WARRANTLESS SEIZURES PURSUANT TO THE FLORIDA CONTRABAND FORFEITURE ACT IN THE WAKE OF *FLORIDA v. WHITE*

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I. INTRODUCTION

In *Florida v. White* (*White II*),[1] the United States Supreme Court brushed aside the Fourth Amendment's Warrant Clause and held that the seizure of Tyvessel Tyvorus White's vehicle in a public place pursuant to the Florida Contraband Forfeiture Act[2] did not violate the Fourth Amendment's proscription against warrantless searches and seizures.[3] Police officers seized the vehicle two months after White was observed delivering cocaine from the car.[4] On remand, the Florida Supreme Court in *White v. State* (*White III*)[5] ignored a good portion of its earlier opinion in which it found that the warrantless seizure of White's car pursuant to the Florida Contraband Forfeiture Act violated state constitutional due process principles.[6]

In upholding the warrantless seizure of White's car, the *White II* majority did not require the State to provide any compelling reasons for the warrantless seizure.[7]

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Mr. Gauldin represented Tyvessel Tyvorus White before the United States Supreme Court, the Florida Supreme Court, and the First District Court of Appeal. For a summary of *Florida v. White*, 526 U.S. 559 (1999), see Dennis Hudson, Student Author, *Recent Developments*, 29 Stetson L. Rev. 858, 858–861 (2000).

1. 526 U.S. 559 (1999) (*White II*).
2. Fla. Stat. §§ 932.701–932.707 (2000).
3. 526 U.S. at 566.
4. *Id.* at 561.
5. 753 S.2d 548 (Fla. 1999) (*White III*).
6. *White v. State*, 710 S.2d 949, 952 (Fla. 1998) (*White I*).
7. *See* 526 U.S. at 573 (Stevens & Ginsburg, JJ., dissenting) ("Indeed, the particularly troubling aspect of this case is not that the State provides a weak excuse for failing to obtain a warrant either before or after White's arrest, but that it offers us no reason at all.").

II. CRITICAL ANALYSIS OF THE MAJORITY'S OPINION

The Court inappropriately relied on *Carroll v. United States*[8] for two propositions. First, the "automobile exception" to the Fourth Amendment's warrant requirement was applicable, because the car itself was contraband (as opposed to *carrying* contraband).[9] The second principle underlying *Carroll* was grounded in the law enforcement practice of searching vessels without a search warrant at the time of the adoption of the Fourth Amendment when the mobility of ships made their seizure difficult.[10]

Concerning the first proposition, the Court in *White II* seemed to find no distinction between "per se contraband" (items that are unlawful to possess) and "derived contraband" (items that become contraband by virtue of having transported or having come into contact with per se contraband).[11] According to the *White II* majority, the premise underlying the automobile exception to the warrant requirement of the Fourth Amendment was valid whether per se contraband was found in the automobile or whether the automobile itself was contraband.[12] Presumably, that premise was the mobility of the vehicle.[13] In a footnote, the Court raised, but expressed no opinion on, the two to three month "delay between the time that the police developed probable cause" and the time they seized the vehicle.[14] This delay undercut the Court's argument that the vehicle's mobility justified its warrantless seizure.

The second proposition on which the *White II* majority relied was that warrantless searches of ships and seizures of goods subject to duties were allowed and practiced at the time of the adoption of the Fourth Amendment.[15] The relevance of the seizure of vessels during the 1800s to the seizure of a modern car is tenuous at best. The warrantless search of ships and seizure of goods or vessels were

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8. 267 U.S. 132 (1925).

9. *White II*, 526 U.S. at 564–565; *Carroll*, 267 U.S. at 149, 151–152 (noting the difference between contraband and property containing contraband).

10. 267 U.S. at 151.

11. 526 U.S. at 564–565. The distinction between "per se" and "derived" contraband was recognized by the Court in *One 1958 Plymouth Sedan v. Pa.*, 380 U.S. 693, 699 (1965).

12. 526 U.S. at 565.

13. *Id.* (explaining that the law recognizes the need for special consideration when the object to be seized is movable).

14. *Id.* at 565 n. 4.

15. *Id.* at 564 (citing *Carroll*, 267 U.S. at 151).

necessary, because no other practical remedy existed.[16] Either the ship was searched and seized where it was found or it escaped into the trackless seas.[17] Obtaining a warrant was impractical because of temporal and geographic considerations.[18]

Despite the Court's conclusion to the contrary, the Florida Supreme Court's initial conclusion in *White I* was correct. "There is a vast difference between permitting" the search of an automobile believed to be carrying contraband and the ex parte seizure of a vehicle based on police officers' subjective belief that it was once involved in conveying contraband.[19] Owning a car, as previously noted by the Court, is not inherently illegal.[20] No harm will flow from the failure to seize an automobile or a similar item immediately, because the purposes for which it is being seized (punishment and revenue) do not need to be satisfied before the minimal delay caused by obtaining a warrant.

The Court, in *White II*, also relied upon *United States v. Watson*[21] for the proposition that the seizure of a person in a public place for a felony without a warrant is permissible.[22] However, the *Watson* court expressed a preference for a warrant.[23] Furthermore, an arrested person has rights that a person does not enjoy when his or her property is seized pursuant to the Florida Contraband Forfeiture Act.[24] The arrest of a person without a warrant (as opposed to the seizure of property based on civil standards) is grounded, at least in part, on public safety.[25]

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16. *Id.* at 153.
17. *Id.*
18. *Id.*
19. *White I*, 710 S.2d at 953.
20. *Austin v. U.S.*, 509 U.S. 602, 621 (1993). "'There is nothing even remotely criminal in possessing an automobile.'" *Id.* (quoting *Plymouth Sedan*, 380 U.S. at 699).
21. 423 U.S. 411 (1976).
22. 526 U.S. at 565.
23. 423 U.S. at 423.
24. *E.g. Powell v. Nev.*, 511 U.S. 79, 80 (1994) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)); *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991) (citing *Gerstein*, 420 U.S. at 103). An arrestee's constitutional rights are protected by criminal law. For instance, a person is entitled to a first appearance with the burden on the government to prove probable cause for his arrest and continued detention. *Powell*, 511 U.S. at 80 (citing *Gerstein*, 420 U.S. at 103); *McLaughlin*, 500 U.S. at 47 (citing *Gerstein*, 420 U.S. at 103). In Florida, for instance, a person is entitled to a prompt first appearance before a judicial officer within twenty-four hours of arrest. Fla. R. Crim. P. 3.130(a) (1999).
25. *Watson*, 423 U.S. at 419 (citing *Rohan v. Sawin*, 59 Mass. 281, 284–285 (1850)). "'The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law.'" *Id.* (quoting *Rohan*, 59 Mass. at 284–285).

G.M. Leasing Corporation v. United States,[26] upon which the majority (but not the State of Florida or even the federal government) so heavily relied, is a special constitutional exception to the Fourth Amendment due to the historic urgency to collect revenue.[27] In *G.M. Leasing*, automobiles were seized without a warrant by Internal Revenue Service agents in partial satisfaction of tax debts.[28]

There are some significant differences between *G.M. Leasing* and *White II*. First, the purpose of the seizure of automobiles in *G.M. Leasing* was to satisfy a debt, not to punish pursuant to forfeiture laws.[29] Second, a lien that had the force of a judgment had been filed in the appropriate county courthouse prior to the seizure of the cars.[30] In *White II*, however, other than the whim of the officers involved, no prior notice, legal or otherwise, had been given.[31] Justices David H. Souter and Stephen G. Breyer, in their concurring opinion,[32] gave the valid but toothless warning that they would not tolerate "as a general endorsement . . . warrantless seizures of anything a State chooses to call 'contraband.'"[33]

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26. 429 U.S. 338 (1977).

27. *White II*, 526 U.S. at 566 (citing *G.M. Leasing*, 429 U.S. at 351). First, the power to collect revenue is derived from the United States Constitution, as is the right to be free from unreasonable, warrantless searches and seizures. U.S. Const. art. I, § 8; *id.* amend. IV. Second, the collection of taxes always has been a special case, handled differently in the law. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Although the Government relies to some extent on forfeitures as a means of defraying law enforcement expenses, it does not, and we think could not, justify the prehearing seizure of forfeitable real property as necessary for the protection of its revenues."); *G.M. Leasing*, 429 U.S. at 352 n. 18 ("The *rationale* underlying these [revenue] decisions, of course, is that the very existence of government depends upon the prompt collection of the revenues." (emphasis added)); *Bull v. U.S.*, 295 U.S. 247, 259 (1935) ("But taxes are the life-blood of government, and their prompt and certain availability an imperious need."); *Springer v. U.S.*, 102 U.S. 586, 593–594 (1880) (Ex parte seizure of real property is allowed when the government collects debts or revenue.).

28. 429 U.S. at 344.

29. *Id.* at 350–351.

30. *Id.* at 343.

31. 526 U.S. at 561.

32. *Id.* at 566–567 (Souter & Breyer, JJ., concurring).

33. *Id.* at 566. No doubt this warning is reminiscent of and will have the same effect as that found in Justice Anthony M. Kennedy, Justice Clarence Thomas, and Chief Justice William H. Rehnquist's concurring opinion in *Austin*, when they indicated that "a serious question" would be raised if a "forfeiture [was] permitted when the owner [had] committed no wrong." 509 U.S. at 629 (Kennedy & Thomas, JJ. & Rehnquist, C.J., concurring in part). While Justice Kennedy retained this concern for the innocent owner in his dissent to *Bennis v. Michigan*, 516 U.S. 442, 473 (1996) (Kennedy, J., dissenting), Chief Justice Rehnquist seems to have completely forgotten the concern he expressed for the innocent owner in *Austin* when he wrote the majority opinion in *Bennis*, which allowed the forfeiture of an innocent

III. THE DISSENT

The dissent poked all of the proper holes in the majority's opinion. Moreover, the dissent pointed out issues that had been presented to the majority,[34] but were ignored by it in its opinion. One of the most significant issues left unaddressed by the majority was the pecuniary interests of the seizing agency. The Florida Contraband Forfeiture Act allows some of the revenue generated from a forfeited vehicle to go to the seizing agency.[35] The seizing agency also may choose to keep the seized item, further interjecting the self-interest of the seizing agents into the process.[36] The amount of revenue obtained from seizures alone is substantial.[37] For instance, the total collections from forfeitures in Florida for the reporting period from October 1, 1997, to September 30, 1998, amounted to more than forty-two million dollars with thirty-five million of that from forfeited cash.[38]

As noted by Justice John Paul Stevens in his dissent,

> [A] warrant application interjects the judgment of a neutral decisionmaker, one with no pecuniary interest in the matter, before the burden of obtaining possession of the property shifts to the individual. Knowing that a neutral party will be involved before private property is seized can only help ensure that law enforcement officers will initiate forfeiture proceedings only when they are truly justified.[39]

Of course, this does not break new ground. The majority was well aware, or should have been well aware, of the bias that is interjected by allowing a law enforcement agent to make the initial decision to seize a vehicle.[40] Law enforcement agencies have been quick to

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owner's car. *Id.* at 453.

34. *White II*, 526 U.S. at 569–573 (Stevens & Ginsburg, JJ., dissenting).

35. Fla. Stat. § 932.704(1) (authorizing such agencies "to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes").

36. *Id.* § 932.7055(1)(a).

37. *Florida Contraband Forfeiture Semiannual Report* (Fla. Dept. of L. Enforcement Apr. 12, 1999) (containing summary forfeiture data for October 1, 1997, through September 30, 1998, obtained by the Author pursuant to a public records request).

38. *Id.*

39. *White II*, 526 U.S. at 572–573 (Stevens & Ginsburg, JJ., dissenting) (citation omitted).

40. *See Harmelin v. Mich.*, 501 U.S. 957, 979 n. 9 (1991) (plurality) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

capitalize on the forfeiture law's revenue potential.[41] Not only does a law enforcement officer engage "in the often competitive enterprise of ferreting out crime,"[42] he also engages in the even more competitive enterprise of filling his agency's coffers. As the dissent notes, a warrant requirement promotes an impartial evaluation of the propriety of a seizure.[43] "Without a legitimate exception, the presumption [that a warrant is required] should prevail."[44]

The case was returned to the Florida Supreme Court with a strong suggestion in Justice Stevens's dissent that although the majority held that the Fourth Amendment did not require a warrant under the circumstances, due process provisions of the Florida Constitution might require a warrant.[45]

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41. A June 1, 1999, law enforcement seminar entitled "Drug Assets Seizure and Forfeiture Management" advertised on the Internet and apparently sponsored by Northwestern University, used the following language to attract potential enrollees: "Here's a great opportunity to learn proper procedures (or to insure you are already following them). One small case can reimburse you for the cost of this course many times over. Even the smallest agency can reap significant benefits from this program." Nw. U. Ctr. for Pub. Safety, *Table of Contents, What's New at NUCPS: Conferences and Seminars, Drug Asset Seizure and Forfeiture Management* <http://www.acns.nwu.edu/traffic/ti333.htm> (accessed July 6, 1999). This Web site address has been changed since the Author's research. The new Internet address is <http://www.northwestern.edu/nucps/nucpsnew/wn-conf.htm> (accessed Nov. 14, 2000) (no longer listing referenced seminar).

42. *Johnson v. U.S.*, 333 U.S. 10, 14 (1948).

43. *White II*, 526 U.S. at 572 (Stevens & Ginsburg, JJ., dissenting).

44. *Id.* at 573.

45. *Id.* at 568 n. 1. In footnote 1 of his dissenting opinion, Justice Stevens observed that the Florida Supreme Court's original opinion could be read to suggest that state constitutional due process protections require a warrant before seizure under the Florida Contraband Forfeiture Act. *Id.* Unfortunately, federal due process was never argued, because the Court in *Calero-Toledo v. Pearson Yacht Leasing Company* held that federal due process considerations were satisfied as long as an innocent owner received a hearing after the seizure. 416 U.S. 663, 679–680 (1974). The innocent owner was not entitled to the preseizure adversarial hearing it requested. *Id.* at 676–677. However, *Calero-Toledo* was not relevant to the Fourth Amendment argument made before the United States Supreme Court in *White II*. First, no argument regarding the Fourth Amendment was made in *Calero-Toledo*. *Id.* at 680 n. 14. Second, the innocent owner-lessor requested a preseizure adversarial hearing, not an ex parte hearing for the purposes of issuing a warrant. *Id.* at 668. Third, it is not clear that the agency that actually seized the vessel in *Calero-Toledo* directly and pecuniarily benefitted from the seizure. *Id.* at 679 (The Court does not address whether the agency benefitted from the seizure and such benefits were not addressed in the facts of the case.).

In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993), the Court required notice and a chance for the owner to be heard before a house could be seized unless the government showed the existence of exigent circumstances. This due process principle apparently is applicable only to real property when, as in *James Daniel Good*, the seized property is a domicile. *Id.* Due process was the only available remedy in *James Daniel Good* because an ex parte hearing to obtain a warrant pursuant to the Fourth Amendment occurred prior to the seizure of the property. *Id.* at 47. At any rate, it is clear that the United States

IV. FLORIDA'S CONSTITUTIONAL DUE PROCESS PROVISION

When the case was returned, White urged the Florida Supreme Court to reaffirm its earlier holding that state constitutional due process principles prevented seizure and forfeiture of property without a warrant.[46] While White did not make this argument at the trial level, the issue of Florida's constitutional due process provisions was addressed on four occasions.

First, in *White I*, the Florida Supreme Court relied on this argument to conclude that state due process principles were offended by seizure without a warrant.[47] Second, once the court addressed this issue on its merits, it was, of course, open to comment by the parties. Third, in White's response to the State's petition for writ of certiorari to the United States Supreme Court, the Court was urged not to take the case on the independent state ground that state due process also prohibited seizure of property without a warrant.[48] Fourth, White, in his supplemental brief on the merits, reminded the court of its stance on this issue during *White I* and urged the court to reaffirm its earlier holding.[49]

The State of Florida, in its Respondent's Supplemental Brief on the Merits, ignored the merits of the state constitutional due process argument and only urged waiver.[50] However, at that point, the State had waived the "waiver" argument.[51]

When the Florida Supreme Court issued its second opinion and denied White relief based upon the initial failure to raise this issue, the court apparently suffered from collective amnesia and ignored

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Supreme Court treats the seizure of a domicile differently than the seizure of a movable item, such as a car or vessel. Indeed, residences typically are treated differently with respect to Fourth Amendment issues. *Compare Watson*, 423 U.S. at 413, 424 (upholding the legality of a warrantless arrest in a restaurant, the ensuing search of the arrestee's car, and seizure of property within the car) *with Payton v. N.Y.*, 445 U.S. 573, 588–589 (1980) (requiring a warrant for arrest of a felon in the home).

46. Supp. Br. of Petr. at 4, *White III*, 753 S.2d 548.

47. 710 S.2d at 952 (citing *Dept. of L. Enforcement v. Real Prop.*, 588 S.2d 957, 965 (Fla. 1991)).

48. Br. Amicus Curiae of the Natl. Assn. of Crim. Def. Laws. in Support of Respt. at 12, *White II*, 526 U.S. 559.

49. Supp. Br. of Petr. at 4, *White III*, 753 S.2d 548.

50. Respt.'s Supp. Br. on the Merits at 4, *White III*, 753 S.2d 548.

51. *See Cannady v. State*, 620 S.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State.").

its previous ruling on the merits of this issue (not withstanding that it was pointed out by White in his supplemental brief).

There is, of course, no question but that state constitutional due process principles require a warrant prior to seizure under the Act. First, this was the holding of the Florida Supreme Court in its original *White I* opinion.[52] Second, there was no reason that the Florida Supreme Court should not have addressed the issue. The issue did not require a new factual development, the court had addressed the issue earlier, and it was the perfect opportunity to do so again.

V. CONCLUSION

The benefits of requiring a warrant prior to a forfeiture seizure are obvious and the costs nonexistent. The only "cost" to the law enforcement agency under the circumstances of this case was mere convenience. Surely, inconvenience to a law enforcement agency is no reason to abolish federal and state constitutional protections.

The benefits gained by requiring a preseizure ex parte hearing before a judicial officer are as follows:

1. While probable cause in some cases is virtually indisputable, other situations are not so clear.[53] In those close cases, the determination of probable cause by a judicial officer supplies protection from the non-neutral and unilateral assessment made by a law enforcement agency that has a pecuniary interest in the outcome of the seizure.

2. The only judicial review that occurs in some drug contraband forfeiture cases is the preseizure ex parte judiciary hearing. Although formal criminal charges may never be filed, vehicles are sometimes seized by law enforcement officers and forfeited without contest by the unfortunate owner or possessor of the vehicle. This is permitted under the civil standard found in the Act, which does not provide for appointment of counsel to represent the indigent. Moreover, in many cases, it is not cost effective for a vehicle owner to fight the forfeiture of a vehicle through forfeiture proceedings. In some circumstances, the Act provides for attorneys' fees if the person whose vehicle was seized prevails in a forfeiture proceeding.[54] As a practical matter, employment of the safeguards of the Act is

52. 710 S.2d at 952.

53. *Compare City of Edgewood v. Williams*, 556 S.2d 1390, 1392 (Fla. 1990) (forfeiture not allowed) *with Duckham v. State*, 478 S.2d 347, 349 (Fla. 1985) (forfeiture allowed).

54. Fla. Stat. § 932.704(10).

cumbersome and may be impossible. Indeed, the statutory "safeguards" of the Act are meaningless if a person whose vehicle was seized is not able to avail himself of them.

3. An ex parte judicial hearing provides an "auditing function." Marginal cases will not be brought to a magistrate once law enforcement agencies learn to leave marginal cases alone. A neutral and detached magistrate, without a pecuniary interest, will make the probable cause determination. In those cases where probable cause does not exist, an individual whose car has been seized will not be placed in the position of having to initiate procedures under the Act in order to obtain the return of his or her property.

4. Because this will be an ex parte preseizure judicial hearing, safe, effective law enforcement will not be impaired. The concern for flight that led the United States Supreme Court, in *Calero-Toledo v. Pearson Yacht Leasing Company*,[55] to reject an adversarial hearing requirement is not present when a petitioner merely requests an ex parte preseizure warrant hearing.[56]

So what is the final effect of *White II*? It may come to pass that law enforcement agencies across the country will begin to operate used car lots, stocked with vehicles obtained by warrantless seizures at the expense of vehicle owners who have been stripped of their Fourth Amendment protections.

55. 416 U.S. 663 (1974).
56. *Id.* at 679.