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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF LAW ENFORCEMENT,

Appellant,

vs.

REAL PROPERTY, ETC.,

Appellees.

CASE NOS.: 77,308; 77,309; 77,310; 77,311; 77,312 (consolidated)

ANSWER BRIEF OF APPELLEES

CERTIFIED FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, AS A MATTER OF GREAT PUBLIC IMPORTANCE, REQUIRING IMMEDIATE RESOLUTION BY THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

The Appellees adopt the PRELIMINARY STATEMENT of the Appellant [AMENDED INITIAL BRIEF OF APPELLANT, p. 1]. Appellees will refer to items in the RECORD ON APPEAL by document and page number; for example, "[Order and Opinion Granting Claimants' Amended Motion to Dismiss Petitions for Forfeiture, RECORD ON APPEAL, pp. 313-25]."

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, the Appellees specifically disagree with the following sentence of the STATEMENT OF THE CASE AND FACTS at page 2 of the AMENDED INITIAL BRIEF OF APPELLANT: "Subsequent to the issuance of the Rules To Show Cause, Charles L. DeCarlo and David Nelson were tried and convicted on all criminal charges." This matter was not before the trial Court, is not part of the RECORD ON APPEAL and is addressed in the separately-filed APPELLEES' MOTION TO STRIKE before this Court.

Additionally, the Appellant fails to acknowledge certain findings by the trial Court that are essential to disposition of the constitutional issues on appeal. Those findings of fact are:

> The five cases before this Court well demonstrate the severity of forfeiture under the 1989 amendment to the Florida Contraband Forfeiture Act.... In these cases Petitioner FDLE has seized and seeks to forfeit Claimant CHARLES L. DECARLO's personal residence and property, including garages, sheds and other improvements (Case No. 90-250-CA); an entire 100-acre platted subdivision of approximately 1-acre parcels, including an airstrip and other improvements (Case No. 90-251-CA); an entire 280-acre subdivision platted into more than 200 separate lots (Case No. 90-252-CA); an R/V mobile home subdivision of over 40 acres, with numerous full R/V hookups, a bath house, restaurant and other improvements (Case no. 90-253-CA); and finally, a 60-acre tract, part of which includes an extension of the airstrip (Case No. 90-383-CA). The Petitioner does not charge use of the entirety of these properties in the commission of criminal activity. Rather, the Petitioner alleges that Mr. DECARLO used portions of the

> properties or improvements (for example, the airstrip as a landing site in Case No. 90-251-CA and the restaurant as a meeting site in Case No. 90-253-CA) to facilitate drug trafficking in a reverse sting operation conducted by several law enforcement agencies.
>
> These forfeiture proceedings began on May 15, 1990, the same day as Mr. DECARLO's arrest in Levy County, Florida. Subsequently, he was charged for this alleged criminal activity by the Office of the Statewide Prosecutor in a contemporaneous but separate criminal prosecution in Marion County, Florida. That prosecution is pending; to date, Mr. DECARLO has not been convicted of any of the alleged criminal activity that is the factual predicate for these forfeiture actions.

[Order and Opinion Granting Claimants' Amended Motion to Dismiss Petitions for Forfeiture (hereinafter "Order and Opinion"), RECORD ON APPEAL, pp. 314-15 (emphasis added)]. The trial Court also made the following findings:

> Further evidence of the punitive intent of the 1989 forfeiture legislation is demonstrated by its inclusion within Chapter 932, entitled "Provisions Supplemental to Criminal Procedure Law" (emphasis added), as well as the "Final Staff Analysis and Economic Impact Statement" of the House of Representatives Committee on Criminal Justice, which accompanied the passage of the 1989 real property amendment to the Florida Contraband Forfeiture Act. That Statement notes that "[t]his bill [SB 354, passed by the Legislature and enrolled as Ch. 89-148, Laws of Florida] ... contains a harsher and more severe punishment for drug traffickers" (emphasis added).

[Order and Opinion, RECORD ON APPEAL, pp. 316-17].

The Appellees otherwise accept the STATEMENT OF THE CASE AND FACTS in the AMENDED INITIAL BRIEF OF APPELLANT.

SUMMARY OF ARGUMENT

The trial Court correctly ruled that the Florida Contraband Forfeiture Act is facially unconstitutional because it violates both substantive and procedural due process rights guaranteed to the Appellees under both the Florida and Federal Constitutions. The trial Court reached this conclusion by three separate due process analyses. While these issues are of first impression before this Court, the trial Court's conclusions are supported by principles of constitutional law that find ample precedent not only in the jurisprudence of this State, but also in due process decisions of the United States Supreme Court and forfeiture decisions of State courts throughout the country.

First, the Act violates the substantive due process rights of the Appellees because that forfeiture legislation is sufficiently punitive and criminal in nature as to require the heightened due process protections required for criminal defendants. This determination is reached by examining the Act under Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) and United States v. Halper, ____ U.S. ____, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) to determine whether the Act, though in rem and civil in form, is sufficiently punitive to be criminal in nature and effect. The focal point of this analysis is legislative intent. The trial Court correctly concluded that the Legislature intended the Florida Contraband Forfeiture Act to be punitive, thereby

warranting heightened constitutional protection for property owners such as the Appellees. Because those protections are not provided on the face of the Act, the legislation is unconstitutional.

Second, regardless of whether the Act is criminal in nature, the forfeiture legislation violates procedural due process. Under this analysis, the Act is constitutionally defective because it fails to provide even minimum standards of due process that must be accorded property owners under a statutory scheme that provides for seizure and forfeiture of property to the State.

The framework for examination of procedural due process is provided in decisions such as Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). The Act fails to provide any meaningful provisions regarding the procedure by which forfeiture hearings should be conducted. These defects have been acknowledged by the Fourth District Court of Appeal, which attempted to remedy the problems by providing rules for practice and procedure under the Act in In re forfeiture of $5,300.00, 429 So.2d 800, 802 (Fla. 4th DCA 1983). The Fourth District's procedural guidelines have been adopted by other District Courts of Appeal. Addressing the Act as amended in 1989, however, the trial Court concluded that it should avoid "inserting into the statute by judicial fiat that which the Legislature omitted" [Order and Opinion, RECORD ON APPEAL, p. 314 (emphasis

deleted)]. Trial and appellate Courts in other States and in the Federal courts have reached the same conclusion, holding that forfeiture statutes which do not provide procedures for the seizure of real property or the conduct of forfeiture hearings violate due process.

Third, the Act is unconstitutionally vague and overly broad because it fails to define the few procedural mechanisms that are provided by that forfeiture legislation. Similarly, the Act's provisions regarding the scope of real property forfeiture are vague, failing to give fair notice of the extent to which contiguous real property is subject to forfeiture. This constitutional concern is particularly important in these cases. The Appellant seeks forfeiture of large parcels of contiguous land that is subdivided into separate lots, as well as numerous improvements that include a residence and businesses. The Appellant's forfeiture petitions allege that only parts of these real properties were used for the commission of criminal activity.

In sum, this appeal squarely presents to this Court questions concerning the facial constitutionality of the Florida Contraband Forfeiture Act, as amended in 1989. The statute is unconstitutional; accordingly, this Court should not amend and effectively rewrite the legislation in order to bring the Act within the requirements of fundamental law.

Nonetheless, the Appellees recognize competing principles of statutory and constitutional interpretation and law. The judiciary has the duty, if reasonably possible and consistent with the constitutional rights of Appellees, to resolve doubts in favor of constitutionality and interpret the Act so as not to conflict with the Florida or Federal Constitutions. Additionally, this Court has the exclusive jurisdiction to provide rules for the practice and procedure in Florida courts under Article V, Section 2(a) of the Florida Constitution. The trial Court specifically recognized this point [Order and Opinion, RECORD ON APPEAL, p. 320 n.3].

If this Court determines that it can and should remedy the Act's deficiencies, then at least minimal procedural due process guarantees should be provided to the Appellees and other property owners who are claimants to property the State seeks to forfeit. These constitutional and procedural protections include a burden of proof on the State at all times throughout forfeiture proceedings, by a standard of proof commensurate with the punitive and at least quasi-criminal nature of the Act. Additionally, this Court should require some form of judicial review, even if ex parte, before real property is seized by law enforcement officers. Such protection is particularly appropriate in Florida because of Article I, Section 2 of the Declaration of Rights, which, in conjunction with Article I, Section 9, mandates greater constitutional protection for

property owners than that which has been provided under the Florida Contraband Forfeiture Act to date.

ARGUMENT

Introduction

A constitutional analysis of the Florida Contraband Forfeiture Act requires a brief overview of general forfeiture law and the legislative history of the Act. This review supplements the historical analysis of forfeiture in the AMENDED INITIAL BRIEF OF APPELLANT, pp. 6-8.

As noted by one commentator, "[f]orfeitures have a long and dark past, yet they continue to be a powerful force in seizing property used in violation of the law." Comment, State and Federal Forfeiture of Property Involved in Drug Transactions, 92 Dickinson L.Rev. 461, 481 (1988). Forfeitures are "harsh exactions" that are not favored at law. City of Miami v. Miller, 148 Fla. 349, 4 So.2d 369, 370 (1941). As noted by the Appellant, the original form of civil forfeiture recognized at common law, the "deodand," was removed from the English law because of its severity [AMENDED INITIAL BRIEF OF APPELLANT, p. 7].

Nonetheless, forfeitures found their way into the Federal statutory scheme at an early point in American history. Civil penalties and forfeitures, particularly in the context of customs and commerce regulations, were an essential source of Federal revenue in the early years of the Republic. See

generally D. Smith, Prosecution and Defense of Forfeiture Cases ¶11.03[2], pp. 1-13 & n.16 (1990). The first Congress provided for forfeitures in Section 36 of the Act of July 31, 1789, 1 Stat. 29, 47-48. That first Federal statute specifically provided for the right to jury trial in forfeiture proceedings, a right deprived the American colonists (but not subjects in England) before the American Revolution.[1] Yet that same Federal legislation put the burden of proof in a Federal customs forfeiture proceeding on claimants to the property, rather than on the Government, to stave off sympathetic jury verdicts for customs violators in a new nation that relied for its revenue on the customs laws but was still strongly anti-Federalist. Hence, the Federal customs law contains procedural aspects, including an unusual burden of proof on the claimant (19 U.S.C. §1615), that are preserved as "vestiges of 'old, forgotten, far-off things and battles long ago.'" United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 461 (7th Cir. 1980).

As in many other State jurisdictions, Florida adopted its first contraband forfeiture act to provide State law enforcement with an additional weapon for the enforcement of the new Florida Comprehensive Drug Abuse Prevention and Control Act. This original forfeiture legislation was codified in Section 893.12, Florida Statutes (1973), enacted by the Legislature as

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[1]The Declaration of Independence decried the Crown and the English Parliament "For depriving us, in many cases, of the Benefits of Trial by Jury."

Section 12 of Chapter 73-331, Laws of Florida. Chapter 73-331 was a substantial adoption of the primary provisions of the Uniform Controlled Substances Act approved by the National Conference of Commissioners of Uniform State Laws in 1970. In 1974, the Legislature enacted Chapter 74-385, §1, Laws of Florida, excising from Section 893.12 those procedural provisions of the original forfeiture act which became the basis for the Florida Uniform Contraband Transportation Act, Sections 943.41 through 943.44, Florida Statutes (1974 Supp.). Thereafter, the Legislature substantially amended the provisions of Sections 943.41 through 943.44 in Chapter 80-68, Laws of Florida, including the Act's title, which became the Florida Contraband Forfeiture Act.[2]

The 1989 amendment broadened the scope of derivative contraband forfeiture beyond any prior Florida legislation.[3] Not only is real property subject to forfeiture; the amended Act authorizes the forfeiture of "proceeds" of criminal activity

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[2]This legislative history is tracked by this Court in Duckham v. State, 478 So.2d 347, 349 (Fla. 1985) and Griffis v. State, 356 So.2d 297, 299-301 (Fla. 1978). The Legislature has amended the Act on numerous occasions since 1980, the most substantial of which are found in the 1989 amendment in Chapter 89-148, Laws of Florida.

[3]The real property forfeiture provisions are broader than those contemplated by the seldom-used provisions of §895.05, Fla. Stat. (1989). While §895.05(2)(a) provides for the forfeiture of real property "used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-.05," the State must still prove a "pattern of racketeering activity" as a predicate to forfeiture.

(Section 932.701(2)(e)) and permits the State to seek "substitute forfeiture" (Section 932.703(1)(a)-(e)).

The 1989 Act substantially broadened the scope of forfeiture, but it failed to drag these proceedings out of the "procedural quagmires" created by "the failure of the statute to provide measures to be followed other than to say '* * * by rule to show cause in the circuit court.'" In re forfeiture of $5,300.00, 429 So.2d at 801-02.

Sections 932.703 and 932.704, Florida Statutes (1989) contain what little procedural guidance has been provided by the Legislature under the Act since its inception. Section 932.703(1) provides, in relevant part, that property used in violation of Section 932.702 and any contraband per se (for example, illegal drugs) "may be seized" by a law enforcement agency; that title to seized property shall immediately vest in the State upon seizure, "subject only to perfection of title, rights and interest in accordance with this act"; that no action, including replevin, can be maintained to recover seized property unless forfeiture proceedings are not initiated within 90 days after seizure; and that there is a rebuttable presumption of forfeiture that the property seized was being "used or was intended to be used in a manner to facilitate the transportation, [etc.] ... of a contraband article" defined under Section 932.701(2). Sections 932.703(2) and (3) provide for innocent owners and lienholders, respectively.

Section 932.704(1) is the Act's primary procedural paragraph. It empowers the State Attorney in the jurisdiction in which the property is seized to "promptly proceed" against the property by "rule to show cause" in the Circuit Court of the jurisdiction in which the seizure or offense occurred. The property is forfeited to the seizing law enforcement agency "upon producing due proof" that the contraband property "was being used in violation of the provisions of this act." The final order of forfeiture by the Court perfects title in the seizing law enforcement agency, relating back to the date of seizure.

Finally, Section 932.704(2) provides that the State Attorney must give notice of the forfeiture proceedings by actual or constructive service "at least four weeks prior to filing the rule to show cause." The notice must include "the name of the court in which the proceeding will be filed and the anticipated date for filing the rule to show cause." Thereafter, Sections 932.704(3)-(5) and Section 932.705 provide very explicit guidance for the sale and distribution of forfeiture proceeds.

Except for the 1985 amendment to the Act[4], which provided

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[4]Ch. 85-316, Laws of Fla., took effect just prior to the Florida Supreme Court's decision in Lamar v. Universal Supply Company, Inc., 479 So.2d 109 (Fla. 1985), which interpreted the "promptly proceed" provisions of §932.704(1), Fla. Stat. (1983). The same legislation also made it clear that, while law enforcement agencies have discretion whether to seize property for forfeiture, once seized the property "shall" be forfeited.

the 90-day period to initiate forfeiture proceedings, the Legislature has never provided additional procedural guidance for the conduct of forfeiture proceedings beyond the terms outlined above, all of which were contained in the original legislation. This is so despite judicial criticism of the procedural deficiencies of the Act.

In apparent frustration with the "procedural void left by a bareboned statutory scheme," Doersam v. Brescher, 468 So.2d 427, 428 (Fla. 4th DCA 1985), the Fourth District Court of Appeal announced substantive and procedural rules for practice under the Act which are, admittedly, "omitted specifics which due process necessitates." In re forfeiture of $5,300.00, 429 So.2d at 802. In that decision and in In re forfeiture of $48,900.00, 432 So.2d 1382 (Fla. 4th DCA 1983), the Fourth District created numerous forfeiture rules of procedure ranging from a requirement that the seizing agency file a verified petition for rule to show cause, to the burden and quantum of proof to be used in proceedings under the Act.[5]

Section 932.703(1). This amendment was in apparent response to the decision in Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984), overruled on other grounds, In re forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986), in which the 1st DCA held that, because forfeiture statutes are not favored in law or in equity, the judicial decision whether to forfeit is discretionary and not mandatory. 454 So.2d at 664.

[5]Other District Courts have adopted the Fourth District's porocedure. The burden and standard of proof chosen by the Fourth District is drawn from 19 U.S.C. §1615. Infra, pp. 44-45.

The Fourth District has expressed concern over the practical and constitutional ramifications of the procedural and substantive guidelines that it has provided, particularly in light of this Court's recent decision in In re forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986) that jury trial is available in forfeiture proceedings. See, e.g., In re forfeiture of 1982 Park Avenue Buick, 505 So.2d 535, 536 (Fla. 4th DCA 1987). The instant appeal presents this Court with the opportunity to address those concerns and, most importantly, the constitutional deficiencies of the Act.

Issue I

THE TRIAL COURT'S HOLDING THAT THE FLORIDA CONTRABAND FORFEITURE ACT IS UNCONSTITUTIONAL SHOULD BE AFFIRMED, BECAUSE THAT ACT IS CRIMINAL IN NATURE AND FAILS TO PROVIDE SUBSTANTIVE DUE PROCESS RIGHTS TO THE APPELLEES, IN VIOLATION OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The initial constitutional inquiry in construing this Act is whether forfeiture under the statute is, in nature, a punishment for which constitutional safeguards relative to criminal proceedings should apply. The test by which to determine the nature of a forfeiture penalty is provided in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). See also United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). That test is concise:

> First, did the Legislature which enacted the statute indicate directly or impliedly whether the penalties were deemed civil or criminal. Secondly, if the Legislature indicated that the penalties were civil and remedial in nature, are the penalties so punitive either in purpose or effect as to negate that intention?

United States v. Ward, 448 U.S. at 249. A finding that the Legislature manifested its intent that the Act be a punitive sanction concludes the constitutional inquiry. It is then unnecessary to explore the second prong of the analysis. Kennedy v. Mendoza-Martinez, 372 U.S. at 167.

Using the United States Supreme Court's test, the trial Court found that the Legislature has indicated its preference that the Florida Contraband Forfeiture Act is punitive and therefore criminal in nature. [Order and Opinion, RECORD ON APPEAL, pp. 316-18]. That legislative intent is manifested objectively:

> [E]vidence of the punitive intent of the 1989 forfeiture legislation is identified by its inclusion within Chapter 932, entitled "Provisions Supplemental to Criminal Procedure Law" (emphasis added) as well as the "Final Staff Analysis and Economic Impact Statement" of the House of Representatives Committee on Criminal Justice, which accompanied the passage of the 1989 real property amendment to the Florida Contraband Forfeiture Act. That Statement notes that '[t]his bill [SB 354, passed by the Legislature and enrolled as Ch. 89-148, Laws of Florida] ... contains a harsher and more severe punishment for drug traffickers" (emphasis added).

[Order and Opinion, RECORD ON APPEAL, pp. 316-17].

The Appellant argues that placement or classification of the Act is not dispositive of legislative intent. Certainly, as this Court recognized in State v. Bussey, 463 So.2d 1141, 1143 (Fla. 1985), that classification "is not determinative on the issue of legislative intent," but that placement "may be persuasive in certain circumstances." Id. (emphasis added). Those circumstances are present with the Florida Contraband Forfeiture Act, which derives from Chapter 893, the Florida Comprehensive Drug Abuse Prevention and Control Act. The forfeiture Act is a criminal code which both derives from and supplements Chapter 893. See In re forfeiture of $37,388.00, 16 F.L.W. 43 (Fla. 1st DCA Dec. 17, 1990), in which the Court noted that "[t]he forfeiture law is supplemental to the criminal procedure law ... [and] ... is penal in nature ...." Id. That is precisely what the trial Court correctly concluded from the Act's classification. Under State v. Bussey, supra, this evidence is certainly persuasive of a punitive legislative intent.

The Appellant also criticizes the trial Court's reliance on the "Final Staff Analysis and Economic Impact Statement" of the House of Representatives Committee on Criminal Justice, arguing that the Staff Statement "provides little insight to the intent of the Legislature" [AMENDED INITIAL BRIEF OF APPELLANT,

p. 13].[6] To the contrary, in In re forfeiture of $7,750.00, 546 So.2d 1128 (Fla. 2d DCA 1989), the Second District Court of Appeal specifically recognized that legislative staff analyses are probative of legislative intent. Id. at 1130. This is logical; legislative staff are responsible for executing legislative intent by researching, drafting and reviewing the bills that become legislation.

The plain language of the Act also provides persuasive evidence of the Legislature's intent that the Act serve primarily as a a penal measure. The plain meaning of statutory language is a primary factor in determining legislative intent. St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). The language of the forfeiture Act demonstrates a legislative intent that forfeiture is an intrinsic statutory measure in the State's enforcement of its criminal laws.

For example, the Act provides that contraband forfeiture is to be enforced solely by law enforcement agencies in this State. See, e.g., Section 932.703(1), Florida Statutes (1989), which provides that property subject to forfeiture should be seized by law enforcement agencies; Section 932.704(1), Florida

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[6]The Appellant also argues that contrary evidence of legislative intent is found in the transcript of committee hearings, attached as Appendix B to the Appellant's brief [AMENDED INITIAL BRIEF OF APPELLANT, p. 10 & n.1]. This unauthenticated transcript excerpt was not presented to the trial Court, is not part of the RECORD ON APPEAL and should not be considered for the first time on appeal. See the APPELLEES' MOTION TO STRIKE filed contemporaneously with this ANSWER BRIEF.

Statutes (1989), which provides that the state attorney "or such attorney as may be employed by the [law enforcement] seizing agency" is responsible for initiating and effecting forfeiture proceedings; and the several provisions of the Florida Contraband Forfeiture Act that provide forfeiture revenue to law enforcement agencies. The Act is a law enforcement weapon, intended to exact a penalty for violation of the criminal laws, as reflected in the statute's plain language. Thus, Sections 932.701(2)(a-f), Florida Statutes (1989), define "contraband article" as real or personal properties which have been, are being, or are intended to be used or employed in a violation or commission of a criminal statute. The Act preconditions contraband forfeiture upon the violation of criminal laws.

The Appellant argues that the Legislature demonstrated its intent by creating an action against the property, in rem in form [AMENDED INITIAL BRIEF OF APPELLANT, p. 10; see also AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT filed by the Metro-Dade Police Department, pp. 4-6]. The in rem classification has been applied to the Act by this and other Courts. At least one Federal Court has found to the contrary, holding that seizures under the Act constitute an in personam measure rather than an in rem scheme. American Tele-Digital, Inc. v. Moreland, No. 89-178-Civ-Oc-16, (U.S. Dist.Ct., M.D.Fla., Nov. 30, 1989 ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; John H.

Moore, United States District Judge, presiding) [Transcript of Proceedings on Nov. 14, 1990, RECORD ON APPEAL, p. 647].

Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886) recognized that although in rem forfeitures are characterized as actions against property, the applicability of constitutional guarantees remains unaffected. The designation in rem is merely a legal fiction; it does not change the essential nature of forfeiture proceedings from suits to determine the rights of persons. Thus, the Boyd Court stated that "[g]oods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, [only] men whose goods they are." Boyd v. United States, 116 U.S. at 637.

Similarly, the Appellant's reliance on judicial decisions that have labeled proceedings under the Act as "civil" in form in misplaced. [AMENDED INITIAL BRIEF OF APPELLANT, pp. 10-11; AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT filed by Metro-Dade Police Department, pp. 5-6]. None of these decisions examine the Act under the Kennedy v. Mendoza-Martinez and United States v. Ward analysis, which the Appellant acknowledges is the appropriate constitutional framework [AMENDED INITIAL BRIEF OF APPELLANT, p. 9; see also AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT filed by Metro-Dade Police Department, p. 4].[7]

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[7]If labels are probative, it should be noted that nowhere in the Act does the Legislature state that forfeiture proceedings are civil, in either form or nature, unlike the forfeiture provisions of the Florida RICO Act. RICO forfeiture provisions are found in §895.05, Fla. Stat. (1989), which is

In conclusion, under the first prong of the Kennedy v. Mendoza-Martinez and United States v. Ward test, the Legislature has expressly and impliedly manifested its intent that proceedings under the Act are criminal in nature. Judicial inquiry into the second prong of the United States Supreme Court's test is unnecessary. Yet even under the second level of analysis, for which the Kennedy v. Mendoza-Martinez case outlines factors to consider, the penalties under the Act are "so punitive either in purpose or effect" as to negate any intention that forfeiture under the Act is primarily remedial. United States v. Ward, 448 U.S. at 248-49. Those factors, with appropriate analysis, are:

* Whether the sanction involves an affirmative disability or restraint: Forfeiture necessarily constitutes an affirmative disability or restraint. Forfeiture under the Act works an "economic penalty" for illegal behavior to restrain further improper use of the property sought to be forfeited. Astol Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663, 686-87, 40 L.Ed.2d 452, 94 S.Ct. 280 (1974). See also Wheeler v. Corbin, 546 So.2d 723, 725 (Fla. 1989)(Ehrlich, C.J., specially concurring: "The forfeiture process is analogous to that of arrest, i.e. it is a seizure of property (rather than of the person) for the purpose of controlling crime)."

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captioned "Civil remedies."

* Whether the forfeiture has historically been regarded as punishment: Florida Courts have considered forfeiture generally, and the Act in particular, as a harsh penalty that is penal in nature. City of Miami v. Miller, 148 Fla. 349, 4 So.2d 369, 370 (1941) (forfeitures are considered "harsh exactions"); City of St. Petersburg Beach v. Jewell, 489 So.2d 78, 80 (Fla. 2d DCA 1986)(the Florida Contraband Forfeiture Act should be strictly construed, "as with criminal statutes"); Cabrera v. Department of Natural Resources, 478 So.2d 454, 455 (Fla. 3d DCA 1985)(forfeiture under the Act is an "extraordinarily harsh penalty"); In re 36' Uniflite, the "Pioneer I" v. State, 398 So.2d 457, 459 (Fla. 5th DCA 1981) (the forfeiture Act is "penal in nature").

In Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952), this Court defined "penalty" in the context of a proceeding to revoke an architect's certificate, concluding that such a proceeding amounted to a prosecution to effect a penalty or forfeiture contemplated by the immunity statutes, Sections 838.08 and 932.29, Florida Statutes (1941).[8] Referring to Boyd v. United States, supra, this Court noted that "some of the cases hold that a penalty or forfeiture may be criminal in nature and civil in form." Specifically:

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[8]Seymour was reexamined by this Court in Headley v. Baron, 228 So.2d 281 (Fla. 1969) and Lurie v. State Board of Dentistry, 288 So.2d 223 (Fla. 1973).

> A penalty generally has reference to a punishment imposed for any offense against the law. It may be corporal or pecuniary. A forfeiture is also a penalty and has to do with the loss of property, position or some other personal right for failure to comply with the law.

62 So.2d at 3. Similarly, forfeitures under the Florida Contraband Forfeiture Act, which are predicated on offenses against the law, constitute a penalty resulting from loss of property and are, therefore, punishment.

* Whether forfeiture is permitted only upon a finding of scienter: The Third District's decision in Flam v. City of Miami Beach, 449 So.2d 367 (Fla. 3d DCA 1984) specifically recognizes that scienter or intent is an operative fact in forfeiture proceedings under the Act, which are predicated upon a person's violation of a criminal statute. Id. at 368-69. The Fourth District has recognized the same requirement of scienter in In re forfeiture of 1969 Piper Navajo, 15 F.L.W. 2909 (Fla. 4th DCA Dec. 5, 1990). The Fourth District affirmed the trial Court's holding declaring the forfeiture provision contained in §330.40, Florida Statutes (1987), as violative of substantive due process rights. That statute would permit forfeiture under the Florida Contraband Forfeiture Act without evidence of criminal behavior by which a court could make "a determination as to whether there existed the criminal intent" to put fuel tanks (otherwise not in conformance with Federal aviation regulations) to an illegal use. Id. at 2910-11.

* Whether the operation of the Act promotes retribution and deterrence, the traditional aims of punishment: The Act is designed to deter. It also exacts retribution. It is noteworthy that this Court recognized the deterrent effect in Griffis v. State, 356 So.2d 297, 299-302 (Fla. 1978). This Court receded from the specific holding of Griffis v. State in Duckham v. State, 478 So.2d 347, 349 (Fla. 1985) and State v. Crenshaw, 548 So.2d 223, 225-26 (Fla. 1989). In doing so, the Court did not question the Griffis rationale that forfeiture under the Act serves as a deterrent to control crime; rather, the Court has recognized that the 1980 amendments to the Act made forfeiture even harsher, so that "possessing drugs even solely for personal use, subjects individuals not only to criminal penalties but also to forfeiture of the vehicle, boat or aircraft in which the drugs are found." State v. Crenshaw, 548 So.2d at 226.

* Whether the behavior on which the forfeiture is predicated is already a crime: This consideration has been explored under the "scienter" factor. By its plain language, the Act authorizes forfeiture for behavior that is defined as criminal. The Appellees disagree with the Appellant's argument that forfeiture under the Act "is not coextensive with a criminal penalty" [AMENDED INITIAL BRIEF OF APPELLANT, p. 18]. This is not the case; rather, most forfeiture cases under the Act are predicated on criminal activity that also could result

in a criminal prosecution (as in the trial proceedings sub judice). If the State chooses not to prosecute, it is not because there is no underlying criminal activity. There is no exception in the appellate decisions interpreting the Act.

* Whether there is a purpose other than retribution assignable to forfeiture and whether the sanction of forfeiture appears excessive when considered in relation to the alternative purpose assigned to the Act: These two factors under Kennedy v. Mendoza-Martinez logically are considered together. The Appellant argues that remedial purposes of the Act that derive from the revenue produced by forfeitures overshadow the statute's punitive effect [AMENDED INITIAL BRIEF OF APPELLANT, pp. 14-17; see also AMICUS CURIAE BRIEF FILED ON BEHALF OF APPELLANT filed by Metro-Dade Police Department, pp. 6-11].

Without question, the Florida Contraband Forfeiture Act is a primary source of law enforcement revenue. The proceedings before this Court are an excellent example of how the Act is used. Hundreds of acres of property with significant improvements are subject to forfeiture based on allegations that only parts of those properties were used in criminal activity. By any fair analysis, the revenue generated by such a forfeiture far exceeds the commensurate criminal activity and the cost of the criminal investigation. Justice Kogan recognized this fact in his dissenting opinion in State v. Crenshaw, 548 So.2d at 228-30. The trial Court specifically found Justice Kogan's

analysis under United States v. Halper, supra, "entirely applicable to these cases and corroborat[ing] this Court's finding that the 1989 Act is intended to be punitive" [Order and Opinion, RECORD ON APPEAL, p.4]. The Appellees submit that both Judges are correct in concluding that "the forfeiture statute is clearly intended to be penal in nature rather than remedial ...." State v. Crenshaw, 548 So.2d at 229 (Kogan, J., dissenting).

* Other factors that warrant a finding of punitive effect: The Kennedy v. Mendoza-Martinez factors outlined above are not exhaustive. Id. at 168-69. Of particular concern is the absence of any remission or mitigation procedure under the Act. See Lamar v. Universal Supply Co., Inc., 479 So.2d 109, 111 (Fla. 1985) (approving the views expressed in In re Alcoholic Beverages Seized From Saul's Elks Club, 440 So.2d 65, 67-68 (Fla. 1st DCA 1983)), which recognized that "there is no corresponding Florida remission procedure". The lack of a remission procedure enhances the punitive effect of the Act, requiring a property claimant to litigate in a judicial forum, with its attendant expense. Further, there is no statutory provision for the award of attorney's fees in the event the forfeiture is successfully defended.[9]

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[9]See generally In re forfeiture of 1976 Kenworth Tractor Trailer Truck, 569 So.2d 1274 (Fla. 1990) (inverse condemnation in post-forfeiture context); Wheeler v. Corbin, 546 So.2d 723 (Fla. 1989) (loss of use).

Under the second prong of analysis, the majority of relevant factors justify a finding that the Florida Contraband Forfeiture Act is punitive and criminal in nature. This conclusion is consistent with Florida precedent which has granted certain constitutional protections due the criminally accused to claimants involved in forfeiture proceedings. For example, Florida Courts have uniformly held that the Fourth Amendment protection from unreasonable searches and seizures should be applied to forfeiture proceedings.[10] Forfeiture claimants enjoy the privilege against self-incrimination in forfeiture proceedings.[11] The due process principles of the entrapment defense have been applied to forfeiture cases,[12] and three members of this Court have suggested that double jeopardy principles might be applicable in an appropriate case.[13] These Florida decisions offer direct support for the trial Court's ruling that the Act is sufficiently criminal in nature to

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[10]See, e.g., In re forfeiture of $62,200, 531 So.2d 352, 354 (Fla. 1st DCA 1988); In re forfeiture of a 1981 Ford Automobile, 432 So.2d 732, 733 (Fla. 4th DCA), review denied, 441 So.2d 631 (1983); Wynn v. City of Opa-Locka, 426 So.2d 1170, 1171 (Fla. 3rd DCA 1983). See also One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 692 (1965).

[11]See In re forfeiture of $160,000.00, 444 So.2d 33, 34 (Fla. 2d DCA 1983).

[12]Flam v. City of Miami Beach, 449 So.2d 367, 368-69 (Fla. 3d DCA 1984).

[13]State v. Crenshaw, 548 So.2d 223, 228-30 (Fla. 1989) (Kogan, J., in a dissenting opinion in which Shaw and Barkett, JJ. concur).

warrant the substantive due process protections provided to the criminally accused.

The Appellant argues that this Court should not uphold the trial Court because Federal case law has found 21 U.S.C. §881 to be constitutional under a Kennedy v. Mendoza-Martinez analysis. The Federal case law is inapposite because the Congress, unlike the Florida Legislature, has explicitly expressed its intent that 21 U.S.C. §881 be a civil forfeiture statute. For example, in 21 U.S.C. §881(b), Congress expressly identifies proceedings under the statute as "civil forfeiture" actions. It then outlines those procedures by which property can be seized by the Government under 21 U.S.C. §881 and the rules by which forfeiture proceedings must be conducted under that statute. In 21 U.S.C. §881(d) Congress specifies that the provisions of law governing customs forfeiture apply to 21 U.S.C. §881 (including 19 U.S.C. §1615, which expressly provides a burden and standard of proof). Congress could not have been any clearer in expressing its intent that forfeiture proceedings under 21 U.S.C. §881 are civil. On the other hand, Congress has also expressed its intent that certain other forfeiture procedures are criminal in nature. For example, criminal forfeiture proceedings are expressly provided for in 21 U.S.C. §853.

Accordingly, it is no surprise that the Federal case law interpreting under 21 U.S.C. §881 has found those proceedings to

be civil in both form and nature. The Federal case law is inapplicable to the Florida Contraband Forfeiture Act. First, Florida's Act does not explicitly provide that it is civil. Secondly, the Act was not modeled after 21 U.S.C. §881; the Act's Federal counterpart was 49 U.S.C. §§781-82. Griffis v. State, 356 So.2d at 299. Further, this Court has recognized that the current Act was substantially amended in 1980. See, e.g., Duckham v. State, 478 So.2d at 349. Those 1980 amendments, creating the Florida Contraband Forfeiture Act, did not adopt any provisions of either 49 U.S.C. §§781-82 or 21 U.S.C. §881, particularly in the context of procedural guidelines for the conduct of forfeiture hearings. Therefore, Federal case law interpreting 21 U.S.C. §881 is not probative of a substantive (or procedural) due process inquiry of the Florida Contraband Forfeiture Act, which is facially bereft and dissimilar to any of the procedural guidelines under the Federal legislation.

In the final analysis, what substantive due process should be provided in the Act, given its punitive and criminal nature and effect? The trial Court determined that:

> The 1989 Act must provide Claimants those substantive constitutional safeguards accorded to criminal defendants by the Fifth and Sixth Amendments of the United States Constitution and Article I, Sections 9 and 16 of the Constitution of the State of Florida. The penalty of forfeiture cannot be imposed without requiring the Petitioner to assume the burden of proof at all times by a standard of proof commensurate with a criminal proceeding. Further, the

> punishment of real property forfeiture under Chapter 932 cannot be imposed without 'a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses.' Kennedy v. Mendoza-Martinez, 372 U.S. at 167.

[Order and Opinion, RECORD ON APPEAL, pp. 317-18]. The failure of the Act to provide for these protections renders it unconstitutional.

The trial Court's primary substantive due process concern is the Act's failure to provide for a burden of proof on the Appellant by a standard of proof commensurate with a criminal proceeding (reasonable doubt). Thus, the trial Court stated: "Of greatest importance, the statute does not require criminal conviction before forfeiture of a person's land" [Order and Opinion, RECORD ON APPEAL, p. 318]. The statute should, on its face, provide that forfeiture cannot be had before the Appellant sustains its burden of proving its entitlement to that penalty beyond and to the exclusion of every reasonable doubt. This burden and standard of proof, the constitutional significance of which was recognized by the United States Supreme Court in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) is required for proceedings under the Act because of the statute's criminal nature.

This conclusion is not without precedent. In State v. 1971 Green GMC Van, 354 So.2d 479 (La. 1977), the Louisiana Supreme Court declared that State's forfeiture legislation

unconstitutional on substantive and procedural due process grounds. The statute at issue, La.R.S. 40:989[14] was almost identical to Florida's current Contraband Forfeiture Act. The only procedural guidance provided by the Louisiana statute was that the "district attorney ... shall proceed ... by rule to show cause ... and have [the property] forfeited on producing due proof ...." This language is identical to that in Section 932.704(1).

The Louisiana Supreme Court, noting that Louisiana law had traditionally disfavored forfeiture (as in Florida) because forfeitures are "designed as a penalty for violation of a law," id. at 484, expressed its concern that its forfeiture statute would allow the forfeiture of vehicles when no person has been either prosecuted or convicted of the underlying offense. The Court also expressed its concern that the statute permitted no other judicial remedy for the return of property, including replevin, remission or mitigation of forfeiture. Id. at 485. Accordingly, the Louisiana Supreme Court held:

> We find the failure of the Statute to require criminal conviction before forfeiture to be a major statutory infirmity.

Id. The Court also found the statute constitutionally deficient because "it does not require proof that the search producing the controlled dangerous substance [which formed the factual

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[14]The Louisiana statute is reprinted verbatim in footnote 4 of the Louisiana Supreme Court's decision, 354 So.2d at 481-82, n.4.

predicate for forfeiture] was legal" and because the statute permitted forfeiture without proof that the owner had knowledge of the commission of the crime leading to forfeiture. Id.

State v. 1971 Green GMC Van is on point with the cases sub judice. The Louisiana Supreme Court held unconstitutional a forfeiture statute very similar to Florida's Contraband Forfeiture Act that failed, as does the Florida Act, to require criminal conviction (and thereby proof beyond a reasonable doubt) before forfeiture can be effected. See also A 1983 Volkswagen v. County of Washoe, 699 P.2d 108, 109 (Nev. 1985), in which the Supreme Court of Nevada also concluded that the State of Nevada must prove its case beyond a reasonable doubt before an order of forfeiture may issue.

Similarly, the Appellees urge this Court to affirm the lower tribunal's ruling and declare the amended Florida Contraband Forfeiture Act, as amended in 1989, an unconstitutional abridgement of substantive due process.

Issue II

THE TRIAL COURT'S HOLDING THAT THE FLORIDA CONTRABAND FORFEITURE ACT IS UNCONSTITUTIONAL SHOULD BE AFFIRMED, BECAUSE THE ACT FAILS TO PROVIDE MINIMAL STANDARDS OF PROCEDURAL DUE PROCESS TO THE APPELLEES IN A FORFEITURE PROCEEDING UNDER THE ACT, IN VIOLATION OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Regardless of whether the Florida Contraband Forfeiture Act is "criminal" in nature and violative of substantive due

process, the fact remains that the Act affects the rights of Appellees, as property owners, to the title and use of their real properties and improvements. Those properties and improvements have been seized by the State since May, 1990 and, under the provisions of Section 932.703(1), "[a]ll rights, interest and title to" the properties have immediately vested in the State upon seizure.

The law is well settled that legislation which provides for the immediate seizure or taking of property without prior notice or prior judicial hearing must be executed under the standards of a narrowly drawn statute. Fuentes v. Shevin, 407 U.S. 67, 91, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); see also Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). This constitutional principle derives from the due process provisions of the Florida and Federal Constitutions, which provide, in relevant part, that "[n]o person shall be deprived of ... property without due process of law ...." Article I, Section 9, Constitution of the State of Florida and Amendments V and XIV, Constitution of the United States. Such due process concerns are particularly applicable to forfeitures, which "are not favored in law or equity ...." General Motors Acceptance Corp. v. State, 152 Fla. 297, 11 So.2d 482, 484 (1943).

Traditionally, due process must be accorded the individual before deprivation of any significant property

interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after seizure. Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). The "extraordinary situation" exception has been applied in forfeiture proceedings. Lamar v. Universal Supply Co., Inc., 479 So.2d at 110. The Lamar decision specifically addressed the forfeiture of personal property (a vehicle) under the Act prior to its amendment in 1989. The Court held that "due process is met provided that the Claimant is afforded a reasonably prompt hearing as required by Section 932.704(1) Florida Statutes (1983)." Id. at 111. The Lamar Court did not address the procedural due process issue raised in this appeal; specifically, whether the Florida Contraband Forfeiture Act, as amended in 1989, satisfies the fundamental requirement that a claimant be afforded "an opportunity to be heard ... 'at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. at 80, quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965).

Thus, except for Lamar and In re forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986), the Court has not addressed the constitutionality of the Act under a procedural due process analysis. Former Chief Justice Ehrlich did note, in his concurring opinion in Wheeler v. Corbin, 546 So.2d at 725, that forfeiture proceedings under the Act have two steps,

seizure and forfeiture. He concluded that because of the language of Section 932.704(1), "no forfeiture action may proceed without a judicial determination that probable cause existed to seize the property." This determination is made post-seizure by the Court in a rule to show cause proceeding. The final determination of whether property was used in violation of the forfeiture Act is made by subsequent hearing, and presumably by jury trial if elected. Id. at 725 (Ehrlich, C.J., concurring specially).

What procedures and rights apply in the forfeiture hearing itself? The Act provides absolutely no guidance. The burden and standard of proof is not established in the statute. Further, while a rule to show cause issues ex parte, based upon the Court's probable cause determination, there is no procedure outlined in the Act for service of the rule on a claimant. Nor does the Act provide for the responsibilities of a claimant in responding to the rule.

Other State courts, confronted with similarly deficient forfeiture legislation, have stricken those statutes. In State v. Miller, 248 N.W.2d 377 (S. Dak. 1976) the Supreme Court of South Dakota held unconstitutional a forfeiture statute that did not provide for specific forfeiture procedures. The State of South Dakota argued that because the statute specifically classified forfeiture as a civil action, forfeiture proceedings should be governed by the South Dakota Rules of Civil Procedure

and that the statute need not set forth procedures for post-seizure notice and hearing. Id. at 379. This argument is similar to that propounded by the Appellant [AMENDED INITIAL BRIEF OF APPELLANT, p. 24; see also AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT filed by Metro-Dade Police Department, p. 13].

The Supreme Court of South Dakota rejected this reasoning, agreeing with the Supreme Courts of the States of California and Washington that "the sounder and better view is that notice and hearing provisions must be contained within the forfeiture statute to satisfy constitutional principles." 248 N.W.2d at 379-80. See also People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) and the cases of State v. Matheason, 84 Wash.2d 130, 524 P.2d 388 (1974) and State v. One 1972 Mercury Capri, 85 Wash.2d 620, 537 P.2d 763 (1975).

Similarly, in Fell v. Armour, 355 F.Supp. 1319 (N.D. Tenn. 1972), the United States District Court examined the constitutional adequacy of forfeiture provisions of the Tennessee Drug Control Act of 1971 in a 42 U.S.C. §1983 action. The Court held that the Act failed to provide property owners with adequate notice subsequent to forfeiture seizure. 355 F.Supp. at 1328-29 (a forfeiture notice must necessarily state the reasons for the seizure and the procedure by which ... [a property owner] ... may seek recovery of his ... [property] ..., including the time period in which he must present his claim for

recovery and the penalty for failure to file within the time period").

As to due process at the forfeiture hearing, the Fell v. Armour Court held because a forfeiture proceeding is quasi-criminal in character, the State of Tennessee must bear the burden of proving that property is used in violation of a forfeiture act. Because the statute failed to specify the burden or standard of proof, the statute violated procedural due process requirements which the Court was without authority to remedy. "While the Court may interpret statutory language so as to conform to due process, it may not insert language into a statute so as to render it constitutional." Id. at 1330.

The reluctance in these decisions to judicially legislate procedural due process is consistent with the trial Court's determination in the instant cases that it lacked authority to remedy the constitutional defects of the Florida Contraband Forfeiture Act:

> The absence of procedural guidelines, particularly for more complex real property forfeiture actions, renders this legislation unconstitutional on its face, in violation of the Claimants' rights to due process of law as guaranteed to them by the Florida and Federal Constitutions.
>
> In this regard, this Court has found no precedent in this State which addresses the procedural guidelines to be followed in real property forfeiture actions under Chapter 932. Tempting as it is to do so, this Court will not breathe constitutional life into a legislative scheme which is silent as to the conduct of forfeiture cases.

[Order and Opinion, RECORD ON APPEAL, p. 320].

The Florida Constitution requires that only the Legislature shall establish legislative policies and standards for the State. Article III, Section 1, Constitution of the State of Florida. The judiciary may not legislate. Brown v. State, 358 So.2d 16, 20 (Fla. 1978). Further, the judiciary should not "read into a statute ... that which the legislature" omitted. State v. Coleman, 131 Fla. 892, 187 So. 357, 360 (1938).

Accordingly, this Court should uphold the trial Court's ruling that the Florida Contraband Forfeiture Act violates procedural due process and is unconstitutional.

Issue III

THE TRIAL COURT'S HOLDING THAT THE FLORIDA CONTRABAND FORFEITURE ACT IS UNCONSTITUTIONAL SHOULD BE AFFIRMED, BECAUSE THAT ACT IS VOID FOR VAGUENESS AND OVERLY BROAD, IN VIOLATION OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A law is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly," or alternatively does not provide explicit standards for those who apply it, thereby encouraging "arbitrary and discriminatory enforcement." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); McKenney v. State, 388 So.2d 1232 (Fla. 1980).

Under this test, claimants to forfeiture proceedings under the Act are not provided with adequate notice of the procedures by which those forfeitures are conducted. For example, the statute provides, in Section 932.704(1), that the State must produce "due proof" to establish forfeiture. This term is subject to many interpretations. "Due proof" may be proof beyond a reasonable doubt; it may be proof by a standard of clear and convincing evidence; it may be proof by a preponderance of the evidence or it may be a lesser standard, such as probable cause. A forfeiture claimant is provided with no notice as to the intended or appropriate definition of this term.

Similarly, a forfeiture claimant is provided with no notice in the Act as to how and when he must respond to the State's forfeiture effort. By implication, a rule to show cause will issue after notice to a potential claimant that the State will seek that judicial process (Section 932.704 (2)); however, once the rule issues, what is a claimant supposed to do? The Act makes no provision for these procedures. In this regard, the language of the Act fails to comply with the requirements of the United States District Court in Fell v. Armour, 355 F.Supp. at 1329.

The Court below held:

> The Claimants, be they individuals or corporations, must not be obligated to guess at the proper procedure to be followed, and the proper protections to be accorded them (and for that matter the State)

> in the context of real property forfeiture proceedings. This Court should not attempt to dictate that procedure. Accordingly, the 1989 Act is unconstitutionally void for vagueness because it fails to define those few procedural guidelines provided in the statute.

[Order and Opinion, RECORD ON APPEAL, p. 322]. The trial Court's ruling, derived from a plain reading of a vague statute, is correct and should be upheld.

Similarly, the Florida Contraband Forfeiture Act, as amended in 1989, fails to give fair notice of the extent to which real property is subject to forfeiture. Chapter 932 only defines a real property "contraband article" as "[a]ny real property or any interest in real property which has been or is being employed as an instrumentality in the commission of, or in aiding and abetting in the commission of, any felony ..." (emphasis added). This constitutional defect pertains to the potential scope of the Act, which permits an overly broad application of the statute and the seizure of property for which there is no factual nexus to underlying criminal activity.[15]

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[15]In the AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT, the Metro-Dade Police Department provides extensive analysis of an Eighth Amendment proportionality argument [AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT, filed by the Metro-Dade Police Department, pp. 19-23], despite its recognition that such a constitutional issue was not addressed by the trial Court. That is accurate; neither party presented an Eighth Amendment proportionality argument, which is necessarily an "as applied" constitutional issue, in the proceedings below. Indeed, very limited evidence was before the trial Court, which ruled only on the facial constitutionality of the Act. Accordingly, the Appellees do not respond to this Eighth Amendment argument, which is not at issue on appeal.

Thus, the Act's failure to define the permissible scope of property forfeiture results in no explicit standards for those who apply it. This encourages discriminatory enforcement. Not only does the person of ordinary intelligence not have sufficient notice that the State might sue for forfeiture of his real property or improvements which are merely contiguous to and not actually used in the alleged commission of criminal activity, but law enforcement agencies might proceed, unguided, with the seizure of real properties in an arbitrary manner.

Such broad application of the Act is compounded by the Legislature's failure to provide for any pre-seizure judicial determination that large parcels of real property or improvements (including homes and businesses) are subject to confiscation and possible forfeiture under the Act. In this regard, the Florida Contraband Forfeiture Act does not provide the same protection to real property owners that are provided in other real property forfeiture. For example, both 21 U.S.C. §853 and §881 provide specific procedures for the seizure of real property, including seizure upon judicial process. Similar provisions are found in §505(b) of the Uniform Act and in numerous State jurisdictions that have adopted or exceeded the Uniform Act's proposals.[16]

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[16]See, e.g., La.R.S. 32:1550B; M.C.L.A. §333.7522 (Mich.); and S.D.C.L. 34-20B-74 & 34-20B-75 (S.Dak.).

Further, in decisions such as United States v. Certain Real Estate Property, 612 F.Supp. 1492 (S.D. Fla. 1985), the Courts have required a pre-seizure hearing when there is a "reasonable likelihood that the res subject to seizure (and forfeiture) is not going to disappear." Id. at 1496. In that case, the Court concluded that real property and improvements, which included a resort company's marina and restaurant,[17] were "large and immoveable" assets that could not be concealed or destroyed. As a result, the Court found that the Government must obtain a pre-seizure ex parte warrant for arrest in rem. Id. at 1497.

Similar protection has not been provided under the Florida Contraband Forfeiture Act, although the AMICUS CURIAE BRIEF ON BEHALF OF THE APPELLANT filed by the Metro-Dade Police Department accurately states that Judge Tench, while not authorized to do so by the Act, issued seizure warrants before the property was physically confiscated. Such a procedure should, perhaps, be the law of the State, but it is not required by the Act. Because it is not, the Act is subject to arbitrary and erroneous enforcement of real property forfeiture provisions that do not otherwise delineate the real property subject to

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[17]In Supreme Court Case Nos. 77,308 and 77,311, over 160 acres and an airstrip was seized; in Supreme Court Case No. 77,310 an entire 280-acre platted subdivision of over 200 separate lots was seized; and in Supreme Court Case No. 77,309, the Appellant seized an R/V mobile home subdivision of over 40 acres, with numerous R/V hookups, a bathhouse, an operating restaurant and other improvements.

seizure and forfeiture, in violation of the Appellees' rights to due process of law guaranteed by Article I, Sections 9 and 16 of the Constitution of the State of Florida and the Fifth and Fourteenth Amendments to the United States Constitution.

Issue IV

> SHOULD THIS COURT DETERMINE TO UPHOLD THE CONSTITUTIONALITY OF THE FLORIDA CONTRABAND FORFEITURE ACT, THEN THE COURT SHOULD PROVIDE SUBSTANTIVE AND PROCEDURAL STANDARDS OF DUE PROCESS FOR PROCEEDINGS UNDER THE ACT, INCLUDING BUT NOT LIMITED TO THE CONSTITUTIONAL REQUIREMENT THAT THE STATE MUST ASSUME THE BURDEN OF PROOF BY THE STANDARD OF CLEAR AND CONVINCING EVIDENCE.

As recognized in State v. Gale Distributors, Inc., 349 So.2d 150, 153 (Fla. 1977):

> This Court is committed to the proposition that it has a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a Statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution.

Additionally, this Court is constitutionally empowered not only to adopt rules of procedure in Florida Courts, but also to fashion appropriate substantive procedures for claimants in forfeiture proceedings under the Act. Article V, Section 2(a), Constitution of the State of Florida; Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982) and Mathews v. Eldridge, supra. In so doing, the Court must distinguish between substantive and procedural law. State v. Garcia, 229 So.2d 236, 238 (Fla. 1969)("[i]n some instances it is difficult to determine whether a rule relates to a matter that is

substantive or a matter that is procedural ..."). The trial Court recognized this difficulty and stated:

> [I]t is this Court's hope that this ORDER AND OPINION will effect either of two results: that the Legislature redraft this forfeiture legislation and provide for those constitutional protections this Court believes are necessary under our State and Federal Constitutions, or that the Florida Supreme Court will provide substantive and procedural guidance for the conduct of forfeiture proceedings under Chapter 932.

[Order and Opinion, RECORD ON APPEAL, pp. 8-9 n.3]

On the assumption that this Court determines that it is reasonably possible to uphold the constitutionality of the Florida Contraband Forfeiture Act by promulgating substantive and procedural guidance for the conduct of forfeiture proceedings, the Appellees submit that certain due process guarantees should be provided to them, other property owners and the State. Those are:

1. A requirement that the State have the burden of proof throughout the forfeiture proceeding;

2. A requirement that the State's burden of proof be met by a standard of proof commensurate with the criminal nature of forfeiture under the Act;

3. A requirement that, in the case of real property, the State be obligated to apply for and obtain, ex parte if necessary, a judicial determination that property is subject to seizure under the Act, before that seizure occurs;

4. Specification of the appropriate notice to be provided to potential claimants by the State not only prior to, but after, issuance of the rule to show cause contemplated by Section 932.704(1);

5. Finally, specification of rules for practice and procedure appropriate under the Act, including but not limited to the rules of Court to be followed for proceedings, discovery, evidence and the conduct of jury trials.

This Court's substantive and procedural guidance for these matters should take into consideration at least two Florida constitutional provisions. The first is the impact of Florida's due process provision in Article I, Section 9. This Court has not been reluctant to apply Section 9 beyond the application of the Federal due process clause. See, e.g., State v. Glosson, 462 So.2d 1082, 1085 (Fla. 1985). Given the otherwise strict scrutiny applied in this State to forfeitures generally, it is particularly appropriate to examine this legislation under Section 9.

Secondly, and just as importantly, Article I, Section 2 provides heightened protection to Florida property owners "to acquire, possess and protect property." This Court recently has suggested the applicability of this constitutional provision to forfeiture proceedings in In re forfeiture of 1976 Kenworth Tractor Trailer Truck, 569 So.2d at 1277. In State v. 1971 Green GMC van, supra, the Supreme Court of Louisiana employed a

similar constitutional provision as an additional and independent basis for holding constitutionally deficient the Louisiana forfeiture statute at issue in that case, which statute was virtually identical in its procedural deficiencies to the Florida Contraband Forfeiture Act. 354 So.2d at 486-87. See also, State v. Spooner, 527 So.2d 336, 348-49 (La. 1988).[18]

The United States Supreme Court has provided guidance for determining the appropriate burden and standard of proof. See, e.g., Mathews v. Eldridge, supra and more recently, Santosky v. Kramer, supra. The general rule is that the proponent of a remedy bears the burden of proof; probandi necessitas incumbit illi qui agit (he who sues has the burden of proof). Judicial examination of forfeiture statutes under the Mathews decision almost uniformly yield that result. See, e.g., United States v. Veon, 538 F.Supp. 237, 245-46; State v. Spooner, 520 So.2d at 347-48 & n.7 (listing those jurisdictions in which the burden of proof has been placed on the State in forfeiture actions when the statute is otherwise silent on the issue).[19]

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[18]Florida's Constitution provides other protections relevant to forfeitures, particularly in real property proceedings. For example, twice in the Declaration of Rights, at Sections 10 and 17, the State Constitution outlaws Bills of Attainder. Further, while not at issue on this appeal, the effect of Art. X, Sec. 4 (homestead exemption from forced sale under process) remains to be addressed).

[19]See also, In re forfeiture of 719 N. Main, 437 N.W. 2d 332, 335 (Mich. Ct. App. 1989); Lettner v. Plummer, 559 S.W. 2d 785, 787 (Tenn. 1977); State v. Rumfolo, 545 S.W. 2d 752, 754 (Tex. 1976).

The Appellant argues that the Fourth District Court of Appeal's decision in In re forfeiture of $48,900.00, 432 So.2d at 1385, which places the burden of proof on the property claimant, should be accepted by this Court. The Fourth District's burden-shifting is inconsistent with the rule in most State jurisdictions, as well as under most Federal forfeiture statutes. The Fourth District relied on the burden-shifting requirements of 19 U.S.C. §1615; however, as examined earlier in this ANSWER BRIEF, customs forfeiture is an historic anomaly that derives from early customs law in this country. Indeed, Federal decisions interpreting forfeiture statutes "silent" on the burden of proof follow the authority of United States v. Regan, 232 U.S. 37, 34 S.Ct. 213, 58 L.Ed. 494 (1914), which requires that the Government prove its case of forfeiture.[20] While 21 U.S.C. §881 has been interpreted to place the burden of proof on the claimant, this is specifically because that statute incorporates the unusual burden-shifting provision of 19 U.S.C. §1615. In this regard (as in many others), this civil Federal forfeiture scheme is entirely unlike the Florida Contraband Forfeiture Act.

Finally, the language of Florida's Act offers support for the Appellees' proposal to place the burden of proof on the

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[20]See, e.g., 18 U.S.C. §924(d); 19 U.S.C. §1305; 21 U.S.C. §334; 26 U.S.C. §7302; and 31 U.S.C. §5317(c). The Uniform Controlled Substances Act, §506(a) also fails to articulate burden of proof and courts have uniformly placed that burden on the State.

State. Section 932.704(1) provides that the State Attorney "shall promptly proceed ... by rule to show cause in the Circuit Court ... and may have such [property] forfeited ... upon producing due proof ... that the [property] was being used in violation of the provisions of this act (emphasis added)." The emphasized section of this statute appears to require that the State has the burden of proof.

What is "due proof"? Under the same authority recited in other State jurisdictions and under the rule of United States v. Regan, supra, the minimum standard of proof that the State must sustain is preponderance of the evidence. A number of jurisdictions have required more, either by statute or judicial determination. See, e.g., State v. 1971 Green GMC van, 354 So.2d at 485; A 1983 Volkswagen, 699 P.2d at 109.[21] Both California and New York require a greater standard (reasonable doubt or clear and convincing evidence, respectively).[22]

In this State, which has historically demanded strict application of forfeiture statutes, and particularly under the constitutional provisions in Article I, Sections 2 and 9, a standard of at least "clear and convincing evidence" on the State is appropriate in proceedings under the Act. Such a standard would reduce the risk of erroneous deprivation of

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[21]See also those citations of authority outlined in State v. Spooner, 527 So.2d at 347 n.7.

[22]Id.

private property, particularly when substantial interests such as real property (and its attendant homes and businesses) are subject to forfeiture.

Appellees also submit that at least an ex parte judicial determination of probable cause is necessary before real property can be seized by law enforcement agents under the Act. Judge Tench, in issuing seizure warrants prior to the property's physical confiscation, acted correctly, albeit without precedent or authority under the Act. His precedent should be required by this Court in all similar forfeiture proceedings when exigent circumstances do not exist. Well-reasoned authority for this proposition and similar procedural guidelines are found in United States v. Certain Real Estate Property, 612 F.Supp. at 1495-98.

This Court also should require notice not only prior to issuance of the rule to show cause (currently provided under §932.704(2)), but also notice after a rule issues. That notice should identify the procedure by which a claimant may seek recovery of his property, including the time period within which a claim must be filed, the penalty for failure to do so and the method by which to file his claim. Fell v. Armour, 355 F.Supp. at 1529. The Fourth District Court of Appeal's notice outlined in In re Forfeiture of $5,300.00, 429 So.2d at 803, provides a good framework for post-rule notice.

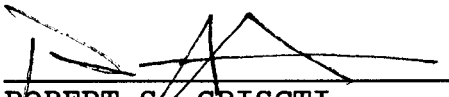
Finally, other rules of practice and procedure in forfeiture proceedings are needed. This Court has the exclusive jurisdiction to promulgate those. In so doing, and in adopting the substantive provisions outlined above, the Appellees submit that forfeiture proceedings under the Act will comport with those standards of due process required not only under the Federal but also under the Florida Constitution.

CONCLUSION

Appellees sought jurisdiction in this Court to elicit a ruling that either declares the Florida Contraband Forfeiture Act unconstitutional or that provides statewide uniformity for practice and procedure under the Act. Just as importantly, the Appellees have come to this Court for the uniform, statewide preservation of essential constitutional rights due each Florida citizen and property owner as a litigant in forfeiture proceedings. Accordingly, the Appellees pray that this Court affirm the ruling of the trial Court by declaring the Florida Contraband Forfeiture Act unconstitutional, or in the alternative, that this Court construe that legislation in a manner that protects their rights to due process of law.

Respectfully submitted,

LAW OFFICES OF TURNER & GRISCTI, PA



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEES has been served by regular U.S. mail/hand delivery to the Office of the Attorney General, Department of Legal Affairs, c/o STEVEN H. PARTON, Assistant Attorney General, Department of Legal Affairs, RICO Section, 2670 Executive Center Circle, West Sutton Building, Suite 107, Tallahassee, FL 32301, Counsel for Appellant; LARRY G. TURNER, Post Office Box 508, Gainesville, Florida 32602, Counsel for Amicus Curiae the Florida Association of Criminal Defense Lawyers; ROBERT KNABE, 73 West Flagler Street, Room 1601, Miami, Florida 33130, Counsel for Amicus Curiae, Florida Police Chief's Association, Etc.; ARTHUR I. JACOBS, P.O. Drawer I, Fernandina Beach, Florida 32034, Counsel for Amicus Curiae the Florida Prosecuting Attorneys Association, this 25th day of February, 1991.

ROBERT S. GRISCTI