D/a 5-7-85

IN THE SUPREME COURT OF FLORIDA

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JEFF C. DUCKHAM, :

Petitioner, Case No.: 66,017

vs. DCA Case No.: AV-364

THE STATE OF FLORIDA,

Respondent. :

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

PETITIONER DUCKHAM'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Claimant JEFF C. DUCKHAM will be referred to in this BRIEF as "DUCKHAM" or the "Petitioner"; the STATE OF FLORIDA will be referred to as the "STATE" or the "Respondent." References to the original RECORD ON APPEAL will be by the designation "[R. _____]".

STATEMENT OF THE CASE AND OF THE FACTS

1. The Facts[1]

In early November, 1981, Petitioner DUCKHAM met with undercover police officer Brad Joll at a local pizza restaurant at 1254 West University Avenue in Gainesville, Florida, near the University of Florida campus. Brad Joll previously had contacted DUCKHAM to discuss purchasing cocaine and the Petitioner had indicated he could obtain cocaine from his roommates [R. 21, 46].

DUCKHAM drove alone to the pizza restaurant in his 1977 Volkswagen Rabbit, the subject of this forfeiture proceeding. He arrived earlier than Joll, who also drove alone in a separate vehicle to the restaurant [R. 21,46].

At the restaurant, DUCKHAM asked Joll for personal information about Joll so that DUCKHAM could assure his roommates of Joll's credibility. During this conversation, Joll was equipped with a "body bug" and a surveillance unit monitored the conversation [R.22,46].

After this conversation, Joll and DUCKHAM drove their respective vehicles to DUCKHAM's residence at 2284 N. W. 19th Place in Gainesville. They exited their cars and entered that residence, where they awaited the delivery of

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[1]See the STIPULATED FACTS [R. 21-22] and the trial Court's ORDER GRANTING DEFENDANT'S MOTION TO QUASH AND DISMISS [R. 46-48].

cocaine to Joll by another individual, Shawn Parker. Shortly thereafter, Parker brought a quarter of an ounce to Joll, and after an additional waiting period Parker delivered a half an ounce of cocaine to the undercover officer [R. 22,46].

At no time was any part of the cocaine transaction, including any conversation about the transaction, conducted in or near DUCKHAM's vehicle. The Volkswagen was not used to transport cocaine, any other contraband or any person other than DUCKHAM, as outlined above [R. 22,46-47].

2. Statement of the Case

Law enforcement officers seized DUCKHAM's Volkswagen on 31 December 1981, the date of DUCKHAM's arrest [R. 21,47]. On 29 March 1983 the State filed its PETITION FOR RULE TO SHOW CAUSE [R. 1,46], seeking forfeiture of the vehicle under the Florida Contraband Forfeiture Act.[2] DUCKHAM subsequently presented four grounds for dismissal of the PETITION in his MOTION TO QUASH RULE TO SHOW CAUSE AND TO DISMISS PETITION FOR RULE TO SHOW CAUSE [R. 8-10].[3] Based on STIPULATED FACTS [R. 21-22] presented to the Honorable

[2]§§932.701-.704, Fla. Stat. (1981 & 1982 Supp.), hereinafter referred to as the "Act"; the current forfeiture statute is at §§932.701-.704, Fla. Stat. (1983).

[3]DUCKHAM's four arguments are: (1) because the STATE waited for over a year to initiate its forfeiture action, it has failed to "promptly proceed" under section 932.704(1) of

Chester B. Chance, Circuit Court Judge, at a final forfeiture hearing in May 1983, the trial Court granted DUCKHAM's MOTION TO QUASH RULE TO SHOW CAUSE AND TO DISMISS PETITION FOR RULE TO SHOW CAUSE. The Circuit Court limited its ORDER GRANTING DEFENDANT's MOTION TO QUASH AND TO DIMISS [R. 46-48] to the Petitioner's argument that the facts of the instant case do not substantiate "facilitation" under the Florida Contraband Forfeiture Act [R. 47]. Judge Chance found that the record indicates that DUCKHAM "acted as an independent intermediary in the transaction" and not as a "'key figure' of illicit leadership," citing In Re: Forfeiture of 1979 Toyota Corolla, 424 So.2d 922 (Fla. 4th DCA 1982); that the "record is void of any indication that Duckham's vehicle constituted part of a 'modus operandi' in the transaction" (again citing to In Re: Forfeiture of 1979 Toyota Corolla, supra); and finally, that "the record amply indicates the Volkswagen's role was 'only remotely incidental' to the transaction," citing City of Clearwater v. One 1980 Porsche 911 SC, 426 So.2d 1260 (Fla. 2d DCA

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the Florida Contraband Forfeiture Act; (2) the PETITION FOR RULE TO SHOW CAUSE fails to adequately state a cause of action for forfeiture; (3) even if the allegations of the PETITION are sufficient, the facts of this case do not substantiate "facilitation" under the Act; and finally, (4) the Act is unconstitutionally vague and overly broad, both on its face and as applied to this forfeiture action [R. 8-10].

1983) [R. 47-48]. In summary, the trial Court held:

> The precise facts which amount to facilitation under the statute remain unsettled, yet, it is clear the instant facts fall short of the minimum statutory threshold.

[R. 47].

The STATE appealed Judge Chance's decision, addressing the single issue of whether the facts of this case amount to "facilitation" under the Act. The First District Court of Appeal reversed on this issue. State v. One 1977 Volkswagen, 455 So.2d 434 (Fla. 1st DCA 1984). In its Opinion, the First District reviewed the stipulated facts of this case and held:

> Contrary to the holding of the trial court, we find that Duckham used his vehicle to facilitate the sale of contraband within the meaning of Section 932.702(3), and the state was entitled to an order of forfeiture. See One 1976 Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984); and In Re: Forfeiture of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984).

455 So.2d at 435. Judge Barfield dissented with an Opinion.[4]

Thereafter, the First District denied the Petitioner's MOTION FOR REHEARING OR FOR CLARIFICATION OF DECISION AND FOR REHEARING EN BANC on all grounds, specifically declining

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[4]Judge Barfield's dissenting Opinion, set forth elsewhere in the text of this BRIEF and further set out at page four of the APPENDIX TO PETITIONER DUCKHAM'S JURISDICTIONAL

to remand the case to permit the trial Court to address the three remaining issues originally raised by DUCKHAM in his MOTION TO QUASH RULE TO SHOW CAUSE AND TO DISMISS PETITION FOR RULE TO SHOW CAUSE. 455 So.2d at 436. The Petitioner timely filed his NOTICE TO INVOKE DISCRETIONARY JURISDICTION PURSUANT TO RULE 9.030(a)(2)(A)(iv), FLORIDA RULES OF APPELLATE PROCEDURE. This Court subsequently issued its ORDER ACCEPTING JURISDICTION AND SETTING ORAL ARGUMENT, which was filed in the First District Court of Appeal on 30 January 1985.

ARGUMENT

I.

A VEHICLE IS NOT SUBJECT TO FORFEITURE UNDER THE "FACILITATION" PROVISION OF SUBSECTION 932.702(3) OF THE FLORIDA CONTRABAND FORFEITURE ACT IF THE VEHICLE IS USED SOLELY AS A MEANS OF INCIDENTAL TRANSPORTATION BY AN INTERMEDIARY IN A CONTROLLED SUBSTANCE TRANSACTION.

Introduction

This case squarely presents the important issue of interpretation and application of the "facilitation" provision of subsection 932.702(3) of the Florida Contraband

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BRIEF, is noted in the Southern Reporter but is not printed. State v. One (1) 1977 Volkswagen, 455 So.2d 434, 436 (Fla. 1st DCA 1984).

Forfeiture Act, which provides:

> It is unlawful: (3) [t]o use any vessel, motor vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

While this Court has not addressed subsection 932.702(3) of the Act, the District Courts of Appeal have examined the facilitation subsection fairly frequently in recent years.[5] However, no prior Florida decision (nor any reported Federal decision interpreting the corresponding Federal forfeiture statute, 49 U.S.C. §§781-782) has authorized forfeiture of a vehicle under facts such as those of the instant case; that is, under circumstances in which an intermediary has used a vehicle solely as a means of incidental transportation prior to the occurrence of an illegal transaction. The First District Court of Appeal's decision reversing the trial Court's denial of forfeiture in this case stands without precedent and conflicts with prior Florida cases on this issue. Further, the decision is at odds with the apparent legislative intent underlying the Florida Contraband Forfeiture Act.

This case presents an opportunity for this Court not only to resolve a conflict of District Court of Appeal deci-

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5 See, e.g., In Re: Forfeiture of One 1979 Mazda, 453 So.2d 144 (Fla. 1st DCA 1984); In Re: Forfeiture of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984); One 1976

sions and provide guidance to the lower courts in interpretation and application of the often-used facilitation provision of the Act, but also to enforce legislative intent and reinforce those rules of statutory construction recognized by this Court in Griffis v. State, 356 So.2d 297 (Fla. 1978). By reversing the First District Court of Appeal's decision, this Court will also insure fairness in application of Florida's forfeiture laws by prohibiting forfeiture of a vehicle which the Petitioner used simply to "cover ground" and not to "facilitate" prohibited conduct.

1. The Scope of "Facilitation": A Framework for Analysis

As stated by the Circuit Court, the substantive legal issue presented by the facts of this case is:

> ...whether a vehicle used to transport an intermediary to or from an unlawful transaction, but in which no part of the transaction occurs, has 'facilitated' that transaction within the meaning of the Statute [the Florida Contraband

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Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984); In Re: Forfeiture of 1977 Jeep Cherokee, 443 So.2d 1027 (Fla. 2d DCA 1983); City of Clearwater v. One 1980 Porsche 911 SC, 426 So.2d 1260 (Fla. 2d DCA 1983); In Re: Forfeiture of 1979 Toyota Corolla, 424 So.2d 922 (Fla. 4th DCA 1982), juris. withdrawn sub nom., Mora v. City of Ft. Lauderdale, 446 So.2d 97 (Fla. 1984); In Re: Forfeiture of 1968 Desco Shrimping Vessel, "Stargazer", 417 So.2d 279 (Fla. 1st DCA 1982), pet'n for review denied, 424 So.2d 760 (Fla. 1983); Mosley v. State, 363 So.2d 172 (Fla. 4th DCA 1978).

> Forfeiture Act, and more specifically, subsection 932.702(3) of the Act].

[R. 47].

Definitions of facilitation abound. In Mosley v. State, 363 So.2d 172 (Fla. 4th DCA 1978) the Court defined facilitation by reference to Webster as "'to make easy or less difficult; to free from difficulty or impediment; as, to facilitate the execution of a task.'" Id. at 174 (footnote omitted) (quoting United States v. One 1950 Buick Sedan, 231 F.2d 219, 222 (3rd Cir. 1956)). See also City of Clearwater v. One 1980 Porsche 911 SC, 426 So.2d 1260, 1262 (Fla. 2d DCA 1983); In Re: Forfeiture of 1968 Desco Shrimping Vessel, "Stargazer", 417 So.2d 279, 280 (Fla. 1st DCA 1982), pet'n for review denied, 424 So.2d 760 (Fla. 1983). As Judge Chance recognized, application of the facilitation provision can be difficult:

> 'Facilitation' is a question of fact which must be resolved by examining the nature of the vehicle's involvement in the underlying transaction. Although the issue is not susceptible to generalization, 'facilitation' flows from a reasonably close nexus between the vehicle's actual use in the transaction and the transaction's dependence upon its use. Accordingly, the dispositive factor is the vehicle's role in furtherance of the transaction.

[R. 47]. Nonetheless, certain parameters to applying this provision are apparent in Florida's case law and were used

by the trial Judge to resolve the facilitation issue of the instant case [R. 47,48].

The following analysis of that case law (and corresponding Federal law on vehicle forfeiture), in addition to an examination of the legislative history and intent of the Florida Contraband Forfeiture Act and established rules of statutory construction, delineates the contours of the "use to facilitate" provision of the Act by demonstrating that <u>mere use</u> of a vehicle in a criminal transaction is not enough to substantiate facilitation. Rather, the State must demonstrate a substantial nexus between use of a vehicle and the prohibited conduct. The vehicle's use or role must be instrumental and purposeful --not remote or incidental -- to accomplishing illegal conduct.

2. <u>"Facilitation" in Florida</u>

Trial courts have uniformly approached forfeiture provisions with an attitude of caution. Characterized as "strict construction," such an approach represents the judiciary's attempt to insure that the strongly conflicting interests at stake -- the State's in exercising its police power, and the claimant's right to enjoy private property -- are harmonized in a constitutional, and basically just, manner. Faced with the harshness and finality of forfeiture, Florida courts have recognized the necessity of strict construction as a

starting point for analysis. See, e.g., General Motors Acceptance Corp. v. State, 152 Fla. 297, 11 So.2d 482, 484-85 (1943); Smith v. Hindery, 454 So.2d 663, 664 (Fla. 1st DCA 1984) (corrected Opinion); In Re: 36' Uniflite, the "Pioneer I", 398 So.2d 457, 459 (Fla. 5th DCA 1981); In Re: Forfeiture of 1969 Chevrolet Camaro, 344 So.2d 82, 82-83 (Fla. 3rd DCA), cert. denied, 342 So.2d 1103 (Fla. 1976). See also Griffis v. State, 356 So.2d at 302.

The inherent broadness of the term "facilitation" in subsection 932.702(3), however, has presented difficulty to Courts attempting to fairly construe the statute. A variety of tests and standards have been adopted by various Florida Courts in evaluating the propriety of forfeiture under the potentially all-inclusive umbrella of the term "facilitation."

In certain cases, forfeiture of a vehicle on a theory of facilitation is clearly justified. When a car has been used to transport contraband for purposes of delivery or sale, it has clearly facilitated a crime. Similarly, when either negotiations for an illegal transaction or the transaction itself occurs in the protective privacy of a vehicle, the vehicle's use falls within the statute's contemplation. Finally, Florida courts have found forfeiture appropriate when a vehicle's use is so integral to an illegal scheme or

design that it may fairly be called part of the crime's "modus operandi." A more difficult fact situation is illustrated by the instant case, in which a vehicle is used only as a means of incidental transportation prior to a criminal transaction. Under these facts, the issue posed is how far the facilitation provision of subsection 932.702(3) will be allowed to extend.

The starting point for analysis of this issue under Florida case law is Griffis v. State, supra. In Griffis, this Court reviewed the history and purpose of sections 943.41-.44 of the Florida Statutes (1975) (the Florida Uniform Contraband Transportation Act) and section 893.12 of the Florida Statutes (1973) (the Florida Comprehensive Drug Abuse Prevention and Control Act), the predecessors to the current Florida Contraband Transportation Act. The issue posed in Griffis was whether a vehicle used by the appellant in that case for the purpose of transporting cannabis and cocaine was subject to forfeiture in the absence of proof that the vehicle had been used as part of an illegal drug operation.

This Court held that while a literal reading of the language of section 943.42 of the Florida Statutes (1975)[6] supported the trial Court's determination that Florida's

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[6]Apparently the State sought forfeiture in Griffis under subsection 943.42(2) of the Florida Statutes (1975), which provided: "It is unlawful: (2) to conceal or possess any

forfeiture statute did not require that a vehicle be used in an illegal drug operation to sustain forfeiture, such a literal reading of the statute must give way to the plain legislative intent, which "was directed at the transportation of controlled substances for distribution and not for personal possession and consumption." Id. at 302. Accordingly, the Griffis Court found forfeiture inappropriate in the absence of a demonstrated "nexus" between contraband found in a vehicle and the furtherance of an illegal drug operation. Id. at 302.

In reaching that conclusion, the Court noted that the predecessor statute to the Florida Contraband Transportation Act was enacted with the express legislative intent of achieving uniformity between the laws of this State and of the United States, necessary to effectively prevent and control drug abuse. Id. at 299. Then turning to an examination of 49 U.S.C. §§781-782, the Federal forfeiture counterparts to Florida's general forfeiture Act, the Griffis Court demonstrated that forfeiture is authorized only when a vehicle is engaged in drug trafficking. Id. at 299-300. Citing the legislative history accompanying the 1950 amendments to 49 U.S.C. §§781-782, this Court quoted:

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contraband article in or upon any vessel, motor vehicle or aircraft."

> 'Vessels, vehicles and aircraft may be termed the operating tools of dope peddlers, and often represent major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.'

Id. at 300.

Quoting a decision by the Supreme Court of South Dakota, State v. One 1972 Pontiac Grand Prix, 242 N.W. 2d 660 (S.D. 1976), in which that Court considered, and rejected, an attempted forfeiture based on a "possession" provision identical to that explored in Griffis, this Court noted:

> 'The statute is transportation to accomplish possession, not simply transportation "with" possession.' (emphasis theirs) Here, there is no evidence in the affidavits of a conscious design to transport, sell, receive, possess, or conceal a controlled substance in the defendant automobile.

256 So.2d at 302 (quoting from State v. One 1972 Pontiac Grand Prix, 242 N.W. 2d at 663, which in turn quoted State v. One Porsche, 526 P.2d 917, 919 (Utah 1974) (emphasis in original)). Approving 1972 Pontiac, this Court simply recognized that in the absence of proof of a nexus between any criminal behavior other than possession and the vehicle's use, forfeiture would do no service to the avowed legislative intent.

In considering the instant case, it should first be noted that the law has changed since Griffis. In 1980, Florida's legislature reacted to the decision by amending the Florida Uniform Contraband Transportation Act. In addition to renaming and renumbering sections 943.41-44, the legislature added section 932.701(2)(e),[7] section 932.702(4),[8] and, most significantly, amended subsection 932.703(1) to provide that "[i]n any incident in which possession of any contraband article ... constitutes a felony, the ... motor vehicle ... in or on which such contraband article is located at the time of seizure shall be contraband subject to forfeiture." Florida courts have recognized that these amendments, taken as a whole, serve to legislatively override Griffis' holding that mere possession of contraband in a vehicle does not subject the vehicle to forfeiture. See, e.g., In Re: Forfeiture of a 1977 Datsun

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[7]Subsection 932.701(2)(e) provides that "contraband article" includes:

> [a]ny personal property, including, but not limited to, any item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, or currency, which has been or is actually employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony.

[8]Subsection 932.702(4) provides that it is unlawful "[t]o conceal or possess any contraband article."

280Z Automobile, 448 So.2d 78, 79 (Fla. 4th DCA), pet'n for review denied, 453 So.2d 43 (Fla. 1984); State v. Peters, 401 So.2d 838, 840 (Fla. 2d DCA 1981).[9]

In order to put the Griffis case and the 1980 amendments into perspective, it is helpful to note what Griffis did not say. First, forfeiture in that case was sought under a possession provision (former subsection 943.702(2), which is now subsection 932.702(2)) rather than the facilitation provision (the current subsection 932.702(3)) upon which the State proceeds in the instant case. Case law has made clear that when possession is the charged basis of forfeiture, the State may proceed upon either the possession provision or the facilitation provision. See, e.g., In Re: Forfeiture of One 1979 Mazda Automobile, 453 So.2d 144, 146 (Fla. 1st DCA 1984) (vehicle subject to forfeiture when used to transport a passenger with marijuana to and from a shopping center and passenger sold marijuana to an undercover officer at the shopping center); State v. Franzer, 364 So.2d 62, 63 (Fla. 4th DCA 1978) (vehicle subject to forfeiture when used as a delivery vehicle in a marijuana distribution scheme). In other words, the 1980 amendments overruling Griffis have no direct impact on the facilitation provision at hand.

An analysis of Griffis is still crucial to the resolu-

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[9]The 1980 amendments to Florida's forfeiture law demonstrate a legislative intent "that the forfeiture of vehicles for mere felony possession will be helpful in the

tion of the instant case, however, because the legislative intent underlying Florida's general forfeiture statute, so carefully scrutinized by this Court in Griffis, remains intact after the 1980 amendments. The amendments, while indeed broadening the scope of permissible forfeiture, must not be viewed as implicitly overruling the basic purpose underlying the Act, that is, allowing forfeiture only when necessary to prevent trafficking in narcotics by depriving narcotics dealers of the "operating tools" of their trade. Griffis v. State, 356 So.2d at 300. Rather, the changes should be interpreted as the legislature's recognition that Florida's general forfeiture statute will be strictly construed by the judiciary and that the legislature must specifically broaden the language of Florida's forfeiture law if it intends to permit forfeiture under facts that legislative and case law history would not otherwise authorize. The 1980 amendments simply permit forfeiture under the facts of Griffis and the predecessor statute to current subsection 932.702(2). They demonstrate the legislature's intent "[t]o provide specific statutory

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fight against the trafficking, transportation, sale, use and possession of drugs." Department of Highway Safety and Motor Vehicles v. Pollack, 10 F.L.W. 297 (Fla. 3d DCA, 29 Jan. 1985).

authority for the forfeiture of certain items since the Florida Supreme Court has consistently refused to expand the scope of forfeiture statutes."[10]

Under the rules of statutory construction and the examination of legislative intent in Griffis, then, forfeiture of DUCKHAM's vehicle in this case is uncalled for. The State has not demonstrated any significant or substantial relationship or nexus between DUCKHAM's use of his vehicle and furtherance of the sale or delivery of cocaine. Far from an "operating tool" of illegal activity, or part of a "conscious design" or "modus operandi" for the sale or delivery of cocaine, the vehicle was used solely as a means of local, incidental transportation prior to a criminal transaction. Further, forfeiture of DUCKHAM's vehicle will not "'help to prevent the illegal sale of narcotics any more than forfeiture of any number of claimant's personal effects which facilitate his ability to deal with such commonplace and everyday problems as transportation.'" Griffis v. State, 356 So.2d at 301 (quoting United States v. One 1972 Datsun, 378 F.Supp. 1200, 1205 (D.N.H. 1974)).
The unwarranted effect of the First District's decision in this case is to unduly broaden the scope of the facilitation provision of the Act beyond legislative intent, as Judge

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[10]COMM. ON CRIM. JUSTICE, FLA. H. REP. HB 85 Statement of Legislative Intent 2 (April 11, 1980 unpublished Committee report).

Barfield recognized in this case:

> I dissent. the court has extended the application of the forfeiture statute to snare all motor vehicles owned by participants in illicit contraband transactions if the owner transports himself for any reason in the vehicle during which time he also furthers the cause of the illegal transaction. Rather than interdicting the flow of contraband, the decision appears to encourage the use of a friend's or relative's vehicle, commercial transportation or other conveyance when the use of the vehicle is not really necessary to the accomplishment of the illegal transaction.

[APPENDIX TO PETITIONER DUCKHAM'S JURISDICTIONAL BRIEF, p. 4].

The District Court of Appeal decisions interpreting and applying the facilitation provision of the Act support DUCKHAM's argument that forfeiture is not appropriate in the instant case. Several of these decisions explore the relationship between Griffis and the facilitation provision of the Act. In Mosley v. State, 363 So.2d 173 (Fla. 4th DCA 1978), for example, the appellant had parked his automobile near a bar and used the car as a site for the negotiation, delivery and payment of heroin. Id. at 173-74. The Fourth District had no difficulty finding forfeiture appropriate under a facilitation theory, even though the facts in Mosley involved a single sale of heroin rather than an "ongoing" criminal operation. Id. at 174-75. In reaching this conclusion, the Mosley Court equated Griffis' "significant

relationship" requirement with the "facilitation" provision of subsection 943.42(3) of the Florida Statutes (1977). Because the facts in Mosley demonstrated that vehicle was used to facilitate the sale of heroin, which constituted "trafficking in drugs," the Fourth District found that the Griffis requirement of "significant relationship" was met, as well as the facilitation requirement of subsection 943.42(3). Id.

Thus, the Mosley decision is instructive on two points. Initially, forfeiture was clearly appropriate in that case under the Griffis rationale -- the vehicle has been used to transport or conceal heroin, in furtherance of the sale of that heroin. The claimant did not simply possess heroin in the vehicle for his personal use; rather, the possession or concealment of the heroin in the vehicle was significantly or substantially related to an illegal drug operation.

Further, as noted by the Mosley Court, forfeiture was authorized under a similar but different forfeiture theory -- facilitation. The claimant in Mosley had obviously used his vehicle to facilitate a heroin transaction. The vehicle was the site of not only the negotiation, but the delivery of and payment for heroin. In the context of facilitation, a significant relationship, or nexus, existed between use of the vehicle and the furtherance of illegal activity. Mosley

purposefully used his vehicle to further, or facilitate, a criminal transaction. In fact, the vehicle was part of a "conscious design," so integral to the transaction as to be deemed part of the "modus operandi" of the parking lot heroin transaction.

Similarly, In Re: Forfeiture of 1968 Desco Shrimping Vessel, "Stargazer" [hereinafter referred to as "Stargazer"], 417 So.2d 279 (Fla. 1st DCA 1982), pet'n for review denied, 424 So.2d 760 (Fla. 1983) demonstrates a claimant's purposeful use of a vessel as part of the modus operandi of a criminal transaction. The vessel was placed on the Steinhatchee River as a decoy, intended to divert law enforcement attention from an importation operation scheduled to take place at another location. Id. at 279-80. Referring to this Court's analysis in Griffis, as well as the discusison of facilitation in Mosley, the First District held:

> Given the expressed intent to use the Stargazer as a decoy and the action in furtherance of that intent of placing the Stargazer in the Steinhatchee River, the setting up of the Stargazer as a decoy can be held to have facilitated the operation.

Id. at 280 (emphasis added).

The key facilitation decision of In Re: Forfeiture of 1979 Toyota Corolla, 424 So.2d 922 (Fla. 4th DCA 1982),

juris. withdrawn sub nom., Mora v. City of Ft. Lauderdale, 446 So.2d 97 (Fla. 1984) also requires that the State show a direct, significant relationship between the use of a vehicle and an illegal transaction in order to authorize forfeiture under the Act. In that case, the claimant drove to a parking lot in an automobile and, by prearranged plan, met an undercover officer in the parking lot. The parking lot had been selected by the claimant as the scene for the cocaine transaction which ensued. The claimant exited his car, which he had parked near the undercover officer's vehicle in the lot, and sat in the back seat of the officer's vehicle to discuss the sale of cocaine. While negotiating the sale, the claimant "expressed that he liked doing business in the parking lot as he felt secure from possibly losing cocaine as had happened to him on a past occasion." 424 So.2d at 923. Thereafter, both individuals exited the officer's vehicle and a third person delivered the cocaine to the lot in a brown grocery bag. The claimant placed the grocery bag in the undercover officer's vehicle, removed some grocery items from the bag and then removed the bag from the undercover officer's vehicle and handed it to the officer. The bag contained cocaine.

The Fourth District Court of Appeal agreed with the trial Court that the claimant's vehicle had been signifi-

cantly involved in the cocaine transaction:

> The real issue in this case is how little a nexus is necessary to make a vehicle subject to forfeiture. In this case, we have no question of the following things: a drug deal was made; Mora was a key figure in the deal; the deal was to be consummated in a parking lot; Mora drove the car in question to the parking lot to consummate the criminal transaction. Given those facts, we hold that is all that is necessary to warrant a forfeiture of the car in question. By using his car to transport himself to the site of drug transaction, Mora used the car to facilitate the consummation of the transaction.

Id. at 924.[11]

Significant factual differences exist between the instant case and 1979 Toyota. In the latter, the claimant himself made it apparent that he intentionally used his vehicle to facilitate the transaction; he stated that he liked doing business in a parking lot for security reasons. 424 So.2d at 923. Furthermore, the facts of 1979 Toyota illustrate the use of a vehicle as an integral part of the "modus operandi" of an illegal transaction, justifying forfeiture on grounds of facilitation. Mora wanted to conduct the cocaine delivery in the anonymity of a shopping center parking lot. He needed a vehicle to accomplish that objective. He chose the specific parking lot in which he

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[11]The Fourth District cited two Federal cases, United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2d Cir. 1977) and United States v. One 1977 Cadillac, 644 F.2d

desired the transaction to occur, located in front of a grocery store. He even went to the length of having groceries packed on top of the cocaine in a grocery bag to increase the likelihood of success of the parking lot transaction. In sum, the use of Mora's vehicle facilitated the cocaine delivery. It was a necessary part of a plan for the transaction which Mora had choreographed.

In the instant case, on the other hand, DUCKHAM used his vehicle for only one purpose -- to cover ground. This incidental use is substantially different from Mora's use of his car in 1979 Toyota. The only similarity between the two cases is that a vehicle was used for transportation prior to an illegal transaction. All similarity between the two cases ends with this fact. Indeed, DUCKHAM is not even a "key figure" under the facts of the instant case; as found

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500 (5th Cir. 1979) to support its decision. Both of these cases were decided by their respective Federal courts on the basis of 21 U.S.C. §881, et. seq., which is a considerably broader Federal forfeiture provision than the Federal counterpart to the Florida Contraband Transportation Act, 49 U.S.C. §§781-782. (This important distinction between the two Federal statutes is outlined in detail elsewhere in this BRIEF.) Thus, these section 881 cases are not appropriate authority for the Fourth District's decision. Further, as discussed elsewhere in this BRIEF, One 1974 Cadillac and One 1977 Cadillac can easily be distinguished from the facts of the instant case. Nonetheless, DUCKHAM maintains that 1979 Toyota was properly decided and provides useful guidance to this Court for application the facilitation provision of the Florida Contraband Transportation Act.

by Judge Chance, he was an "intermediary" [R. 47-48]. While this distinction is not critical to disposition of this case, it is yet another factor to consider in accurately comparing the facts of 1979 Toyota and those of the instant case.

The Second District Court of Appeal distinguished 1979 Toyota from the facts before it in City of Clearwater v. One 1980 Porsche 911 SC, 426 So.2d 1260 (Fla. 2nd DCA 1983). In that case, the claimant drove his Porsche automobile to Tampa International Airport, parked the car at the airport and then flew from Tampa to North Dakota. While in North Dakota, the claimant participated in the sale of marijuana to an undercover policeman. Among various items found in the Porsche at the time of its seizure in Tampa, after the claimant's arrest in North Dakota, were an address book containing the name and phone number of the North Dakota undercover policeman and a note with the name and location of the store which rented the trailer used to haul the marijuana. Id. at 1261.

The Second District ruled in the Porsche case that the use of the vehicle to transport the claimant on part of his journey to North Dakota, where he consummated a sale of marijuana, was a use of the vehicle "only remotely incidental" to the sale of the marijuana. The Court continued:

> The criminal activity was not proved to have dependence upon the use of the Porsche. We believe that any other ruling by the trial court under the particular circumstances of this case would have passed beyond the outer limits of the terms 'facilitation' and 'aiding or abetting.'

Id. at 1262.

DUCKHAM's use of his Volkswagen to travel to locations where he discussed a cocaine transaction and ultimately concluded his role as middleman in the transaction is almost precisely similar to the use of the vehicle in the Porsche case. As in Porsche, the criminal activity ultimately consummated was never dependent upon the use of the Volkswagen; no drugs or other contraband, including currency, were transported in DUCKHAM's vehicle; no conversations regarding an illegal transaction took place inside the Volkswagen; and the vehicle was never used to transport anybody other than DUCKHAM for short distances. The trial Court was correct in finding that the role of DUCKHAM's Volkswagen was only remotely incidental to the transaction [R. 48].

The First District did not mention 1980 Porsche in its Opinion in the instant case. The Court cited only In Re: Forfeiture of One 1979 Ford, 450 So.2d 863 (Fla. 4th DCA 1984) and One 1976 Dodge Van v. State, 447 So.2d 984 (Fla. 1st DCA 1984). Both of these decisions, however, refer to 1979 Toyota. 450 So.2d at 864; 447 So.2d at 986. A careful

analysis of the cited cases amply supports DUCKHAM's argument that forfeiture is appropriate under the facilitation provision only if some significant relationship, other than incidental transportation, is demonstrated between the use of a vehicle and the furtherance of criminal activity.

In One 1979 Ford the Fourth District found that the following facts sufficiently demonstrate facilitation:

> [T]he only connection shown between the vehicle forfeited and the appellant's illegal activities was that the vehicle was used by the appellant to travel to and from a bar where appellant consummated an illegal drug transaction.

Id. at 864. Other than citing to Chapter 932 and 1979 Toyota, no further discussion is offered by the Fourth District as to the basis, factual or otherwise, for its decision that forfeiture was appropriate under the facts of One 1979 Ford. Even these minimal facts, however, demonstrate a critical distinction between One 1979 Ford and the instant case: At some point, whether it was when the appellant traveled to or from the bar where an illegal transaction was consummated, drugs must have been transported in the vehicle. Logic compels this conclusion -- either the appellant took drugs to the bar to consummate a transaction, or drove to the bar to consummate a transaction and transported the drugs in his vehicle when he left

the car. In either event, such transportation of contraband is both distinguished from the instant case and authorizes forfeiture under precedent such as Griffis, State v. Peters, 401 So.2d 838, 840 (Fla. 2d DCA 1981) and State v. Franzer, 364 So.2d 62, 63 (Fla. 4th DCA 1978). See also In Re: Forfeiture of One 1979 Mazda Automobile, 453 So.2d 144, 146 (Fla. 1st DCA 1984); Heinrich v. Miller, 444 So.2d 589, 590 (Fla. 2d DCA 1984). All these decisions permit forfeiture when a vehicle is used to transport contraband in furtherance of delivery or sale of that contraband. Such facts do not exist in the instant case.

In One 1976 Dodge Van, law enforcement officers intercepted a telephone conversation between Randy Yarborough and Helen Crenshaw in which those individuals negotiated a purchase of dilaudid. The transaction was to occur at the Tallahassee Hilton Hotel. Later that day, Yarborough and a third party, Becky Taylor, arrived at the Hilton in Yarborough's car. Taylor entered the Hilton and met Crenshaw. Several minutes later, the appellant (and supplier of the dilaudid) arrived at the Hilton in his van and parked in the front of the hotel. Crenshaw left the Hilton, entered the van, talked with the appellant for a short period of time, then left the van and returned to the Hilton. Crenshaw and Taylor entered a restroom for a few

moments; when they exited, Taylor returned to Yarborough's car and Crenshaw spoke briefly with the appellant. Id. at 985.

Several days later, a second telephone conversation was intercepted, this time between Yarborough and the appellant. During that conversation, a second purchase of dilaudid was discussed. The appellant agreed to deliver the dilaudid to Yarborough's residence. Id.

The First District affirmed the trial Court's decision to forfeit the van, finding "a sufficient nexus between the van and the illegal drug transaction" to define the van as a contraband article under subsections 932.701(2)(e) and 932.703(1) of the Act. Id. More specifically, the First District held that the van facilitated the consummation of the dilaudid transaction under subsection 932.703(1) when the appellant used the vehicle to transport himself to the transaction location. Citing 1979 Toyota, the First District offered no further analysis of its decision.

As in One 1979 Ford, the facts of One 1976 Dodge Van raise the clear inference that contraband was carried in the van by the appellant/supplier for the purpose of delivery or sale at the Hilton. Accordingly, the van was subject to forfeiture under the facilitation provision of subsection 932.702(3). This fact alone distinguishes One 1976 Dodge

Van from the facts of the instant case. Further, the second intercepted telephone conversation indicated that the appellant, who was to again deliver dilaudid, used his vehicle as a delivery truck -- and as part of his modus operandi in dilaudid transactions.

As with One 1979 Ford, the basis for One 1976 Dodge Van's reliance on 1979 Toyota is not articulated by the First District. Clearly, 1979 Toyota does not involve facts in which the vehicle sought to be forfeited had transported contraband. On the other hand, all three cases involve facts in which key figures (drug dealers) purposefully used vehicles as part of the modus operandi of the illegal transactions. None of the above cases are limited by facts similar to those of the instant case, in which the vehicle was not used to transport contraband for delivery or sale and was not otherwise directly used to facilitate a criminal transaction.[12]

In summary, Florida precedent, as well as the apparent legislative intent of the Florida Contraband Forfeiture Act, requires a more significant relationship between the use of a vehicle in a criminal transaction and mere transportation of a participant prior to or during the transaction. Such a direct relationship is established when a vehicle is used to

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[12]In Re: Forfeiture of 1977 Jeep Cherokee, 443 So.2d 1027 (Fla. 2d DCA 1983) is similar to One 1976 Dodge Van and One 1979 Ford. The claimant in that case, a "key figure" and

transport contraband for delivery or sale, is the negotiation site for a transaction or the site for the transaction itself, or when the vehicle is purposefully used as an integral part of a plan of criminal activity.

3. Federal Law On Facilitation

As noted previously the Federal counterpart to the Florida Contraband Forfeiture Act is 49 U.S.C. §§781-782. Griffis v. State, 356 So.2d at 299.[13] Specifically, 49 U.S.C. §781(a)(3) provides:

> It shall be unlawful ... (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

Perhaps the keynote Federal decision interpreting the

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supplier of cocaine, used his vehicle to drive to a restaurant where he met a confidential informant. After negotiations with the informant, the claimant traveled from the restaurant to his residence to obtain cocaine, presumably carried that cocaine from his residence back to the restaurant, concluded the transaction at the restaurant and then left. He was later arrested. While the Second District found that the Jeep facilitated the sale of cocaine because it was used to carry the claimant to and from the transaction site, id. at 1029, the inescapable inference from the facts of 1977 Jeep is that the cocaine was actually transported in the subject vehicle. Under these circumstances, the Jeep was clearly subject to forfeiture, insofar as it facilitated the sale or delivery of cocaine.

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[13]This Court stated in Griffis:

> 49 U.S.C. §781, §782, are the current

Congressional intent behind the 1950 Amendment of 49 U.S.C. §§781-782 is that of United States v. One 1972 Datsun, 378 F. Supp. 1200 (D.N.H. 1974). This Court quoted extensively from One 1972 Datsun in the Griffis decision. 356 So.2d at 300-01. The District Court noted in One 1972 Datsun:

> The legislative history surrounding these Amendments [the 1950 Amendments to 49 U.S.C. §§781-882] clearly shows that a purpose of vehicle forfeiture in the enforcement of the narcotics law is to prevent the flow of narcotics by depriving narcotics peddlers of the 'operating tools' of their trade, thereby financially incapacitating the illegal narcotics activity.

378 F. Supp. at 1205 (footnote omitted).

Subsection 781(a)(3) case law has given effect to legislative intent by uniformly finding vehicle forfeiture appropriate under the "facilitation" ground of that statute only when a vehicle is used as part of a conscious design to

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> Federal Forfeiture Counterparts to the "Florida Uniform Contraband Transportation Act" [former §§943.41-943.44, Fla. Stat. (1975)]. The "Florida Uniform Contraband Transportation Act is substantially identical to 49 U.S.C. §781, §782. 49 U.S.C. §781, §782, were also the federal forfeiture provisions in effect at the time Chapter 73-331, §12, Laws of Florida [former §893.12, Fla. Stat. (1973)], was enacted, having been enacted by Congress in 1939 and subsequently amended in 1950.

356 So.2d at 299.

facilitate a criminal transaction. Under this case law (which is more extensive than Florida's facilitation law), forfeiture is appropriate if a vehicle is used to transport contraband or is otherwise significantly involved in the illegal transaction as, for example, when the vehicle is used as the transaction or negotiation site. Mere "incidental" use of the vehicle as a means of locomotion or transportation is not enough to forfeit under the statute. United States v. One 1971 Chevrolet Corvette, 496 F.2d 210, 212 (5th Cir. 1974).

In United States v. One 1951 Oldsmobile Sedan, 129 F. Supp. 321 (E.D. Pa. 1955), the District Court permitted forfeiture of a vehicle in which an illegal transaction actually took place, noting:

> Where an automobile is used to lessen the burden or to assist in the task of executing the illegal transaction, even though the drug is never in the automobile, it 'facilitates' the sale or transportation within the meaning of the statute; where, however, the automobile is not in actuality a part of the transaction it does not 'facilitate' within the meaning of the statute.

Id. at 324.

In Platt v. United States, 163 F.2d 165 (10th Cir. 1947), the Court of Appeals was confronted with a section 781(a)(3) facilitation case in which a woman living with her mother used her mother's vehicle to drive to a drugstore,

where she presented a forged prescription for morphine. The Court stated:

> The use of the automobile did not make the accomplishment of the purchase more easy or free it from obstructions or hindrance, or make the sale any less difficult. It was merely the means of locomotion by which Blanche Cooper went to the store to make the purchase. Its use enabled her to get to the store more quickly than if she had walked or had used a slower means of transportation. But the argument that this facilitated the purchase disregards the ordinary and accepted meaning of the word when applied to the sale. Ascribing such a meaning to the use of the word 'facilitate' would raise grave doubts as to the constitutionality of the statute on the ground of vagueness and indefiniteness.[14]

Id. at 167. The Ninth Circuit Court of Appeals reached an identical conclusion in Howard v. United States, 423 F.2d 1102 (9th Cir. 1970). In that case, the claimant drove his Buick automobile to the area where a Chevrolet loaded with marijuana was parked. The claimant drove around the block, then parked across the street from the Chevrolet load car and entered the Chevrolet. He was arrested as he drove the Chevrolet away. Id. at 1103. The Ninth Circuit had no problem concluding:

> [T]he seized car was merely the means of locomotion by which the person suspected of participating in illegal drug traffic reached the site of that activity. The

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[14]This argument regarding the constitutionality of the statute is precisely that raised by DUCKHAM before the trial Court [see, e.g., R. 34-37].

> ease or the difficulty of transporting the marihuana in the Chevrolet was not affected by the manner in which Howard reached the load car. The use of an automobile to commute to the scene of a crime does not justify the seizure of that automobile under sections 781 and 782.

Id. at 1103-04 (citations omitted). *See also Simpson v. United States*, 272 F.2d 229, 230-31 (9th Cir. 1959) (car not subject to forfeiture under Internal Revenue forfeiture provision because automobile was simply used to transport the owner to a point from which she could proceed to engage in illegal activity and automobile not used or directly involved in the course of that illegal activity).

United States v. One Liberian Refrigerator Vessel, 447 F. Supp. 1053 (M.D. Fla. 1977) is a recent Federal decision in which the Court found a sufficient basis for forfeiture under section 781 *and* 21 U.S.C. §881.[15] The facts of that case demonstrated that the vessel at issue had been loaded with cocaine. Judge Krentzman, examining recent Federal decisions, noted "an evolving trend toward a new principle: a substantial nexus between the contraband or illegal activity and the inanimate facilitating instrumentality (i.e. vessel or vehicle) must be demonstrated." *Id.*at 1060. This nexus cannot be too "remote, casual and insubstantial," or

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[15]The Court's decision was also based on 19 U.S.C. §1595(a), which provides, in relevant part, for the forfeiture of "every vessel ... *used* in, to aid in, or *to faci-*

the factual basis for forfeiture will be insufficient. Id.

While 49 U.S.C. §§781-782 is the blueprint for the Florida Contraband Forfeiture Act, 21 U.S.C. §§881 et. seq. is significantly different from subsection 781(a)(3) and subsection 932.702(3) in the following respect: Subsection 881(a)(4) permits the forfeiture of any vehicle "used, or ... intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of ... [controlled substances]" (emphasis added). Because subsection 881(a)(4) permits forfeiture if a vehicle is used to facilitate a drug transaction in any manner, the scope of the "facilitation" theory under section 881 stretches further than that of section 781. See, e.g., United States v. One 1979 Mercury Cougar XR-7, 666 F.2d 228, 230 (5th Cir. 1982); United States v. One 1977 Cadillac Coupe Deville, 644 F.2d 500, 501-02 (5th Cir. 1981)(Unit B); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 425 (2d Cir. 1977). Further, sections 881 et. seq. apply to controlled substances only; sections 781-782, as with the Florida Contraband Forfeiture Act, constitute a general forfeiture statute that applies to various types of contraband, including controlled substances. Thus, the

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litate, by obtaining information or in any other way, the importation [...of any illegal article] (emphasis added).

inclusion of the language "in any manner" leaves no doubt that Congress intended forfeiture of conveyances under the narcotics law to have a wider reach than the general contraband forfeiture provisions of 49 U.S.C. §§781-782. To hold otherwise "would negate the need for and purpose of the new statute." United States v. One 1977 Cadillac Coupe Deville, 644 F.2d at 502.

In cases such as United States v. One 1979 Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983) and United States v. One 1977 Cadillac Coupe Deville, supra, Federal appellate courts have permitted forfeiture under subsection 881(a)(4) when vehicles were used for transportation of the claimants, "key figures" in the illegal transactions involved in those cases, to transaction sites. Specifically, in One 1979 Porsche, the Court noted that the subject vehicle was used to transport the claimant from Knoxville, Tennessee to Atlanta, Georgia, where the claimant was to buy cocaine. Forfeiture was deemed appropriate because "[t]he subject vehicle in this case was used to transport the 'pivotal figure in the transaction' several hundred miles to the precise location at which the attempted purchase took place." 709 F.2d at 1427. In One 1977 Cadillac forfeiture was permitted under section 881 where the vehicle was used to transport a drug supplier and confederate to a transaction

site. 664 F.2d at 501. The Fifth Circuit found as a "pivotal" distinction the fact that forfeiture proceedings in _One 1977 Cadillac_ were brought under section 881's "in any manner" language, rather than section 781. _Id_. at 502.

Yet, even while these two decisions and other section 881 cases would seemingly permit forfeiture under that section for mere transportation of a key figure to the site of an illegal transaction, a close reading of those cases indicates that the vehicles played more significant roles in the underlying illegal transactions. In _One 1979 Porsche_, the vehicle was used to travel a long distance, and in _One 1977 Cadillac_ and _United States v. One 1974 Cadillac Eldorado_, 548 F.2d 421 (2nd Cir. 1977), the vehicles were used to transport not only the supplier but also a confederate to transaction sites. In other words, section 881 is not without its limits. _See_, _e.g._, _United States v. One 1972 Chevrolet Corvette_, 625 F.2d 1026 (1st Cir. 1980) (no "facilitation" where there was not an antecedent relationship between the vehicle and the sale of the narcotics); _United States v. McMichael_, 541 F. Supp. 956 (D. Md. 1982) (use of vehicle for counter-surveillance is sufficient for section 881 forfeiture, although "the use of an automobile merely as a means of locomotion to reach the scene of an

illegal activity or in a manner not directly connected with the sale of drugs may not constitute such facilitation," 541 F. Supp. at 959 n.6); and United States v. One 1970 Buick Riviera, 374 F. Supp. 277 (D. Minn. 1973) (in a case similar to City of Clearwater v. One 1980 Porsche 911 SC, 426 So.2d 1260 (Fla. 2d DCA 1983) in terms of "remoteness," fact that a car was used to take a confederate to an airport for travel to Mexico to obtain heroin was an insufficient basis for foreiture under section 881, although paper money wrappers from the currency given to the confederate were found in vehicle).

In United States v. One 1972 Datsun, supra (decided several years after passage of section 881), the District Court refused to forfeit a vehicle pursuant to section 881 under facts substantially similar to those of the instant case. In One 1972 Datsun, the facts demonstrated that the claimant, on one occasion, after agreeing to sell an under-cover officer LSD, "operated the Datsun so as to deliber-ately lead" the officer to the claimant's apartment, where the claimant sold the officer a large quantity of the drug. Subsequently, a similar transaction occurred. The claimant again agreed to sell the officer LSD and told the officer to meet the claimant at a motor inn. After the two met at that motor inn, they drove to the claimant's apartment (the

undercover officer following the claimant, who was driving the Datsun), where the claimant delivered a large quantity of LSD to the officer. 378 F. Supp. at 1201.

As in the instant case, no contraband nor any person other than the claimant were transported in the Datsun, and no negotiations took place in or near that vehicle. In finding forfeiture inappropriate, the District Court reviewed a significant number of Federal decisions. It noted that intentional "transportation or concealment of contraband in a conveyance ... will subject the conveyance to forfeiture." 378 F. Supp. at 1202 (citations omitted); that use of a vehicle "as a place for conducting negotiations for or transacting any portion of a sale is sufficient to subject the vehicle to forfeiture," id. at 1202 (citations omitted); and that "[u]se as a look-out or decoy vehicle in a convoy will also render the vehicle subject to forfeiture." Id. at 1202 (citations omitted). However, facilitation requires "a concrete, direct and instrumental use of the vehicle in some aspect of the underlying criminal activity"; "...to be forfeited, a vehicle must have some substantial connection to, or be instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent." Id. at 1203-04 (footnote omitted). Because the Government did not allege that the Datsun was

used by the claimant as part of the "modus operandi" or that the Datsun had been adapted for narcotics activity, and because the facts did not substantiate forfeiture under other recognized grounds, the District Court denied forfeiture. Id. at 1205.

In summary, forfeiture on a facilitation theory under the facts of the instant case might be appropriate under subsection 881(a)(4), with its "in any manner" language, but clearly is inappropriate under subsection 781(a)(3), which is the Federal counterpart to the subsection 932.702(3) "facilitation" provision of the Florida Contraband Forfeiture Act.

Summary

The case at bar offers this Court an opportunity to reaffirm the vitality of the Griffis decision in certain essential respects. The result in Griffis would probably be different today, in light of the 1980 amendments to the Florida Contraband Forfeiture Act. But the principle of strict construction of forfeiture law, as well as statutory construction of the Act to effect the legislative intent that Florida's general forfeiture statute be in uniformity with its Federal counterpart, remain as strong as ever.

The Florida Contraband Forfeiture Act's facilitation provision does not permit forfeiture of property used "in

any manner" to facilitate an illegal transaction. The First District Court of Appeal's decision in this case, however, effectively amends Florida's Act in such a manner. The line limiting the potentially unlimited scope of the facilitation provision of Florida's Contraband Forfeiture Act has been blurred by the First District in the instant case. The task of properly redrawing this line, offering guidance to Florida's lower courts in future decisions, now lies before this Court.

II.

THE DISTRICT COURT ERRED IN DENYING DUCKHAM'S REQUEST TO REMAND FOR THE TRIAL COURT'S CONSIDERATION OF THREE ALTERNATIVE GROUNDS TO DENY FORFEITURE.

The District Court in the instant case denied DUCKHAM's MOTION FOR REHEARING OR FOR CLARIFICATION OF DECISION AND FOR REHEARING EN BANC, in which remand was sought for consideration of three alternative grounds to deny forfeiture initially raised by the Petitioner in his MOTION TO QUASH RULE TO SHOW CAUSE AND TO DISMISS PETITION FOR RULE TO SHOW CAUSE [R. 8-10]. The trial Court had not ruled on these alternative grounds because it found that the facts of this case did not justify forfeiture under the Florida Contraband Forfeiture Act [R. 46-48]. With no citation of authority, the District held, in effect, that the alternative issues

may not now be heard by any Court.

Certainly, the First District did not question the propriety of the trial Court's declining to reach constitutional arguments raised by DUCKHAM in his MOTION TO QUASH when the case was found to be properly disposed of on other grounds. See Griffis v. State, 356 So.2d at 298; McKibben v. Mallory, 293 So.2d 48, 51 (Fla. 1974). Because the Circuit Court found that DUCKHAM's case fell outside the reach of the statute, it was unnecessary for the trial Court to reach the issue of the Act's constitutionality, raised as one of three alternative by DUCKHAM. State v. One (1) 1977 Volkswagen, 455 So.2d at 436 (on rehearing).

In appealing the trial Court's decision, the STATE limited the scope of the issues to be considered on appeal. Recognizing that DUCKHAM raised four arguments in the trial Court, the STATE in its INITIAL BRIEF before the First District Court of Appeal, at page 4, recognized that "the trial judge addressed only one of those [four] issues and based the dismissal ... on that one ground. Therefore only that one issue will be addressed in this appeal." The parties acted reasonably in focusing their attention upon the determination of the facilitation issue prior to considering other issues. Specifically, DUCKHAM did not act imprudently in failing to argue the constitutional issues which, while

presented to the lower Court, were never considered by that Court.

The District Court apparently felt itself without authority to remand the case for consideration of the alternative grounds not raised on appeal. The First District erred in so limiting its powers. This Court, in In Re: Kionka's Estate, 121 So.2d 644 (Fla. 1960) explored this precise procedural issue:

> It is not unusual that a trial court will decide a case on a theory which in the view of the trial judge makes it unnecessary to pass upon the validity of a statute .... This will happen most frequently ... where the appellate court reverses the trial court .... In such cases the appellate court would no doubt remand the cause to the trial court for a written ... determination of the validity of the statute.

Id. at 646. Clearly, remand was well within the power of the First District.

The failure to raise constitutional arguments before the District Court which were not considered by Judge Chance in this case was in line with this Court's holding that "[u]nder ordinary circumstances, this Court prefers that the constitutionality of a statute be considered first by a trial Court." Dickinson v. Stone, 251 So.2d 268, 271 (Fla. 1971). See also Division of Bond Finance v. Smathers, 337 So.2d 805 (Fla. 1976) (initial challenges to the constitu-

tionality of statutes should be made in the trial court.

In light of the basic principle that questions not presented to and ruled upon by the trial court are not properly subject to review in an appellate court, Keyes Co. v. Sens, 382 So.2d 1273, 1276 (Fla. 2d DCA 1980); American Home Assur. Co. v. Keller Industries, 347 So.2d 767, 772 (Fla. 3d DCA 1977), DUCKHAM acted correctly in seeking remand in this case for determination of the alternative grounds after the First District had decided the issue of facilitation.

DUCKHAM'S behavior was particulary appropriate with regard to the question of whether the State "promptly" proceeded in this forfeiture action pursuant to subsection 932.704(1) of the Florida Statutes, which is at once an issue of constitutional proportions and a question of fact. As such, the issue should first have been considered by the trial Court. To now hold that such constitutional claims may never be resolved would, in this circumstance, violate the spirit and letter of Article I, Section 21 of the Florida Constitution by effectively denying DUCKHAM access to the Courts.

Should this Court find it necessary to reach this issue by affirming the District Court's Opinion on facilitation, DUCKHAM respectfully requests that this Court reverse the District Court's order denying remand, thus allowing resolu-

tion of the alternative grounds for denial of forfeiture raised by DUCKHAM in this case.

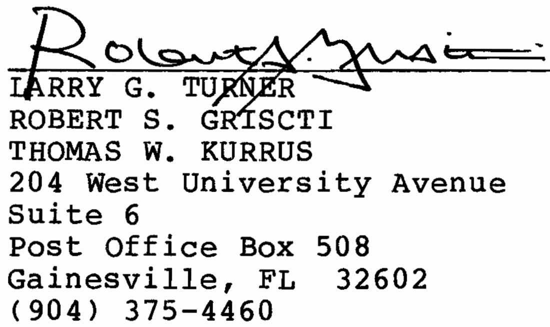
CONCLUSION

For the reasons expressed in this BRIEF, Petitioner JEFF C. DUCKHAM respectfully prays that this Court reverse the decision of the First District Court of Appeal and reinstate the trial Court's determination that the facts of this case do not justify forfeiture pursuant to the facilitation provision of the Florida Contraband Forfeiture Act.

In the alternative, should this Court determine that a finding of facilitation is justified by the facts of this case, Petitioner DUCKHAM prays that this Court remand this cause to the trial Court for its consideration of the remaining three issues presented by the Petitioner in his MOTION TO QUASH RULE TO SHOW CAUSE AND TO DISMISS PETITION FOR RULE TO SHOW CAUSE.

Respectfully submitted,

LAW OFFICES OF TURNER, KURRUS
& GRISCTI, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF ON THE MERITS has been furnished by regular United States Mail to Eric J. Taylor, Assistant Attorney General, Department of Legal Affairs, Civil Division, The Capitol, Suite 1501, Tallahassee, Florida 32301, this 27th day of February 1985.

ROBERT S. GRISCTI