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SUPREME COURT OF FLORIDA

8/17

CASE NO. 81,803

District Court of Appeal
3d District No. 91-1913

THE STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellant,

v.

MARK ALFORD HERRE,

Appellee.

BRIEF OF THE APPELLEE

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II. WHETHER IMPOSITION OF THE CONTROLLED SUBSTANCE SALES TAX, SECTION 212.0505, FLORIDA STATUTES, UNDER THE CIRCUMSTANCES OF THIS CASE, VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

III. WHETHER THE FOURTH AMENDMENT APPLIES TO PROCEEDINGS CONDUCTED PURSUANT TO THE CONTROLLED SUBSTANCE SALES TAX, SECTION 212.0505, FLORIDA STATUTES?

IV. WHETHER THE DEPARTMENT OF REVENUE MET ITS BURDEN OF PROVING THAT MR. HERRE ENGAGED IN THE UNLAWFUL SALE, USE, CONSUMPTION, DISTRIBUTION, MANUFACTURE, DERIVATION, PRODUCTION, TRANSPORTATION OR STORAGE OF CANNABIS?

STATEMENT OF THE CASE

Herre's Criminal Charge, Plea and Subsequent "Tax" Assessment

On October 14, 1988, the appellee, MARK ALFORD HERRE, was stopped along a highway by a Monroe County Sheriff's Deputy while driving an Avis Rent-A-Car vehicle. After other officers arrived, the vehicle was searched without Herre's consent, a warrant or probable cause to believe that any crime had occurred. During the search, the officers found approximately 300 pounds of marijuana in the vehicle. (ROA-I-72-73; ROA-II-86.)[1]

As a result of the seizure, Herre was charged by the State of Florida with trafficking in marijuana in violation of Section 893.135, Florida Statutes. On December 28, 1988, after pleading nolo contendere to the lesser included offense of attempted trafficking in marijuana, Herre was sentenced to a five (5) year period of probation and, as a special condition thereof, he was also ordered to pay a fine of $5,000. (ROA-I-73.)

On November 17, 1988, the State of Florida, Department of Revenue, notified Herre, by service of a jeopardy assessment, that he had "engaged in the *unlawful* sale, use, consumption, distribution, manufacture, derivation, production, transportation or storage" of marijuana and, therefore, was being assessed: (1) a "tax" of $105,000.00, pursuant to Section 212.0505(1)(a), Florida Statutes[2]; (2) an additional "surcharge" of $52,500.00,

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[1] "ROA" designates the Record-On-Appeal as formulated by the Third District Court of Appeal below.

[2] Subsection 212.0505(1)(a) provides:

> (1)(a) Every person is exercising a taxable privilege who engages in this state in the *unlawful* sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage of any medicinal drugs as defined in chapter 465, cannabis as defined in s. 893.02, or controlled substance enumerated in s. 893.03. For the exercise of such privilege, a tax

(continued...)

pursuant to Subsection 212.0505(1)(b)[3]; and (3) a "penalty" of $78,750.00, pursuant to Subsection 212.0505(3).[4] (ROA-I-1; emphasis added.) In the same form, the Department notified Herre that the tax assessment was in jeopardy "because of such *unlawful* activity and lack of payment." (ROA-I-1; emphasis added.)

On December 15, 1989, Herre requested an administrative hearing, pursuant to Sections 72.011 and 120.575, Florida Statutes, to determine the validity of the Department's assessment and to challenge the constitutionality of Section 212.0505 itself. (ROA-I-15.) He argued *inter alia*: (1) that Section 212.0505 was, on its face, unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution; (2) that Section 212.0505 constituted a penalty, despite its civil form, which violated the Double Jeopardy Clause of the Fifth Amendment when imposed upon him following his criminal conviction; (3) that the search and seizure of the marijuana violated the Fourth and Fourteenth

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[2](...continued)
is levied on each taxable transaction or incident, including each occasional or isolated unlawful sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage, at the rate of 50 percent of the estimated retail price of the medicinal drug, cannabis, or controlled substance involved in the transaction or incident.

(Emphasis added.)

[3] Subsection 212.0505(1)(b) provides:

(b) In addition to any other tax there shall also be a 25 percent surcharge on the estimated price of the transaction or incident taxable under paragraph (a).

[4] Subsection 212.0505(3) provides:

(3) The taxes imposed under this section are subject to the same interest and penalties and the same procedures for collection and enforcement as other taxes imposed under this part, except that a dealer's credit under s. 212.12(1) is not allowed. The department may adopt rules for administering the taxes imposed by this section.

Amendments to the United States Constitution and his rights under Article I, Section 12, of the Florida Constitution and that the exclusionary rule should apply to the tax proceedings; and (4) that there was insufficient evidence linking him to the marijuana in the vehicle to satisfy the Department's burden that he had "engaged" in "unlawful" activities involving the cannabis. (ROA-I-15; *see also* ROA-I-2-8.)

Following a period of discovery, on December 5, 1990, the parties entered into a stipulation which obviated the need for an evidentiary hearing. (ROA-II-85-87.) The parties agreed that the facts underlying Herre's arrest and the seizure of the marijuana were as set forth in the depositions of Monroe County Sheriff's Deputy William Emral and Captain Robert Wilkinson. (ROA-II-85; *see* ROA-I-46-119.) In addition, the parties agreed that the actual cost to the State of Florida of Herre's prosecution was only $117. (ROA-II-86.) Based upon these stipulated facts, on December 14, 1990, Mr. Herre requested that the Department declare Section 212.0505 inapplicable and/or unconstitutional. (R0A-II-88.)

On July 12, 1991, the Department issued a Final Order, rejecting all of Herre's contentions and sustained the assessment in full. (ROA-II-140.) The Department made no findings concerning the legality of search but held that regardless of any illegality the exclusionary rule did not apply to proceedings under Section 212.0505. (ROA-II-121, 145.)[5] As to Herre's other constitutional claims, the Department ruled the it was not empowered

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[5] The Department based this ruling on Subsection 212.0505(5) which provides:

> (5) Any assessment made pursuant to this section shall be deemed prima facie correct in any judicial or administrative proceeding in this state. The suppression of evidence on any ground by a court in a criminal case involving a transaction or incident taxable under this section or the dismissal of criminal charges in such a case shall not affect any assessment made under this section.

to determine the constitutionality of statutes and declined to express any opinion on the arguments. (ROA-II-129-130, 145-46.)

The Appeal To the Third District Court of Appeal

Herre appealed the Department's Final Order to the Third District Court of Appeal, raising all four issues presented in the administrative proceedings. *See* p. 3 *supra*. On April 20, 1993, the Third District Court of Appeal reversed the Department's Final Order, holding that Section 212.0505, Florida Statutes violated Herre's Fifth Amendment right against self-incrimination. The court declined to follow a decision from the First District Court of Appeal, *Harris v. State Department of Revenue*, 563 So. 2d 97 (Fla. 1st DCA), *rev. den.*, 574 So. 2d 141 (Fla. 1990), but certified its decision as in conflict with *Harris*. The Third District did not address Herre's other three claims.

This Court has jurisdiction pursuant to Rule 9.030(a)(1)(A)(ii) of the Florida Rules of Appellate Procedure. Moreover, although the Third District only chose to address the Fifth Amendment issue, this Court has the discretion to consider all issues properly raised below. *See Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).

STATEMENT OF THE FACTS

Monroe County Deputy Sheriff William Emral was on routine patrol on the morning of October 14, 1988 when he was notified by the Plantation Key radio dispatcher that the Sheriff's Office had received an anonymous phone call from a tipster who indicated that "there were two subjects loading what appeared to be narcotics into a white, four door Cadillac" with license number 367 ZGX. (ROA-I-70-71.) The tipster further indicated that the vehicle would be headed north on the highway from Lower Matecumbe, Florida. (ROA-I-71.) The tipster did not state what sort of "narcotics" were being loaded, when or

where he or she made the observations or how he or she knew that the objects "appeared to be narcotics." (ROA-I-71-72.)[6]

Deputy Emral drove his vehicle to a position where he could observe the northbound traffic along the highway in question and waited. Approximately ten minutes after receiving the tip, he saw a vehicle matching the description of the Cadillac, although there was only a single man in it. (ROA-I-75.) Deputy Emral expressly testified that the Cadillac was at all times being driven properly but, nonetheless, he decided to stop it based upon the tip. (ROA-II-76-78.) After radioing for backup assistance, he followed the Cadillac awhile until traffic cleared and then activated his flashing lights to pull over the vehicle. (ROA-I-77.)

Deputy Emral noticed that the Cadillac was a rental vehicle and asked Herre for both his driver's license and the rental contract. (ROA-I-79.) He immediately ran a check on the driver's license. As Herre was retrieving the rental agreement from the vehicle, Deputy Emral noticed two soft-sided, cloth bags inside the car. (ROA-I-81.) The bags appeared to be full but he could not tell what was inside them from their appearance. Nor did he smell anything unusual. (ROA-I-84.)

When Herre produced the rental agreement, Deputy Emral noticed that it was in the name of a Mr. Robert E. Lee with a Maryland address. (ROA-I-85.) He did not check to see if the rental agreement was overdue or when the vehicle was rented. (ROA-I-86.) He did question Herre about the whereabouts of Mr. Lee. Herre stated "he believed [Mr. Lee] was having breakfast" but did not know where. (ROA-I-86.) By this time, the backup assistance had arrived -- Deputy Chuck Visco and Captain Wilkinson. (ROA-I-86.)

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[6] After receiving the brief tip, Deputy Emral called back the dispatcher to see if the tipster had given any other information. "[T]hey said no, that was it. That was the extent of the call." (ROA-I-71; *see also id*. at 72.)

Deputy Emral decided to tell Herre about the anonymous tip to see how he would react. When Herre did not respond, Deputy Emral asked him whether he had been loading anything.[7] Herre answered that he had been "in the process of loading dive gear." (ROA-I-87.) Deputy Emral told him that the bags he saw in the passenger compartment did not resemble "dive bags." However, he acknowledged that Herre might have said that the dive gear was loaded into the trunk. (ROA-I-93.)[8] Other than not responding initially to the Deputy's statements about the anonymous tip, Herre neither did nor said anything unusual or suspicious. (ROA-I-93.)

Having been unsuccessful in obtaining any incriminating statements from Herre, Deputy Emral simply asked him point blank whether he could "satisfy my curiosity" by searching the vehicle. (ROA-I-93.) Herre replied "no, it is not my car. I rather you not." (ROA-I-94.)

Stymied, Deputy Emral "wasn't sure on what grounds I stood" legally, so he asked Captain Wilkinson for advice. (ROA-I-53, 62, 95.) Captain Wilkinson decided to question Herre himself. He first asked whether Herre had permission to drive the vehicle. Herre responded that he did. (ROA-I-54.) When Captain Wilkinson then asked about the whereabouts of Mr. Lee, Herre stated that Mr. Lee was either having breakfast or was diving but that he did not know where he was. (ROA-I-54, 96.) He also did not know how to reach

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[7] Deputy Emral admitted that he had not *Mirandized* Herre before interrogating him, despite the fact that Herre was not free to depart. (ROA-I-88.)

[8] Deputy Emral also conceded that the bags he saw were of sufficient shape to hold dive gear and, in any event, he never directly asked whether the dive gear Herre loaded was contained in them or was only in the trunk. (ROA-I-89-90.) Captain Wilkinson, who arrived on the scene later, also admitted that he could tell what was in the bags by looking at them. (ROA-I-59.)

Mrs. Lee. (ROA-I-95-96.)[9] By this time, Deputy Emral had already conducted a check on the license tag of the vehicle and found that it had *not* been reported stolen. The officers did not bother to call Avis Rent-A-Car company. (ROA-I-98.) Nonetheless, the officers claimed they had authority to "impound" the vehicle to determine whether it was stolen and informed Herre that it was "department policy" to conduct an inventory search of impounded vehicles. (ROA-I-57, 97-99.) Deputy Emral expressly stated that he did not have probable cause to believe the vehicle was stolen. (ROA-I-102.)[10] Nonetheless, the officers believed they had authority to impound the vehicle.

After taking the keys from the ignition, the officers immediately commenced their "inventory search." They immediately searched *the trunk* of the vehicle, not the allegedly suspicious bags in the passenger compartment. (ROA-I-60, 62, 105-06.)[11] Inside the trunk, the officers found bales of marijuana wrapped in plastic. (ROA-I-110-11.)

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[9] Both Deputy Emral and Captain Wilkinson acknowledged that, at this point, Herre, although definitely not free to leave, had still not been *Mirandized*. (ROA-I-55, 96.)

[10] Captain Wilkinson claimed that there was "probable cause" at this point to believe the vehicle was stolen. (ROA-I-58.) However, the Final Order expressly adopted the portion of the Department's Proposed Recommended Order indicating that "Mr. Herre was *not* suspected of a crime." (ROA-II-93-94, 143; emphasis added.) Accordingly, the Court must conclude that, for purposes of this case, the officers lacked probable cause to believe that the vehicle was stolen.

[11] Captain Wilkinson testified there was no department policy concerning how to conduct inventory searches:

> No, sir. We don't have any policy of what you should do first or what you should do last. Some officer[s] may pick up an inventory sheet first. Other officers would probably look through the vehicle but there is no standard procedure.

(ROA-I-60.)

Nothing in the trunk or elsewhere in the vehicle linked Herre to the marijuana other than the facts recited above. (ROA-I-114, 118.) Nor did Herre make any statements linking him to the drugs. (ROA-I-64.) Herre was then arrested and taken to jail. (ROA-I-63, 112.)

SUMMARY OF THE ARGUMENT

I. Section 212.0505 is unconstitutional on its face under the Fifth and Fourteenth Amendments for two reasons.

First, as the Third District correctly held, Section 212.0505 violates all taxpayers' Fifth Amendment rights against self-incrimination, because it compels a "selective group inherently suspect of criminal activities," *Albertson v. SACB*, 382 U.S. 70, 79, 86 S.Ct. 194, 199, 15 L.Ed.2d 165 (1965), --*i.e.,* those and only those engaged in the "unlawful" trafficking in cannabis and controlled substances -- to incriminate themselves by coming forward and paying a tax and registering with the Department of Revenue. *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). Moreover, since the "confidentiality" provisions set forth in Section 213.053 do not provide for use and derivative use immunity, or its equivalent, the Third District also correctly found that they are not co-extensive with the protections afforded by the Fifth Amendment privilege. Hence, they do not cure the Fifth Amendment violation in Section 212.0505. *See State v. Smith*, 813 P.2d 888 (Idaho 1991); *People v. Duleff*, 515 P.2d 1239 (Colo. 1973); *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986). *Cf. State v. Durrant*, 769 P.2d 1174 (Kan.), *cert. denied sub nom. Dressel v. Kansas*, 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600 (1989); *Briney v. State Dept. of Revenue*, 594 So. 2d 120 (Ala. Civ. App. 1991), *cert. denied*, 1992 Ala. LEXIS 171 (Jan. 31, 1992); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn.

1988). The First District Court of Appeal's decision in *Harris v. State Dept. of Revenue*, 563 So. 2d 97 (Fla. 1st DCA 1990), which holds to the contrary, was wrongly decided and should not be followed by this Court.

Second, Section 212.0505 creates a tax to be administered by the Department of Revenue. Section 212.18(2) directs that the Department "shall" promulgate "by rule and regulation" the specific "method" for payment and "shall prepare instructions" for all taxpayers. The Department, however, has never promulgated *any* regulations for administering Section 212.0505. This defect violates both the Florida Administrative Procedure Act, Section 120.52, Florida Statutes, and Herre's right to due process under the Fifth and Fourteenth Amendments. Accordingly, Section 212.0505 is unenforceable unless and until the Department complies with the statutory directive and establishes the requisite rules, procedures, methods and instructions.

II. Section 212.0505 also violates Herre's Fifth Amendment right against being twice placed in jeopardy for the same offense -- "unlawful" trafficking in cannabis. This is so, despite the "civil" label of the cannabis tax, because at least one of the purposes behind the tax is punitive. *See United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989).

III. The Department of Revenue erred as a matter of law in concluding that the exclusionary rule of the Fourth Amendment did not apply to the revenue collection proceedings. Although the United States Supreme Court in *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), ruled that the exclusionary rule did not apply in a civil tax case where an agency of the federal government introduced evidence illegally seized by another sovereign, state law enforcement authorities, it expressly left open whether or not

the rule would or should apply in *intra* sovereign situations. In the instant case, the deterrent goals of the exclusionary rule would be fully served by applying the exclusionary rule to the intrasovereign activities of the State of Florida. If the exclusionary rule applies to these proceedings, the tax assessment is unconstitutional, because the primary evidence used to assess the tax -- the cannabis found in the trunk of the rented Cadillac -- was illegally seized.

IV. Even if the illegally seized evidence is considered, the stipulated evidence fails to establish that Herre was "engaged" in the unlawful trafficking in cannabis, as required by Section 212.0505. Although he was driving the Cadillac, the evidence established that the vehicle was rented by a third party. And, there was no evidence that Herre *knew* what was inside the bags or the trunk.

ARGUMENT

I. THE CONTROLLED SUBSTANCE SALES TAX IS UNCONSTITUTIONAL ON ITS FACE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The Statutory Scheme

The Department contends that the Third District erroneously construed the Controlled Substance Sales Tax, 212.0505, Florida Statutes. According to the Department, the tax is nothing more than a "generic sales tax" that can be paid by a taxpayer without having "to differentiate between legal versus illegal transactions." Department's Brief, at pp. 1-2. Thus, according to the Department, the tax can be paid and forms filled out "in a non-self-incriminating manner." *Id*. at p. 6 (emphasis in original). The Department's arguments are belied by the express language of Section 212.0505.

The Controlled Substance Sales Tax, 212.0505, Florida Statutes, requires any "person" who "unlawful[ly]" sells, uses, distributes, manufactures, produces, transports or stores cannabis or other controlled substances, to pay a "tax" amounting to 50 percent of the retail value of the substance, an additional 25 percent "surcharge," plus interest and penalties. *See* pp. 2-3 nn. 1-3 *supra*. Thus, contrary to the Department, Section 212.0505 *on its face* is applicable *solely* to criminal activity. However, under Subsection 212.0505(4), payment of the tax expressly does not legalize the otherwise "unlawful" activity being taxed.[12]

Under Section 212.18(2), the Department of Revenue is authorized to "administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter," including Subsection 212.0505.[13] As a required part of these duties, Subsection 212.18(2) also states that the Department "shall provide by rule and regulation" a specific "method" for accomplishing these goals and "shall prepare instructions" for "all persons required by this chapter" to pay taxes. *See* n. 13. However, no such rules,

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[12] Subsection 212.0505(4) provides:

> (4) Neither this section or the assessment or collection of taxes under this section shall be construed as making lawful the transaction or incident which is the subject of the tax.

[13] Subsection 212.18(2) provides:

> (2) The department shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. It is authorized to make and publish such rules and regulations not inconsistent with this chapter, as it may deem necessary in enforcing its provision in order that there shall not be collected on the average more than the rate levied herein. The department shall provide by rule and regulation a method for accomplishing this end. It shall prepare instructions to all persons required by this chapter to collect and remit the tax to guide such persons in the proper collection and remission of such tax and to instruct such persons in the practices that may be necessary for the purposes of enforcement of this chapter and the collection of the tax imposed hereby.

regulations or instructions have ever been promulgated by the Department. *See* Florida Administrative Code, Chapter 12A-1, "Sales and Use Tax On Services" (R. 8/91).

Subsection 212.06(2) defines the term "dealer" as used throughout Chapter 212. The term is defined as any "person" who, *inter alia*, sells, manufactures, imports, maintains, uses or solicits business involving "tangible personal property," presumably including the "unlawful ... cannabis" at issue in Subsection 212.0505. Under Subsection 212.18(3)(a), all such "dealers" must "file with the department an application for a certificate of registration for each place of business, showing the names of the persons who have interests in such business and their residences, the address of the business, and such other data as the department may reasonably require." Subsection 212.18(3)(a) further provides that a "dealer's" failure to file for a certificate of registration constitutes a first degree misdemeanor. And, under Subsection 212.17(4), the Department of Revenue is required to promulgate the necessary forms for "dealers" to comply with Subsection 212.18(3).[14]

The use taxes imposed by Chapter 212, Florida Statutes, are also subject to the dictates of Section 213.053, Florida Statutes. *Harris v. State Dept. of Revenue*, 563 So. 2d 97, 98 (Fla. 1st DCA 1990). Entitled "Confidentiality and Information Sharing," Section 213.053(2) provides that any information obtained by the Department of Revenue about a citizen who (voluntarily or otherwise) complies with Section 212.0505 is exempt from disclosure under the Public Records statutes and is "confidential except for official purposes." The term "official purposes" is defined by administrative regulation to mean "within the Department [of Revenue], and does not include other agencies *unless specifically*

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[14] Copies of these forms are published in Florida Jur. 2d, v. 54, §§ 39:35 - 39:38 (1983 & 1991 Supp.), and are reproduced in the accompanying APPENDIX.

included in s. 213.053." Florida Administrative Code, Chapter 12-22.003(2) (emphasis added). However, the number and nature of the "specifically included ... agencies" effectively limits the "confidentiality" provision to *private* parties. State and federal law enforcement agencies have virtually unlimited access to the information.

Thus, under Subsection 213.053(8), the Department of Revenue "shall" provide any and all requested information about taxpayers either upon the order of a court *or* merely upon the issuance of a subpoena by a State Attorney, a United States Attorney, a state or federal grand jury or a court in a criminal or even certain civil proceedings or investigations.[15] *See also* Florida Administrative Code, Chapter 12-22.004(4). The Department is also authorized to share information, *without* even a subpoena or court order, to the United States Department of the Treasury and the Internal Revenue Service. *See* Section 213.053(5), Florida Statutes; Florida Administrative Code, Chapter 12-22.004(1).[16]

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[15] Subsection 213.053(8) provides:

> (8) The Department of Revenue shall provide returns, reports, accounts, or declarations received by the department, including investigative reports and information, or information contained in such documents, pursuant to an order of a judge of a court of competent jurisdiction or pursuant to a subpoena duces tecum only when the subpoena is:
>
> (a) Issued by a state attorney, a United States attorney, or a court in a criminal investigation or a criminal judicial proceeding;
>
> (b) Issued by a state or federal grand jury; or
>
> (c) Issued by a state attorney, the Department of Legal Affairs, a United States attorney, or a court in the course of a civil investigation or a civil judicial proceeding under the state or federal racketeer influenced and corrupt organizations act or under chapter 896.

[16] Subsection 212.053(5) provides:

(continued...)

B. Section 212.0505 Violates the Fifth Amendment Privilege Against Self-Incrimination

Subsection 212.0505 creates a tax on the "unlawful" possession, importation or distribution of marijuana in the State of Florida. The unlawful possession, importation and distribution of marijuana constitutes both a federal and state crime. Chapter 212, Florida Statutes, in addition to requiring the payment of a tax, requires "dealers" in taxable activities, including the unlawful possession, importation or distribution of marijuana, to "register" with the Department of Revenue under circumstances likely to reach law enforcement authorities -- again at both the state and federal levels. Accordingly, the Third District correctly concluded that Section 212.0505 constitutes a blatant violation of the Fifth and Fourteenth Amendments to the United States Constitution.

In *Marchetti v. United States*, 390 U.S. 39, 58, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and its companion case, *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), the United States Supreme Court struck down a similar tax/registration scheme involving illegal gambling. In *Marchetti*, the defendants were charged with willfully failing to pay an "occupational tax" and with willfully failing to register, pursuant to 26 U.S.C. § 4412. The wagering tax statute, 26 U.S.C. § 4401, was similar to Subsection 212.0505. It imposed a percentage tax on the gross amount of all wagers accepted by a wagering enterprise, imposed additional yearly "occupational" taxes on such enterprises and required those

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[16](...continued)

(5) The department may make available to the Secretary of the Treasury of the United States or his delegate, the Commissioner of the Internal Revenue of the United States or his delegate, the Secretary of the Department of the Interior of the United States or his delegate, or the proper officer of any state or his delegate, exclusively for official purposes, information to comply with any formal agreement for the mutual exchange of state information with the Internal Revenue Service of the United States, the Department of the Interior of the United States, or any state.

subject to the tax to "register" with the government on IRS forms. 390 U.S. at 42. The Court recognized that the occupational tax was not imposed in "'an essentially non-criminal and regulatory area,'" but was "directed to a 'selective group inherently suspect of criminal activities,'" *i.e.,* illegal gamblers. *Id.* at 57 (quoting *Albertson v. SACB*, 382 U.S. 70, 79, 86 S.Ct. 194, 199, 15 L.Ed.2d 165 (1965)). Moreover, much like the registration forms required by Subsections 212.18(3)(a) and 212.17(4), the IRS forms at issue in *Marchetti* required the taxpayers to state their names, business addresses and associates. *Id.* at 42. And, as under Subsection 212.0505(4), *see* p. 12, n. 12 *supra*, payment of the wagering tax and/or registering did not legalize the wagering activity being taxed. *Id.* at 44.

The Supreme Court in *Marchetti* held that the wagering tax/registration scheme was unconstitutional under the Fifth Amendment. At the outset, the Court stated that the issue was "*not* whether the United States may tax activities which a State or Congress has declared unlawful." 390 U.S. at 44. The government may do so. Rather, the issue was whether the methods employed were "consistent with the limitations created by the privilege against self-incrimination." *Id.* at 44. The Court held that they were not:

> Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant "link in a chain" of evidence tending to establish his guilt.... It would appear to follow that petitioner's assertion of the privilege as a defense to this prosecution was entirely proper, and accordingly should have sufficed to prevent his conviction.

Id. at 48-49 (citation omitted). *See also id.* at 54 ("[p]rospective registrants can reasonably expect that registration and payment of the occupational tax will significantly enhance the likelihood of their prosecution for future acts, and that it will readily provide evidence which will facilitate their convictions").

Furthermore, the Supreme Court refused to rewrite the statute by imposing an immunity provision equivalent to the Fifth Amendment. The Court ruled that the very "terms of the wagering tax system make quite plan that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities." 390 U.S. at pp. 58-59.

Similar defects lead to the downfall of the federal Marijuana Tax Act (former 26 U.S.C. § 4741 *et seq.*) in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). The Marijuana Tax Act required that all persons who "deal in" marijuana pay an annual occupational tax. In addition, the Act required "transfer" taxes "upon all transfers of marijuana." 395 U.S. at 14. Separate provisions required those paying the taxes to "register" with the Internal Revenue Service. Still other provisions authorized the registration documents to be open to law enforcement personnel upon the payment of a fee by such officials. *Id.* at 15. Relying upon *Marchetti*, the Court found the Act unconstitutional, since taxpayers would have "ample reason to fear" that transmittal of information about their payments would be disclosed to law enforcement authorities and provide a "'"link in a chain" of evidence tending to establish his guilt' under the state marijuana laws then in effect.'" *Id.* at 16. And, as in *Marchetti* and *Grosso*, the Court refused to read into the Act an immunity provision co-extensive with the Fifth Amendment in order to cure the constitutional defect. *Id.* at 26-27.

The Third District correctly reasoned that Section 212.0505 was unconstitutional for the same reasons expressed in *Marchetti, Grosso* and *Leary*. *See Herre v. Department of Revenue*, No. 91-1913 (Fla. 3d DCA April 20, 1993), slip op. at p. 5. As with these defective wagering and marijuana taxes, Section 212.0505 is not aimed at "'an essentially non-criminal

and regulatory area,'" but is "directed to a 'selective group inherently suspect of criminal activities,'" *i.e.,* the "unlawful" traffickers in cannabis and other controlled substances. Such activity is criminal under both federal law and the laws of virtually every state in the union. Thus, contrary to the Department's claim, the registration requirements attendant to paying this tax are every bit as revealing as those at issue in *Marchetti, Grosso* and *Leary*. Payment and registration expressly does not legitimize the illegal activity. And, the information sharing procedures in Subsection 213.053 provide ready access to the incriminating information supplied by the taxpayer to federal and state law enforcement authorities.

The fact that the forms utilized by the Department do not *themselves* require disclosure of the taxpayer's "occupation or the nature of his business" does not insulate the taxpayer from self-incrimination as the Department contends, *see* Brief for the Department, at p. 7, because the tax itself is applicable *only* to those engaged in illegal activities. Courts are obliged to respect a citizen's invocation of his Fifth Amendment right so long as the risk of incrimination is more than "insubstantial" or "trifling." *Marchetti v. United States*, 390 U.S. at 53. As the United States Supreme Court emphasized in *Hoffman v. United States*, 341 U.S. 479, 488, 71 S.Ct. 814, 819, 95 L.Ed. 1118 (1951), the privilege must be sustained unless it is "*'perfectly clear'* from a careful consideration of all circumstances in the case, 'that the witness is mistaken and that the answer[s] *cannot possibly* have such a tendency' to incriminate." (emphasis in the original; citation omitted). *Accord United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980). Moreover, a citizen "need not prove the danger, otherwise the privilege would be meaningless." *United States v. Goodwin*, 625 F.2d at 700. A citizen witness cannot be compelled to provide potentially incriminating information simply because of a court's "predictive judgment" of what would occur in future proceedings. *Pillsbury*

Company v. Conboy, 459 U.S. 248, 261, 103 S.Ct. 608, 616, 74 L.Ed.2d 430 (1983). *See also In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974) (privilege does not depend upon likelihood but upon possibility of prosecution); *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979) (the privilege should not depend upon "a judge's prediction of the likelihood of prosecution"). The Department has failed to established that Herre's fears of self-incrimination were "insubstantial" or "trifling."

The constitutionality of Subsection 212.0505 presents a question of first impression in this Court. The only Florida court to discuss the Fifth Amendment problem was the First District Court of Appeal in *Harris v. Department of Revenue*, 563 So.2d 97 (Fla. 1st DCA 1990). The taxpayer in *Harris* also challenged the statute under the Fifth Amendment. The First District recognized the applicability of *Marchetti*. 563 So.2d at 98. However, it ruled that the confidentiality provisions of Subsection 213.053 fully cured the Fifth Amendment problem, since, according to the First District, Section 213.053 "provide[d] sufficient protections *at least co-extensive with the privilege against self-incrimination*." 593 So.2d at 99 (emphasis added).

In fact, Section 213.053 did no such thing. To be co-extensive with the Fifth Amendment, a state statute must fully *immunize* the statements from both direct and derivative use by both state and federal sovereigns. The issue was first discussed in by the United States Supreme Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 78-79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964). The Court in that case held that testimony sought by state officials pursuant to a state grant of immunity could not be compelled under the Fifth Amendment "unless the compelled testimony and its fruits may not be used in any manner by federal officials in connection with a criminal prosecution against him." *Murphy*,

378 U.S. at 79, 84 S.Ct. at 1609. *Accord Agrella v. Rivkind*, 404 So.2d 1113, 1115 (Fla. 3d DCA 1981) ("[t]he Constitution requires ... that Agrella's testimony under a state grant of immunity not be used against him by the Federal Government," citing *Murphy*); *Gilliam v. State*, 267 So.2d 658, 659 (Fla. 2d DCA 1972) (state immunity sufficient to overcome fear of federal prosecution, citing *Murphy*).[17]

These principles were reaffirmed by the Supreme Court in *Kastigar v. United States*, 406 U.S. 441, 456-57, 92 S.Ct. 1653, 1662-63, 32 L.Ed.2d 212 (1972), where the Court upheld the federal "use" immunity statute, 18 U.S.C. § 6001. The Court found that the scope of the immunity conferred by the statute was co-extensive with the Fifth Amendment, because it absolutely prohibited a sovereign from using either the statements themselves *or* any fruits of those statements. In practical terms, this means that to prosecute a defendant who has received Fifth Amendment-equivalent immunity, the prosecuting sovereign must demonstrate that every witness and every "item" of evidence "was derived from legitimate, independent sources." *United States v. Hampton*, 775 F.2d 1479, 1485, 1487-88 (11th Cir. 1985) (citations omitted).

> Moreover, the government's burden is not limited to such "negation of taint"; rather, the government must go further and affirmatively prove legitimate independent sources for its evidence and affirmatively establish that none of the evidence presented to the grand jury was derived directly *or indirectly* from the immunized testimony.

775 F.2d at 1485-86. (emphasis in original). *See also United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Palumbo*, 897 F.2d 245 (7th Cir. 1990). Derivative fruits would include using immunized statements to gain investigatory leads. *Hampton*, at 1487.

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[17] Justice White's concurring opinion in *Murphy* referred to the Court's holding as a "rule forbidding federal officials *access to statements* made in exchange for a grant of state immunity." *Murphy*, 378 U.S. at 93, 84 S.Ct. 1610 (emphasis added). The tax statute at issue herein provides a ready means of "access" to incriminating "statements."

They also would preclude using statements to build a case against other witnesses who subsequently agree to cooperate. *Id.* at 1488.

Subsection 213.085 does not provide any assurance against "use" much less "derivative use." On the contrary, as noted above, it expressly contemplates that both federal and state law enforcement authorities can gain free, unlimited and *unconditioned* access to the information merely by issuing a subpoena. The Internal Revenue Service -- a federal agency with both civil and criminal investigatory powers -- does not even need a subpoena. *See* p. 14 *supra*. The Department asks rhetorically: "Of what good to law enforcement is a name and the tax amount shown on a form?" Brief of the Department, at p. 8. The answer is "plenty." The tax only has to be paid on illegal drugs. Hence, the signature on the form is an admission that the taxpayer has engaged in criminal activity resulting in the designated profit. Such an admission, if not sufficient in an of itself to commence criminal charges, certainly presents a link in a chain of incriminating evidence upon which such charges could -- and we submit would -- be based.

Accordingly, the holding in *Harris* that the limited confidentiality provisions of Section 213.085 were co-extensive with the Fifth Amendment is seriously flawed and should not be followed by this Court. Since it is *not* co-extensive, Section 212.0505 must be deemed unconstitutional. As the Third District recognized, this conclusion is also compelled by a review of other states which have passed similar drug tax or registration statutes.

For example, in 1989, the Idaho legislature enacted The Illegal Drug Stamp Tax Act, I.C. § 63-4206. The Act, as originally worded, required those unlawfully in possession of controlled substances to purchase and affix drug tax stamps to the substances or face civil and criminal penalties. Although there was no requirement that the purchaser of drug

stamps give identifying information when paying the tax, there was also no *express prohibition* against using any information obtained by the state officials through the purchase of the stamps in criminal proceedings or investigations. In *State v. Smith*, 813 P.2d 888 (Idaho 1991), the Supreme Court of Idaho struck down the statute as unconstitutional under the Fifth Amendment and vacated the defendant's conviction.[18] *People v. Duleff*, 515 P.2d 1239 (Colo. 1973) (holding unconstitutional marijuana licensing requirement as violative of the Fifth Amendment, citing *Marchetti, Grosso* and *Leary*).

A tax most analogous to Section 212.0505 was declared unconstitutional by the Supreme Court of South Dakota in *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986). In that case, the court struck down a Luxury Tax on Controlled Substances and Marijuana as unconstitutional under the Fifth Amendment, despite the fact that the statute provided that any criminal prosecutions of those who paid the tax could not "be initiated or facilitated by the disclosure of confidential information" provided. 384 N.W.2d at 690. The court found that this provision was inadequate to fully safeguard a taxpayer's Fifth Amendment rights, because another provision of the statute created an exception to the confidentiality/non-prosecution provision when information was officially requested by civil or criminal law enforcement authorities. *Id.* at 691. As previously discussed, Section 212.0505 also contains a "confidentiality" provision which is similarly plagued by a law enforcement exception.

On the other hand, courts have upheld statutes in states which have provided exceptionless use and derivative use immunity for payment of drug taxes. In *State v. Durrant*, 769 P.2d 1174 (Kan.), *cert. denied sub nom. Dressel v. Kansas*, 492 U.S. 923, 109

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[18] In 1990, the Idaho legislature amended the statute and cured the constitutional defect by expressly barring use of any information provided in any criminal proceeding. *See State v. Smith*, 813 P.2d at 890 & n. 1.

S.Ct. 3254, 106 L.Ed.2d 600 (1989), the Supreme Court of Kansas upheld the constitutionality of Kansas' marijuana tax statute. However, the Kansas statute, unlike the ones in either Florida or Idaho, expressly barred state employees from disclosing information obtained through the tax payment procedure in any criminal proceedings, except those to enforce the tax act. Moreover, in analyzing the constitutional question, the court recognized that "[t]he validity of the statutes depend upon the scope of the immunity granted under the act." 769 P.2d at 1181. The court went on to construe the immunity provided by the statute to encompass both use *and* derivative use in order to be fully co-extensive with the Fifth Amendment. *Id.* at 1183. *See also Briney v. State Dept. of Revenue*, 594 So. 2d 120 (Ala. Civ. App. 1991), *cert. denied*, 1992 Ala. LEXIS 171 (Jan. 31, 1992) (upholding jeopardy assessments under the Drugs and Controlled Substances Excise Tax Act on Fifth Amendment challenge, since Act expressly barred use of information obtained from the taxpayer "'in any criminal proceeding ... unless such information is independently obtained'"); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988) (upholding Minnesota Marijuana and Controlled Substance Taxation Act, since it afforded taxpayer immunity and contained provisions to permit anonymous payment).

Section 212.0505 is just as unconstitutional as the similarly defective statutes in Idaho, South Dakota and Colorado. It fails to provide use and derivative use immunity or the equivalent, like the statutes in Kansas, Alabama, Minnesota and the revised Idaho statute. Therefore, the Court must conclude, as did the Third District, that Section 212.0505 is unenforceable and violative of the Fifth and Fourteenth Amendments.

C. Section 212.0505 Violates Herre's Rights Under the Fifth and Fourteenth Amendments, Because the Department of Revenue Has Never Promulgated the Requisite Rules and Regulations to Permit Voluntary Payment

As noted in Section A *supra*, Subsection 212.18(2) *requires* the Department of Revenue to "provide by rule and regulation" a specific "method" for paying the taxes set forth in Chapter 212 and to "prepare instructions" for "all persons required by this chapter" to pay taxes. However, since no such rules, regulations or instructions have ever been promulgated, Subsection 212.0505 is unenforceable. The Department of Revenue must be precluded from taxing citizens, and then adding delinquent penalties on top of it, under well established principles of the Florida Administrative Procedure Act, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Florida Constitution.

The Department of Revenue is an administrative agency, governed by the Florida Administrative Procedure Act ("FAPA"). *See* Section 120.52, Florida Statutes. Under FAPA, an administrative agency is required to formally promulgate as a "rule" any requirement which is of "general applicability that implements, interprets or prescribes law, policy, procedure or practice requirements of the agency." Section 120.52(14), Florida Statutes. *Accord Gulfstream Park v. Div. of Pari-Mut. Wagering*, 407 So.2d 263, 265 (Fla. 3d DCA 1981), citing *Department of Revenue v. U.S. Sugar Corp.*, 388 So.2d 586 (Fla. 1st DCA 1980). Indeed, any agency statement which seeks to "require compliance, or otherwise to have the direct and consistent effect of law" is a "rule" requiring formal promulgation under FAPA. *State, Dept. of Admin. Etc., Person, v. Harvey*, 356 So.2d 323, 325 (Fla. 1st DCA 1978), quoting *McDonald v. Dep't of Banking & Fin.*, 346 So.2d 569, 581 (Fla. 1st DCA 1977).

The taxation procedures which the Department contends were violated and upon which it seeks to justify the six figure tax and penalties are plainly "rules" within the meaning of the FAPA. The (non-existent) procedures are meant to be of "general applicability" to all prospective taxpayers who fall within the scope of Section 212.0505 and would be needed to "implement" and "interpret" Subsection 212.0505. However, the Department of Revenue has not promulgated any rules or regulations, despite the separate, express directive to do so in Section 212.18(2). Since there are no rules, regulations, methods or instructions established for paying taxes under Section 212.0505, Section 212.0505 is void and unenforceable as a matter of law. *See Gulfstream Park*, 407 So.2d at 265 (holding that requirement of Division of Pari-Mutual Wagering, Department of Business Regulation, concerning time period for seeking a racing permit was a "rule of general applicability" which had not been promulgated under the FAPA as required and, therefore, "shall not be given effect") (citation omitted); *Florida Department of Offender Rehabilitation v. Walsh*, 352 So.2d 575 (Fla. 1st DCA 1977) (per curiam) (finding that the "Directive" issued by the Florida Department of Offender Rehabilitation was a "rule" within the meaning of FAPA and was, therefore, "void" since it had never been promulgated as such as required by FAPA).

The Department of Revenue's attempt to enforce Section 212.0505 absent any rules, regulations or methods of payment also violates Herre's due process rights. Federal courts recently were faced with a similar problem. Under the Bank Secrecy Act, 31 U.S.C. §§ 5311-5324, Congress requires financial institutions to file currency transaction reports but has delegated to the Department of the Treasury the authority to define the circumstances under which reporting must occur, as well as the manner in which it must occur. Due to this delegation of authority, the United States Supreme Court has held that the Bank Secrecy

Act, standing alone, imposes no duties on the public *until implementing regulations have been properly promulgated*. *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 26, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) ("we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone").

Where the Treasury Department has not followed its Congressional mandate and clearly specified the circumstances under which forms must be filed, courts have held that the statutory reporting requirement is unenforceable. For example, in *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986), the defendant was charged with aiding and abetting a bank's failure to file currency transaction reports ("CTRs") under 31 U.S.C. § 5313(a), conspiring to do so under 18 U.S.C. § 371 and with concealing material information from the IRS in violation of 18 U.S.C. § 1001. Reinis ran a money laundering operation and made a series of "structured" cash deposits at a bank to avoid the CTR filing requirement. Since no regulation prohibited structuring at the time, the government relied upon language in Form 4789. The court rejected the government's argument on the grounds that the form "was never promulgated pursuant to the rule making requirements" of the federal Administrative Procedure Act and reversed Reinis' conviction. 794 F.2d at 508.[19]

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[19] *Accord United States v. Richter*, 610 F. Supp. 480, 489 (N.D. Ill. 1985) (form 4789 deemed an improperly promulgated rule barring prosecution); *United States v. $200,000 In United States Currency*, 590 F. Supp. 866, 873-74 (S.D. Fla. 1984) (finding that Customs form 4790 was an improperly promulgated "rule" and barring civil forfeiture proceedings based thereon). Courts have consistently barred criminal prosecutions under due process principles for lack of notice where the Department of Treasury has failed to promulgate appropriate regulations. *See, e.g.*, *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. St. Michael's Credit Union*, 880 F.2d 579, 593-596 (1st Cir. 1989); *United States v. Bucey*, 876 F.2d 1297 (7th Cir. 1989); *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988); *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

These principles are not unique or limited to litigation under the federal Bank Secrecy Act. In *United States v. Levy*, 553 F.2d 969 (5th Cir. 1976), a defendant was prosecuted for filing a false statement with the IRS in violation of 26 U.S.C. § 7602. IRS agents required Levy to fill out a Form 433-AB and list all his assets. Levy filled out the form but concealed some of his assets. The Fifth Circuit nonetheless reversed Levy's conviction, because there was no statute or regulation authorizing the agents to require Levy to use the Form 433-AB. The Court then held that "an indispensable first step on the road to a felony prosecution, and conviction" for a defendant's failure to properly file a form was the proper *promulgation* of the form through administrative regulations. *Id.* at 974-75.

Absent "validation" by the publication, notice and comment procedures of the Florida Administrative Procedure Act ("FAPA"), 120.52, Florida Statutes, the taxes and penalties imposed under Section 212.0505 cannot stand any more than the prosecution in *Levy*.[20]

Similarly, the United States Supreme Court in *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), recently upheld the Florida Supreme Court's decision to exclude evidence found in a closed container during an inventory search, solely because the Florida Highway Patrol had no "standardized ... procedure" with respect to the opening of closed containers. *See also United States v. Hahn*, 922 F.2d 243 (5th Cir. 1991) (invalidating

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[20] FAPA's notice and comment requirements are not merely technical; rather they are significant requirements designed to assure the quality and responsiveness of agency policymaking. The United States Supreme Court in *Chrysler Corp. v. Brown*, 441 U.S. 281, 303, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), found that the parallel notice and comment requirements of the federal Administrative Procedure Act, 5 U.S.C. § 553 "assure fairness and mature consideration of rules of general application." *See also Chamber of Commerce of the United States v. O.S.H.A.*, 636 F.2d 464, 470 (D.C. Cir. 1980); *American Bus Association v. United States*, 627 F. 2d 525, 528 (D.C. Cir. 1980). "Even seemingly technical or proforma publication requirements must be strictly enforced because these requirements afford an opportunity for exchange of ideas among regulating agencies, regulated citizens, and experts in the field being regulated." *Rivera v. Patino*, 524 F. Supp. 136, 148 (N.D. Cal. 1981).

inventory search by Internal Revenue Service where IRS had never promulgated a standard procedure or guidelines for conducting such a search).[21]

Application of Section 212.0505 to Herre presents similar constitutional problems. Since the Department of Revenue has never promulgated regulations governing the manner and method of payment of taxes, the Department had no authority to require Herre to pay them, much less penalize him for failing to comply with the non-existent regulations.

Before the Third District, the Department erroneously contended that it did not need to promulgate rules and regulations, asserting that the Florida Legislature simply gave it the *discretion* to make rules. The Department's argument was based on a misinterpretation of Section 212.18(2), Florida Statutes. That provision provides in full:

> (2) The department shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. It is authorized to make and publish such rules and regulations not inconsistent with this chapter, as it may deem necessary in enforcing its provision in order that there shall not be collected on the average more than the rate levied herein. The department shall provide by rule and regulation a method for accomplishing this end. It shall prepare instructions to all persons required by this chapter to collect and remit the tax to guide such persons in the proper collection and remission of such tax and to instruct such persons in the practices that may be necessary for the purposes of enforcement of this chapter and the collection of the tax imposed hereby.

The Department contended that the "as it may deem necessary" clause gave it the discretion to *not* implement any rules. However, that clause plainly applies only to the sentence in which it is contained, which directs that the Department ensure "that there shall not be collected on the average more than the rate levied herein." The Department simply ignored the express, mandatory nature of the remainder of Section 212.18(2), which repeatedly uses

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[21] The absence of any inventory search policy by the Monroe County Sheriff's Department, *see* p. 8, n. 11 *supra*, is also one of the many reasons why the search conducted in this case was unconstitutional.

the mandatory term "shall" when directing the Department to promulgate "by rule and regulation" a specific "method" for payment of the tax and "instructions" to "guide" and "instruct" the taxpayer.

Even if Section 212.18(2) could be ignored, the Department has never cited any authority for the proposition that an administrative agency can levy taxes, surcharges and additional "penalties" -- as it has done here -- wholly on its own, without enacting any rules or regulations. If Section 212.0505 is entirely "self-executing," as the Department claimed before the Third District, it is blatantly unconstitutional, since it permits the Department to act arbitrarily and at its whim.

II. APPLICATION OF SECTION 212.0505 TO HERRE VIOLATES HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST BEING TWICE PLACE IN JEOPARDY FOR THE SAME OFFENSE

Under the circumstances of this case, application of Section 212.0505 would also violate Herre's Fifth and Fourteenth Amendment rights against being twice placed in jeopardy. *See In Re: Kurth Ranch,* 986 F.2d 1308 (9th Cir. 1993) (holding Montana's drug tax unconstitutional under the Double Jeopardy Clause of the Fifth Amendment). In 1988, Herre pleaded nole contendere to attempted trafficking in the same marijuana at issue herein and was sentenced and fined. Only afterwards did the Department of Revenue seek to impose the additional $236.250.00 "tax" under Section 212.0505.

A statute need not be labeled criminal to constitute "punishment" for double jeopardy purposes. "It is the effect, not the form of the law" which determines whether the double jeopardy or *ex post facto* provisions of the Constitution apply. *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981). As the Court recognized in *Cummings v.*

Missouri, 4 Wall. 277, 325-26, 18 L.Ed.2d 356 (1867), in discussing the retroactive application of "criminal" laws:

> The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.

4 Wall at 325. *See also Austin v. United States*, No. 92-6073 (U.S. April 20, 1993), 7 Fla. L. Weekly Fed. S572, at S574 (civil forfeitures deemed sufficiently punitive to be limited by Excessive Fines Clause of the Eighth Amendment); *Beazell v. Ohio*, 269 U.S. 167, 170, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (the *ex post facto* provision is addressed to laws "whatever their form" which increase punishment); *Burgess v. Salmon*, 97 U.S. (7 Otto) 381, 384, 24 L.Ed. 1104 (1878) (ostensibly civil tobacco tax could not be retroactively applied, despite its civil label); *Ex Parte Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867) (a law that barred lawyers from practicing unless they professed an oath of loyalty found to be unconstitutionally *ex post facto*). *See generally Hicks v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 1429, 99 L.Ed.2d 721 (1988) ("the labels affixed either to the proceeding or to the relief imposed ... are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law").

Hence, if a law on its face is "civil" that does not end a Court's inquiry into whether the imposition of its sanctions would violate the double jeopardy clause or constitute an ex post facto violation. A Court must determine whether its true purpose is to punish.

The Supreme Court in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989), explained how and to what degree a civil statute's purposes render it "punitive." In *Halper*, the manager of a medical laboratory that provided medical service to patients eligible for benefits under Medicare was convicted of submitting false claims for

federal reimbursement, in violation of the criminal false claims statute, 18 U.S.C. § 287. On 65 occasions Halper had requested reimbursement of $12 per claim when in fact his company was entitled to only $3 per claim, thereby defrauding the government of $585. He was fined and sentenced to two years of imprisonment. 490 U.S. at 437. Following his conviction, the government brought a civil action against him under the False Claims Act. *See* 31 U.S.C. § 3729. That Act provided for a civil penalty of $2,000 per claim, "an amount equal to 2 times the amount of damages the Government sustains, because of the act of that person and costs of the civil action." Harper's $585 fraud would thus have resulted in a recovery by the government of more than $130,000. 490 U.S. at 438.

The district court held that Halper's "civil" penalty violated the Double Jeopardy Clause of the Fifth Amendment and the United States Supreme Court unanimously agreed. While acknowledging that the government can often pursue both criminal and civil sanctions for the same underlying conduct, the *Halper* Court announced "a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449.

The Court expressly rejected the contention that the civil label controlled. As the Court explained: "The notion of punishment, as we commonly understand it, cuts across the division between civil and criminal law.... Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* at 1902-03. The goals of "punishment," the *Halper* Court further explained, were retribution and deterrence, neither of which were legitimate, non-punitive governmental objectives. *Id.* at 1902 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20, 99 S.Ct. 1861, 1874, n. 20, 60 L.Ed.2d 447 (1979)). The Court thus held that "a civil sanction

that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as *also serving* either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 1902 (emphasis added).

The new rule focuses on two factors. *First*, if the express purposes of a statute are not "solely" remedial, then the Double Jeopardy Clause will apply. *See also Austin v. United States*, No. 92-6073 (U.S. April 20, 1993), 7 Fla. L. Weekly Fed. S572, at S574 (although civil forfeitures serve "remedial purposes," they are also punitive and, therefore, subject to limitations under the Excessive Fines Clause of the Eighth Amendment). *Second*, in the absence of express language indicating a legislative purposes, if the civil sanction is so disproportionate that it "crosses the line between remedy and punishment," the clause is implicated. Applying this rule, the Supreme Court remanded the case to the district court to permit the government to present an accounting of its damages and costs. *See also United States v. Hall*, 730 F. Supp. 646, 655-56 (M.D. Pa. 1990) (government's attempt to impose disproportionate civil penalty on defendant who had pled guilty to charge of transporting negotiable instruments out of the country without filing currency reports, in violation of 31 U.S.C. §§ 5316(b) and 5322(b), violated double jeopardy).

Thus, under *Halper*, this Court must look at the sanctions imposed by Section 212.0505 as applied in this case to determine whether they serve "solely" a remedial purpose. If the sanctions are not "solely" remedial but "also" serve retributive or deterrent purposes, then the Double Jeopardy Clause of the Fifth Amendment prevents their application. An examination of Section 212.0505 demonstrates that the sanction was meant to punish, at least in part. Hence, the Double Jeopardy Clause applies and the "tax" in this case is unconstitutional. This is so, for two reasons.

First, under the circumstances of this case, the tax is just as disproportionate as the one in *Halper*. The Department of Revenue has stipulated that the State's cost of prosecuting Herre was only *$117*. *See* p. 4 *supra*. Yet, the State not only confiscated the contraband seized but "taxed" Herre at total of *$236,250.00* -- or more than *2,000 times* the State's costs.[22]

Second, the tax *only* applies to those who deal "unlawfully" in cannabis or controlled substances. Since the purportedly civil "tax" is inextricably linked to the criminal activity, the tax itself must be deemed to have been motivated, at least in part, by punitive purposes.

An analogous situation occurred in *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). In that case, the Court found that a law barring Communist party members from offices in labor unions was punitive and constituted an impermissible bill of attainder. The element of punishment was found in the fact that "the purpose of the Statute before us is to purge the governing boards of labor unions of those whom Congress regards *as guilty of subversive acts and associations* and therefore unfit to fill [union] positions...." 381 U.S. at 460 (emphasis added). The Solicitor General in *Brown* had argued that the statute did not constitute punishment in that it was enacted for preventive rather than punitive reasons. 381 U.S. at 456-7. The Court disagreed, finding that:

> [i]t would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes; retributive, rehabilitative, deterrent -- and preventive. One of the reasons society imprisons those convicted of

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[22] In *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), the Supreme Court upheld the constitutionality of civil penalties of 50 percent for evading income taxes. The Court viewed the excessive sanction as remedial, in part, because it was intended to "reimburse the Government for the heavy expense of investigation and the loss resulting form the taxpayer's fraud." 303 U.S. at 401, 58 S.Ct. at 634. In sharp contrast, the cost of investigation in this case was tiny in proportion to the amount of the "tax" levied.

> crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment.

381 U.S. at 458. *See also Austin v. United States*, No. 92-6073 (U.S. April 20, 1993), 7 Fla. L. Weekly Fed. S572, at S577 (civil forfeitures deemed punitive, in part, because "Congress has chosen to tie forfeiture directly to the commission of drug offenses").

Section 212.0505 must be considered punitive under *Brown*, because it too is aimed solely against those who the Florida legislature views as "guilty" of illegal behavior -- the "unlawful" trafficking in drugs. Hence, the "tax" serves retributive purposes and seeks to deter future "unlawful" behavior by the degree of taxation.

That the "tax" imposed by Section 212.0505 must be considered "punishment" is also supported by a review of United States Supreme Court cases construing, in a number of different contexts, whether a tax is, in fact, a penalty. In *Lipke v. Lederer*, 259 U.S. 557, 66 L.E.2d 1061, 42 S.Ct. 549 (1922), the Court reviewed a federal prohibition era statute which made the manufacture and sale of liquor illegal *and* imposed a tax on the "'illegal manufacture [and] sale'" of liquor. The Court considered this "tax" to, in fact, constitute a penalty:

> The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. [Citation omitted.] When by its very nature and imposition it is a penalty, it must be so regarded. [Citation omitted.] *Evidence of crime ... is essential to assessment ... [of the tax].* It lacks all the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government" and clearly involves the idea of punishment for infraction of the law -- the definite function of a penalty.

Lipke, 259 U.S. at 561-62 (emphasis added).

As with the liquor "tax" at issue in *Lipke*, "[e]vidence of crime ... is essential to assessment" of the tax created by Section 212.0505. Only "unlawful" transactions in cannabis

and controlled substances are subject to the "tax." It, too, "lacks all the ordinary characteristics of a tax."

Before the Third District Court of Appeal, the Department of Revenue ignored *Lipke* and, instead, relied upon *United States v. Sanchez*, 340 U.S. 42, 71 S.Ct. 108, 95 L.E.2d 47 (1950). *See also Harris v. State, Dept. of Revenue*, 563 So.2d at 99 (finding *Sanchez* controlling in construing Section 212.0505). In *Sanchez*, the Supreme Court temporarily upheld the constitutionality of the Marijuana Tax Act.[23] As noted in *Sanchez*, in enacting the Act, Congress expressly had two objectives -- to raise revenue *and* to "'render extremely difficult the acquisition of marijuana by persons who desire it for illicit uses.'" 340 U.S. at 43, 71 S.Ct. at 109 (citing legislative history). *See also id.* at 44, 71 S.Ct. at 110 (noting "the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels"). Accordingly, under the Supreme Court's decision in *Halper*, the Marijuana Tax Act would be subject to the Double Jeopardy Clause since it was not enacted "solely" for regulatory purposes.

Moreover, the Supreme Court in *Sanchez* distinguished *Lipke*, because the Marijuana Tax Act was "*not* conditioned upon the commission of a crime." 340 U.S. at 45, 71 S.Ct. at 110. "Since [the taxpayer's] tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction." *Id.* Like the tax in Lipke, Section 212.0505 is expressly conditioned on the commission of criminal conduct -- the "unlawful" sale, use, manufacture, etc. of cannabis. Therefore, it is more analogous to the defective statute in *Lipke* than to the Marijuana Tax Act at issue in *Sanchez*.

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[23] As discussed in Section I(B) *supra*, the Act was eventually declared unconstitutional by the United States Supreme Court in *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

In *In Re: Kurth Ranch,* 986 F.2d 1308 (9th Cir. 1993), the Ninth Circuit struck down a similar drug tax enacted by the Montana legislature as unconstitutional under the Double Jeopardy Clause of the Fifth Amendment. Despite its "civil tax" label, the court found the $100 an ounce tax on marijuana to be punitive. The court further found that the state failed to meet *its* burden of establishing, if it could, that the tax accurately reflected its "costs and expenses." 986 F.2d at 1312. The court refused to take "judicial notice" of the allegedly "staggering costs associated with fighting drug abuse in this country." *Id.* As previously noted, in the instant case the Department actually stipulated to its actual costs and never, before reaching the Third District, even attempted to justify the "tax" based on alleged societal "costs."

Section 212.0505 was plainly enacted, at least in part, for punitive purposes. Accordingly, its application to Herre violated his Fifth and Fourteenth Amendment rights against being twice placed in jeopardy.

III. THE TAX ASSESSMENT MUST BE VACATED, BECAUSE ALL EVIDENCE FROM THE ILLEGAL SEIZURE AND ITS FRUITS SHOULD NOT HAVE BEEN CONSIDERED UNDER THE EXCLUSIONARY RULE

The language of the Fourth Amendment draws no distinction between civil and criminal proceedings. It simply states that:

> The right of the people to be secure in their persons , houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Accordingly, the amendment's restrictions have repeatedly been held applicable to governmental intrusions of personal privacy or liberty outside of the narrow area of criminal investigation.[24]

In recent years, the Court has emphasized that the primary remedy for Fourth Amendment violations should be limited to situations where its deterrent purposes will be served.[25] Nonetheless, as in the double jeopardy context, the label of the proceeding is not determinative of whether the exclusionary rule applies. Thus, for example, the Supreme Court has held that the exclusionary rule applies to civil proceedings under the Occupational Safety and Health Act, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), and to civil forfeiture proceedings, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965).

In *One 1958 Plymouth Sedan*, Pennsylvania police stopped and searched a car, finding in the trunk thirty-one cases of liquor not bearing Pennsylvania tax seals. Pursuant to statute, the State filed a petition for forfeiture of the automobile. At the hearing, the owner of the car sought dismissal on the ground that the forfeiture of the automobile depended

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[24] *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 270. 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); *United States v. Biswell*, 406 U.S. 311, 316-17, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); *Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971); *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[25] *See, e.g., United States v. Peltier*, 422 U.S. 531, 536-39, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975) (noting that in applying the exclusionary rule to unconstitutionally seized evidence, the Court has relied principally upon the exclusionary rule's deterrent purposes); *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (characterizing the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1070 (11th Cir. 1982) ("the primary function of an exclusionary sanction is to deter unlawful conduct").

upon the admission of evidence that police obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. The Pennsylvania Supreme Court rejected this objection and held that the exclusionary rule was inapplicable. The Supreme Court reversed.

Noting that the object of a forfeiture proceeding is "to penalize for the commission of an offense against the law," the Court characterized the proceeding as "quasi-criminal" in nature. *Plymouth Sedan*, 380 U.S. at 700. In reaching this conclusion, the Court focused on the substantial penalty which the forfeiture proceeding imposed on the defendant: forfeiture of a car valued at approximately one thousand dollars. Given the fact the defendant could have received a less severe penalty, a fine that could not exceed five hundred dollars, for the criminal conviction for the same offense, the Court reasoned that the exclusionary rule should apply.

> It would be anomalous indeed, under the circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, *requiring the determination that the criminal law has been violated*, the same evidence would be admissible.

Id. at 701 (emphasis added).

The same "anomalous" situation would occur here if the exclusionary rule did not apply. The vehicle Herre was driving was searched and he was arrested by State criminal law enforcement officers investigating criminal conduct. Indeed, following his arrest, Herre was successfully prosecuted, imprisoned and fined. Following his conviction, the State sought to impose an even greater "fine" using Section 212.0505 -- a statute expressly "requiring the determination that the criminal law has been violated." In each situation, the proof of a criminal violation in a noncriminal proceeding brings on the imposition of a related, but noncriminal sanction. In *Plymouth Sedan*, proof that the defendant illegally

transported liquor in his car resulted in the forfeiture of the vehicle involved in that transportation. In the instant case, proof that Herre committed an "unlawful" drug offense resulted in the imposition of a "tax" based upon that "unlawful" behavior.

The Department of Revenue nonetheless contends that the exclusionary rule does not apply to proceedings under Section 212.0505, relying principally upon *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). However, the Department's reliance upon *Janis* is misplaced.

In *Janis*, the Supreme Court refused to extend the exclusionary rule to a federal civil tax proceeding where evidence was illegally obtained by *state* authorities. In that case, the Los Angeles police seized $4,940.00 in cash and gambling paraphernalia from Janis pursuant to an invalid search warrant. *Janis*, 428 U.S. at 436-38. Although the Fourth Amendment prohibited the State and the federal government from using the evidence in criminal trials, *id.* at 458, the Internal Revenue Service brought a civil action in federal court for unpaid taxes from Janis' undeclared income. The federal government based its claim on the gambling records and other evidence that local police illegally seized. *Id.* at 437.

The district and circuit courts held in favor of Janis on the ground that the evidence had been illegally obtained. *Id.* at 439. The Supreme Court, however, reversed and held "that the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement of another sovereign." *Id.* at 459-60. In reaching this conclusion, the Court explained that the deterrent function of the exclusionary rule would not be served in intersovereign situations:

> Working, as we must, with the absence of convincing empirical data, common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the "punishment" imposed upon the offending criminal enforcement officer is the removal of that evidence from

> a civil suit *by or against a different sovereign*. In *Elkins*, the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counter-balanced this attenuation sufficiently to justify an exclusionary rule. Here, however, the attenuation is further augmented by the fact that the proceeding is one to enforce only the civil law of the other sovereign.

Id. at 457-58 (footnote omitted; emphasis added). In a footnote, the Court continued that if Janis had proved federal participation or involvement in the illegal search and seizure by State officials, the outcome may have been otherwise:

> As stated above... we decide the present case on the assumption that no such agreement or arrangement existed. Respondent remains free on remand to attempt to prove that there was federal participation in fact. If he succeeds in that proof, he raises the question, not presented by this case, whether the exclusionary rule is to be applied in a civil proceeding involving an intrasovereign violation.

Id. at 455-56, n. 31.

Instead of being controlled by the holding of *Janis*, the instant case presents the situation expressly reserved by *Janis*: Whether the deterrent purposes of the exclusionary rule are met in an entirely *intra* sovereign tax proceeding. *See Savina Home Industries v. Secretary of Labor*, 594 F.2d 1358, 1362 n. 5 (10th Cir. 1979) ("[o]f course, this rationale [in *Janis*] does not bar invocation of the rule in cases of 'intrasovereign' violations'"), citing *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.) (records seized by IRS agent, participating in joint investigation of narcotics trafficking for purposes of criminal prosecution for tax evasion, also suppressed in subsequent civil proceeding for assessments and fraud penalties), *cert. denied*, 396 U.S. 986, 90 S.Ct. 481, 24 L.Ed.2d 450 (1969); *Vander Linden v. United States*, 502 F. Supp. 693, 697 (S.D. Iowa 1980) ("the 'deterrent effect' in an 'intrasovereign' situation would be furthered by excluding illegally obtained evidence in subsequent civil trial proceedings"); *Lassoff v. Gray*, 207 F. Supp. 843, 846-49 (W.D. Ky. 1962) (civil tax assess-

ment held invalid when based solely on evidence illegally seized by IRS); *United States v. Modes, Inc. and Budhrani*, 787 F. Supp. 1466, 1471 (C.I.T. 1992) (applying exclusionary rule to civil customs proceeding, because "this case, unlike *Janis*, involves an intrasovereign constitutional violation") (collecting cases). *Contra Harris v. State, Dept. of Revenue*, 563 So.2d at 100 (construing *Janis* as precluding use of exclusionary rule in all civil tax proceedings).[26]

The chief purpose the exclusionary rule, "is to deter future unlawful police conduct." *Janis*, 428 U.S. at 446 (citing *Calandra*). "In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred," *id.* at 448, those whose "conduct ... is to be controlled." *Ibid*. In the instant case, it is the state police officers themselves whose conduct needs to be deterred. It would be anomalous indeed, if State law enforcement officials could use their awesome police powers along the highways of this State to stop vehicles illegally at their whim. While they could not criminally prosecute any drug couriers ensnared in such a dragnet fashion, if the exclusionary rule did not apply, they could simply use the drug "tax" to impose exorbitant "civil" penalties. Such aberrant police behavior is the very sort the exclusionary rule was meant to deter. Moreover, since the legality of the search was not addressed in the parallel criminal proceeding, application of the exclusionary rule would have substantial deterrent value. *See Pullin v. Louisiana State Racing Commission*, 484 So. 2d 105 (La. 1986). For the same reason, the cost of applying the

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[26] The Supreme Court in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), also belies the Department's broad reading of *Janis*. In *G.M. Leasing* the Court stated that there was no support for the proposition that "the warrant protections of the Fourth Amendment do not apply to invasions of privacy in furtherance of tax collection." 429 U.S. at 356, 97 S.Ct. at 630. Indeed, the Court noted that "one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes...." *Id.* at 355, 97 S.Ct. at 630.

deterrent sanction of the rule will be negligible under the circumstances of this case. The rule is *meant* to deter illegal police actions.[27]

Since the exclusionary rule applies in this case, the Court must vacate the tax assessment in its entirety. The search was conducted, as Deputy Emral conceded, without probable cause to believe any crime occurred.[28] Without evidence of the seized marijuana, the tax assessment has no factual basis whatsoever.

IV. THE TAX ASSESSMENT MUST BE VACATED, BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT HERRE WAS ENGAGED IN UNLAWFUL TRAFFICKING IN MARIJUANA

Under Florida law, an individual will be deemed to have actual possession of contraband where he has "physical possession" of it and "knowledge of such physical possession." *Torres v. State*, 520 So. 2d 78, 79 (Fla. 3d DCA 1988), quoting *Hively v. State*, 336 So. 2d 127, 129 (Fla. 4th DCA 1976). If the individual does not have physical possession of contraband, he can be found guilty of "constructively" possessing it where two criteria are met. *First*, he must "know ... of its presence on or about his premises" and, *second*, he must have "the ability to maintain control over said controlled substances." *Brown v. State*, 428 So. 2d 250

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[27] The only intrasovereign civil case decided by the Supreme Court since *Janis* is *Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). After balancing the interests at stake, the Supreme Court declined to apply the exclusionary rule. It did so, in part, because the INS had "its own comprehensive scheme for deterring Fourth Amendment violations by its officers," including rules "restricting stop, interrogation, and arrest practices...." 104 S.Ct. at 3487-88. The Department of Revenue has no such internal procedures which would substitute for the deterrent value of the exclusionary rule.

[28] The Department of Revenue did not seriously contest the illegality of the search in the proceedings below. And, the Final Order indicated that Herre "was not suspected of a crime" prior to the search. *See* p. 8, n. 10 *supra*. Therefore, we do not present an extended discussion concerning the illegality of the search.

(Fla.), *cert. denied*, 463 U.S. 1209, 103 S.Ct. 3541, 77 L.Ed.2d 1391 (1983). *Accord Torres*, 520 So. 2d at 79.

To establish constructive possession, the State, in turn, must establish three elements. *First*, the individual must have dominion and control over the contraband. *Second*, the individual must know of the presence of the contraband. *Third*, the individual must be aware of its illegal nature. *Brown*, 428 So. 2d at 252; *Herrera v. State*, 532 So. 2d 54, 58 (Fla. 3d DCA 1988); *Williams v. State*, 529 So. 2d 345, 347 (Fla. 1st DCA 1988); Torres, 520 So. 2d at 80; *Kuhn v. State*, 439 So. 2d 291 (Fla. 3d DCA 1983).

Where the individual is the sole owner of property or a vehicle in which contraband is found, knowledge properly may be inferred from that fact alone. *See Devine v. State*, 504 So. 2d 788, 789 (Fla. 3d DCA 1987) (citations omitted). However, where, as here, the individual is *not* in *exclusive* possession or control of the property, "knowledge of the contraband's presence and the ability to control it will not be inferred." *Torres*, 520 So. 2d at 80 (citations omitted). *Accord Herrera v. State*, 532 So. 2d 58; *Williams v. State*, 529 So. 2d at 347. Rather, the State must establish both the individual's knowledge of the contraband and his control over it by "independent proof." *Herrera v. State*, 532 So. 2d at 58; *Williams v. State*, 529 So. 2d at 347; *Torres*, 520 So. 2d at 80. These rules hold true even where the contraband is in plain view. *Torres*, 520 So. 2d at 80; *Johnson v. State*, 456 So. 2d 923, 924 (Fla. 3d DCA 1984). "Mere proximity to contraband, without more, is legally insufficient to prove possession." *Torres*, 520 So. 2d at 80 (citations omitted).

The Department of Revenue failed to meet its burden of establishing a sufficient factual basis to conclude that Herre had sole dominion and control over the marijuana. The entire rationale behind the "inventory search" was the assumption that Mr. Lee existed and

was the true renter of the vehicle being driven by Herre. Although the officers were suspicious of Herre based upon the tip, by their own conduct and admissions they did not even have probable cause to arrest Herre, much less proof sufficient to meet the Department of Revenue's burden of persuasion under Section 212.0505.[29] No drugs were visibly present, and Herre made no incriminatory statements.

Courts have reversed criminal convictions based upon considerably *more* evidence of these elements than were present in this case. For example, in *Hively v. State*, 336 So. 2d 127 (Fla. 4th DCA 1976), Hively borrowed an automobile to drive the co-defendant home. Two Orange County sheriff deputies observed the co-defendant smoking something, possibly marijuana, inside the automobile. When the deputies stopped the vehicle, they smelled marijuana and found a pipe on the console between the front bucket seats and a bag of marijuana on the floor in front of the driver's (Hively's) seat. A further search of the vehicle produced two marijuana cigarette butts and a "roach clip." The court reversed Hively's conviction for insufficient evidence of constructive possession. Despite the obvious and open presence of marijuana in the car, the critical fact in the case was that Hively -- like Herre herein -- did not own the car.

In criminal cases, courts have consistently found legally insufficient evidence of constructive possession under similar circumstances. *See, e.g.*, *Johnson v. State*, 456 So. 2d

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[29] At best, Deputy Emral had merely reasonable suspicion to conduct an investigation. *See generally Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (an anonymous tip corroborated only as to as to innocuous details at most gives rise to reasonable suspicion and not probable cause); *United States v. Campbell*, 920 F.2d 793 (11th Cir. 1991) (same); *United States v. Solomon*, 728 F. Supp. 1544 (S.D. Fla. 1990) (same). *Cf. McCarthy v. State*, 536 So.2d 1196 (Fla. 4th DCA 1989) (anonymous tip that house was a "dope house" combined with observations that after car arrived in parking lot, men emerged and went inside briefly and subsequent furtive gestures upon approach by police did not supply founded suspicion to justify stop of men).

923, 924 (Fla. 3d DCA 1984) (defendant did not live in apartment where contraband found and accordingly he did not have dominion and control of it); *Kuhn v. State*, 439 So. 2d 291 (Fla. 3d DCA 1983) (individual found sitting in the cab of a pickup truck which held eleven bales of marijuana in plain view, not dominion and control); *Metzger v. State*, 395 So. 2d 1259 (Fla. 3d DCA 1981) (no constructive possession by guest who may not have been aware of contraband). *See also Williams v. State*, 529 So. 2d 1234, 1235 (Fla. 1st DCA 1988) (no constructive possession, in part, because contraband "was concealed within a container underneath a couch"); *Green v. State*, 460 So. 2d 986 (Fla. 4th DCA 1984) (presence in room with cocaine in plain view, coupled with knowledge of the illegal nature of substance insufficient to sustain conviction absent evidence of dominion and control); *Taylor v. State*, 319 So. 2d 114 (Fla. 2d DCA 1975) (marijuana in plain view, but defendant-guest had no control over premises).

The Department of Revenue's evidence was insufficient as to the knowledge element as well. In *Rita v. State*, 470 So. 2d 80 (Fla. 1st DCA 1985), the State received information that drugs were going to be off-loaded and driven away in a white refrigerated truck. They found the boat, which contained marijuana residue. Later, they located the truck being driven by the defendant. When the truck was stopped, the odor of marijuana was strong. When the truck was searched, 3500 pounds of marijuana were found in the locked rear cargo compartment. Rita had no key that would unlock the rear compartment, and there were no windows or other openings between the cab and cargo compartment that would permit access to or physical observation of the materials inside. 470 So. 2d at 84-85. The defendant told the police he had been told by an unidentified man to drive the truck from a bar in South Dade County to a "parking lot." *Id*. at 85.

Based upon these facts, Rita's probation was revoked from a prior offense in Suwannee County. He was also substantively charged in Dade County with constructive possession of the marijuana. However, the substantive charges were dismissed at the trial level. The First District reversed the probation revocation, holding that there was insufficient evidence of constructive possession despite the odor of marijuana and his statement of "suspect and questionable credibility." *Id.* at 86. The Third District affirmed the dismissal of the charges. *See State v. Rita*, 451 So. 2d 894 (Fla. 3d DCA), *rev. denied*, 459 So. 2d 1041 (Fla. 1984).

In the instant case, there was no telltale odor. Nor was there any obvious secret compartment to alert Herre that something was amiss. There was no evidence that Herre knew the drugs were in the vehicle. *See also Torres v. State*, 520 So. 2d 78 (Fla. 3d DCA 1988) (no inference of knowledge permitted, in part, where marijuana "secreted deep within the hull" of ship and no detectable odor). Herre did not make any statements of "suspect and questionable credibility." Under these circumstances, the Department of Revenue was entitled to no inference that Herre knew the marijuana was secreted in the trunk or the bags.[30]

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[30] Florida courts place a heavy burden on the State before inferences of guilty knowledge are permitted. *See, e.g.*, *Smith v. State*, 279 So. 2d 27 (Fla. 1973) (rejecting inference that husband knew of illegal drugs secreted in wife's jewelry box in bedroom); *Williams v. State*, 529 So. 2d 1234, 1235 (Fla. 1st DCA 1988) (reversing appellant's conviction for constructive possession of drugs found in box under a couch in den and occupied by another occupant); *Cortez v. State*, 488 So. 2d 163 (Fla. 1st DCA 1986) (reversing trafficking conviction for insufficient evidence of husband's constructive possession of marijuana where marijuana found in box in plain view near wife's bed and in closet shelf of their children's bedroom); *Gaynus v. State*, 380 So. 2d 1174 (Fla. 4th DCA 1980) (insufficient evidence that joint occupant of residence possessed drugs found in one of the bedroom closets); *Brownlee v. State*, 354 So. 2d 120 (Fla. 3d DCA 1978) (fact that defendant admitted that a bedroom was "his room" deemed legally insufficient to show knowledge of drugs (continued...)

Indeed, courts have reversed convictions based upon significantly more evidence. For example in *A.S. v. State*, 460 So. 2d 564 (Fla. 3d DCA 1984), the defendant was charged with constructive possession of cocaine found hidden inside a roll of toilet tissue in the glove compartment of the defendant's sister's car which the defendant was driving. There is no indication in the opinion that the sister was in the car at the time the defendant was stopped. The defendant was concerned with the search of the car and upset that the drugs were discovered. The Third District found this evidence insufficient to sustain the conviction.

More recently, the court reversed a criminal conviction of one of the defendant's in *Harris v. State*, 501 So. 2d 735 (Fla. 3d DCA 1987). In that case, an informant and four others drove in a truck to a hotel to sell cocaine to undercover detectives. Upon reaching the hotel, the informant and everyone in the truck except Harris went to the detectives' room. Harris waited in the hotel lobby. After the cocaine sale was completed in the room, everyone was arrested. Upon his arrest, Harris expressly indicated knowledge of the cocaine, stating "that he was only along for the ride, he'd never touched the cocaine, he only drove it down." 501 So. 2d at 735. The court still reversed, stating that the evidence was, in fact, "woefully inadequate to establish [Harris' guilt]." *Id.* The court had "no difficulty" ruling that he did not have constructive possession of the cocaine. *Id.* at 736.

Other courts in Florida are equally strict. For example, in *Pena v. State*, 465 So. 2d 1386 (Fla. 2d DCA 1985), undercover police officers arranged to purchase cocaine from two

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[30](...continued)
therein when room also occupied by another person); *M.W.W. v. State*, 389 So. 2d 1240, 1242 (Fla. 3d DCA 1980) (reversing defendant's conviction for constructive possession of drugs found in bedroom jointly shared with his brother).

drug dealers, Evans and Marques. The State introduced evidence of Pena's association with Evans and Marques prior to the deal. Pena drove with Evans and Marques to a parking lot where the deal was consummated in his presence. Indeed, when the undercover officers approached the car and asked whether the cocaine was there, all three defendants *including* Pena nodded affirmatively. A subsequent search of the car revealed a box of cocaine in the truck and a bag of cocaine on the rear floorboard near where Pena was sitting. At trial, Pena disclaimed knowledge and stated he did not understand English. The court reversed Pena's conviction, holding that "[r]egardless of one's suspicions, the above evidence was insufficient as a matter of law to prove Pena knowingly sold or delivered the cocaine or was knowingly in actual or constructive possession of the drug." 465 So. 2d at 1388.

In *Doby v. State*, 352 So. 2d 1236 (Fla. 1st DCA 1978), the defendant was an inmate at Union Correctional Institute. He was convicted of smuggling marijuana into the prison. Following a furlough, his wheel chair was searched and marijuana found inside. Despite the fact that it was his own wheel chair, the court reversed, because other people may have had access to the wheel chair during his furlough.

In *Corson v. State*, 527 So. 2d 928 (Fla. 5th DCA 1988), undercover agents staked out a known "crack" selling area. Corson drove up to a parking lot along with two passengers. One of the agents approached and asked what they wanted. One of the passengers said cocaine, and the agent sold him some. As the agents closed in to make the arrests, the passenger threw away the cocaine. The court reversed Corson's conviction, holding that he

never had constructive possession of the cocaine, despite the fact that Corson had control of the vehicle.[31]

The facts of the instant case do not come close to passing muster under the foregoing precedent. There is simply no evidence that Herre owned the marijuana or the vehicle or knew the marijuana was in the vehicle. The Department of Revenue made no effort to locate Mr. Lee, the registered renter of the vehicle, or, alternatively, prove that the name was fictitious. *See Johnson v. State*, 456 So. 2d at 924 n. 2 (noting State's failure "to find out who owned the apartment where the drugs were found").

While the Court may be obliged to view the stipulated record in a light most favorable to the Department of Revenue, the Court must reject "leaping assumptions" not *reasonably* drawn from the evidence. *United States v. Covelli*, 738 F.2d 847, 860 (7th Cir.), *cert. denied*, 469 U.S. 847, 105 S.Ct. 211, 83 L.E.2d 141 (1984). Similarly, the rule that permits factfinders to reach verdicts based upon circumstantial evidence is not a "license to let their imaginations run rampant," *United States v. Mora*, 598 F.2d 682, 684 (5th Cir. 1979), or to "pil[e] inference upon inference," *Direct Sales Co. v. United States*, 319 U.S. 703, 711, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943). *Accord Torres v. State*, 520 So. 2d at 80 ("[i]t would be impermissible to allow the state to meet its burden through a succession of inferences that

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[31] Cases involving similar facts and similar results are legion. *See, e.g.*, *Mishmas v. State*, 423 So. 2d 446 (Fla. 1st DCA 1983) (reversing conviction of driver of truck containing marijuana wrapped in plastic, despite the fact that odor obvious); *Shad v. State*, 394 So. 2d 1114 (Fla. 1st DCA 1981) (reversing conviction of passenger of truck containing bales of marijuana, despite the fact that defendant's cloths were on top of bales which smelled); *Manning v. State*, 355 So. 2d 166 (Fla. 4th DCA 1978) (reversing conviction for constructive possession where the defendant was in the driver's seat of jointly occupied vehicle in which drugs were found).

required a pyramiding of assumptions in order to arrive at the conclusion necessary for a conviction").

In the stark absence of any evidentiary foundation, the Department of Revenue erred in ruling that Herre was "engaged" in marijuana trafficking.

CONCLUSION

For all of the foregoing reasons, the Court must vacate the jeopardy assessment and declare Section 212.0505 unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief was mailed this 23rd day of July, 1993, to Lee R. Rohe, Assistant Attorney General, Office of the Attorney General, The Capitol, Tax Section, Tallahassee, FL 32399-1050.

G. RICHARD STRAFER

APPENDIX

2. FORMS [§§ 39:35–39:55]

§ 39:35. Form of application for certificate of registration

State of Florida
DEPARTMENT OF REVENUE

Application for
Certificate of Registration

To Engage in or Conduct Business as a Dealer, in State or Non-Resident, involving Sales and Use Tax.

INSTRUCTIONS ON REVERSE SIDE

DO NOT WRITE IN THIS SPACE

Certificate No. ☐☐ ☐☐ ☐☐☐☐☐☐ ☐☐

Bond: Type _____ Amount _____ M ☐ Q ☐ S ☐ A ☐

Amount Fee Paid _____, M. C. ☐☐☐☐, Issuing ☐ Address Code ☐

S. I. C. ☐☐☐☐

1. Business Name _____

2. Owner's Name _____
(NAME OF OWNER-INDIVIDUAL, CORPORATION, PARTNER)

3. Business Location: Street _____
(LOCATION OF BUSINESS OR REAL PROPERTY)

City _____ State _____ Zip Code _____

County _____ (Within city limits? Yes ☐, No ☐) Bus. Telephone _____
(AREA CODE) (PHONE NUMBER)

4. Date business and sales actually commenced Mo. _____ Da. _____ Yr. _____

5. Enter the Federal Employer Identification Number of the Business or the Social Security Number of the owner when no F. E. I. No.

F. E. I. ☐☐ ☐☐☐☐☐☐☐ S. S. N. ☐☐☐ ☐☐ ☐☐☐☐

6. MAILING ADDRESS: (If other than 3 above) Name _____

Street or P. O. Box _____

City _____ County _____ State _____ Zip Code _____

7. Indicate Whether CORPORATION ☐ PARTNERSHIP ☐ INDIVIDUAL PROPRIETORSHIP ☐

Full name of individual owner, partners or officers	Home Telephone	Home Address	Corporate Office or Interest in Partnership

8. Kind of Business: _____ Number of Locations registered with Florida _____
(Grocery, hardware, jewelry, drug, department store, garage, lumber and building materials, hotel, apartment house, rooming house, motor court, restaurant, theatre, realty rentals, public and private utilities sales, etc. If combination specify such as filling station and cafe, hotel and restaurant, etc.)

9. Do you sell at: (check one only) Retail ☐, Wholesale ☐, Both ☐ Rentals ☐

10. If corporation, give state in which incorporated _____ and individual designated to accept service in Florida: _____

11. Do you own business location, Yes ☐, No ☐. If answer is "No" give name and address of building owner. _____

12. If applicant was previously registered as a dealer in Florida, give trade name and address of former business. _____

13. If this application results from a CHANGE IN OWNERSHIP, or TYPE OF BUSINESS ORGANIZATION, Enter:

Former Owners or Trade Name _____ Telephone _____
(AREA CODE) (PHONE NUMBER)

ADDRESS _____ CITY _____

STATE _____ ZIP CODE _____ OLD CERTIFICATE NUMBER _____

14. Check reason for filling out this form: (check one only) NEW BUSINESS ☐, or CHANGE OF OWNERSHIP ☐, or CHANGE OF LEGAL ENTITY ☐, or CHANGE OF LOCATION (different county) ☐.

IMPORTANT – ALL INFORMATION REQUESTED MUST BE GIVEN AND THE APPLICATION SIGNED BY THE TAXPAYER.

_____ Date _____
(SIGNATURE)

_____
(State whether individual owner, member of firm, executor, administrator, trustee, etc., or give title of officer if corporation.)

_____
(AREA CODE) (PHONE NUMBER)

DO NOT SEND CASH BY MAIL

Attach $5.00 check or money order payable to order of Department of Revenue. Section 212.18(3) of Sales and Use Tax Law provides that a fee of $5.00 shall accompany this application if you are a dealer in the State of Florida. If the business location for which registration certificate is requested is located outside Florida, the $5.00 fee is not required. A bond may be required as outlined in Section 212.14(4) F.S.

DR 1
R 6/80

DO NOT DETACH BLUE COPY

INSTRUCTIONS FOR COMPLETING FORM DR-1

APPLICATION MUST BE COMPLETED IN BLACK INK OR TYPEWRITER

1. BUSINESS NAME: Enter the business name, trade name, doing business as (DBA) name, Florida charter name, corporate name, partnership name or other name by which the business may be known.

2. OWNER'S NAME: Enter the owner's name if the business is a single proprietorship, the name of the principal partner or the name of the partner completing the application if the business is a partnership (all other partners names should be entered in 6 below), and if the owner is a corporation enter the name of that corporation (corporate officers names should be entered in 6 below). Indicate whether individual, corporation or partner.

3. BUSINESS LOCATION:

   Street: Enter the street name and number of the actual physical location of the business. In the case of a rural address, list the RFD box number and describe where business is located. This address **cannot** be a post office box.

   City: Enter the city in which the business is located. If not within the city limits, enter the city where the post office that services the address listed above is located.

   State: Enter the state in which the city and address are located.

   Zip: Enter the zip code of the post office area in which the address and city are located.

   County: Enter the Florida county in which the address and city are located. If not in Florida, leave blank.

   WITHIN CITY LIMITS: Enter "yes" if within the incorporated limits of the city listed above. If in the county or outside the incorporated limits of the listed city, enter "no."

   BUSINESS TELEPHONE: Enter the area code, exchange and number of the phone physically located at the business location. If no business phone, but there is a pay phone inside the business, enter that number. If none of the aforementioned give a phone number that is listed in the name of the principal owner or a partner that can be used as the business phone number.

4. EFFECTIVE DATE. Enter the month, day and year the business became liable for the collecting of sales tax or will open and become liable for the collection of sales tax in regard to the owner and business for which this application is being filed

5. FEDERAL EMPLOYER IDENTIFICATION NUMBER OR SOCIAL SECURITY NUMBER. Enter the Federal Employer Identification number in the FEI line (if FEI is available). If the FEI number is not available, enter the Social Security Number of the owner, principal partner or partner completing the application. If this is a corporation, enter the FEI number.

6. MAILING ADDRESS: Enter the name of the person or company to which you desire to have your tax forms and correspondence mailed if other than the business name in 1 above. Enter the address (street or box, city, county, state and zip) of the principal entered in name of mailing address above if it is different from the business location on line 3.

7. Check whether the type of business organization is a CORPORATION, a PARTNERSHIP, or INDIVIDUALLY owned. Enter the full names of partners or corporate officers, their home phone numbers, home addresses, and their corporate title or interest in the partnership.

8. Enter the KIND OF BUSINESS (grocery, commercial rental, service station, motel, etc.) that most correctly describes the type of service that your business furnishes the public. If the type of business is not explicit, tell what is sold, rented, etc.

   ENTER THE NUMBER OF BUSINESS LOCATIONS you have registered and are here registering in Florida.

9. If your business sells at RETAIL, WHOLESALE or Both or is in real estate rentals or other type of RENTALS, check the box that best describes this activity. ONE MUST BE CHECKED.

10. IF CORPORATION: Enter the state in which the corporation has been incorporated and give the month, day, and year of incorporation in space provided. Enter the name of the Florida corporate representative along with his address and Florida telephone number.

11. Check the "yes" or "no" block which indicates your ownership of the business location. If "no" is checked, enter the name (or trade name) and address of the person or corporation from whom you lease the business location.

12. IF YOU WERE PREVIOUSLY REGISTERED WITH THE DEPARTMENT OF REVENUE: Enter the name and location address of the former business.

13. If you purchased or otherwise assumed ownership of the business or are changing the type of business organization as set forth in 6 above, enter the former owners name or business name and the address of the previous owner, or enter the address of the present business if it is at a different location. If the business had a Certificate number, enter that number.

14. Check the block which best indicates your reason for submitting this application.

IMPORTANT: Be certain that the owner or a Corporate officer has signed the application form, that all pertinent information has been supplied and that a check made payable to the Department of Revenue, in the amount of FIVE DOLLARS has been attached.

STATE OF FLORIDA
DEPARTMENT OF REVENUE
CARLTON BUILDING
TALLAHASSEE, FLORIDA 32301

This public-use form, number DR-1, may be obtained by writing to:

Department of Revenue
Division of Administration
Room 104
Carlton Building
Tallahassee, Florida 32301

§ 39:36. Form of sales and use tax certificate of registration

GR 11
R 8/82

State of Florida
DEPARTMENT OF REVENUE
CERTIFICATE OF REGISTRATION
Issued Pursuant to Chapter 212, Florida Statutes

THIS CERTIFICATE IS NONTRANSFERABLE

REGISTRATION DATE | OPENING DATE | CERTIFICATE NUMBER

REFER TO THIS NUMBER WHEN REPORTING TAX

MAILING ADDRESS

THIS CERTIFIES THAT

☐

IS HEREBY AUTHORIZED AND EMPOWERED TO COLLECT SALES AND USE TAXES FOR THE STATE OF FLORIDA

THIS CERTIFICATE MUST BE POSTED IN A CONSPICUOUS PLACE

*******SALES TAX FACTS TO REMEMBER*******

WHO IS REQUIRED TO REPORT ON A REGULAR BASIS TO THE FLORIDA DEPARTMENT OF REVENUE?

- Every person conducting business in the State of Florida is responsible for filing a "Sales & Use Tax Report" at the end of each assigned reporting period.
- In the event that your pre-printed sales tax report does not arrive in the mail, it is your responsibility to contact the Department of Revenue and request that a form be sent to you.
- Your sales tax return is due the 1st of the month following the reporting period and delinquent if filed after the 20th. Example: Month ending March 31st is due on April 1 and delinquent after April 20th (postmark date acceptable).
- If your report is filed timely, you are entitled to retain the specified collection allowance as your commission. If your report is filed late, you lose the commission and will be assessed penalty and interest.
- You must register each location from which you do business and file a return for each location unless the Department has approved reporting in another manner.
- You are required to file a return even though you may have no sales tax to report. Late filing of a "zero sales" return will result in a $5.00 penalty assessment.
- It is your responsibility to notify the Department of Revenue if you have any changes in your business (new location, mailing address etc., incorporated, change in partners in partnership, etc).
- In the event that your business is sold or closed the law requires you to pay all taxes, penalty and/or interest within 15 days.

DOES A SALES TAX NUMBER EXEMPT A DEALER FROM PAYING SALES TAX?

- You may extend your sales tax number to your suppliers when making purchases of items that will be resold, incorporated into an item of tangible personal property for sale, or rented as tangible personal property. All other purchases are taxable.
- When accepting a tax number from another dealer, in lieu of charging sales tax, you must keep, on file, a "Resale Certificate" which includes: business name, location address, reason for purchase, signature of authorized agent, and tax number. Resale certificate forms are available at a nominal cost from your local office supply store, or if you prefer, you may have your printer prepare a form for your use. (Suggested wording is available from the Department.)

PLEASE CONTACT THE FLORIDA DEPARTMENT OF REVENUE LOCAL AREA OFFICE IF YOU REQUIRE ADDITIONAL INFORMATION OR ASSISTANCE REGARDING FLORIDA SALES AND USE TAX.

§ 39:37. Form of application for importation permit

DR-10
R. 04/82

State of Florida
Department of Revenue
BUREAU OF LICENSING & REGISTRATION
Tallahassee, Florida
APPLICATION FOR
IMPORTATION PERMIT

DO NOT WRITE IN THIS SPACE
Permit No. _____
Registration No. _____

To engage in importing tangible personal property by truck, automobile, or other means of transportation other than a common carrier pursuant to Chapter 212, Florida Statutes.

1. _____
(Individual, Corporate or Trade Name under which Trucks will be Operated.)

2. _____
(Name of Present Owner or Owners)

3. _____
(Location of Place of Business, Street, City, State, Zip Code)

4. Give mailing address if other than the address given above _____
(P. O. Box or Street No. City or Town State Zip Code)

5. Give Sales or Use Tax Certificate of Registration Number _____

6. Kind of Tangible Personal Property that will be imported _____

7. Year, make and serial number of each vehicle (owned or leased by applicant) _____

Fill in applicable line, and return to the
DEPARTMENT OF REVENUE
APPLICATION ACCEPTANCE
CARLTON BUILDING, ROOM 211
TALLAHASSEE, FLORIDA 32301
No fee required for importation permit

_____
(Signature)

_____
(State whether individual owner, member or firm executor, administrator, trustee, etc., or give title of officer if corporation)

_____
(Date)

See Reverse Side

IMPORTATION OF TANGIBLE PERSONAL PROPERTY UNDER THE FLORIDA SALES AND USE TAX LAW

Any person or firm importing tangible personal property into the State of Florida (OTHER THAN BY COMMON CARRIER OPERATING OVER REGULATED ROUTES AND SCHEDULES) *must be registered as a dealer and have an Importation Permit.*

1. On sales for resale, dealer must obtain and have on file resale certificates from dealers to whom tangible personal property is delivered.

2. On sales to direct consumers, 5% tax, based upon delivered sales price, must be collected and remitted to the Department.

As provided in Section 212.13, Florida Statutes, all dealers' records must be available for inspection by the Department at all reasonable hours. Any vehicle not qualified as a common carrier as mentioned above, which imports tangible personal property into Florida without first obtaining an Importation Permit, is in violation of the law. The vehicle and cargo will be seized as contraband and dealt with as provided in Section 212.16, Florida Statutes.

Upon issuance of the permit, the required number of identification cards will be furnished for the vehicles *entering Florida.* All cards should be completed with the required information and posted in or on the vehicle, or made immediately available for inspection by an authorized agent of the Department.

THE IDENTIFICATION CARDS ARE NOT TRANSFERABLE.

DEPARTMENT OF REVENUE
Carlton Building
Tallahassee, Florida 32301

This public-use form, number DR-10, may be obtained by writing to:

Department of Revenue
Division of Administration
Room 104
Carlton Building
Tallahassee, Florida 32301

§ 39:38. Form of master importation permit

STATE OF FLORIDA
DEPARTMENT OF REVENUE
BUREAU OF REGISTRATION AND RECORDS

DR-12
R. 12/82

Master Importation Permit
Issued Pursuant to the Sales and Use Tax Act
Chapter 212, Florida Statutes

THIS PERMIT IS NON-TRANSFERABLE AND IS GOOD UNTIL REVOKED

DATE ISSUED Mo.	Day	Yr.

PERMIT NUMBER
CERTIFICATE NUMBER

PERMISSION IS HEREBY GRANTED TO

For the importation of Tangible Personal Property into the State of Florida in trucks owned or leased by the above individual or firm in the conduct of regular business.

§ 39:39. Form of importation permit identification card

STATE OF FLORIDA
DEPARTMENT OF REVENUE
BUREAU OF REGISTRATION & RECORDS
RM 211 CARLTON BLDG.

DR 33
R. 5/82

IMPORTATION PERMIT
Identification Card For Vehicle And Cargo

Issued Pursuant to the Sales and Use Tax Act
Chapter 212, Florida Statutes

DR-33

DATE ISSUED Mo.	Day	Yr.

PERMIT NUMBER
CERTIFICATE NUMBER

PERMISSION IS HEREBY GRANTED TO

For the Importation of Tangible Personal Property into the State of Florida in the vehicle as described on reverse side.

(OVER)

KIND OF VEHICLE_____

MAKE OF VEHICLE_____

SERIAL NO. OF VEHICLE_____

THE IMPORTATION PERMIT IDENTIFICATION CARD FOR VEHICLE AND CARGO SHALL BE POSTED IN OR ON THE VEHICLE OR MADE IMMEDIATELY AVAILABLE FOR INSPECTION.

THIS CARD NOT TRANSFERABLE