

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF LAW ENFORCEMENT,

Appellant,

vs.

Case No. 77,308; 77,309;
77,310; 77,311 & 77,312

REAL PROPERTY, ETC.,

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Department of Law Enforcement, was the Plaintiff in the trial court and will be referred to herein as either the "Appellant" or by proper name. Appellee, Real Property, etc., was the Respondent in the trial court, and will be referred to as either "Appellee" or by proper name.

There is no record on appeal prepared as of yet for this case.

STATEMENT OF THE CASE AND FACTS

On May 15, 1990, Charles M. DeCarlo and David Nelson were arrested as the result of drug trafficking activities in a reverse sting operation conducted by the Florida Department of Law Enforcement and the Levy County Sheriff's Department centered around the importation of approximately 250 kilos of cocaine in violation of Chapter 893, Fla. Stat. On May 16, 1990, Judge Benjamin M. Tench issued seizure warrants under Chapters 893 and 932, Florida Statutes, for the seized real properties which are the subject of the underlying forfeiture actions in the lower court. Subsequent to the issuance of the Rules To Show Cause, Charles M. DeCarlo and David Nelson were tried and convicted on all criminal charges.

On or about July 16, 1990, and during early August, 1990, Judge Benjamin M. Tench issued Orders of Rule To Show Cause based upon a *prima facie* showing of probable cause. On August 6, 1990, Claimants Charles M. DeCarlo, Cedar Key Campsites, Inc., Cedar Key Hunting and Game Preserve, Inc., Cedar Key Flying Club, Inc., Cedarwood Estates, Inc. and Cedar Key Mobile Home Village, Inc., filed their Amended Notices of Intent To Claim A Security Or Other Interest In Property Sought To Be Forfeited in response to Petitioner's Amended Petitions For Rule To Show Cause filed on May 24, 1990, July 16, 1990, and July 27, 1990.

On September 28, 1990, Claimants filed their Motions To Dismiss Petitions For Forfeiture And To Quash Rules To Show Cause. Subsequently on October 1, 1990, Claimants filed their Amended Motions To Dismiss Petitions For Forfeiture And To Quash Rules To Show Cause. Hearing was held before Judge Benjamin M. Tench on November 4, 1990, in Bronson, Levy County, Florida on the Amended Motions To Dismiss. For purposes of this hearing the court consolidated the Motions and arguments.

On December 21, 1990, Judge Benjamin M. Tench issued an Order and Opinion Granting Claimants' Amended Motions To Dismiss Petitions For Forfeiture.

On December 26, 1990, Petitioner filed its Notice of Appeal with the First District Court of Appeals. On January 3, 1991, Petitioner filed its Motion For Consolidation On Appeal. On January 7, 1991, Petitioner filed its Amended Motion To Consolidate. On January 10, 1991, Appellees filed their Joint Response To Amended Motion For Consolidation On Appeal.

On January 7, 1991, Appellees filed their Joint Suggestion of Certification to the Supreme Court of Florida. On January 7, 1991, Appellant filed its Response To Appellees Joint Suggestion of Certification to the Supreme Court of Florida. On January 29, 1991, this Court issued its Order Requiring Immediate Resolution. On February 1, 1991, the Clerk of the Supreme Court of Florida

notified its receipt of the certified judgment of the trial court.

On February 5, 1991, this Court issued its Order Accepting Jurisdiction, Establishing Briefing Schedule and Setting Oral Argument, consolidating the cases on appeal for expedited review.

SUMMARY OF THE ARGUMENT

The trial court erred in his findings and conclusions that the Florida Contraband Forfeiture Act of 1989 is facially unconstitutional. The manifest intent of the Legislature was that the Act be civil in nature, and the forfeiture remedy is not so punitive in purpose or in effect that it overrides the primary intent of the Legislature to create a remedial, nonpunitive, civil sanction. Moreover, the procedures applicable to such *in rem* civil proceedings are those regularly prescribed by the rules and law as applicable to such proceedings and likewise applicable for the 1989 Act. Finally, the Florida Contraband Forfeiture Act of 1989 gives fair notice to a person of ordinary intelligence that any real property interest, in its entirety, is forfeitable if used in violation of the Act.

ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN DECLARING THE FLORIDA CONTRABAND FORFEITURE ACT (SECTIONS 932.701-704, FLA. STAT. (1989)), UNCONSTITUTIONAL.

A. HISTORY AND NATURE OF FORFEITURE AT COMMON LAW.

At English common law there existed two distinct types of forfeiture. First, and most frequent, was a forfeiture imposed as a penalty upon a defendant's conviction of a criminal offense. The convicted defendant forfeited all his real and personal property based upon the breach of the criminal law and as offense to the King's peace. Additionally, the common law recognized the penalty of seizure, which was a civil forfeiture derived from the theory of deodand. Deodand required forfeiture of the value of an inanimate object directly or indirectly causing death of a person, whether done intentionally or accidentally, and without regard to the guilt or innocence of the owner of the object. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-4 (1974), and authorities cited therein. "Although the deodand vanished from English law, the ascription of personality to offending objects persisted into the modern law of civil forfeiture." United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York, 747 F.Supp. 173, 177 (E.D. N.Y. 1990). See also, J.W. Goldsmith, Jr. v.

United States, 254 U.S. 505, 510-11, 41 S.Ct. 189, 190-91, 65 L.Ed. 376 (1921).

Modern approaches to civil seizure adopted the deodand's rationale that an instrumentality or object used to commit an offense is "guilty." Today, civil forfeitures are *in rem* proceedings brought against property, rather than the wrongdoer, based on the legal fiction that the property is "guilty." *In rem* proceedings are treated as civil actions, in which the moving party must prove its case by a preponderance of the evidence. However, a number of forfeiture statutes require a showing of probable cause for instituting the lawsuit and then shift the burden to the party claiming any interest in the property. See, e.g., 19 U.S.C. §1615 and 21 U.S.C. §881. Under the majority view, neither conviction of the wrongdoer, nor postponement of forfeiture of the subject property until disposition of the case, is required in a civil forfeiture. See generally, Calero-Toledo v. Pearson Yacht Leasing Co., *supra*, and Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379-498 (1976).

In contrast, criminal forfeitures are *in personam* proceedings, instituted only in conjunction with criminal charges against particular defendants. Allegations regarding the forfeitability of property connected with the crimes charged are

contained in an indictment or information. Forfeiture of the property depends upon conviction of the defendant and, generally, the property may not be seized by the government until after the defendant is adjudged guilty. Any third party claims to the property must be resolved in an ancillary proceeding to perfect title in the government since a criminal forfeiture order is good only against the defendant's interest in the property. Calero-Toledo v. Pearson Yacht Leasing Co., supra, and Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, supra.

B. THE CONTRABAND FORFEITURE ACT, AS AMENDED IN 1989,
SATISFIES DUE PROCESS OF LAW.

Both the Federal and Florida Constitutions guarantee the concepts of substantive and procedural due process to the citizens of the State of Florida as a safeguard against state actions. Guarantees of procedural due process include notice and an opportunity to be heard and to defend before a competent tribunal vested with jurisdiction of the subject matter of the cause. Calero-Toledo v. Pearson Yacht Leasing Co., supra; Bussey v. Legislative Auditing Committee of Legis., 298 So.2d 219, 221 (Fla. 1st DCA 1974), cert. denied, 304 So.2d 451 (Fla. 1974). "The phrase 'due process' when applied to substantive rights as distinguished from procedural rights means that a state or municipality is without right to deprive a person of life,

liberty or property by an act having no reasonable relationship to any proper governmental purpose." State ex rel. Furman v. Searcy, 225 So.2d 430, 433 (Fla. 4th DCA 1969). Accord, Johns v. May, 402 So.2d 1166, 1169 (Fla. 1981).

In dismissing the *in rem* petitions *sub judice*, the trial court essentially ruled that the Florida Contraband Forfeiture Act, as amended in 1989, violated the claimants' due process rights because the Act is clearly intended to be penal and criminal rather than remedial and civil. (See Appendix A for Order and Opinion of the trial court). Therefore, the court found the Act must provide the full panoply of constitutional safeguards accorded to criminal defendants, including proof beyond a reasonable doubt in a prior criminal trial and all its incidents. This holding is erroneous.

In determining whether a forfeiture proceeding is civil or criminal in nature, the U.S. Supreme Court has developed the following analysis:

Our inquiry in this regard has traditionally proceeded on two levels. 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.

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-63, 104 S.Ct. 1099, 1105, 79 L.Ed.2d 361 (1984)(citing U.S. v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980)). Utilizing this test, Appellant contends the lower court's decision must be reversed.

Legislative Intent

Without question the Florida Legislature intended the Florida Contraband Forfeiture Act to be a remedial civil sanction. The Act provides that the seizing agency "shall proceed against the contraband article . . . or real property. . . ." Section 932.704(1), Fla. Stat. (1989), thus creating an *in rem* proceeding to be instituted against the defined property alleged to have been used in violation of the Act. "In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object." United States v. One Assortment of 89 Firearms, 465 U.S. at 363.

Significantly, evidence that the 1989 Legislature was cognizant of the fact that the proposed amendment was civil in nature appears in discussions concerning the Act during committee hearings.¹ Furthermore, the Legislature expressly patterned the

¹ The Committee posed the question as to what burden of proof was applicable to the 1989 Amendment to proponents of the bill

Act after its federal forfeiture counterpart, 49 U.S.C. §§ 781 and 782. Griffis v. State, 356 So.2d 297 (Fla. 1978). 49 U.S.C. §§ 781 and 782, as well as 21 U.S.C. §881, are substantially similar to Florida's Act and have been consistently found to be civil *in rem* proceedings. See, e.g., United States v. One 1976 Cadillac Seville, Etc., 477 F.Supp. 879 (E.D. Mich. S.D. 1979); and United States v. One 1973 Pontiac Grand Am, 413 F.Supp. 163 (W.D. Tex. 1976).

The trial court's order indicates that the primarily punitive intent of the Legislature can be demonstrated by the Act's "inclusion within Chapter 932, entitled 'Provisions Supplemental to Criminal Procedure'." (Emphasis in original) (Order and Opinion, p. 4). However, this Court has stated:

The arrangement and classification of laws for purposes of codification in the Florida Statutes is an administrative function of the Joint Legislative Management Committee of the Florida Legislature. §11.242, Fla.Stat. (1983). The classification of a law or a part of a law in a particular title or chapter of Florida Statutes is not determinative on the issue of legislative intent, though it may be persuasive in certain circumstances. Where there is a question, established principles of statutory construction must be utilized.

during a committee hearing and was informed that the lesser civil burden applied. (See Appendix B, p. 5-6).

State v. Bussey, 463 So.2d 1141, 1143 (Fla. 1985). Given the fact that: (1) the statutory provisions of the Act have remained substantially the same despite its transference from §893.12, to §943.41 et seq., to its present location in §932.701 et seq., and (2) the statute was modeled upon the federal civil forfeiture statutes, the trial court's conclusion that the Legislature intended to make the Florida Contraband Forfeiture Act a criminal statute is clearly erroneous.

It is also significant to recognize that the Legislature consciously viewed forfeiture separate and distinct from the criminal penalties contained in Chapter 893, Florida Statutes. The different placement of civil and criminal sanctions has been held to manifest a clear intent by the Legislature to separate the criminal and civil labels of a statute. Helvering v. Mitchell, 58 S.Ct. 630, 303 U.S. 391 (1938); United States v. \$2,500 in United States Currency, 689 F.2d 10, 14 (2d Cir. 1982). Conspicuously absent from the listing of penalties imposed upon violators of Chapter 893 is the forfeiture of contraband.

The trial court also sought to find support for its finding of a primarily punitive legislative intent based on the "Final Staff Analysis and Economic Impact Statement" of the House of Representatives Committee on Criminal Justice relating to the real property amendment to the Act, which stated that the bill

"contains a harsher and more severe punishment for drug traffickers." (Order and Opinion, pp. 4-5.) While this statement may accurately reflect the conclusion of the Staff, it provides little insight to the intent of the Legislature

Based on the use of a civil federal model, the testimony heard in committee and the plain statutory language, it is abundantly clear that the Legislature intended the Florida Contraband Forfeiture Act to create a civil remedy, not a criminal penalty. Therefore, it is necessary to address the second prong of the Ward test to determine whether the statutory scheme of the Act is by the "clearest proof" so punitive either in purpose or effect, as to negate the legislative preference for a civil sanction.

Statutory Effect

The next question which must be addressed is whether the statutory scheme of the Florida Contraband Forfeiture Act is so punitive, either in purpose or effect, that it negates the intent of the legislature to create a civil sanction. The Supreme Court has noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." U.S. v. Ward, *supra*, at 2641. The Supreme Court has post-Ward outlined the following factors to assist in this determination:

"Whether the sanction involves an affirmative disability or restraint, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment, retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." *Id.*, at 168-169, 83 S.Ct., at 567-68. (Footnotes omitted). This list of considerations is, however, "neither exhaustive nor dispositive." United States v. Ward, 448 U.S. 242, 249, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980).

United States v. One Assortment of 89 Firearms, 465 U.S. at 365, 104 S.Ct. at 1106, 79 L.Ed.2d at 361, n. 6 (1984).

The Florida Contraband Forfeiture Act has not been historically regarded as punishment, and no *scienter* is required to cause a forfeiture under the statute. "The statute makes no attempt to tailor the amount of the loss suffered by forfeiture to the degree of culpability, a strong indication that any punitive effect is incidental." United States v. \$2,500 In United States Currency, *supra*. Moreover, the State has a strong remedial goal of compensation for its efforts to prevent and mitigate the harms and costs caused by the unlawful use of the property (whether real or personal).

It is unquestionable that Florida possesses some of the worst problems in the nation in dealing with drug related activity. Among the goals sought by the State under the Florida Contraband Forfeiture Act are elimination of the instrumentalities used to facilitate a crime, removal of the weapons of the drug trade, prevention of immediate and future personal and economic losses - not to seek retribution or deterrence.

Another goal of the State's Forfeiture Act is to obtain reimbursement of any costs to the State in connection with drug related activity. The harms and costs associated with drug related activities include, but are not limited to, illicit profits from actual drug sales, severe collateral consequences such as drug addiction, increased drug violence, drug prevention and education, and the State's investigative, enforcement, and incarcerative costs. Indeed, §932.704(3)(a) of the Act specifically designates how proceeds from sale of forfeited contraband are to be applied to such direct and collateral costs:

The proceeds of sale shall be applied: first, to payment of the balance due on any lien preserved by the court in the forfeiture proceedings; second, to payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security, and forfeiture of such property; third, to payment of court costs incurred in the forfeiture proceeding. The remaining proceeds shall be deposited in a special law enforcement trust fund established by

the board of county commissioners or the governing body of the municipality, and such proceeds and interest earned therefrom shall be used for school resource officer, crime prevention, or drug education programs or for other law enforcement purposes.

The difference between criminal and civil penalties is examined in United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943):

[I]t has frequently been held that one important difference between criminal and civil penalties is that the former is primarily punitive or deterrent in purpose - calculated to 'vindicate public justice,' - while civil penalties are primarily remedial and designed to "protect the government from financial loss.

Accord, United States v. A Parcel of Land With A Building Located Thereon At 40 Moon Hill Road, Northbridge, Massachusetts, 884 F.2d 41, 43 (1st Cir. 1989). The drug trade has generated costs to government that are immeasurable. Drugs touch the lives of everyone, it is not an isolated disease affecting the few. The forfeiture laws were clearly designed to address all these myriad ills.

All "sanctions" are necessarily "penal" to some degree, but the primary purposes of the Florida Contraband Forfeiture Act serve broad remedial, non-punitive, purposes. Cf. United States

v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 544 (5th Cir. 1987);
United States v. 26.075 Acres, Located in Swift Creek Tp., 687
F.Supp. 1005, 1013 (E.D. N.C. 1988).

Whether the amount or intent of personal and real property forfeited in a particular case is violative of some constitutional guarantee depends upon the application of the facts to the specific constitutional right asserted. However, such application issues are premature in the case *sub judice*. In any event, courts have approved the forfeiture of large tracts of real property based upon much less criminal activity than alleged here. See, e.g., United States v. 26.075 Acres, Located in Swift Creek Tp., *supra*, (five sales of cocaine totaling 12 grams); United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989)(four sales of cocaine totaling 12.8 grams resulting in forfeiture of 26 acres, including residence).

It might appear that the Florida Contraband Forfeiture Act applies to behavior that is already a crime. However, this is not a situation where the criminal statute permits both criminal and civil penalties to be levied for the same criminal offense. Instead, the Act applies its forfeiture sanction to much broader conduct than a particular felony or drug offense. This includes transporting, concealing, or possessing (or the use of property to facilitate transporting, concealing or possessing) a

contraband article and acquiring real or personal property with proceeds obtained in violation of the Act. Section 932.702, Fla. Stat. Thus, the forfeiture remedy is not coextensive with a criminal penalty so as to defeat its civil nature. See, United States v. D.K.G. Appaloosas, Inc., 829 F.2d at 544; United States v. One Assortment of 89 Firearms, *supra*. Even if the Legislature may be considered to have imposed both a criminal and civil sanction to some extent for the same conduct, it "does not necessitate a finding that both sanctions must be considered criminal -- especially where the 'civil' sanction covers a broader range of conduct than is proscribed by the 'criminal' sanction." United States v. D.K.G. Appaloosas, Inc., 829 F.2d at 544.

In sum, a review and analysis of the Ward factors fail to establish by the "clearest proof" that the Legislature provided a sanction so punitive as to transform an *in rem* forfeiture proceeding, clearly intended as a civil remedy, into a criminal penalty. Therefore, the forfeiture mechanism set forth in the Florida Contraband Forfeiture Act (§ 932.701 et seq., Fla.Stat.), as amended in 1989, does not on its face violate due process for failure to afford the claimants the full panoply of constitutional protections afforded criminal defendants.

Finally, time and again the federal forfeiture laws have been consistently upheld as civil in nature and meeting all requirements of due process. Compare, United States v. One Assortment of 89 Firearms, 104 S.Ct. at 1099 (1984)(stating that the federal forfeiture provision was not intended as punishment, but rather as a civil remedy that does not demand application of the double jeopardy clause); One Lot Emerald Cut Stones and One Ring v. United States, 93 S.Ct. 489 (1972)(finding that forfeiture provisions were not so unreasonable or excessive as to transform a civil remedy into a criminal penalty); Helvering v. Mitchell, *supra*; United States ex rel. Marcus v. Hess et al., 63 S.Ct. 379 (1943); United States v. 141st. Corporation, 911 F.2d 870 (2nd Cir. 1990); United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976, (finding that Congress has specifically intended that drug forfeiture provisions should be viewed as providing for remedial civil sanctions, not criminal penalties).

Procedural Due Process

The trial court maintains the Florida Contraband Forfeiture Act violates the guarantee of procedural due process because the Legislature failed to provide guidance in the Act as to how properties are to be seized and the standard of proof and burden of proof of the parties in a forfeiture proceeding. (Order and Opinion, pp. 7-9)

Procedural due process of law is defined as notice of the action and an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67 (1972). It has also been held that lack of pre-seizure notice and a hearing is not a denial of due process. Calero-Toledo v. Pearson Yacht Leasing Co., *supra*. Accord, Lamar v. Universal Supply Co., Inc., 479 So.2d 109 (Fla. 1985). To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. "Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices satisfies due process." Orlando Sports Stadium, Inc. v. State Ex Rel. Powell, 262 So.2d 881, 884 (Fla. 1972) (criminal public nuisance action).

In Lamar, this Court held that the Florida Contraband Forfeiture Act's prohibition under §932.703(1), Fla. Stat. (1983), against recovery of an interest in seized property did not violate constitutional rights of due process or access to the courts in light of the requirement under §932.704(1) that the State promptly file a forfeiture action following seizure. Since the Lamar decision, the Legislature has expanded constitutional protections by amending the Act to provide that an action for recovery of an interest in seized property may be instituted if the State has not initiated a forfeiture action within 90 days of a seizure. §932.703(1), Fla. Stat. (1989). Such additional

protections likewise exceed the due process protections afforded in similar federal forfeiture statutes. See, e.g., 21 U.S.C. §881 and 49 U.S.C. §§781 and 782.²

In Calero-Toledo v. Pearson Yacht Leasing Co., *supra*, the Supreme Court expressed that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." In response to the Lamar decision, the Florida Legislature has enacted additional safeguards beyond those required under constitutional law. Accordingly, property of "innocent owners" is not subject to forfeiture by the State under the Florida Contraband Forfeiture Act. Sections 932.703(2) and (3), Fla. Stat. (1989).

Furthermore, the Act provides, *inter alia*, that the State "shall promptly proceed against the contraband" property "by rule to show cause in the circuit court." Section 932.704(1), Fla. Stat. (1989). Thus, any rule to show cause issued out of a circuit court must be signed by a judge upon determining that the allegations of the petition are sufficient and not frivolous. In

² Further protections are afforded by adoption of the Florida Department of Law Enforcement written policies governing forfeiture of real property under the Florida Contraband Forfeiture Act. (See Appendix C).

Re U.S. Currency In Amount of \$5300.00, 429 So.2d 800, 803 (Fla. 4th DCA 1983).³

The first Florida decision discussing procedural application of the Act is In Re U.S. Currency In Amount Of \$5,300.00, *supra*, in which the court determined that in conducting a seizure and seeking forfeiture under the Act, the filing of a petition and subsequent pleadings, as well as any hearings, should be conducted in accordance with the Florida Rules of Civil Procedure:

It is basic, as a matter of constitutional law, that procedural due process must be afforded when the government takes private property belonging to a citizen. See generally 10 Fla.Jur.2d, Constitutional Law, § 263. And we feel that it is within our province to construe a statute, where possible, in a manner so that it will not conflict with the constitutional guarantee of due process in harmony with the principle that the legislature will be presumed to have intended to enact a valid and constitutional law. Smetal Corporation v. West Lake Inv. Co., 126 Fla. 595, 172 So. 58 (1936). To that end we feel justified here in construing Section 932.704, Florida Statutes (1981) to impliedly contain omitted specifics which due process necessitates.

Id. at 802.

³ In the instant case, Judge Tench signed both the pre-seizure warrants for the real and personal property, as well as the Rule To Show Cause Orders based upon his finding of probable cause.

In a later decision, the court, again recognizing that the Florida Contraband Forfeiture Act is a civil *in rem* proceeding, set out the burdens and standard of proof in a forfeiture proceeding.

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 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. (Footnotes and citations omitted.)

In Re App. 48,900 Dollars In U.S. Currency, 432 So.2d 1382, 1385 (Fla. 4th DCA 1983).

Due process of law means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. Ryan's Furniture Exchange v. McNair, 162 So. 483, 487 (Fla. 1935). In particular, the requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining

in a particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government. Minder v. Georgia, 183 U.S. 559, 562, 22 S.Ct. 224, 46 L.Ed. 328, 330 (1902); Brown v. New Jersey, 175 U.S. 172, 176, 20 S.Ct. 77, 33 L.Ed. 119, 121 (1899).

An action brought under the Florida Contraband Forfeiture Act must certainly be classified as a civil proceeding and, *a fortiori*, governed by the laws normally applied in the regular course of such proceedings. This is exactly the path that was taken by the Fourth District Court of Appeals, and its rulings are now law in this state. The fact that the court certified questions of proper procedures under the Act does not take away from the validity of the basis for its decisions. The amendment of the Act in 1989 to include real property forfeitures in no manner changes the body of law applicable to civil proceedings in general and to forfeitures under the Act specifically.

Civil rules and applicable law pertaining to the Act have also been adhered to by other courts in Florida. Marks v. State, 416 So.2d 872 (Fla. 5th DCA 1982); In Re Forfeiture of Six Video Poker Machines, 544 So. 1097 (Fla. 1st DCA 1989). In Marks, it was stated:

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 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.

Id. at 874.

It is manifestly clear that the Florida Contraband Forfeiture Act, as amended in (1989), fully satisfies due process of law. The trial court's decision to the contrary is made without legal authority and hinges merely on the fact that real property is now forfeitable under the 1989 amendment to the Florida Contraband Forfeiture Act. It is obvious that, in view of the existing pre-1989 procedural law, this point served solely as a basis for attempting to declare the statute unconstitutional.

C. THE FLORIDA CONTRABAND FORFEITURE ACT OF 1989
IS NOT VOID FOR VAGUENESS.

The trial court ruled that the 1989 Act was unconstitutionally vague in that the Act fails to give fair notice of the "extent to which contiguous real property, including improvements, is subject to forfeiture." In reaching this conclusion,

the trial court wholly ignored §893.12(2)(b), Fla. Stat., which, along with the amendments to §§ 932.701-704, Fla. Stat., was passed and is part of Chapter 89-148, Laws of Florida. There, the extent to which real property is subject to forfeiture is clearly and unequivocally set out.

Section 893.12(2)(b) reads in pertinent part:

All real property, including any right, title, leasehold interest, and other interest in the whole of any lot or tract of land 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 § 893.03(1) or (2) may be seized and forfeited as provided by the Florida Contraband Forfeiture Act. . . .
(Emphasis added)

Similarly, a "contraband article" is defined in §932.701(f) as follows:

Any 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 or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
(Emphasis added.)

There can be no doubt that a person of ordinary intelligence is given fair notice that any real property interest, in its entirety, is subject to forfeiture if connected with illegal conduct in violation of the Florida Contraband Forfeiture Act, as amended in 1989.

In United States v. 26.075 Acres, Located In Swift Creek Tp., *supra*, the court faced the same type of vagueness attack as in this case regarding a real property forfeiture under 21 U.S.C. §881(a)(7) (which language is virtually identical to §893.12(2)(b), Fla. Stat.).⁴ The court there held:

Claimant argues that the terms of §881(a)(7) are unconstitutionally vague as applied to these facts, in violation of the fifth amendment. The court cannot agree, and finds that the terms of Section 881 are clear and plain and sufficient to "give the person of ordinary intelligence a reasonable

⁴ 21 U.S.C. §881(a)(7) reads:

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

opportunity to know what is prohibited so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). Based on the plain language of §881(a)(7), reasonable persons should recognize that if they make real property available as a situs for an illegal drug transaction it is forfeitable. Just as the owner of an automobile should know that using his automobile as a place for conducting negotiations, transacting a drug sale, or transporting contraband will subject his automobile to forfeiture, see, e.g., United States v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912 (4th Cir. 1976), claimant should similarly know that making available or intending to make available her real property as a situs for an illegal drug transaction will render her real property, in its entirety, subject to forfeiture. See United States v. Lots 12, 13, 14 and 15, No. 86-53 (E.D. Ky. Feb. 5, 1987) slip op. at 4; United States v. 124 East North Avenue, Lake Forest, Illinois, 651 F.Supp. 1350, 1353-54 (ND Ill. 1987). (Emphasis added.)

Id. at 1014.

Accordingly, the appellate courts have previously announced the procedural rules and their applicability under the 1989 Act, thereby giving persons of ordinary intelligence fair notice of the "procedures" in forfeiture of real property. Likewise, there is fair notice given as to the extent and amount of real property interests which are forfeitable.

CONCLUSION

It is the function of the constitution to protect the rights of its citizens. This protection has always been balanced between the individual's personal rights and the rights of the public as a whole. The Fifth Amendment will protect the individual's right to life, liberty and property only to the extent that these rights do not subject the public to harm. The Legislature has decided that property, be it personal or real, can be used in a manner that creates a harm to the public that outweighs the rights to its ownership. It has enacted the Florida Contraband Act to remove the rights of the owners through legal process that affords ample due process.

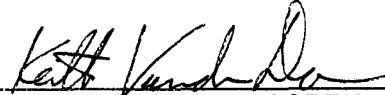
The Fifth Amendment makes no distinction between the property it protects. It does not afford greater protections towards realty as opposed to personalty. The lower court's logic that the addition of real property to the Act causes it to become punitive, and therefore criminal, is not only unsupported by the law but is also seriously flawed. Fundamental due process rights are more than amply protected under this Act.

In rem forfeiture law always was and is now, civil and remedial, not criminal and punitive. Based on the remedial purpose of the Act and the adequate provisions for notice and an opportunity to be heard, this Honorable Court is requested to

reverse the order of the trial court finding the Act unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief of Appellant has been furnished by U.S. Mail to ROBERT S. GRISCTI, P.A., 204 West Univeristy Avenue, Suite 5, Post Office Box 508, Gainesville, Florida 32602; MR. LARRY G. TURNER, Esquire, Griscti and Turner, P.A., Florida Association of Criminal Defense Lawyers, Post Office Box 508, Gainesville, Florida 32602; MR. ARTHUR I. JACOBS, Esquire, Florida Prosecuting Attorneys Association, Post Office Drawer I, Fernandina Beach, Florida 32625; AL SIMMONS, Esquire, Post Office Box 759, Cedar Key, Florida 32625; and MS. PAULINE M. INGRAHAM-DRAYTON, Esquire, Florida Department of Law Enforcement, 711-B Liberty Street, Jacksonville, Florida 32202, this 19th day of February, 1991.



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