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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 78,377

LOUIS A. CAGGIANO,

Respondent.

RESPONDENT'S BRIEF

On Discretionary Review from the
District Court of Appeal, Second District
of Florida

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PREFACE

Petitioner is the Attorney General of the State of Florida. He will be referred to as "the State" herein.

Respondent is Louis A. Caggiano.

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

STATEMENT OF THE CASE AND FACTS

Respondent agrees with the statement of the case and facts presented in the State's initial brief, to the extent stated. There are, however, additional facts which are material to this Court's decision and Respondent's arguments in this Court.

First of all, Respondent's residence had homestead status established well before any of the racketeering activity occurred. There has been no allegation that the homestead was purchased with, improved by, or otherwise involved with proceeds from racketeering activity. In fact, the trial court struck the allegation that Respondent had "used the receipts of his racketeering conduct to purchase, invest in, acquire interest in, and improve real property," with the consent of the State. Nor has there been any dispute that the Respondent's property is, in fact, homestead, and used only for his residence.

The total extent of Respondent's homestead's involvement in the racketeering activity was the placing of three bets at that location between October 20, 1984 and December 2, 1984. There was never any allegation or proof that any other improper use occurred, and no other evidence, such as wiretaps, meetings, or paraphernalia on the premises, to show any other such use of the premises.

Among the other issues raised by Respondent in the District Court were that he was entrapped into the use of his homestead in the course of racketeering activity, that there was an insufficient nexus between the subject property and the

racketeering activity, and that the trial court had erred by striking certain expert affidavits directed to these issues.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative, and the Second District Court of Appeal should be affirmed in its holding that Article X, Section 4 of the Florida Constitution prohibits forfeiture of homestead property under the Florida RICO (Racketeer Influenced and Corrupt Organization) Act.

Article X, Section 4 of the Florida Constitution, properly construed, is not limited to forced sales resulting only from debts of the owner. Rather, it encompasses all forced sales, whatever their basis, because its express terms contain no limitation to forced sales resulting from the debts of the owner. This exemption is limited only by certain specific exceptions, expressed in the text of the provision, which do not include RICO forfeitures. To imply any limitation or exception not expressed in the provision would be contrary to the plain meaning of the text of the Constitution, and would exceed proper scope of constitutional interpretation.

The State has waived its argument that a RICO forfeiture is neither a forced sale nor a judgment acting as a lien within the meaning of the homestead provision by failing to raise it properly in the lower courts. Likewise, the State has waived its argument concerning constructive abandonment of Appellee's homestead.

A RICO forfeiture is a forced sale within the meaning of Article X, Section 4. Both District Courts of Appeal which have considered the issue have so held and there is no conflict of

decisions on this point. There is no material difference between a forced sale resulting from debts of the owner and a "court imposed alienation of title," as the State describes RICO forfeitures. The State's argument, based on technical definitions of sale and forced sale, is contrary to the established rule of construing the homestead provision liberally and in favor of providing protection for the homestead.

ARGUMENT

ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION PROHIBITS FORFEITURE OF HOMESTEAD PROPERTY UNDER FLORIDA RICO ACT

I. ARGUMENTS IN SUPPORT OF THE SECOND DISTRICT'S DECISION

The Second District was correct in its construction of the homestead provision.[1] The primary rule of construction of any constitutional provision is to derive the meaning intended by the framers of the Constitution. Williams v. Smith, 360 So.2d 417 (Fla. 1978). The intent of the framers of Article X, Section 4 was to preserve the home and shelter for the family. Olesky v. Nicholas, 82 So.2d 510 (Fla. 1955); Deem v. Shinn, 297 So.2d 611 (Fla. 4th DCA 1974). Because a RICO forfeiture would deprive the family of its home and shelter, just as effectively as any forced sale, construing the homestead provision to allow RICO forfeiture would be contrary to the intent of its framers.

In addition, such a construction would be contrary to the plain meaning of the provision. Presumably, if the framers had intended to limit the homestead protection to forced sales resulting from debts of the owner, they would have stated the limitation, just as they clearly expressed several exceptions to the protection. This unexpressed limitation is the basis for the holding of DeRuyter v. State, 521 So.2d 135 (Fla. 5th DCA 1988),

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[1] Caggiano v. Butterworth, 16 FLW D1642 (Fla. 2d DCA June 21, 1991).

and the State's argument. Compare People v. Allen, infra at p. 11, where such a limitation is expressed in the Colorado homestead law. Florida law rejects such implied limitations on its homestead provision. See Olesky, supra, at 513.

Such a construction is also contrary to the well-established rule that the homestead provision is to be liberally construed in favor of the protection. Graham v. Azar, 204 So.2d 193 (Fla. 1967). Implying the limiting language used by DeRuyter has the effect of restricting the scope of the homestead protection, contrary to the manner in which courts should construe that provision.

Such a construction is especially inappropriate in the context of this case, where the homestead provision is in conflict with a forfeiture statute. Such statutes are historically disfavored and strictly construed. Ferlita v. State, 380 So.2d 1118 (Fla. 2d DCA 1980). The RICO forfeiture statute is silent as to homestead property, and the homestead provision contains no exceptions for forfeitures. It can reasonably be argued either that the Legislature did not intend the forfeiture statute to apply to homestead property, or that forced sales from forfeitures are not an exception to the homestead provision's prohibition or forced sales.

The Second District so held, and its holding is supported by Kansas v. Mitchell, 399 P.2d 556 (Kan. 1965). In that case, the Supreme Court of Kansas rejected the State's attempt to obtain a padlock order on homestead property, because "the padlocking of a

homestead for the violation of any law is not specifically mentioned or even implied in the exceptions [stated in the Kansas homestead provision]." Id.

The Kansas court adopted the construction that "no encumbrance or lien or interest can ever attach to or affect the homestead, except the ones specifically mentioned in the Constitution." Id. In language equally applicable to the Florida homestead provision, the Kansas court declared:

> "The homestead provision of our Constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. These exceptions are unqualified. They create no personal qualifications touching the moral character of the resident nor do they undertake to exclude the vicious, the criminal, or the immoral from the benefits so provided. The law provides for punishment of persons convicted of illegal acts, but the forfeiture of homestead rights guaranteed by our Constitution is not part of the punishment." Id. (Emphasis supplied.)

Likewise, Florida law does not permit exceptions or limitations to be implied into its constitutional homestead exemption. See Olesky, supra at 513, stating that the only exceptions to the homestead protection are these expressed in the Constitution itself.

The Florida homestead provision is contained in the Constitution, while the RICO forfeiture act is a mere statute. The Legislature cannot deprive a party of his constitutional exemption, either directly or indirectly. Hodges v. Cooksey, 15 So. 549 (Fla. 1894). To permit RICO forfeiture of homestead

property would permit an act of the Legislature to completely abrogate the protection provided by the Florida Constitution. (Significantly, cases relied upon by the State in this case involve homestead provisions contained in statutes instead of constitutions. See infra at p. 11, for further discussion.)

The Second District's reasoning and result is proper not only from a statutory construction point of view, but from a separation of powers point of view as well. The State asked the Second District to imply limitations and exceptions into the homestead provision. Such a procedure goes far beyond interpreting a provision, and exceeds the proper scope of interpretation. Obviously, the function of the judicial branch is to interpret the laws, and not to write them. Fla.R.Co. v. Adams, 47 So. 921 (Fla. 1908). Neither are the courts to engage in judicial lawmaking in the guise of statutory or constitutional interpretations. Proper respect for separation of powers between the legislative and judicial branches requires that homestead forfeiture be accomplished, if at all, by constitutional amendment. Any policy arguments upon which the State relies, and there ar many in its brief, are more properly addressed to the Legislature and the people, rather than to this Court.

II. CRITICISMS OF STATE'S ARGUMENTS AND AUTHORITIES

(a) Homestead Exemption Limited to Claims from Debts of Owner

Respondent acknowledges that the courts of this State have often expressed the purpose of the homestead provision as being

to protect the family from forced sale "for debts of the owner." This is merely because those courts were dealing with factual contexts involving claims against homestead property which resulted from financial debts of the owner. Naturally, the courts will describe a rule in terms relevant to the context of the case in which it is applied. But these descriptions are not holdings which limit the scope of the constitutional provision; they are in terms of authority, mere dicta. Describing the homestead provision as applicable to forced sales "for the debts of the owner" does not imply that the homestead provision applies only to forced sales for the debts of the owner. As noted above, the provision contains no such limiting language. To the contrary, Article X, Section 4 states that homestead property is protected from "forced sale under process of any court," which necessarily includes a court order of forfeiture.

In any event, the purpose of the homestead provision has just as often been described broadly as being to protect the family home and provide for it a refuge from misfortune, without the requirement that the misfortune arise from a financial debt. See Caggiano, supra; Deem, supra; In re Noble's Estate, 73 So.2d 873 (Fla. 1954) (the purpose of the homestead provision is simply to shelter the family); Collins v. Collins, 7 So.2d 443 (Fla. 1942) (the purpose of homestead is to shelter the family and provide it a refuge from stresses and strains of misfortune); Frase v. Branch, 362 So.2d 317 (Fla. 2d DCA 1978) (purpose of homestead protection is to preserve home for family, even at

sacrifice of just demands, and to protect family from destitution and want).

The true issue is whether the purpose of the homestead is to be construed broadly, in favor of the protection, or narrowly, by means of implied limitations. Clearly, the courts favor the broad and liberal construction of the homestead provision.

The State relies upon two out-of-state cases[2] which follow DeRuyter, supra, in support of its argument that the homestead provision does not apply to RICO forfeitures. Both cases are plainly distinguishable, and one strongly supports Respondent's argument.

Both cases deal with state laws where the homestead provisions are contained in statutes, (§38-41-201, C.R.S., and §33-1101(A), A.R.S.), rather than in the state Constitution, as in Florida. Thus, both cases are clearly distinguishable on that basis alone. They do not even speak to the significant Florida state constitutional issues presented in the instant case.

Furthermore, the Colorado case, People v. Allen, involves a Colorado homestead statute, §38-41-201, C.R.S., which by its express terms is limited to execution and attachment "arising from any debt, contract or civil action" (e.s.).

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[2]In the Matter of a Parcel of Real Property known as 1632 N. Santa Rita, Tuscon, 801 P.2d 432 (Ariz. App. 1990), and People v. Allen, 767 P.2d 798 (Colo. App. 1988).

This is the exact terminology absent from the Florida homestead provision. The result of the Allen case is hardly surprising given the express limitations of the Colorado homestead statute. Such a case gives little support to the State's argument in the instant case, where the State attempts to reach the same result where the dispositive language is absent.

The State's argument that homestead protection is limited to forced sales "for the financial debts of the owner" is further undermined by cases where homestead protection prevailed over claims based upon tortious or criminal conduct of the owner. For example, in Olesky v. Nicholas, 82 So.2d 510 (Fla. 1955), this Court held that the homestead exemption provided for in the Constitution applied to preclude an execution sale grounded upon the intentional tort of malicious prosection.

That homestead should be exempt even from consequences of criminal activity has been recognized previously. For example, in Leupold v. Krause, 95 Ill. 440 (1880), the court stated as follows:

> "Neither fraud, nor even the commission of a criminal offense, can work a release of the right of homestead."

This holding was later approved in Holterman v. Roynter, 198 N.E. 723 (Ill. 1935) and again in In Re Estate of Milhouse v. Nash, 377 N.E. 2d 382 (Ill. 4th Dist. 1978). These Illinois holdings are consistent with Florida's Olesky. Most importantly, the Florida homestead provision contains no except for criminal activity.

(b) Equitable Liens as Unexpressed Exceptions to Homestead Protection

Likewise, the State attempts to rely upon cases involving equitable liens, contending they are liens beyond those exceptions stated in Article X, Section 4(a). Such cases are factually and legally inapplicable. Equitable liens are imposed only where proceeds from fraud or reprehensible conduct are used to invest in, purchase, or improve real property, or where an equitable lien is necessary to secure to an owner the benefit of his ownership interest. Further, equitable liens are imposed to protect "creditors" from financial hardship imposed by fraudulent conduct, where it can be remedied by tracing specific funds to a specific property.

Clearly, those factual situations are not present in the instant case. It is undisputed that no illicit proceeds were used to purchase, acquire or improve Respondent's property, and obviously the State is a stranger to his property. There is no creditor to protect, and no proceeds to trace to Respondent's property. The cases cited by the State in support of its constructive trust or equitable lien argument all contain one or more of these factors. The instant case does not.

Actually, the exceptions to homestead protection expressed in Article X, Section 4(a) correspond to the factual situations where equitable liens are imposed. It can reasonably be argued that the common-law equitable lien remedy was thereby incorporated into the homestead provision, and is therefore not

an example of liens imposed "beyond those exceptions provided for in Article X, Section 4," as the State contends. This concept has been recognized in Florida law. See, e.g., Olesky, supra at 513, where this Court describes one of the State's equitable lien cases, Jones v. Carpenter, 106 So. 127 (Fla. 1925), as an application of the Florida homestead provision:

> "This Court traced funds into the home place and applied the provision of the Florida Constitution to the effect that the homestead is not exempt from claims for repair of the alleged homestead" (e.s.).

Thus, equitable liens do not represent liens on homestead property beyond the exceptions permitted in the homestead provision itself, and their existence does not support the argument that RICO forfeitures should apply to homestead property.

(c) Forfeiture Neither a Forced Sale Nor a Lien

The State now argues that a RICO forfeiture is not within Article X, Section 4 because it is not even a "forced sale" or a lien. (Petitioner's Brief, pp. 16-19.) This Court should not consider this argument because this ground was never presented properly to the trial court or the District Court. The sole ground for the State's position below was that because a RICO forfeiture arose from criminal activity, rather than from a "debt of the owner," it was not within the protection from forced sale provided by Article X, Section 4. In other words, a RICO

forfeiture was not the right kind of forced sale.[3]

The State never disputed that a RICO forfeiture was a forced sale until it filed its motion for rehearing after the Second District decision under review. It was never disputed in the trial court at all. The State has waived that ground, because issues raised for the first time on appeal are not properly before the reviewing court. Cases in support of this proposition are legion, and the only exception, fundamental error, is not present. See e.g. Occhicone v. State, 570 So.2d 902 (Fla. 1990) (in order to preserve issue for appellate review, specific legal argument or ground on which it is based must be presented to trial court); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Tillman v. State, 471 So.2d 32 (Fla. 1985) (in order for issue to be preserved for further review by higher court, issue must be presented to lower court and specific legal argument or ground to be argued on appeal must be part of that presentation).

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[3]To resolve any doubt that the State failed to dispute that a forfeiture was a forced sale in the lower courts, simply compare the language contained in pp. 2-3 of Motion for Rehearing filed in the Second District Court of Appeal, and in pp. 16-18 of its Petition in this Court (e.g., "Petitioner vigorously asserts that RICO forfeiture is not a judicial or forced sale...") with its Answer Brief filed in the Second District at pp. 14-19. The wording is substantially similar throughout, yet the "vigorous assertion" referenced above is noticeably absent in the appellate briefs.

Respondent did not even cite or discuss the Bly case, infra, his appellate brief or reply brief, because there was no dispute as to whether a forfeiture was a forced sale. Now that the issue is raised, Bly is, of course, quoted extensively.

This Court's cases clearly require a high level of specificity to preserve an issue on appeal. Specific arguments and grounds must be presented to lower courts before they can be reviewed on appeal. The State has clearly failed to comply with this standard regarding its argument that a forfeiture is not a forced sale. The same is true regarding its argument that Respondent "constructively abandoned" his homestead. The constructive abandonment argument was raised for the first time in the State's Petition in the Supreme Court of Florida.[4]

It is simply not enough to contend generally that "homestead property is subject to forfeiture," and then add various grounds and argument as the case proceeds from trial court to Supreme Court. The State has waived all grounds except that the Florida homestead provision is limited to situations involving "debts of the owner." The only issue properly before the Court is whether Article X, Section 4 is so limited. This Respondent entitled to have his cases decided upon issues properly raised before this

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[4]The facts of the instant case are insufficient to prove abandonment. Abandonment of a homestead has only been found where there is a permanent absence without intent to return, or a permanent change in the character of the use of the property as a residence. See, e.g., In Re Imprasent, 86 B.R. 721 (B.C.M.D. Fla. 1988) (abandonment may be proved only by strong showing of intent not to return); and McEven v. Larson, 185 So. 866 (Fla. 1939) (construction of rental property on homestead constituted abandonment).

It is undisputed that Respondent used his property as homestead before, during and after the three isolated acts of bookmaking occurred on the premises. These facts fail even to approach the circumstances required for abandonment.

Court.

Respondent will nevertheless address this issue on the merits, although he does not abandon his waiver argument by doing so. The State now contends that a RICO forfeiture is not a "forced sale," but rather a "court imposed alienation or divestiture of title..." (Petitioner's Brief, p. 16.)

Since a sale is itself an alienation or transfer of title, and a RICO forfeiture alienates and transfers title from an owner to the State, it is difficult to perceive how a forfeiture is different from a sale. Respondent perceives no distinction between the terms which could be material to this Court's analysis or resolution of the certified question. This argument essentially presents a semantic distinction without legal significance. Moreover, the entire argument is a hyper-technical exercise in strict construction of the homestead provision. Such an argument again runs afoul of the rule that the homestead provision is to be construed liberally in favor of the protection. Graham v. Azar, supra.

Whether or not a forfeiture judgment is a lien is immaterial because a forfeiture need not be a forced sale and a lien, merely one or the other, and it is clearly a forced sale, therefore within the homestead provision. Furthermore, although the forfeiture judgment itself may be an order of conveyance, the forfeiture process begins with a RICO lien or a lis pendens, as was done in Respondent's case on December 14, 1984. The State's focus only on the forfeiture final judgment ignores the reality

that the State can encumber homestead property during the forfeiture proceeding. See Section 895.07 and 895.05(12)(a) authorizing RICO liens. In any event, it is hard to understand how an outright conveyance would be permitted where the homestead law prohibits even mere encumbrance as by a lien.

Both DeRuyter and Caggiano below held that a forfeiture was a forced sale; DeRuyter impliedly and Caggiano expressly.[5] DeRuyter was concerned solely with distinguishing between forced sales resulting from debts, and those resulting from criminal activity, i.e., forfeitures. DeRuyter didn't say much, but this much it did say:

> "Forfeiture here is not predicated upon the debts incurred by the owner but rather is based solely upon the illegal uses to which the property is put." Id at 138.

The Supreme Court of Iowa has also held forfeiture to be a judicial sale within the meaning of its homestead exemption. In the Matter of Property seized from Bly, 456 N.W. 2d 195 (Iowa 1990). This case is highly instructive in the principles to be employed in deciding whether a forfeiture is within a homestead exemption, and so will be quoted at length.

> "In considering whether an order of forfeiture is a judicial sale within the meaning of Iowa Code section 561.16, we are guided by well-established principles. In this state, homestead statutes are broadly

[5]At oral argument before the Second District, the State's counsel, in response to questioning by Judge Hall, conceded that DeRuyter impliedly held that a RICO forfeiture was a forced sale, according to the undersigned counsel's recollection.

and liberally construed in favor of exemption. "Regard should be had to the spirit of the law rather than its strict letter." The homestead exemption is not "for the benefit of the husband or wife alone, but for the family of which they are a part." Further still, we have recognized that the exemption is not only "for the benefit of the family, but for the public welfare and social benefit which accrues to the state by having families secure in their homes." The policy of our law is to jealously safeguard homestead rights." Bly at 199, citations omitted.

"With these principles in mind, we think that the term "judicial sale" as used in chapter 561 was intended to encompass any judicially compelled disposition of the homestead, whether denominated a "sale" or not. Cf. 40 Am.Jur.2d Homestead §92 (1968) (any compulsory disposition of the homestead is contrary to the homestead exemption); Lanahan v. Sears, 102 U.S. 318, 322, 26 L.Ed. 180, 181 (1880) ("A forced dispossession [of a homestead] in ejectment is as much within the prohibition [of forced sale of a homestead] as a forced sale under judicial process."). Although an order of forfeiture is less a sale to the State than a commandeering by the State, it cannot be denied that the benevolent purposes of the homestead statute would be frustrated by giving the term "judicial sale" in section 561.16 a narrow or technical construction dependent upon finding a true "sale."[6] The term should be given a liberal construction in section 561.16 so as to further the purposes of the exemption. See Iowa Code §4.2 (Iowa Code to be construed liberally to promote its objects)." Id.

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[6]The State chose to quote only the portion of this sentence prior to the comma. Petitioner's Brief at p. 18. Respondent believes this Court should have the benefit of the entire sentence to obtain an accurate statement of the Iowa court's true rationale.

The Iowa court noted that even sales held without proceedings in court, foreclosure sales and tax sales, had been held to be judicial sales, because to have held otherwise would have frustrated the purposes of the law in question. Bly at 198.

It then stated a principle of construction highly relevant to defining the term "forced sale" in the instant case: A term is always given a meaning dependent upon the context in which it is used and the policies to be furthered or frustrated by the meaning assigned to the term. Id.

If the State's restrictive definition of forced sale is used, the purposes of the homestead provision would be frustrated, whereas if the definition employed by the Second District, and urged by Respondent, is used, those purposes will be furthered.

The principles of homestead law referenced in Bly are embodied in Florida homestead law as well. Florida's Constitution uses a term (forced sale) which, if anything, is even less restrictive than the term (judicial sale) used in Iowa law. The result in Florida would be even more certain: RICO forfeiture is a forced sale within the meaning of the Florida homestead provision, and therefore prohibited.

The State attempts to distinguish Bly, implying that Iowa law is somehow different than Florida homestead law. However, a review of the above quotation from Bly conclusively demonstrates that Iowa law and Florida homestead law are remarkably similar. Given the similar purposes of both Iowa and Florida homestead

law, and the additional fact that Florida's homestead law is contained in the Florida Constitution (which could not be affected even by a "special declaration of statute," as permitted in Iowa homestead law), Bly's applicability is clear and persuasive.

The weight of authority, expressed in the law of Florida and other states, is that a RICO forfeiture is a forced, judicial sale and within the meaning of homestead exemptions which prohibit such sales.

CONCLUSION

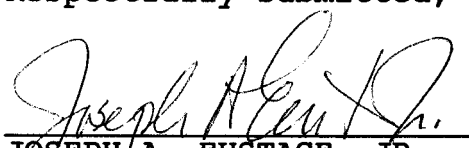
A RICO forfeiture is a forced sale within the meaning of Article X, Section 4 of the Florida Constitution. This homestead provision contains no express limitation or exception to the contrary. The exemption from forced sale extends to any forced sale under process of any court, subject only to the restrictions of the language of the Constitution itself. Olesky, supra at 513 (e.s.).

As recently as this year, this Court has recognized the special significance of a citizen's homestead. In a recent landmark forfeiture case, Dept. of Law Enforcement v. Real Property, 16 FLW S497 (Florida, August 15, 1991), this Court reaffirmed the importance of the home.

> "An individual's expectation of privacy and freedom from government intrusion in the home merits special constitutional protection."
>
> "Property rights are among the basic substantive rights expressly protected by the Florida Constitution, Article I, Section 2, Fla. Const."
>
> "Those property rights are particularly sensitive where residential property is at stake, because individuals unquestionably have constitutional privacy rights to be free from governmental intrusion in the sanctity of their homes and the maintenance of their personal lives, Article I, §2, 12, 23, Fla. Const."

This Court should remain consistent with these principles, and affirm the decision of the Second District Court of Appeal, and hold that Article X, Section 4 of the Florida Constitution prohibits forfeiture of homestead property.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Brief of Respondent, Louis A. Caggiano, have been sent by U.S. Mail to the Clerk of the Supreme Court, and a true and correct copy of the foregoing has been sent by U.S. Mail to Roberta J. Fox, Assistant Attorney General, Department of Legal Affairs, 135 West Central Blvd., Suite 250, Orlando, Florida 32801; Keith P. Vanden Dooren, Assistant Attorney General, Department of Legal Affairs/RICO, The Capitol, Tallahassee, Florida 32399-1050; and Robert S. Griscti, Amicus Curiae, Counsel for FACDL, 204 W. University Avenue, Suite 6, Gainesville, Florida 32601 this 27th day of September, 1991.

JOSEPH A. EUSTACE, JR., ESQUIRE