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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF LAW ENFORCEMENT,

Appellant,

vs.

REAL PROPERTY, ETC.,

Appellee.

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

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REPLY BRIEF OF APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KEITH VANDEN DOOREN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NUMBER 0209260

DIANA K. BOCK
ASSISTANT ATTORNEY GENERAL

JEANNE CLOUGHER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-9105

COUNSELS FOR APPELLANT

PARKER THOMSON
Special Assistant Attorney General

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ISSUE I

THE FLORIDA CONTRABAND FORFEITURE ACT OF 1989 IS CIVIL AND REMEDIAL IN NATURE AND DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Based on Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980), Appellees initially argue that the Act of 1989 "is, in nature, a punishment for which constitutional safeguards relative to criminal proceedings should apply" and that no further constitutional inquiry is necessary since "the Legislature manifested its intent that the Act be a punitive sanction." (Appellees' Ans. Br., pp. 14-15) Appellees have deliberately confused the two pronged test for determining whether a forfeiture proceeding is civil or criminal in nature as announced in Kennedy and Ward. They fail to draw a distinction between whether a forfeiture proceeding was intended to be labeled civil or criminal -- the first prong in the Ward analysis -- and whether a sanction is penal in purpose and effect, rather than remedial -- the second prong.

In United States v. Ward, *supra*, 100 S.Ct. at 2641, it was said:

> This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction. (Citations omitted.) 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. (Citation omitted.) In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." (Citations omitted.)

In applying rules of statutory construction to determine legislative intent, the Court must first look to the ordinary meaning of the statute. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). It is true that the Legislature did not specifically use the word "civil" in describing forfeitures under the Act. However, as already noted in Appellant's Amended Initial Brief, it did provide for proceeding against the property itself, an in rem forfeiture, "as opposed to common law forfeiture upon conviction which is in personam against the defendant". In re Forfeiture of 1978 Cheverolet Van, 493 So.2d 433, 434, n. 2 (Fla. 1986). Accord, In re Forfeiture of Approx. 48,900 Dollars In U.S. Currency, 432 So.2d 1382 (Fla. 4th DCA 1983); In re Alcoholic Beverages Seized From Saul's Elks Club,

440 So.2d 65 (Fla. 1st DCA 1983).[1] By providing for the forfeiture to be in rem, the Legislature clearly manifested its intent to provide a civil sanction. Seventeen years of judicial interpretation without legislative intervention bolsters that conclusion. Under rules of statutory construction, our inquiry should end with this facially manifested intent. Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983).

But further support of the Legislature's intent to create a civil sanction can also be found in the Act's legislative history. The Act was originally enacted by Ch. 73-331, Laws of Florida. See Griffis v. State, 356 So.2d 297 (Fla. 1978); Duckham v. State, 478 So.2d 347 (Fla. 1985). The legislative intent of the statute is contained in the introductory language

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[1] This Court, quoting from Goldsmith Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376 (1921), has stated:

> "* * * It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a paraticular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a 'thing' that can be used in the removal of goods and commodities' and the law is explicit in its condemnation of such things."

E. W. Scarborough v. E. S. Kelly, 7 So.2d 321, 325 (Fla. 1942).

to the enactment, which notes the signing into law by the President of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and expresses the intent of the Legislature to create uniformity between the laws of Florida and the laws of the United States. As noted by the Griffis court, "49 U.S.C. § 781, § 782, are the current federal counterparts to the 'Florida Uniform Contraband Transportation Act.' The 'Florida Uniform Contraband Transportation Act' is substantially identical to 49 U.S.C. § 781, § 782." Griffis v. State, *supra*, at 299. The Griffis court could have further noted that 21 U.S.C. § 881 was part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and was also substantially similar to the Uniform Act. All three federal counterparts provide for "civil" in rem forfeitures. Given the express legislative intent to create uniformity, coupled with the civil nature of its federal counterparts, the legislative history of the Act leads inescapably to the conclusion that the Legislature intended to create a civil sanction.

Under the Ward analysis, the Court must now inquire whether the Act's forfeiture remedy is so punitive as to negate that intention by the "clearest proof." United States v. Ward, *supra*, at 2641. Appellees assert that Federal case law is inapplicable to this analysis because the Florida Contraband Forfeiture Act was not modeled after 21 U.S.C. § 881 and because the Act did not

adopt any provisions of 49 U.S.C. § 781-82 or 21 U.S.C. § 881 in its 1980 amendments. (Appellees' Ans. Br., p. 28) This assertion ignores the legislative history of the Act already addressed and the opinion of this Court in Duckham v. State, *supra*. In Duckham the Court noted that "21 U.S.C. § 881, part of the Comprehensive Drug Abuse Prevention Act of 1970, contains a similar forfeiture provision to that contained in §§ 932.701-704. In construing § 881 numerous federal courts have upheld or ordered forfeiture in situations similar to that presented here." Id. at 348, n. 3. The Court went on to cite a number of Federal cases involving § 881 in support of its decision in Duckham.

Appellees' claim that the Act, as amended in 1980, failed to adopt any provisions of §881 is clearly refuted by the legislative history. Appellees' Ans. Br., p. 28. Section 932.701(2)(e) providing for forfeiture of personal property was enacted in 80-68, Laws of Florida, and is substantially similar to 21 U.S.C. §881(a)(6), which was passed by Congress in Pub.L. 95-633, § 301(1) in 1978. Furthermore, Section 893.12(2)(b), Fla. Stat. (1989) (part of the Act's real property forfeiture scheme) is word for word almost identical to 21 U.S.C. § 881(a)(7), passed by Congress in 1984. As a result, the applicability of Federal case law construing § 881 is obvious.

A number of Circuit Courts of Appeals have been faced with the same penal/remedial question that confronts this Court. As the Appellees concede, federal case law interpreting 21 U.S.C. §881 has found those proceedings to be civil in both form and effect. Appellees' Ans. Br., pp. 27-28. See United States v. $2,500 in United States Currency, 689 F.2d 10 (2nd Cir. 1982), (holding any punitive effect incidental in light of the broad remedial purposes of § 881); United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989) (holding real property forfeiture provision civil in light of extremely strong non-punitive, remedial purposes); United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532 (5th Cir. 1987) (holding ex post facto clause inapplicable to real property forfeiture provision of § 881 due to its remedial purpose); United States v. $250,000 in United States Currency, 808 F.2d 895 (1st Cir. 1987) (holding, because § 881 is civil in nature, proof beyond a reasonable doubt unnecessary); United States v. One 1976 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65 (9th Cir. 1976) (holding allocation of burden of proof to claimant is not violation of due process due to predominately civil nature of § 881); Bramble v. Richardson, 460 F.2d 968 (10th Cir. 1974) (holding absence of proof beyond a reasonable doubt did not result in denial of due process).

The remedial goals and purposes of drug related forfeitures were of particular importance to those courts. In United States

v. $2,500 in United States Currency, *supra*, the court detailed the remedial purposes of the Drug Abuse Prevention and Control Act of 1970, finding that "[f]orfeitures of drugs, vehicles and money used in drug trafficking has many apparent remedial, non-punitive purposes. These include impeding the success of the criminal enterprise by eliminating its resources and instrumentalities, diminishing the efficiency and profitability of the business by increasing the costs and risk associated with it, and helping to finance the governments efforts to combat drug trafficking." Id. at 13. While this decision dealt with personal property, the court in United States v. Santoro, *supra*, was faced with the forfeiture of real property.

In Santoro, the Court once again stressed the remedial purpose of forfeiture.

> Although the punitive aspects of any forfeiture are self-evident, the remedial, non-punitive purposes of 21 U.S.C. § 881 are extremely strong:
>
> > These remedial purposes include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of ill-gotten gains, stripping the drug trade of its instrumentalities, including money, and financing Government programs designed to eliminate drug-trafficking.

Id., at 1543, 1544.

This Court noted an additional remedial purpose in Griffis, prevention of the use of forfeited property in subsequent offenses. Based on the overwhelming remedial purposes of the Act, any penal or punitive attribution is incidental and does not constitute the "clearest proof" needed to invalidate the civil nature of this sanction.[2]

Appellees' reliance on United States v. Halper, __ U.S. __, 109 S.Ct. 1982, 104 L.Ed. 487 (1989), in stating that "[b]y any fair analysis, the revenue generated by such a forfeiture [herein] far exceeds the commensurate criminal activity and the cost of the criminal investigation" is misplaced, and the statement itself is without a factual foundation. Halper involved the application of a civil sanction not its facial validity. Sanctions were imposed under both criminal and civil statutes proscribing identical conduct, whereas the civil Florida Contraband Forfeiture Act proscribes a broader range of conduct than any related criminal provisions. The money sought by the sanctions in Halper was not the instrumentality of a crime, as is the property sought herein, but attempted to serve the sole remedial purpose of reimbursing governmental expenses. (Indeed, civil fines are capable of no other remedial purpose.) Halper's

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[2] These remedial purposes bring into question the dissent's statement in State v. Crenshaw, 548 So.2d 223, 229 (Fla. 1989), that "[f]orfeiture cannot be called a remedial sanction" under the Act.

application is limited by the requirement of a prior criminal punishment having been imposed. Here, no such criminal penalty has occurred. The obvious significance of Halper is that, while a civil sanction may be unconstitutional in its application, the facial validity of the sanction is unaffected.[3]

ISSUE II

THE FLORIDA CONTRABAND FORFEITURE ACT OF 1989 SATISFIES PROCEDURAL DUE PROCESS REQUIREMENTS.

As Appellees correctly point out in their Answer Brief, at page 33, this Court has already ruled that the Florida Contraband Forfeiture Act affords sufficient due process protections. In Lamar v. Universal Supply Co., Inc., *supra*, the Court stated:

> The seizure of property pursuant to a forfeiture statute constitutes an extraordinary situation in which postponement of notice and hearing until after seizure does not deny due process, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). The due process rights of claimants are adequately protected, therefore, by the requirement that the state attorney promptly file a forfeiture action following seizure. § 932.704(1), Fla.Stat. (1983).

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[3] The Halper court held: "Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive." Id. at 109 S.Ct. 1903.

Lamar, 479 So.2d at 110. Since Lamar was decided, the Legislature has provided for replevin actions to be filed for the return of seized property if forfeiture proceedings are not initiated within 90 days after the date of seizure, further enhancing the due process protections of the statute and its alleged lack of remission or mitigation procedure. Ch. 85-316 § 1(1), Laws of Florida.

The amendment of the Act to include real property does not alter the conclusion of the Lamar Court. While real property cannot be moved as personal property may, its ownership can be alienated so as to defeat forfeiture thus requiring the need for pre-hearing seizures.

In addition to this Court's decision in Lamar, an analysis of the Act's provisions clearly refutes Appellees' claim of a lack of due process. By providing for an in rem proceeding the Legislature has defined the nature of the proceeding and burden of proof. Section 932.704(1), Fla. Stat. (1989). The meaning of the term "due proof" is clear when viewed in the light of the burden of proof historically applied to civil in rem proceedings. The Act further defines the type of proceeding by designating it to be by rule to show cause. Section 932.704(1), Fla. Stat. (1989). This provision provides the added protection of judicial review since the trial court is required to make a probable

cause determination before issuing its order. The Court's order itself provides notice to the litigants. The Act provides that the burden of proof is on the state attorney or the seizing agency's attorney by allowing forfeiture upon their providing "due proof". Section 932.704(1), Fla. Stat. (1989). The Act further provides that the burden of proof of innocent ownership is on the claimant. Sections 932.703(2) and (3), Fla. Stat. (1989). The Act provides for notice to potential claimants prior to filing a rule to show cause. Section 932.704(2), Fla. Stat. (1989). Taken as a whole, these provisions clearly meet minimal due process requirements.

Appellees' complaint that the Act fails to specify procedures after the issuance of a rule to show cause is specious. Pursuant to Article V, Section(2)(a), Constitution of the State of Florida, this Court possesses the exclusive authority to provide rules of procedure governing the course of conduct of judicial proceedings. There can be no doubt that upon issuance of an order to show cause a judicial proceeding has commenced.

Appellees' complaint that the Act fails to provide for judicial review prior to seizure is equally without merit. A seizure is a seizure, and is therefore governed by the Fourth Amendment to the Constitution of the United States and Section 12

of the Constitution of the State of Florida. W. LaFave, SEARCH & SEIZURE, § 2.1 (2nd ed. 1987). Given that fact, no explicit provision is necessary.

And finally, Appellees' complaint of vagueness continues to ignore § 893.12(2)(b), which must be read in pari materia with §§ 932.701 et seq. (See Initial Amended Brief of Appellant, pp. 25-26.)

A review of the other states' forfeiture statutes cited by Appellees and decisions construing them plainly reveals that the provisions of those statutes are entirely inapposite. Unquestionably those statutes were found constitutionally infirm due to their lack of even minimal constitutional protections. Appellees' argument that the 1989 Act violates procedural due process when compared to the manifestly constitutionally deficient statutes of the other states is meritless.

CONCLUSION

Contrary to Appellees' deliberate confusion of the two-pronged analysis announced in Kennedy and Ward, the Legislature has clearly manifested, either expressly or impliedly, its intent to label the Florida Contraband Forfeiture Act as a civil in rem proceeding. The Legislature's intent is supported by the plain language of the statute, as well as the Act's legislative history.

Moreover, there is no clear proof that the forfeiture sanction under the Act is primarily of penal, rather than remedial, so as to override the Legislature's unambiguous intent. Both the federal forfeiture laws and the decisions relating thereto are probative of the non-punitive, remedial nature of the Act's forfeiture sanction, and have been relied upon by the courts of this State in deciding similar issues under the Act.

Commensurate with the Florida Contraband Forfeiture Act's civil nature and effect, the provisions of the statute clearly meet minimal due process requirements and provide notice and an opportunity to be heard.

Based on the foregoing, this Court is therefore respectfully requested to reverse the trial court's order finding the Florida Contraband Forfeiture Act, as amended in 1989, unconstitutional on its face.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

KEITH VANDEN DOOREN
Assistant Attorney General
Florida Bar Number 0209260

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-9105

DIANA K. BOCK
ASSISTANT ATTORNEY GENERAL

JEANNE CLOUGHER
ASSISTANT ATTORNEY GENERAL

PARKER THOMSON
SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 4th day of March, 1991.

KEITH VANDEN DOOREN