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SUPREME COURT OF FLORIDA

CASE NOS. 77,308; 77,309; 77,310; 77,311; and 77,312

DEPARTMENT OF LAW ENFORCEMENT,

APPELLANT

vs.

REAL PROPERTY, ETC.,

APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT,

CERTIFIED AS A MATTER OF GREAT PUBLIC IMPORTANCE
REQUIRING IMMEDIATE RESOLUTION

AMICUS CURIAE BRIEF
ON BEHALF OF APPELLANT

FLORIDA SHERIFF'S ASSOCIATION

FLORIDA POLICE CHIEF'S ASSOCIATION

DADE COUNTY ASSOCIATION OF CHIEFS OF POLICE

FLORIDA ASSOCIATION OF POLICE ATTORNEYS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PREFACE

This is an appeal of a Circuit Court, Eighth Judicial Circuit decision which held that the Florida Contraband Forfeiture Act is unconstitutional on its face and as a matter of law. The District Court of Appeal, First District, certified the orders of the trial court as a question of great public importance requiring immediate resolution. This Amicus Curiae brief is submitted to provide an additional perspective of the issues, both constitutional and public interest.

SUMMARY OF ARGUMENT

The Florida Contraband Forfeiture Act provides substantive and procedural due process, and is not unconstitutionally vague. In a case interpreting the "Act", this Court stated that the intent of the Legislature was that the Florida Forfeiture Act be in conformity with its federal counterparts. Griffis v. State, 356 So.2d 297 (Fla. 1978).

The "Act" is based upon the federal civil forfeiture statutes, which have long allowed the seizure of real property, although the "Act" provides more protections to a claimant. In the salient federal forfeiture case, the United States Supreme Court held that an "innocent-owner" claimant was not denied due process by the omission of certain statutory provisions, Calero-Toledo, infra. However, in the case at bar, it was held that the Florida Forfeiture Act fails to provide due process because of the absence of statutory provisions. The court below also held the "Act" to be unconstitutional because its remedy was deemed punitive rather than remedial, and expressed concern that forfeiture of an entire piece of real estate might be based on the illegal use of only a portion of the property. In that same United States Supreme Court case, a yacht owned by an innocent leasing company was forfeited because a lessee possessed one marihuana (sic) cigarette on board. The Supreme Court reversed the holding by a District Court that the State Statutes were unconstitutional.

In finding that the lessor was not unconstitutionally deprived of his property, the Supreme Court stated:

> Appellants next argue that the District Court erred in holding that the forfeiture statutes unconstitutionally authorized the taking for government use of innocent parties' property without just compensation. They urge that a long line of prior decisions of this Court establish the principle that statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents . . . We agree. The historical background of forfeiture statutes in this country and this Court's prior decisions sustaining their constitutionality lead to that conclusion.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974) (emphasis added). The Supreme Court's logic in Calero-Toledo clearly leads to the conclusion that the "Act" is not unconstitutional. After Fourth Amendment seizure issues are resolved, due process is the same for real property as it is for personal property, such as the yacht. Further, in Calero-Toledo, unlike the case at bar, the claimant was never even charged with or convicted of a crime. The Circuit Court's finding that the "Act" is unconstitutional is therefore error.

I. (SUBSTANTIVE DUE PROCESS)

THE TRIAL COURT ERRED IN FINDING THE 1989 "ACT" AS AMENDED UNCONSTITUTIONAL FOR FAILURE TO PROVIDE THE SAME SUBSTANTIVE DUE PROCESS RIGHTS AFFORDED TO CRIMINAL DEFENDANTS, AS THE "ACT" IS CIVIL IN NATURE AS EXPRESSLY INTENDED BY THE FLORIDA LEGISLATURE AND ITS PENALTIES ACCOMPLISH LEGITIMATE REMEDIAL OBJECTIVES SO AS NOT TO NEGATE THAT INTENTION.

The Florida Contraband Forfeiture Act, as originally enacted and as amended in 1989 (hereinafter the "Act"), is civil in nature and therefore does not afford the same substantive constitutional safeguards accorded in criminal actions. The United States Supreme Court has set out a clear test as to the determination of the nature of a statutory forfeiture as either criminal or civil:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was **so punitive** either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.

United States v. Ward, 448 U.S. 242, at 248 (1980) (emphasis added); and see United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

As to the first prong of this test, the Florida Legislature clearly intended for the "Act" to be civil. The statute itself states, "The State Attorney ... shall promptly proceed **against the contraband article** ... by rule to show cause ... ", clearly and expressly evidencing that such

procedures must be "in rem", and therefore inherently civil. Section 932.704(1) Florida Statutes (1989) (emphasis added). And see U.S. v. One Assortment of 89 Firearms, supra (in rem proceedings are civil).

Furthermore, the Florida Supreme Court has stated that:

> ... the legislative intent in enacting Chap. 73-331 § 12 Laws of Florida, contained in the introductory language to the act, was inter alia, to achieve "uniformity between the laws of Florida and the laws of the United States" which was "necessary and desirable for effective drug abuse prevention and control." ... The express intent of the Legislature was that the Florida forfeiture statute be in uniformity with its federal counterpart.

Griffis v. State, 356 So.2d 297, 299 (Fla. 1978). Florida forfeiture law is in fact based on the analogous federal statutes, which are explicitly civil. In re Forfeiture of Approximately $48,900 in U.S. Currency, 432 So.2d 1382, at 1384 n.4 (Fla. 4th DCA 1983). Moreover, these federal forfeiture statutes have invariably been held to be civil sanctions and remedial in nature when challenged. See One Assortment of 89 Firearms, supra; Helvering v. Mitchell, 303 U.S. 391 (1938); United States v. Ward, 448 U.S. 242 (1980); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); United States v. U.S. Currency, Amount of $228,536, 895 F.2d 908 (2d Cir. 1990). It would therefore be absurd to believe that our Legislature, in its desire to achieve such uniformity, intended an in personam procedure, replete with all its attendant personal protections, without specifically mandating such. Finally, every district court of appeal in Florida ruling or commenting on the issue has found the

statute to be essentially civil in nature. In re Forfeiture of Approximately $48,900 in U.S. Currency, supra; Marks v. State, 416 So.2d 872 (Fla. 5th DCA 1982); City of Tallahassee v. One Yellow 1979 Fiat, 414 So.2d 1100 (Fla. 1st DCA 1982); In re Forfeiture of $7,750 in U.S. Currency, 546 So.2d 1128 (Fla.2d DCA 1989); Sotolongo v. State, 516 So.2d 117 (Fla. 3d DCA 1987).

The remedial nature of a statute is thus an important consideration in evidencing legislative intent. See One Assortment of 89 Firearms, supra; and see Delisi v. Smith, 423 So.2d 934 (Fla. 2d DCA 1982) (indicating that a remedial sanction must bear some correlation to the damages sustained by society or the costs of enforcing the law). The remedial nature of the "Act" is made abundantly clear by a simple reading of Section 932.704(3)(a), which outlines in detail how the proceeds of a forfeiture action are to be applied, including: to pay for the cost of the investigation and prosecution of the forfeiture, to provide for a law enforcement trust fund for specialized investigations and projects (and not to be used for normal operating expenses), and to fund programs for school resource officers, drug education, and crime prevention.

It is also noteworthy that the House of Representatives Criminal Justice Committee Analysis relating to the 1989 amendments to the "Act" states in Section II that: "This bill should have a **positive fiscal impact** on the State of Florida and the law enforcement agencies participating in the seizure and forfeiture of property." Such language clearly evidences

a remedial intent as described above. House of Representatives Committee On Criminal Justice Final Staff Analysis And Economic Impact Statement, June 30, 1989 (relating to Forfeiture of Contraband/Policies) (emphasis added).

The second prong of the 89 Firearms test was never even addressed by either the Trial Court or the Claimant below, and therefore in no way establishes by the "clearest proof" that the statutory scheme of the "Act" is so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty. In any case, several considerations have been found by subsequent court rulings to satisfy this second level of inquiry. United States v. $2,500 in U.S. Currency, 689 F.2d 10, at 13 (2d Cir. 1982). The court in that case found significant the broad remedial purposes evoked by the statute in question. Likewise, our forfeiture "Act" was clearly designed to serve broad remedial purposes as noted above. Moreover, the court stated in support of the remedial nature of the statute in question the following, which is just as applicable to our own statute:

> Forfeiture of drugs, vehicles and money used in drug trafficking has many apparent remedial, non-punitive purposes. These include impeding the success of the criminal enterprise by eliminating its resources and instrumentalities, diminishing the efficiency and profitability of the business by increasing the costs and risks associated with it, and helping to finance the government's efforts to combat drug trafficking. $2,500, supra at 13.

Although the "Act" may be in the criminal procedures section of the Florida Statutes, the Court in U.S. v. Ward, supra, makes it clear that both a civil and a criminal

sanction may be imposed in respect to the same act or omission, and found it significant that the civil and criminal penalties at issue in that case were separated within the same statute. Likewise, the "Act" is a separately labeled section and independent section specifically placed in the "Supplemental Criminal Procedures" section, and notably, is **not** contained in the "Crimes" section of the Florida Statutes.

At this juncture, it is also imperative to scrutinize the recent United States Supreme Court's ruling in United States v. Halper, 490 U.S. ___, 109 S.Ct. 1892 (1989). A careful analysis of the case shows it to be inapplicable to civil forfeiture, although its ruling would have no negative impact on the case at bar in any event.

The factual situation in Halper involved a criminal prosecution under the federal criminal false claims statute for the filing of 65 false billing claims, amounting to a total of $585 fraudulently claimed. Halper was convicted on all 65 counts, fined $5,000 and sentenced to two years imprisonment. The government then elected to file a civil action against Halper under the civil False Claims Act, ultimately being awarded the statutory damages of $2,000 per claim, totalling some $130,000. The district court ruled that since Halper had already received a criminal punishment, the large additional penalty violated the double jeopardy clause.

On appeal, the United States Supreme Court found that the sanction was sufficiently disproportionate to constitute a second punishment, but only remanded the case to allow the government to show that the district court's assessment of the

government's injuries was erroneous. Specifically, the Court held that:

> We therefore **hold** that under the Double Jeopardy Clause a defendant who **already** has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not **fairly** be characterized as remedial, **but only** as a deterrent or retribution... The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears **no rational relation** to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Halper, supra (emphasis added). Clearly, this broad holding should not effect what has already been shown to be an essentially remedial statute, since the "Act" certainly can be **fairly** characterized as remedial, and in no way can **only** be characterized as deterrent or retribution. See Matter of a Parcel of Real Property Known As 1632 N. Santa Rita, 801 P.2d 432 (Ariz.App. 1990) rev. denied Dec. 18, 1990. To say that the "Act" bears **no rational relation** to the goal of compensating the government is illogical. As aptly put by a federal district court:

> No clear line divides punitive from remedial purposes... Some decisions have described §881 as having the remedial purpose to diminish the economic power of drug traffickers and deprive them of the instrumentalities useful in their trade... The distinction between incapacitation and deterrence is particularly elusive... The aim of compensating the government for its efforts to prevent or mitigate the harms caused by the property's unlawful use is a **remedial** goal. That harm consists not only of the illicit

> profits from the actual drug sale, but the severe **collateral consequences** of facilitating drug traffic, such as drug addiction, increased drug-related violence, and the government's enforcement costs. All these are ills the drug laws were designed to address.

United States v. Certain Real Property and Premises Known as 38 Whaler's Cove Dr., 747 F.Supp. 173 at 180 (E.D.N.Y. 1990). Further, pursuant to Halper's holding, no bar could exist **prior** to the imposition of a criminal punishment.

Nonetheless, the holding in Halper is clearly limited in scope and does not effect the civil forfeiture of contraband property, as the following language demonstrates:

> In other words, as we have observed above, the process of affixing a sanction that compensates the government for all its costs inevitably involves an element of **rough justice.** Our upholding reasonable **liquidated damages** clauses reflects this unavoidable imprecision. Similarly, we have recognized that in the ordinary case **fixed-penalty plus-damages** provisions can be said to do no more than make the government whole. We cast no shadow on these time honored judgments. What we announce now is a **rule** for the **rare case**, the case such as the one before us, where a **fixed-penalty** provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused (emphasis added)..

Halper, therefore, only applies to fixed-penalty provisions involving damages in the form of a fine to be paid from an offender's legitimate resources, and clearly does not apply to the forfeiture of contraband property.

Moreover, Halper's mandate was simply to remand the case for proceedings consistent with its opinion. It did not find the statute at issue unconstitutional. It merely examined the penalty as applied, and ruled accordingly. As Justice Kennedy

stated in his concurring opinion in Halper, "Today's holding, I would stress, constitutes an objective rule that is grounded **in the nature of the sanction and the facts** of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding."

Halper did not overrule 89 Firearms nor even mention forfeiture and should not now be interpreted as having done so. In a recent case decided **after** Halper, the District of Columbia Circuit, in ruling that double jeopardy did not apply to section 881(a)(6), followed the reasoning of 89 Firearms and did not even mention Halper. U.S. v. Price, 914 F.2d 1507 at 1512 (D.C.Cir. 1990). The Florida Contraband Forfeiture Act is constitutional on its face, and as there is more than a reasonable basis for doing so, this Honorable Court must construe the "Act" so as to uphold its constitutionality.

II. (PROCEDURAL DUE PROCESS)

THE TRIAL COURT ERRED IN FINDING THE "ACT" UNCONSTITUTIONAL ON ITS FACE FOR FAILURE TO PROVIDE ADEQUATE PROCEDURAL SAFEGUARDS, AS THE "ACT" DOES PROVIDE ITS OWN PROCEDURE AS SUPPLEMENTED BY THE FLORIDA RULES OF CIVIL PROCEDURE, IS SUFFICIENTLY CIVIL IN NATURE TO NOT REQUIRE A CRIMINAL BURDEN OF PROOF, AND REQUIRES A FOURTH AMENDMENT WARRANT FOR THE SEIZURE OF REAL PROPERTY.

It is incumbent to begin any analysis of procedural due process issues and the "Florida Contraband Forfeiture Act" by referring at the outset to the Florida Supreme Court's decision in Lamar v. Universal Supply, Inc., 479 So.2d 109 (Fla. 1985). In that case, this Court found the "Act" adequately protects the due process rights of claimants:

> ..."a person who asserts that the State is unlawfully holding his property would be deprived of due process if the law did not afford him a prompt hearing on his assertion." Sawyer v. Gable, 400 So.2d 992,997 (Fla. 3d DCA 1981). The seizure of property pursuant to a forfeiture statute constitutes an extraordinary situation in which postponement of notice and hearing until after seizure does not deny due process. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). The due process rights of claimants are adequately protected, therefore, by the requirement that the state attorney promptly file a forfeiture action following seizure. §932.704(1), Fla. Stat. (1983).

Lamar, supra at 110. Noticeable by its absence is any mention or concern for the actual procedures employed both then and now, the rule to show cause and the rules of civil procedure. See Forfeiture of $48,900, supra (which discusses forfeiture procedures and was decided over two years before Lamar).

The negative implication apparent by the Court's not referring to or even mentioning the procedure employed when addressing a constitutional procedure question makes clear

that the Supreme Court perceived no procedural defects. Nonetheless, a procedural review of the "Act" is in order. The procedural use of the petition and rule to show cause method to initiate forfeiture actions was first employed in the Florida Comprehensive Drug Abuse and Control Act, sections 893.01-.15, Florida Statutes (1973). The gravamen of the rule to show cause is that it must be signed by a judge upon determination that the allegations of the petition are sufficient and not frivolous. In re Forfeiture of $48,900, supra; In re Forfeiture of $5,300, 429 So.2d 800 (Fla. 4th DCA 1983); and see 56 Am.Jur.2d, Motions, Rules, and Orders § 34 and 60 C.J.S., Motions and Orders § 20 et seq. In all other procedural respects except as noted below, the forfeiture action is civil and follows the Florida Rules of Civil Procedure. Id.

As stated in the Florida Rules of Civil Procedure:

> Rule 1.010. Scope and Title of Rules. These rules apply to all suits of a civil nature and all special statutory proceedings in the circuit courts and civil courts of record and other trial courts except those to which the probate and guardianship rules or the summary claims procedure rules apply but the form, content, **procedure**, and time for pleading in all **special statutory proceedings** shall be as prescribed by the statutes governing the proceedings unless these rules specifically provide to the contrary (emphasis added).

Since the "Act" encompasses a special statutory proceeding, the Legislature was well within its authority to mandate a rule which gives the added protection of a judge's review of the initiating petition before signing the rule to show cause.

Although forfeiture has always been characterized as quasi-criminal for Fourth Amendment purposes, such a rule is simply an added protection which does not change the nature of a forfeiture action from civil to criminal. In re Forfeiture of $48,900 in U.S. Currency, supra; One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965). As to whether a remedy is too punitive to tolerate civil litigation procedures, the tests as outlined in Argument I of this brief make it abundantly clear that the statute is sufficiently remedial to be considered civil in nature, and therefore does not invoke any double jeopardy concerns or its attendant criminal protections. See U.S. v. $2,500 in U.S. Currency, 689 F.2d 10, at 12 (2d Cir. 1982). "Even with the application of the foregoing constitutional protections [referring to fourth amendment protection in forfeiture cases], forfeiture proceedings are essentially civil in nature and, therefore, **they are governed by the rules of civil procedure.**" In re Forfeiture of $48,900, supra at 1385 (emphasis added).

We now turn to the burden and standard of proof required in a civil forfeiture. The due proof required in 932.704(1), Florida Statutes, and a claimant's burden in 932.703 to prove by a preponderance of the evidence that the forfeiture was not violated, clearly are analogous to their federal counterparts as intended by the Legislature, and have always been held to be so by the Courts of this State. In re Forfeiture of $48,900, supra; Morton v. Gardner, 513 So.2d 725 (Fla. 3d DCA 1987); Lobo v. Metro-Dade Police Department, 505 So.2d 621 (Fla. 3d DCA 1987); In re Forfeiture of 1976

Corvette, 442 So.2d 307 (Fla. 5th DCA 1983). The standard burden is as follows:

> The burden of proof in a forfeiture proceeding is allocated in the following manner: The governmental entity seeking forfeiture bears the initial burden of going forward, but it must only show probable cause that the res subject to forfeiture was illicitly used within the meaning of the forfeiture statute. Once the governmental entity has established probable cause, the burden shifts to the claimant to rebut the probable cause showing or, by a preponderance of the evidence, to establish that the forfeiture statute was not violated or that there is an affirmative defense which entitles the claimant to repossession of the item...

In re Forfeiture of $48,900, supra at 1385 (and omitting a series of string cites of analogous federal cases).

As previously noted, the "Act" is civil, and therefore a criminal burden and criminal standard of proof is not required. As stated by the Court in Marks v. State, 416 So.2d 872 (Fla. 5th DCA 1982) (emphasis added):

> We agree with our sister court that proof of a conviction is not necessary. Forfeiture is a civil remedy and the law does not and never has required proof beyond a reasonable doubt to sustain the plaintiff's case. **The legislature sets the standard of proof when it enacts the statute as a civil penalty.** Had the legislature wanted to require a burden of proof greater than the civil standard - proof by a preponderance of the evidence - then it could have required that proof of a conviction of the felony was necessary to entitle the state to forfeiture.

As to the procedure used to actually seize real property, it is readily apparent that the Trial Judge was concerned that the 1989 amendments to the "Act" were deficient in that area. However, a review of black letter search and seizure law and a look at the procedure followed by the Judge

himself in the case below should alleviate any fears that the "Act" lacks procedural due process in that regard.

Since there is no procedure in this State analogous to the federal warrant of arrest in rem, which is simply a statutory process or writ, how then is the seizure of real property to be accomplished? The "Act" itself does not require a warrant or other writ for the seizure of property. See State v. Pomerance, 434 So.2d 329 (Fla. 2d DCA 1983). As stated in Pomerance, "We know of no rationale for judicially engrafting onto a statute a requirement that a warrant be obtained."

Nonetheless, it is axiomatic that if a contraband vehicle were locked inside someone's garage, or if contraband currency was stashed in someone's bank deposit box, the proper method to effectuate a search and seizure for those items would be by securing a search warrant. Contraband, the fruits or instrumentalities of a crime, weapons by which an escape may be effected, and mere evidence have always been classified as proper items for which a search warrant may be obtained. Warden v. Hayden, 387 U.S. 294 (1967).

"Since the protection of private dwellings lies at the heart of the fourth amendment, only exigent circumstances will justify a warrantless intrusion into a home." United States v. Parr, 716 F.2d 796, 814 (11th Cir. 1983) (citing Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980)." United States v. Ladson, 774 F.2d 436 (11th Cir. 1985). Ladson involved the question of whether the entry into a private dwelling by federal officers during the execution of

a federal seizure warrant was legal absent a finding of probable cause contained within the warrant. The Court in Ladson went on to find that "The showing of probable cause necessary to secure a warrant may vary, but the necessity for the warrant persists... We hold that absent exigent circumstances, ...if probable cause exists to enter the premises, obtain a warrant." Ladson, supra at 440. This Court in Lamar v. Universal Supply, supra (citing the U.S. Supreme Court in Calero-Toledo, supra), held that forfeiture is an extraordinary situation in which the postponement of notice and hearing until after seizure does not deny due process, and that due process rights are adequately protected by the prompt filing of a forfeiture action after seizure. See Lamar, supra at 110.

Although pre-dating the Ladson case and the real property amendments to the "Act", the Court in Pomerance was similarly on point when it stated, "The courts have long distinguished between automobiles and houses in the context of a search." Pomerance, supra at 330. Just because the 1989 amendments do not mention a warrant requirement for the seizure of real property is not to say that it doesn't exist. The Fourth Amendment warrant requirement exists independently of the forfeiture statute, just as the rules of civil procedure do, but certainly mandates a procedure which must be followed. "At least one court has held that, absent exigent circumstances, the constitution forbids seizure of real property under § 881 without prior judicial review. See United States v. Certain Real Estate Property, 612 F.Supp. 1492, 1498 (S.D.Fla.

1985)... This precautionary prior judicial review cured any possible constitutional defect." U.S. v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988).

In the case at bar, a seizure warrant meeting the requirements of a Chapter 933 search (and seizure) warrant was prepared along with an affidavit reciting probable cause, reviewed ex-parte by the Judge below, and then signed. Surely such a procedure adequately protected the claimant's rights and afforded him due process pursuant to this Court's ruling in Lamar v. Universal Supply, supra. The Fourth Amendment has always been held to be applicable to civil forfeitures. See Forfeiture of $48,900, supra; and see One 1958 Plymouth Sedan, supra. Therefore, simply put, the 1989 "Act" as amended did not need to recite any new procedural mechanism for the seizure of real property, as a Chapter 933 search and seizure warrant supplies sufficient procedural guidance to meet any due process concerns.

Therefore, adequate procedures do exist to safeguard a claimant's procedural due process rights. The principle that the legislature will be presumed to have intended to enact a valid and constitutional law should be applied here, and this Court should find the "Act" as amended to be constitutional on its face as to procedural due process.

III. (VAGUENESS AND PROPORTIONALITY)

THE TRIAL COURT ERRED IN FINDING THE "ACT" UNCONSTITUTIONAL FOR BEING VAGUE AND OVERBROAD, AS THE "ACT" IS CLEAR ON ITS FACE AND NOT SUBJECT TO ANY EIGHTH AMENDMENT PROPORTIONALITY.

The judge below expresses concerns at the vagueness of the "Act" as amended, indicating that the scope of the real property provisions are unclear. The truth of the matter is that the real property amendments are quite clear on their face and were purposely meant to be broad in scope and to subject an entire parcel of land to forfeiture.

The "Act" was amended in 1989 by Chapter 89-148, Laws Of Florida, S.B.No. 354. That law, expressly relating to contraband forfeiture, states in section 5 that:

> (2)(b) All real property, including any right, title, leasehold interest, and other interest in the whole of any lot or tract of land and any appurtenances or improvements, which real property is used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, or which real property is acquired with proceeds obtained as a result of, a violation of any provision of this chapter related to a controlled substance described in s. 893.03(1) or (2) may be seized and forfeited as provided by the Florida Contraband Forfeiture Act...

Such language is substantially the same as the language contained in 21 USC 881(a)(7), which has been consistently interpreted by the federal courts to subject an entire parcel of land to forfeiture even if only part of it is directly connected to drug activity. U.S. v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990); U.S. One 107.9 Acre Parcel of Land Located in Warren Township, 898 F. 2d 396, at 400 (3d Cir. 1990); U.S. v. A Parcel of Land with a Building Located

Thereon at 40 Moon Hill Rd., 884 F.2d 41, at 45 (1st Cir. 1989); U.S. v. Santoro, 866 F.2d 1538, at 1543 (4th Cir. 1989); U.S. v. Tax Lot 1500, 861 F.2d 232, at 235 (9th Cir. 1988). When read in pari materia with the other sections of the 1989 law, it is clear that the term real property as used within any of the sections of that law is not vague and does include the entire deeded tract of that property. However harsh that may seem, that was the Legislature's intent.

Moreover, the plain meaning of the term real property, as defined in Black's Law Dictionary, clearly indicates an entire deeded tract of land: "real property. Land, and generally whatever is erected or growing upon or affixed to land. Also rights issuing out of, annexed to, and exercisable within or about land. A general term for lands, tenements, and hereditaments; property which, on the death of the owner intestate, passes to his heir." Black's Law Dictionary 1096 (5th ed. 1979).

Although **Eighth Amendment proportionality** is not included within the Trial Judge's Order, it still merits attention as its issues are closely related to the issues already addressed. To begin with, several federal courts have already concluded that the Eighth Amendment's protections do not apply in civil forfeiture actions brought under § 881(a)(7) because forfeiture is a civil, remedial measure, not **punishment** for a crime. U.S. v. 141st Street Corp., 911 F.2d 870, at 880 (2d Cir. 1990); and see One 107.9 Acre Parcel of Land, supra at 400; 40 Moon Hill Rd., at 43-45; U.S. v. Santoro, supra at

1543; Tax Lot 1500, supra at 234; Matter of 1632 N. Santa Rita, 801 P.2d 432, at 437 (Ariz.App. 1990). As stated in Tax Lot 1500, supra at 234: "We have found no case holding the eighth amendment applicable to civil forfeiture actions. The text of the eighth amendment suggests an intention to limit the power of those entrusted with the **criminal-law function** of government." (Emphasis added). Language in several other cases is also quite persuasive, including:

> Even for an infraction of the narcotics law far smaller in magnitude than that of appellants, forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government's injury or loss. The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement - not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention - easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance, in this case marijuana. Moon Hill Rd., supra at 44.

and

> "Nor do we find merit in any underlying de minimis argument that the sale of a relatively small amount of cocaine does not warrant forfeiture of the house. The so-called nexus test is not a measure of the amount of drugs or drug trafficking, and we find the proportionality between the value of the forfeitable property and the severity of the injury inflicted by its use to be irrelevant. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682-87, 94 S.Ct. 2080, 2091-94, 40 L.Ed.2d 452 (1974) (forfeiture of $20,000 yacht based on discovery of single marijuana cigarette on board under Puerto Rican Statute Modeled after 21 USC § 881(a)(4))..." United States v. Premises Known as 3639-2nd St., N.E., 869 F.2d 1093, at 1096 (8th Cir. 1989).

and lastly

> However, forfeiture is a penalty without clear limits. The value of the property is not inevitably related to the harmfulness of the use to which it is put... Although perhaps trivial in their dollar amount, these sales are quite serious in their collateral consequences. The maintenance of the programs to deal with drug problems is expensive... Forfeiture of Levin's approximately $70,000 interest in the condominium does not seem a grossly excessive amount for his share of the costs of remedying the ills occasioned by drugs. U.S. v. Certain Real Property, 747 F.Supp. 173 at 181 (E.D.N.Y. 1990).

Although harsh, these cases do offer some protection against an obviously unfair seizure. "21 USC § 881(a)(7) requires something more than an incidental or fortuitous contact between the property and the underlying illegal activity, although the property need not be indispensable to the commission of a major drug offense." Premises Known as 3639-2nd St., supra at 1096.

It should be noted that of the few existing cases which discuss the possible applicability of the Eighth Amendment to civil forfeiture, all have found it applicable only **as applied** to the facts in a particular case. U.S. v. 141st Street Corporation, 911 F.2d 870, at 881 (2d Cir. 1990); U.S. v. Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258, at 1270 (2d Cir. 1989); U.S. v. One Parcel of Real Estate, 903 F.2d 490, at 495 (7th Cir. 1990); Matter of 1632 N. Santa Rita, Tuscon, 801 P.2d 432, at 437 (Ariz.App. 1990).

This Court's decision in State v. Crenshaw supports the proposition that proportionality does not apply to the forfeiture statute. However, Crenshaw addressed only the

scenario where a felony amount of drugs was possessed inside a vehicle or conveyance, and found that fact sufficient to subject a conveyance to forfeiture pursuant to the "Act". The majority's reasoning in Crenshaw is certainly correct, but was based on the "Act" before its real property amendments were added. As noted in the above paragraph, it would seem that the Act's analogous federal cases on real property do perceive a minimal nexus requirement concerning real property. Therefore, the dissenting opinion in Crenshaw, which concerns the rebuttable presumption of facilitation based on possession, and which thereby necessitates that the possession be more than remotely incidental to the occupant's possession for personal use, may be appropriate, **but only** as a standard for real property seizures. The majority's opinion as to conveyances is as appropriate now as when decided, and those federal real property cases do not affect its authority as to conveyances. State v. Crenshaw, 548 So.2d 223 (Fla. 1989).

Therefore, the 1989 "Act" as amended is not vague and proportionality does not apply. The statute is broad and harsh, but clear and fundamentally fair in light of the worst crime scourge this country and state has ever faced. This Court should allow it to remain intact.

SUMMATION

The Florida Legislature, which must be presumed to know the plain meaning of the words it uses, enacted a civil forfeiture statute directing a seizing agency to promptly proceed against the contraband article, conveyance, real property, or interest in real property. The forfeiture is not a consequence of, and is independent of, any conviction or criminal proceeding in personam. In an in rem forfeiture statute, Mr. Justice Story observed, "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . . " The Palmyra, 12 Wheat 1 (1827), cited in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974).

Although the "Act" has been described as quasi-criminal, it is more accurately described in the title to Chapter 932, Florida Statutes. The "Act", a civil forfeiture statute, is titled as one of the Provisions Supplemental To Criminal Procedure Law. The Legislature intended that the "Act" supplement, not supplant, criminal proceedings, and being a civil action, the "Act" has a different standard of proof. In Calero-Toledo, a civil forfeiture case, the Supreme Court also stated that:

> Judicial inquiry into the guilt or innocence of the owner could be dispensed with, the Court held, because state lawmakers, in the exercise of the police power, were free to determine that certain uses of property were undesirable and then establish "a secondary defense against a forbidden use . . . "

Id, at 686 (citing Van Oster v. Kansas, 272 U.S. 465 (1926). The "Act" is just such a secondary defense against forbidden use of property in criminal activity.

Under the Florida "Act", civil forfeiture cases are filed by a stricter standard than that of other civil actions. The forfeiture action commences by verified petition followed by a judicially-issued rule to show cause. Property may only be seized when probable cause exists, and Chapter 57 costs and attorney's fees can be assessed if an improper seizure occurs. Fourth Amendment protection is also afforded to the property's claimant/owner. Evidence, or the res itself, may be suppressed if improperly seized. With any entry onto a constitutionally protected area, as with a seizure of real property, a search and seizure warrant must be used if no exception to the warrant requirement exists. The Florida "Act" contains affirmative defenses and protections that the federal statutes lack, and the "Act" does not permit administrative, non-judicial forfeiture as in the federal system. The Florida "Act", pursuant to its own rules and procedures, The Model Policy For Forfeiture Of Assets By Law Enforcement Agencies, and supplemented by the Florida Rules of Civil Procedure, provides ample due process, whether the property seized is real or personal.

If the "Act" were to be declared unconstitutional, the remedial purposes which it serves would be negated. Remedial purposes include forfeiture of drugs, vehicles, money

and other property, eliminating the resources and instrumentalities of a criminal enterprise, increasing the costs and risks of said enterprise, helping to finance the government's efforts to combat drug trafficking, and development of drug abuse education programs. See United States v. $2,500.00 in U.S. Currency, 689 F.2d 10 (2d Cir. 1982). When property is forfeited, the "Act" provides that, if the property is not used by the agency or transferred to a public or non-profit organization, the proceeds shall be applied to: liens, costs of forfeiture, court costs, school resource officer, crime prevention, or drug abuse education programs, or special investigations and other enumerated law enforcement purposes. Depending on the seizing agency, any remaining proceeds shall be deposited into the State General Revenue Fund or a law enforcement or state attorney's trust fund. Sec. 932.704(3)(a), Florida Statutes (Supp. 1990). These statutory uses of the proceeds of forfeiture to compensate the government are clearly remedial, not punitive.

CONCLUSION

This Court has held that all doubts should be resolved in favor of the constitutionality of a statute. When this Court examined the "Act" on due process grounds in 1985, the Court found that it was constitutional. Lamar v. Universal Supply Co., 479 So.2d 109 (Fla. 1985). The Florida Contraband Forfeiture Act is no less constitutional now, and the Amicus Curiae respectfully urge that the decision of the Circuit Court be reversed.

Respectfully Submitted,

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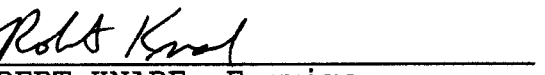
By:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amicus Curiae Brief on Behalf of Appellant has been telefaxed and mailed to DIANA BOCK, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 135 West Central Boulevard, #250, Orlando, Florida 32801, Counsel for Appellant; and to ROBERT S. GRISCTI, Esquire, 204 West University Avenue, Suite 6, Post Office Box 508, Gainesville, Florida 32602, Counsel for Appellee; this 14th day of February 1991.

Robt Knabe

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