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IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

IN RE: FORFEITURE OF 1985 FORD RANGER PICKUP TRUCK, VIN #1FTBR10S7FUB74784, FLORIDA LICENSE #802-DPU; AND $453 U.S. CURRENCY.

CASE NO. 78,456

PETITIONER'S BRIEF

ON CONFLICT REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

PAGES

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 5

ARGUMENT

THE FLORIDA LEGISLATURE HAS ENACTED A STRINGENT PROPERTY FORFEITURE LAW WHICH LIMITS THE FORFEITURE EXEMPTION FOR CO-OWNED PROPERTY TO PROPERTY CO-OWNED BY A HUSBAND AND WIFE. 6

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

CASES	PAGES
Barth v. City of Miami, 1 So.2d 574 (Fla. 1941)	14
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080 (1974)	11, 13
City of Clearwater v. Malick, 429 So.2d 718 (Fla. 2d DCA 1983)	10
Fell v. Armour, 355 F.Supp. 1319 (M.D. Tenn. 1972)	10
Florida Department of Law Enforcement v. Real Property, 16 F.L.W. S497 (Fla. 1991)	10, 15
In re Forfeiture of $53.00, 444 N.W.2d 182 (Mich. 1989)	7
In Re Forfeiture of 1978 BMW Automobile, 524 So.2d 1077 (Fla. 2d DCA 1988)	3, 6, 7, 8, 10, 14,
In Re 1979 Lincoln Continental, etc., 405 So.2d (Fla. 3d DCA 1981)	7
In re Forfeiture of 1985 Ford Ranger Pickup Truck, 582 So.2d 3 (Fla. 1st DCA 1991)	2, 3, 6, 7
In re Forfeiture of One 1976 Dodge Van, 429 So.2d 718 (Fla. 2d DCA 1983)	10
J. W. Goldsmith, Jr. v. United States, 253 U.S. 505, 42 S.Ct. 189, 65 L.Ed.2d 376 (1921)	11
Nash Miami Motors v. Bandel, 47 So.2d 701 (Fla. Div.B. 1950)	7
People v. Garner, 732 P.2d 1194 (Col. 1987)	9
Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987)	8-9
Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984)	8
State v. Crenshaw, 548 So.2d 223 (Fla. 1989)	13

TABLE OF CITATIONS

(Continued)

CASES	PAGES
United States v. Certain Real Property and Premises Known as 38 Whaller's Cove Drive, Babylon, New York, 747 F.Supp. 173 (E.D.N.Y. 1990)	11
United States v. One Single Family Residence, 894 F.2d 1511 (11th Cir. 1990)	8

FLORIDA STATUTES

§ 932.701, Florida Statutes	5, 12
§ 932.701(2)(e), Florida Statutes	3
§ 932.702, Florida Statutes	5, 12
§ 932.703, Florida Statutes	5, 12
§ 932.703(2), Florida Statutes	8
§ 932.704, Florida Statutes	5, 12
§ 932.704(1), Florida Statutes	12

LAWS OF FLORIDA

Chapter 85-316, Laws of Florida	11

RULES

Fla.R.App.P. 9.030	4

OTHER AUTHORITIES

The Dangerous Instrument Doctrine, 1917, 26 Yale L.J. 224	13
Forfeiture of Auto Used in Narcotics Crime, 50 ALR 3d 172	10

PRELIMINARY STATEMENT

The State of Florida was the petitioner in the trial court and will be referred to herein as Petitioner. Alan R. Barry and Alvin R. Barry, joint owners of the 1985 Ford Ranger Pickup Truck were respondents below and shall be referred to as Respondents in this brief.

STATEMENT OF THE CASE AND FACTS

The facts of this case are undisputed. On July 1, 1989, the Panama City Police Department seized the 1985 Ford Ranger Pickup Truck belonging to Respondents near 1722 W. 17th Street, Panama City, Florida. The basis for the seizure was set forth in an affidavit of probable cause filed by Panama City Police Department Detective Richard Carlett, which set for essentially the following:

On July 1, 1989, officers of the Panama City Police Department and the Bay County Sheriff's Department conducted a reverse sting in a parking lot in Panama City, Florida. Alan R. Barry, driver and co-owner of the 1985 Ford pickup approached Investigator Ben Moore and purchased an individually wrapped rock of crack cocaine for twenty dollars ($20.00). (R-1-4) Officers then approached Mr. Barry to arrest him for possession of cocaine. Mr. Barry attempted to run over the officers and left the parking lot. (R-1-4) Mr. Barry was apprehended and charged with possession of cocaine, tampering with evidence, and two counts of aggravated assault upon a police officer. The Panama City Police Department seized the 1985 Ford Ranger pickup truck. (R-1-4)

The title to the motor vehicle sought to be forfeited was registered to Alvin R. Barry and his son Alan R. Barry. In re Forfeiture of 1985 Ford Ranger Pickup Truck, 582 So.2d 3, 4 (Fla. 1st DCA 1991). The parties agreed by stipulation that the father was an innocent owner with his son and that the father neither

knew or should have known by reasonable inquiry that such property was employed or likely to be employed in criminal activity. Id.

The State filed a petition for rule to show cause and for final order of forfeiture against the 1985 Ford Ranger pickup truck. Id. Alan R. Barry filed an answer and asserted the affirmative defense that the vehicle in question is the subject of joint ownership by the respondent and his father, Alvin R. Barry. Id. The trial court subsequently issued an order declaring that § 932.701(2)(e), Florida Statute, was unconstitutional and denied the forfeiture. Id. On appeal the First District Court of Appeal reversed and remanded for appropriate disposition of the property consistent with the Court's opinion.

The majority of the Court declined to follow In re Forfeiture of 1978 BMW Automobile, 524 So.2d 1077 (Fla. 2d DCA 1988), because the result reached in that case appeared to establish constitutional impediments arising from both equal protection and due process considerations. The majority opinion further indicated that the concept of imputed knowledge, or imputed criminality, was created by the Second District Court's decision, not the legislature, and held that an "innocent owner" need not be the owner of the whole property where the ownership is divisible and the property is susceptible of division in kind or sale and division of the proceeds.

The State of Florida petitioned this Court for review pursuant to Fla.R.App.P. 9.030. This Court accepted jurisdiction, and this brief follows.

SUMMARY OF ARGUMENT

The Florida Legislature has created a specific exemption to §§ 932.701-704, Florida Statutes, the felony instrumentality statute, to protect innocent co-owners of jointly held property sought to be forfeited where the co-owner is the spouse of the wrongdoer. The legislative intent behind the exemption is to prevent the economic ruin of the family unit by the irresponsible criminal action of one spouse at the expense of the other and remaining family dependents. The Courts have long recognized the logic within this intent and necessity and desirability of preserving the marital relationship through protection of the innocent owner. However, any extension of this statutory exemption to afford protection for an innocent co-owning parent from the wrongdoing of his adult son should only occur through the legislative process. The First and Second District Courts of Appeal differ on this issue. Petitioner contends the Second District view is correct and urges adoption of its position.

ARGUMENT

THE FLORIDA LEGISLATURE HAS ENACTED A STRINGENT PROPERTY FORFEITURE LAW WHICH LIMITS THE FORFEITURE EXEMPTION FOR CO-OWNED PROPERTY TO PROPERTY CO-OWNED BY A HUSBAND AND WIFE.

This case presents an issue characterized as "interesting and novel . . ." by the Second District Court of Appeal. Namely, is the guilty knowledge of one co-owner of property a sufficient basis to justify forfeiture of that property under the felony instrumentality statute[1] where the co-owners are not husband and wife and therefore not subject to the statute's exemption for marital properties. Relying upon its own precedent and earlier decisions of the Third District Court of Appeal, the Second District Court of Appeal has held that no reasonably innocent owner exemption exists except for property owned by a husband and wife as co-owners. In re Forfeiture of 1978 BMW Automobile, 524 So.2d 1077 (Fla. 2d DCA 1988). A divided panel of the First District Court of Appeal declined to follow that opinion "because the result reached in that case appears to establish constitutional impediments arising from both equal protection and due process consideration." In re Forfeiture of 1985 Ford Ranger Pickup Truck, 582 So.2d 3, 4 (Fla. 1st DCA 1991). Petitioner contends that the decision of the Second District Court of Appeal, adopted by Judge Booth in her dissenting opinion below, provides the sounder basis for reviewing and interpreting the forfeiture statutes and should be adopted by this Court. If the

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[1] **See** Sections 932.701-704, Florida Statutes (1989).

result appears to provide a harsh remedy vis-a-vis one or more owners of the forfeited property, experience drawn from the federal and other state systems show that the matter can and should be addressed by the Legislature. See In re Forfeiture of $53.00, 444 N.W.2d 182 (Mich. 1989).

Two well recognized legal theories appear to clash in this case. The first is the well recognized maxim "the law does not favor, and equity abhors, a forfeiture." Nash Miami Motors v. Bandel, 47 So.2d 701, 703 (Fla. Div.B 1950). The other is "Expressio Unius Est Exclusio Alterius." See 1978 BMW, supra. While this latter maxim is only an aid, and not a rule, of statutory interpretation, nonetheless, its logic should assist this Court's decision making process. As noted by Judge Booth in her dissent below:

> The "innocent spouse" exception in the act is based on a doctrine of tenancy by the entireties. Under that doctrine, neither spouse can, by his or her unilateral act, alienate, encumber, or forfeit property held jointly by husband and wife. See Parrish v. Swearington, 379 So.2d 185 (Fla. 1st DCA 1980); United States v. One Parcel of Real Estate at 11885 S.W. 46th Street, 715 F.Supp. 355, 359 (S.D. Fla. 1989). Property held jointly by husband and wife is thus not subject to rules applicable generally to jointly held property.

1985 Ford Ranger, supra, at 5. Second, recognition of the distinction between marital property and other generally held property is set out by Judge Schwarz's opinion in In re Forfeiture of 1979 Lincoln Continental, 405 So.2d 249, 250 (Fla. 3d DCA 1981):

> Secondly, the prevailing law, with which we agree, is that each of the named parties is deemed the "owner" of property titled in the alternative as was the vehicle in question, so that the undisputed guilty knowledge of Robert Brown is sufficient to justify forfeiture even if the "other owner," Mrs. Brown, was shown to have been entirely innocent. State v. One 1968 Buick Electra, Delaware Registration 43003, 301 A.2d 297 (Del. Super. Ct. 1973); Amrani-Khaldi v. State, 575 S.W.2nd 667 (Tex.Civ.App. 1978); see, Matter of 1976 Blue Ford Pickup, Arizona License NL-3234, 120 Ariz.App. 432, 586 P.2d 993 (1978).

Florida case authority thus supports the position of the Second District Court of Appeal in the 1978 BMW case. In that case, the court held, "The meaning of the Legislature's amendment to § 932.703(2) is clear; when the co-owners are husband and wife, it makes no difference how the property is titled or registered. If one of them is a reasonably innocent owner, then the property is not to be forfeited." 524 So.2d at 1080. See also, United States v. One Single Family Residence, 894 F.2d 1511, 1515 (11th Cir. 1990) (recognition of doctrine of tenancy by the entireties under Florida law).

The Legislature added spousal co-owner language section to the statute in response to a previous court decision. Smith v. Hindery, 454 So.2d 663 (Fla. 1st DCA 1984), and § 932.703(2), Florida Statutes (1985).[2] If the Legislature had intended to extend that exception to all co-owners, it would have done so. Cf. Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987)

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[2] See Laws of Florida, Chapter 85-316, regarding the amendment.

(Legislature had abrogated the common law doctrine of joint and several liability and then established three exceptions to the abrogation).

Further support for the Second District's position is found in the decision of the Supreme Court of Colorado in People v. Garner, 732 P.2d 1194 (Col. 1987). In that case, the state sought to forfeit an automobile based upon the fact that it had been used by one of its registered co-owners for the unlawful possession, transportation, and distribution of controlled substances. The co-owners were Jack Garner and his former wife, Lynett Garner. In response to the District Attorney's civil action for forfeiture, Lynett Garner filed an answer in which she claimed an ownership interest in the vehicle but denied any knowledge of a role in the alleged illegal use of the vehicle. Focusing upon the purpose behind Colorado's public nuisance statute, which provided the basis for the vehicle forfeiture, the Colorado Supreme Court found that the Legislature intended the forfeiture of a vehicle determined to be a public nuisance even though one of its co-owners is innocent of any wrongdoing. In reaching this decision, the court held:

> [W]e do not read this section so broadly as to exempt from forfeiture property owned by more than one person when only one owner was involved in or had knowledge of the prohibited use, while the other did not. To so read the statute would allow an owner to use the property for one or more of the proscribed illegal purposes and still defeat the forfeiture provisions by simple expedient of placing title to the property and co-ownership with some innocent person.

Id. at 1197. In reaching this conclusion, the court relied in part upon a Florida decision, In re Forfeiture of One 1976 Dodge Van, 429 So.2d 718 (Fla. 2d DCA 1983); referred to in the 1978 BMW case under another title, City of Clearwater v. Malick, 429 So.2d 718 (Fla. 2d DCA 1983). In that case, a father and son were co-owners of the vehicle with the title in the alternative. It was stipulated that the father had no knowledge of the son's cocaine usage activity. However, the Second District held, "Guilty knowledge of one co-owner is sufficient basis to justify forfeiture."

This secondary defense against illegal use of a vehicle under the cover of an innocent co-owner was also recognized under California decisional law prior to California's repeal of its forfeiture statute. See Forfeiture of Auto Used in Narcotics Crime, 50 ALR 3d 172, 180-82, and the cases collected therein. See also, Fell v. Armour, 355 F.Supp. 1319, 1331 (M.D. Tenn. 1972) (collecting federal cases upholding the principal that "under the current state of the law, no constitutional objections exist to the forfeiture of a vehicle once it has been used in a violation of a forfeiture statute, regardless of lack of knowledge or innocence of the owner").

Petitioner is well aware of this Court's desire to provide procedural due process to individuals whose property is subject to forfeiture. Florida Department of Law Enforcement v. Real Property, 16 F.L.W. S497 (Fla. 1991). However, in the face of the clear and unequivocal language provided by the Legislature,

in Chapter 85-316, this Court should leave any amendment of the substance of the forfeiture laws to the Legislature.

The decision *sub judice* creates divisible ownership and declines to impute the guilty knowledge of one owner to an entirely innocent co-owner, apparently in disregard of the historical nature of forfeiture at common law and its evolution into statutory law. Common law recognized the penalty of seizure, which was a civil forfeiture derived the theory of Deodand. Deodand, the origins of which are traceable to biblical[3] and pre-Judeo-Christian practices, reflected the view that an inanimate object directly or indirectly causing the death of a person, whether done intentionally or accidentally, was the accused and required forfeiture of the value of that object to the Crown. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 2090-94 (1974), and authority cited therein. Although Deodand did not become the common law tradition of this country, 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 Whaller's Cove Drive, Babylon, New York, 747 F.Supp. 173, 177 (E.D.N.Y. 1990), see also, J.W. Goldsmith, Jr. v. United States, 253 U.S. 505, 510-511, 42 S.Ct. 189, 190-91, 65 L.Ed.2d 376 (1921).

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[3] See Exodus 21:28 ('[i]f an ox gore a man or woman, and they die, he shall be stoned and his flesh shall not be eaten"), as quoted by Justice Brennan in Calero, infra 94 S.Ct. 2090 footnote 17.

Modern approaches to civil seizure adopted the Deodand rational 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 upon the legal fiction that the property is "guilty".

Without question, the Florida Legislature intended §§ 932.701-704 to be a remedial civil sanction. The Act provides that the seizing agency "shall proceed against the contraband article . . . motor vehicle, . . ." § 932.704(1), thus creating an *in rem* proceeding to be instituted against the defined property alleged to have been used in violation of the Act. By providing for the forfeiture to be *in rem*, the Legislature clearly manifested its intent to provide uniform civil sanctions.

It is unquestionable that Florida possesses some of the worst problems in the nation in dealing with drug related activity. Among the statutory goals 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, and to obtain reimbursement of any cost 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 incarceration costs. This Court has recognized the unambiguous legislative intent that forfeiture

is proper when the driver or occupant of a vehicle unlawfully possesses drugs constituting a felony. State v. Crenshaw, 548 So.2d 223 (Fla. 1989).

In Calero-Toledo v. Pearson Yacht Leasing Co., supra, the Supreme Court ruled that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." However, the Florida Legislature chose to create a statutory "innocent owner" defense, and further extended that defense to include an "innocent spouse" exception for property held jointly by husband and wife. The decision of the First District superlegislates an additional exception to the statute. While the Legislature may have created a dichotomy in the ultimate penalty suffered by a joint owner of property as opposed to the sole owner of property (where both are equally innocent) the responsibilities of ownership and the penalties for damages resulting from ownership, especially dangerous instrumentalities such as automobiles, is recognized as a legitimate policy distinction which has been affirmed by the courts of this state on numerous occasions in analogous situations.

For example, The Dangerous Instrumentality Doctrine is firmly rooted in common law: one who keeps or entrusts to another something which is particularly dangerous, and which is especially apt to do injury to third persons, has placed upon himself a duty of special care to prevent it from doing injury. See Horack, The Dangerous Instrument Doctrine, 1917, 26 Yale L.J. 224, 227-28.

Florida has expanded the common law doctrine to instrumentalities such as motor vehicles, which are not dangerous per se, but are peculiarly dangerous in their operation. The legislature in recognition of the many and great dangers incident to their use, has enacted special regulations for the running of automobiles or motor vehicles on the public roads and highways of the state. The liability of the owner grows out the obligation of the owner to have the vehicle properly operated when it is used by his authority on the public highway. Barth v. City of Miami, 1 So.2d 574, 578 (Fla. 1941).

In the instant case the seizure was based on the son's use of the truck to obtain cocaine and to attempt to run over a police officer while fleeing the scene a sting operation. Suppose, arguendo, that the son had struck the police officer severely injuring him. What is the rationale for not subjecting the father's interest in the truck to forfeiture for the crime, but holding the father jointly and severally liable for all of the damages incurred by the officer, which damages could be many time greater than the value of the vehicle?

In declining to follow 1978 BMW, supra, the First District majority stated, "[t]hat decision would allow a sole owner of property to escape forfeiture although the owners permissive use of the property resulted in the targeted criminal conduct, while a joint owner of property, equally innocent, who could not forbid the use of the property, would suffer loss by forfeiture." 582 So.2d at 4. However, the joint owner chose a form of ownership

that would not allow him to forbid the use of the property. Florida's Legislature has intended that by so choosing and waiving control over the operation of a vehicle on the public highways of this State, the joint owner should be strictly accountable, at least to the extent of his interest therein, for its improper use.

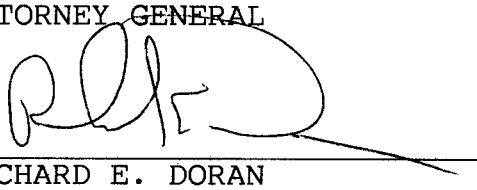
Even as this brief is being drafted, the Florida Legislature is considering some significant amendments to this law. Some of these changes target procedural requirements set forth in this Court's Florida Department of Law Enforcement v. Real Property decision, supra. Other considerations focus upon so-called "fairness" issues. Clearly, the Legislature has not hesitated to address the substantive matters as it deems appropriate. When left with the option of substituting judicial judgment for that of the Legislature, as occurred below, or adopting the Second District Court of Appeal's approach, Petitioner contends that the latter course of action is more appropriate and urges this Court to adopt the view of the Second District Court of Appeal on this issue.

CONCLUSION

Based upon the above-cited authority, Petitioner requests this Honorable Court reverse and remand the decision below with appropriate instructions.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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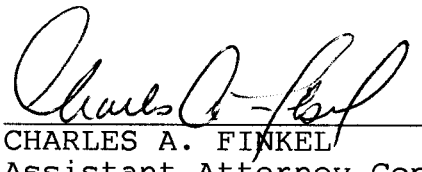

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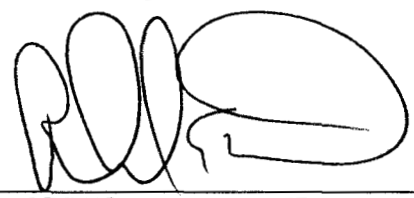
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF** has been furnished to **JOHN F. DANIEL**, Daniel & Komarek, Chartered, Post Office Box 2522, Panama City, Florida, Counsel for Respondents, by U.S. Mail this 13TH day of December, 1991.



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forfeiture.brf/charlesf