or we want this or that tool or we want that; what we're fighting about is the money that they're going to be sold for, what's going to happen to the proceeds from the sale of these items, and that's where we think that they should be sold, put into an escrow account, and then as these contingencies, what if's fall down --

THE COURT: Well, I guess you keep coming back to you might start a civil forfeiture, you might do this, you might do that. I guess I really would just like to know exactly what the Government's position is, so are you telling me that subject to possible reimbursement of court appointment -- court-appointed attorney fees and subject to a

possible claim for fines and incarcerations, you don't have a claim against the property?

MR. MURPHY: Well, I guess it depends if those are imposed or not. If they are not imposed and we have a viable civil forfeiture claim, then we'll probably proceed on that claim. I mean, there are -- there are so many questions as to what's going to happen --

THE COURT: Why can't you just say you lost on the combine and you're willing to give it up?

MR. MURPHY: I think we agree to that, on the theory that we lost on, all we're saying is that there are other theories out there. I don't think there's any dispute we lost on the criminal theory on the combine. As to some specific items --

THE COURT: So you want to try this lawsuit twice. I really have a problem with that, Mr. Murphy, a real serious problem with that.

MR. MURPHY: Not necessarily, Judge. I'm saying that there are a lot of items here that we're talking about that had nothing to do -- were not specified in the jury verdict, and that's I think in large part what we're talking about. The ones that were specified in the jury verdict, you know, again, we're not fighting those in this criminal case, not fighting those at all.

THE COURT: Miss Ginsberg, what's your position?

MS. GINSBERG: Judge, I have a lot of things to say. I'm not even sure where to start because they raise so many.

First, I guess the easiest issue, with respect to any possible claims for fines and costs, there is no authority anywhere that says that the Government can prevent defendant from spending his own money to pay lawyer fees or whatever legitimate expenses he has so that the Government can keep in reserve money so that if the Court decides that he has the ability to pay a fine at some future date that those funds are there.

Additionally, there's been a Third Circuit case that said that the guidelines are without authority to impose the costs of incarceration, that that's an unconstitutional imposition, and that's going to be raised at sentencing, but I think all of that is a smoke screen. The Government has had months to consider whether or not they're going to file a civil forfeiture in this case. They can't tell this Court what items would be forfeited -- They are trying desperately to find some way to hold something over Mr. Myers' head so he doesn't have assets free to pay his lawyer, and I will represent to the Court that the Government, these United States Attorneys, have now deprived the Court of its ability to enter any forfeiture order because one of these two United States Attorneys called the Iowa Department of Finance and

Revenue and told them -- told them to instigate the civil Iowa tax lien, provided them the information, and they are the ones that initiated that proceeding, and now there is a civil tax lien on all of Mr. Myers' property for a drug tax in an amount specified by one of these United States Attorneys.

THE COURT: How much is it?

MS. GINSBERG: Well, it's an estimated amount. It's four hundred forty some odd thousand dollars, which the collection agent told me this morning was based on figures that are received from law enforcement in the various jurisdictions, and Mr. Myers was told yesterday, and I would put him on the stand under oath, he was told by an individual in that office that this was initiated by the United States Attorney's Office for the City of Cedar Rapids and that they are the ones that provided the information, and until that proceeding can be contested, I can't even tell you what the correct amount is going to be, if there is any amount. I can tell you that we intend to contest it, and I intend to hold these United States Attorneys responsible in whatever lawful way is possible, because what they have done is manipulated this Court. They have done everything they can to frustrate what the intentions of this Court are. They are afraid that, and were afraid that you were going to return some of those funds and that Mr. Myers would be able to pay his counsel of

choice with assets which the jury said should be returned, and they have now made it impossible for him to have access to those assets and for this Court to get access to any of those assets. So I don't think the Court now can enter any order of forfeiture.

Aside from that, as far as the land is concerned, and I'm not even sure what posture this is in -- I think that the issue of what should be -- what can be forfeited -- I'm sorry, I'm getting mixed up. But the jury, I'm asking, I have a very specific request, because I think we have to deal with the forfeiture issue, anyway, notwithstanding what the United States Attorneys have done with the Iowa Department of Finance, the jury -- I am asking for this Court to make a finding of fact and a ruling of law that these items that the jury voted forfeited -- not forfeited are not forfeited, that that issue has been decided and precluding, to the extent that this Court can, the United States Attorney's Office from maybe initiating some civil proceeding if they can figure out some theory on some possible piece of property that they can figure out a way to try and come to this Court and confound these proceedings.

The jury, at their request, was given a preponderance of the evidence standard, and the jury not only decided certain items were forfeitable and certain weren't, but they decided that this whole general theory that property

was used to disguise, to conceal, that it facilitated the growing operation because it created a legitimate enterprise on the property and therefore it concealed the drug operation, they ruled on that because they said no, some of the property goes back. So therefore that has been decided. This is res judicata, it is collateral estoppel, and they can't have it both ways, and that's what they're asking this Court to do, and I'm asking this Court to do whatever it can to enter a finding that what -- that the jury made these determinations and that they are collateral estoppel, and if they think they can come to the Court and ask for another civil hearing because they goofed in the criminal case or they just lost, they were just wrong, that at least there is something -- something in the record on which Mr. Myers can rely in the civil proceeding, more than just having to re-litigate all of these issues again. They have been litigated. The Government lost, and they don't like it.

Now, I think the items that were forfeited, the jury voted were forfeited. They were very specific items in the jury verdict, including something not so specific, but tools and equipment. The Government had every option to put on any evidence it had of anything that was used to facilitate the drug dealing. They had no evidence. The only evidence they had was the evidence they put on, and they didn't put on any evidence about tools and equipment. So now

what we're trying to do is figure out some way to just tie it this property, and I think it's improper and I think it's an abuse, and I don't think this Court should allow it or condone it.

I'd also like to say with respect to the real estate and its final disposition, I'm not certain exactly, I tried to find the written motions that were filed, if there were written motions with respect to proportionality and the Eighth Amendment issues, I think there is a very legitimate -- I couldn't find any specific pleadings --

THE COURT: It was part of the motion to dismiss the Indictment.

MS. GINSBERG: That's what I thought. Apart from that, the case that was apparently relied on by the Government in terms of getting its jury instruction on the single parcel I think was either misread by the Government not properly argued to the Court, but that case says --

THE COURT: You can say I misread it.

MS. GINSBERG: I don't know what happened because wasn't there, but that case, United States v. Smith, which was provided to me yesterday by Mr. McLaughlin, talks about how if a property is one parcel or several parcels, and clearly in this case the jury came back with a question saying, "Can't we parcel this?" So it was clear the jury's intention, if they could do that. This Smith case says,

Sixth Circuit case, 1992, that you look to the original document creating the defendant's interest in the property to determine whether or not it is one or more parcels. In this case the Government apparently argued that the last document, the voluntary contract in lieu of foreclosure, was the document that should be looked at and, therefore, it was one parcel. Well, I fortunately was able to review the documents seized and in the custody of the Internal Revenue Service and a copy of the quitclaim deed to Mr. Rhomberg and the contract, the alternative nonjudicial voluntary foreclosure agreement, specifically describes that property as two parcels, not one, and it says parcel number one and parcel number two, and I do have a copy for the Court.

In addition to that, this contract is not the contract that gave Mr. Myers his original interest in the property, which is what the Smith case says you have to look to. Mr. Myers bought two separate parcels of land about ten years apart and then bought two more little pieces that he added on by quitclaim deeds from two totally other people --

THE COURT: I'm aware of the fact that the property was acquired by separate --

MS. GINSBERG: So I think even under the Smith case the property should have been parceled and even if it's -- if the Court is reluctant to issue a new trial on the forfeiture portion of this case, that as a matter of -- as a

constitutional requirement at sentencing, this is a criminal forfeiture, the Eighth Amendment has been held to apply to criminal forfeitures, that notwithstanding the jury verdict, there are cases which I didn't bring with me, but cases which say that the Court has the obligation to make sure that the jury's forfeiture verdict does not violate the Eighth Amendment excessive fine clause, and I think with the facts of this case there is a very substantial argument that forfeiting the entire property, especially given the jury's expression of its sentiment and -- that imposing the forfeiture order as the jury voted would violate the Eighth Amendment excessive fine clause, and I intend to argue that at sentencing.

Frankly, at this point I'm not sure what we can do because of what the Government has now done with the tax stamp lien.

THE COURT: It just seems to me, Mr. McLaughlin and Mr. Murphy, a relatively simple case has become extremely complicated and in large part by refusal of the Government to accept the jury verdict. I thought that when the jury came back I would enter a simple order saying the Government gets the property that the jury says is forfeitable and the defendant would get the property that the jury says wasn't forfeitable, and you would go home and Mr. Myers would probably go to jail and that would be the end of it, but

apparently that's not the end. What authority -- Miss Ginsberg raises an issue -- what authority do I have to require that the money be escrowed, as opposed to pay for counsel, that the jury has found is not subject to forfeiture, to pay prospective fines?

MR. MURPHY: Your Honor, I'm not -- frankly, I'm not aware of any authority for that. I haven't looked into that particular issue, and I'm not aware of any authority one way or the other on that issue.

I do view it much in the same way, though, as we view the claim which we brought up at the very outset of Miss Ginsberg's appearance in this case with the return of fees, and I'm aware that there is authority out there --

THE COURT: I agree there is authority to do that.

MR. MURPHY: -- that says the Government can hold that, so it's some type of an equitable lien in favor of the Government, and that's basically the sole authority. I mean, again, we're not saying -- I don't think we're saying that the Court can't order, you know, these particular items that the jury specifically found were not forfeitable under the criminal case, we're not saying that -- not fighting that in the criminal case, not saying the Court can't say give those back to the defendant --

THE COURT: I guess the problem is, Mr. Murphy, maybe I'm showing my frustration here -- I gave you the

instruction on preponderance that you asked for, and I guess I find it distressing to hear you say, "Well, we lost that and we may now file a separate civil forfeiture where there is also going to be a preponderance argument, and that because we may at some date in the future try to forfeit this stuff civilly, Judge, don't give anything back to Mr. Myers so he can pay his attorney, hold every single piece of property he has," and I guess that offends me. It offends my sense -- maybe I have got a warped sense of fairness, but it offends my sense of fairness that the defendant went through the trial, you won 90 percent of what you wanted, he got 10 percent, and you say, "Don't give him the 10 percent, Judge, because we might have some other card up our sleeve that we can pull out at some point down the road, and don't give him the money to hire an attorney."

MR. MURPHY: Well, again, I don't know what else we can say.

THE COURT: Why did we go through the criminal forfeiture if you're not going to accept the verdict?

MR. MURPHY: We do accept the verdict --

THE COURT: But say you're going to start a civil forfeiture against the very same property the jury specifically -- or you may -- you may start a civil forfeiture -- Why bother to go through a criminal forfeiture if you lost, after having gotten a preponderance of the

evidence instruction, you come back and say, "Well, Judge, don't give them the property back because we may at some point in the future decide to proceed civilly" --

MR. MURPHY: I think the confusion comes here, and again, the confusion comes I believe from the civil forfeiture that we would propose on down the line, I don't think would be so much directed as to the specific identifiable items in the criminal --

THE COURT: Can't you just say that, it won't be identified?

MR. MURPHY: Well, if I could just take a look -- I mean, basically what we're fighting about, as I indicated earlier, the vast majority of other things out there that have not been specified, that were not specified in the verdict one way or the other, I mean, that's the bulk -- those are the bulk of the assets that are out there --

MS. GINSBERG: Your Honor, they were miscellaneous tools and equipment. What the Government doesn't like is they now find out that the farm has a lien on it and may not be worth much --

THE COURT: They knew that.

MS. GINSBERG: They may or may not have known it before, but turns out that the equipment, the tools and equipment, are probably worth more than the farm.

THE COURT: Well, Mr. Mark Meyer pointed out at the

jury instruction conference this farm was probably worthless to the Government.

MS. GINSBERG: But at the time they initiated these proceedings, they thought they had the real asset, and they goofed.

MR. MURPHY: If there was any goof, Your Honor, to use that term, it was in not specifying other particular items.

THE COURT: What, do you have a list -- Let me see what we're talking about here.

MR. MURPHY: I don't know that I have an extensive list -- What we're talking about are, for instance, what -- Miss Ginsberg sent us a letter. That's a good starting point. She wants back two 1,000-gallon LP tanks, a corn dryer, a stalk chopper, grain cleaner, a chisel plow, manure spreader, a blade, a John Deere tractor, a corn planter, a bus, some of the scrap metal, and things like that that are out there, and those obviously have not been ruled upon by the jury. As the Court will recall, we had evidence regarding several of those things. Now, the fact that we did not specify those in the count -- the forfeiture count of the Indictment I don't think in any way, shape or form should preclude us from considering a further action, and specifically what I'm talking about are, for instance, the LP tank, the chisel plow, the International plow, the manure

spreader, railroad cars --

THE COURT: Manure spreader, the jury found that the farm equipment didn't have anything to do with the forfeiture. The manure spreader didn't --

MR. MURPHY: Respectfully, Judge, there are different theories, different theories here, and specifically with regard to those items, those we can clearly show by checks were purchased with proceeds of the laundered money, and that would be the nature of a subsequent civil action, specifically identifiable assets that have not been ruled on, up or down, by the jury.

Now, I don't know, and I'm not going to presume to say what the jury did, but I think to the extent that there were pieces of farm equipment that were not given in the forfeiture verdict, those were under the facilitation theory rather than proceeds theory on money laundering --

MS. GINSBERG: Your Honor, I don't think he's accurate. We didn't put a manure spreader here. I have a witness here ready to testify that the items were items on Mr. Myers' property many years before he even met Mr. Dan Meyer, and I think they're included in tools and equipment which the jury -- The jury did not hear any evidence of any other farm tools or equipment being used to facilitate the marijuana growing, and they don't want to live with it.

THE COURT: The bottom line is that there is an intractable problem here and we are going to have two jury trials and a day-long hearing over manure spreaders --

MS. GINSBERG: Apparently so unless the Court says no.

MR. MURPHY: I mean, and there is a manure spreader, with all due respect, in the March 5th, 1993, letter from Miss Ginsberg --

MS. GINSBERG: I'm looking at a March 25th letter.

MR. MURPHY: We certainly had not contemplated that here today, Judge. We had contemplated a ruling -- Maybe I'm incorrect in anticipating what we are going to do here today --

THE COURT: I guess what I thought -- Here's what I thought we were going with this, Mr. Murphy, and I guess in reading your brief, I'm obviously wrong, I thought I would enter an order that said that the property the jury found was subject to forfeiture would be forfeited. The specific items of property that the jury said were not subject to forfeiture, the combine, the specific vehicles with vehicle identification numbers go back to the defendant, subject to the $15,000 possible recoupment for the attorney fees, and if there's a dispute as to what's included within the category of miscellaneous tools and equipment, we may need an hour or two of evidence on that issue, but I understand the

Government says they do not want to do that.

MR. MURPHY: I don't think we're saying we don't want to do that, Judge. I hadn't anticipated necessarily the hour or two of evidentiary items. I thought we were going to decide the Eighth Amendment and all the other things that Mr. Meyer wanted to address the last time, and I thought Miss Ginsberg said she wasn't familiar with those, wanted a continuance to become familiar with those. So that's what I thought we were going to do.

But with regards to the prior portion of what the Court just stated, I don't think we have a particular problem with that. All I'm saying, somewhere down the line -- defendant is on notice, somewhere down the line we may be coming after those assets under some other theories.

THE COURT: You don't have any objection to my releasing them today?

MR. MURPHY: Not the specific identifiable items in the jury verdict that were not forfeited in the jury verdict. All we're saying is I don't know that that's necessarily the prudent course, given what we're telling everybody and, frankly, what we have told everybody from the outset of this case, I mean, Mark Meyer would tell the Court, I'm sure, that from the outset of this case we have told him, we have told the defendant that he is not going to have anything left when this case is done because there are a

bunch of different theories that we're going to go after the assets on his farm. As a practical matter, he's going to be divested of the assets on his farm, and that's no surprise. That's nothing new, not doing any last-minute things, raising new theories. This is stuff that we have argued about from the outset of this case --

THE COURT: But, Mr. Murphy, what right does the United States Government have to come in and tell a person, "We're going to take every single asset you have," even a drug dealer, and then go to trial and when you lose on a few assets, say, "Well, gee, I guess we're wrong. We weren't able to divest them of every single asset, so now we're going to come up with alternative theories A, B, C, D, E"? I don't think that's a very commendable attitude. I think it's one of the problems the United States Government is having right now with the whole forfeiture statute, it's this attitude that we're going to strip this person down to their last nickel and we're going to do everything within our power to do so.

MR. MURPHY: I didn't state it perhaps as well as I could have.

THE COURT: You may have stated it too accurately.

MR. MURPHY: Well, I mean, what we told him was there are several theories, several ways that this stuff is going to be subject to seizure, and the law is going to

require it, and we don't see how he's going to get out of it. Now, obviously, he wants to litigate, that's fine, but we have told him, you know, basically all of our theories except for the Iowa tax stamp thing from the outset of the case. He's known about those things. He's known that we would be pursuing collection under any one of those alternative theories, but to get back to the Court's point about what it plans to do or what it intended to do or anticipated it was going to do, again we don't have a general problem with that. All we are saying is, as we have told the defendant from the outset of this case, there are other avenues out there available to us and we may be pursuing those, and the defendant from the outset of the case, in recognition of those arguments, pleaded indigency. He said, "If that's true, then I don't have any money. I'm not going to have any money to pay an attorney" --

THE COURT: I think that's pretty obvious, if the Government comes in and says, "We're going to strip you of every single nickel you own," then it's not too unreasonable for the defendant to say, "I don't have any money."

MR. MURPHY: That's fine. Again it comes to the point where then all of a sudden he wants to change attorneys and all of a sudden he wants to say that he has assets, and all we're saying is, "Wait, if you're going to do that, make sure you know that everybody is on notice of what we're going

to do, of the claims that the Government has of the property, what the law requires with regards to the fines, with regards to the reimbursement," things like that, and if you take the property back, it's going to be subject to any right -- we're not going to give up any right we may have to pursue it under an alternative theory.

MS. GINSBERG: This is arrogance. I've never heard anything like it. The United States telling this Court, the Court doesn't decide what remedies are legally available to Mr. Myers, the Government decides. The Government is collaterally estopped from bringing a civil forfeiture on this property now, and I have absolute confidence in that argument, and if they file a civil forfeiture, I think this Court is going to have to rule -- I know this Court is going to have to rule on whether or not they are collaterally estopped --

THE COURT: Well, just a second. Let's --

MS. GINSBERG: Let me back up one second. I am going to oppose this Court entering any forfeiture order at this point. I think that this is absolute manipulation. If the Government is doing what it's doing with the Iowa tax stamp to prevent Mr. Myers from having access to his assets, I don't think the Court should allow that manipulation to inure to the benefit of the Government. The Government has now deprived the United States Treasury of access to that

forfeited property, and I don't think that the Court should buy into this manipulation and allow the Government to get away with it. What they want to do is say, "Okay, notwithstanding the fact that there is a state tax lien against all of this property now, we want you to enter our forfeiture order, give us what we think we're entitled to, but prevent him from getting any of it." I don't think it works that way. The Court has got to step in at some point and say, "I'm not going to let these United States Attorneys manipulate this process this way."

There's nothing I can do at this point in the proceedings except protest the Iowa tax lien, but the United States Government should not be allowed to benefit at the expense of Mr. Myers, not for his criminal -- if he's committed crimes and has penalties, he should pay, albeit he brought it on himself, but if Mr. Myers can't get ahold of those assets because of an Iowa state tax lien, neither does this Court have jurisdiction to enter an order giving the Government the property that the jury forfeited, and I object to the Court entering any order of forfeiture because there is a tax lien, and I will present the Court with my copy. I have the only copies. We can make a copy. I want to put it in the record. I don't think this Court has jurisdiction to enter any order of forfeiture, and I strongly urge the Court not to do anything until at least we can come back to the

Court with some authority one way or the other.

853, which is the criminal forfeiture statute, contemplates that the final order of forfeiture is entered at the time of sentencing. These preliminary orders are matters of convenience, but I think that the United States Attorneys have done -- they're playing with this man, and I will tell them and tell this Court, I don't care if I don't get paid to represent Mr. Myers, paid a dime at the sentencing, he is going to have the lawyer of his choice at the sentencing, and I'm asking here today, because of what the United States Attorneys have done, to again make him indigent, to authorize court-appointed fees for the expenses of getting transcripts, getting the subpoenas issued and getting them served, because they have again made him indigent. I will not ask for fees in this matter. I will wait and fight that out, but the United States Attorneys have again made this man indigent by initiating this tax proceeding.

I am requesting the Court authorize court-appointed fees to pay the expenses of the rest of his representation, and I will tell the Court, I am not asking for fees for myself, but I think this is an outrage. It is an attempt to deprive. You heard Mr. Murphy, he was perfectly satisfied as long as the court-appointed lawyer was the one getting paid out of court-appointed fees, but, oh, Mr. Myers did a terrible thing, he thought he had his assets back, and he

wanted a different lawyer. Well, he's got a different lawyer, and at this point he's got him for free, but I think because he is now again indigent, he is entitled to the costs of proceeding and should be authorized those costs under the CJA.

THE COURT: All right. I'm going to take a short recess.

I have to tell you, Mr. Murphy, I find the attitude of the Government in this case to be very disturbing, and I don't know what I'm going to do at this point, but I guess I just find it very disturbing that we go through a trial and the Government just basically flat out says, "We are not going to live by what the jury says. We are going to strip this man of every asset he owns, regardless of what a jury says," and that bothers me, and that's what you're telling me today.

I'm going to take a recess for 15 minutes.

(The hearing was recessed at 9:59 a.m. and reconvened at 10:17 a.m.)

THE COURT: All right. I tell you, the first thing I'm going to do at this point is let's go ahead and argue the motions made pretrial about proportionality and homestead.

Those are your motions, Miss Ginsberg. You may argue them.

MS. GINSBERG: Your Honor, I am personally not

going to argue the homestead aspect of that motion. I think that the federal statutes prevail.

THE COURT: There's Eighth Circuit authority against you on that issue.

MS. GINSBERG: With respect to the proportionality, this is a criminal forfeiture. The Eighth Amendment applies. The jury itself expressed its desire not to forfeit property which it did not believe was related to this crime and but for the Court's instruction would have parceled the property, as I read the record.

THE COURT: You're basically tying your proportionality argument into the separate tracts argument?

MS. GINSBERG: That's correct, and I would -- in support of that argument, I would introduce the quitclaim deed and the alternative nonjudicial voluntary foreclosure agreement which transferred Mr. Myers' interest in this property to Joe Rhomberg in 1989, which itself describes the land as parcel number one and parcel number two.

THE COURT: Well, isn't the contract between Myers and Rhomberg already in the record?

Do you recall, Mr. Murphy?

MS. GINSBERG: The deed might be, but this is an agreement --

THE COURT: Let me see what you have there.

MS. GINSBERG: May I approach?

THE COURT: You may.

MR. MURPHY: Your Honor, I thought it was in the record as Exhibit 73.

THE COURT: All right. So what you have here, Miss Ginsberg, is an agreement between Myers and Rhomberg dated January 13, 1989, and I haven't read through the whole thing, but I assume it's the agreement that provides that Myers will quitclaim back the deed to Rhomberg and then Rhomberg will turn around and resell it to Myers on a real estate contract?

MS. GINSBERG: That's correct, and also, Your Honor, the actual quitclaim deed which has an Exhibit A which also delineates two separate parcels of property.

THE COURT: Can I see your copy of the exhibit that was entered at trial, Mr. Murphy? Do you have that handy? I think that Exhibit A is attached to that exhibit, as I recall.

Government Exhibit 73 is the real estate contract that then is sort of the third document in this sequence. There's the agreement, the quitclaim deed back to Rhomberg, and then the real estate contract between Rhomberg, the seller, and Myers as buyer, as I understand it.

Well, the only real difference, Miss Ginsberg, between the two documents is in the real estate contract which was entered into evidence at trial as Government's

Exhibit 73, the legal description which is attached as Exhibit A is apparently virtually identical to what you have attached as Exhibit A attached to the quitclaim deed, except for the fact that in the quitclaim deed, between the two parcels there is a space, whereas in the contract they eliminated the space and just ran the descriptions together, but they do separate them both by "and," both tracts.

MS. GINSBERG: I understand the Court's point.

I would also refer the Court to the quitclaim deed which says that, "This deed is given" -- I guess the document which actually transfers the interest, but says, "This deed is given pursuant to an alternative nonjudicial voluntary foreclosure procedure." So specifically refers to the foreclosure agreement which recites the descriptions as two separate parcels. I view that as a fall-back argument, actually. Under the Smith case, the Sixth Circuit said that this was basically an issue of first impression and the court viewed it had to define what constituted property under 853 that would be subject to forfeiture, and in that case Smith was arguing there were four separate tracts of land and only the tract of land where I believe it was drugs were grown -- there were four parts -- where the drugs were located should be considered, and the court said that you had to -- In that case there was a quitclaim deed from the defendant's divorced wife, quitclaiming all of her interests in all of that

property to the defendant as part of the divorce settlement, and the Government was trying to rely on that document, saying that that is the document which gave him his interest which he defines the scope of the property, and since she quitclaimed everything to him, that it was all one parcel, and the court said no. The court said under Tennessee law, the owners, husband and wife, take as owners by the entirety, so therefore the wife's quitclaim deed basically had the same effect as if she had died, and what the court did was look to see how the defendant Smith originally obtained his interest in the property and said the quitclaim deed from the wife really didn't change that because he was the sole owner, again the entirety from the beginning, and in that case Smith obtained it by four separate contracts, and the court said because of that, it has to be treated as four separate parcels.

In this case, Mr. Myers obtained this property originally -- actually -- these two substantial lots were obtained by separate contracts and separate owners, one in 1965 and one in 1974. Then there were some very minor acquisitions from two totally other people, just little pieces of land, but it's our position that the Court has to -- under Smith, that the Court has to look to the original documents which -- from which Mr. Myers acquired his interest, and those are the documents which would determine

whether or not this is one or more parcels, and I think that that's really what the quitclaim deed and this voluntary agreement reflects, that this was separate parcels.

THE COURT: Well, I don't think there was a lot of dispute about that at trial. I mean, first of all, I have a problem putting in evidence that wasn't introduced at trial, particularly documents that would have been available at a motion for new trial stage. I don't see where there's anything about these documents which would indicate that they are newly discovered evidence that couldn't have been available at trial. If you want to mark them, make them part of the record for appeal purposes, you're welcome to do so, but I really don't see where I'm going to really consider these. But moreover, I don't really know that it makes a lot of difference. I don't think there was ever any serious dispute, based upon the record made at the trial, that Mr. Myers had acquired the property in two separate tracts at two separate times. I wasn't aware of these little pieces you're talking about.

It's my recollection of the evidence, it's basically uncontroverted that these are two separate tracts of property acquired on two distinct pieces of time, were originally owned by other people as two separate farms, and that at some point, and I believe Mr. Rhomberg went through quite a bit of testimony about this whole scenario, I think

Mr. Myers even himself testified about this issue, at some point in the late 1980's, Mr. Myers got into financial difficulty and Mr. Rhomberg took mortgages against the property and eventually they worked out this settlement that is apparently reduced to writing in the document that you want to introduce, alternative nonjudicial voluntary foreclosure, and the property went back to Rhomberg and then it was reconveyed to Mr. Myers by this contract that was entered into evidence. I mean, I don't know what you're doing here adds a lot to what's already pretty much undisputed in the record.

MS. GINSBERG: I think it's a legal interpretation. I agree, Your Honor, I was actually intending to introduce these documents as part of the sentencing because I think the Court, in addition to having to rule on these motions, also has to make sure that its sentence doesn't violate the Eighth Amendment. I guess I got a little ahead of myself --

THE COURT: Let me ask you this, in terms of a motion for new trial proceedings or proportionality argument, if I were to determine, and I'm not saying I'm inclined to, but if I were, after listening to your arguments or if there's some recent cases that have come out since the Smith case from the Sixth Circuit, that I was wrong in not instructing the jury on the right to consider this as separate tracts, what relief are you seeking?

MS. GINSBERG: Your Honor, I don't see that it needs to be done by way of a new trial. I'm asking that one of two things happen -- I guess I'm asking that the portion of the jury verdict which includes the parcel which is not the parcel on which the marijuana was grown be excluded from the forfeiture verdict. I think the Court can do that at sentencing in order to make the forfeiture order comply with the Eighth Amendment requirements, and there is a case which I didn't bring with me today because I didn't expect to be arguing it in this context which says that notwithstanding a jury forfeiture verdict, the Court has an independent responsibility to make sure that the forfeiture order does not violate the Eighth Amendment and has to fashion its final order to make sure it complies with the Eighth Amendment.

So I think that the Court can say that as a matter of constitutional interpretation, proportionality, that it is disproportionate to forfeit a separate parcel of land on which no marijuana was grown, and just -- I suppose we could go through the unnecessary -- I view it unnecessary retrial of that part of that issue. I think the Court can make findings that parcel one is the parcel where all the marijuana was and the buildings were and just fashion its final order at such time as one can be entered to include only the one parcel on which the marijuana was grown --

THE COURT: All right --

MS. GINSBERG: -- and I do think that the jury's question to the Court is a clear indication of what the jury thought was proportionate to the offense.

THE COURT: Are you aware that the jury did more than make a question?

MS. GINSBERG: The only thing -- Mr. Myers has told me that there were some things brought back by the jury. I did see -- I have copies of the jury instructions, and I saw a letter from the jury saying, "Can we parcel out" --

THE COURT: Well, the jury actually issued a question which I answered which basically asks about separate tracts, but then the jury, with the return of the verdict, made a statement.

MS. GINSBERG: I was not aware of that. If the Court wouldn't mind, I would like to hear that.

THE COURT: The note from the jury says, "Your Honor, can we make some sort of statement with our decision in writing?" Now, I wasn't -- unfortunately, I didn't take the verdict. Judge McManus did, but -- Let me see what the statement is. You're certainly free to read it, but what it says is, "The opinion of some," doesn't say all, "The opinion of some of the members of the jury felt that the forfeiture of real property should be broken down into smaller portions and allowed to be described in smaller multiple descriptions, example," excuse me, I can't tell if that is a colon or an

exclamation point, "example: Personal property was itemized." Then it's signed by three members of the jury, including the jury foreman. I don't know if that means -- we can only speculate as to whether or not more than three people felt that way, but at least three members of the jury did make that statement.

MS. GINSBERG: I do think the Smith case -- I would urge the Court to read that again. It does cite two Fourth Circuit opinions which say that you have to look to the instruments that created the defendant's interest in the property, not the final thing that is sometime down the road, but they are the cases that the Smith opinion relies on for referring back to the original documents creating the original interest that Smith had in these four separate parcels; that as a matter of law, the jury should have been instructed that the land could be parceled and then as a matter of Eighth Amendment interpretation that it is a disproportionate penalty to impose on a defendant the forfeiture of property which was used to facilitate the commission of a crime, and that that is the obligation of the Court to determine.

THE COURT: All right. Anything further, Miss Ginsberg, on that issue?

MS. GINSBERG: No, sir.

THE COURT: Do you have any other issues you want

to bring up today, other than what we've previously described --

MS. GINSBERG: Your Honor, I'm not sure where this other situation leaves us. I have a witness who's come from Waukon to testify as to the existence of most of the property that I had enumerated in my March 23rd letter, that that was property -- I kind of envisioned this hearing, as Your Honor did, that there would be a decision one way or the other about which property was covered or generally should the Government get back what the jury forfeited, should the defendant get back what the jury said was not forfeitable, and to the extent there was some ambiguity in the jury's verdict, I have a witness here prepared to testify at least with respect to the items I've specifically identified that they were the property. He worked on the farm, property he saw on the farm long before Mr. Gene Myers ever met Mr. Dan Meyer and, therefore, it was not property that was part of this M and M Enterprises.

THE COURT: Are you -- Is this witness going to be lengthy?

MS. GINSBERG: I don't think so. I anticipated going through a list of items with him and asking him what -- if he had seen those items on the farm and when.

THE COURT: Well, without precluding the Government from putting on maybe some further evidence later, if he's

come all the way from Waukon to testify, rather than bring him back, I'll let you make a record on it.

Do you want to talk about this proportionality and separate tracts argument, Mr. Murphy?

MR. MURPHY: Your Honor, I just have a few points I would like to make, then if I could, I would have Mr. McLaughlin address it.

First, just with regards to the jury, the jury notes, I think it's important to know also -- may not be important to know -- that we did also poll the jury. The Government polled the jury after the verdict. Notwithstanding the notes, it was their verdict, and they had no questions about it, but I would also cite to Rule 606 which I think would say that you can't look to evidence from the jury to attack a verdict, and so we don't think that that really has any evidence as to what the jury thought or what a couple members of the jury may have thought at some point in the deliberations really has any bearing as to the legal issue which I think is what the Court has to resolve. I'm not sure that the defendant has specifically preserved the Eighth Amendment issue, but I'll ask that Mr. McLaughlin be permitted to address the proportionality argument that defense attorney does raise.

THE COURT: Mr. McLaughlin.

MR. McLAUGHLIN: Thank you, Your Honor.

I believe that when the motions were filed, both before and after the trial, that several related issues were raised before the Court. Specifically, the Court I believe needs to be concerned about the argument Miss Ginsberg has raised as relates to the Smith case, but doesn't really go, I don't think, to the issues of proportionality or excessive fines or a violation of due process, but more goes to the definition of how one should define the property that is subject to forfeiture. I think the Court need go no further than look at the plain meaning of 853(a)(2) which provides that "Any of the person's property used or intended to be used in any manner or part to commit or to facilitate the commission" results in a forfeiture of that entire parcel of property. I'd cite the Court to a couple of additional cases, in addition to Smith. I don't think the Court has to go specifically to look at the documents that create it, although in this instance I think if the Court were to follow Smith and look at the documents that created Mr. Myers' interest in this property, needs go no further than to look at the contract that created the relationship between Rhomberg and Myers.

I'd cite the Court to United States v. Harris, 903 F.2d 770, Tenth Circuit case. In that instance the statutory language allowed the forfeiture of property in its entirety even if only a portion of it was used for illegal

purposes. I believe there's also an Eighth Circuit case that talks about proportionality as well. Again, we're talking about a definition as it relates to how you define property under the statute and, like I say, I think all these are interrelated. When you talk about the issues of due process and whether or not this was so large, the forfeiture of this property is so large and disproportionate, I think the case law would say that one needs to look to a variety of issues. I think one thing that the Court should look at is if this were an excessive fine under the Eighth Amendment, then Congress has looked at the statute and said, "If you violate, raise more than I believe it's a hundred plants, you know, may be guilty or you may be given a fine of in excess or up to $2 million" --

THE COURT: Let me ask something here about this excessive -- Maybe I should ask Miss Ginsberg, more appropriately than you.

Do I need to have some evidence as to what the value of this property is? It's been represented that there's no equity in this property. Once it's sold, that th Government, whoever ultimately ends up with the farm, will realize nothing out of it.

MR. McLAUGHLIN: I don't believe it's necessary for the Court to take into account what the fair market value o the property is. Even if they were to put a $500,000 value

on the farm, I still don't believe it's disproportionate to the illegal activities that took place. I went through and counted up the fines. If they were maxed out on each, I think it's in excess of $10 million potentially for a fine here, and there's no forfeiture in this case that's going to exceed certainly $2 million. In this instance I think the Court is going to look and decide where this is an excessive fine, clearly an examination of the issues, specifically the language in the Smith case Miss Ginsberg cited also talks about the applicability of the disproportionality argument in the Eighth Amendment when it mentions, "Even if we were to assume, however, that a forfeiture order under 853 is subject to the Eighth Amendment, this order is neither cruel nor unusual," and this was a million-dollar forfeiture of a piece of property, "nor grossly disproportionate to the crime," and cites Harmelin v. Michigan and Solem v. Helm, then notes the fact that Congress provided a two-million-dollar fine for the manufacture of a hundred or more marijuana plants --

THE COURT: Isn't one of the problems we have right now with this particular argument is that under the current state of Eighth Circuit law, I don't -- as I read it, I think Miss Ginsberg has got a very difficult burden to get over on, but at least there's one and I believe maybe two cases that have been argued or about to be argued before the Supreme Court that go directly to this proportionality issue. I

think one of them is out of the Eighth Circuit --

MS. GINSBERG: That's the Austin (phonetically) case argued before the --

THE COURT: What the law is could change in the next 60 days.

MR. McLAUGHLIN: My understanding, yes, I think that's about all I could point out.

I would note in some of the other motions that were filed that issues of double jeopardy, also an issue of bill of detainer was raised earlier on. I think the Court can look to the briefs we filed in both response to the motion to dismiss and posttrial motions as well and conclude that there are no valid bases for those particular arguments and the circumstances in this case.

Thank you.

MS. GINSBERG: Your Honor, could I make one reply?

I don't disagree with at least as the law is today that the proportionality argument is a difficult one. The Austin case was an Eighth Circuit case. The Supreme Court will decide whether the Eighth Amendment applies to civil forfeiture. It was not a criminal forfeiture. But this whole issue of proportionality was argued in that case, but all of these cases address the proportionality of forfeiture that was a proper forfeiture. In this instance I think what we have is -- I think we had an improper jury instruction,

and it may well be that this Court decides that's a matter for the appeals court, but since the motion is -- the motion for new trial is pending before this Court now, I thought it appropriate to raise it, since there is a vehicle for the Court to correct it before we go to appeal.

THE COURT: Well, seems to me --

Did you want to say something, Mr. McLaughlin?

MR. McLAUGHLIN: No.

THE COURT: Seems to me it's a difficult argument for the defendant to make that the size of the forfeiture is disproportionate under the current state of the Eighth Circuit law, and I don't think there's much question about what the statute says, that all or part of the property -- all the property is subject to forfeiture if any part of it was used for illegal activity. I think the problem comes in, and this is what we wrestled with with the jury instruction, and this is what I eventually came down on on the Government and against the defendant's argument, is how do you define property? It's not -- I mean, it's easy once you define what the property is, then the statute is clear. The question becomes, what's the property? And I think, as I understand the state of the law, if a person owned a home in Cedar Rapids, Iowa, and a vacation condo in Vail, Colorado, and he or she acquired that property by separate transactions at separate times, et cetera, and carried on drug activity

out of their Cedar Rapids property, that would clearly be forfeitable, and if they had -- if the drug activity had no connection to the Vail property, it wouldn't be forfeitable. Now, that's the extreme example. Here we have sort of a hybrid. The properties were acquired at separate times in separate tracts, but eventually became part of one tract, and under my ruling that made it all subject to forfeiture. It's an issue I think the Eighth Circuit could go the other way on, frankly. It's a difficult issue, and I'll take a look at it another time in connection with your motion for new trial, but I think it's one that I will be -- I will freely admit is susceptible to different interpretations and one that I think I was right on, but I wouldn't be shocked if the Eighth Circuit said I wasn't.

MS. GINSBERG: Your Honor, could I give you the citation to Smith again? 966 F.2d 1045, and there are a couple of cases cited in that case, the Fourth Circuit cases are cited in that case.

THE COURT: Thank you. I assume that no one has found anything more recent than Smith on this issue?

MS. GINSBERG: This was a July 1992 decision.

Actually, Your Honor, I could say -- I have a district court opinion which doesn't refer to Smith in particular. It is out of my -- the Eastern District of Virginia, the Norfolk Division. It is a case where there was

a lounge and a motel that was sought to be forfeited and there was insufficient evidence introduced at the trial to determine which of two parcels, the lounge and the -- if they were on the same parcel or not, but -- and so the judge refused -- the district judge refused to forfeit I think it was the lounge because the court -- the Government failed to put on sufficient evidence at trial to prove that the lounge was also on the same parcel as the motel, and it's kind of an indirect acceptance of this dual parcel question. The court said in its opinion, "There was no discussion of the whereabouts of the Candlelight Lounge or that parcel one of the two separate parcels of property described in the deed included the motel and the lounge."

THE COURT: Is that a published decision?

MS. GINSBERG: I don't know, it was decided March 23rd, 1993. I got it -- I will provide the Court with a copy. I got it through our Lawyers Weekly service that provides these opinions.

THE COURT: What's the citation?

MS. GINSBERG: It is United States v. Real Property Located at 1808 Diamond Springs Road. It was a civil forfeiture, and it's Civil Action No. 2:92V --

THE COURT: Start over again.

MS. GINSBERG: I think it's 92CV, for civil, 785, Eastern District of Virginia, the Norfolk Division. It's

March 23, 1993. I would be glad to provide copies both to the Court and to the United States Attorney.

THE COURT: Well, I don't really want to rely too heavily on any unpublished decision. I would certainly be willing to check if it's on Lexis or West Law --

MS. GINSBERG: It's not the major case which we rely on. I think it makes -- it takes for granted the argument about separate parcels.

THE COURT: All right. Then if there's nothing further, you can put on your witness, Miss Ginsberg.

MS. GINSBERG: I would call Mr. Ellefson.

(The testimony of the witness Kerry Ellefson was not transcribed.)

THE COURT: All right. You're excused.

All right. Do you have anything further at this point?

MS. GINSBERG: Not at this point.

THE COURT: What is the defendant's intention concerning all this property? I know he wants it returned to him, but is he willing to have it sold? Is there any that he wants to keep in kind?

MS. GINSBERG: Your Honor, a tractor and the I-beams that he uses in his moving business. Other than that --

THE COURT: Well, the tractor was specifically

determined by the jury to be subject not to forfeiture.

MS. GINSBERG: I think there's more than one tractor.

THE COURT: I'm talking about the one specifically found by the jury to not be subject to forfeiture.

MS. GINSBERG: That one he wants to keep, the one that was not forfeited, and the I-beams that he uses in his moving business, but his intention generally was to sell the property and pay me and whatever monies were left he would use as probably towards his appeal.

THE COURT: I guess what I'm trying to get to here, and maybe my experience as a bankruptcy judge is starting to show through --

MS. GINSBERG: That might be helpful to all of us.

THE COURT: -- but, you know, usually what happens in these situations, you can fight for days about this property, but you find out when you sell it you're not fighting over that much money. I'm just wondering if there couldn't be some agreement, at least if you can't agree on something else, to liquidate it as opposed to fighting over manure spreaders and backhoes and this type of thing. What I'm inclined to do at this point -- Quite frankly, I don't care about the state lien too much. If they've got a lien against the property, they've got a lien against the property, and I guess that's going to have to be fought out

between the defendant and the property he gets back and the United States Government and the property they get. My inclination at this point is when it comes time for a sentencing hearing, to enter a forfeiture order forfeiting the property forfeited, enter an order returning the property that the jury specifically found was not subject to forfeiture, and if there's some group in the middle, get that liquidated and we can fight over the money, but if Mr. Myers wants the tractor back in kind, I don't see why he shouldn't get it back -- liquidate the rest of it.

MR. MURPHY: Your Honor, which tractor?

THE COURT: I guess I'm referring to the one that the jury found, the Case 2470.

MR. MURPHY: I think the jury found that was forfeitable.

MS. GINSBERG: Your Honor, I didn't realize there were two tractors. Maybe I should call Mr. Ellefson back to the stand --

THE COURT: Just a second. In the special verdict form --

MR. MURPHY: There were two separate theories.

THE COURT: You're right, Mr. Murphy. Under one theory, they found the 2470 was forfeitable, and one they didn't.

Which tractor is it he wants?

MS. GINSBERG: A 4010 John Deere.

THE COURT: That was never even raised as an issue, apparently.

Well, if you didn't ask for it to be forfeited, he can have it back?

MR. MURPHY: That's fine. Our concern right now is we don't recall such a tractor being out there.

THE COURT: Do you want to ask Mr. Ellefson about it? I don't know if it's an issue.

MS. GINSBERG: I would like to at least make the record, call Mr. Ellefson back and ask him about it.

THE COURT: All right. Fine.

(The witness Kerry Ellefson was recalled to the stand as a witness briefly and his testimony was not transcribed.)

THE COURT: All right. You may step down.

All right. I'm going to get out my orders on the motion for new trial. Assuming I deny the motion for new trial, we'll have the sentencing. At that time I'll enter the forfeiture orders, let Miss Ginsberg make her argument on proportionality as part of the sentencing.

Do you want these documents entered at this time or do you want to wait, Miss Ginsberg?

MS. GINSBERG: I guess I might as well wait.

THE COURT: All right. You may take them back, and I'm referring to the agreement, the nonjudicial forfeiture

agreement, and the quitclaim deed.

Would you review the proposed order, Miss Ginsberg, that Mr. McLaughlin has prepared on the forfeiture? I know you don't want the property forfeited, but you can anticipate I'm going to enter some form of order. If you have a form of order you want to use to return the property that the jury specifically found was not subject to forfeiture, I'll take a look at that, but I anticipate at the sentencing hearing that we are going to get this thing resolved and the property is going back; and if you want to start a civil forfeiture, get it started before the sentencing, although I have to tell you, you're going to have to come up with some pretty strong arguments at this point for me to even sign a probable cause warrant.

MR. MURPHY: As far as which property, Your Honor, any property or the -- you're talking about the property in the jury's verdict?

THE COURT: Yes.

MR. MURPHY: We are not going to proceed against that. I know the Court thinks we're being zealous, to say the least, in our pursuit of Mr. Myers' assets, but we're not proceeding against that, but it's -- as I've indicated previously, we respect the jury's verdict, but we are going to pursue to the extent we think we can the other property that's out there.

THE COURT: Again, why don't you see -- before you go and have another jury trial over a bunch of miscellaneous property that may not be worth a lot, why don't you see if you can work out a deal to liquidate it and see what you're talking about dollarwise.

MR. MURPHY: Again, as I said earlier, I think what we're fighting about is not the property itself, but the money behind it. We would be just as happy to sell all that property, put it in a big pot, this Court can make a finding this much goes here, this much goes here, and this much goes here. I don't care where it goes. If it's entitled to go for attorney's fees, that's fine. Entitled for a fine, that's fine. We don't care about that much. We're just saying it should be sold, liquidated and then split up to whatever the Court says is appropriate.

MS. GINSBERG: Your Honor, I have to tell the Court, so there is no misunderstanding, I don't want the Court to think that I'm playing games, but considering at this point what the Government has done is made it impossible for Mr. Myers to take any of that property, because of that, I object to doing anything with this property. I want it all stayed. I want everything stayed pending appeal. We're not going to make this any easier. They're doing what they're doing. We're doing what we're doing. I can't agree to liquidate any of this property.

THE COURT: As I say, when it comes time for sentencing, unless I buy into your proportionality argument, Miss Ginsberg, the Government is getting a decree of forfeiture as to the property the jury found specifically was subject to forfeiture. Mr. Myers is getting back the property that the jury specifically found was not subject to forfeiture, and we'll fight about the rest of it. This case is not going to go on forever. It's taking on sort of a life of its own at this point over forfeiture issues, and we're going to get on with it.

MS. GINSBERG: What is it that we need to do to resolve the property that is not either specifically identified by VIN number or --

THE COURT: My inclination is unless the Government -- I'll tell the Government this, unless you start a civil forfeiture by the time of sentencing and get a probable cause warrant, I'm -- all that property is going back to Mr. Myers because I at this point believe that if you haven't either gotten the property through criminal forfeiture and you haven't commenced a civil forfeiture, I don't see what authority there is for -- to require that the United States Marshal continue to hold and maintain that property. You will have had about five months since the verdict came down, and it seems to me that things like manure spreaders and things like that are the types of things that

are in the category of miscellaneous tools and equipment, and unless you can come up with some specific grounds for civil forfeiture by the time of the hearing, I'm going to order it all back except the property that the jury found was subject to forfeiture.

MS. GINSBERG: Your Honor, I anticipate -- maybe my mind is more evil than it should be -- but based on the representations the Court made today, I would anticipate if a decision is made to proceed to the civil forfeiture that the United States would not come to Your Honor for the probable cause warrant, but to Magistrate Judge Jarvey, which --

THE COURT: I don't think he'll sign it. I think he'll refer them to me. So I don't think you need to worry about that.

All right. Anything further then today?

All right. Then we're adjourned.

(The hearing was recessed at 11:44 a.m. - and reconvened at 11:46 a.m.)

MS. GINSBERG: Your Honor, I apologize. There is another matter I would like the Court to rule on. That is the question of whether court-appointed fees can be authorized for expenses of this prosecution because the Government has caused to be initiated this Iowa tax lien. As I understand it, I don't purport to understand Iowa tax law, but I did speak with the revenue officer this morning, I

understand there is a tax lien in effect at this moment against all of Mr. Myers' assets.

THE COURT: I thought that you were being retained from -- with monies provided by relatives of Mr. Myers.

MS. GINSBERG: I was to a point, but I intended to look -- and my fees and expenses have been paid -- well, my expenses have been paid thus far, and I intended, based on the Supreme Court's direction to lawyers under Capital and Drysdale (phonetically), I think it's appropriate to look to return of the property which should be returned to pay the remainder of the fees, and I undertook this representation hoping that would be possible. If not, Mr. Myers is going to be responsible to me for my legal fees.

THE COURT: Let me see the lien notice that you're referring to.

What's the Government know about this lien business?

MR. MURPHY: Your Honor, the lien is a tax lien for tax stamp violation. It is a lien -- I believe that's actually the Department of Revenue, State of Iowa, that puts those on there, and we had a meeting with the revenue people last week, discussing cases in which they may have an interest, and this one came up and as a result of their approaching us about getting involved with us on cases in general, we said, "Here's one," and they said this is an

appropriate case they're interested in, and they proceeded with it.

THE COURT: How is the lien computed?

MR. MURPHY: It's based upon the number of plants.

THE COURT: How many plants did you tell them are involved?

MR. MURPHY: I didn't tell them.

MR. McLAUGHLIN: I believe we told them approximately 443, I believe.

THE COURT: What is it, a thousand, $500 a plant, or what?

MR. MURPHY: I think it's a thousand dollars -- $500 a plant, and then, as I understand it, there's a $500 penalty, so it's a thousand per plant.

MS. GINSBERG: The man told me this morning it's $5 a gram plus a hundred percent penalty.

MR. MURPHY: I think they figure it at a hundred grams per plant.

MS. GINSBERG: Your Honor, I would like to have those made part of the court file.

THE COURT: Would you mark them, please.

THE CLERK: Would you like them marked A, B and C?

MS. GINSBERG: A, B and C.

THE CLERK: The Distress Warrant has been marked Defendant's Exhibit A; the Notice of Tax Lien has been marked

Defendant's Exhibit B; and the Notice of Assessment for Drug Tax has been marked Defendant's Exhibit C.

THE COURT: Does the Government have any response to Miss Ginsberg's request?

MR. MURPHY: Well, other than to say that we resist for the grounds that we previously urged at the time of her involvement in this case. There's counsel that has represented Mr. Myers -- or Mr. Gene Myers from this district throughout the case. If he's indigent and knows we're going to pursue the avenues of the collection of assets, he's done so with his eyes open. We've been told a couple different things, one, that the money was going to be paid by relatives, then we were told that the money was going to partially come from the collection of any assets recovered in this case.

I think there's a conflict of interest if money is to be collected from assets in this case, but beyond that, I think it may violate 3006A if there's separate title -- Section 3006A, if there's a separate agreement for services and to be reimbursed privately in this case.

Of course, Miss Ginsberg is not a member of the court-appointed list. In effect, we are allowing the defendant to do -- in the first instance, picking and choosing his attorney in this matter. I don't think he should be entitled to do that.

MS. GINSBERG: Your Honor, if any of these assets are recovered, I would be more than happy to reimburse the court for any fees. What the Government has done is made -- Let me back it up. The United States Supreme Court said that attorney's fees are not forfeitable when -- lawyers get into these cases at their peril, basically, but the Supreme Court has now said it's not a conflict of interest to do this, you can forfeit lawyer's fees when lawyers get into the cases. If I decide, out of the goodness of my heart, that I'm willing to work for free for Mr. Myers, that's my decision. If he's able to pay me out of assets he can recover, that's something -- if it's a risk I undertake, I undertake it. His family has already sent me money, but they have no more money to send.

But the 18 U.S. Code Section 3006 specifically says if a defendant gets assets, then the Court should be informed, the judge can determine if the monies can be repaid. Not trying to pull a fast one on the Court. Mr. Myers thought he was indigent. He asked for court-appointed counsel. He got a jury verdict. He thought he had assets again. He hired a lawyer. His family helped him to the extent they could. Now he has no assets because the United States has instigated this tax lien. He's indigent again. I'm not asking for the Court to appoint me and pay me court-appointed legal fees. What I'm asking is that the

expenses of his case be paid under the Criminal Justice Act, and there is certainly ample precedence of courts awarding expenses even when a defendant has retained counsel if it is proven that he has no money after he retained his counsel, has no money to pay costs.

THE COURT: You're only asking for expenses?

MS. GINSBERG: I am only asking for expenses.

THE COURT: All right. I'll grant it. Most of the expenses have been paid already, I think.

MS. GINSBERG: I think they have. There is another transcript which I understand is finished which I thought I was going to have to pay for, and there are witness fees and things for the sentencing which will have to be paid.

THE COURT: Given the fact that it appears that there has now been a state tax lien imposed upon all Mr. Myers' assets, that will not free up any assets to pay for these expenses, that I will authorize and find that Mr. Myers is indigent for purposes of paying necessary expenses to prosecute or to handle the sentencing and, to the extent I have the authority, to prosecute the appeal, but will not authorize court appointment at this time of an attorney to represent Mr. Myers.

All right. So submit your vouchers in connection with any expenses.

MS. GINSBERG: Thank you, Your Honor.

THE COURT: Anything further?

All right. Then we're adjourned --

One other thing, for the record, I will accept the Exhibits A, B and C that have been tendered this morning as part of the request for appointment -- not appointment, but for reimbursement of expenses at Government expense.

MS. GINSBERG: Thank you, Your Honor.

(The hearing was concluded at 11:56 a.m.)

C E R T I F I C A T E

I, Daniel J. Shaw, hereby certify that I am the Official Court Reporter of the United States District Court, Northern District of Iowa; that I reported in shorthand the foregoing matter and reduced the same to typewritten form; that the foregoing pages are a true and complete transcript of my shorthand notes so taken.

Dated this 28th day of April, 1993.

DANIEL J. SHAW, C.S.R.

Ms. BROWN. Thank you very much. And thank you for your involvement. Your original testimony that you gave in September will be included in the record.

Ms. HOLLANDER. Thank you.

[The information follows:]

STATEMENT OF

E.E. EDWARDS, III, ESQUIRE

ON BEHALF OF THE

NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

REGARDING

THE FEDERAL ASSET FORFEITURE PROGRAM

SEPTEMBER 30, 1992

Résumé of E.E. Edwards III

Personal:
Born September 28, 1943 in Little Rock, Arkansas. Raised in McKenzie, Tennessee.

Education: J.D. Vanderbilt University, 1971; Award for outstanding senior writing, 1971. A.B. with honors, University of North Carolina, 1965; Morehead scholar 1961-65.

Legal Positions: Assistant District Attorney General, Nashville, 1971-73; partner, Moseley and Edwards, 1974-75; senior member, E. E. Ewards and Associates, 1976 to present .

Law Practice: Litigation oriented firm with heavy concentration in criminal defense; extensive trial practice in state and federal courts; substantial appellate practice before Tennessee appellate courts and U.S. Court of Appeal for Fifth and Sixth Circuits.

Bar Activities: Board of Directors, National Association of Criminal Defense Lawyers, 1979-present; ABA Criminal Justice Section, committee member 1977-78; Tennessee Association of Criminal Defense Lawyers, President 1976-77, founding board member, 1973-76; Tennessee Supreme Court's Commission on Rules of Criminal Procedure, 1976-present; Tennessee Bar Association, House of delegates 1975-77 Tennessee Trial Lawyers Association; Guest Lecturer, Vanderbilt Law School and various legal and clerks' associations.

Non-Legal Positions: Publisher, The Tennessee Report (weekly political newsletter), 1969-71; staff, U.S. Senator Albert Gore, Sr., 1968; legislative liaison, Tennessee Governor's staff, 1967; staff member, Executive Office of the President, 1965-66; staff announcer (summer employee), WHDM, McKenzie, Tennessee 1961-65.

Mr. Chairman, Members of the Subcommittee. On behalf of the National Association of Criminal Defense Lawyers (NACDL), thank you for inviting us to share our comments on asset seizure and forfeiture programs.

For several years now, the Department of Justice's [DOJ] asset forfeiture program and similar state and local programs, utilizing the wealth of new and expanded federal and state forfeiture statutes[1], have provided federal, state and local law enforcement agencies with a powerful weapon to fight the war on drugs. However, with the increased use of civil forfeiture statutes, the process has run amuck. Law enforcement agencies, in their zeal, have turned the "war on drugs" into a "war on the Constitution". NACDL has several concerns with this program as practiced and the resulting denigration of constitutional protections.

For purposes of this discussion, we will distinguish between criminal and civil forfeiture - and will focus on civil forfeiture. Criminal forfeitures are part of a criminal proceeding against a defendant. The verdict of forfeiture is rendered by the jury only after a guilty verdict on the criminal charge which is the predicate for the forfeiture. Defendants

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1. There are over one hundred federal civil forfeiture statutes, encompassing crimes from gambling, and narcotics violations to child pornography profits.

have most of the constitutional safeguards afforded persons eligible to lose their liberty , but problems remain [See attachment 1].

It is civil forfeiture ,however, which concerns us the most due to the lack of constitutional safeguards and the unfair procedural advantages afforded the government over ordinary citizens. Civil forfeitures are in rem proceedings. The government proceeds against property, and, by resort to a legal fiction, the property is held guilty and condemned . **Because the property itself is the defendant, the guilt or innocence of the property owner is irrelevant.** The "use" made of the property becomes the central issue. It is this legal fiction which allows many extremely harsh and unwarranted repercussions to flow from the use of civil forfeiture.

Civil forfeitures allow the government to impose economic sanctions on persons who are beyond the reach of the criminal law either because there is insufficient evidence to obtain a conviction against them, or because they are fugitives from justice, or because, while supplying the material means necessary for certain criminal activity, they have broken no laws themselves.

In deciding when to seize property -- power which is largely unbridled -- the police are influenced by provisions which often allow

them to profit from these seizures, by keeping all or part of the value of the seized assets. This obvious conflict of interest invites abusive practices. Although these forfeiture laws unquestionably serve legitimate law enforcement purposes, this is not to say that every application of every forfeiture statute is wise, just, or even constitutional. The forfeiture laws are used to forfeit property of persons who have no responsibility for its criminal misuse - as occurs with the forfeiture of currency due to cocaine "traces" found on it. This practice has funneled millions of dollars into police coffers, with most such seizures -- 80 to 90% -- never challenged. Authorities routinely seize large amounts of cash at airports and roadblocks without establishing any connection to drug dealing other than the money itself.

The policy of seizing large sums of cash simply because it is currency must be totally re-evaluated for comportment with constitutional protections. Studies have shown that 80-90% of the currency available today will test positive for some kind of drug; therefore, the practice of having drug dogs "alert" on the money is meaningless. The frequent practice of targeting minorities in airports and

along interstate routes for search and seizure [2] is based on racism - pure and simple - and is morally, not to mention legally, bankrupt.

Statistics on seizures document the use of racially based "profiles" to determine law enforcement targets. Volusia County, Florida Sheriff Bob Vogel's elite drug squad has seized over $8 million dollars in the past three years from motorists traveling I95. Out of 262 seizure cases, only 63 resulted in criminal charges. Of the 199 cases in which there was no evidence to support criminal charges, 90% of the drivers were minorities; though not arrested or charged with a crime, these individuals had their money seized. When confronted with this statistic, Sheriff Vogel said, "What this data tells me is that the majority of money being transported for drug activity involves blacks and Hispanics."[3] Similarly, a 10-month *Pittsburgh Press* investigation of drug law seizure and forfeiture included an examination of court records on 121 "drug courier" stops where money was seized and no drugs were discovered. The *Pittsburgh Press* found that black, Hispanic and Asian people accounted for

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2. See "Tainted Cash or Easy Money", *Orlando Sentinel*, June August, 1992" ; "Presumed Guilty - The Law's Victims in the War on Drugs", *The Pittsburgh Press*, August 11 16, 1991.

3. *Ibid.*

77% of the cases. [4]

The presumption of innocence is fundamental to the American criminal justice system. This basic tenent is compromised whenever assets are confiscated without any proof- and in many cases without even a charge - of criminal wrongdoing.[5] It is then up to the person whose assets have been seized to prove that he or she is innocent and that the government should not retain his or her property. This turns the justice system "on its head".

The *Orlando Sentinel* uncovered an appalling level of "extortion" being practiced by Volusia County Sheriff's Deputies. In the absence of **any** evidence of criminal complicity, and with the Sheriff's knowledge that the currency would have to be returned, the law enforcement agency offers "settlement" to avoid undue delay and unnecessary legal fees. Rather than go to court to defend seizures, the agency cuts deals with the drivers, innocent and drug dealers alike. Motorists can get **some** of their money back if they agree not to sue the agency. For example, Sheriff's

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4. *Ibid.*

5. The *Orlando Sentinel* investigation found that **no charges were filed in three out of every four cases** lodged by Volusia County Sheriff's Deputies. The *Pittsburgh Press* investigation found that **80% of the people who lost property to the federal government were never charged.**

Deputies seized $19,000 from a Massachusetts paint shop owner. They returned $14,250 and kept $4,750. They seized $38,923 from a Miami lawn-care business owner. They returned $28,923 and kept $10,000. They seized $31,000 from a Virginia car salesman. They returned $27,250 and kept $3,750. None of these people were charged with a crime. They were all offered out of court settlements with no judicial supervision of the process. Volusia County judges expressed surprise at these settlements. [6]

Some courts are beginning to look askance at civil forfeitures. For the first time, the Second Circuit has expressed serious doubts about the constitutionality and fairness of our civil forfeiture statutes.[7] "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." This is a significant decision. The court criticized the government's conduct in shutting down an ongoing business when there was no need for such drastic action. The court allowed an interlocutory appeal from the district court's decision.

A tide of abuse of innocent people is sweeping the nation, but

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6. *Orlando Sentinel* & *Pittsburgh Press.* Op Cit.

7. United States v. All Assets of Statewide Auto Parts. No. 92-6015 (2nd Cir. Aug. 3, 1992) See slip op. at 6120

recognition of forfeiture law abuse is now dawning on the public and in legislative halls. This hearing will go a long way toward alerting the public and Congress to the present reality. We thank you Chairman Conyers for convening this hearing today.

WHAT IS WRONG WITH THE FORFEITURE LAWS IN GENERAL

Federal forfeiture statutes are written to facilitate the denigration of constitutional protections afforded the citizenry. This occurs in several areas and several ways.

NOTICE OF SEIZURE & COST BOND

Many claimants are losing their right to contest the forfeiture of their property due to procedural defaults; in particular, the failure to meet the short time deadlines for filing a claim and cost bond with the seizing agency under 19 U.S.C. Sec. 1608 (20 days from the date of the first publication of the notice of seizure) and for filing a second verified claim -- this one in federal district court -- under Supplemental Admiralty Rule c(6) (10 days from the date on which the warrant of arrest

in rem is executed).

When the DEA or the FBI seizes property , a claimant is required to post a bond in the amount of 10% (up to a maximum of $5,000) of the value of the property to preserve the right to contest the forfeiture. The claimant has up to 30 days to post the bond after receipt of the notice of forfeiture. Frequently, the government seizes several items, and requires that a separate bond be posted for each item. Many people lose their property at this stage because they are unable to post the cost bond within the time limit.

Contesting a forfeiture case is an expensive proposition. Many forfeitures go uncontested due to the high cost of litigating these cases. For example, an owner can no longer economically hire counsel to defend against forfeiture of a $10,000 - $20,000 automobile if the government is intent on proceeding to trial. Legal fees in such a case would eat up the value of the seized property - in short order. Claimants in civil forfeiture cases are not entitled to counsel as a matter of right because the Sixth Amendment does not apply to civil forfeitures. Federal defenders and Criminal Justice Act lawyers are not currently authorized to represent claimants in civil forfeitures. Consequently, many people lose their property simply because they cannot afford to hire a lawyer.

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Procedures exist for claimants to proceed in forma pauperis (w/out paying the cost bond). However, the seizing agencies routinely omit from the package of notice and instructions the in forma pauperis form one must fill out to qualify. Most forfeiture notices briefly refer to this option without explanation. Consequently most claimants are unaware of this option.

Adding insult to injury, the cost bond is used to pay the government's costs of litigating the forfeiture. This is an absurdly unjust arrangement -- letting the government take property away from someone without having to prove anything, then making the owner pay in advance the government's costs of trying to take it away permanently. Furthermore, unlike criminal cases, the bond is imposed without any independent determination of probable cause. The cost bond should be abolished.

POST-SEIZURE PROBABLE CAUSE HEARINGS

The administrative forfeiture proceeding was designed to resolve uncontested forfeitures. Under this process, the post-seizure probable cause determination is waived. The property is forfeited without benefit of court intervention. The "cost bond" is the mechanism through which contested seizures proceed to judicial resolution.

However, as discussed above, the cost bond eliminates many claims which would otherwise be contested. We suggest that one way to partially ameliorate this concern would be to include in the statute a provision for a prompt post-seizure hearing at the claimant's demand. At this aministrative hearing, the government would be required to show the probable cause underlying the seizure.

Allowing the government to seize a home and, on the strength of an ex parte seizure warrant, summarily evict the owner before trial is unfair. Presently, in some locations, the government executes occupancy agreements with the owners which permit them to continue living in their residence until a final determination is made. Occupancy agreements, while less onerous than summary eviction, represent a less than satisfactory interim resolution. These agreements typically require the property owner to waive Fourth Amendment rights by consenting to random inspections of the property. Citizens should not be required to waive basic constitutional rights in order to avoid summary eviction from their homes.

We believe that the better approach is to codify the holding in the

Livonia Road case [8] which held that due process requires notice and an opportunity to be heard before the seizure of real property. This decision has been followed by every circuit that has decided the issue since Livonia Road. These decisions are well reasoned, and the requirement of pre-seizure notice and hearing should be incorporated into the statute in these situations. Similarly, the provision authorizing the warrantless seizure of property, absent exigent circumstances, should be eliminated.[9]

APPLICATION OF THE SUPPLEMENTARY RULES OF ADMIRALTY & CERTAIN MARITIME CLAIMS

There is no longer any justification for federal forfeitures to be governed by the Supplemental Rules for Admiralty. The application of these rules goes back 200 years, when most customs seizures occurred on the high seas. That is no longer the case, therefore the federal rules of civil procedures should apply. The application of the supplemental rules allows warrantless seizures where there are no recognized exceptions to

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8. Unites States v. Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989)

9. See '21 U.S.C. Section 881(b)(4)

the constitutionally mandated warrant requirement. Consequently, these rules are often ignored in order to comply with due process, but they nevertheless remain on the books.

UNFAIR PROCEDURAL ADVANTAGES FOR THE GOVERNMENT

Current statutory law gives the government many unfair procedural advantages over citizens. Many innocent people lose their property because they cannot afford to fight the government, or because the government wears them down with years of litigation, rather than because the government has a good case.

Burden of Proof/ Who Should Have It?

The single greatest problem with the current statutory framework is the burden of proof provision, 19 U.S.C. Section 1615. The statute places the burden of proof on the claimant to show that the property is not subject to forfeiture. This is fundamentally unfair and constitutionally anomalous in view of the quasi-criminal character of the proceedings and the important interests at stake. It is extremely difficult to prove a

negative. For example, when the government offers testimony that an unidentified informant claims to have participated in, or witnessed, a drug transaction at a claimant's residence, the claimiant bears the the burden of proof that it did not occur. This turns the criminal presumption of innocence until proven guilty on its ear. Seizing agencies typically seize anything and everything of 'value, leaving it to the claimant to establish that the seized items are not subject to forfeiture.

The government's threshold showing of probable cause is easily met with rank hearsay. While one might argue this untested evidence is sufficient to seize the property, it surely should not be sufficient to permanently deprive the owner of his or her ownership rights.

Burden of Proof/ What Should it Be?

Requiring the government only to make a mere showing of probable cause and then shifting the burden of proof to the property holder runs counter to the principles of a free society. This reversal of the normal burden of proof is unique to civil forfeitures. In all other cases the party trying to change the status quo has the burden of proof by "a preponderance of the evidence" or more. The government, with its

infinitely superior resources, should not have this additional advantage over its citizens. If the property owner is truly involved in criminal activity to an extent that would justify forfeiture of the property, the government should be able to prove the criminal culpability "beyond a reasonable doubt," or at a minimum, by "clear and convincing evidence".

The Florida Supreme Court has unanimously held that, under the Florida Constitution, the state must prove its civil forfeiture cases by "clear and convincing evidence".[10] Judge Weinstein of the Eastern District of New York has also ruled that in order to forfeit a home or apartment lease under Section 881(a)(7) the government should be required to prove its case by "clear and convincing evidence."[11] As a matter of constitutional due process, the reasoning of these decisions is very persuasive. However, the federal circuit courts have turned a deaf ear to such arguments without analyzing them. Thus, it appears that only Congress can alter 19 U.S.C. Sec. 1615, a statute enacted in 1789, when notions of due process were less well defined.

Case law makes it clear that probable cause is **not** tested at the

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[10]10. Dept. of Law Enforcement v. Real Property, Etc., 588 So. 2d 957 (Fla. 1991).

[11]. United States v. Leasehold Interest in 121 Nostrand Avenue, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991)

time of seizure. Ultimately the government must show that it had probable cause at the time the law suit commences.[12] We disagree with a different opinion expressed in dicta, which argues that evidence acquired after the suit is filed may be used to cure defects in probable cause existing when the suit is insituted. Such after acquired evidence should be **excluded** and cases lacking probable cause at filing should be barred.

Hearsay Evidence

Presently, the government's threshhold showing is easily met through hearsay testimony. As with all other civil proceedings, the Federal Rules of Evidence should prohibit the use of hearsay in forfeiture cases.[13] Congress could provide, statutorily, that forfeiture cases must adhere to the Federal Rules of Evidence and alleviate this problem with hearsay.

Lack of Statutory Time Limits On The Government

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12. United States v. Banco Cafetero Int.'l, 608 F. Supp. 1394, 1405 (S.D.N.Y.)

13. Federal Rules of Evidence #1101

Under the present forfeiture statutes, an innoncent property owner has no right to file suit in court for return of his property. Rather the statute provides that the government must file the forfeiture case. There are few statutory deadlines placed on the government to keep the process moving. As a result, forfeiture cases often bog down in the system. Unnecessary delay between the seizure of the property and the time when the claimant finally gets his or her day in court is a constant problem. During the delay, the asset often depreciates and the property owner is deprived of its use with no recourse. Even if the property owner wins, the statute does not provide for compensation for loss of use or depreciation.

Congress can deal with this problem by setting a statutory time limit for the government to file a forfeiture complaint. If the prosecutor fails to comply with the deadline, the forfeiture action should be barred. Congress has partially addressed this problem by enacting 21 U.S.C. 888. Under section 888(c) the government has 60 days to file a forfeiture complaint after a claim and cost bond have been filed with the seizing agency, unless the court extends the period for filing for good cause shown or by agreement of the parties. Presently, section 888 applies only

to vehicles seized for drug-related offenses. Its protections should be applied to all forfeiture statutes. [14]

Stay of Proceedings

21 U.S.C. Section 881(i) provides for a stay of proceedings upon motion of the government where there is a parallel criminal case. Congress should amend the statute to provide for a stay upon motion of either party. Frequently, a claimant is forced to choose between competing constitutional rights in order to either protect his right against self-incrimination or pursue his forfeiture claim.

INNOCENT THIRD PARTIES/ REMISSION

Many innocent people lose valuable property rights because of something someone else does which is beyond their control. Congress should enact better procedures for protecting innocent third parties, i.e. the defenses to forfeiture must be strengthened in favor of innocent third

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[14].There is a constitutional defense to forfeiture based on unnecessary governmental delay but the Supreme Court's test is so stringent that few claimants can prevail.

party claimants. Currently, in this area the system treats a criminal defendant better than an innocent third party. In criminal forfeitures brought under U.S.C. 853 and RICO statutes, the criminal defendant is entitled to many criminal procedure safeguards.[15] Innocent third parties in civil forfeiture proceedings should receive at least the same if not more rights. Instead they are required to bear the burden of proof and overcome government hearsay.

In his Annual Report of the Department of Justice Asset Forfeiture Program (1990), the Attorney General claims at p. 18:

> The Department of Justice routinely grants petitions for remission or mitigation of forfeiture, primarily to innocent lienholders and innocent family members. It is the Department's policy to liberally grant such petitions as a means of avoiding harsh results.

Although this statement sounds good, it simply is not accurate. Experienced defense attorneys rarely file such petitions because they are usually denied. Title 19 U.S. C. Section 1618, the statute governing

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15. However most circuits have ruled in favor of the Section 853 (d) rebuttable presumption at trial that any property of a person convicted of a Title 21 drug felony is subject to forfeiture under section 853 if the U.S. establishes its case by a **preponderance of the evidence.**

remission, has for two centuries provided for the grant of remission to petitioners who establish that they acted "without willful negligence." Historically, DOJ had granted remission based upon a showing that the petitioner was not negligent in the care and use of the property. On August 31, 1987, DOJ issued new regulations abandoning the statutory negligence standard and requiring petitioners to meet a more stringent standard of care. [16] In other words, to get relief via the remission process, a petitioner now must show that forfeiture of his property would violate due process. This policy is in conflict with the report of the Attorney General and cannot be reconciled with the negligence standard adopted by Congress in Section 1618.

DOJ does not make remission decisions public and typically does not even explain to the petitioner its reasons for denying a petition. Remission policies and procedures are intended to function as a check on unbridled prosecutorial discretion and to avoid unfair and unjust results. As implemented under current law, remission is totally left to the discretion of the DOJ, with virtually no review or appeal of their decisions.

This lack of oversight often results in harsh, unwarranted, and

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16. See 28 C.F.R. Section 9.5 (b)(5).

arbitrary forfeiture decisions. The examples cited in the *Orlando Sentinel* and *Pittsburgh Press* investigations exemplify the harm to innocent citizens that results from the abuse of unbridled government discretion. In another example, Assistant United States Attorney Leslie Ohta of Hartford, Connecticut has made a reputation pursuing forfeiture cases relentlessly. Her repeated use of questionable informants has been repeatedly criticized, but found sufficient to support many forfeitures, that were unfair to third parties.

However, a different standard was applied when Ms. Ohta's 18-year old son was arrested for selling drugs. The police allege that Miki Ohta used the family's Chevy Blazer to sell LSD and that he sold marijuana to an informant in his parents' house. Both the local police and DOJ officials declined to pursue forfeiture cases against Ms. Ohta, and Ms. Ohta herself questioned the credibility of the informant used.

In all likelihood, Ms. Ohta had no idea that her son was selling drugs. But she could have -- and others not so well connected to the DOJ would have -- lost her home and car. Ms. Ohta was much luckier than most - much luckier than those she prosecuted. DOJ transferred her out of the asset forfeiture unit - but she lost none of her property in the process.[17]

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17. CBS "Street Stories", July 9, 1992, 9-10 p.m.

There is currently a split in the federal circuits regarding the interpretation of 21 U.S.C. Section 881 (a)(7). That section provides in part:

> ... except that no property shall be forfeited under this paragraph to the extent of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The majority of federal circuits have held that an owner may avoid forfeiture by establishing either lack of knowledge or lack of consent. [18] However, a minority of circuits, including the Ninth Circuit, have held that in order to prevail, an owner must establish both lack of knowledge and lack of consent.[19] Although these decisions have been heavily criticized, they remain law in their respective circuits.

The requirement of establishing both lack of knowledge and lack of consent poses a particularly harsh problem for innocent spouses. The

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18. See, e.g., United States v. 6109 Grubb Road, 886 F. 2d 618, 625 (3d Cir. 1989); United States v. 141st Street Corp., 911 F. 2d 870, 878 (2nd Cir. 1990), cert. denied U.S. . 111 S. Ct. 1017, 112 L.Ed2d 1099 (1991); United States v. One Parcel of Real Estate at 1012 Germantown Road, 963 F.2d 1496 (IIth Cir. 1992)

19. See e.g., United States v. One Parcel of Land Known as Lot III-B, 902 F 2d 1443 (9th Cir. 1990)

innocent spouse may have knowledge that the other spouse is engaging in unlawful activity in the home, but does not consent to it, and is powerless to do anything to stop it. The Hobbson's choice is either to leave the family home or to report the activity to the police and risk arrest and prosecution of the spouse.

Accordingly, Congress should clarify the statute to provide a defense when the innocent owner can establish either lack of knowledge or lack of consent.

SUBSTANTIAL NEXUS

Federal forfeiture statutes do not require that there be a substantial nexus between the unlawful activity and the property seized. Although the legislative history certainly suggests such a requirement, the courts are split as to whether there need be such a substantial nexus and what it means. For example, the Seventh Circuit has held that no such requirement exists. [20] In that case, the court affirmed the forfeiture of a residence based on two telephone calls made from the informant to the

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20. United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, 906 F.2d 490 (7th Cir.1990)

homeowner at the residence during which calls the sale of cocaine was negotiated. No drugs were ever stored at the residence and no sales took place there. The informant, not the defendant, made the calls, nevertheless the home was forfeited.

Congress could not have intended such unfair results. Congress should modify the statute to require a court to find substantial connection between the unlawful activity and the property to be seized.

PROBLEMS WITH PROPORTIONALITY

The broad reach of the statutes allows forfeiture of expensive assets for trivial offenses. Sales of amounts as small as a gram of cocaine have led to the loss of homes. Similarly, growing a few marijuana plants in a small corner of a large parcel of land has led to the forfeiture of the entire parcel, even where the parcel consists of hundreds of acres. It is unfair to punish someone with an disproportionate forfeiture penalty when the wrong committed is trivial -- particularly if the trivial offense was committed by someone else.

Most circuits have held that the Eighth Amendment prohibition against cruel and unusual punishment has no application to civil

forfeitures. However,in a recent 8th Circuit case [21], the Court held that the Eighth Amendment does not apply to civil forfeiture but urged Congress to enact proportionality defenses. We wholeheartedly support this recommendation.

PROPERTY MAINTENANCE

The government is doing an inadequate job of maintaining seized property. Innocent owners have no recourse if their property is damaged or otherwise allowed to deteriorate in value while in the custody of the federal government.

The government often takes two years or more after seizure to bring a forefeiture case to trial. By the time the case is resolved, the asset has often depreciated to a fraction of its seized value.

When the government wins, the depreciated asset is auctioned off for a fraction of its seized value and innocent lienholders often lose part of their equity. If the owner wins the forfeiture case, it is a pyrrhic victory --and an absolute travesty to the citizen who has been forced to

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21. U.S. v. One Parcel of Property located at 508 Depot Street, 964 F2d 814 (8th Cir. 1992)

spend money and time fighting the forfeiture case. The government raises sovereign immunity as a defense to any claims for depreciation and property damage. Therefore, even when the government cannot prove its case, the owner still loses.

The United States should be liable for the loss of value and loss of use of any property it seizes if the claimant prevails, regardless of whether the government's care of the property was negligent. This should certainly be the case when a court later determines that the seizure was illegal. Yet, under current law, it is not clear whether a claimant has a right of action -- for losses occasioned by an illegal seizure of property.

CONFLICTS OF INTEREST

We can no longer ignore the conflicts of interest and policy problems which arise when law enforcement and prosecutorial agencies financially benefit from the forfeiture decisions they make. Decisions regarding whose property to seize, and how to deal fairly with citizens whose property they have seized is often determined by the profit to be realized from the seizures.

State and local law enforcement agencies frequently work with

federal agencies on forfeiture cases and share the proceeds of the forfeiture. This procedure thwarts state law, which may require forfeited assets to be desposited into the general treasury. It also allows states to take advantage of the more lenient federal statutes. The types of cases the state and local agencies choose to pursue are often influenced by the knowledge that the federal government will share the proceeds from the forfeited assets. . The federal government's participation in this preemption of state priorities should be questioned.

In short, the inherent conflict of interest and unbridled discretion the current forefeiture law sanctions invites abuse. The opportunities for abuse are legion: (1) local police may cut deals with federal agencies to target individuals whose assets can best benefit both agencies; (2) joint forefeitures allow local police and federal agencies to avoid state constitutional law; and, (3) law enforcement agencies and prosecutor's offices have come to rely on forefeitures as alternative revenue sources. Congress should investigate the conflict of interest created when prosecutors and police agencies set quotas for forefeited assets and use the money to create additional positions.

WHAT SHOULD BE DONE TO CHANGE THE LAW

In August of 1991, NACDL's Board of Directors adopted the following policy on forfeiture.

It is the policy of the National Association of Criminal Defense Lawyers that the seizure of a person's assets by the government should be treated in exactly the same way as the seizure of a person, and all the protection afforded by the Bill of Rights should apply.

Several basic safeguards should be incorporated in all forfeiture laws, both state and federal:

(l) The burden of proving that forfeiture law applies should always be on the government just as it is in criminal prosecutions. The degree of proof required should be proof beyond a reasonable doubt and hearsay should not be allowed in the government's case.

(2) In the absence of exigent circumstances, the government should be required to justify a seizure of property to a court before, not after, the seizure is made. The cost bond should be eliminated. Post-seizure probable cause determinations on demand should be instituted. Deadlines for compliance by owners with procedural requirements should be longer.

(3) Forfeiture laws should recognize that innocent people often incur huge expenses in defending their property. Forfeiture laws should include a provision for an "early exit," allowing a case to be dismissed when an innocent party shows that he or she has an ownership interest and the government has no proof that the person had involvement in criminal conduct.

Remission/mitigation decisions are reviewable by the courts in some very limited circumstances but we should broaden these categories of review. The government should be required to issue a detailed statement explaining why any request is denied.

(4) Forfeiture of real property should always require that there be a substantial nexus between the unlawful activity and the property seized.

(5) Forfeiture laws should always require a reasonable connection between the severity of the alleged offense and the value of the property to be forfeited. Disproportionality defenses should be

included in the statutes. [22]

(6) Courts rely upon the in rem fiction to deny constitutional safeguards to people brought before them in forfeiture actions. Congress should simply decide what constitutional protections apply in forfeiture actions, such as the right to a jury trial etc., and statutorily mandate these protections.

We should acknowledge that forfeiture is a quasi-criminal action. Most people do not realize that, under current laws, a citizen can be found not guilty -- never be charged with a crime --and have his or her property nevertheless taken.

(7) The United States government should be liable for loss of use and deterioration of an asset in cases wherein the claimant (s) prevail.

The ultimate responsibility to justify a program which raises so

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22. Congress included a disproportionality defense in the obscenity forfeiture statute, 18 U.S.C. 1467. Its protections should be added to all other forfeiture statutes.

many constitutional and policy questions must rest with the Department of Justice. Two questions seem inordinantly appropriate:

What proportion of your forfeitures are of the assets of large drug empires and what proportion comes from the "Willie Jones's" of the world?

Has this resulted in a decrease in the flow of drugs and/or a decrease in the number of persons engaging in the illegal trafficking of drugs?

The constitutional price our citizens pay is too high to justify the continuation of current

The changes we recommend will allow the Department of Justice and law enforcement agencies to continue to employ forfeiture as a strategy against crime without abrogating the constitutional rights of American citizens.

NACDL thanks the Committee for giving us the opportunity to participate in this hearing.

JACOBOVITZ, ENGLISH & SMITH

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July 31, 1992

Ms. Kathleen Clark
Senate Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Sent via facsimile and by mail

Dear Kathleen:

At your request, I've put together a list of problematic issues relating to federal criminal forfeitures with cross-references to the pertinent portions of my book, Prosecution and Defense of Forfeiture Cases. I couldn't resist making some personal comments on the issues. I trust this will be helpful to the Committee. I've tried to keep this as short as possible.

After you've read up on these issues, please feel free to call me again.

1. Difficult issues of statutory construction are posed by the inscrutable language of 18 U.S. C. §1963(a)(1) and (a)(2). See ¶13.02 [1][c]. Now that these issues have surfaced and been debated in the case law it is time for Congress to think about clarifying the statutory language.

2. I believe that the liberal construction clauses have no place in a criminal statute. See ¶13.02[3].

3. Congress needs to clarify whether the pre-trial restraint of substitute assets is authorized. See p. 13-37 to 38.

4. It is not clear what interests in a criminal enterprise are forfeitable. See ¶13.03[1] and [2].

5. "Enterprise" forfeitures remain controversial because they can be grossly disproportionate to the seriousness of the

criminal activity and because they are the equivalent of a nuclear weapon in the hands of the prosecutor. The Organized Crime and Racketeering Section has exercised great restraint in using this weapon. See ¶¶13.03[3] and 13.05. I understand that the Money Laundering Section has recently decided to require its approval before using 18 U.S.C.§§981-2 to try to forfeit whole enterprises on the theory that they facilitated money laundering activity. It's about time they started to reign in the use of the money laundering statute, which is as easily abused as RICO.

6. RICO forfeitures based on obscenity predicates are controversial for fairly obvious reasons. See ¶13.03[5]. The Supreme Court just granted cert. to review the awful decision in Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991). The Court will decide whether the sweeping forfeiture in that case runs afoul of the First or Eighth Amendments. Because there is now a criminal forfeiture statute specifically dealing with obscenity cases(18 U.S.C. §1467), which has a unique proportionality provision, I believe that there is now no need or justification for making obscenity offenses RICO predicates--if there ever was.

7. Forfeiture of attorney fees remains problematic. Fortunately, DOJ has shown admirable restraint here. How long will that continue? The Young Turks in the field want to be a lot more aggressive than DOJ has permitted. See ¶13.04[1]. The defense bar would dearly like to see some form of statutory protection against fee forfeiture efforts.

8. We will continue to see a lot of litigation over the limitations imposed by the Eighth Amendment. See ¶13.05. It will be interesting to see how the Supreme Court resolves Alexander v. Thornburgh. The courts haven't given any real meaning to the Excessive Fines Clause yet. I hope the Supreme Court views it as a real limitation on disproportionately severe fines and forfeitures, including civil forfeitures.

9. Is forfeiture a kind of criminal charge that must be alleged in the indictment as Rule 7(c)(2) provides or is it merely an additional penalty that need not be alleged in the indictment? The case law is now thoroughly confused on this important point. See ¶14.01.

10. The aggressive use of restraining orders and other means of freezing assets subject to forfeiture has generated a lot of controversy, particularly where third party interests are affected. The case that generated the most controversy was United States v. Regan, 858 F.2d 115 (2d Cir. 1988) (the Princeton/Newport case). See ¶14.02, p. 14-22.3 to 22.9. The recent freeze order obtained by the OTS against Kaye, Scholer has drawn attention to this problem again. OTS's powers to freeze assets go further than what prosecutors can do under RICO and §853. They don't even need a court order!

11. I think I explained my problem with the §853(d) rebuttable

presumption over the phone. The easy solutions: delete the provision altogether or require the government to establish the factual predicates triggering the presumption beyond a reasonable doubt (instead of by a preponderance of the evidence). See ¶14.03.

12. A defendant should have a statutory right to a bifurcated trial if he requests one. The circuits are divided on whether bifurcation must be granted and under what circumstances. See ¶14.04[1].

13. A defendant should clearly be able to obtain a court order staying disposition of the forfeited property pending appeal in appropriate circumstances. However, 21 U.S.C. §853(e)(1) and 18 U.S.C. §1963(f) say that a defendant may not apply for a stay; only a third party can. Rule 38(e) Fed.R.Crim.P. has no such limitation. Most courts are ignoring §853(e), and rightly so because a defendant should obviously have the right to seek a stay. Otherwise, he effectively has no right to appeal from a forfeiture judgment and even if his conviction is reversed he loses his property! See [illegible] concerned about [illegible] this.

14. Many significant constitutional and statutory questions remain about the adversary hearing procedure and the scope of third party interests protected by the [illegible] Congress can usefully clarify [illegible] You might want to speak with [illegible] since he's been ably [illegible]

15. There is sometimes a conflict between the government's interest in forfeiting [illegible] obtaining restitution. [illegible] DOJ policy to protect the victim's interest is not done in practice. DOJ needs some guidelines on this at a minimum. See ¶15.03.

Cordially,

David B. Smith

David B. Smith

DBS/ag
cc: Adam Gelb
Senate Committee on Labor and Human Relations

11 No. 21
9-22-92
Stephen Wood
21
Through Wood Cross X

black. How would that compare to your experience of people stopped in the -- that you and your colleagues stopped in the Nashville Airport?

A. Are you wanting a percentage?

Q. Yes. I suppose so. Whatever insight you can give me.

A. (Pause.) I'd say -- I'd say maybe 50 to 60 percent.

Q. Okay. Would be black or just minorities in general?

A. I'd say probably minorities in general.

Q. Black, Hispanic, would that cover it?

A. No, sir. We've also interviewed Asian, orientals.

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Q. So, 50 to 60 percent of the people that the Interdiction Unit in general, not just you, specifically, but the Unit in general questions would be minorities?

A. I would say so.

Q. Would the vast majority of those be black?

MR. RODEN: Object to the term, vast majority.

Q. Three-quarters of them, 90 percent of them, what would you guess or estimate?

A. I'd say, probably, 80 to 85 percent.

MR. RODEN: Eighty or 85 percent of the 60 percent -- 50 to 60 percent.

MR. WOOD: Right.

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II-18

Sanford A. Angelos, Forensic Chemist
David W. Parmalee, Supervisory Chemist

Report on Trace Analysis of U.S. Currency

BENJAMIN A. PERILLO, LABORATORY CHIEF
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Background

Within the past year numerous requests have been made, by both DEA and authorities outside of the agency, for assistance in the analysis of U.S. currency. The requests range from providing information to actual requests for analysis of samples. As a result, several FBI and DEA cases have been developed using the information obtained by extraction and identification of cocaine from U.S. currency. A recent High Times article cited that shredded U.S. currency from a Federal Reserve Bank was found to have traces of cocaine (1). Additionally, a Tampa newspaper article reports the finding of traces of cocaine on ten of eleven $20 bills tested (2). Finally, an expert witness for the defense, has testified that he found traces of cocaine in samples from seven major Miami banks (3). A project (C-0033) was initiated to determine the extent of cocaine contamination on U.S. currency supplied by the Federal Reserve Banks.

Experimental

The following procedure was used with all samples analyzed (4):

1. Samples were soaked with 100ml of chloroform for @ 2 minutes.
2. Recovery of 95 to 100ml of chloroform.
3. Reduction of volume to 10ml.
4. Back extraction with 0.1 normal sulphuric acid.
5. Retained aqueous phase made basic with ammonium hydroxide.
6. Extraction with 10ml of chloroform.

7. Evaporation of solvent to dryness.

8. Residue dissolved in 0.5ml methanol.

Blanks

The project was done in five separate phases and in each phase a glassware/solvent blank was taken. Although two of the blanks had a gray-green tint, they were all negative.

Instrumentation

A Finnigan 4500 gas chromatograph-mass spectrometer with a Incos data system was used to detect the presence of cocaine. The instrument was capable of detection of 100 nanograms of cocaine. The parameter are as follows: column 3% OV-101 6 foot; electron impact; 70 electron volts; at 230°C.

Phases I-V

The first phase was the analysis of six samples of shredded $50 dollar bills provided by the Chicago Federal Reserve Bank. These samples were randomly selected by bank personnel while processing the bills submitted by several banks from the Chicago area. See Table 1.

The second phase was the analysis of five samples of shredded $100 dollar bills provided by the Chicago Federal Reserve Bank. These samples were randomly selected by bank personnel while processing the bills. Both phase one and two samples were submitted by the same area banks. See Table 2.

The third phase was the analysis of five samples of shredded $50 dollar bills. Like those in phase one they were randomly selected from the processing of a batch of money from area banks. This is a different submission than phase one. See Table 3.

The fourth phase was the analysis of five samples of shredded $100 dollar bills. As were the samples of phase three, these randomly selected samples were submitted by area banks at the same time as those in phase three. See Table 4.

The final phase was the analysis of five belts from the high speed apparatus used to sort unfit money from that eligible to be released for general circulation. The belts were analyzed as one sample.

Results

Of the twenty-one shredded money samples submitted for analysis, seven were found to have traces of cocaine. One-third of a randomly selected sample is a significant argument that the general currency in circulation is contaminated with traces of cocaine. The amount of the cocaine detected ranged from 2.4 to 12.3 nanograms per bill.

The result of the analysis of the belts from the high speed sorting apparatus is positive for cocaine with an estimated 200 nanograms being detected. This result, is more significant than the finding of one third of the samples to be contaminated. The apparatus is used to count and sort fit from unfit U.S. currency prior to its circulation by the Federal Reserve Bank.

Conclusion

The results, from the samples received from the Chicago Federal Reserve Bank, confirms the presence of traces of cocaine on general circulation U.S. currency. Moreover, the results indicate that the Federal Reserve Bank itself may be contaminating the currency through the normal procedures used by the bank. The belts must be initially contaminated by the currency, then inturn the belts will contaminate "clean" currency. These results indicate the termination of the project as all aspects show that the forensic usefulness of trace analysis is at best limited.

Recommendation

1. The project be terminated.
2. That trace analysis of currency for general enforcement or seizure be stopped.
3. That trace analysis of currency be done only for limited special intelligence purposes.
4. That DEA discourage the use of trace analysis of currency by presenting and publishing the results in the scientific literature.
5. That seized, forfeited or abandoned monies that are possibly contaminated with any controlled substance be flagged for subsequent shredding by the Federal Reserve Bank.

SANFORD A. ANGELOS
Forensic Chemist
North Central Laboratory

References

1. High Times, No. 108, August 1984, p. 19.

2. The Tampa Tribune, Friday, February 22, 1985, p. 6B.

3. Narcotics Control Digest, Vol. 15, No. 3, February 6, 1985, p. 9.

4. Sorgen, G.J. and Heagy, J.A., Microgram, Vol. XI, No. 8, pp. 132-133.

Table 1 - Phase I - $50 Bills from Chicago Federal Reserve Bank

Sample #	Number of Bills (1)	Result	Cocaine/Bill (2)
1	3	Negative	0
2	9	Negative	0
3	10	Negative	0
4	13	Negative	0
5	10	Negative	0
6	10	Negative	0

1. Approximated by weight of shredded money.

2. Estimated from reconstructed ion chromatography in nanograms

Ms. BROWN. Mr. Edwards, you were the attorney for Willie Jones. Are there any comments that you would like to make pertaining to the drug profile or anything about the case that you want to share?

Mr. EDWARDS. Well, I think there are many lessons, valuable lessons, to be learned from the Willie Jones case.

I can attempt to point out a few. For example, the U.S. district judge who heard the case, Judge Thomas Wiseman, I think, upheld the finest traditions of the Federal judiciary. Last summer he wrote approximately a 30-page opinion simply deciding the threshold question of whether Willie Jones could get his day in court.

I was very interested in Mr. Copeland's comments about the financial resources utilized by the government in fighting over this $9,000 of a very modest Nashville landscaper.

The first battle was over whether the U.S. court has jurisdiction to waive the bond requirements so that Willie Jones could be heard before a Federal court. They spent enormous resources fighting that fight. And last summer, Judge Wiseman held that the DEA has acted arbitrarily and capriciously in refusing to waive the bond. So that was just round one.

Then he heard the proof. And that trial occurred last fall, I believe very shortly after Mr. Jones appeared in this hearing room. In April, Judge Wiseman released a 63-page opinion. And reading this opinion, you can see that the court was very sorely troubled by many aspects of the Willie Jones case.

I can point out two or three. I believe that the Jones case is the first time where a Federal court has specifically found that officers involved in a so-called interdiction unit, in this case at the Nashville airport—but there are interdiction units all over the country—the first time that a Federal court has specifically found that they were targeting people for interdiction on the basis of race or ethnic origin. And Judge Wiseman found that on the basis of the proof in the Willie Jones case.

I think the lesson—or the conclusion to be drawn from that is not that it happened to Willie Jones but that it is happening all over the country. It is happening in Volusia County. And I am cocounsel in that case. And the facts, as found by the Orlando Sentinal in that case, are shameful. They shouldn't happen in the United States. But let me just give you an idea of some of the proof that I was able to pull together for the Jones trial.

A drug interdiction unit officer in the Memphis airport has given testimony in another case that 75 percent of the people they stopped, according to his estimate, were black—were African-Americans. In a case arising out of a stop and seizure in the Cincinnati airport, an interdiction officer there testified that, in his estimate, half of the people they stopped were minorities.

In Jones' case, a member of the interdiction unit testified that 50 to 60 percent of the people, in his estimate, that they stopped in the Nashville airport were minorities, and probably 85 percent of those were black. As a result of that testimony, and some of the other testimony that we presented, Judge Wiseman ordered the government to provide us the log book that began to be kept by the interdiction unit in Nashville after we filed the case on behalf of Willie Jones.

Previously, they had kept no records whatsoever of who they chose to stop and interview unless they actually seized property. Of course you can't tell race from looking at a log book. That has nothing but a person's name. But we found that 15.2 percent of the people stopped during the time that the log book was kept were either Hispanic or Asian surnames.

Well, if 15 percent in the Nashville airport—there are not that many Hispanics in the Nashville airport—if 15 percent are Hispanic or Asian, I would suggest that the officer's estimate of 50 to 60 percent being minorities was a substantial understatement. What can be—the conclusion that can be drawn is that this is a nationwide problem. There are many, many injustices reaped under the forfeiture laws. But one of the worst, I would submit, is its impact on minority citizens because they are targeted from one coast to the other. And it is something that sorely deserves the attention of Congress.

Another matter that was made quite clear in Judge Wiseman's opinion in the Jones case is that the government—specifically the DEA—but it trickled down so it is not just the DEA; it's local law enforcement agencies in every State—for years, at least since 1986, the government has knowingly perpetrated a sham.

In 1985, 1986, a chemist with the DEA's north central laboratory, which I believe is in Chicago, although I am not sure of that, I suppose on his own initiative, did a scientific experiment. He got samples of money from Federal Reserve banks in the Chicago area and tested them. And he also tested the belts on the money—the high speed money sorting machines that the Federal Reserve uses in every Federal Reserve bank in the country.

He found that approximately a third of his money samples were tainted from anywhere from two to five nanograms of cocaine. A nanogram is a billionth of a gram. But a drug dog can detect as little as one or two nanograms of cocaine on a dollar bill or a 20 dollar bill. But more telling, he found something like 200 nanograms, on average, on the belts that the Federal Reserve bank uses.

And the conclusion he drew was that the Federal Reserve's own processes in dealing with the American money supply have contaminated our money supply. His recommendation was that the DEA stop using trace analysis, whether it be chemical or by dog sniff, in drawing conclusions about samples of money, and that his report be publicized, be distributed.

Well, I suggest that it was distributed straight to the old circular file. The government is still using a dog sniff on a—on a stash of money that is found in somebody, on somebody's person, or in a briefcase, or in the trunk of a car—to establish that probable cause that Mr. Copeland spoke of. It is a sham. It is a farce.

The government knows that the money supply is contaminated so that you can't rely upon a dog sniff on a bundle of money. And Judge Wiseman found that specifically and was rather critical of the fact that the government continues to do this.

And I could read from page 54 of his opinion, but I believe the committee has a copy of his opinion; and I commend it to you.

One of the things that Judge Wiseman said, I think, is really telling. It accurately describes what happens probably in a majority

of the currency seizures that happen on interstate highways, in airports, and bus stations all over the country not just by Federal officers but by local officers as well.

And here is what he said, "This case," referring to the Willie Jones case, "is best described in the Second Circuit's own language: It is a forfeiture proceeding started in bad faith, with wild allegations, based on the hope that something would turn up to justify the suit."

That is what happens when a law enforcement officer who is charged with looking for property involved in drugs finds property. There is, very frequently, untold pressure upon him to get property, to make a quota, or to see how much he can seize. If he finds money or if he finds valuable property, he will seize it because he has the authority to seize it.

The government entrusts him to use his judgment, as he deems fit, in making the decision whether to seize property or not; so he will seize it because it is there. Because there is a lot of money there or there is an expensive car there, he will seize the property; and then they will worry about investigating to see if they can come up with reasons to justify it.

And why can they do it? Can any American citizen do that? No. It is theft. It is piracy. But the government can do it. Law enforcement officers, especially drug law enforcement officers can do it because the law permits them and that, in a very basic way, is what is wrong with forfeiture.

Ms. BROWN. Thank you very much.

Mr. McCandless.

Mr. MCCANDLESS. Thank you, Madam Chairman.

I just have a couple of short questions regarding procedures that are in place relative to the paying of the costs of a bond to contest a seizure of property. You state that a petition to waive the cost bond can be ruled adversely by the seizing agency.

How often do seizing agencies make adverse determinations? Do you have any idea?

Ms. HOLLANDER. I don't have any idea. The important thing to note is that it goes back to the seizing agency to decide whether the person has to pay the cost bond.

Very rarely is someone who is indigent litigating that situation. So we don't know how often it happens, but I would suspect that it doesn't happen very often because most people don't know how to even file the procedures to try to waive the cost bond.

Mr. MCCANDLESS. In your written statement you talked about the fact that the government can seize a home on the strength of an ex parte seizure warrant and summarily evict the owner before trial.

Share with us what an ex parte seizure warrant is and on what basis it can be obtained.

Ms. HOLLANDER. It can be obtained on the basis of probable cause. And ex parte means, simply, that it is just one side that goes to the judge. The government goes to the judge, gets a seizure warrant. The homeowner doesn't know about this ahead of time and has no right to contest it before the seizure is made.

One of the recommendations we have made is that there be hearings before the seizure. This way when there is a seizure, the

homeowner and the homeowner's lawyer, if there is one, don't know about it. That is what ex parte means.

The government goes in by itself to the court, on the basis of probable cause alone, gets this warrant, goes out, seizes the home, and can evict the owner. And then the litigation begins to determine that the home was not in some way related to some illegality. That happens innumerable times around this country.

Mr. MCCANDLESS. I would like your reaction to the assertion that defense attorneys—and this is getting close to you here—have an obvious personal interest in fighting for the claimant's right to be able to pay his attorney fees in cash forfeited.

Ms. HOLLANDER. People have a right to attorneys under the sixth amendment. And for Mr. Copeland to say, as he did here, that attorneys have some kind of a conflict of interest is really nothing short of outrageous. Attorneys don't have a conflict of interest.

When money is seized by the government that should not have been seized, that money may or may not go to pay for attorneys fees. But you end up in a situation where someone becomes indigent who could have paid for an attorney out of legitimate money that the attorney had a right to have; and, instead, the government is going to end up having to pay for that attorney.

In fact, in the case in Iowa where the government has refused to release those assets which the jury awarded back to the owner—this involves some very expensive farm implements—the owner intended to sell those farm implements, which the jury found that the government did not even meet a preponderance of the evidence standard to seize—he intended to sell those to hire counsel to assist him in his appeal. However, because the government will not release them, the judge had to appoint counsel under the Criminal Justice Act to represent the owner in his continuing battle to get back from the government that which the jury said was his. And that is the kind of situation we have.

Attorneys are never in a conflict of interest, otherwise they would be in a conflict of interest in every single case that we ever have. It is an outrageous statement to say that attorneys are fighting only for their own fees. Attorneys are fighting these cases and assisting people in these cases because, although there is no provision for appointed counsel, there are some people who fortunately can afford counsel; and there are lawyers who are doing more and more of these cases, frankly, pro bono, without fee, just to try to show that these laws need some change.

Mr. MCCANDLESS. Thank you.

Mr. Edwards, I was interested in your comments about the contamination of money and how that skews what I had understood your comments to mean, the dog or any other way of determining through the smell process.

Has anyone made a study? When we talk about the measurements that you were alluding to, one billionth of a gram, did I understand correctly?

Mr. EDWARDS. You understood correctly, yes, sir.

Mr. MCCANDLESS. Is that a level that a normally trained dog could pick up?

Mr. EDWARDS. Yes. It is my understanding from talking to dog trainers that a well-trained drug dog can detect one or two

nanograms of cocaine adhering to a fabric or to paper such as a dollar bill.

Ms. HOLLANDER. If I could add something?

There is one study where a very small amount of marijuana, just a few pounds, was put in the middle of a football field, and the dogs could smell it in the air at the end of the football field.

So they are able to smell marijuana and marijuana residue—I can tell you that I have testimony in a case pending in Illinois which is a very similar kind of case where the officer testified that if someone was in a room where someone else was smoking marijuana, and the individual who was not smoking then got in a car and began driving, his dog would alert to that vehicle.

Mr. MCCANDLESS. Mr. Edwards—and it is not a matter of disbelief—but if we took what you have just told me, that all the money is contaminated, then the dog would be sniffing my pocket, too, wouldn't he?

Mr. EDWARDS. Absolutely.

Mr. MCCANDLESS. And your pocket and everybody else's pocket?

Mr. EDWARDS. Yes, sir.

Mr. MCCANDLESS. Are the dogs trained not to sniff everybody's pocket?

Mr. EDWARDS. I am sorry?

Mr. MCCANDLESS. Well, if you have got 10 people coming out of an airport with their baggage or something like that, is the dog going to pick out any one person?

Mr. EDWARDS. No. The dog's trainer——

Mr. MCCANDLESS. If all the money is contaminated from this room or this exit from an airplane or something in everybody's pockets, doesn't this kind of confuse the dog?

Mr. EDWARDS. No. The dog's trainer indicates the area to the dog, the area he wants the dog to inspect.

For example, if I took the money out of my pocket and put it right here, and Ms. Hollander put the money out of her purse right there, and you put the money out of your pocket on the table up there, the trainer would take the dog to the various areas, and then I would suggest, the dog would alert on all three areas.

In doing the Orlando Sentinel series concerning what was happening in Volusia County, the reporters went to several prominent people—a judge, a prosecutor, a prominent pastor—and asked them to swap some money. They would give them a $20 bill and say would you swap my $20 for one out of your pocket. And then they had dogs scrutinize those moneys, and a majority of the—in a majority of the cases the dog alerted on the money that they got and—Sheriff Vogel wouldn't give them any money. But a local chief of police did, and the dog alerted on his money.

So what is happening, Congressman, is typically when a law enforcement officer stops a car—and this is not just Volusia County, this is nationwide—or stops someone at an airport or a bus station and finds currency, they will call out a drug dog and see if the drug dog alerts on the currency.

And, typically, the drug dog does alert on the currency. Then they take the position that they then have probable cause to believe that the currency is forfeitable because it has been used in drug activity. And they use that to establish probable cause and

have used it for years even though the DEA's own report indicates that it is not reliable evidence.

But it is used. A drug dog drug sniff, exclusively, in many instances is used to establish so-called probable cause so the government takes the property and then—which triggers, for one thing, putting the burden on the property owner. And it triggers the property owner having to incur expenses in trying to get the property back if they can afford it. I mean, it is used—it is a rascal.

Mr. MCCANDLESS. What you have just told me, if I point the dog in any direction where there is money in the United States, the dog will react positively.

Mr. EDWARDS. If the money has been circulated, and it is not just brand new money, there is a very high probability that the dog will alert on it.

Mr. MCCANDLESS. How high a probability?

Mr. EDWARDS. Well, the various tests have been run, many of which are cited by Judge Wiseman in his opinion, in some cases as high as 90 percent. In the DEA's own test, it was one-third of the samples that tested positive for cocaine.

Would you agree, Nancy?

Ms. HOLLANDER. Most of the studies say somewhere between 70 and 90 percent will test positive around the country.

Mr. MCCANDLESS. Which merely comes to mind—I am being theoretical here now, you understand, that a small town in Kansas would be less likely to have the level on the money than you would in, say, New York, Los Angeles, or some other area where the money is continually circulated within that region and it picks up an additional amount.

Mr. EDWARDS. That is certainly possible.

Mr. MCCANDLESS. But they didn't address the regions of the United States, then?

Ms. HOLLANDER. Well, they really didn't. But most of the studies have been done in Florida and California.

However, they found that the money was getting contaminated when it came off the Federal Reserve belts, that the belts kept recontaminating the money. I don't know that they have done studies around the country in all the little areas. But all of the studies that have been done—there have been several now—have said anywhere between 70 and 90 percent.

Mr. EDWARDS. Congressman, let me add one thing to that. In all the forfeiture cases of which I am aware that involve seizures of currency, if the currency was forfeited to the government, guess where it went? Right back in the money system, money supply. It was redeposited.

Mr. MCCANDLESS. Well, the life expectancy of a dollar is 14 months, then it has to be reprinted and destroyed.

Thank you.

Mr. EDWARDS. Yes, sir.

Ms. BROWN. I have a question—a couple of quick questions before we end the panel.

One, the Justice Department indicated that the amount of time property is held pending return is no different than for a criminal case. How do you see this issue?

Ms. HOLLANDER. Well, I beg to differ with that. The government is under no obligation to even set time limits in most property. And I know personally of many cases where property is held for many, many months, sometimes years and certainly many, many months before the government even initiates forfeitures.

Now, it is simply not true that the property is held only as long as it would take to initiate a criminal case. And it is interesting that the government draws those comparisons since, on the one hand, it says that forfeiture is not a criminal sanction and then it continuously draws comparisons between the criminal cases and the seized property.

And we have got to remember here we are talking about people's homes and vehicles and money that they can't survive without in many cases. But I think it is simply incorrect.

Ms. BROWN. Do you think that the Asset Forfeiture Program adversely impacts law enforcement priorities in State and local government?

Ms. HOLLANDER. Absolutely, because all around the country there are little pockets of police districts that have been set up as they have been in Volusia County.

I uncovered one in Illinois called Operation Valkyrie where officers are getting paid out of seized assets. They set up these projects to stop primarily racial and ethnic minorities, looking for anything that they can find to forfeit.

And you have got places—for instance, I found a town of 7,000 in Illinois where the police chief is flying an airplane. This is a town that never had a drug bust to speak of until they got these assets, and now they have five officers, 24 hours a day, on the interstate highway stopping everyone going north bound who has a dark complexion.

So it has changed priorities around the country and in very severely harmful ways to the constitution.

Ms. BROWN. Thank you. The committee may have additional written questions that they want to submit to you.

A last question for Mr. Marshall. What will it mean if the social services agency was able to participate with some of these funds that come into, let's say, Rhode Island as you discussed earlier?

Mr. MARSHALL. What would we do with the money are you saying?

Ms. BROWN. Yes. How would it impact children?

Mr. MARSHALL. How would it impact children? Right now, basically, it is not just in Rhode Island. The alternative programs for youth, OK, that deal with crime prevention that followed in the Juvenile Justice Delinquency Prevention Act are basically in the Runaway Homeless Youth Act. OK. That has about $36 million, OK, compared to other initiatives. So these services are very slim at the best.

I think that we would look at impacting services that do outreach to the families, work with the whole family. In my mind, the best prevention program is a healthy family. OK. And categorical funding that doesn't focus on the family and focuses on the individuals, in my mind, is wasted money. It is wasted money. So I would require outreach to the families and require linkages to treatment resources.

Ms. BROWN. I want to personally thank you all for coming forward. Working with you, we are going to try to put some fairness back into this system. I think this is the American way, and thank you very much for coming.

Ms. HOLLANDER. Thank you.

Mr. EDWARDS. Thank you for having us.

Ms. BROWN. The subcommittee stands adjourned.

[Whereupon, at 2:05 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Sheriff

Robert L. Vogel, Jr. • Sheriff Volusia Coun
Post Office Box 569 • DeLand, Florida 32721-05

TO: Subcommittee on Legislation and National Security
Committee on Government Operations
U.S. House of Representatives
FROM: Sheriff Robert L. Vogel, Jr.
DATE: July 22, 1993
SUBJECT: Overview of the Volusia County Sheriff's Office
Drug and Currency Interdiction Program

Thank you for the opportunity to discuss important aspects of the Volusia County Sheriff's Office drug and currency interdiction program on Interstate 95 in east-central Florida.

I will begin by stating facts that shape our program: Volusia County deputy sheriffs do not stop motorists on the basis of a racial or ethnic profile. They do, however, stop motorists based on their observation of moving traffic and equipment violations, as defined in Florida statutes. Every effort is made to stop anyone who is observed committing a moving traffic violation, regardless of race, ethnic origin or any characteristics of drivers or occupants. Deputies are trained to detect suspicious activity after the valid traffic stop and to conduct follow up investigations when circumstances so dictate. These law enforcement techniques are designed to reveal criminal activity and have been found lawful by the Florida and U.S. Supreme Courts in cases which I personally investigated as a Florida Highway Patrol trooper.

The Volusia County Sheriff's Office employs 348 sworn law enforcement officers. The Special Enforcement Team consists of five deputies whose duties are to enforce the laws of the state in any area of our county that demands special attention. They receive no additional compensation or special benefits for this high risk assignment. Since February 1989, the team has investigated in excess of 350 cases, ranging from arrests for drug trafficking and other

Daytona 254-4689 • DeLand 736-5995 • Deltona 736-5995 • New Smyrna 423-3300 x2115 • Fax 904-736-5

violent felonies to arrests for DUI. Under the Florida Contraband Forfeiture Act, close to $8 million, in excess of 168 pounds of cocaine, 134 pounds of cannabis, 100 quaaludes and 247 hits of LSD have been confiscated. It is important to note that during these four years, only two citizens have filed formal complaints with the Volusia County Sheriff's Office about their treatment by Special Enforcement Team deputies. Each of the two complaints was not sustained after a thorough and extensive investigation by members of the Internal Affairs Unit.

Gov. Lawton Chiles in mid-1992 appointed a task force to review the Florida Contraband Forfeiture Act and how it was being applied by law enforcement agencies across the state. The task force was created in response to media accusations concerning abuses of the civil forfeiture laws, including allegations of race-motivated profile stops. During the months of the review, we eagerly and openly responded to all requests and questions about our program from the task force. The nine member panel completed its detailed review earlier this year without finding one single example of wrongdoing by Volusia County deputies on Interstate-95.

Today you are confronting the same issues and allegations that were so thoroughly examined by the Florida governor's review committee.

During 1992 and 1993, a Central Florida newspaper published a long-running series of articles, editorials and cartoons about our drug and currency interdiction program. We vehemently dispute their statistics and the accuracy of their stories. The fact that money was confiscated from a larger percentage of minorities on the interstate is a social and economic issue unrelated to the forfeiture law. Federal asset seizure programs reflect similar percentages.

Asset forfeiture is a powerful weapon for law enforcement. Its primary objective is to take the profit out of crime and thereby deter criminal activity. There is no question that society benefits from this tool in many ways, including law enforcement's use of the assets that are seized.

The Florida Contraband Forfeiture Act was modeled after the Federal law, but contains more due process safeguards, including strict guidelines as to

how the assets may be utilized. Specifically, a law enforcement agency cannot expend any confiscated monies without the approval of the local governing authority. This provides the necessary check and balance in the system and the requisite due process.

Civil forfeiture laws do not require an arrest or conviction when there is seizure of contraband. This is a point of concern for many lay people. Another concern appears to be the settlement of forfeiture cases wherein percentages of seized monies are returned. A forfeiture action is an in rem proceeding governed by the civil rules of procedure. According to the Office of the State Courts Administrator in Tallahassee, less than 1 percent of all civil cases filed in the State of Florida result in jury trial. This means that more than 99 percent of these cases are settled by agreement of the parties. The settlement of a civil forfeiture action is, therefore, the most often used method of resolving these cases, not only in Volusia County but across the state as well.

Since Volusia County's drug and currency interdiction program was introduced in February 1989, each case has been filed in Circuit Court and each settlement has received full judicial review. It is important to note that the settlement of cases in no way undermines the validity of the initial traffic stop or the probable cause for seizure of the money.

It is my understanding that you have heard comments from Selena Washington, who filed a lawsuit against the Volusia County Sheriff's Office that was served at noon today. Unfortunately, due to the pending litigation I am unable to discuss the facts of this specific case. However, I anxiously await the opportunity to present the "rest of the story" in a court of law, which is the proper forum for this issue.

In conclusion, thank you for the opportunity to provide you with a brief overview of a program of which we are very proud. We continue to wage the war on crime on Interstate 95, which has been judicially declared a drug pipeline. We will continue to do so with professionalism and with deep respect for the Constitution and the rights of all citizens.

ATTACHMENT B

- Copy personal money order from Diles to Washington, April 20, 1990, $500

- NFCU withdrawal from R. Diles to S. Washington, April 6, 1990, $1,200

- Undated, unnotarized statement from R. Diles stating he loaned S. Washington $6,800 for repair to house to be paid back with insurance money

- Total receipts from Diles: $5,650

- Statement from S. Washington's father dated July 15, 1990, stating he loaned $6,000 to her for repairs to home due to hurricane to be paid back with insurance money

- Copy of cashier's check from Claudette Gadsden to S. Washington, $2,000

- Notarized statement from Claudette Gadsden dated May 13, 1990, stating she loaned aunt (S. Washington) $4,000 ($2,000 cashiers check and $2,000 cash) until insurance claim settled

- Letter from attorney stating that S. Washington applied for Disaster Relief Fund (no documentation provided). States damages in the amount of $44,000. States roof so severely damaged, it needed repair as quickly as possible. Stated loans from Gadsden and Diles $12,800.

- Letter from attorney stated money in bank wrappers (deputy said in bands for easy counting)

- Letter from attorney regarding S. Washington's trip - she was on her way to Miami with a roofer she contracted with to repair roof (never mentioned before)

WTSC signed by Judge Johnson finding probable cause to seize money.

Investigator's Notes:

- Investigators went to S. Washington's house in September 1990.

Appeared to have been unoccupied for a year.

Damage to house not as severe as others in neighborhood.

Appeared to be rental property. Neighbor said they'd been working on it for a year.

S. Washington not compensated by Federal agency (Disaster Relief)

B

SELENA WASHINGTON/JOHN WASHINGTON - SEIZURE - April 24, 1990 - $19,990

Newspaper Account:

- Money was for repairs to her Charleston home damaged by Hurricane Hugo. Building materials in coastal South Carolina skyrocketed. She was going to Miami to hunt bargains.

- She had no criminal history, provided cancelled checks and sworn affidavits to show where money came from.

- Said she owns several pieces of real estate.

- Backseat tape: Driver said to passenger, "You ain't got nothing stupid in there, have you?" Said she was to buy plywood and marble in Miami and ship it back.

- Told deputies to call her father, who works for state highway, call her son, a probation judge.

- Said she was a realtor instructor.

File Account:

- Selena Washington had prior conviction in 1982 for illegally transporting liquor.

- She was stopped for speeding (72 MPH). Said she was going to Florida to John's house (passenger). John said he lived in Miami. Going to Florida to visit his relatives.

- She said she was a real estate broker going to Florida for three days, but gave no reason for trip other than so John could be with his people.

- $12,000 of money found in Crown Royal bag, in flash rolls; $7,000 found in second Crown Royal bag in Selena's purse.

- After money found, said going to Miami to buy building material because of Hurricane Hugo. Initially said money was insurance pay-off, then said she got it from her father.

Documents Provided:

- Federal Savings & Loan disbursement receipt dated December 1, 1989, no name indicated - $1,182.49.

- Copies of cashiers check from Robert Diles to Selena Washington from November 22, 1989 through March 22, 1990, total: $3,950.

MILWAUKEE
B

TOTAL CASES	-	249
CURRENCY CASES	-	196
DRUG CASES	-	64
CASES WITH ARRESTS	-	107
CASES WITH CURRENCY AND DRUGS OR CURRENCY ONLY	-	213
ARRESTS IN THESE CASES	-	71 (33.33%)

RACE COMPARISON

1. CASES WHICH INVOLVED ASSET SEIZURES:

26% WHITE
74% BLACK

2. ALL CASES MADE BY SET:

27% WHITE
73% BLACK

TOTAL CASES	249	49% HAD PRIOR FELONY OR NARCOTIC ARRESTS
PRIOR FELONIES	122	36% HAD SUBSEQUENT FELONY OR NARCOTIC ARREST
POST FELONIES	89	85% OF ALL CASES HAD PRIOR OR SUBSEQUENT FELONY OR NARCOTIC ARRESTS
PRIOR AND POST NARCOTICS	174	70% HAD PRIOR OR SUBSEQUENT NARCOTIC ARRESTS
		**********
CURRENCY CASES	196	45% HAD PRIOR FELONY OR DRUG ARRESTS
PRIOR FELONIES	89	34% HAD SUBSEQUENT FELONY OR DRUG ARRESTS
POST FELONIES	67	79% OF ALL CURRENCY CASES HAD PRIOR OR SUBSEQUENT FELONY OR DRUG ARRESTS
PRIOR AND POST NARCOTICS	126	64% HAD PRIOR OR SUBSEQUENT DRUG ARRESTS
TOTAL CASES	249	
CASES WITH ARRESTS	107	43% OF ALL CASES INVOLVED ARRESTS OF ONE OR MORE INDIVIDUALS

ONE HUNDRED THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143

June 29, 1993

The Honorable Janet Reno
Attorney General
Department of Justica
Washington, D.C.

Dear Madam Attorney General:

I am writing to request that the Department of Justice initiate an investigation into alleged discriminatory practices of the Volusia County Sheriff's Office in the State of Florida, and elsewhere.

Specifically, the Subcommittee on Legislation and National Security has heard testimony alleging that the Sheriff's Office is stopping motorists on Interstate 95 on the basis of race in order to search their vehicles and seize cash under the Florida Contraband Forfeiture Act. On June 18 the NAACP filed a civil rights lawsuit in Federal court in Orlando, Florida against Sheriff Vogel, alleging that the Volusia County Sheriff's Office has used a race-based drug courier profile since 1989 that targets African American and Hispanic motorists travelling along Interstate 95.

Clearly, such practices are forbidden by statutory and constitutional law: the Fourteenth Amendment and the Civil Rights Act both forbid unequal treatment of African-Americans and other minority motorists by state law enforcement officers. This is an extremely serious matter, which requires an immediate Federal investigation.

Unfortunately, this incident is not an isolated one. The Subcommittee is familiar with several extensive investigative series by reputable journalists in the last few years that have documented what appears to be a race-based drug courier profile that is in use across the United States.[1] According to the Pittsburgh Press, 77 percent of the people stopped in airports whose cash is then seized have been African-American, Hispanic and Asian. Unfortunately, it has not been possible to determine the accuracy of these reports because the Department of Justice does not keep statistics on the people stopped. The

[1] Pittsburgh Press (August 1991); Orlando Sentinel (June 1992); and Houston Chronicle (May 1992).

situation in Volusia County demonstrates the necessity of a much broader investigation of the use of race-based drug courier profiles.

As you may know, on June 22, 1993, the Subcommittee held a second oversight hearing on abuses in the implementation of Federal and state asset forfeiture laws. At that hearing, we received testimony about the seizure practices in Volusia County, where the Sheriff's "Selective Enforcement Team" has seized $8 million since 1989. Sheriff Robert Vogel submitted materials which confirm that over 70 percent of his Office's asset seizures involved black motorists.

In addition, Ms. Selena Washington, an African-American woman, testified that on the night of April 25, 1990 Volusia County Sheriff's Deputies stopped her on Interstate 95 and seized $19,000 in currency that she had in her possession. According to Ms. Washington's testimony, the deputies informed her that she was traveling at 72 mph in a 65 mile per hour zone, and detained her until she agreed to a search of her car. No traffic citation was issued, and Ms. Washington was not charged with any crime. The Deputies did not ask for identification and refused to attempt to verify Ms. Washington's explanation that the money was an insurance payment for damage inflicted to her Charleston, South Carolina residence during Hurricane Hugo. Ms. Washington insisted on following the Deputies back to the Sheriff's Office, where the currency was counted and she was given a receipt. After retaining counsel, Ms. Washington was repaid $15,000 in settlement. Ms. Washington is a named plaintiff in the class action lawsuit that has been filed by the NAACP.

The NAACP has now provided the Subcommittee with the enclosed June 24, 1993, affidavit of former Deputy Sheriff Donald G. McCormick. In that affidavit, Mr. McCormick describes the race-based practices of the Office and at least one incident in which Sheriff Vogel personally witnessed an apparently pretextual stop of a black motorist. As McCormick states "members of the SET [Selective Enforcement Team] routinely target dark-complexioned motorists for interdiction stops on I-95." McCormick also states that when riding with the SET team, police officer Randy Spitler asked the Volusia County Deputy Sheriff: "What are we looking for?" the Deputy Sheriff responded: "Just let me know when a nigger passes by."

I know you will share my deep concern over these apparently race-based practices by the Volusia County Sheriff's Office. It is critical that the Department of Justice get to the bottom of

this situation immediately. If these allegations are substantiated, I urge prompt and vigorous prosecution of those involved.

Thank you for your prompt attention to this critical matter. I look forward to working with you, and to hearing from the staff in the Civil Rights Division and in the Federal Bureau of Investigation to whom the matter has been assigned.

Sincerely,

John Conyers, Jr.
Chairman
Legislation and National Security
Subcommittee

enc.

Office of the Attorney General
Washington, D. C. 20530

July 15, 1993

The Honorable John Conyers, Jr.
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

This is in response to your recent letter concerning the allegedly racially discriminatory practices of the Volusia County Sheriff's Department Selective Enforcement Team in effecting asset forfeiture stops along Interstate 95 in Florida.

The Federal Bureau of Investigation has been requested to conduct an investigation into this matter. You can be assured that if the evidence shows that there was a prosecutable violation of federal criminal civil rights statutes, appropriate action will be taken.

Thank you for bringing this matter to my attention.

Sincerely,

Janet Reno

PRESUMED GUILTY

THE LAW'S VICTIMS IN THE WAR ON DRUGS

BY ANDREW SCHNEIDER AND MARY PAT FLAHERTY

REPRINTED FROM
The Pittsburgh Press
AUGUST 11-16,1991

PRESUMED GUILTY

THE LAW'S VICTIMS IN THE WAR ON DRUGS

It's a strange twist of justice in the land of freedom. A law designed to give cops the right to confiscate and keep the luxurious possessions of major drug dealers mostly ensnares the modest homes, cars and cash of ordinary, law-abiding people. They step off a plane or answer their front door and suddenly lose everything they've worked for. They are not arrested or tried for any crime. But there is punishment, and it's severe.

This six-day series chronicles a frightening turn in the war on drugs. Ten months of research across the country reveals that seizure and forfeiture, the legal weapons meant to eradicate the enemy, have done enormous collateral damage to the innocent. The reporters reviewed 25,000 seizures made by the Drug Enforcement Administration. They interviewed 1,600 prosecutors, defense lawyers, cops, federal agents and victims. They examined court documents from 510 cases. What they found defines a new standard of justice in America: You are presumed guilty.

A Pittsburgh Press reprint

PRESUMED GUILTY

Government seizures victimize innocent

y Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

Part One: The overview

February 27, 1991.

Willie Jones, a second-generation nursery man in his family's Nashville business, bundles up money from last year's profits and heads off to buy flowering [illegible] makes this trip [illegible] cash, which the small growers prefer.

But this time, as he waits at the American Airlines gate in Nashville Metro Airport, he's flanked by two police officers who escort him into a small office, search him and seize the $9,600 he's carrying. A ticket agent had alerted the officers that a large black man had paid for his ticket in bills, unusual these days. Because of the cash, and the fact that he fit a "profile" of what drug dealers supposedly look like, they believed he was buying or selling drugs.

He's free to go, he's told. But they keep his money — his livelihood — and give him a receipt in its place.

No evidence of wrongdoing was ever produced. No charges were ever filed. As far as anyone knows, Willie Jones neither uses drugs nor buys or sells them. He is a gardening contractor who bought an airplane ticket. Who lost his hard-earned money to the cops. And can't get it back.

That same day, an ocean away in Hawaii, federal drug agents arrive at the Maui home of retirees Joseph and Frances Lopes and claim it for the U.S. government.

For 49 years, Lopes worked on a sugar plantation, living in its camp housing before buying a modest home for himself, his wife, and their adult, mentally disturbed son, Thomas.

For a while, Thomas grew marijuana in the back yard — and threatened to kill himself every time his parents tried to cut it down. In 1987, the police caught Thomas, then 28. He pleaded guilty, got probation for his first offense and was ordered to see a psychologist once a week. He has, and never again has grown dope or been arrested. The family thought the episode was behind them.

But earlier this year, a detective scouring old arrest records for forfeiture opportunities realized the Lopes house could be taken away because they had admitted they knew about the marijuana.

The police department stands to make a bundle. If the house is sold, the police get the proceeds.

Jones and the Lopes family are among the thousands of Americans each year victimized by the federal seizure law — a law meant to curb drugs by causing financial hardship to dealers.

A 10-month study by The Pittsburgh Press shows the law has run amok. In their zeal to curb drugs and sometimes to fill their coffers with the proceeds of what they take, local cops, federal agents and the courts have curbed innocent Americans' civil rights. From Maine to Hawaii, people who are never charged with a crime have had cars, boats, money and homes taken away.

In fact, 80 percent of the people who lost property to the federal government were never charged. And most of the seized items weren't the luxurious playthings of drug barons, but modest homes and simple cars and hard-earned savings of ordinary people.

But those goods generated $2 billion for the police departments that took them.

The owners' only crime in many of these cases: They "looked" like drug dealers. They were black, Hispanic or flashily dressed.

Others, like the Lopeses, have been connected to a crime by circumstances beyond their control.

Says Eric Sterling, who helped write the law a decade ago as a lawyer on a congressional committee:

"The innocent-until-proven guilty concept is gone out the window."

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Greg Lanier/The Pittsburgh Press

Airport drug teams seize cash from travelers suspected of being couriers

The law: Guilt doesn't matter

Rooted in English common law, forfeiture has surfaced just twice in the United States since Colonial times.

In 1862, Congress permitted the president to seize estates of Confederate soldiers. Then, in 1970, it resurrected forfeiture for the civil war on drugs with the passage of racketeering laws that targeted the assets of convicted criminals.

In 1984, however, the nature of the law was radically changed to allow the government to take possessions without first charging, let alone convicting, the owner. That was done in an effort to make it easier to strike at the heart of the major drug dealers. Cops knew that drug dealers consider prison time an inevitable cost of doing business. It rarely deters them. Profits and playthings, though, are their passions. Losing them hurts.

And there was a bonus in the law. The proceeds would flow back to law enforcement to finance more investigations. It was to be the ultimate poetic justice, with criminals financing their own undoing.

But eliminating the necessity of charging or proving a crime has moved most of the action to civil court, where the government accuses the item — not the owner — of being tainted by crime.

This oddity has court dockets looking like purchase orders: United States of America vs. 9.6 acres of land and lake; U.S. vs. 667 bottles of wine. But it's more than just a labeling change. Because money and property are at stake instead of life and liberty, the constitutional safeguards in criminal proceedings do not apply.

The result is that "jury trials can be refused; illegal searches condoned; rules of evidence ignored," says Louisville, Ky., defense lawyer Donald Heavrin. The "frenzied quest for cash," he says, is "destroying the judicial system."

Every crime package passed since 1984 has expanded the uses of forfeiture, and now there are more than 100 [illegible] in place [illegible] anymore, forfeiture covers the likes of money laundering, fraud, gambling, importing tainted meats and carrying intoxicants onto Indian land.

The White House, Justice Department and Drug Enforcement Administration say they've made the most of the expanded law in getting the big-time criminals, and they boast of seizing mansions, planes and millions in cash. But The Pittsburgh Press in just 10 months was able to document 510 current cases that involved innocent people — or those possessing a very small amount of drugs — who lost their possessions.

And DEA's own database contradicts the official line. It showed that big-ticket items — valued at more than $50,000 — were only 17 percent of the total 25,297 items seized by DEA during the 18 months that ended last December.

"If you want to use that 'war on drugs' analogy, then forfeiture is like giving the troops permission to loot," says Thomas Lorenzi, president-elect of the Louisiana Association of Criminal Defense Lawyers.

The near-obsession with forfeiture continues without any proof that it curbs drug crime — its original target.

"The reality is, it's very difficult to tell what the impact of drug seizure and forfeiture is," says Stanley Morris, deputy director of the federal drug czar's office.

Police forces [illegible] the fruits

The "loot that's coming back" to police forces all over the nation has redefined law-enforcement success. It now has a dollar sign in front of it.

For nearly 18 months, undercover Arizona state troopers worked as drug couriers driving nearly 13 tons of marijuana from the Mexican border to stash houses around Tucson. They hoped to catch the Mexican suppliers and distributors on the American side before the dope got on the streets.

But they overestimated their ability to control the distribution. Almost every ounce was sold the minute they dropped it at the houses.

Even though the troopers were responsible for tons of drugs getting loose in Tucson, the man who supervised the set-up still believes it was worthwhile. It was "a success from a cost-benefit standpoint," says former assistant attorney general John Davis.

PRESUMED GUILTY

reasoning: It netted 20 arrests and least $3 million for the state forfeiture fund.

"That kind of thinking is what frightens me," says Steve Sherick, a Tucson attorney. "The government's thirst for dollars is overcoming any long-range view of what it is supposed to be doing, which is fighting crime."

George Terwilliger III, associate deputy attorney general in charge of the U.S. Justice Department's program, emphasizes that forfeiture does fight crime, and "we're not at all apologetic about the fact that we do benefit (financially) from it."

In fact, Terwilliger wrote about how the forfeiture program financially benefits police departments in the 1991 Police Buyer's Guide of Police Chief Magazine.

Between 1986 and 1990, the U.S. Justice Department generated $1.5 billion from forfeiture and estimates that it will take in $500 million this year, five times the amount it collected in 1986.

District attorney's offices throughout Pennsylvania handled $4.5 million in forfeitures last year; Allegheny County, $218,000; and the city of Pittsburgh, $191,000 — up from $9,000 four years ago.

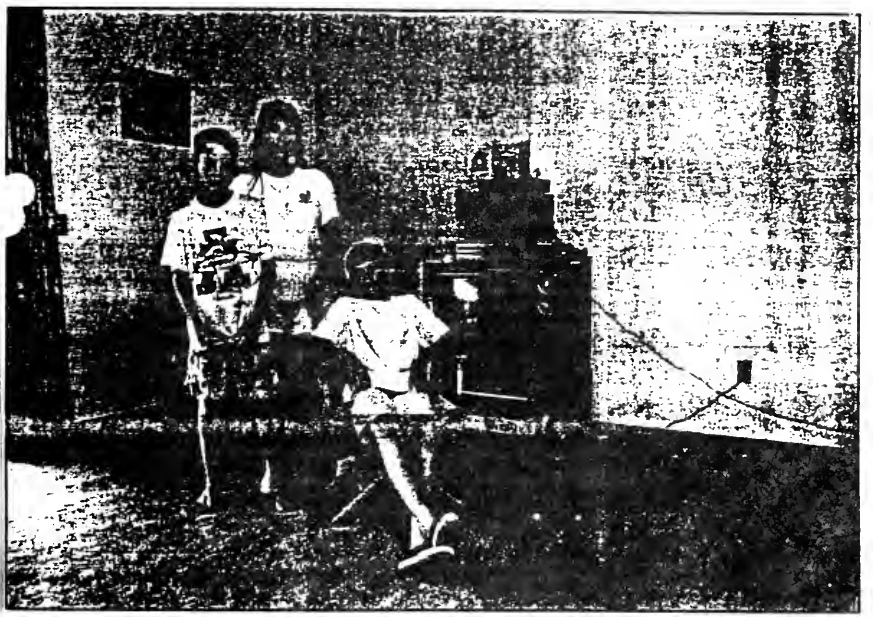
Forfeiture pads the smallest towns' coffers. In Lenexa, Kan., a Kansas City suburb of 29,000, "we've got about $250,000 moving in court right now," says narcotics Detective Don Crohn.

Despite the huge amounts flowing to police departments, there are few public accounting procedures. Police who get a cut of the federal forfeiture funds must sign a form saying merely they will use it for "law enforcement purposes."

To Philadelphia police that meant new air conditioning. In Warren County, N.J., it meant use of a forfeited yellow Corvette for the chief assistant prosecutor.

'Looking' like a criminal

Ethel Hylton of New York City has yet to regain her financial independence after losing $39,110 in a search



Cynthia Glocker for The Pittsburgh Press

Judy Mulford, 31, and her 13-year-old twins, Chris, left, and Jason, are down to essentials in their Lake Park, Fla., home, ...ich the government took in 1989 after ...laiming her husband, Joseph, stored cocaine there. Neither parent has been criminally charged, but in April a forfeiture jury said Mrs. Mulford must forfeit the house she bought herself with an insurance settlement. The Mulfords have divorced, and she has sold most of her belongings to cover legal bills. She's asked for a new trial and lives in the near-empty house pending a decision.

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arly three years ago in Hobby Airport in Houston.

Shortly after she arrived from New York, a Houston officer and Drug Enforcement Administration agent stopped the 46-year-old woman in the baggage area and told her she was under arrest because a drug dog had scratched at her luggage. The dog wasn't with them, and when Miss Hylton asked to see it, the officers refused to bring it out.

The agents searched her bags, and ordered a strip search of Miss Hylton but found no contraband.

In her purse, they found the cash Miss Hylton carried because she planned to buy a house to escape the New York winters which exacerbated her diabetes. It was the settlement from an insurance claim and her life's savings, gathered through more than 20 years of work as a hotel housekeeper and hospital night janitor.

The police seized all but $10 of the cash and sent Miss Hylton on her way, keeping the money because of its alleged drug connection. But they never charged her with a crime.

The Pittsburgh Press verified her jobs, reviewed her bank statements nd substantiated her claim she had 8,000 from an insurance settlement. It also found no criminal record for her in New York City.

With the mix of outrage and resignation voiced by other victims of searches, she says: "The money they took was mine. I'm allowed to have it, I earned it."

Miss Hylton became a U.S. citizen six years ago. She asks, "Why did they stop me? Is it because I'm black or because I'm Jamaican?"

Probably both — although Houston police, haven't said so.

Drug [illegible] observed in dozens of airports, train stations and bus terminals and along major highways repeatedly said they didn't stop travelers based on race. But a Pittsburgh Press examination of 121 travelers' cases in which police found no dope, made no arrest, but seized money anyway, showed that 77 percent of the people stopped were black, Hispanic or Asian.

In April 1989, deputies from Jefferson Davis Parish, Louisiana, seized $23,000 from Johnny Sotello, a Mexican-American whose truck overheated on a highway.

They offered help, he accepted. They asked to search his truck, he agreed. They asked if he was carrying cash. He said he was because he was scouting heavy equipment auctions.

They then pulled a door panel from the truck, said the space behind it could have hidden drugs, and seized the money and the truck, court records show. Police did not arrest Sotello but told him he would have to go to court to recover his property.

Sotello sent auctioneers' receipts to police which showed that he was a licensed buyer. The sheriff offered to settle the case, and with his legal bills mounting after two years, Sotello accepted. In a deal cut last March, he got his truck but only half his money. The cops kept $11,500.

"I was more afraid of the banks than anything — that's one reason I carry cash," says Sotello. "But a lot of places won't take checks, only cash or cashier's checks for the exact amount. I never heard of anybody saying you couldn't carry cash."

Affidavits show the same deputy who stopped Sotello routinely stopped the cars of black and Hispanic drivers, exacting "donations" from some.

After another of the deputy's stops, two black men from Atlanta handed over $1,000 for a "drug fund" after being detained for hours, according to a handwritten receipt reviewed by The Pittsburgh Press.

The driver got a ticket for "following to (sic) close." Back home, they got a lawyer.

Their attorney, in a letter to the sheriff's department, said deputies had made the men "fear for their safety, and in direct exploitation of that fear a purported donation of $1,000 was extracted ... "

If they "were kind enough to give the money to the sheriff's office," the letter said, "then you can be kind enough to give it back." If they gave [illegible] we will invoke litigation."

Six days later, the sheriff's department mailed the men a $1,000 check.

Last year, the 72 deputies of Jefferson Davis Parish led the state in forfeitures, gathering $1 million — more than their colleagues in New Orleans, a city 17 times larger than the parish.

Like most states, Louisiana returns the money to law enforcement agencies, but it has one of the more unusual distributions: 60 percent goes to the police bringing a case, 20 percent to the district attorney's office prosecuting it and 20 percent to the court fund of the judge signing the forfeiture order.

"The highway stops aren't much different from a smash-and-grab ring," says Lorenzi, of the Louisiana Defense Lawyers Association.

Paying for your innocence

The Justice Department's Terwilliger says that in some cases "dumb judgment" may occasionally create problems, but he believes there is an adequate solution. "That's why we have courts."

But the notion that courts are a safeguard for citizens wrongly accused "is way off," says Thomas Kerner, a forfeiture lawyer in Boston. "Compared to forfeiture, David and Goliath was a fair fight."

Starting from the moment the government serves notice that it intends to take an item, until any court challenge is completed, "the government gets all the breaks," says Kerner.

The government need only show probable cause for a seizure, a standard no greater than what is needed to get a search warrant. The lower standard means that the government can take a home without any more evidence than it normally needs to take a look inside.

Clients who challenge the government, says attorney Edward Hinson of Charlotte, N.C., "have the choice of fighting the full resources of the U.S. Treasury or caving in."

Barry Kolin caved in.

Kolin watched Portland, Ore., police padlock the doors of Harvey's, his bar and restaurant, for bookmaking on March 2.

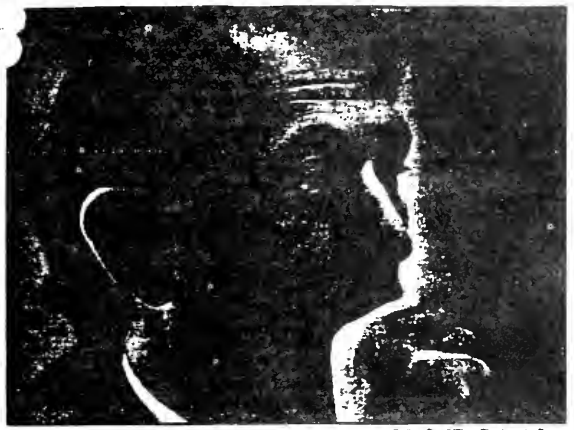
Earlier that day, eight police officers and Amy Holmes Hehn, the Multnomah County deputy district attorney, had swept into the bar, shooed out waitresses and customers and arrested Mike Kolin, Barry's brother [illegible]

Nothing in the police documents mentioned Barry Kolin, and so the 40-year-old was stunned when authorities took his business, saying they believe he knew about the betting. He denied it.

Hehn concedes she did not have the evidence to press a criminal case against Barry Kolin, "so we seized the business civilly."

During a recess in a hearing on the seizure weeks later, "the deputy DA says if I paid them $30,000 I could open up again," Kolin recalls. When the deal dropped to $10,000, Kolin took it.

Kolin's lawyer, Jenny Cooke, calls the seizure "extortion." She says: "There is no difference between what the police did to Barry Kolin or what Al Capone did in Chicago when he walked in and said, 'This is a nice little bar and it's mine.' The only difference is today they call this civil forfeiture."



Callie Shell/The Pittsburgh Press

George Terwilliger, who helps set Justice Department's forfeiture policy, calls the law "effective."

Minor crimes, major penalties

Forfeiture's tremendous clout helps make it "one of the most effective tools that we have," says Terwilliger.

The clout, though, puts property owners at risk of losing more under forfeiture than they would in a criminal case in the same circumstances.

Criminal charges in federal and many state courts carry maximum sentences. But there's no dollar cap on forfeiture, leaving citizens open to punishment that far exceeds the crime.

Robert Brewer of Irwin, Idaho, is dying of prostate cancer, and uses marijuana to ease the pain and nausea that comes with radiation treatments.

Last Oct. 10, a dozen deputies and Idaho tax agents walked into the Brewers' living room with guns drawn and said they had a warrant to search.

The Brewers, Robert, 61, and Bonita, 44, both retired from the postal service, moved from Kansas City, Mo., to the tranquil, wooded valley of Irwin in 1989. Six months later, he was diagnosed.

According to police reports, an informant told authorities Brewer ran a major marijuana operation.

The drug SWAT team found eight plants in the basement under a grow light and a half-pound of marijuana. The Brewers were charged with two felony narcotics counts and two charges for failing to buy state tax stamps for the dope.

"I didn't like the idea of the marijuana, but it was the only thing that controlled his pain," Mrs. Brewer says.

The government seized the couple's five-year-old Ford van that allowed him to lie down during his twice-a-month trips for cancer treatment at a Salt Lake City hospital, 270 miles away.

Now they must go by car.

"That's a long painful ride for him. His testicles would sometimes swell up to the size of cantaloupes, and he had to lie down because of the pain. He needed that van, and the government took it," Mrs. Brewer says.

"It looks like the government can punish people any way it sees fit."

The Brewers know nothing about the informant who turned them in, but informants play a big role in forfeiture. Many of them are paid, targeting property in return for a cut of anything that is taken.

The Justice Department's asset forfeiture fund paid $24 million to informants in 1990 and has $22 million allocated this year.

Private citizens who snitch for a fee are everywhere. Some airline counter clerks receive cash awards for alerting drug agents to "suspicious" travelers. The practice netted Melissa Furtner, a Continental Airlines clerk in Denver, at least $5,800 between 1989 and 1990, photocopies of the checks show.

Increased surveillance, recruitment of citizen-cops, and expansion of forfeiture sweeps are all part of the take-now, litigate-later syndrome that builds prosecutors' careers, says a former federal prosecutor.

"Federal law enforcement people are the most ambitious I've ever met, and to get ahead they need visible results. Visible results are convictions and, now, forfeitures," says Don Lewis of Meadville, Crawford County.

Lewis spent 17 years as a prosecutor, serving as an assistant U.S. attorney in Tampa as recently as 1988. He left the Tampa job — and became a defense lawyer — when "I found myself tempted to do things I wouldn't have thought about doing years ago."

Terwilliger insists U.S. attorneys would never be evaluated on "something as unprofessional as dollars."

Which is not to say Justice doesn't watch the bottom line.

Cary Copeland, director of the department's Executive Office for Asset Forfeiture, said they tried to "squeeze the pipeline" in 1990 when the amount forfeited lagged behind Justice's budget projections.

He said this was done by speeding up the process, not by doing "a whole lot of seizures."

Ending the abuse

While defense lawyers talk of reforming the law, agencies that initiate forfeitures scarcely talk at all.

DEA headquarters makes a spectacle of busts like the seizure of fraternity houses at the University of Virginia in March. But it refuses to supply detailed information on the small cases that account for most of its activity.

Local prosecutors are just as tight-lipped.

Thomas Corbett, U.S. Attorney for Western Pennsylvania, seals court documents on forfeitures because "there just are some things I don't want to publicize. The person whose assets we seize will eventually know, and who else has to?"

Although some investigations need to be protected, there is an "inappropriate secrecy" spreading through the country, says Jeffrey Weiner, president-elect of the 25,000-member National Association of Criminal Defense Lawyers.

"The Justice Department boasts over the few big fish they catch. But they throw a cloak of secrecy over the information on how many innocent people are getting swept up in the same seizure net, so no one can see the enormity of this atrocity."

Terwilliger says the net catches the right people: "bad guys" as he calls them.

But a 1990 Justice report on drug task forces in 15 states found they

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stayed away from the in-depth financial investigations needed to cripple major traffickers. Instead, "they're going for the easy stuff," says James "Chip" Coldren Jr., executive director of the Bureau of Justice Assistance, a research arm of the federal Justice Department.

Lawyers who say the law needs to be changed start with the basics: The government shouldn't be allowed to take property until after it proves the owner guilty of a crime.

But they go on to list other improvements, including having police abide by their state laws, which often don't give police as much latitude as the federal law. Now they can use federal courts to circumvent the state.

Greg Lanier/The Pittsburgh Press

State Trooper Kenneth Munshower leads Pennsylvania in the number of suspected drug traffickers he stops along the highways.

Tracy Thomas is caught in that very bind.

A jurisprudence version of the shell game hides roughly $13,000 taken from Thomas, a resident of Chester, near Philadelphia.

Thomas was visiting in his godson's home on Memorial Day, 1990, when local police entered looking for drugs allegedly sold by the godson. They found none and didn't file a criminal charge in the incident. But they seized $13,000 from Thomas, who works as a $70,000-a-year engineer, says his attorney, Clinton Johnson.

The cash was left over from a sheriff's sale he'd attended a few days before, court records show. The sale required cash — much like the government's own auctions.

During a hearing over the seized money, Thomas presented a withdrawal slip showing he'd removed money from his credit union shortly before the trip and a receipt showing how much he had paid for the property he'd bought at the sale. The balance was $13,000.

On June 22, 1990, a state judge ordered Chester police to return Thomas' cash.

They haven't.

Just before the court order was issued, the police turned over the cash to the DEA for processing as a federal case, forcing Thomas to fight another level of government. Thomas now is suing the Chester police, the arresting officer and the DEA.

"When DEA took over that money, what they in effect told a local police department is that it's OK to break the law," says Clinton Johnson, attorney for Thomas.

Police manipulate the courts not only to make it harder on owners to recover property, but to make it easier for police to get a hefty share of any forfeited goods. In federal court, local police are guaranteed up to 80 percent of the take — a percentage that may be more than they would receive under state law.

Pennsylvania's leading police agency — the state police — and the state's lead prosecutor — the Attorney General — bickered for two years over state police taking cases to federal court, an arrangement that cut the Attorney General out of the sharing.

The two state agencies now have a written agreement on how to divvy the take.

The same debate is heard around the nation.

The hallways outside Cleveland courtrooms ring with arguments over who will get what, says Jay Milano, a Cleveland criminal defense attorney.

"It's causing a feeding frenzy."

Government seized home of man who was going blind

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

James Burton says he loves America and wants to come home.

But he can't. If he does, he'll wind up in prison, go blind, or both.

Burton and his wife, Linda, live in a austere, concrete-slab apartment furnished with lawn chairs near Rotterdam in the Netherlands. It is a home much different from the large house and 90-acre farm they owned near Bowling Green, Ky., before the government seized both.

For Burton, who has glaucoma, home-grown marijuana provided his relief — and his undoing.

Since 1972, federal health secretaries have reported to Congress that marijuana is beneficial in the treatment of glaucoma and several other medical conditions.

Yet while some officials within the Drug Enforcement Administration have acknowledged the medical value of marijuana, drug agents continue to seize property where chronically ill people grow it.

"Because of the emotional rhetoric connected with the marijuana issue, a doctor who can prescribe cocaine, morphine, amphetamines and barbiturates cannot prescribe marijuana, which is the safest therapeutically active drug known to man," Francis Young, administrative law judge for DEA, was quoted as saying in Burton's trial.

In an interview this past July 4, Burton said, "We don't really have any choice right now but to stay" in the Netherlands, where they moved after he completed a one-year jail term for

Aaron Sakulich for The Pittsburgh Press

James Burton now lives in the Netherlands

three counts of marijuana possession. "I can buy or grow marijuana here legally, and if I don't have the marijuana, I'll go blind.

Burton, a 43-year-old Vietnam War veteran, has a rare form of hereditary, low-tension glaucoma. All of the men on his mother's side of the family have the disease, and several already are blind. It does not respond to traditional medications.

At the time of Burton's arrest, North Carolina ophthalmologist Dr. John Merritt was the only physician authorized by the government to test marijuana in the treatment of glaucoma patients. Merritt testified at Burton's trial that marijuana was "the only medication" that could keep him from going blind.

On July 7, 1987, Kentucky State Police raided Burton's farm and found 138 marijuana plants and two pounds of raw marijuana. "It was the kickoff of Kentucky Drug Awareness Month, and I was their special kickoff feature. It was all over television," Burton said.

Burton admitted growing enough marijuana to produce about a pound a month for the 10 to 15 cigarettes he uses each day to reduce pressure in his eye.

A jury decided he grew the dope for his own use — not to sell, as the government contended — and in March 1988 found him guilty of three counts of simple possession.

The pre-sentence report on Burton shows he had no previous arrests. The judge sentenced him to a year in a federal maximum security prison, with no parole.

On top of that, the government took his farm: 90 rolling, wooded acres in Warren County purchased for $34,701 in 1980 and assessed at twice that amount when it was taken.

On March 27, 1989, U.S. District Judge Ronald Meredith — without hearing any witnesses and without allowing Burton to testify in his own behalf — ordered the farm forfeited and gave the Burtons 10 days to get off the land. When owners of property live at a site while marijuana is growing in their presence, "there is no defense to forfeiture," Meredith ruled.

"I never got to say two words in defense of keeping my home, something we worked and saved for for 18 years," said Burton, who was a master electrical technician. Linda, 41, worked for an insurance company. "On a serious matter like taking a person's home, you'd think the government would give you a chance to defend it."

Joe Whittle, the U.S. Attorney who prosecuted the Burton case, says he didn't know about the glaucoma until Burton's lawyer raised the issue in court. His office has "taken a lot of heat on this case and what happened to that poor guy," Whittle says. But "we did nothing improper.

"Congress passes these laws, and we have to follow them. If the American people wanted to exempt certain marijuana activity — these mom and pop or personal use or medical cases — they should speak through their duly elected officials and change the laws. Until those laws are changed, we must enforce them to the full extent of our resources."

The action was "an unequaled and outrageous example of government abuse," says Louisville lawyer Donald Heavrin who failed to get the U.S. Supreme Court to hear the case.

"To send a man trying to save his vision to prison, and steal the home and land that he and his wife had worked decades for, should have the authors of the Constitution spinning in their graves."

Drug agents more likely to stop minorities

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

Part Two: The way you look

Look around carefully the next time you're at any of the nation's big airports, bus stations, train terminals or on a major highway, because there may be a government agent watching you. If you're black, Hispanic, Asian or look like a "hippie," you can almost count on it.

The men and women doing the spying are drug agents, the frontline troops in the government's war on narcotics. They count their victories in the number of people they stop because they suspect they're carrying drugs or drug money.

But each year in the hunt for suspects, thousands of guiltless citizens are stopped, most often because of their skin color.

A 10-month Pittsburgh Press investigation of drug seizure and forfeiture included an examination of court records on 121 "drug courier" stops where money was seized and no drugs were discovered. The Pittsburgh Press found that black, Hispanic and Asian people accounted for 77 percent of the cases.

In making stops, drug agents use a profile, a set of speculative behavioral traits that gauge the suspect's appearance, demeanor and willingness to look a police officer in the eye.

For years, the drug courier profile counted race as a principal indicator of the likelihood of a person's carrying drugs.

But today the word "profile" isn't

Greg Lanier/The Pittsburgh Press

Willie Jones had $9,600 seized and is now fighting to keep his landscaping business

officially mentioned by police. Seeing the word scrawled in a police report or hearing it from a witness chair instantly unnerves prosecutors and makes defense lawyers giddy. Both sides know the racial implications can raise constitutional challenges.

Even so, far away from the courtrooms, the practice persists.

Stereotypes trigger stops

In Memphis, Tenn., in 1989, drug officers have testified, about 75 percent of the people they stopped in the airport were black. The latest figures available from the Air Transport Association show that for that year only 4 percent of the flying public was black.

In Eagle County, Colo., the 60-mile-long strip of Interstate 70 that winds and dips past Vail and other ski areas is the setting of a class-action suit that charges race was the main element of the profile used in drug stops.

According to court documents in one of the cases that led to the suit, the sheriff and two deputies testified that "being black or Hispanic was and is a factor" in their drug courier profile.

Lawyer David Lane says that 500 people — primarily Hispanic and black motorists — were stopped and searched by Eagle County's High Country Drug Task Force during 1989 and 1990. Each time, Lane charged, the task force used an unconstitutional profile based on race, ethnicity and out-of-state license plates.

Byron Boudreaux was one of those stopped.

Boudreaux was driving from Oklahoma to a new job in Canada when Sgt. James Perry and three other task force officers pulled him over.

"Sgt. Perry told me that I was stopped because my car fit the description of someone trafficking drugs in the area," Boudreaux says. He let the officers search his car.

"Listen, I was a black man traveling alone up in the mountains of Eagle County and surrounded by four police officers. I was going to be as cooperative as I could," he recalls.

For almost an hour the officers unloaded and searched the suitcases, laundry baskets and boxes that were wedged into Boudreaux's car. Nothing was found.

"I was stopped because I was black, and that's not a great testament to our law enforcement system," says Boudreaux, who is now an assistant basketball coach at Queens College in Charlotte, N.C.

In a federal trial stemming from another stop Perry made on the same road a few months later, he testified that because of "astigmatism and color blindness" he was unable to distinguish among black, Hispanic and white people.

U.S. District Court Judge Jim Carrigan didn't buy it and called the sergeant's testimony "incredible."

"If this nation were to win its war on drugs at the cost of sacrificing its citizens' constitutional rights, it would be a Pyrrhic victory indeed," Carrigan wrote in a court opinion. "If the rule of law rather than the rule of man is to prevail, there cannot be one set of search and seizure rules applicable to some and a different set applicable to others."

Livelihood in jeopardy

In Nashville, Tenn., Willie Jones has no doubt that police still use a profile based on race.

Jones, owner of a landscaping service, thought the ticket agent at the American Airlines counter in Nashville Metro Airport reacted strangely when he paid cash Feb. 27 for his round-trip ticket to Houston.

"She said no one ever paid in cash anymore and she'd have to go in the back and check on what to do," Jones says.

What Jones didn't know is that in Nashville — as in other airports — many airport employees double as paid informers for the police.

The Drug Enforcement Administration usually pays them 10 percent of any money seized, says Capt. Judy Bawcum, head of the Nashville police division that runs the airport unit.

Jones got his ticket. Ten minutes later, as he waited for his plane, two drug team members stopped him.

"They flashed their badges and asked if I was carrying drugs or a large amount of money. I told them I didn't have anything to do with drugs, but I had money on me to go buy some plants for my business," Jones says.

They searched his overnight bag and found nothing. They patted him down and felt a bulge. Jones pulled out a black plastic wallet hidden under his shirt. It held $9,600.

"I explained that I was going to Houston to order some shrubbery for my nursery. I do it twice a year and pay cash because that's the way the growers want it," says the father of three girls.

The drug agents took his money.

"They said I was going to buy drugs with it, that their dog sniffed it and said it had drugs on it," Jones says. He never saw the dog.

The officers didn't arrest Jones, but they kept the money. They gave him a DEA receipt for the cash. But under the heading of amount and description, Sgt. Claude Byrum wrote, "Unspecified amount of U.S. currency."

Jones says losing the money almost put him out of business.

"That was to buy my stock. I'm known for having a good selection of unusual plants. That's why I go South twice a year to buy them. Now I've got to do it piecemeal, run out after I'm paid for a job and buy plants for the next one," he says.

Jones has receipts for three years showing that each fall and spring he buys plants from nurseries in other states.

"I just don't understand the government. I don't smoke. I don't drink. I don't wear gold chains and jewelry, and I don't get into trouble with the police," he says. "I didn't know it was against the law for a 42-year-old black man to have money in his pocket."

Tennessee police records confirm that the only charge ever filed against Jones was for drag racing 15 years ago.

"DEA says I have to pay $900, 10 percent of the money they took from me, just to have the right to try to get it back," Jones says.

His lawyer, E.E. "Bo" Edwards filled out government forms documenting that his client couldn't afford the $900 bond.

"If I'm going to feed my children, I need my truck, and the only way I can get that $900 is to sell it," Jones says.

It's been more than five months, and the only thing Jones has received from DEA are letters saying that his application to proceed without paying the $900 bond was deficient. "But they never told us what those deficiencies were," says Edwards.

Jones is nearly resigned to losing the money. "I don't think I'll ever get it back. But I think the only reason they thought I was a drug dealer was because I'm black, and that bothers me."

It also bothers his lawyer.

"Of course he was stopped because he was black. No cop in his right mind would try that with a white businessman. These seizure laws give law enforcement a license to hunt, and the target of choice for many cops is those they believe are least capable of protecting themselves: blacks, Hispanics and poor whites," Edwards says.

Money still held

In Buffalo, N.Y., on Oct. 9, Juana Lopez, a dark-skinned Dominican, had just gotten off a bus from New York City when she was stopped in the terminal by drug agents who wanted to search her luggage.

Drugs contaminate nearly all the money in America

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

Police seize money from thousands of people each year because a dog with a badge sniffs, barks or paws to show that bills are tainted with drugs.

If a police officer picks you out as a likely drug courier, the dog is used to confirm that your money has the smell of drugs.

But scientists say the test the police rely on is no test at all because drugs contaminate virtually all the currency in America.

Over a seven-year period, Dr. Jay Poupko and his colleagues at Toxicology Consultants Inc. in Miami have repeatedly tested currency in Austin, Dallas, Los Angeles, Memphis, Miami, Milwaukee, New York City, Pittsburgh, Seattle and Syracuse. He also tested American bills in London.

"An average of 96 percent of all the bills we analyzed from the 11 cities tested positive for cocaine. I don't think any rational thinking person can dispute that almost all the currency in this country is tainted with drugs," Poupko says.

Scientists at National Medical Services, in Willow Grove, Pa., who tested money from banks and other legal sources more than a dozen times, consistently found cocaine on more than 80 percent of the bills.

"Cocaine is very adhesive and easily transferable," says Vincent Cordova, director of criminalistics for the private lab. "A police officer, pharmacist, toxicologist or anyone else who handles cocaine, including drug traffickers, can shake hands with someone, who eventually touches money, and the contamination process begins."

Cordova and other scientists use gas chromatography and mass spectroscopy, precise alcohol washes and a dozen other sophisticated techniques to identify the presence of narcotics down to the nanogram level — one billionth of a gram. That measure, which is far less than a pin point, is the same level a dog can detect with a sniff.

What a drug dog cannot do, which the scientists can, is quantify the amount of drugs on the bills.

Half of the money Cordova examined had levels of cocaine at or above 9 nanograms. This level means the bills were either near a source of cocaine or were handled by someone who touched the drug, he says.

Another 30 percent of the bills he examined show levels below 9 nanograms, which indicates "the bills were probably in a cash drawer, wallet or some place where they came in contact with money previously contaminated."

The lab's research found $20 bills are most highly contaminated, with $10 and $5 bills next. The $1, $50 and $100 bill usually have the lowest cocaine levels.

Cordova urges restraint in linking possession of contaminated money to a criminal act.

"Police and prosecutors have got to use caution in how far they go. The presence of cocaine on bills cannot be used as valid proof that the holder of the money, or the bills themselves, have ever been in direct contact with drugs," says Cordova, who spent 11 years directing the Philadelphia Police crime laboratory.

Nevertheless, more and more drug dogs are being put to work.

Some agencies, like the U.S. Customs Service, are using passive dogs that don't rip into an item — or person — when the dogs find something during a search. These dogs just sit and wag their tails. German shepherds with names like Killer and Rambo are being replaced by Labradors named Bruce or Memphis' "Chocolate Mousse."

Marijuana presents its own problems for dogs since its very pungent smell is long-lasting. Trainers have testified that drug dogs can react to clothing, containers or cars months after marijuana has been removed.

A 1989 case in Richmond, Va., addressed the issue of how reliable dogs are in marijuana searches.

Jack Adams, a special agent with the Virginia State Police, supervised training of drug dogs for the state.

He said the odor from a single suitcase filled with marijuana and placed with 100 other bags in a closed Amtrak baggage car in Miami could permeate all the other bags in the car by the time the train reached Richmond.

And what happens to the mountain of "drug-contaminated" dollars the government seizes each year? The bills aren't burned, cleaned, or stored in a well-guarded warehouse.

Twenty-one seizing agencies questioned all said the tainted money was deposited in a local bank — which means it's back in circulation. ●

Greg Lanier/The Pittsburgh Press

U.S. Customs agent Leon Senecal and drug dog Amber check a bus in Buffalo

Police profit by seizing homes of innocent

By Andrew Schneider and Mary Pat Flaherty
The Pittsburgh Press

Part Three: Innocent owners

The second time police came to the Hawaii home of Joseph and Frances Lopes, they came to take it.

"They were in a car and a van. I was in the garage. They said, 'Mrs. Lopes, let's go into the house, and we will explain things to you.' They sat in the dining room and told me they were taking the house. It made my heart beat very fast."

For the rest of the day, 60-year-old Frances Lopes and her 65-year-old husband, Joseph, trailed federal agents as they walked through every room of the Maui house, the agents recording the position of each piece of furniture on a videotape that serves as the government's inventory.

Four years after their mentally unstable adult son pleaded guilty to growing marijuana in their back yard for his own use, the Lopeses face the loss of their home. A Maui detective trolling for missed forfeiture opportunities spotted the old case. He recognized that the law allowed him to take away their property because they knew their son had committed a crime on it.

A forfeiture law intended to strip drug traffickers of ill-gotten gains often is turned on people, like the Lopeses, who have not committed a crime. The incentive for the police to do that is financial, since the federal government and most states let the police departments keep the proceeds from what they take.

The law tries to temper moneymaking temptations with protections for innocent owners, including lien holders, landlords whose tenants misuse property, or people unaware of their spouse's misdeeds. The protection is supposed to cover anyone with an interest in a property who can prove he did not know about the alleged illegal activity, did not consent to it, or took all reasonable steps to prevent it.

But a Pittsburgh Press investigation found that those supposed safeguards do not come into play until after the government takes an asset, forcing innocent owners to hire attorneys to get their property back — if they ever do.

"As if the law weren't bad enough, they just clobber you financially," says Wayne Davis, an attorney from Little Rock, Ark.

Feared for their son

In 1987, Thomas Lopes, who was then 28 and living in his parents' home, pleaded guilty to growing marijuana in their back yard. Officers spotted it from a helicopter.

Because it was his first offense, Thomas received probation and an order to see a psychologist. From the time he was young, mental problems tormented Thomas, and though he visited a psychologist as a teen, he had refused to continue as he grew older, his parents say.

Matthew Thayer for The Pittsburgh Press

Four years after their son's marijuana arrest, police seized Hawaii home of Joseph and Frances Lopes.

Instead, he cloistered himself in his bedroom, leaving only to tend the garden.

His parents concede they knew he grew the marijuana.

"We did ask him to stop, and he would say, 'Don't touch it,' or he would do something to himself," says the elder Lopes, who worked for 49 years on a sugar plantation and lived in its rented camp housing for 30 years while he saved to buy his own home.

Given Thomas' history and a family history of mental problems that caused a grandparent and an uncle to be committed to institutions, the threats stymied his parents.

The Lopeses, says their attorney Matthew Menzer, "were under duress. Everyone who has been diagnosed in this family ended up being taken away. They could not conceive of any way to get rid of the dope without getting rid of their son or losing him forever."

When police arrived to arrest Thomas, "I was so happy because I knew he would get care," says his mother. He did, and he continues weekly doctor's visits. His mood is better, Mrs. Lopes says, and he has never again grown marijuana or been arrested.

But his guilty plea haunts his family.

Because his parents admitted they knew what he was doing, their home was vulnerable to forfeiture.

Back when Thomas was arrested, police rarely took homes. But since, agencies have learned how to use the law and have seen the financial payoff, says Assistant U.S. Attorney Marshall Silverberg of Honolulu.

They also carefully review old cases for overlooked forfeiture possibilities, he says. The detective who uncovered the Lopes case started a forfeiture action in February — just under the five-year deadline for staking such a claim.

"I concede the time lapse on this case is longer than most, but there was a violation of the law, and that makes this appropriate, not money-grubbing," says Silverberg. "The other way to look at this, you know, is that the Lopeses could be happy we let them live there as long as we did."

They don't see it that way.

Neither does their attorney, who says his firm now has about eight similar forfeiture cases, all of them stemming from small-time crimes that occurred years ago but were resurrected. "Digging these cases out now is a business proposition, not law enforcement," Menzer says.

"We thought it was all behind us," says Lopes. Now, "there isn't a day I don't think about what will happen to us."

They remain in the house, paying taxes and the mortgage, until the forfeiture case is resolved. Given court backlogs, that likely won't be until the middle of next year, Menzer says.

They've been warned to leave everything as it was when the videotape was shot.

"When they were going out the door," Mrs. Lopes says of the police, "they told me to take good care of the yard. They said they would be coming back one day."

'Dumb judgment'

Protections for innocent owners are "a neglected issue in federal and state forfeiture law," concluded the Police Executive Research Forum in its March bulletin.

But a chief policy maker on forfeiture maintains that the system is actively interested in protecting the rights of the innocent.

George J. Terwilliger III, associate deputy attorney general in the Justice Department, admits that there may be instances of "dumb judgment." And says if there's a "systemic" problem, he'd like to know about it.

But attorneys who battle forfeiture cases say dumb judgment is the systemic problem. And they point to some of Terwilliger's own decisions as examples.

The forfeiture policy that Terwilliger crafts in the nation's capital he puts to use in his other federal job: U.S. attorney for Vermont.

A coalition of Vermont residents, outraged by Terwilliger's forfeitures of homes in which small children live, launched a grass-roots movement called "Stop Forfeiture of Children's Homes." Three months old, the group has about 70 members, from school principals to local medical societies.

Forfeitures are a particularly sensitive issue in Vermont, where state law forbids taking a person's primary home. That restriction appears nowhere in federal law, which means Vermont police departments can circumvent the state constraint by taking forfeiture cases through federal courts.

The playmaker for that end-run: Terwilliger.

"It's government-sponsored child abuse that's destroying the future of children all over this state in the name of fighting the drug war," says Dr. Kathleen DePierro, a family practitioner who works at Vermont State Hospital, a psychiatric facility in Waterbury.

The children of Karen and Reggie Lavallee, ages 6, 9 and 11, are precisely the type of victims over which the Vermonters agonize. Reggie Lavallee is serving a 10-year sentence in a federal prison in Minnesota for cocaine possession.

Because police said he had been involved with drug trafficking, his conviction cost his family their ranch house on 2 acres in a small village 20 miles east of Burlington. For the first time, the family is on welfare, in a rented duplex.

"I don't condone what my husband did, but why victimize my children because of his actions? That house wasn't much, but it was ours. It was a home for the children, with rabbits, chicken, turkeys and a vegetable garden. Their friends were there, and they liked the school, " says Mrs Lavallee, 29.

After the eviction, "every night for months, Amber cried because she couldn't see her friends. I'd like to see the government tell this 9-year-old that this isn't cruel and unusual punishment."

Terwilliger's dual role particularly troubles DePierro. "It's horrifying to know he is setting policy that could expand this type of terror and abuse to kids in every state in the nation."

Terwilliger calls the group's allegations absurd. "If there was someone to blame, it would be the parents and not the government."

Lawyers like John MacFadyen, a defense attorney in Providence, R.I., find it harder to fix blame.

"The flaw with the innocent owner thing is that life doesn't paint itself in black and white. It's oftentimes gray, and there is no room for gray in these laws," MacFadyen says. As a consequence, prosecutors presume everyone guilty and leave it to them to show otherwise. "That's not good judgment. In fact, it defies common sense."

Proving innocence

Innocent owners who defend their interests expose themselves to questioning that bores deep into their private affairs. Because the forfeiture law is civil, they also have no protection against self-incrimination, which means that they risk having anything they say used against them later

The documentation required of innocent owner Loretta Stearns illustrates how deeply the government plumbs.

The Connecticut woman lent her adult son $40,000 in 1988 to buy a home in Tequesta, Fla., court documents show.

Unlike many parents who treat such transactions informally, she had the foresight to record the loan as a mortgage with Palm Beach County

Craig Line for The Pittsburgh Press

Karen Lavallee and her three children are the type of forfeiture victims that concern a Vermont group trying to stop government seizure of homes of children whose parents face drug charges.

Her action ultimately protected her interest in the house after the federal government seized it, claiming her son stored cocaine there. He has not been charged criminally.

The seizure occurred in November 1989, and it took until last May before Mrs. Stearns convinced the government she had a legitimate interest in the house.

To prove herself an innocent owner, Mrs. Stearns met 14 requests for information, including providing "all documents of any kind whatsoever pertaining to your mortgage, including but not limited to loan application, credit reports, record of mortgages and mortgage payments, title reports, appraisal reports, closing documents, records of any liens, attachments on the defendant property, records of payments, canceled checks, internal correspondence or notes (handwritten or typed) relating to any of the above and opinion letter from borrower's or lender's counsel relating to any of the above."

And that was just question No. 1.

Landlord as cop

Innocent owners are supposed to be shielded in forfeitures, but at times they've been expected to become virtual cops in order to protect their property from seizure.

T.T. Masonry Inc. owns a 36-unit apartment building in Milwaukee, Wis., that's plagued by dope dealing. Between January 1990, when it bought the building, and July 1990, when the city formally warned it about problems, the landlord evicted 10 tenants suspected of drug use, gave a master key to local beat and vice cops, forwarded tips to police and hired two security firms — including an off-duty city police officer — to patrol the building.

Despite that effort, the city seized the property.

Assistant City Attorney David Stanosz says "once a property develops a reputation as a place to buy drugs, the only way to fix that is to leave it totally vacant for a number of months. This landlord doesn't want to do that."

Correct, says Jerome Buting, attorney for Tom Torp of Masonry.

"If this building is such a target for dealers, use that fact," says Buting. "Let undercover people go in. But when I raised that, the answer was they were short of officers and resources."

It looks like coke

Grady McClendon, 53, his wife, two of their adult children and two grandchildren — 7 and 8 — were in a rented car headed to their Florida home in August 1989. They were returning from a family reunion in Dublin, Ga.

In Fitzgerald, Ga., McClendon made a wrong turn on a one-way street. Local police stopped him, checked his identification and asked permission to search the car. He agreed.

Within minutes, police pulled open suitcases and purses, emptying out jewelry and about 10 Florida state lottery tickets. They also found a registered handgun.

Then, says McClendon, the police "started waving a little stick they said was cocaine. They told me to put on my glasses and take a good look. I told them I'd never seen cocaine for real but that it didn't look like TV."

For about six hours, police detained

the McClendon family at the police tion where officers seized $2,300 in ,h and other items as "instruments drug activity and gambling para- nernalia" — a reference to the lottery tickets.

Finally, they gave McClendon a traffic ticket and released them, but kept the family's possessions.

For 11 months, McClendon's attorney argued with the state, finally forcing it to produce lab test results on the "cocaine."

James E. Turk, the prosecutor who handled the case will say only "it came back negative."

"That's because it was bubble gum," says Jerry Froelich, McClendon's attorney. A judge returned the McClendons' items.

Turk considers the search "a good stop. They had no proof of where they lived beyond drivers' licenses. They had jewelry that could have been contraband, but we couldn't prove it was stolen. And they had more cash than I would expect them to carry."

McClendon says. "I didn't see anything wrong with them asking me to search. That's their job. But the rest of it was wrong, wrong, wrong."

Seller, beware

Owners who press the government or damages are rare. Those who do are often helped by attorneys who forgo their usual fees because of their own indignation over the law.

For nearly a decade, the lives of Carl and Mary Shelden of Moraga, Calif., have been intertwined with the life of a convicted criminal who happened to buy their house.

The complex litigation began when the Sheldens sold their home in 1979, but took back a deed of trust from the buyer — an arrangement that made the Sheldens a mortgage holder on the house.

Four years later, the buyer was arrested and later convicted of running an interstate prostitution ring. His property, including the home on which the Sheldens held the mortgage, was forfeited. The criminal, pending his appeal, went to jail, but the government allowed his family to live in the home rent-free.

Panicked when they read about the arrest in the newspaper, the Sheldens discovered they couldn't foreclose against the government and couldn't collect mortgage payments from the criminal.

After tortuous court appearances, the Sheldens got back the home in 1987, but discovered it was so severely damaged while in government control that they can now stick their hand between the bricks near the front door.

The home the Sheldens sold in 1979 for $289,000 was valued at $115,500 in 1987 and now needs nearly $500,000 in repairs, the Sheldens say, chiefly from uncorrected drainage problems that caused a retaining wall to let loose and twist apart the main house.

Disgusted, they returned to court, saying their Fifth Amendment rights had been violated. The amendment prohibits the taking of private property for public use without just compensation. Their attorney, Brenda Grantland of Washington, D.C., argues that when the government seized the property but failed to sell it promptly and pay off the Sheldens, it violated their rights.

Between 1983 and today, the Sheldens have defended their mortgage through every type of court: foreclosures, U.S. District Court, Bankruptcy, U.S. Claims.

In January 1990, a federal judge issued an opinion agreeing the Sheldens' rights had been violated. The government asked the judge to reconsider, and he agreed. A final opinion has not been issued.

"It's been a roller coaster," says Mrs. Shelden, 46. A secretary, she is the family's breadwinner. Shelden, 50, was permanently disabled when he broke his back in 1976 while repairing the house. Because he was unable to work, the couple couldn't afford the house, so they sold it — the act that pitched them into their decade-long legal quagmire.

They've tried to rent the damaged home to a family — a real estate agent showed it 27 times with no takers — then resorted to renting to college students, then room-by-room boarders. Finally, they and their children, ages 21 and 16, moved back in.

"We owe Brenda (Grantland) thousands at this point, but she's really been a doll," says Shelden. "Without people like her, people like us wouldn't stand a chance." ●

Civil forfeitures can threaten a company's existence

By Andrew Schneider and Mary Pat Flaherty
The Pittsburgh Press

For businesses, civil forfeitures can be a big, big stick. Bad judgment, lack of knowledge or outright wrongdoing by one executive can put the company itself in jeopardy.

A San Antonio bank faces a $1 million loss and may close because it didn't know how to handle a huge cash transaction and got bad advice from government banking authorities, the bank says. The government says the bank knowingly laundered money for an alleged Mexican drug dealer.

The problems began when Mexican nationals came to Stone Oak National Bank, about 150 miles north of the border, to buy certificates of deposits with $300,000 in cash. The Mexicans planned to start an American business, they said. They had drivers' licenses and passports.

Bank officers, who wanted guidance about the cash, called the Internal Revenue Service, Secret Service, Office of the Comptroller of the Currency, the Federal Reserve, and the Department of Treasury.

Federal banking regulators require banks to file CTRs — currency transaction reports — for cash deposits greater than $10,000.

That paper trail was created to develop leads about suspicious cash. Once the government was alerted, the thinking went, it could track the cash, put depositors under surveillance or set up a sting.

A tape-recorded phone line that Stone Oak, like many banks, uses for sensitive transactions captured a conversation between a Treasury official and then-bank president Herbert Pounds. According to transcripts, Pounds said:

"We're a small bank. I've never had a transaction like that. . . . I talked to several of my banking friends. They've never had anybody bring in that much cash, and the guys say they've got a lot more where that came from."

Pounds asked for advice and was told to go through with the transaction. "That's fine . . . as long as you send the CTR," the Treasury official said. "That's all you're responsible for."

The bank took the money and filed the form.

Between that first transaction in [redacted] 1987 and the [redacted] certificates of deposit, [redacted] continued to file reports, according to photocopies reviewed by The Pittsburgh Press.

"The government had two years to come in and say, 'Hey, something smells bad here,' but it never did," says Sam Bayless, the bank's attorney.

But the government now charges that the bank customers were front men for Mario Alberto Salinas Trevino, who was indicted for drug trafficking in March 1989. Fourteen months later, the bank president and vice president were added to the indictment and charged with money laundering.

The bank never was criminally charged, and the officers' indictments were dismissed May 29.

The U.S. attorney's office in San Antonio said it would not discuss the case.

Because the Mexicans used their certificates as collateral for $1 million in loans from Stone Oak, the bank is worried it will lose the money. In addition, according to banking regulations, it must keep $1 million in reserve to cover that potential loss. For those reasons, it has asked the government for a hearing and has spent nearly $250,000 for lawyers' fees.

But the bank can't get a hearing because the forfeiture case is on hold pending the outcome of the criminal charges. And the criminal case has been indefinitely delayed because Salinas escaped six weeks after he was arrested.

[redacted] regulatory authorities could well require Stone Oak National Bank to close before ever having the opportunity for its case to heard," says its court brief.

To brace for a loss, Stone Oak closed one of its branches. "For the life of me," says Bayless, "I can't understand why the government would want to sink a bank. And, to boot, why would the government want another Texas bank?"

Bayless, who says, "I'm very conservative, I'm a bank lawyer, for heaven's sake," derides the federal action as "narco-McCarthyism."

Problems with paperwork also led to the seizure of $227,000 from a Colombian computer company.

The saga started in January 1990 when Ricardo Alberto Camacho ar-

rived in Miami with about $296,000 in ash to pay for an order of computers.

Camacho is a representative of Tandem Limitada, the authorized dealer in Colombia and Venezuela for VeriFone products, says VeriFone spokesman Tod Bottari. The cash covered a previously placed order for about 1,600 terminals.

Both the government and Camacho agree that when he arrived in Miami, he declared the amount he was carrying with Customs. They also agree that the breakdown of the amount — cash vs. other monetary instruments, such as checks — was incorrect on his declaration form.

Camacho and the government disagree about whether the incorrect entry was intentional — the government's position — or a mistake made by an airport employee.

The airport employee, in a deposition, said he had filled out the form and handed it to Camacho for him to initial, which he did. "Mr. Camacho assumed the agent had correctly written down the information provided to him," says Camacho's court filings over the subsequent seizure of the money. The government says Camacho deliberately misstated the facts to hide cash made from drug sales.

Camacho brought in the suitcase full of U.S. cash, which he had purchased at a Bogota bank, because he thought it would speed delivery of his order, he told federal agents.

VeriFone's lawyers directed Camacho to deposit the money in their account in Marietta, Ga., says Bottari. The final bill for the computers was $227,000.

VeriFone arranged for an employee to meet Camacho at the bank and told the bank he was coming, Bottari says. The bank notified U.S. Customs agents that it was expecting a large deposit. When Camacho arrived, federal agents were waiting with a drug-sniffing dog.

The agents asked Camacho if he would answer "a few questions about the currency," Camacho agreed.

The handler walked the dog past a row of boxes, including one containing some of Camacho's money. The dog reacted to that box.

At that point, the agents said they were taking the money to the local Customs office, where they retrieved information from the report Camacho had filed in Miami.

The reporting discrepancy, and the dog's reaction, prompted the government to take the cash.

Although the computer deal went through several weeks later when Tandem wired another $227,000, that wasn't enough to convince Albert L. Kemp Jr., the assistant U.S. attorney on the case, that the first order was real.

After the seizure, Kemp says, the government checked Camacho's background. He is a naturalized American citizen who went to business school in California and then returned to help run several family businesses in Colombia.

He travels to the United States "four or five times a year," says Kemp. "He has filled out the currency reports correctly in the past, but now he says there was a mistake and he didn't know about it.

"C'mon," says Kemp. "In total, his whole story doesn't wash with me.

"We believe the money is traceable to drugs, but we don't have the evidence. So instead of taking it for drugs, we're using a currency reporting violation to grab it." ●

Crime pays big for informants in forfeiture drug cases

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

Part four: The informants

They snitch at all levels, from the the Hell's Angel whose testimony across the country has made him a millionaire, to the Kirksville, Mo., informant who worked for the equivalent of a fast-food joint's hourly wage.

They snitch for all reasons, from criminals who do it in return for lighter sentences to private citizens motivated by civic-mindedness.

But it's only with the recent boom in forfeiture that paid informants began snitching for a hefty cut of the take.

With the spread of forfeiture actions has come a new, and some say, problematic, practice: guaranteeing police informants that if their tips result in a forfeiture, the informant will get a percentage of the proceeds.

And that makes crime pay. Big.

The Asset Forfeiture Fund of the U.S. Justice Department last year gave $24 million to informants as their share of forfeited items. It has $22 million earmarked this year.

While plenty of those payments go to informants who match the stereotype of a shady, sinister opportunist, many are average people you could meet on any given day in an airport, bus terminal or train station.

In fact, if you travel often, you likely have met them — whether you knew it or not.

Counter clerks notice how people buy tickets. Cash? A one-way trip?

Operators of X-ray machines watch for "suspicious" shadows and not only for outlines of weapons, which is what signs at checkpoints say they're scanning. They look for money, "suspicious" amounts that can be called to the attention of law enforcement — and maybe net a reward for the operator.

Police affidavits and court testimony in several cities show clerks for large package handlers, including United Parcel Service and Continental Airlines, Quik Pak, span "suspicious" packages and alert police to what they find. To do the same thing, police would need a search warrant.

Underground economy

At 16 major airports, drug agents, counter and baggage personnel, and management reveal an underground economy running off seizures and forfeitures.

All but one of the airports' drug interdiction teams reward private employees who pass along reports about suspicious activity. Typically, they get 10 percent of the value of whatever is found.

The Greater Pittsburgh International Airport team does not and questions the propriety of the practice.

Under federal and most states' laws, forfeiture proceeds return to the law enforcement agency that builds the case. Those agencies also control the rewards of informants.

The arrangement means both police and the informants on whom they rely now have a financial incentive to seize a person's goods — a mix that may be too intoxicating, says Lt. Norbert Kowalski.

He runs Greater Pitt's joint 11-person Allegheny County Police-Pennsylvania State Police interdiction team.

"Obviously, we want all the help we can get in stopping these drug traffickers. But having a publicized program that pays airport or airline employees to in effect, be whistleblowers, may be pushing what's proper law enforcement to the limit," he says.

He worries that the system might encourage unnecessary random searches.

His team checked passengers arriving from 4,230 flights last year. Yet even with its avowed cautious approach, the team stopped 527 people but netted only 49 arrests.

At Denver's Stapleton Airport — where most of the drug team's cases start with informant tips — officers also made 49 arrests last year. But they stopped about 2,000 people for questioning, estimates Capt. Rudy Sandoval, commander of the city's Vice and Drug Control Bureau.

As Kowalski sees it, the public vests authority in police with the expecta-

Greg Lamer/The Pittsburgh Press

Lt. Norbert Kowalski heads the drug interdiction unit at Greater Pittsburgh Airport

tion they will use it legally and judiciously. The public can't get those same assurances with police-designees, like counter clerks, says Kowalski.

With money as an inducement, "you run the risk of distorting the system, and that can infringe on the rights of innocent travelers. If someone knows they can get a good bit of money by turning someone in, then they may imagine seeing or hearing things that aren't there. What happens when you get to court?"

In Nashville, that's not much of an issue. Juries rarely get to hear from informants.

Police who work the airport deliberately delay paying informants until a case has been resolved "because we don't want these tipsters to have to testify. If we don't pay them until the case is closed they don't have to risk going to court," says Capt. Judy Bawcum, commander of the vice division for the Nashville Police Department.

That means their motivation can't be questioned.

Bawcum says it may appear that airport informants are working solely for the money, but she believes there's more to it. "I admit these (X-ray) guards are getting paid less than burger flippers at McDonald's and the promise of 10 percent of $50,000 or whatever is attractive. But to refuse to help us is not a progressive way of thinking," says Bawcum. "This is a public service."

But not all companies share the view that their employees should be public servants. Package handling companies and Wackenhut, the X-ray checkpoint security firm, refuse to allow Nashville police to use their workers as informants.

"They're so fearful a promise of a reward will prompt their people to concentrate on looking for drugs and money instead of looking for weapons," says Bawcum.

Far from being uncomfortable with the notion of citizen-cops, Bawcum says her department relies on them. "We need airport employees working for us because we've only got a very small handful of officers" at the airport, she says.

For her, the challenge comes in sustaining enthusiasm, especially when federal agencies like the DEA are "way too slow paying out." Civic duty carries only so far. "It's hard to keep them watching when they have to wait for those rewards. We can't lose that incentive."

The deals

Most drug teams hold tight the details of how their system works and how much individual informants earn, preferring to keep their public service private.

But in a Denver court case, attorney Alexander DeSalvo obtained photocopies of police affidavits about tipsters and copies of three checks payable to a Continental airline clerk, Melissa Furtner. The checks, from the U.S. Treasury and Denver County, total $5,834 for the period from September 1989 to August 1990.

Ms. Furtner, reached by phone at her home, was flustered by questions

about the checks.

"What do you want to know about the rewards? I can't talk about any of it. It's not something I'm supposed to talk about. I don't feel comfortable with this at all." She then hung up.

As hefty as the payments to private citizens can be, they are pin money compared to the paychecks drawn by professional informants.

Among the best paid of all: convicted drug dealers and self-confessed users.

Anthony Tait, a Hell's Angel and admitted drug user who has been a cooperating witness for the FBI since 1985, earned nearly $1 million for information he provided between 1985 and 1988, according to a copy of Tait's payment schedule and FBI contract obtained by The Pittsburgh Press.

Of his $1 million, $250,000 was his share of the value of assets forfeited as a result of his cooperation. His money came from four sources. FBI offices in Anchorage and San Francisco, the state of California and the federal forfeiture fund.

Likewise, in a November 1990 case in Pittsburgh, the government paid a former drug kingpin handsomely.

Testimony shows that Edward Vaughn of suburban San Francisco earned $40,000 in salary and expenses between August 1989 and October 1990 working for DEA, drew an additional $500 a month from the U.S. Marshal Service and was promised a 25 percent cut of any forfeited goods.

Vaughn had run a multimillion-dollar, international drug smuggling ring, been a federal fugitive, and twice served prison time before arranging an early parole and paid informant deal with the government, he said in court.

As an informant, he said, he preferred arranging deals for drug agents that are known as reverse stings: the law enforcement agents pose as sellers and the targets bring cash for a buy. Those deals take cash, but not dope, directly off the streets. In those stings, he said, the cash would be forfeited and Vaughn would get his pre-arranged quarter-share.

His testimony in Pittsburgh resulted in one man being found guilty of conspiracy to distribute marijuana. The jury acquitted the other defendant saying they believed Vaughn had entrapped him by pursuing him so aggressively to make a dope deal.

To pay or not to pay

The practice of giving informants a share of forfeited proceeds goes on so discreetly that Richard Wintory, an Oklahoma prosecutor and forfeiture proponent who until recently headed the National Drug Prosecution Center in Alexandria, Va., says, "I'm not aware of any agency that pays commissions on forfeited items to informants."

Although the federal forfeiture program funnels millions of dollars to informants, it does not set policy at the top about how — or how much — to pay.

"Decisions about how to pursue investigations within the guidelines of appropriate and legal behavior are best left to people in the field," says George Terwilliger III, the deputy attorney general who heads the Justice Department's forfeiture program.

That hands-off approach filters to local offices, such as Pittsburgh, where U.S. Attorney Thomas Corbett says the discussion of whether to give informants a cut of any take "is a philosophical argument. I won't put myself in the middle of it."

The absence of regulations spawns "privateers and junior G-men," says Steven Sherick, a defense attorney in Tucson, Ariz., who recently recovered $9,000 for John P. Gray of Rutland, Vt., after a UPS employee found it in a package and called police.

Gray, says Sherick, is "an eccentric older guy who doesn't use anything but cash." In March 1990, Gray mailed a friend hand-money for a piece of Arizona retirement property Gray had scouted during an earlier trip West, say court records. The court ordered the money returned because the state couldn't prove the cash was gained illegally.

Expanding payments to private citizens, particularly on a sliding scale rather than a fixed fee, raises unsavory possibilities, says Eric E. Sterling, head of the Criminal Justice Policy Foundation, a think tank in Washington, D.C.

Major racketeers and criminal enterprises were the initial targets of forfeiture, but its use has steadily expanded until now it catches people who never have been accused of a crime but lose their property anyway.

"You can win a forfeiture case without charging someone," says Sterling. "You can win even after they've been acquitted. And now, on top of that, you can have informants tailoring their tips to the quality of the thing that will be seized.

"What paid informant in their right mind is going to turn over a crack house — which may be destroying an inner city neighborhood — when he can turn over information about a nice, suburban spread that will pay off big when it comes time to get his share?" asks Sterling. ●

35 arrested despite bumbling ways of informant

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

The undercover operation was called BAD. The main informant was named Mudd.

And the entire affair was . . . a bust.

The prosecutor in Adair County in Missouri's northeast corner chuckles now about the "bumbled" investigation.

But Sheri and Matthew Farrell, whose 60-acre farm remains tied up in a federal forfeiture action due to the bumbling, can't see the humor.

A paid police informant named Steve R. Mudd, who went undercover for $4.65 an hour in a marijuana investigation near Kirksville, Mo., accused Farrell of selling and cultivating marijuana on his land. Mudd was the only witness in the joint city-county drug investigation called Operation BAD — Bust a Dealer.

For a year starting in November 1989, Mudd worked for city and county police identifying alleged dealers around Kirksville, population 17,000. He received "buy money" and would return after his deals — minus the money and with what he said were drugs.

Mudd went to supposed traffickers' homes "but didn't wear a wire(tap) and didn't take any undercover officer with him. He said he was in a rut and didn't want a lot of supervision," says prosecutor Tom Hensley. When he came back to the office, Mudd would write reports — but the dates and times often didn't match what he would say later in depositions.

Mudd himself had gone through drug rehabilitation, and had drug sales and possession on his criminal record, says Hensley. Mudd also had a history of passing bad checks and was always near broke, working odd jobs.

Nevertheless, Mudd became the linchpin of Operation BAD.

Based on his word, police arrested 35 people in Adair County, including Farrell. As Mudd told it, Farrell had sold him marijuana and confided he used tractors outfitted with special night lights to harvest fields of dope.

Jeff Robertson/For The Pittsburgh Press

The Farrells face forfeiture of their Missouri farm

He "whipped up quite the story. He had us out there at night banging around, renting big trucks to carry dope. There's no receipts, nothing to show that. And wouldn't someone have seen us?" asks Mrs. Farrell.

Hensley confirms that Farrell has no criminal record, yet on Mudd's allegation, the county sheriff first arrested Farrell then ordered his house and farm seized in November.

"They came out and searched everything. They took away tea, birdseed, they vacuumed our ashtrays in the truck and didn't find anything. Then they told us the house was seized and in governmental control.

They told us to keep paying the taxes, not to do anything else to the land," says Mrs. Farrell, 36, a U.S. Postal Service worker in Kirksville. Her husband, 38, runs a metal working shop out of his home.

Of the 35 cases initiated by Mudd, only Farrell's involved seized land.

Adair County kept the criminal cases in local court.

But to make the most of the seizure, the county turned the Farrell forfeiture case over to the federal government. Missouri state law directs that forfeiture proceeds go to the general fund where they are earmarked for public school support. Under federal regulations, though, the local police who bring a forfeiture case get back up to 80 percent of any proceeds.

"The federal sharing plan is what affected how the case was brought, sure," says Hensley. "Seizures are kind of like bounties anyway, so why shouldn't you take it to the feds so it comes back to the local law enforcement effort?"

With the forfeiture case firmly lodged in federal court, the county criminal cases began to be heard — and promptly fell apart.

All 35 cases "went down the tubes," says Hensley. At the first hearing, which included Farrell's case, Mudd failed to appear due to strep throat. It took him two months to regain his voice, says Hensley, and then he couldn't regain his memory.

"The dates he was saying didn't mesh with what he'd put down on reports. And I couldn't go out on the street without someone stopping to tell me a Mudd bad-check story. I decided my only witness was not worth a great deal, especially if he was having trouble with his recall."

The case crumbled into powder when the powder turned out to be Tylenol 3. Hensley said lab tests showed Mudd had brought back fake drugs as evidence.

Hensley withdrew the criminal charges against Farrell and the others.

Says Hensley of his star witness, "My honest impression is the guy is just dumb and watched too much 'Miami Vice.' You never see 'Miami Vice' guys write anything down, do you?"

The prosecutor doesn't feel Mudd "scammed us that bad. He took us once to a patch of dope growing along a country road across the state line in Iowa. It was out of the way, so he had to know something. But he couldn't say for sure who was growing it."

Although Mudd was less than an ideal informant, local police relied on him "because there is marijuana use here and we had to get somebody. We don't get big enough cases to get the state police here to do an investigation up right."

Hensley says he "couldn't say how" Mudd might have come up with Farrell's name, but Mrs. Farrell has a theory. Several years ago, Mike Farrell, Matthew's brother, received probation for a marijuana possession charge — his only arrest. Hensley confirms that.

"I think he figured he could say 'Farrell' and it would stick," says Mrs. Farrell.

Though the criminal case has faded, the Farrells' forfeiture case rolls on.

Philosophically, Hensley agrees with the notion "that if you're not guilty or charges are dismissed then you ought to be off the hook on the forfeiture since no one could prove the case against you. But that isn't the way it works with the federal government."

He is not inclined "to call down to St. Louis and tell the U.S. attorney to drop it. I've got other things to do with my time. I don't want to sound malicious but this will all work out."

So far, it is merely working its way through federal court.

The prosecutor on the Farrell case verifies that the state case was adopted by the federal government which means "the facts of their criminal case are the same facts that underlie the forfeiture action," says Daniel Meuleman, assistant U.S. attorney. "But that doesn't mean we can't go ahead because there are different standards of proof involved."

Different is lower. To get a criminal conviction, prosecutors need proof beyond a reasonable doubt. To pursue a federal forfeiture, they need only show probable cause.

Meuleman refuses to say whether he will use Mudd as a witness.

Meanwhile, the Farrells wait.

Their attorney's bills already are $5,600 "and that put a crimp in our style. We were in shock for a good two months. Every day we thought something else might happen and we were scared in our own home.

"That's gotten a little better," says Mrs. Farrell, "but in a town this small there's still a lot of talk, you know." ●

With sketchy data, government seizes house from man's heirs

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

In Fort Lauderdale, Fla., last summer, forfeiture reached beyond the grave, seizing the $250,000 home of a dead man.

A confidential informant told police that in 1988 the owner, George Gerhardt, took a $10,000 payment from drug dealers who used a dock at the house along a canal to unload cocaine.

The informant can't recall the exact date, the boat's name or the dealers' names, and the government candidly says in its court brief it "does not possess the facts necessary to be any more specific."

But its sketchy information convinced a judge to remove the house from heirs, who now must prove the police wrong.

"I was flabbergasted. I didn't think something like this could happen in this country," said Gerhardt's cousin, Jeanne Horgan of Hartsdale, N.J. She, a friend of Gerhardt's from high school, and a home health aide who cared for Gerhardt while he was dying of cancer, are his heirs.

Gerhardt, who died at the age of 49, was an only child who inherited "substantial amounts" from his parents and lived in a home that had been in his family for 20 years, says Marc H. Gold, attorney for the heirs.

Gerhardt ran a marina until he was 38, then retired and lived off the estate left him by his parents.

"I've gone back through his tax returns and every penny is accounted for. I can't find an indication he ever was arrested or charged with anything in his life," says Gold.

The heirs have filed a motion to have the case dismissed.

While that request is pending, the government is renting the house to other tenants for roughly $2,200 a month which the government keeps.

Although the government had its tip six months before Gerhardt's death, it didn't file a charge against him. It also didn't seize his house until three months after he died.

The notice the government was taking the home came with a sharp rap on the door and a piece of paper handed to Brad Marema, the heir who had cared for Gerhardt and moved into the house. The notice gave Marema a few days to pack up before the government changed the locks.

The point of trying to take the house, "is not so much to punish at this stage. The motivation really is to use the proceeds from the sale of the property to prevent other drug offenses," says Robyn Hermann, assistant chief of the civil section for the U.S. attorney's office in the Southern District of Florida.

The government's case depends on the informant's tip, says Ms. Hermann. "Even if I knew more about him (Gerhardt) I wouldn't say, but I don't think we do."

The answer to how heirs counter allegations against a dead man "is real easy," she says. "Answers are acquired through discovery," a procedure in which both sides respond to questions from the other. "We'll take depositions, they'll take depositions. That's when they get their answers."

But that isn't how the law is supposed to work, counters Gold.

"Who am I suppose to subpoena? Where do I send an investigator? The government is supposed to have a case, a reason for kicking someone out of their home. It's not supposed to remove them, then build a case." ●

Crimes are small, but 'justice' takes it all

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

Part Five: Crime and punishment

A Vermont man was found guilty of growing six marijuana plants. He received a suspended sentence and was ordered to do 50 hours of community work. But there was an added penalty: He and his family nearly lost their 49-acre farm.

In Washington, where the maximum criminal penalty could have been a $10,000 fine, an elderly couple served 60 days for growing 35 marijuana plants — and lost their $100,000 house.

In Bismarck, N.D., a young couple received suspended sentences after pleading guilty to growing marijuana. The judge who ordered them to forfeit the three-bedroom house where they lived with their three children worried from the bench that he might be throwing them onto the welfare rolls. But he says he had no choice.

All three families are the victims of a federal law that allows the government to take homes, lands, vehicles and other possessions from Americans convicted of possessing drugs or violating a host of other statutes.

The law was intended to penalize major drug dealers and organized crime figures by taking their property, selling it and returning the proceeds to the cops for other investigations. But the dollar return to the cops has been so great that it's now being used for scores of crimes, some no more than misdemeanors by first-time lawbreakers.

Because of the law, more and more people are losing their property. For many, the punishment no longer fits the crime.

Town: Back off

Community outrage helped Robert Machin and Joann Lidell keep their farm in South Washington, Vt., after the federal government tried to seize it in 1989.

Signs decrying "Cruel and unusual punishment — remember the Eighth Amendment" were posted along local roads. Lawmakers and politicians got involved. Nearly all their neighbors signed petitions.

Machin and Lidell, advocates of the back-to-nature movement, support themselves and their three children off their 49 acres. They boil maple sap into syrup, press apples into cider and educate their children in the rustic, gas-lit rooms of their eight-sided wooden house.

Their trouble began in September 1988, when a teenager busted for a traffic violation traded his way out of a ticket by telling state police he could show them 200 marijuana plants growing on Machin's farm.

Police raided the property and found only six plants, which Machin admitted to growing.

He received a suspended sentence and spent 50 hours doing community service. Tranquility returned to the Machin farm, but the government wasn't through.

On Aug. 12, 1989, U.S. Attorney George Terwilliger III filed action to seize the Machin house and property. Vermont state law does not permit the seizure of a home, so the case was pursued through federal courts.

But the political pressure and the outpouring of concern from the community forced Terwilliger, who also runs the Justice Department's forfeiture fund, to back off.

"The Machin case is one where public scrutiny forced the government to do it right. What about all the others where no one is watching?" Machin's lawyer, Richard Rubin, asks.

Let the feds do it

There was little public scrutiny in November 1989 after Robert and Brenda Schmalz pleaded guilty to marijuana charges in Bismarck, N.D., and got probation.

North Dakota state law does not allow the forfeiture of real estate involved in crimes. So, in order to seize the house, prosecutors took the Schmalz case to federal court, says federal Judge Patrick Conmy, who got the case.

Conmy said at the hearing that the couple had grown marijuana in their basement for their own use. Even so, because they used their house in the crime, Conmy says, he had no choice but to order them to forfeit their home.

"I don't really care if somebody loses their Cadillac, or their coin collection, the cash that's with the drugs. That's fine. It's looked on as a hazard of doing business," the federal judge says.

"But you get a husband, wife and several children in a three-bedroom home and the husband raises marijuana in the basement with some grow lights, and you take their house for that. That, to me, is different."

Headaches

The marijuana Jack Blahnik grew in his yard controlled severe pain from his cluster headaches, he says.

Blahnik completed 68 years of his life without a single brush with the police. But in his 69th year, he and his 61-year-old wife, Patricia, were arrested, convicted and jailed for 60 days for growing 35 marijuana plants.

On March 6, 1990, the state of Washington also seized the couple's

three-bedroom home and the five acres it sat on.

Blahnik admits he was growing the dope.

"I showed it to the police, I took them out to the shed in the back yard and told them that I was growing the stuff for my own use, to try to control the pain from these cluster headaches that I have," Blahnik says.

Blahnik heard that marijuana helps such headaches, and his doctor confirmed its value.

"My wife was against my growing the stuff, but she went to jail because she copied some growing instructions for me," Blahnik says.

The statute under which the Blahnik's house was seized requires the state to provide "evidence which demonstrates the offender's intent to engage in commercial activity." The police never made that link, affidavits show.

The Blahnik's $100,000 property in Woodland, about 130 miles south of Seattle, was their nest egg.

"It was our life savings," Blahnik says. "Everything we had went into that house and land."

Police charged that drug sales financed the house.

"They knew that wasn't true," Mrs. Blahnik says. "Our bank statements and tax forms show that everything we ever put into buying that house, and everything else we have, came from money that we worked hard 40 years to save."

The Blahniks' lawyer, Michael McLean, calls the seizure unconstitutional and punitive.

"The maximum fine for this crime in the state of Washington is $10,000. The Blahnik's property was worth 10 times that amount."

Blahnik does not question that he should be punished for breaking the law. However, he questions the manner in which it was done.

"The prosecuting attorney went on television, putting our mug shots on and claiming they had made the biggest seizure ever made in either Washington or Oregon and we could possibly be connected to a nationwide drug ring," Blahnik says.

"They failed to mention that their big seizure was our retirement money," Blahnik says.

A costly catch

Sometimes the government's push to seize property drives it to spend far more than it makes. For example, it's estimated that the state of Iowa spent more than $100,000 defending the seizure of a $6,000 fishing boat.

It has been three years since the Iowa Department of Natural Resources agents charged Dickey Kaster with having three illegally caught fish.

The officers stopped Kaster, a 63-year-old retired gas company foreman, leaving Clear Lake. In the back of his truck the fish cops found a silver bass, a northern pike and a muskie, and said they had "net marks" on them. Kaster was charged with gill-netting, a misdemeanor in Iowa punishable at the time by up to 30 days in jail and a $100 fine for each fish. Altogether, he paid about $500 in fines.

But the officers also seized Kaster's 16-foot boat, 40-hp motor and trailer — worth about $6,000.

"No doubt they had net marks on them, but so do 75 percent of the fish in the lake, I caught them with a rod and right crawlers," Kaster says.

District Court Judge Stephen Carroll said the seizure was unconstitutional and ordered the boat, motor and trailer returned.

But Cerro Gordo County Attorney Paul Martin appealed to the Iowa Supreme Court, which ruled the property could be seized.

Kaster's saga of the three fish has been on local court dockets four times and before the Iowa Supreme Court twice.

A court clerk in Mason City estimated that "probably a lot more than $100,000" was spent in pursuit of justice for those fish.

Kaster says he knows exactly what the ordeal cost him.

"Just about everything I own. I auctioned off the inventory of my bait and tackle shop at about a dime on the dollar and sold my house to pay the legal bills and keep the bank happy," he says.

"I didn't get my boat back, but I'm still trying," he says. "You can't let the government ignore the Constitution. I'm fighting this over a boat that shouldn't have been taken, but it really deals with how fair our government is supposed to be."

Greg Lanier/The Pittsburgh

Don and Ruth Churchill's land was seized after marijuana was found in the cornfiel

PRESUMED GUILTY

Mixed crop

And fairness is what is worrying Don and Ruth Churchill, who are fighting to keep their family farm in Indiana.

"Salt of the earth" and "good, God-fearing people" are how some neighbors in the southern Indiana farming community describe the 54-year-old couple.

In 1987, Churchill had found some marijuana plants mixed in with his corn and immediately notified state police.

Farmers in the area were aware that a group called "the Cornbread Mafia" was planting marijuana in other people's cornfields throughout nine Midwestern states.

The cops destroyed the crop, and the Churchills thought they were done with marijuana.

But two years later, while they were watching a TV newscast about thousands of marijuana plants being found on farmland, they recognized the land as theirs.

The next morning, the Churchills went to the sheriff to say it was their land. Ten days later, state police arrived at their door to arrest Churchill and his 34-year-old son, David, charging them with numerous felony counts, including possession of and cultivating marijuana.

An informant had reported that he saw Churchill, his son and a third, unidentified man tending marijuana crops on land they own in Harrison County. The informant later reported that dope was also growing on other Churchill land in Crawford County, court affidavits show.

In February, four months before their first criminal trial, the federal government — prodded by state police who would get the bulk of any forfeiture proceeds — seized the 149 acres the Churchills own in both counties.

They are awaiting the outcome of the cases.

While the Churchills anguish over the possible loss of their property, they don't dispute that police found thousands of marijuana plants growing on their two tracts.

What Churchill disputes is that he or anyone else in his family grew it.

"I farm part time. We plant in the spring and harvest in the fall and don't mess with the corn in between." Before the large cache of marijuana was discovered, "we hadn't been out there for weeks," says Churchill, who leaves for work at 4 a.m. to get to the Ford truck plant 43 miles away in Louisville, where he has worked for 27 years.

Planting of "no-till" crops is very common in the area as a way to make extra money.

The farmland, especially valuable because it contains the largest natural spring in Indiana, has been in Mrs. Churchill's family for generations.

Standing on the steps of a wood-frame chapel in the midst of some of the land the government is trying to take, Mrs. Churchill expressed her disillusionment.

"This church is built on my family's land. I was baptized here, and Don and I were married here. This used to be a place of peace and happiness," Mrs. Churchill says. "Now, this place, our community, our lives, our faith in government, everything has changed.

"If they take our land, I'm going to lose faith in everything," she says.

Ron Simpson, the state's primary prosecutor of the criminal charges, questions the fairness of the federal government's seizure of the Churchills' land when most of it was inherited from the wife's family.

"Under our system, if someone is punished, they should have been charged with something, and we've brought no charges against Mrs. Churchill. We have no evidence that she knew anything about the marijuana that was growing," Simpson says. "You just have to wonder about how fair this seizure is."

Churchill says:

"We assumed the legal system was fair, that if we were innocent, we had nothing to worry about. Now I'm in one court defending myself and my son against drug charges, and in another court, they're trying to take my land away. I'm worrying about a lot of things now."

A handful of trouble

The issues of proportionality and fairness pose challenges for even strong supporters of forfeiture laws, including Gwen Holden, a director of the National Criminal Justice Association in Washington, D.C., a group that represents state law enforcement interests.

"If an individual is clearly a major trafficker and everything he ever bought is dirty, no one has major heartburn. If someone owns 200 acres of land and there's drugs on a corner and the guy never knew it was there, then the rule of reason should kick in," Ms. Holden says. "You shouldn't be taking the whole farm if he didn't know it was there."

Taking Bradshaw Bowman's whole farm is exactly what the government is trying to do.

The 80-year-old man was arrested for growing marijuana, and the local sheriff has seized his 160-acre ranch in the breathtaking high desert area of southern Utah.

A convicted drug dealer-turned-sheriff's informant blew the whistle on a handful of marijuana plants growing on Bowman's property.

Bowman's "Calf Creek Ranch" is 300 miles south of Salt Lake City, at the entrance to a National Scenic Vista area of stunning canyons.

The marijuana was found on a hiking trail far from Bowman's house.

"I've had this property for almost 20 years, and it's absolute heaven. I love this place. My wife's buried here," Bowman says. "I can't believe they're trying to take it away from me, and I didn't even know the stuff was growing there.

"I used to serve on jury duty, but at 70 they make you stop. In all my time sitting in the jury box, I never heard of the Constitution treated this way."

Garfield County Attorney Wallace Lee, who is prosecuting both the criminal charges and the civil effort to seize Bowman's house, says, "He's getting his day in court."

"The fact that he's 80 years old has no bearing on the case at all and certainly not with me," Lee says. "I'm out to prosecute a criminal case here, and it doesn't matter whose house it is."

Bowman's lawyer, Marcus Taylor, says:

"This is the classic example of the absurdity, injustice and almost immoral nature of forfeiture.

"You could hold that entire bundle of 67 plants in one hand." ●

Jet seized, trashed, offered back for $66,000

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

With more than 9,000 flights under his belt, Billy Munnerlyn has survived lots of choppy air. But it took only one flight into a government forfeiture action to send his small air charter service crashing to the ground.

Munnerlyn and his wife, Karon, both 53, worked for years building their Las Vegas business. Their four planes — a jet and three props — flew businessmen, air freight, air ambulance runs and Grand Canyon tours.

"It wasn't a big operation, but it was ours," Mrs. Munnerlyn says.

Today, Munnerlyn is making 22 ..nts a mile trucking watermelons ..d frozen carrots across the country ..i an 18-wheeler.

He has filed for bankruptcy. He sold off his three smaller planes and office equipment to pay $80,000 in legal fees. His 1969 Lear Jet — his pride and joy — is being held by the federal government at a storage hangar in Texas.

Munnerlyn's life went into a tailspin the afternoon of Oct. 2, 1989, when he flew an old man and four padlocked, blue plastic boxes to the Ontario International Airport, outside Los Angeles.

His passenger was 74-year-old Albert Wright, a convicted cocaine trafficker. The plastic boxes contained $2,795,685 in cash.

But Munnerlyn says he didn't know that until three hours after they landed and Drug Enforcement Administration agents handcuffed him and took him to the Cucamonga County Jail. Munnerlyn was charged with drug trafficking and ordered to pay $1 million bail. Seventy-one hours later, he was released without being charged.

When he went to get his plane, a ..rug agent told him "it belongs to the ..vernment now" — a simple statement that launched a devastating legal battle that continues today.

An informant had told Ontario Airport police that Wright would arrive Oct. 2 with a large amount of currency to purchase narcotics.

Police were waiting when the Lear landed. They watched Wright get off the plane. For the next three hours, agents followed him as he met two other people, picked up a rented van, returned to the airport and unloaded the plastic containers from Munnerlyn's jet.

Police followed the van to a residence about 20 miles away. They surrounded the van and four people nearby. All were identified as being major cocaine traffickers.

A search of the plastic boxes found $2,795,685.

At the airport, agents told Munnerlyn he was in trouble. They searched the jet. No drugs were found, but they seized $8,500 in cash that he had been paid for the charter.

"I guessed they would figure out I had nothing to do with that guy and his drug money, and give me my plane and $8,500 back," Munnerlyn says.

He was wrong.

Two weeks later, drug agents showed up at Munnerlyn's Las Vegas home and office and carried off seven boxes of documents and flight logs.

It was just the beginning of the government's efforts to prove he was a drug trafficker and had flown for Wright for years.

Munnerlyn says he didn't even know Wright was the man's name.

Several days before the seizure, Munnerlyn was contacted by a man identifying himself as "Randy Sullivan," a banker, who was willing to discuss financing a new aircraft that Munnerlyn had been telling business contacts he wanted to buy.

Munnerlyn agreed to meet him Oct. 2 at Little Rock Airport. "We were going to fly back to Las Vegas, where I was going to show him my operation and talk about him financing my purchase of a larger plane," Munnerlyn picked up "Sullivan" and four boxes of "financial records."

"He was a distinguished-looking, very old man dressed in a dark suit. He looked like a banker is supposed to look," Munnerlyn says.

They stopped in Oklahoma City to refuel. When they took off 45 minutes later headed to Las Vegas, "Sullivan" told Munnerlyn he had made a telephone call and had to go to the Ontario airport instead. They would discuss the loan at a later date, he told the pilot.

While en route, he paid Munnerlyn $8,300, the normal tariff for a jet charter, and gave him a $200 tip.

"I told the DEA that I never saw that man before in my life, and I've never had anything to do with drugs," Munnerlyn says. "All I want is my plane back."

Assistant U.S. Attorney Alejandro Mayorkas is still fighting to prevent that from happening.

In court documents Mayorkas filed, he acknowledged the government "will rely in part on circumstantial evidence and otherwise inadmissible hearsay" to try to justify the forfeiture.

The government "need not establish a substantial connection to illegal activity, but need only establish probable cause," the prosecutor wrote.

Mayorkas says the fact the aircraft flew into Los Angeles, "an area known as a center of illegal drug activity," is probable cause.

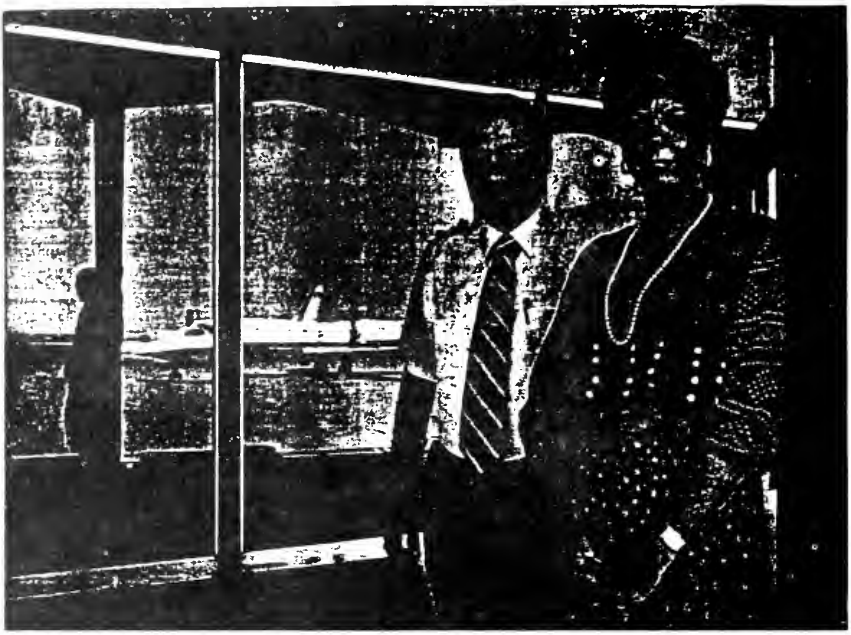
The prosecutor faulted Munnerlyn for not knowing what was in the boxes, but government regulations do not require charter pilots to question or examine baggage.

Munnerlyn wanted Wright to testify, but the government said he couldn't.

"He was the only guy other than me who could tell the court that we didn't know each other. But Mayorkas said they couldn't find him," Munnerlyn says.

At a three-day trial that began last Oct. 30, Mayorkas sprang a surprise witness. A ramp worker from Detroit's Willow Run Airport testified that he had seen Munnerlyn and Wright at his airport "in the fall of 1988."

The witness, Steven Antuna, de-



Jeff Roberson for The Pittsburgh Press

Billy and Karon Munnerlyn's Las Vegas air charter service was sold off to pay legal bills to fight the government's seizure of their Lear Jet.

scribed Munnerlyn to a T, right down to the full reddish, gray-streaked "Hemingway-like" beard he had when he was arrested.

The only problem was that Munnerlyn didn't have a beard until the summer of 1989.

Mrs. Munnerlyn and her 31-year-old son took the stand and refuted the statements about the beard.

The six-member jury ruled that the plane should be returned to the pilot and his wife.

In December, Mayorkas asked for another trial — and held on to the plane. He said Munnerlyn's family members had lied.

But Munnerlyn submitted 51 affidavits from FAA and Las Vegas officials, U.S. marshals, bank officers, customers and business contacts swearing he did not have a beard in the fall of 1988.

Photos and a TV news tape of Munnerlyn being interviewed after rescuing a couple from Mexico after a hurricane, both taken that fall, showed him beardless.

But the government kept the plane.

Munnerlyn and his wife shuttled between Las Vegas and Los Angeles more than 20 times.

"Each time we went we thought this nightmare would be over, but each time there was some new game that the government wanted to play," Mrs. Munnerlyn says.

First, Mayorkas demanded the pilot pay the government $66,000 for his plane.

"We didn't have any money left and we couldn't figure out why we should have to pay the government anything when a jury said we were innocent," Munnerlyn says.

Mayorkas lowered the "settlement" to $30,000, still far more then the Munnerlyns could raise.

In April, Munnerlyn went to the U.S. Marshal Service's aircraft storage site in Midland, Texas. He climbed over, under and through his plane, which had been torn apart during the DEA search for drugs.

"The whole thing was a mess," he says. "That plane's going to need about $50,000 worth of work to bring it up to FAA standards again, to make it legal to fly."

In mid-June, Mayorkas made what he called a "final offer."

"We have to pay the government $6,500 to get back my plane, that a jury says shouldn't have been taken in the first place, and they want to keep the $8,500 that I was paid for the flight," Munnerlyn says.

Last month, when asked if the settlement request was fair, Mayorkas said:

"If he was innocent, he would have taken reasonable steps to avoid any involvement in illicit drug activity," Mayorkas says.

But he wouldn't detail what preventive measures Munnerlyn should have taken.

The Munnerlyns are trying to borrow the money to get their plane back. ●

Forfeiture threatens constitutional rights

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

Last part: Reforms

The bottom line in forfeiture ... is the bottom line.

And that, say critics, is the crucial problem.

The billions of dollars that forfeiture brings in to law enforcement agencies is so blinding that it obscures the devastation it causes the innocent.

A 10-month study by The Pittsburgh Press found numerous examples of innocent travelers being detained, searched and stripped of cash. Of small-time offenders who grew a little marijuana for their own use and lost their homes because of it. Of people who had to hire attorneys and fight the government for years to get back what was rightfully theirs.

Attorney Harvey Silverglate of Boston says: "There is a game being played with forfeiture. They go after the drug kingpins first, then when everyone stops looking, they turn the law and its infringement of constitutional protections against the average person."

Many people who have watched seizures and forfeitures burgeon as a law-enforcement tool say changes must be made quickly if the traditional American system of justice, based on the constitutional rights of its citizenry, is to remain intact.

No crime, no penalty

When Nashville defense attorney E.E. "Bo" Edwards cites remedies, he sts first the need to make forfeiture possible only after a criminal conviction. Edwards heads a newly created forfeiture task force for the National Association of Criminal Defense Lawyers.

As the forfeiture law now stands, property owners who never were charged with a crime or were charged and cleared still can lose their assets in a forfeiture proceeding.

Under forfeiture, the government must only show that an item was used in a crime or bought with crime-generated money. The government doesn't have to prove the property owner is the criminal.

Changing the law to allow forfeiture only after a property owner's criminal conviction would ensure the government proves its cases beyond a reasonable doubt, Edwards says.

The legal fiction "of property violating the law, that 'property' can do wrong, is ludicrous and offensive to the American scheme of government," says Edwards. "Arresting a plane, for instance, when there is no proof the pilot broke any laws is not only an abuse of our judicial system but a moronic game."

The narrow legal view holds that because forfeiture usually is a civil case, it involves monetary penalties and not punishment, like jail, that takes away personal freedoms.

Taking that narrow view, it seems unnecessary to include the due process protections of criminal court — such as the presumption of innocence — because the potential penalties never would be as severe as those in a criminal case.

But prosecutors and appeals courts who say forfeiture is not a punishment are "denying reality," says Thomas Smith, head of the American Bar Association's criminal justice section. "The law was enacted to punish, and if you ask anyone who has lost a house or a bank account to it, they will tell you it is punishment."

Allowing forfeiture only in the event of a conviction also would eliminate the risks owners are exposed to when they face a criminal charge against them in one courtroom and the civil forfeiture case in another.

Under criminal and civil proceedings, the defendant has a constitutional guarantee that he needn't testify to anything that may incriminate him.

But because a person may face two trials on the same issues, it raises the possibility that a civil forfeiture case could be brought in the hope that information divulged there could later shore up an otherwise weak criminal case.

Ill-defined procedures

The gusto for seizure is weakening the traditional protections that surround police work. The definition of "reasonable search and seizure," for example, has been stretched to include tactics that some believe aren't reasonable at all.

The U.S. Supreme Court this June said it is legal for police — wearing full drug-raid gear and with guns showing — to board buses about to depart a station and ask random passengers if they will consent to a search.

In his dissent, Justice Thurgood Marshall branded the tactic coercive and in violation of the Fourth Amendment. "It is exactly because this 'choice' is no 'choice' at all that police engage in this technique," he wrote.

Training films for state police or drug agents in Arizona, Michigan, Massachusetts, Texas, Louisiana, New Mexico and Indiana show that drug searches involve much more than a visual scan or quick hand search.

Officers in the films obtained by The Pittsburgh Press didn't just look. They opened suitcases in car trunks

and pulled out back seats, side door panels and roof linings. In several of the films, they went so far as to remove the gas tank. When they're done, they may or may not put the car back together. The owner's ability to collect damages will depend on the protections offered by state law.

Grady McClendon had to fight in court for nearly a year to get back about $2,300 taken by police in Georgia following a highway search. His money was seized after police said they'd found cocaine in the car. Lab tests later showed it was bubble gum, but for 11 months police held McClendon's money without charging him with a crime.

During the search, McClendon says, "they made us stand four car lengths away. If I'd have known that, I wouldn't have said yes, because I couldn't see what they were doing in the dark. That isn't what I expected in a search."

No accounting for money

The public is often left in the dark about how the proceeds of forfeiture are spent.

A Georgia legislator who this year drafted a law that added real estate to the items that can be taken in his state, also inserted a "windfall" provision for funds.

Under the provision, once forfeiture proceeds equal one-third of a police department's regular budget, any additional forfeiture money will spill over to the general treasury.

State Rep. Ralph Twiggs says he worried that once police began seizing real estate it would bloat their budgets, especially in Georgia's many small towns. "I was looking at all the money going into the federal program and I was thinking ahead. I don't want gold-plated revolvers showing up."

Gold-plated revolvers may be an extreme worry. But as it now stands, it is very hard to determine how police spend their money.

The money or goods returned to local police departments through the federal forfeiture system do not have to be publicly reported. Congress, in its "zeal to pass this feel-good (drug) law," says Philadelphia City Council member Joan Specter, "apparently forgot to require an accounting of the money.

"The happy result for the police is that every year they get what can only be called drug slush funds," says Specter.

A department that receives forfeiture funds from cases it pursued through federal court or with the help of a federal agency is merely required to assure the U.S. attorney in writing that it will use the money for "law enforcement purposes." And even that minimal requirement wasn't met in Philadelphia.

The Philadelphia police didn't file the forms last year, says Specter, and used the money to cover the costs of air conditioning, car washes, emergency postage, office supplies and fringe benefits.

"That would be fine," she says, "except that the intent of the federal law was for the money to go back into the war on drugs."

It also meant Philadelphia city council "made budgetary decisions in the absence of complete information." At a time when $4 million in forfeiture funds was on hand or in the pipeline for Philadelphia, the city's chemical lab, where drugs are analyzed, had a backlog of more than 3,000 cases, she says. The lab bottleneck caused court delays and prolonged jailing of suspects before their trials began, Specter says.

The Philadelphia Police Department had estimated $1.2 million would double the lab's capacity, but the forfeiture funds were spent elsewhere. "Who should be setting the priorities?" she asks.

Sen. Arlen Specter of Pennsylvania echoed his wife's view in an address to colleagues in the U.S. Senate. The absence of public accounting by the police who received federal shared funds, he says, "is a glaring oversight in the law, which ought to be corrected."

What legislators have done, says Chicago defense attorney Stephen Komie, "is emboldened prosecutors and police to create this slush fund of unappropriated money for which nobody votes a budget."

The federal forfeiture fund itself, which has taken in $1.5 billion in the last four years and expects to get another $500 million this year, had its first standard audit only last year.

Circumventing state law

The relationship between state and federal forfeiture systems is thorny in other respects. Washington, D.C., helps local law enforcement do end runs around state law.

The process is formally known as "adoption" — and U.S. Rep. William Hughes of New Jersey, who devised it, now says he made a mistake that he would like to undo.

In adoption, a U.S. attorney's office will take over prosecution of a case developed entirely by local police.

Theoretically, local law enforcement officials go to federal prosecutors because the federal government has more resources available to dissect complicated criminal enterprises and its jurisdiction reaches beyond state lines.

But more often, The Pittsburgh Press review of forfeiture found, the cases are passed along because local police find state laws too restrictive in what can be seized and how much money police can make.

If local departments choose to use the federal system, "then it seems to me it's entirely appropriate for us — so long as the resources are there and what not — to help in that process," says Associate Deputy Attorney General George Terwilliger III, the head of forfeiture for the Justice Department.

"But I don't know that we'd encourage it."

But his department clearly does. The Justice Department's "Quick Reference to Federal Forfeiture Procedures" says on Page 203 that "adoptive seizures are encouraged."

Hughes says including "adoption" in his legislation "was a mistake," because it has become a way for police to game the forfeiture system.

When he introduced legislation that would have ended federal adoption, "it went nowhere, because law enforcement rallied and convinced everyone they needed those cuts of the pie."

Local police have started using the federal courts to do end-runs around state laws that earmark forfeiture money for the likes of schools instead of cops, or else guarantee police less money than they would get in federal court. There, the cut for local law enforcement can be as much as 80 percent of the value of forfeited items.

But it's not always money that propels police into federal court. It can also be differences over prosecution.

In Allegheny County, for instance, District Attorney Robert Colville will not pursue a forfeiture unless he first wins a criminal conviction against the property owner on a drug charge. Local police know that and avoid Colville's office — and go to federal court — when they aim to seize items from owners who aren't even charged with a crime, Colville says.

The departments argue their approach is legal, "but for me, legal isn't necessarily fair," Colville says.

"It was never intended states would be able to use the federal process to avoid state policy. (Former Attorney General Dick) Thornburgh in particular" has supported adoption. "We want to clean that up," Hughes says, adding that "for the chief law enforcement office of the country to permit that

process" of end-runs is "absolutely wrong."

Short-sighted solutions

Colville also believes the law's requirement that the money go for enforcement purposes restricts other, equally beneficial, uses. He would like to use more money for drug prevention and rehabilitation programs — uses that are strictly limited under federal sharing rules.

For example, federal guidelines permit forfeiture funds to be used to underwrite classroom drug education programs but only if they're presented by police in uniform, Colville says. He'd like to send in health officials as well, to "get a different, equally important message across.

"I've come to the belief as a prosecutor that aggressive prosecution alone won't solve the problem. Guys I arrested 25 years ago when I was a policeman I still see coming back into the system. We need to address underlying social and economic problems." He has advocated using forfeiture money for the likes of summer jobs programs in drug-plagued neighborhoods, an idea rejected by the federal government.

Hughes, the New Jersey congressman, says he regrets earmarking all the federal forfeiture funds for law enforcement purposes, but cannot find support for changing the stipulation.

He originally thought police would need every dime they took in to pay for complicated investigations and assumed the forfeited goods would just cover the cost. Once the kitty grew, he figured, then money could be set aside for areas such as drug treatment.

But the coffers grew much faster than expected and now it is proving hard to get police to give up the money. "We never dreamed we would be seizing $1 billion. Now the coffers are overflowing, but using the money in different ways is a touchy point at Justice."

Not even appeals from Louis Sullivan, secretary of Health and Human Services, compel a change. During an interview in Pittsburgh last week, Sullivan said he has asked that forfeiture funds go partially toward drug rehab but Justice turned him down repeatedly.

Justice recently turned down a proposal from Jackson Memorial Hospital, a cash-poor public hospital in Miami, to use $6 million seized during a south Florida money-laundering case to build a new trauma center.

The hospital is known in the industry as a "knife-and-gun-club" because of the volume of shootings and stabbings it handles. Police investigate nearly 85 percent of the hospital's cases.

In its proposal, Jackson suggested training medical staff to spot injuries that are the result of a crime, adding on-call photographers who would specialize in taking pictures of victims for use during trials and improving preservation of damaged clothing, bullets and other pieces of evidence.

The idea had bipartisan support from Miami's congressional delegation, Metro-Dade police and the U.S. attorney's office in Miami.

The memorandum from Justice rejecting the idea came from Terwilliger, who wrote that seized money must go to official use which "typically, has included activities such as the purchase of vehicles and equipment," including guns and radios.

But, says Hughes, "if the purpose is to deal with the drug problem effectively, Justice's reluctance to consider new ideas — particularly when it comes to treatment programs — seems to me to undercut their ultimate goal."

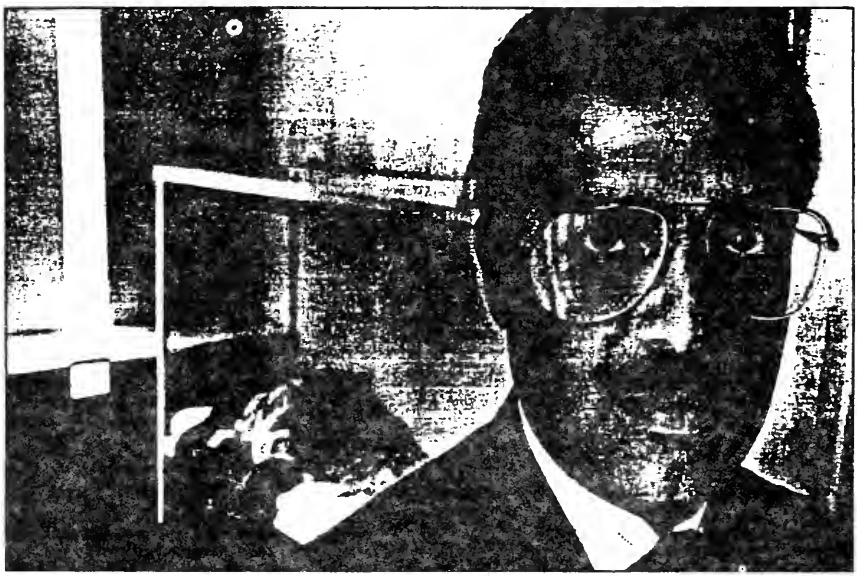
The Justice Department, which champions forfeiture as the law enforcement tool of the '90s, declines to talk about where the law is headed.

"I don't think it's appropriate in the context of a press interview to discuss potential policy and legislative issues," says Terwilliger.

But in not talking, the government "masks the details of the total emasculation of the Bill of Rights," says John Rion, a Columbus, Ohio, lawyer.

"The taxpayer thinks this forfeiture stuff is wonderful, until he's the one who loses something. Then, he realizes that it's not just the criminal's rights that have been taken away, it's everybody's." ●

Drug-fighting sheriff puts compassion before forfeitures



Patrick Schneider for The Pittsburgh Press

Robert Ficano says his Detroit-area drug team gives warning before seizing property

By Andrew Schneider and Mary Pat Flaherty

The Pittsburgh Press

In Detroit, Wayne County Sheriff Robert Ficano is an unabashed supporter of grabbing the spoils of the war on drugs, but he tempers his fervor for forfeiture with controls.

Ficano appears to be running precisely the type of drug interdiction program authors of forfeiture and seizure legislation envisioned.

It aggressively pursues drug criminals, it has procedures that protect innocent citizens, and it shows compassion — right down to the teddy bears narcotics agents carry to drug raids on homes where children live.

In addition, it turns forfeited money right back into more drug investigations. It can do that, because the confiscated money has allowed it to create a new interdiction team devoted to stopping narcotics.

"We started with two officers out of the Wayne County Jail and we wanted to see if they would be able to seize enough in their raids, for them to pay for their own salaries," he says.

That first year, in 1984, they seized $250,000.

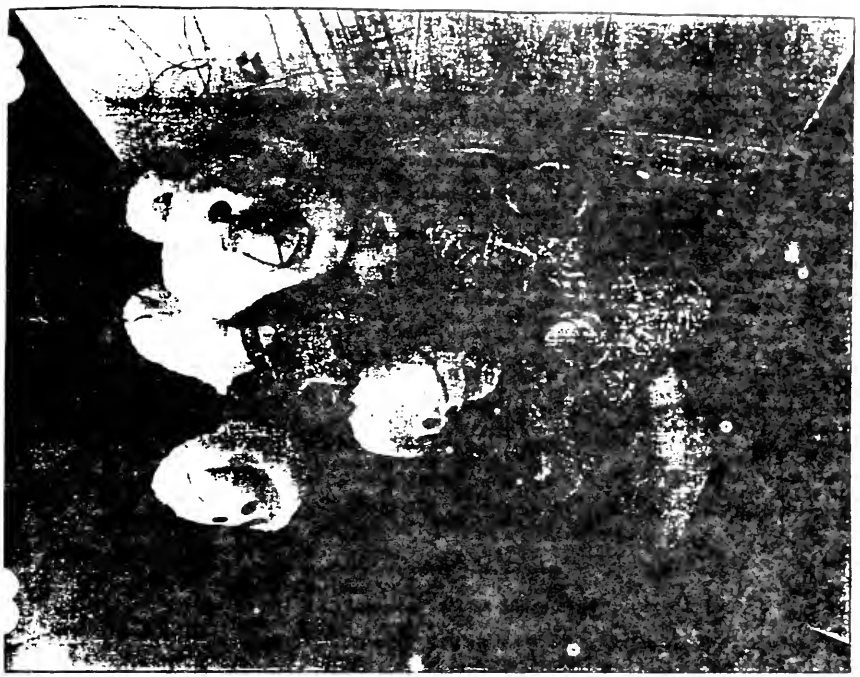
"Last year we seized over $4 million. And we've been able to completely fund the narcotic unit out of these forfeited funds," Ficano says.

Today he has 35 officers, 3 drug dogs and all the weapons, surveillance and communication gear needed to equip a modern drug team, with a $2.2 million budget.

"There isn't a dime of it from taxpayers' money that's used. So, in essence, you have the crooks paying for their own busts," he says.

The public's fear of drugs helps win support for forfeiture. "However, we in law enforcement have to ensure that a balance is always kept. You can't violate people's rights.

"Whenever you push a law, a tool, as far as you can go and get up toward the edge, it becomes a difficult bal-



Teddy bears that police in Detroit area give to children present during drug raids

ance. There's a responsibility that goes with it.

"In the area of forfeiture and seizure, I think we've probably gone as far as we can and still be accepted by the public and by the courts. I think we're near that edge," the sheriff says.

To maintain balance, Ficano instituted a series of steps that had some of his 900 deputies grumbling at first that he was going soft.

One of his major targets, he says, is closing crack houses, shooting galleries and other residential drug operations.

"We want these properties cleaned up and under the law we can seize them, but a surprising number of owners of drug houses have no idea of the activity, so we make sure they know what's going on," the sheriff says.

Ficano sends owners two written warnings that illegal activities are occurring on their property and that repeated arrests have been made.

"The first time we do it, we tell them what we found on their property and some of the things they can legally do to get these drug traffickers out," Ficano says. "We'll warn them a second time. The third time, we move to seize the house."

He admits he could make more money if he grabbed the property at the first violation, as many other departments do.

"But the motivation shouldn't be just seizing property. If we can get the public, the owners, to stop the trafficking, then we've accomplished an important goal," he says. "The warnings are needed because you just shouldn't wipe someone out, someone who may be innocent, without giving them a chance."

He also gives warning to drug buyers driving into the county.

In some crack areas, he says, neighborhood streets that in the middle of the afternoon should be peaceful and tranquil look like the parking lots at the University of Michigan stadium on a football Saturday.

In conjunction with local police departments, Ficano took out newspaper ads cautioning, "Buyers of Illegal Drugs, Take Notice." The ads listed descriptions of some of the 210 cars that have been seized from recreational drug users — and the neighborhoods of their owners — and warned drug buyers to stay out of Wayne County or risk losing their vehicles.

Similarly, he gives a couple of chances to innocent owners of cars used by someone else in drug trafficking. After the first warning, they can claim innocence, that they didn't know that someone else was using the

car to buy drugs. The second time the car is stopped, it costs owners $750 to get it back. If there's a third time, it's a seizure.

"A lot of these people need the cars to go to work or school, so we give them every chance we can, but it's got to stop."

He bristles when asked if he's soft on drug traffickers.

"Look at our arrest records — over 300 raids and 1,000 arrests last year — we're not soft at all," Ficano says. "We can enforce the law and be aggressive about it, but we can also do it with some compassion and the common sense that is supposed to come with the badge."

Safeguards and tight controls are a must, he insists.

"We do not want cowboys. We do not want officers who follow the typical stereotype drug cop from 'Miami Vice' and other TV shows. Seizure is an important tool, but we'll lose it unless we keep a heavy emphasis on respecting individual rights."

Sitting atop the TV set in his office is a very un-"Miami Vice" prop: an 18-inch, black-and-white speckled teddy bear.

"The biggest deputies we have can be distressed watching a child react to a parent or both parents being arrested after a drug raid. It eats away at you," the sheriff says.

The bears are kept in the trunk of the unit's cars and vans, he says.

"If there is a raid or property is being seized and there are children involved, our deputies can pull the bears out to, hopefully, calm down the children," Ficano says.

It's difficult to envision a brawny SWAT officer, decked out in a helmet and bullet proof vest, carrying a gun in one hand and a teddy bear in the other. But the narcotic unit's weekly search warrant and arrest report has a column headed "Number of Bears."

The reports for the first two weeks of May show that two of nine bears given out were given as officers seized property.

"If there's something that can be done to reduce the pain that accompanies some of the things we have to do, why not do it?" Ficano asks.

The one area Ficano was hesitant to discuss in detail was the activity of his men as part of the Drug Enforcement Administration's joint task force at Detroit's Metro airport.

Some lawyers, including the American Civil Liberties Union, have criticized the DEA team for being overzealous in seizing cash from suspected drug dealers.

The sheriff did say safeguards exist to prevent improper stops, but added that DEA directed him not to discuss his airport work.

While his drug unit is among the biggest moneymakers in the country, and the forfeited funds are key to financing that unit, he says there is a "very clear limit" on how far he will go.

"These new laws open all sorts of new areas for seizing the assets of drug traffickers. We'll use accountants, people with business and banking expertise — all sorts of non-traditional police skills to try to track and forfeit every dollar these dealers are making.

"But there's a line that we won't cross," Ficano says. ●

Editorial / Aug. 11, 1991

Unreasonable seizures

The "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" is enshrined in the Fourth Amendment to the Constitution.

For the most part, this bedrock right is so firmly entrenched, so thoroughly borne out by experience, that Americans take it for granted. When we read of an honest family deprived of its savings or its home or farm at the whim of the police, we assume an isolated abuse or think smugly of faraway tyrannies unblessed by our cherished Bill of Rights.

At least we used to. The remarkable series "Presumed Guilty," by Pulitzer Prize-winning reporters Andrew Schneider and Mary Pat Flaherty, now running in this newspaper, paints a startlingly different picture. It documents a rash of unreasonable seizures unintentionally spawned by the war on drugs.

The opening for this corrosion of civil rights was the amendment of the racketeering laws, starting in 1984, to permit authorities to confiscate possessions of suspects never charged with crimes, much less convicted. This radical departure from traditions of law was justified in terms of "seizing the assets of drug criminals," as the White House National Drug Strategy put it, and helping "dismantle larger criminal organizations."

So much for intentions. Mr. Schneider and Ms. Flaherty's 10-month investigation documents more than 400 cases of innocent people forced to forfeit money or property to federal authorities. These victims are farmers and factory workers, small-business owners and retirees. Often, their only offense was exhibiting behavior or personal traits considered typical of drug couriers.

But even among people convicted of crimes, some penalties were wildly disproportionate. Should a family be permanently robbed of the farm that is its home and livelihood because six marijuana plants were found growing in a field?

"Presumed Guilty" is a withering indictment of the forfeiture laws. This page will explore its implications in the coming days.

Editorial / Aug. 14, 1991

What price this war?

In its zealous prosecution of the "war on drugs," the government undeniably and intolerably has trampled the rights of countless innocent people.

Using hundreds of wide-open federal and state seizure laws, police and prosecutors have taken homes, cash and other personal possessions of people whose only offense was being in the wrong place at the wrong time or fitting some officer's or informant's preconceived, and likely racist, notion of what a criminal looks like.

In some localities, government seizures take on the trappings of a criminal enterprise, with prosecutors, police departments, judges and tipsters conspiring to grab someone's property and divvy it up, all without regard to due process of law.

Those on the receiving end of such injustices are to be excused if they come to regard the government itself as a corrupt organization.

The abuses are documented in a continuing series, "Presumed Guilty," by reporters Mary Pat Flaherty and Andrew Schneider of The Pittsburgh Press.

The series examines the effect of a 1984 change in the federal racketeering law that allows police to seize the property of those even marginally involved with illegal drug activity. No conviction is required, only a showing of "probable cause." The idea was to deprive drug traders of their trinkets and baubles: the jewelry, cars, boats and real estate bought with illegal proceeds.

The kicker was that the assets would revert to the law enforcement agency that seized them, with proceeds going to finance the fight against drugs. Some $2 billion has been generated for police departments, much of which no doubt has been put to good use.

But there are instances — far too many of them — in which financial incentive and lack of safeguards have pushed the "good guys" over the line.

In Hawaii, federal prosecutors combed through records of old cases looking for opportunities to seize property. They took the home of Joseph and Frances Lopes, a couple of modest means whose son had pleaded guilty four years earlier to growing marijuana in the backyard for his personal use. "The Lopeses could be happy we let them live there as long as we did," an arrogant G-man snorted.

At some airports, counter clerks spy on customers, looking for those carrying large amounts of cash. They tip off the cops and collect a cut of the loot if there is a seizure.

Police, using dubious "profile" criteria that disproportionately target minorities, stop people like Willie Jones, a landscaper from Nashville. Mr. Jones' "crime" was to be carrying cash on a trip to Houston to buy shrubbery. He was relieved of $9,600 by Drug Enforcement Administration agents.

Like 80 percent of those whose property has been taken, Mr. Jones was not charged with a crime. He's still fighting the government to get his money back.

The reporters' 10-month investigation revealed more than 400 cases from Maine to Hawaii in which the rights of innocent people were steamrollered. Their findings should send a chill up the backs of all citizens — most particularly those in the law enforcement community who must act to salvage the credibility and legitimacy of the war on drugs.

Editorial / Aug. 18, 1991

Seizure: Out of control

Less than four months from now, on Dec. 15, to be exact, the 10 original amendments to the U. S. Constitution — the precious Bill of Rights — will be 200 years old.

For two centuries, these superbly crafted safeguards have served to protect the individual rights of the American people, withstanding attempt after attempt to erode the liberty guaranteed by the Constitution.

But seven years ago, Congress, in a well-intentioned but poorly executed attempt to step up the war on drugs, twisted some of the guarantees until a crack developed. Since then, money-hungry law enforcement agencies across the country have slammed wedges into the breach, creating a gap of frightening dimensions.

Compromised, indeed, even seriously endangered by the Congressional fervor of the Orwellian year of 1984, are three basic rights.

No longer is an American assured by the Fourth Amendment that he or she will not be subjected to "unreasonable searches and seizures." No longer does the Fifth Amendment assure that private property will not be taken "for public use without just compensation." And no longer does the Eighth Amendment protect anyone from "cruel and unusual punishment."

Blame Congress. By changing the federal forfeiture law, aimed at curbing drugs by causing hardships to dealers, Congress in 1984 gave law enforcement agencies the power — and even an incentive — to abridge these rights.

How the law has run rampant over the rights of individuals since then was startlingly documented during the past week in The Pittsburgh Press. Reporters Andrew Schneider and Mary Pat Flaherty, in six chilling installments, documented more than 400 cases of innocent people falling victim to government out of control.

They found that police, using hundreds of federal and state seizure laws, have confiscated $1.5 billion in assets and expect to take in $500,000 more this year. But, it turns out, for every drug lord and dealer who loses his ill-gotten treasures to the government, there are four innocent people who are being victimized — fully 80 percent of the people who lose property to the federal government are never charged with a crime.

They are searched, unreasonably in most cases, and after fitting a profile that is likely racist. Their property is taken with not even a thought of compensation. Their homes, their farms, their very life savings are confiscated in as cruel and as unusual a punishment as one can imagine.

Why? Because the forfeiture law calls for funds derived from seizures to be turned back to law enforcement agencies, to be used to continue the war on drugs.

That's a cunningly attractive concept — crime paying for its own investigation and prosecution. In practice, though, the theory falls distressingly flat, the victim of human greed.

Law enforcement agencies, on the hunt for dollars, are on a seizure binge, taking property indiscriminantly and without compassion. People only marginally involved with a drug investigation, people who never were charged with a crime, have lost their homes, money and belongings. So have those who were charged and cleared.

Some were even the victims of bounty hunters — those who, for a piece of the seizure pie, become informants. As it stands now, anybody with a finger to point can share in money seized from a person they tab as "suspicious."

But because it doesn't matter whether their target is guilty or innocent — just whether there is a seizure of property in which they will share — the system is wide open to abuse. And it has been abused, to the point where innocent travelers have been detained, searched and stripped of their money.

Even some police shudder at what is happening. Wayne County (Detroit) Sheriff Robert Ficano, who, while agresssive in leading his drug war, is careful not to wage it at the expense of the rights of individuals. "Seizure is an important tool," he said, "but we'll lose it unless we keep a heavy emphasis on respecting individual rights."

He's right, of course. Seizure has been, is, and should continue to be a big gun in the war on drugs. But it can't be a shotgun, blasting away at innocent people who happen into its path.

The legal massacre uncovered by Mr. Schneider and Ms. Flaherty must stop and only Congress has the necessary remedial power.

The forfeiture law must be overhauled once again, due process restored, the bounty hunters disenfranchised and seizure of property permitted only after an individual has been convicted of a crime.

All we are demanding, after all, is that Congress pay attention to a 200-year-old list of guarantees that was ignored in 1984.

PRESUMED GUILTY

About the authors

Mary Pat Flaherty, 36, is a graduate of Northwestern University who has worked for 14 years at The Pittsburgh Press where she currently is a special editor/news and a Sunday columnist.

In 1986, she won a Pulitzer Prize for specialized reporting for a series she wrote with Andrew Schneider on the international market in human kidneys. She was the first recipient of the Distinguished Writing Award given by the Pennsylvania Newspaper Publishers Association; twice has won writer of the year awards from Scripps Howard and has received numerous state and regional reporting awards.

Her assignments at The Press have included coverage of the 1988 Olympics in Seoul and a 5-week trip through refugee camps in Africa.

Andrew Schneider, 48, began reporting for The Pittsburgh Press in 1984. Since that time, he has won two consecutive Pulitzer Prizes: in 1985 for the series he co-wrote with Mary Pat Flaherty on abuses in the organ transplant system, and in 1986, for a series with Matthew Brelis, on airline safety, which also won the Roy W. Howard public service award.

His other work includes a series with reporters Lee Bowman and Thomas Buell on safety problems of the nation's railroads and a series with Bowman, exposing deficiencies in Red Cross disaster services.

Before joining The Press, he worked for UPI, the Associated Press and Newsweek. He is the founder of the National Institute of Advanced Reporting at Indiana University.

Orlando Sentinel

The best newspaper in Florida

SUNDAY, June 14, 1992—TUESDAY, August 4, 1992

Tainted cash or easy money?

Case histories

Jose Raposa	Edwin Johnson	Hersel Lawson
New Bedford, Mass.	Miami	Roanoke, Va.
Paint-shop owner	Lawn-care business owner	Car salesman
Age: 29	Age: 48	Age: 35
Amount seized: $19,000	Amount seized: $36,823	Amount seized: $31,000
Amount returned: $14,250	Amount returned: $28,823	Amount returned: $27,250
Sheriff's take: $4,750	Sheriff's take: $10,000	Sheriff's take: $3,750
Charges: None	Charges: None	Charges: None

Volusia deputies have seized $8 million from I-95 motorists. The trap is for drug dealers, but money is the object. Three of every four drivers were never charged.

[redacted]
OF THE SENTINEL STAFF

DELAND — Volusia County Sheriff Bob Vogel's elite Interstate 95 drug squad has taken tens of thousands of dollars from motorists against whom there is no evidence of wrongdoing nor any criminal record.

In one case, a woman lost part of an emergency loan to fix her hurricane-damaged home. On another occasion, grandparents lost part of their retirement nest egg.

Special report

And in virtually every case, the people stopped and stripped of their cash were either black or Hispanic.

Seizing cash from drug dealers is nothing new. But a review of records by *The Orlando Sentinel* raises questions about tactics and about the ethics of allowing this freewheeling drug squad to beef up the sheriff's budget with selective traffic stops of people never charged with a crime.

The findings:

- In 199 of 282 cases — three out of every four — no charges were filed. Yet in only four cases did drivers get all of their money back.
- Although Vogel contends that the stops are legitimate, nine of every 10 seizures involve blacks or Hispanics.
- Rather than go to court to defend seizures, the agency cuts deals with the drivers, drug dealers included. Motorists can get some of their money back if they agree not to sue the agency.
- If a driver won't agree to a car search, a

Please see **TRAP, A-16**

drug-sniffing dog is standing by. But the Sentinel found evidence that most Florida currency carries traces of cocaine, casting doubt on the practice.

■ There are no written rules governing seizures. No higher authority outside the agency reviews results. There is no penalty for frivolous stops or seizures.

A broadly written state law allows the sheriff to keep whatever is seized, regardless of whether a crime was committed.

For the drivers, the realization hits like a hammer: The law allows their money to be taken, and there isn't much they can do.

"It's highway robbery," said David Vinikoor, a Fort Lauderdale defense lawyer.

Vinikoor, as a prosecutor, fought for passage of Florida's 1980 seizure law. "The concepts of guilt and innocence," he said, "have gone out the window."

Consider the case of Joseph Kea.

In March 1990 Deputy Bobby Jones stopped Kea for driving six miles above the speed limit. Kea, a 21-year-old black Navy reservist from Savannah, Ga., said he was going to Miami to school.

After issuing a warning, Jones got Kea's permission to search the car. Jones found no drugs, no evidence of wrongdoing.

But Jones found Kea's Navy uniform in the trunk, along with $3,989 in a nylon bag.

Jones said Kea was unusually nervous, that he had no luggage and had folded his money in groups of $100. He also noted Kea's wrinkled uniform and scuffed shoes, things no legitimate military man should allow.

Jones decided Kea was a trafficker and took the cash.

Through Jacksonville lawyer Willie J. Walker, Kea provided Navy pay stubs to show the source of the money and a resume showing a steady salary and work history.

A sheriff's investigator probed Kea's background but found no dirt, no criminal record.

At one point, even the investigator appeared to have doubts about the case. In the case file is a letter from Walker on which someone at the Sheriff's Office wrote: "Bobbie (sic) Jones doesn't care if the money is returned."

After eight months of fruitless demands, Kea agreed not to sue. He got back $2,989, of which his attorney got about 25 percent. The Sheriff's Office kept $1,000.

Since the practice started in 1989, the Sheriff's Office has seized almost $8 million. The agency has kept about half, after working out settlements with motorists' attorneys.

Vogel defends his seizures, saying deputies are hitting dealers where it hurts — in their wallets.

The stretch of highway where the enormously popular sheriff battles dealers is a key artery for tourists headed for Disney World. It's the fast track to Daytona Beach for bikers and spring breakers.

And it's the "mule" trail for drug couriers heading for South Florida, the entry point for most illegal drugs entering the country.

"There's no secret we live in the drug capital of the world," Vogel said.

The sheriff said his seizures should not be scrapped just because there might be "a few number of cases that there might be some legal questions ... that I can't respond to.

"Are you suggesting then that we let them [drug dealers] go and not seize the illegal drug money?

"If you don't like the statutes ... then you get the doggone statutes changed. We don't have to prove the fact that they are guilty."

A review of agency records shows that it is not simply a question of what officers can prove. Case files show that some motorists lost money simply because officers were suspicious.

Informal settlements

There is pressure to reform seizure laws at both state and national levels. Revisions to Florida's law go into effect July 1. They will force some changes in Volusia County's procedures, but critics say they don't go far enough to prevent abuses.

Plenty of law enforcement agencies seize cash. The Metro-Dade Police Department in Dade County, for example, seizes more drug money than anyone else in Florida but won't do out-of-court settlements.

That leaves too much room for abuse, said Tom Guilfoyle, head of Metro-Dade's forfeiture unit. Instead, a judge must approve agreements.

In Volusia County, it's clear that most of the $8 million seized was drug money. In a quarter of the cases, arrests were made, mostly involving drugs. Many drivers had previous drug convictions. Some didn't even argue over the seizure.

But records show some drivers were stripped of cash simply because deputies — saying they were well-versed in the habits of dealers — didn't like something they saw.

One driver was deemed suspicious because he didn't carry enough luggage, another because he carried too much.

Deputies routinely said bills in denominations of $1, $5, $10, $20, $50 and $100 were suspicious because they are typical of what dealers carry. But that leaves few alternatives for others.

"If they can't prove it was involved in illicit activity," said South Florida forfeiture lawyer Sharon Kegerreis, "then why should they get to keep any of it?

"It's a new form of lawlessness."

Vogel disagreed: "I am totally convinced that the people that are working in our Selective Enforcement Team ... feel wholeheartedly that those individuals are involved in drug activity or illegal activity."

Most shocking for drivers is the realization that the due-process provisions that protect criminal defendants' rights don't apply.

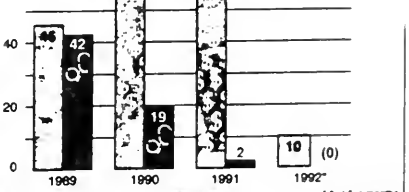
The presumption of innocence is gone. In this civil arena, drivers have to prove their right to carry cash.

Hiring an attorney to contest seizures can be expensive. To win a suit against the agency for legal costs, a driver would have to prove that deputies had no basis for seizure. That's extremely difficult; to take money, deputies merely have to show "probable cause" that a crime has been, or will be, committed.

Ultimately, that little-known trapdoor provision means that it's less expensive to settle out of court.

Cash seizures

The Selective Enforcement Team made most of its arrests in 1989, the year the seizure program began. Arrests fell rapidly since, while no-arrest cash seizures climbed. Today, cash seizures are a fraction of what they had been in previous years.



Source: Sentinel research; Volusia County's Sheriff office

BRENDA WEAVER/SENTINEL

the driver is innocent.

Presumed guilty?

Consider, for instance, the case of Jose Raposa, owner of Tri-Star Paint Shop in New Bedford, Mass. Raposa, 29, had $19,000 seized by Deputy Jones on May 2, 1991.

Jones didn't believe Raposa's story that he was headed to Miami to look for antique cars he had seen in a car-trader magazine or that he had gotten a home-equity loan because car dealers require cash.

Jones said Raposa was more nervous than the average person. Jones noted marijuana in the ashtray, although it wasn't enough to warrant a citation.

Raposa hired an attorney, who submitted bank documents showing the loan.

Volusia County investigator Paul Page followed up but found no criminal record.

A note to Mel Stack, the agency's forfeiture attorney, scrawled on one of Page's investigative reports stated: "Mel: Paul indicated pretty strongly that they can turn nothing up concrete on this guy."

After six months, Raposa accepted a settlement offer: The sheriff kept 25 percent; Raposa got 75 percent, of which his attorney collected $1,000.

"They should have given all my money back," he said, "but the lawyer said go for the deal."

It was the same for others who had no significant criminal record and against whom there was no evidence of wrongdoing.

Edwin Johnson — a 48-year-old black self-employed businessman and father of four — lost $10,000 in a settlement.

"If I had had the money, I would have fought longer," he said. "But it had gone on long enough. It caused me and my family a lot of pain."

Stack said the cases questioned by the newspaper were not "a representative sample" and likely would not cast the agency or the practice in a good light.

Ed Duff Jr., a former state assistant attorney general and son of former Volusia County Sheriff Ed Duff, said: "I don't think the Legislature intended the forfeiture law to be used this way."

It's one thing for a guilty person to lose 50 percent of his or her money, Duff said. But, "if you're innocent, even 1 percent is too much."

The objective: Cash

Chief Circuit Judge McFerrin Smith was dismayed by the *Sentinel's* findings and questioned whether the agency was more interested in curbing crime or collecting cash.

"At best, it looks borderline, doesn't it?" he asked.

Vogel disputed that analysis. As a whole, the agency is heavily involved in fighting drugs and makes numerous arrests, he said.

But for the drug-seizure squad, the bottom line is the bottom line. It has collected the equivalent of roughly $5,000 a day during the past 41 months.

Vogel said the squad tries to build criminal cases from its cash seizures.

Yet only a fourth of all seizures involve on-scene arrests. And although the agency conducted follow-up investigations when drivers contested seizures, it has never made an arrest as a result.

The follow-up does play a role, though, in further solidifying the decision to take money. In the case of Hersel Lawson, a 35-year-old Virginia businessman, two officers became suspicious during a visit to Lawson's used cycle shop in Roanoke.

Their report criticized the shop as dirty and lacking adequate parking and display space.

would keep half of the $31,000 seized. Ultimately, Lawson's attorney was able to reclaim all but $3,750. But the settlement battle took seven months. Lawson's attorney got about 25 percent of the recovery.

"I was so stunned by it all, I didn't know how to react," Lawson said. "I've got a spotless record except for traffic tickets."

There are other ways in which records show that the emphasis is on collecting cash, not making arrests.

The five-man drug team works a combined 200 hours a week, stopping southbound cars.

It does occasionally stop cars in northbound lanes, where a drug dealer more likely would be carrying cocaine or marijuana. But records show that almost all cases were made in southbound lanes, where a dealer is more likely to be carrying cash.

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.

There was the case of two brothers stopped Jan. 29, 1989, on their way south. The two were asked to wait in the back of a patrol car during the search. In a secret recording made of their conversation, one says to the other that the drug-sniffing dog had "missed the reefer."

Deputy Frank Josenhans, who seized $9,540, said: "Look, I could arrest you for conspiracy to traffic cocaine, but it's not worth it."

Five months later, Josenhans again stopped one of the brothers and seized $36,864.

The officer kidded the driver about the dangers of his "occupation." Josenhans again noted that he could arrest him but wouldn't.

"He thanked me," Josenhans wrote.

The agency offered a settlement; the brothers accepted. The Sheriff's Office kept $24,249; the brothers got back $22,155.

"Think about that," South Florida forfeiture lawyer Carl Lida said. "Why would a police department give back what they think is drug money?"

Vogel said that he did not know, until interviewed in May by the *Sentinel*, that so many cases — three of every four — ended in settlements.

"I'm assuming those decisions are being made accurately," he said. "And if they're not, then we adjust the policy, we make corrections, we make changes."

Stack said that there might be questions about the propriety of negotiating settlements. But he said it's no different from plea-bargaining in criminal cases.

Stack said his job is to do what's best for his client, the agency. "It's a business. We don't want the wrong case to go up on appeal."

Circuit Judge Uriel Blount Jr., a 28-year veteran of the Volusia County bench, was dismayed to hear that two-thirds of the seizures involved less than $20,000 and that settlements occurred so frequently without judicial supervision.

"What you're telling me is somewhat surprising," Blount said.

The solution, according to forfeiture lawyer David Raben: "We need some congressman's kid to get stopped so people can see what this is like."

The series

Today: No one was charged in 3 of every 4 cash seizures by the squad.

Monday: Nine of every 10 seizures involves a black or Hispanic motorist.

Tuesday: Sheriff Vogel spends more fighting drugs but hasn't fared better.

Tainted cash or easy money?

Deputies take $19,000 and leave a woman in despair

☐ A hidden microphone records the words of a woman as deputies search her car: 'The Lord is my Shepherd . . .'

By Jeff Brazil and Steve Berry

OF THE SENTINEL STAFF

When Volusia County's Selective Enforcement Team deputies search cars they consider suspicious, occupants are asked to wait in a patrol car.

There, a hidden microphone records anything said.

The Sheriff's Office doesn't tell drivers they are being recorded nor does it issue a Miranda warning, because occupants are not being arrested.

When incriminating statements are made — as in the case of the motorist who told his traveling companion that the deputy's dog had "missed the reefer" — they're used to support the decision to seize money.

Sometimes, though, the tapes paint a different picture as in the case of two black motorists stopped April 24, 1990, while traveling from South Carolina to Miami.

Selena Washington, a 43-year-old Charleston woman who owns several pieces of real estate, and John Washington, her 41-year-old cousin, got a warning for traveling 72 mph in a 65 mph zone.

Afterward, they let the deputy search the car.

The tape begins with Selena Washington telling the deputy that the $19,000 he has found in her car is for repairs to her Charleston home, damaged by Hurricane Hugo. Because the price of building materials had skyrocketed in coastal South Carolina since the hurricane, they had decided to drive to Miami to hunt bargains.

She wants the deputy to call someone — it is not clear whom — to verify her story.

The deputy directs Washington and her cousin to the back of his patrol car but assures them that they are not under arrest.

After a few moments, he returns.

Deputy: Right now, we believe this is drug money.

Selena Washington: Oh no, sir.

Deputy: If it turns out this is drug money, we're going to seize it.

Selena Washington: No, sir. You can go and call back to Charleston and . . .

Deputy (interrupting): Well, we can't do that tonight. So just let me finish my investigation.

Selena Washington: Oh. OK. I'm sorry.

The deputy leaves.

Selena Washington to John Washington: You ain't got nothing stupid in there have you?

John Washington: No.

Selena Washington: Drug money? I don't know nothing 'bout no drug money.

John Washington: Drugs?

Selena Washington: He crr-razy. Drug money? I don't know nothing about no drugs. Drugs? Lord a mercy, what is drug money?

The deputy returns, and they discuss the money.

She repeats her explanation that the money is for building materials — plywood and marble — that she would buy in Miami and have shipped to Charleston.

She again asks him to call to verify her story.

The deputy refuses.

Deputy: We believe this is drug money right now.

Selena Washington: No, sir. Whatever you want to do, we can do. You look through my papers and see who I is.

Deputy: We'll do that.

Selena Washington: OK.

The deputy leaves. There is a long silence. He returns, asking her to prove that she owns the money.

Selena Washington: I tell you what. We can call back to my father, my son, J.E. Washington. He's a probation judge. My father's name LeRoy, and he works for the state highway. My name's Selena Washington. I'm a Realtor instructor.

Deputy, referring to another deputy: He feels this is drug money. He's going to confiscate it. You have the right to follow us back [to the station] and get a receipt.

Selena Washington: I don't have any money on me. Give me something to make arrangements. This is why I brought cash money because I know they not going to take a personal check from me.

Deputy: No. If he gave you any of it, he feels he would be giving drug money back.

Selena Washington: Oh, my. Can I go to the station and make a call?

Deputy: No. What you are going to have to do is to get you an attorney and c back at a later time. This is going to be cided by our attorney.

Selena Washington: I really need a (u telligible).

Deputy: I can understand that. Have ther of you ever been arrested for anythi

Selena Washington: No.

The deputy leaves.

Over and over again, she recites Ps 23: "The Lord is my Shepherd. I shall want . . ."

The deputy returns.

Deputy: We're about done here. T ends.

Postscript: A records check verified Selena Washington had no criminal hist She also provided canceled checks sworn affidavits to support her explanat of how she came by the money.

She wanted to fight, but her attorney, chael Blacker, told her it would cost much, the law makes it nearly impossible recoup legal fees and court costs.

After eight months, the departm agreed to give back some of her money.

She accepted the deal and got ba $15,000. The department's take: $4,0 Blacker was paid $1,000.

Transcript

Seizing cash is no sweat for deputies

By Jeff Brazil and Steve Berry

OF THE SENTINEL STAFF

For Volusia County deputies, seizing money is simple.

They stop a car for following too closely, for instance, or for changing lanes without signaling. Then, if they are suspicious, they search the car.

Of 199 no-arrest seizure cases during the past three years, three-quarters of the stops were for one of four minor infractions: failure to maintain a single lane, following too closely, defaced license tag or broken taillight.

The most serious violation shown as a reason for a stop — driving more than 11 mph faster than the speed limit — occurred in six cases.

Not one of those speeders was ticketed. And of the 199 drivers, only 13 got tickets.

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 then would pause, return to the car and ask for 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 a driver's consent.

How it works

The decision to take money is left to deputies.

Their decisions are almost never second-guessed. Drivers got all their money back in only four of the 199 no-arrest cases, though a significant number of motorists had no criminal records and provided documentation that they said showed they came by their money legally.

Success counts. Seizure team supervisor Bobby Jones was promoted to sergeant after making several big seizures.

One-fourth of the drivers whose money was seized but who were not arrested got back into their cars and weren't heard from again.

In such cases, the agency lists the seizure as a forfeiture by default, meaning that the driver or passengers were assumed to be drug "mules" who would not risk further contact with authorities by contesting the seizure.

The other three-quarters of the drivers contested.

At that point, the agency initiated a background investigation.

In more than three years, the agency has never arrested anyone as a result. Yet in every case the deputy filled out an investigative report stating that the seizure was justified because, in his professional view, the driver or passengers, were "traffickers."

Ultimately, the agency cut a deal with every "trafficker," usually keeping 10 to 50 percent of the money and returning the rest.

Settlements are handled by the sheriff's forfeiture attorney, Mel Stack, who uses his own discretion to cut deals. Stack was paid $44,000 a year as an employee to handle settlements. He resigned in mid-1990 to start his own firm. Sheriff Bob Vogel now pays him $48,000 a year as a consultant to decide how much to give back.

Stack said the deal often involves his "gut feeling."

In three years, only one no-arrest case has gone to trial. When the judge heard about Gregory Walton's lengthy criminal record, he awarded the sheriff the full amount seized, $22,520.

Walton initially filed an appeal with the 5th District Court of Appeal in Daytona Beach but didn't follow through.

'How could they say they treated me fairly?'

By Jeff Brazil and Steve Berry

OF THE SENTINEL STAFF

Jorge Nater and his wife would like to come back to America — six of their seven grandchildren live here — but it will be awhile.

The Puerto Rican couple's run-in with the cash-seizure squad has left them bitter.

Volusia County Deputy Sheriff Ray Almodovar stopped Jorge Nater, 48, and family friend Francisco Muriel for following another car too closely Feb. 4, 1991. Almodovar searched their car and seized $36,990, saying the pair were drug traffickers.

The deputy didn't believe Nater's story that he had sold an apartment complex in Puerto Rico three days earlier to a man in New Jersey. The deputy also didn't believe Nater when he said he was headed to Brevard County, where four of his sons live and that he was going to buy a home in Pompano Beach.

Pointing to Nater's guilt:

He was more nervous than the average person, Almodovar said. When asked where he was going, he had to look up the address.

Finally when Nater and Muriel were asked to wait in a patrol car during the search, a hidden microphone recorded Nater saying to Muriel that, if they were allowed to leave, maybe they should hide the money "in a tire."

Pointing to his innocence: Documentation confirming his real-estate transaction, including a sworn affidavit from the buyer; no criminal record; testimonial letters from the mayor, police chief and a priest in his hometown.

After nine months of fruitless demands and the realization that he probably couldn't recover court costs, even if he sued and won back his cash, Nater agreed to a settlement.

Case history

The Sheriff's Office returned about 84 percent of his money, all but $6,000. Nater's attorney, Jose Perez of Orlando, got about 25 percent of the recovery.

Both he and Nater remain outraged over the seizure.

"It's a little shocking," Perez said. "In some of these cases, I'm sure they're doing a good job.

"But in others they're taking it from innocent people. And they have the money — you have to fight to get it back."

In a recent telephone interview, Nater struggled to check his emotions. "How could they possibly say they treated me fairly when they took my money?" he said.

Robert Perez of the Sentinel staff contributed to this report.

Blacks, Hispanics big losers in cash seizures

☐A review of Volusia sheriff's records shows that minorities are the targets in 90 percent of cash seizures without arrests.

[redacted]
OF THE SENTINEL STAFF

When Volusia County Sheriff Bob Vogel's deputies stop a motorist and confiscate that person's money without making an arrest, you can almost be certain that the person is black or Hispanic.

An *Orlando Sentinel* analysis of agency records shows that Vogel's targets were blacks and Hispanics in the vast majority of cash-seizure cases.

Special report

Vogel's explanation is simply that whites are less likely to be involved in transporting drug money. He says that race is not a factor in deciding which cars to stop.

His five-man drug squad has been patrolling Interstate 95 looking for suspicious motorists since 1989.

But the *Sentinel* review produced statistics that

Please see **TARGET, A-6**

Sheriff Vogel says whites are less likely to transport drug money

TARGET from A-1

strongly suggest the Sheriff's Office uses a "drug profile" to target whom it stops, even though the state Supreme Court ruled that use illegal.

Court rulings allow use of the profile only to detain a driver after a stop for a traffic violation.

All told, there have been 262 seizure cases since the practice began. Three-fourths of the time, in 199 cases, there were no arrests. Officers simply confiscated cash.

In those no-arrest cases, more than 90 percent of the drivers or passengers were minorities. Less than 5 percent were white, records show. In the other 5 percent of cases, officers had not noted race in their reports.

Most drivers got a good portion of their money back, but they first had to promise not to sue the agency.

The records also show that minorities lost the most money.

In the cases with no arrests, officers seized $3.8 million from minorities; whites lost $628,200.

"What this data tells me is that ... the majority of money being transported for drug activity involves blacks and Hispanics," Vogel said.

Vogel said the stops are for traffic violations and that seizures are based on drug-courier indicators, such as nervousness, not race.

Vogel said the team stops plenty of whites, but most don't have drugs or drug money.

Paul Joseph, state president of the American Civil Liberties Union, called the statistics "startling."

"It would seem odd that nine of 10 people acting suspicious are black. It raises a question."

The program has been enormously successful, seizing almost $8 million and large quantities of drugs.

The Sheriff's Office kept half the money after settlements with drivers.

The *Sentinel* compiled data from every cash-seizure case in which no arrest was made.

Complete data for each of the 63 cash seizures involving an arrest were not available. After two reporters had spent more than a month reviewing seizure files, agency attorney Nancye Jones denied further access. Jones said the newspaper's review created liability for the agency, unless the cases first were purged of confidential information, such as drivers' criminal histories.

Data were collected, however, for 46 of the 63 arrest cases. It paralleled the findings in the non-arrest cases. The majority of motorists were black or Hispanic.

The sheriff said the newspaper's research was naive and a "liberal exploitation" of selected cases.

Married and the father of a teenage daughter, Vogel carries out everything with gusto, be it his hobby, antique-collecting, or his anti-drug crusade. He counts himself among the toughest of the get-tough-on-drugs crowd.

As a Florida Highway Patrol trooper, Vogel had a knack for catching smugglers that earned him spots on *20/20* and *60 Minutes* and helped elect him sheriff in 1988.

Vogel had developed a set of characteristics, which he called the drug smuggler's profile: mostly young males driving four-door sedans or rental cars at a few miles an hour over the limit.

Vogel's profile did not include race, he said. But statistics showed that most of his seizures involved minorities.

Later, several court cases challenged the profile. In 1990 the Florida Supreme Court ruled against Vogel, saying that — as a trooper in 1985 — he had improperly stopped Paul Clive Johnson, 29, of Paterson, N.J., on the basis of the profile. Vogel found four marijuana bales in the car.

In a companion case, however, the court ruled that Vogel was justified in using the profile to detain Travis Harris Cresswell, 43, of Massachusetts for 45 minutes. The court said the detention occurred after Vogel had made a legitimate traffic stop — for following too closely.

As a result of the rulings, the profile is restricted, not outlawed. After stopping someone for a traffic violation, officers may use it, along with other indicators of criminal activity, to justify detaining the driver, the court said.

Nevertheless, records show that most stops by Vogel's deputies for infractions so minor that t seldom interest officers enfon traffic laws. In almost every c deputies simply gave warnings.

It begins with officers who l tion their cars in the highway m an, perpendicular to I-95.

At night, deputies shine h beams and floodlights across road so they can estimate a driv age and see the license plate other indicators, Vogel said.

Colorado lawyer David Lane he thinks it's to see skin color.

"Why else would they be shir their high-beam lights across highway?" asked Lane, who file discrimination suit in Colora challenging similar profiles.

"Why do they need to look at driver? It's because they woul want to stop an elderly white cou with Disney stickers on their c he said.

Carl Lida, the attorney who rep sented Paul Johnson before the preme Court, said minorities particularly vulnerable.

"And if you're a minority, you especially afraid to make him n The traffic laws are being used an excuse to search," Lida said.

"Let me put it to you this w How many times have you e been stopped for a traffic violat and been asked to search your ca

Seizure case profile*

An analysis of the Selective Enforcement Team's cash seizure cases in which there were no arrests:

AGE		Speeding, 1-5 mph over limit	7%
18 to 29	52%	Speeding, 6-10 mph over limit	10%
30 to 39	25%	Speeding, 11+ mph over limit	3%
40 to 49	12%	Broken light	4%
50 to 59	3%	**ACTION**	
60 to 69	1%	Warning	77%
69-plus	1%	Citation	7%
Unknown	7%	No action	16%
SEX		**NUMBER PERSONS IN CAR**	
Male	73%	One	20%
Female	25%	More than one	78%
RACE / ETHNIC GROUP		**AMOUNT SEIZED**	
Black	65%	$1 to $5,000	18%
Hispanic	6%	$5,001 to $10,000	18%
White	6%	$10,001 to $20,000	27%
Unknown	2%	$20,001 to $30,000	14%
CAR		$30,001 to $40,000	5%
Out-of-state	58%	$40,001 to $50,000	4%
Rental	31%	$50,001 to $100,000	9%
Florida	13%	$100,001 and over	5%
REASON FOR STOP			
Failure to maintain single lane	35%		
Following too closely	27%		
Defaced tag	7%		

Source: Sentinel research.

Note: Some categories may not add up to 100 percent because of rounding off or incomplete agency reports.

MARK LOSEY/SENTINEL

A black man waits after Volusia County deputies pulled him over for minor traffic violations on Interstate 95.

The series

Sunday: No one arrested or charge in 3 of every 4 cash seizures.

Today: Nine of every 10 seizure volves a black or Hispa

Monday: Sheriff Vogel speaks out f fight drugs, but hasn't faired fantas

'I could win the battle but lose the war'

☐ After 6 months of trying to reclaim his life savings of $38,923, Edwin Johnson quit fighting and agreed to a settlement.

By Jeff Brazil and Steve Berry

OF THE SENTINEL STAFF

The last people Edwin Johnson expected to take his life savings were law enforcement officers.

Returning to Florida from Georgia on April 15, 1991, Johnson, 48, was stopped on Interstate 95 for not signaling to change lanes.

After giving a warning, Volusia County Deputy Sheriff Michael Frederick asked to search the car.

Johnson agreed.

"If I thought it would lead to what it did, of course, I wouldn't have let him," Johnson said. "But I'm a law-abiding citizen."

When Frederick found $38,923 in a bag in the trunk, he told Johnson he thought it was drug money.

Johnson said it was profit from his business, Ed's Lawn Service in Miami, and a previous one, Thirst Quenchers Inc., a discount beverage distributor Johnson owned for eight years.

Case histories

Johnson said he carried cash because he doesn't trust banks after being a victim of wage garnishment after a 1985 lawsuit.

Frederick found no drugs, no weapons and no evidence of wrongdoing.

Johnson, however, said Frederick told him he matched a drug courier profile.

Pointing to his guilt:

Johnson, who is black, was nervous. He didn't carry enough luggage. When asked to specify the amount of cash, he said, "30-some thousand," not the actual amount.

Pointing to his innocence:

Johnson's attorney, David Raben, provided accounting documents, tax forms, canceled checks, testimonial letters from Johnson's clients, records verifying the wage-garnishment story and a resume detailing Johnson's 28-year work record.

"Having experienced a writ of garnishment, ... he was disinclined to subject himself to a similar seizure," Raben wrote.

The agency checked Johnson's criminal history and found only a very old misdemeanor, which was insignificant, according to Mel Stack, the forfeiture attorney.

After six months, Johnson agreed to a settlement. "It seemed like they could outlast you," he said. "I could win the battle but lose the war."

Johnson got back about 75 percent of his money, $28,923. The sheriff's office kept $10,000. Raben got a third of the recovery.

"If they gave money back to innocent people," Raben said, "they'd have given it back to Ed Johnson."

Good record couldn't save man's money

☐ Hersel Lawson says calling him a drug trafficker is a 'joke.' But deputies weren't laughing when they took his $31,000.

By Jeff Brazil and Steve Berry

OF THE SENTINEL STAFF

Hersel Lawson Jr. told the Volusia County Sheriff's Office he would submit to a test — any test — to show that he didn't use drugs.

"I know it sounds silly," the 35-year-old Roanoke, Va., resident said. "But I never have. I've got a spotless record, except for traffic tickets."

Lawson's record was of little help April 15, 1991, when deputies seized $31,000, saying he was a drug trafficker.

Lawson told Deputy Ray Almodovar he owned a business in Roanoke and was taking the money, the proceeds of a bank loan, to Fort Lauderdale to open a bar with a friend.

Asked why he was using cash, Lawson admitted that his business was entangled in bankruptcy proceedings; he didn't want the courts to know about the money.

Pointing to his guilt:

The deputy thought that the story sounded suspicious. Lawson was nervous. He had the money in a Crown Royal whiskey bag, a popular carrying case among dealers. And there were four or five marijuana joints in the passenger side of his car, which Lawson said belonged to a hitchhiker he had picked up in Jacksonville.

Later investigators visited Lawson's used-motorcycle business and found it unkempt. And they said it lacked sufficient parking and display space, which they found incriminating, according to a report.

Pointing to his innocence:

Bank records showing a recent $25,000 business loan; no criminal record; corroborating statements from the friend with whom he planned to open a bar.

The Sheriff's Office made two settlement offers. Lawson first was offered $11,000, about 35 percent, of his money. Then he was offered $16,500, about 53 percent.

Lawson refused both, calling the assertion that he was a trafficker "a joke." Seven months later, Lawson, now a car salesman, agreed to do what no other seizure claimant has done: He let a mediator decide.

After hearing all the agency's evidence, the mediator ordered it to give back $27,250, about 88 percent, of his money. The sheriff's office kept $3,750. Lawson's attorney got a third of the recovery.

Toxicologist Wayne Morris says if currency has been in circulation long enough, it likely is tainted with cocaine.

You may be drug free, but is your money?

☐ Cocaine is found on the cash of non-users. The test suggests that a dog would detect cocaine on almost anyone's money.

By Jeff Brazil and Steve Berry

OF THE SENTINEL STAFF

Uriel Blount Jr. is a circuit judge. He has never snorted cocaine. But his money has traces of the illegal drug on it.

Leesburg Police Chief Jim Brown hasn't snorted cocaine either. His money has traces, too.

The same is true of State Sen. Dick Langley, Sanford Mayor Betty Smith, Daytona Beach Community College President Philip Day and *Orlando Sentinel* Editor John Haile.

Each recently agreed to help *The Orlando Sentinel* test the theory that most currency in Florida is tainted with tiny amounts of cocaine. Without warning, reporters approached them and offered an even trade for money in their wallets.

The money was tested; most samples tested positive.

In Florida the presence of cocaine, even in microscopic amounts, is critical. It has been a key factor in justifying the seizure of tens of millions of dollars.

South Florida reigns supreme in seizing drug money. But no Florida agency north of Fort Lauderdale seizes more than the Volusia County Sheriff's Office. Under Sheriff Bob Vogel, it has earned a national reputation for cash seizures along Interstate 95.

One legal proof the agency uses is an "alert" signal by a drug-sniffing dog. If the dog wags his tail or barks when sniffing for drugs, it constitutes legal "probable cause" to believe that the money is tainted.

The newspaper's test, however, suggests that the odds are that a drug dog would detect cocaine on almost anyone's money in this state, according to toxicologist Wayne Morris.

Morris has testified in hundreds of criminal cases that as much as 90 percent of currency in some cities tests positive for cocaine. "If you took 10 samples from any major city in America, I'd be surprised if any one of them didn't come up positive," he said.

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, intermingling with other bills.

Besides Blount, Brown, Langley, Smith, Day and Haile, the newspaper obtained money from the Rev. Hal Marchman, founder of a Volusia County drug-treatment center, Orange County Chairman Linda Chapin and from a Publix cash drawer in DeLand.

Vogel was asked to participate but would not, saying: "That strikes me as somewhat offensive."

Vogel said the newspaper was "getting into personal and theatrical issues. We are not writing stories for the *Sentinel* or any other newspaper — at least I'm not."

Vogel would not allow the agency's dogs to be used in a sniff test of the samples.

"We're not going to call into question the credibility of our dogs by doing something like that," said Nancye Jones, Vogel's legal adviser.

In April the samples were taken to Morris, the toxicologist. He is a former crime-laboratory specialist for the Florida Department of Law Enforcement and now owns Morris Forensics Inc. in Winter Park.

The 57 bills — in denominations of $1, $5, $10 and $20 — were tested with a gas chromatograph. To confirm findings, bills also were tested in a mass spectrometer.

The results: Six of nine samples carried detectable amounts of cocaine. The grocery-store sample was "borderline."

Samples from Marchman and Chapin were clean. Both were carrying new bills when asked to participate. Morris had predicted that they would test clean; the money hadn't circulated.

"The fact that you can get a negative on a new bill basically makes the argument," Morris said. "If it's been in circulation long enough, it'll be tainted."

Of six positive samples, only tiny amounts of cocaine — invisible to the eye — were present. But all were well within the range of a drug dog's detection ability, Morris said. Dogs' ability to smell is thousands of times more sensitive than humans.

Brown said, "I think you're on to a good story."

Haile, whose money had the most cocaine, said: "Based on what I've heard about tainting of money by drugs, I'm not surprised.

"The question is whether finding traces of drugs on money in Florida really says anything about who is dealing in drugs."

Blount said that many in law enforcement know that most money is tainted. That's why Vogel wouldn't "play the game," Blount said. "I think [he] knew what you were going to get."

Mel Stack, forfeiture attorney for the Sheriff's Office, said the agency has been downplaying the dog's role.

But dozens of lawyers interviewed for this series of reports said the agency continues to use dog alerts as grounds for confiscations and "as a legal hammer" during negotiations.

Confiscated cash bankrolls fight against drugs

☐ Critics say the seizure law encourages police agencies to spend time looking for drug money instead of fighting crime.

[redacted]
OF THE SENTINEL STAFF

Special report

DELAND — Sheriff Bob Vogel spends hundreds of thousands more than his predecessor did to fight drugs, bankrolling his campaign with the confiscated cash of Interstate 95 motorists, most of whom were never charged with a crime.

State law allows the Volusia County Sheriff's Office to keep what it seizes from suspected drug dealers. Records show that Volusia's five-man drug squad has netted millions for the agency through selective traffic stops and car searches.

Yet, a review by *The Orlando Sentinel* shows that the sheriff has begun to use confiscated money to pay for routine operations. That appears to violate the law that allows cash seizures.

Where the sheriff gets his money — and how he spends it — is important because of what critics term "the profit motive" arising from the state seizure law.

Critics contend that the law encourages police agencies to spend their time looking for drug money instead of doing police work.

Vogel's drug team has been seizing cash from motorists for three years. Only one of every four from whom money was taken was charged with a crime.

A review of agency spending during Vogel's three years in office shows an increasing reliance on confiscated money. The largest share has been used to pay for the fight against drugs, the issue on which Vogel rode into office.

This year, the agency's entire

Please see **SEIZE, A-4**

Fewer arrests despite windfa

SEIZE from A-1

$125,000 operating budget for drug investigations comes from confiscations. And it is 10 times what former Sheriff Ed Duff spent on average.

Last year, when seizures were higher, the drug investigations budget was 25 times what Duff spent.

Nevertheless, the agency made at least one-third fewer drug arrests last year than in 1989 when Vogel took office.

The sheriff says it is an indication of the effectiveness of his drug-busting programs.

However, the falling arrest rate is mirrored across the state and, locally, at the Daytona Beach Police Department. But experts say that can be misleading.

Numerous studies during recent years show less "recreational" drug use today. But "hard-core" users remain.

Focusing on arrests may, in fact, ignore the actual drug problem, said Ronald Akers, a University of Florida sociologist.

If overall drug use was already on the decline nationally, stepped-up efforts of local agencies may have had little real effect, said Akers, author of *Drugs, Alcohol and Society*.

"You have to judge it against what's going on elsewhere," he said. "Are there other agencies that are having similar decreases, which are not pouring in money?"

Locally, arrests for burglary and property theft, crimes closely linked with narcotics, remained steady since 1988, figures from the Volusia County Jail show.

"The [drug] arrests are down, but all the other crimes you'd associate with drugs are up," said John DuPree, Volusia County judicial services director.

Critics question spending

When Vogel took over the Sheriff's Office, it was far behind the times, he said. It has taken millions to catch up. And the good news for Volusia County taxpayers, he said, is that drug dealers paid the tab.

That philosophy has its detractors, however.

"It's bad policy to give a police department a financial stake in law enforcement," said Paul Joseph, a law professor at Nova University and president of the American Civil Liberties Union's Florida chapter.

"Police should be out finding criminals, not out raising money for their department," he said.

The drug squad has confiscated almost $8 million since confiscations began three years ago. After arranging out-of-court settlements with motorists, the Sheriff's Office kept roughly half.

Not only has the windfall meant a beefed-up drug-investigations fund, it has paid for a new airplane, new Stetson-style hats and a laundry list of high-tech crime-fighting gear, such as motion detectors for agents and a system to detect hidden electronic bugs.

Total spending for the investigative fund: $400,000. It climbs to $723,637 if high-technology equipment for narcotics deputies — such as location monitors for un-

Sheriff's Narcotics Investigative Unit budget

	1988	1989	1990	1991	1992
General fund (tax dollars)	67,000*	17,000	27,500	27,500	0
Seized money	0	0	50,000	225,000	125,000
Total	67,000	17,000	77,500	252,500	125,000

*Excludes salaries and administrative expenses.

Note: Under former Sheriff Duff, the general fund covered murder, rape and other felony investigations.

Source: Volusia County Budget Office

Drug arrests

Agency	1986	1987	1988	1989	1990	1991
Volusia County Sheriff's Office	234	461	1,159	1,057	514	691
Daytona Beach Police Dept.	633	1,098	1,708	1,741	1,286	1,067
Volusia County	1,379	2,416	N/A	3,951	3,016	2,910
State	58,720	68,747	N/A	85,525	77,174	72,785

Source: Florida Department of Law Enforcement.

Highlighting the differences

Most state and federal law enforcement agencies seize property, but Volusia County distinguishes itself in several ways.

Many agencies don't make seizures without an arrest or, at least, finding drugs. Most don't have squads whose primary task is to seek and seize assets.

Volusia's practices are similar to those of the federal Drug Enforcement Administration, which seizes hundreds of millions of dollars a year at ports, airports and bus stations based on a "drug courier profile."

Alleged abuses by DEA prompted congressional hearings in May.

dercover agents — is included.

Critics question the need for such spending.

"Bob is definitely the most expensive sheriff we've ever had," said Big John, a Volusia County Council member and Vogel's chief critic. "For what? My squabble is with the way we spend unprecedented sums of money."

Vogel dismisses the criticism as politically motivated.

"Big John doesn't know that it's a good sign to see a decrease in arrests," Vogel said. "It shows that the individuals are not out there committing the crimes."

Some council members have criticized his refusal to provide details of how the drug fund is spent. But state law lets Vogel keep that information secret. Vogel says disclosure would endanger deputies.

Vogel's use of confiscated funds has ballooned since he took office.

In 1989, Vogel operated with a $17,000 investigative budget furnished by Duff. No confiscated funds were used.

In 1990, Vogel budgeted $27,500 for investigations and beefed up the fund by adding another $50,000 in confiscated funds. Last year Vogel again began with $27,500 in tax dollars but added $225,000 in confiscated funds.

This fiscal year Vogel removed taxpayer support, except to pay for deputies' salaries and some basic expenses.

Vogel: Saving tax dollars

Vogel says that is smart management and saves tax money.

But it appears to run against the letter of the forfeiture law. It specifically allows police to pay for school-resource officers, equipment and various crime- and drug-prevention programs. It also lets agencies finance "protracted or complex investigations."

But the statute says confiscated funds "shall not be a source of revenue to meet normal operating needs" or other activities normally funded with tax money.

Under Vogel, nearly $9 of every $10 spent on undercover rentals, purchase of evidence and informants' tips comes from seizures, records show.

Without seized money, Vogel says, his narcotics program would be crippled.

Legislative staffers involved in recent revisions of the seizure law, who would speak only if not identified, confirmed that it was the intent of the law to ban such reliance. But there is no penalty for misappropriation of the funds, they said.

Although narcotics enforcement traditionally has been a normal operating expense, sheriff's officials say that their use is legal because they have expanded the drug squad's duties.

"The other point, too, is there is no penalty in the statute for — I won't say misuse — say, for the use of confiscated funds for something that maybe it shouldn't have been used for," sheriff's attorney Nancye Jones said.

"There's no criminal penalty, and I don't think the taxpayers are going to complain about us using that money for narcotics investigations rather than money out of their pocket."

Where confiscated funds went

$710,491 — Computers, related equipment and software.

$154,582 — Radio equipment, communications research, cellular phones.

$613,472 — Uniforms, safety equipment, hats, name tags and gun holsters.

$723,637 — Narcotics equipment/investigations. High-tech gear Vogel said was needed to put his deputies on equal footing with drug dealers, including:

- A system that can detect hidden electronic bugs and recording equipment.
- A tracking system that can monitor the movements of undercover officers.
- Electronic bugs.
- Spy cameras to record meetings with drug suspects.

$695,592 — Crime prevention-/drug education, school resource officers in high schools and drug awareness materials.

$411,779 — Purchase of a plane, maintenance of another confiscated from a suspect.

$218,455 — Other (safes, signs, cellular phones, legal bills, office materials and numerous pieces of equipment used in police work).

Total $3,528,008

Source: Volusia County Sheriff's Office, Sentinel Research.

The series

Sunday: No one arrested or charged in 3 of every 4 cash seizures.
Monday: Nine of every 10 seizures involves a black or Hispanic.
Today: Sheriff Vogel spends more to fight drugs, but hasn't fared better.

Sheriff's drug squad gets the bad guys . . .

By Steve Berry and Jeff Brazil

OF THE SENTINEL STAFF

Sixteen months ago, Volusia County Sheriff Bob Vogel's Selective Enforcement Team snatched a $10 million cocaine stash on Interstate 95.

Nine months later it seized almost $700,000 from a secret compartment in a minivan.

Of 262 cash and drug seizures along I-95, the two cases best represent the way Vogel likes to portray his anti-drug campaign.

Most of the team's cash seizures net less than $20,000, and there are few arrests, but it's clear that the seizure squad can hit it big.

The coke bust was in April 1991, when Sgt. Bobby Jones stopped a car going 35 mph in the fast lane.

His suspicions arose when driver Arquimedes Perez, 30, and passenger, Maria Carmen Florat, 26, both of New York, acted unusually nervous. Jones' search revealed a concealed compartment containing 88 pounds of cocaine.

Both were convicted of cocaine conspiracy and possession. A federal judge sentenced Perez to 14 years and Florat to 16 years.

In the $700,000 case, Jones made no arrest, although it was the largest cash seizure in the team's history.

Tommy Andres Filion, 29, of Miami was stopped because his van was weaving.

After warning him about careless driving, Jones noticed that one section of the van floor was higher than the other.

Beneath the carpet he found a concealed compartment containing $697,599.

Filion and a passenger said they knew nothing about it. They declined a receipt and never returned to dispute the confiscation.

. . . but sometimes, bad guys get off easy

By Steve Berry and Jeff Brazil

OF THE SENTINEL STAFF

When Deputy Bobby Jones confiscated nearly $190,000 from Douglas Harbert and Thomas Pasco on Interstate 95, he did what Volusia County Sheriff Bob Vogel likes best.

He hit a drug dealer in the wallet.

But, as in many other cases involving motorists with drug-arrest records, he ultimately pulled his punch.

Although Jones found drugs in the car and lodged felony cocaine charges against both men, Vogel's staff ended up giving back $28,685.

When they learned that Harbert owed federal income taxes, they sent another $58,545 to the IRS.

Vogel's office retained $101,000.

It's a typical scenario. Vogel contends that every dollar he seizes comes from drug dealers. Nevertheless, he almost always strikes bargains with them, avoiding the need to prove his case in court.

In that case, Jones thought that he had found solid drug-courier "indicators." Besides the unusually large amount of cash, Jones found 7 grams of cocaine, 15 grams of marijuana, cocaine sifters still powdered with residue, a roach clip and rolling papers.

Both men acted unusually nervous and gave conflicting stories about their destination and plans.

Later in criminal court, the bargaining continued. Both men entered pleas that left them with misdemeanor drug convictions.

Video gives look at Volusia tactics

☐ The tape reflects the findings of a 'Sentinel' investigation. In 31 traffic stops, 25 of the drivers are black or Hispanic.

A videotape obtained by *The Orlando Sentinel* shows a single member of the Volusia County sheriff's drug squad making more than 30 traffic stops over a period of four days.

No tickets were issued. While almost half of the cars were searched, only one arrest was made. Twenty-five of the 31 drivers stopped were black or Hispanic.

Those figures closely track the results of an investigation by the *Sentinel* of drug-squad records for the three years it has been confiscating cash from Interstate 95 motorists. It found that no one was charged in three of every four cases, and more than 90 percent of the motorists from whom cash was seized, but who were not ar-

Please see **TAPE, A-8**

Chiles reacts to report on drug squad seizures

After reading a special report in *The Orlando Sentinel* about cash seizures by the Volusia County sheriff's drug squad, Gov. Lawton Chiles scrawled a note on the front page: "Buddy, we need to talk about this," and had it delivered to Lt. Gov. Buddy MacKay.

Chiles will discuss the report with Florida Department of Law Enforcement officials, a spokesman said.

Tape shows deputy opening drivers' wallets to count cash

TAPE from A-1

rested, were minorities.

Sheriff Bob Vogel said the videotape — made from a dash-mounted video camera in the officer's car — is an unscientific sample from which no conclusions can be drawn.

Vogel has said that the Sheriff's Office keeps no record of its many stops in which there were no arrests and no seizures.

The videotape is a glimpse of the methods used to confiscate nearly $8 million since 1989, though it is far from being conclusive.

"That's four days out of a three-year program," added Sgt. Bobby Jones, who made the stops in the tape, which covers a period of roughly 20 hours on patrol along the interstate.

The tape was provided to the *Sentinel* by Winter Park attorney Andrew Zelman, who represents a defendant in a seizure case.

It shows:

■ Every stop was for a minor infraction: following too closely, not using blinkers, swerving or, in one case, a cracked windshield.

A Florida Supreme Court ruling requires that deputies stop a car for a legitimate traffic violation before detaining the driver or searching the car.

■ For the black drivers, the stops lasted 4 minutes, on average; for whites, about 1 minute.

One Spanish-speaking driver was detained for 45 minutes. In that search, Jones found cocaine and arrested both occupants.

■ Jones searched one of six cars belonging to white drivers. He searched 11 of 23 cars belonging to black drivers.

In some cases, Jones opened drivers' wallets to count their cash.

■ When one motorist refused a search, a drug dog was escorted around the car twice. Deputies searched the man's car. Nothing was found.

An "alert" signal by a dog gives deputies probable cause to believe drugs or drug-tainted money are inside. That allows deputies to search a car without consent.

■ Nearly all of the motorists were subjected to personal questions concerning employment, destination, relatives and amount of luggage. For example:

"Where's all your clothes at?"

"What kind of work do you do?"

"How come (your wife) doesn't live with you?"

■ Many of the drivers were startled that they had been stopped, saying they had broken no laws.

This exchange occurred between Jones and a young black man stopped for "swerving in his lane." He was traveling with a cousin, a friend and a small child.

Motorist: "What's the reason you're stopping me for, officer?"

Jones does not answer.

Motorist: "You still haven't told me why you stopped me."

Jones: "You're very observant."

The state Supreme Court ruling came on an appeal of a seizure made by Vogel when he was a Florida Highway Patrol trooper. The court ruled that he had improperly used a drug-smuggler's profile in making the decision to stop the car.

The profile essentially targets young males driving in sedans close to the speed limit.

The court did allow use of the profile — along with other traits associated with drug smuggling — to detain a driver after a legitimate traffic stop.

Critics, however, charge that the Volusia drug squad uses the profile, including skin color, to target their stops. The sheriff's office denies that is the case.

A nationally recognized expert on the use of drug profiles, Nancy Hollander, said: "Sure you can have a lot of success if you just stop everybody. But we do have laws against that."

Hollander is president-elect of the National Association of Criminal Defense Lawyers and has established a nationwide task force to review forfeiture practices across the country.

"The profile itself is a bit of a fraud," she said. "It's whatever strikes that officer's fancy at a given time."

Attorney Zelman said the tape shows the team is essentially "poaching" on the interstate, searching hundreds of motorists, mostly minorities, whose only crime is that they fit the sheriff's profile.

Zelman represents Maria Florat, a passenger in the seizure case shown on the tape, in which 88 pounds of cocaine worth about $10 million was seized.

She recently was convicted by a federal jury in Orlando of conspiracy to possess cocaine, with intent to distribute, and possession with intent to distribute. Zelman has filed an appeal in the case, arguing the seizure was illegal because the squad's tactics are racist.

"If you stop enough blacks and Hispanics on I-95, you're bound to find some with drugs and money," Zelman said.

Protest mounts over Volusia cash seizures

☐ Minority leaders blast the practice, and Gov. Lawton Chiles worries the seizures may be violating rights.

By John C. Van [illegible] Jeff Brazil

OF THE SENTINEL STAFF

TALLAHASSEE — Gov. Lawton Chiles questioned Thursday whether law enforcement officers are abusing their power by seizing money from motorists because they may fit a drug courier "profile."

It was the second time in two days that Chiles addressed the issue of cash seizures by Volusia County deputy sheriffs along Interstate 95 after reading a special report in *The Orlando Sentinel* earlier this week.

Chiles

"I'm concerned . . . if you're stopping cars on the basis of not seeing some violation, but it appears that you're stopping cars on the basis of a profile — that it's an older car, that it's driven by a black or Hispanic," Chiles said. "I don't think that that's a good policy.

"I don't think the forfeiture law was put into effect for that."

On Wednesday, Chiles had announced the formation of a panel to review whether the Sheriff's Office had exceeded the intent of the law that allows officers to confiscate suspected drug money.

The panel also is to look into use of the seizure law throughout the state.

The governor spoke at length about the issue during a news conference Thursday. It came while a chorus of protests were lodged against the Volusia seizures.

Black and Hispanic leaders condemned the practice, as did a rash of callers at local radio talk shows. The Sheriff's Office reported receiving many calls. The gov-

Please see **CHILES, A-5**

•• The Orlando Sentinel Friday June 19 1992 A-5

NAACP plans to go to court over seizures, leader says

CHILES from A-1

ernor's office also took calls, a spokesman said.

The chairman of the House Criminal Justice Committee, Rep. Elvin Martinez, called for a statewide grand jury investigation.

"What they are doing appears to be out and out thievery," said Martinez, D-Tampa. "I think the statewide grand jury ought to look at it. If nothing else, it's a total abuse of authority, and I'm embarrassed by it.

"It's extortion is what it is."

For the first time this week, Sheriff Bob Vogel was not accessible and did not make a statement, instructing Sheriff's Office clerks to refer all inquiries to a spokeswoman.

In a three-day series ending Tuesday, the *Sentinel* reported that the Volusia sheriff's drug squad has confiscated tens of thousands of dollars from people with no criminal history and with no evidence of wrongdoing.

Cash was taken from more than 250 motorists during the past three years, although charges were brought in only one of every four cases. Blacks and Hispanics were involved in more than 90 percent of the cases in which money was taken, but no charges filed.

Using a race-related profile to stop motorists to search for drugs has been prohibited by the Florida Supreme Court.

The Sheriff's Office kept half of nearly $8 million seized in the anti-drug campaign, returning the rest to motorists.

The newspaper found that Vogel's office routinely arranges out-of-court settlements with drivers who receive a portion of their money back if they promise not to sue. Only four people got all their money back, though others provided evidence their money was legitimate.

"If anything like that is happening, that ought to be reviewed by judicial officers," the governor said Thursday. "I would say at the outset, that ought to be reviewed by a judge."

On a call-in radio show Wednesday, Vogel had announced that all future cases would be reviewed by him and his seven top commanders. Until now, an attorney on retainer to the agency has handled settlements for Vogel.

Vogel, who called the *Sentinel*'s reports biased, said he welcomed any review by the governor and said the suggestion that his program targets minorities "ridiculous."

However, several minority leaders were outraged.

"Our plan is to get involved immediately and go to court," said Tom Poole, state president of the National Association for the Advancement of Colored People.

Mike Ruiz, president of the Florida Hispanic American Voters League in Winter Park, issued a news release condemning the the sheriff's "autocratic practices."

"Sheriff Bob Vogel's comments and unscrupulous tactics can only be deemed racist and a flagrant abuse of power," he said.

"This organization refuses to believe that Florida's laws don't have to be in conformity with the 4th and 14th Amendments."

But Vogel had support from other sheriffs.

Maury Kolchakian, general counsel for the Florida Sheriff's Association, said the Legislature has done enough to restrict how forfeitures may be conducted.

"It seems like there's more emphasis being put on cracking down on the people trying to protect the citizens . . . than on the criminals," Kolchakian said.

Citing reforms to the law that take effect July 1, he said: "Anything on top of that is unwarranted."

But Chiles said he worries some officers may be violating rights of blacks and Hispanics by stopping them because they fit a profile of suspected drug dealers, not because they violated the law.

"If you took every allegation that appears to be out there it may be so," he said.

If the panel's probe turns up evidence that deputies violated the forfeiture law, Chiles said he would refer the matter to a special prosecutor.

"The forfeiture laws that are now on the books seem to be very broad," he said. "They allow what I think in some instances could be some misuse of what the intent of those laws were."

Sen. Larry Plummer, D-Miami, chairman of the Senate Criminal Justice Committee said: "If we do an end run on the U.S. Constitution, because we're doing such a good job, it's all well and good when it's the bad guy. But what happens to the innocent person? When it's you?"

State Rep. Alzo Reddick, D-Orlando, said, "I am outraged and saddened that money may have been taken from innocent people. If people have earned their dollars honestly and when it is seized, it becomes a burden to get it back, something is wrong. It appears there are some constitutional issues here."

Thus far, the Commissioner of the Florida Department of Law Enforcement, Tim Moore, and Chiles' general counsel, J. Hardin Peterson, have been named to the panel.

Martinez said a couple of the "more level-headed sheriffs" and some non-law enforcement people likely will join the panel.

FDLE spokesman John Joyce said the agency will look into whether the forfeiture law is being applied equitably, especially in settlements.

"It might need some tweaking here and there," Joyce said. "We're not above getting a tuneup if it's needed."

Martinez, an outspoken critic of the forfeiture law, said he thinks the panel will find more than it bargained for. Regardless, he said his committee will consider changes in the law as a priority for the 1993 legislative session.

Sentinel staff writers Henry Curtis and Sean Somerville contributed to this report.

Judge orders Sheriff's Office to return $265,000 to motorist

[redacted]

OF THE SENTINEL STAFF

DAYTONA BEACH — A judge has ordered the Volusia County Sheriff's Office to give back $265,000 confiscated from an Interstate 95 motorist, saying the agency violated Fourth Amendment protections against illegal search and seizure.

Circuit Judge William Johnson had harsh criticisms for the tactics of the Sheriff's Office, saying there was no justification to take money from Aubrey Marcus Duncan, 51, of Fort Washington, Md.

Johnson immediately ruled against the Sheriff's Office after hearing its evidence. Duncan's attorney didn't have to present a case; the jury was released.

The ruling applies only to Duncan, but the tactics Johnson criticized are routinely used by Sheriff Bob Vogel's Selective Enforcement Team. The agency has seized nearly $8 million since 1989, mostly from I-95 motorists.

After a traffic stop for a minor violation, Duncan was asked for permission to search his car. Saying he was aware of his rights because he is a former police officer, Duncan refused. He then was detained until a

Please see **RULING, A-10**

A-10 The Orlando Sentinel, Thursday, June 25, 1992

Judge says detaining motorist 'clearly illegal'

RULING from A-1

drug-sniffing dog could be summoned.

But Johnson said that the subsequent "alert" signal from the dog — which provided the legal probable cause to search without Duncan's consent — appeared staged.

The circumstances of Duncan's case parallel most of the more than 260 cash seizures the drug squad has made, court records show.

The sheriff's attorney said he may appeal the ruling.

Here's what happened:

Duncan and his passenger, LaShon Denise Mapp, 33, of Washington, were stopped April 25, 1991, by Deputy Ray Almodovar because their car swerved.

Both are black. They were riding in a 4-door sedan with an out-of-state license plate and traveling at the speed limit.

Almodovar quizzed Duncan about where he was going and with whom he was traveling.

He did not issue a ticket.

After turning toward his patrol car to leave, Almodovar asked Duncan if he was carrying anything illegal. Duncan said no.

Almodovar asked if he could search. Duncan declined.

Citing Duncan's refusal to search, his "nervousness" and conflicting statements made by him and his passenger, the deputy said he believed "something was going on."

He detained them for 10 minutes until the dog arrived. After finding the money in a bag in the trunk, Almodovar said he believed Duncan was a "narcotics trafficker" and seized it.

Duncan told the deputy he is a professional gambler and routinely carries large sums.

A 40-minute videotape of the incident — made from a dash-mounted camera in Almodovar's car — was shown to the jury to support the seizure. But Johnson found fault with it, saying it showed:

- Duncan's traffic violation was merely a "one-second swerve." Another vehicle passing Duncan in the fast lane appeared to be violating the speed limit.
- Duncan was not nervous, contrary to what the deputy said.
- Detaining Duncan after he refused the search was "clearly illegal."
- The drug-sniffing dog did not "alert" until the second trip around the car and appeared to do so "as if in response to a command."

The seizure "was the result of an illegal detention and a search conducted without probable cause," Johnson said.

In an interview after the ruling, Mel Stack, the sheriff's attorney, said the department believes that Duncan is a "major drug trafficker in the Washington, D.C., area."

The judge "gutted" his case by barring testimony of a federal agent and a deputy from Duncan's hometown, Stack said.

Both would have testified that Duncan had been investigated for possible drug violations. But Duncan's lawyer argued that their testimony was irrelevant, in part, because it had nothing to do with the seizure and was based on information gathered several years ago for which Duncan has never been arrested.

Duncan has a 1969 conviction for conspiracy to distribute narcotics for which he served a prison term, Stack said.

Maryland prison authorities could not be reached to confirm the prison stay.

Duncan's attorney, Dean Mosley, said the ruling could call into question the sheriff's practice of seizing cash without arresting drivers.

"I don't know what's going to happen up there, but they really need to evaluate what they're doing," he said.

"This has really wrecked this man's life."

Mosley said he will charge Duncan a sizable fee, $100,000. The case, he said, has cost Duncan the loss of his money for more than a year and his house is being foreclosed on.

The ruling comes on the heels of a special report on the Volusia cash seizures published last week in *The Orlando Sentinel*.

After reading the three-day series, Gov. Lawton Chiles asked his general counsel and the commissioner of the Florida Department of Law Enforcement to review the cases. Key lawmakers and black and Hispanic leaders condemned the agency.

The newspaper reported that three of every four people from whom money was seized were never arrested or charged; more than 90 percent were minorities.

The drug team stops motorists heading south on I-95 and searches the cars of those it believes are suspicious, looking for drug money.

Chiles asked if the seizure law gives police too much power and if police are targeting minorities because they fit a drug courier profile.

"It's good that Vogel is fighting crime," Mosley said. "But you can't do it by violating constitutional rights and doing it on the basis of race.

"This was a profile stop — clear and simple."

"It's not fair," Duncan said from his home in Fort Washington. "I've got my tax attorney on the other line trying to figure out what to do about all this."

Forfeiture laws seize national scorn

Across the country, even the suspicion of a crime can cost people dearly

[redacted]
OF THE SENTINEL STAFF

An Iowa retiree catches three fish illegally. He gets slapped with a fine and a suspended sentence. He thinks that's the end of it.

It isn't. State wildlife agents show up one day to seize his $6,000 boat, saying it "facilitated a crime."

A Vietnamese mother of three carrying $113,000 to her homeland fails to report that she's leaving the United States with that much money. Detained at a Seattle airport, she admits her mistake and eventually pays a $5,000 fine.

She, too, thinks that's the end of it. But the federal government says she violated the "Trading with the Enemy Act" and takes the $113,000.

Both cases illustrate how law enforcement agencies throughout the country have ensnared ordinary people with forfeiture laws designed to fight drug smugglers.

Charged with minor offenses, or no offense at all, people are losing their money, their property and their homes.

Special report

Such liberal application of forfeiture laws has prompted a nationwide outcry for reform.

Locally, a freewheeling Volusia County Sheriff's Office drug squad has seized nearly $8 million during the past three years, mostly from drivers on Interstate 95 whose cars were searched after being stopped for minor traffic violations.

An investigative report published in June by *The Orlando Sentinel* found that in three of every four Volusia County cash seizures no one was charged with a crime.

In many cases the drivers had no criminal record. Of those whose money was taken, but who were never charged, more than 90 percent were black or Hispanic.

The Volusia County seizures are now being investigated by a special panel that Gov. Lawton Chiles appointed after reading the *Sentinel* report.

Sheriff Bob Vogel defends the seizures. In every case, he says, the motorists involved were drug traffickers.

Please see **SEIZE, A-21**

SEIZE from A-1

The controversy — here and throughout the country — centers on vaguely worded forfeiture laws adopted during the past 10 years to beef up the war on drugs.

Since 1985 more than $2.4 billion has been seized by federal authorities exercising unprecedented powers.

Those who are stopped don't have to be convicted of a crime to lose their assets. They don't even have to be arrested.

Police can seize money or property if they believe it was used, or might be used, in a crime. They must have probable cause to take it, but they do not have to prove a crime occurred.

Probable cause is the lowest legal standard that can be used to justify an action such as a seizure or the issuance of a search warrant. Legally speaking, it is more than a mere suspicion, but it does not have to be supported by a preponderance of evidence.

Under forfeiture law, the burden of proof is on the owner to show why property shouldn't be taken.

The incentive for law-enforcement agencies is enormous: They get to keep — and spend — what they seize.

A growing list of critics

Defense lawyers have criticized the laws for years. They say forfeiture violates constitutional guarantees of due process, as well as those prohibiting cruel and unusual punishment. They contend cash seizures on highways and in airports are racist because police use race-related profiles to target searches.

As the use of forfeiture has expanded, so has the list of critics.

In the past year, newspapers in St. Louis, Houston, Pittsburgh and Fort Lauderdale have reported extensively about forfeiture abuses, as have television news programs.

"Things are out of control," said Mark Nestmann of Atlanta, publisher of a newsletter about forfeitures. "What you found in Florida is happening all over the country."

Pressure to reform is growing:

■ Congress is expected to announce this week that it will hold hearings to review if blacks, Hispanics and other minorities are targeted; if innocent people are victimized; and if police put more emphasis on seizing money than fighting crime.

A congressional staffer who will play a key role in the hearings, but who would speak only if not identified, said: "It looks as if there have been some major abuses."

In New Jersey, Louisiana, Missouri, Tennessee and Colorado, lawmakers are considering proposals to restrict forfeiture.

■ At least three federal appeals judges recently have questioned the constitutionality of forfeiture.

Written opinions from such high-ranking judges influence the decisions of lower courts, which, for the most part, have given police great latitude in forfeitures.

In a case involving the forfeiture of a man's automobile repair business, federal Judge Floyd R. Gibson of the 8th U.S. Circuit Court of Appeals said the court upheld the forfeiture but very reluctantly.

He wrote: "We are troubled by the government's view that any property, whether it be a hobo's hovel [illegible] Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."

■ Outraged by perceived abuses, grass-roots organizations have sprung up in Vermont and New Jersey: Stop Forfeiture of Children's Homes and Forfeiture Endangers Americans' Rights (FEAR). Their mission: to inform Americans that forfeiture could happen to anyone.

■ Television programs *60 Minutes* and *Street Stories* recently aired segments about forfeiture. *Street Stories* featured a federal prosecutor in Connecticut who zealously pursued forfeiture cases — until her son was arrested on suspicion of selling LSD from her car.

Critics define the problem in a single word: greed.

Few restrictions on police

Because forfeiture law is broad, authorities can seize property with the most tenuous link to crime.

In Knoxville, Tenn., $700 was confiscated from a man because he was in a drug-infested neighborhood. Police said he was probably there to buy drugs but they found no drugs on him or in his car. He was not arrested.

Ironically, it was he who had summoned the police after someone shot at his car.

In Fort Worth, Texas, two airplanes valued at $500,000 apiece were seized from an aircraft broker because Customs agents, acting on a confidential informant's tip, said they believed that the buyer was a Brazilian drug smuggler. Agents searched the airplanes but found nothing and made no arrests.

In Warwick, R.I., a 74-year-old grandfather's [illegible] was seized after his son was arrested for selling narcotics there. The man said he didn't know what his son

But defense lawyers and forfeiture victims disagree, saying that it is a David-versus-Goliath struggle to fight a forfeiture.

Victims have few rights. Technically, it is not they but their property that is on trial. They are not automatically entitled to a lawyer if they can't afford one.

Sometimes the issue isn't innocence but whether the punishment outweighs the crime.

Dick Kaster, a retired Ventura, Iowa, gas foreman, was convicted of illegally catching three fish in 1988. He lost his $6,000 fishing boat and had to sell his bait shop, hatchery business and home to pay legal costs.

He has been to the local courts four times and to the Iowa Supreme Court twice.

Kaster represents himself because he ran out of money. He recently filed a civil-rights suit against the Iowa Department of Natural Resources.

"I'm getting tired of being called stupid for doing this," the 64-year-old father of two said. "But I'll never quit until I have to.

"They stole my boat," he said.

Therese Cheung-Seekit, 43, admits she made a mistake when she failed to tell U.S. Customs agents she was taking $113,000 out of the country in May 1989.

But she says she paid for her crime with a $5,000 fine. Taking the money — which she had collected from more than 100 Vietnamese families in Seattle to take back to needy relatives — was not fair, she said.

"The law is very confusing," she said in broken English. "They know ... we would like to bring our money back to our people. My money was not dirty."

U.S. District Judge John C. Coughenour upheld the seizure but with a blistering condemnation of the officers involved.

"The facts in the record entirely support Ms. Cheung-Seekit's statements that she undertook the journey to Vietnam out of humanitarian concerns," he wrote.

Citing precedent, Coughenour said he was compelled to support the seizure.

"It is, however, with the greatest reluctance that this decision is made," he wrote. "What governmental interest this forfeiture could possibly serve has been, and perhaps will remain, obscure."

Cheung-Seekit plans to appeal.

An effective tool against drugs

Even with congressional hearings, it's unclear whether forfeiture laws might change.

Critics of the laws say they fear reformers might be perceived as being soft on crime. Besides, even critics say forfeiture is a valuable tool against drug trafficking.

Copeland, the Justice forfeiture chief, speaks for many in law enforcement when he says that any effort to restrict forfeiture could hurt the war on drugs.

Copeland says that almost $500 million in federal forfeiture money has gone toward prison construction since 1985. Another $150 million is earmarked this year for drug-abuse treatment.

All of that, he says, would have come from taxpayers if it weren't for forfeiture.

was doing.

But police said he knew, or should have known.

Critics say that police see forfeiture as a way to pad increasingly thin budgets. Certainly it has been a lucrative tool for law enforcement.

Forfeitures by the U.S. Department of Justice amounted to $644 million in 1991 — 24 times what was seized in 1985, the year forfeiture laws first were broadened to fight drugs.

Local and state agencies nationwide collected more than $280 million last year.

And in most places there is little control over how the money is spent.

In states that have statutes restricting conditions under which police may seize property, local agencies simply ask federal counterparts, such as the Drug Enforcement Administration, to "adopt" their cases. That way cases are handled under more liberal federal laws.

Missouri State Sen. Wayne Goode once voted to give police in his state the power to do just that. He now regrets it.

"More and more" accounts of abuse have come out, said Goode, who plans to introduce a bill next year to forbid forfeiture in Missouri unless the property owner is convicted of a crime.

Forfeiture victims have few rights

How many innocent people have been victimized?

That depends on whom you ask.

In a letter to *The Pittsburgh Press* — which published a series about abuses of seizure law by federal agents — U.S. Department of Justice forfeiture chief Cary Copeland said 80 percent of his agency's seizures are never challenged.

That, Copeland said, reflects the "strength of our cases."

The cost of kleptomania: A $130,000 house

Kathy Schrama of Franklin, N.J., pleaded guilty to stealing UPS parcels off her neighbors' porches.

Schrama has kleptomania. She sees a therapist.

Because she was a first-time offender and most of the packages were returned to their owners, her sentence was light: three years probation and 200 hours of community service.

But prosecutors, using laws intended to strip drug dealers of their assets, took more: her family's $130,000 house and two cars.

Schrama, 40, and her husband, Mark, 38, couldn't believe it.

"We were caught up in the war on drugs, and what did our case have to do with drugs?" she said.

The Schramas were arrested (Mark Schrama was accused of receiving stolen property) just days before Christmas 1990.

That same day Sussex County prosecutors seized their two-story home and two cars, saying the property was used to facilitate a crime.

While the criminal case was pending, the couple and their 12-year-old son, Michael, were locked out for four months.

A judge eventually allowed them to move back, although the state placed a lien on the home.

Case history

Early on, Kathy Schrama said, prosecutors offered to let them "buy back" their house for $60,000. They refused. Later prosecutors reduced the price to $20,000, then $10,000.

"It seems to me that if they had a strong case the price would be going up, not down," she said.

After 19 months and an estimated $50,000 in legal fees, both the criminal and forfeiture cases ended this summer.

Though the Schramas received only probation and community service (Mark denied any wrongdoing but pleaded guilty to receiving stolen property), prosecutors demanded $5,000 to remove the lien.

"To me, it was extortion," she said. "I didn't swallow it well. But we had already spent so much fighting the case — we caved in."

Today they are jobless, penniless and debt-ridden. They wonder what effect the past 1½ years will have on their son.

"We have tried not to put any ideas in his head," she said. "But he doesn't understand how this can be fair; how, for a $500 crime, it warranted throwing us out of our home.

"He wants to be a lawyer, he says, so this doesn't happen to other people," Kathy Schrama said. "But we'll see. He's only 12."

— JEFF BRAZIL

Businessman: I don't sell to drug dealers

Agents say man sold ingredients for drugs — he says that's crazy

One of the nation's more compelling forfeiture cases involves Ken Brown, 30, of Albuquerque, N.M.

The U.S. Drug Enforcement Administration says that Brown used his lucrative chemical company to supply makers of methamphetamine.

Brown says the government simply has the wrong man.

In the late 1980s, DEA agents raided a methamphetamine laboratory and found chemical containers bearing labels from Brown's business, Chemco International.

In the spring of 1991, undercover agents subsequently bought controlled chemicals from a Chemco employee. Brown was seldom present when sales occurred, court documents state.

The chemicals in question have more than 5,000 uses, one of which is to manufacture methamphetamine, or "speed." It is not illegal to possess or sell them, except in large quantities.

Eventually, DEA agents raided Brown's home with a search warrant depicting Brown as a key figure in a conspiracy to manufacture and distribute speed.

Agents expected to find drugs, lists of illegal manufacturers and manufacturing equipment.

"Not a single piece of contraband was found," according to documents. Never-

Case history

theless, federal agents used forfeiture laws to seize Brown's business, its $300,000 inventory, his $220,000 home, two cars worth $35,000 and personal belongings, including his 8-year-old son's Nintendo game, tennis racket, go-cart, minibike, Mickey Mouse fishing pole and bowling ball.

Informants supposedly pegged Brown as leader of a Las Vegas biker gang called the "Gypsy Jokers" and another gang in Albuquerque called the "Banditos."

"I don't even own a motorcycle," Brown said. "As for my labels being on the bottles they found: If I were supplying drug dealers, I certainly wouldn't leave my name and address for anyone to find."

Among Brown's customers: major state and federal government agencies, including the U.S. Department of Forestry and the state Fish and Game Commission.

Brown, his wife, Sandra, and their son are allowed to rent their house from the government, pending the outcome of his criminal trial, scheduled for the fall.

Brown said the DEA recently offered to release its claim to his home, cars and personal property if he surrendered his business. He refused. "I won't spend a day in jail or pay a penalty for something I didn't do," he said.

He has petitioned the court for the return of his son's belongings and is attending real estate school to start a new career.

He has been told that, regardless of the outcome of his trial, he will never get his business back.

— JEFF BRAZIL

Informants make out like bandits

☐ An investigation into forfeiture laws finds that law enforcement paid snitches nearly $30 million in 2 years.

By Jeff Brazil
[illegible]

A congressman investigating reported abuses of forfeiture laws nationwide released U.S. Department of Justice records Monday that show nearly $30 million was paid to snitches over the last two years.

Rep. John Conyers, D-Mich., also armounced Monday that the House Government Operations Committee, of which he is chairman, will hold hearings on forfeiture abuses the first week of September.

Conyers

Conyers had scathing words for the spending revealed in the Justice Department's records. One unidentified informant made $780,000 in 1990, records show. Another made $591,000 in 1991.

"The idea of this forfeiture fund was to make the dealers pay for the war on drugs — not to provide a windfall for profiteering middlemen who may well be using the money for additional criminal activities," Conyers said.

Forfeiture laws let federal, state and local law enforcement agencies seize money and property from people suspected of committing a crime. Seized money is supposed to be funneled back into the war on drugs, but there are few controls over how it is spent.

The Justice Department said the payments were justified because agents were able to make big seizures based on information from the snitches.

In Florida and elsewhere, forfeiture laws are under fire because they allow authorities to keep property,

Please see **FORFEIT, A-7**

Report: At least 8 informants paid $275,000 or more each

FORFEIT from A-1

even in cases where people are charged with minor offenses or none at all.

Locally, a special drug squad at the Volusia County Sheriff's Office has seized nearly $8 million during the past three years, mostly from drivers on Interstate 95 whose cars were searched after being stopped for minor traffic violations.

An investigative report published in June by *The Orlando Sentinel* found that — in three of every four Volusia County cash seizures — no one was charged with a crime.

More than 90 percent of those whose money was taken, but who were never charged, were black or Hispanic. In many cases the drivers had no criminal record.

The use of forfeiture in Volusia and other parts of the state is being investigated by a special panel Gov. Lawton Chiles appointed after reading the *Sentinel* report.

Other newspapers and television news programs have documented forfeiture abuses nationwide.

Conyers said the September hearings will focus on whether blacks, Hispanics and other minorities are being targeted; if innocent people are being victimized; if police put more emphasis on seizing money than fighting crime; and whether seized funds could be better spent.

The revelation that a handful of informants are making a mint from forfeiture funds surfaced in the process of preparing for the hearings.

According to Justice Department records given to Conyers at his request, about two dozen informants made between $100,000 and $250,000 in fiscal years 1990 and 1991.

At least eight informants broke the quarter-million dollar barrier, raking in $275,000 to $780,000.

"This doesn't make sense," said Conyers, who suggested that the money would be better spent on drug treatment and rehabilitation. "With resources becoming ever more scarce, we should spend this money on programs that work, not on paying windfall profits to some glorified snitch."

Cary Copeland, Justice forfeiture chief, said the snitch payoffs are monies well spent.

He said the law forbids Justice from paying more than 25 percent of a seizure to an informant. That means, he said, that the $30 million in snitch stipends the past two years has netted at least $120 million in forfeited funds during that time.

"We're not paying it to them because we like them," Copeland said. "We're paying it to them because they put money in the pot."

Copeland downplayed the significance of the upcoming hearings. He said: "We're not nervous at all. We run a quality program."

Brenda Grantland, counsel for a grass roots coalition known as FEAR (Forfeiture Endangers American's Rights), said the hearings would be an eye-opener for most Americans.

BEFORE

THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON GOVERNMENT OPERATIONS

OVERSIGHT HEARING TO REVIEW
THE DEPARTMENT OF JUSTICE'S
ASSET FORFEITURE PROGRAM

SPEAKING IN FAVOR OF THE ASSET FORFEITURE PROGRAM

THE NATIONAL TROOPERS COALITION

RICHARD J. DARLING, CHAIRMAN

PARTICIPATING MEMBER
NATIONAL LAW ENFORCEMENT STEERING COMMITTEE
NATIONAL LAW ENFORCEMENT COUNCIL

TESTIMONY BEFORE THE UNITED STATES
HOUSE OF REPRESENTATIVES COMMITTEE ON
GOVERNMENT OPERATIONS

TESTIFYING: Sergeant Richard J. Darling
Michigan State Police
232 North Verlinden Avenue
Lansing, Michigan 48915

Sergeant Darling, a fifteen year veteran of the Michigan State Police, is chairman of the National Troopers Coalition. The National Troopers Coalition is composed of state police and highway patrol organizations throughout the United States and has a membership of approximately 40,000.

Mr. Chairman and honorable members of this distinguished committee, I am Richard J. Darling, testifying on behalf of the National Troopers Coalition. The National Troopers Coalition consists of approximately 40,000 enlisted officers of all ranks from state police and highway patrol organizations throughout the United States.

The National Troopers Coalition membership meets on a regular basis with prominent leaders in the Legislative, Executive, and Judicial branches of our federal government, as well as leading law enforcement organizations and criminal justice officials. Our members keep informed on top issues affecting them and take action to support or oppose legislation they think is of particular concern.

The National Troopers Coalition supports the Department of Justice's Asset Forfeiture Program. The Program is highly successful and has been conducted in a responsible manner. The partnership established between the nation's law enforcement agencies through the Equitable Sharing Program has become the first and strongest line of defense against the perpetual onslaught of drugs in America. Law enforcement agencies must continue to access this program in conjunction with the United States Department of Justice. Diminishing the program would adversely affect law enforcement's ability to respond to the pervasive threat of drugs and to continue many of their most successful and valuable initiatives.

The purposes of the Equitable Sharing Asset Forfeiture Program include the punishment of criminal activity by depriving criminals of property used in or acquired through illegal activities. Punishment is in common use to deter crime because it is effective. The forfeiture of one's illegally obtained assets as punishment is an economical alternative to expensive incarceration in overcrowded prisons. Those who victimize society for personal gain should not

be given property rights to their illegal acquisitions, regardless of the nature of the criminal activity that put them in possession of the property.

The Asset Forfeiture Program also serves to enhance cooperation among federal, state, and local law enforcement agencies through the equitable sharing of recovered assets. Furthermore, this program produces the revenue necessary to reenforce and strengthen the law enforcement response to the national epidemic that illicit drugs has become.

The permissible law enforcement uses of seized property under the Asset Forfeiture and Equitable Sharing programs include:

A. **Activities Calculated to Enhance Future Investigations**
The support of investigations and operations that may result in further seizures and forfeitures, e.g. payment of overtime for officers and investigators; payment of salaries for new law enforcement positions that supplement the work force; payments for temporary or not-to-exceed-one-year appointments; payments to informants; "buy", "flash", or reward money; and the purchase of evidence.

B. **Law Enforcement Training**
The training of investigators, prosecutors, and law enforcement support personnel in any area of law enforcement.

C. **Law Enforcement Equipment and Operations**
The purchase of body armor, firearms, radios, cellular telephones, computer equipment, and software to be used in support of law enforcement purposes, purchase of vehicles (e.g. patrol vehicles, surveillance vehicles), electronic surveillance equipment, and uniforms.

D. **Detention Facilities**
The costs associated with construction, expansion, improvement, or operation of detention facilities.

In addition, law enforcement agencies, in concert with the United States Department of Justice, have in place a system of checks and balances which is intended to prevent any improprieties from occurring. These have been incorporated into the National Code of Professional Conduct for Asset Forfeiture and are as follow:

NATIONAL CODE OF PROFESSIONAL CONDUCT FOR ASSET FORFEITURE

I. Law enforcement is the principal objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.

II. No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves.

III. Whenever practicable, and in all cases involving real property, a judicial finding or probable cause shall be secured when property is seized for forfeiture. Seizing agencies shall strictly comply with all applicable legal requirements governing seizure practice and procedure.

IV. If no judicial finding or probable cause is secured, the seizure shall be approved in writing by a prosecuting or agency attorney or by a supervisory-level official.

V. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures.

VI. The manual shall include procedures for prompt notice to interest holders, the expeditious release of seized property where appropriate, and the prompt resolution of claims of innocent ownership.

VII. Seizing entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.

VIII. Unless otherwise provided by law, forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.

IX. Seizing agencies shall strive to ensure that seized property is protected and its value preserved.

X. Seizing entities shall avoid any appearance of impropriety in the sale or acquisition of forfeited property.

No program, regardless of quality, can be completely insulated from the potential for misapplication by individuals. I urge you to focus on the good that society as a whole derives from the Asset Forfeiture Program and place less emphasis on the speculation of occasional abuse.

Crime cannot be treated as a political issue. It must be treated by prevention, detection, enforcement, adjudication, and incarceration, but these programs cost money. In this time of fiscal restraint by state and local government, it is altogether fitting that those who bring the drug plague to America pay to halt its insidious advance.

No country at war would seriously consider denying its armies access to seized materials to continue the fight. Law enforcement is at war with the drug empire, on behalf of this nation. If anyone doubts the magnitude of this confrontation, consider the casualties and the body counts. Regrettably, this war is being fought on American soil and the victims include the civilian population.

The United States Justice Department Asset Forfeiture and Equitable Sharing Program must continue, without interruption. It is our supply line to the battle front, essential to law enforcement's continuing fight in our nation's war on drugs. It is a fight we cannot afford to lose, and a fight we cannot win without your support.

On behalf of the National Troopers Coalition and the nation's law enforcement community, I deeply appreciate any consideration that the committee gives this testimony during deliberations.

Thank you all, very much.

United States House of Representatives
Committee on Government Operations
Subcommittee on Legislation and National Security

Testimony of

Lieutenant Colonel Thomas H. Carr
Chief, Bureau of Drug Enforcement
Maryland State Police

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