**SUPREME COURT OF FLORIDA**

THOMAS S. TRAMEL, III, as
SHERIFF OF COLOMBIA COUNTY,

Petitioner,

v.

CHARLES STEWART, JR. and
BEVERLY J. STEWART,

Respondents.
_____/

CASE NO.: 89,032

First District Court of
Appeal Case No.: 95-3971

Third Judicial Circuit
Case No.: 90-314-CA

# RESPONDENT'S ANSWER BRIEF

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Appeal from the District Court of Appeal,
First District

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## STATEMENT OF THE CASE

On April 4, 1990 the Petitioner, Thomas S. Tramell, III, as Sheriff of Colombia County, filed his Petition for Rule for Order to Show Cause why certain real property identified as the homestead of the Respondents and certain personal property located thereon in the form of money, a motor vehicle, and implements necessary to the growing of cannabis on the property should not be forfeited. (RI-1-7) The Respondents filed an Answer. The Petitioner filed a Motion to leave to Amend his Petition and filed an Amended Petition for Rule of Order to Show Cause on July 17, 1990. (RI-57-67) The Trial Court entered an Order to Show Cause on August 1, 1990. (RI-68-72)

The Respondents filed their Answer to the Amended Petition on August 24, 1990. (RI-79,80) On September 27, 1990 the Respondents filed a Motion to Dismiss the Amended Petition for the Rule or Order to Show Cause based upon constitutional objections of Double Jeopardy, Homestead Protection, and as an excessive fine in violation of the Eighth Amendment to the United States Constitution. (RI-84,85) This Motion was denied by the Court on April 2, 1993 during the course of an adversarial preliminary hearing and a hearing on the Pretrial Motion to Dismiss. (RII-355,356) The Respondents raised the same issue on a Motion for Summary Judgment as to Homestead Property on the same date (RII-357-359) which was also denied by the

Court. These issues were again raised during trial in Motions for Directed Verdict and denied.

The case was tried on September 25, 1995 and continued until a jury verdict on September 29, 1995, that the property and the buildings were generated from the proceeds of the sale of cannabis and were therefore forfeited to the Petitioner; that some of the personal property was forfeitable as facilitation equipment for the growing of cannabis while other personal property such as a motor vehicle was not shown to have facilitated or been the product of proceeds of illegal activity and was not forfeited.

On October 10, 1995, a Motion for New Trial was filed on behalf of Ms. Hall (NEE Stewart) and on October 24, 1995 a Motion for New Trial was filed on behalf of Mr. Stewart. (RII-563-568) On November 2, 1995 a Notice of Appeal was timely filed on behalf of both Respondents. (RII-571-574)

The First District Court of Appeal reversed the trial court's decision, ruling that the Respondent's homestead property was Constitutionally protected from forfeiture and certified as a question of great public interest the limited issue of:

> "Whether Article X, §4, Fla. Const., prohibits civil forfeiture of homestead property pursuant to §§ 932.701-.702, Fla. Stat., when the proceeds of the illegal activity are invested in or used to purchase the property?"

The First District Court of Appeal reversed on this issue and felt that this precluded consideration of the additional issues of (a) the sufficiency of the evidence presented at trial, (b) the double jeopardy claim, or ( c) the claim of excessive fine in violation of the Eighth Amendment. The Petitioner's have sought review by this Court of the First District's Reversal on the limited Homestead Protection Issue.

## STATEMENT OF THE FACTS

The Respondents purchased 6.38 acres of land from Mr. Tunsil in 1985 using their combined savings as a $3000.00 down payment. The seller financed the remainder or the purchase price over a seven-year period at 11% interest. (T. 656) The Respondents used funds from the sale of a previous homestead to pay for the construction of their new home (T. 662,663) They sold their old house for $44,000.00 and netted $27,000.00 profit from the equity. This profit comprised over one-half of the funds ultimately utilized by the Respondents to purchase material for the construction of their new homestead. (T. 663) The Respondents began construction on their new home in 1986 utilizing their own honest "sweat equity" with the help of some of their friends.

The amendment to the forfeiture statute in the State of Florida allowing forfeiture of real property was not yet in effect (Florida Statute § 932.701 became effective in 1989). Therefore, the Respondents' property was unequivocally a homestead interest in 1985, 1986, 1987, 1988, and 1989.

C.L. Johnson, Mrs. Hall's (NEE Stewart's) father, testified that he contributed $13,000.00 in 1986 to the cost of construction material. (T. 580) In support of his testimony, the Respondents exhibit number three was entered into evidence, (which was a bank book containing a withdrawal of $13,000.00 on May 9, 1986) to illustrate

from whence came the funds which Mr. Johnson claimed he provided. In addition Mr. Stewart had saved $6,500.00 he received as compensation for injuries from a motorcycle accident. (T. 647,648) and sold another motorcycle for $5000.00 (T. 666) Further, on May 9, 1986 Mr. Stewart redeemed two certificates of deposit, one for $5,500.00 and one for $1050.00 and those were documented in evidence by exhibit numbers 6 and 7. (T.664,665) The funds for these redeemed certificates of deposit were used to buy building materials for the home. In 1989 Mr. Stewart borrowed $6000.00 from the Anchor Savings Bank for construction of the barn and continued to supply labor through himself and his friends for this project. (T. 680)

During this entire time period Mr. Stewart worked full time at Occidental Petroleum Company and he progressed from position of general laborer to electrician. (T. 646) In 1979 he worked as a Maintenance Mechanic (T. 648) for what he considered to be a very well paying wage for the Lake City community. (T. 657) He was able to save money, at first $50.00 per week and then as he got raises $75.00 per week and ultimately $100.00 per week. (T. 658) The money he saved he would later utilize when he constructed his new homestead in 1986 and again when he constructed the new shop for his motorcycle repair business in 1989. The Respondents claimed that all of these funds were used to purchase land in 1985, construct the residence in 1986 and construct the barn in 1989, were legitimate funds and were not the proceeds

of any marijuana sales.

Sometime in June, 1989, the Respondent, Mr. Stewart, decided to utilize the unfinished top floor of the barn for a marijuana growing operation. (T. 688) He ordered grow lights and other paraphernalia necessary for the growing operation, not to provide a new means of livelihood but rather to provide himself with high quality of cannabis for personal consumption. (T. 696)

In February, 1990 Christopher Lutsko, an admitted professional cocaine trafficker, (T. 280) having been arrested and prosecuted for his importation of cocaine into the Lake City area, made a plea bargain to avoid facing a mandatory prison sentence and agreed to turn in a certain number of persons. (T. 285) As part and parcel of this plea agreement, Mr. Lutsko arranged for four (4) surveilled purchases from the Respondents. The Respondents were arrested on February 14, 1990 for possessing, cultivating, and selling cannabis. They entered pleas, were sentenced to either probation or prison respectively and fined for the criminal prosecutions.

The Petitioner in February, 1990 concluded that the house and the barn were all a part of a large scale sophisticated marijuana growing operation and based on this conclusion, he elected to seek forfeiture of that property. (T. 7) One of the Petitioner's witnesses Raymond Burn, a special agent for the Department of Justice Drug Enforcement Administration testified as an expert on marijuana growing operation and

rendered the opinion that the Respondents' property contained a relatively new marijuana operation which had only been in existence for approximately three months. (T. 106) This was entirely consistent with the Respondents' description of his activities on this property. The only evidence potentially contrary to that position is that of the informant, Christopher Lutsko, who testified that he had made 200 to 300 marijuana purchases from the Respondents from 1986 until 1990. (T. 238)

On cross-examination, Mr. Lutsko further revealed that most of his purchasing of marijuana occurred after the Respondents' homestead was already built in 1986 and after he returned from living in Alabama in 1986. (T. 295) He further acknowledged that he had no idea where the money came from to purchase the Respondents' land in 1985, build the house in 1986 or build the barn in 1989. (T. 297)

While the Petitioner claims that Mr. Lutsko was led into his life of crime by the Respondents, the record does not bear this out. On page two (2) of their statement of facts in the initial brief, the Petitioner alleges that on "one occasion Mr. Stewart took him [Mr. Lutsko] to a hotel in Gainesville, Florida and seduced him" (T- p.326) An inspection of the record reveals that there is no testimony of any "seduction" and this simply demonstrates the extent to which the Petitioner has inaccurately described the real facts in this matter.

Certified Public Accountant David Brewer testified that he reviewed and audited the tax returns and other financial documents of the Respondents and found their income to be as indicated in their tax returns. (T. 390) Even though he concluded that the Stewarts lived within their means on paying their normal expenditures for living in the Lake City community, he was of the opinion that they could not afford to buy the land in 1985 or build the home in 1986 or the barn in 1989. (T. 405) On cross examination, Mr. Brewer did acknowledge that the Appellant appeared to be honest and accurate in their income tax reporting and were consistent in what they spent with other families in the Lake City Community. (T. 406) He further acknowledged that he had not considered any funds from the motorcycle accident where there was a recovery for personal injury because that would not be a taxable event. He also did not take into consideration cashing in certificates of deposit or other financial contributions that were made by family members and were not recorded by any mortgage document. (T. 407) Mr. Brewer acknowledged that this case was distinct and different from his usual client where he would usually have the opportunity to sit down with the subject, ask for any records. In this case, Mr. Brewer was merely given a box of financial records of the Respondents and told to do the best that he could. (T. 408) He admitted that a family building their own home was a fairly unique situation in his experience and that there could be non-receipted events such as trading services for help on the construction of

the house which would not show up in any of the records which he reviewed (T. 417-428)

The Petitioner also presented Michael Wright, an economist he had requested to perform a financial analysis of the Respondents' finances. Mr. Wright, in his analysis, reduced all of the years of income reporting presented by Mr. Brewer to terms of 1990 dollars so that he could compare them all on the same currency level. (T. 441) He concluded that the Respondents were within range of "an average income family in the South" with an average income of approximately $30,000.00 per year and that such a family, according to statistics in a book, would be unable to save any money in a year's time. On cross-examination, Mr. Wright had to acknowledge that he had made errors in 1986 by omitting $2000.00 of gross income, in 1987 omitting $3600.00, in 1988 $5315.00 and $4900.00 in 1989. (T. 448) However, despite his acknowledgment that the Respondents had actually earned an average of $3000.00 more per year than his computations had been based on, he still concluded that they would be unable to have saved any funds during that five year period of analysis. (T. 452) He had to confess that the "average family statistics in the South" assumed that certain expenses, including payment for the construction of a home or mortgage payments formed an integral part of his analysis. (T. 454) Mr. Wright's statistics did not account for a family that was particularly efficient and saved money at every opportunity. (T. 457)

The Petitioner also presented testimony from two appraisers, one in construction and one in real estate, who rendered the opinion that the Appellant's home would have cost over $100,000.00 to build and that it would have been impossible to build the home as testified by the Respondents, even if they built the home themselves. Their opinions were based on a physical inspection of the premises and their knowledge of cost of construction it he geographic area. Richard Parnell (T. 574), Zane Cray (T. 598,599), Alphonso Jones (T. 605,606), Linwood Markham (T. 616,617), and Robin Vass (T. 628) all testified that they either volunteered to help construct the home or worked in exchange for Mr. Stewart's repairing their motorcycles, thus reducing the labor cost of construction.

## SUMMARY OF THE ARGUMENT

Florida's statute permitting civil forfeiture of real property violates Article X, Section 4 of the Florida Constitution as applied to a homestead. Even though this case involves a proceeds theory of forfeiture, Florida's homestead protection prevails. A contrary holding would permit the Petitioner to circumvent the Constitutional Homestead Protection it afforded to Florida's citizens.

The Petitioners argument that title to the Respondents' homestead property never vested misses the mark and is improperly rooted in cases that have been either overruled or pertain solely to personal property issues. The Respondents obtained good title at the time of purchase of real estate in 1985, and improved their property with their own honest "sweat equity" in 1986. The subsequent criminal prosecution in 1990 does not disqualify this property from the constitutional homestead protection. It is important to recognize that the Florida Statute § 932.701-702 did not apply to real property until after 1989. In any event, Article X, §4 of the Florida Constitution prohibited the forfeiture of the respondent's homestead property.

## ARGUMENT

## I. THE CIVIL FORFEITURE OF THE STEWART PROPERTY VIOLATES FLORIDA'S CONSTITUTIONAL PROTECTION OF HOMESTEAD PROPERTY.

### A. CAGGIANO MANDATES THAT HOMESTEAD PROPERTY NOT BE SUBJECT TO FORCED SALE, INCLUDING FORFEITURE.

The Florida Constitution, as interpreted by the Florida Supreme Court, protects the Stewarts' home from forfeiture. Butterworth v. Caggiano, 605 So. 2d 56, 61 (Fla. 1992). In 1992, this Court struck down an attempted RICO forfeiture of a homestead. Id. at 58. Caggiano, the owner of the homestead, was convicted under RICO for fifteen counts of bookmaking, three of which actually occurred in his home. Since the property was homestead, it was held that Article X, Section 4 of the Florida Constitution prevented forfeiture of Caggiano's home even when some of the crimes occurred there. Id. at 61.

This Court employed the "settled rule of constitutional interpretation" that a constitution's words should be given their most common meaning, "unless the text suggests that they have been used in a technical sense." Id. at 58. With regard to Florida's constitution, it was noted that there is no indication in the protection against forced sale of a homestead that some technical or special use of the language

is required. Id. Rather, "It appears that the homestead exemption uses broad, nonlegal terminology that was intended simply to guarantee that the homestead *would be preserved against any involuntary divestiture by the courts*, without regard to the technicalities of how that divestiture would be accomplished." Id. at 59 (emphasis added).

After recognizing that forfeitures are harsh penalties historically unfavored at both law and equity, this Court pointed out that Article X, Section 4 provides for only three specific exceptions to the homestead protection: (1) payment of taxes, (2) satisfying contracts entered into by the homeowner for the purchase or improvement of the homestead, and (3) satisfying contracts with laborers for work done on the homestead. Id. at 60. Since forfeiture is not one of the three listed exceptions, the court noted, it is precluded under the Florida Constitution. Id.

Caggiano reflects this Court's requirement of a "strict construction of the exceptions" to homestead protection. Id. at 61. Moreover, citing to the Kansas Supreme Court, Caggiano pointed out that it made no difference that the attempted divestiture was related to a criminal proceeding. Id. at 60. (citing State ex rel. Apt. v. Mitchell, 399 P.2d 556, 558 (Kan. 1965)). The Kansas court urged that "[t]he law provides for punishment of persons convicted of illegal acts, but the forfeiture of homestead rights guaranteed by our Constitution is not part of the punishment." Id.

This quotation directly disapproved of the law as it stood before Caggiano. See DeRuyter v. State, 521 So. 2d 135, 138 (Fla. 5th DCA 1988) (holding that "forfeiture of property due to its use in a criminal enterprise . . . [is] entirely different from the 'forced sale' language in the constitution.")

Even though Caggiano addressed a forfeiture under RICO rather than the Florida Contraband Forfeiture Act, the holding prevents forfeiture of the Stewarts' home in this case. *See* Jonathan D. Colan, Comment, *You Can't Take That Away From Me: The Sanctity of the Homestead Property and its Effect on Civil Forfeiture of the Home*, 49 U. MIAMI L. REV. 159, 182 (1994); United States v. Lot 5, Fox Grove, Alachua County, Florida, 23 F.3d 359, 362-63 (11th Cir. 1994). Unfortunately, few courts after Caggiano have faced this issue, and those that have simply cite Caggiano without elaborating. See In re Lot 20, Block H, Revise Map of Royal Park Addition to Palm Beach, Florida, 603 So. 2d 714 (Fla. 4th DCA 1992) (striking down RICO forfeiture).

In striking down the forfeiture, Caggiano made no distinction between RICO and the Florida Contraband Forfeiture Act. The forced sale attempted by the seizing agency in Caggiano is identical to the forced sale attempted by Petitioner in this case. Regardless of the statute used, forfeiture, an unfavored practice at law and equity, is not a listed exception to Florida's Homestead protection. Thus, forfeiture

of the Stewarts' home should not be allowed in light of this Court's requirement that exceptions to Homestead protection be strictly construed.

Petitioner contends that footnote 5 of Caggiano allows it to seize the Stewart homestead. See Caggiano, 605 So. 2d at 60 n.5. Footnote 5 listed several cases argued by the State in which this Court allowed liens or forfeitures of homestead "where proceeds from fraud or reprehensible conduct were used to invest in, purchase, or improve the homestead." Id. Petitioner argues that since this is a civil forfeiture action based on a proceeds theory, footnote 5 allows the forfeiture. However, virtually all of the listed cases, fell within one of the three stated exceptions to the homestead provision, Id., but this case simply does not.

A total of six cases were listed in footnote 5. Id. The First District Court of Appeals stated at page 4 of its opinion that none of the listed cases permits forfeiture of the Stewart homestead. The first case listed is Bessemer v. Gersten, in which the court allowed a lien on homestead because the homeowners had accepted a deed with notice that failure to pay for upkeep of a community recreation facility would result in a lien on their home. 381 So. 2d 1344, 1348 (Fla. 1980). In this way, the court noted, the homeowners had contracted for improvement of their homestead (exception number 2, supra), and consented to the lien on the homestead. Id. In the second case, the homeowners contracted for the construction of an

addition to their home, an improvement under exception number 2, supra. LaMar v. Lechlider, 135 Fla. 703, 704-05, 185 So. 833, 834-35 (1939). The courts in the third and fourth cases did not allow the requested forfeitures. Jetton Lumber Co. v. Hall, 67 Fla. 61, 67, 64 So. 440, 442 (1914); Milton v. Milton, 63 Fla. 533, 537-38, 58 So. 718, 719 (1912). In the fifth case, the court allowed a lien on the homeowner's property after the homeowner had drawn checks from his employer's account to pay for improvements to his home (exception number 2, *supra*). Jones v. Carpenter, 90 Fla. 407, 415-16, 106 So. 127, 130 (1925). The court noted that the lien served as restitution for the creditors of the homeowner's employer, which was bankrupt. Id. at 130. Consequently, the employer was allowed to enforce the lien and collect the money the homeowner had taken for the purpose of improving his homestead. Id. The final case in footnote 5 is Tullis v. Tullis, 360 So. 2d 375 (1978). In Tullis, the court allowed a forced sale of a homestead because the ex-wife of the person claiming homestead also owned an undivided interest in the homestead. Id. at 376, 378. The court noted that a forced sale was the only way for the ex-wife to obtain a beneficial interest in the property. Id. at 378.

Petitioner may not successfully rely on footnote 5 to argue for the forfeiture. The only court allowing a forfeiture that did not fit within one of the exceptions was Tullis; however, allowing a forced sale to allow the ex-wife a beneficial interest in

the property is in no way analogous to allowing Petitioner to order a forced sale. Thus, footnote 5 does not open a door through which Petitioner may seize Stewarts' constitutionally protected homestead.

Florida is not the only state providing near-absolute protection of the homestead. In Oklahoma ex rel. McCoy v. 1844 Burnt Oak Drive, the court analyzed Oklahoma's homestead exemption, which was very similar to Florida's, concluding that forfeiture of a homestead was not allowed. 831 P.2d 1008, 1010 (Okla. Ct. App. 1992). The court noted that Oklahoma's forfeiture statutes did not list homestead as something that could be forfeited Id. Rather, the Oklahoma forfeiture statutes simply listed real property as being forfeitable and the court noted that allowing this exception to the homestead protection would "open the door to further erosion of the very basis for its enactment." Id.

As McCoy demonstrates, since Florida's forfeiture statutes does not specifically list homestead as forfeitable property, forfeiture should not be allowed in this case. See §932.701(2)(a)6, Fla. Stat. (1993). By mentioning only real property, and not specifically mentioning any waiver of constitutionally protected area a strict construction infers that the legislature intended that forfeiture of a homestead not be allowed. See McCoy, 831 P.2d at 1010.

The Petitioner's reliance upon In the Matter of Property Seized from Bly, 456 NW 2d 195 (Iowa 1990) and Cox v. Wauddy, 433 NW 2d 716 (Iowa 1988) is misplaced. These cases precede this Court's Caggiano decision and was clearly distinguished by the First District Court of Appeal in footnote 1 at page 4 of its reversal of this case.

Even though the Stewart's may have violated Florida's drug laws, they did not consent to the forfeiture of their homestead. In Kansas ex rel. Braun v. 918 North County Line Road, the court specifically rejected the argument that a defendant consents to a forfeiture by violating a state's drug laws. 840 P.2d 453, 455 (Kan. 1992). In striking down the States' attempt at seizing a homestead, the court, like the Caggiano court, also noted that forfeiture was not one of the three listed exceptions to Kansas' homestead protection. Id. Consequently, the Stewarts should not be deemed to have "constructively" consented to violation of their constitutionally protected homestead right.

## B. THE ANALYSIS FROM OTHER STATE SUPREME COURTS IS COMPARABLE TO THIS COURT'S ANALYSIS IN CAGGIANO'S CONSIDERATION OF MAINTAINING THE HOMESTEAD PROTECTION

Many state constitutions give homeowners special protection against forced sale or governmental forfeiture. Alejandro Caffarelli, Comment, Civil Forfeiture Hits Home: A Critical Analysis of United States v. Lot 5, Fox Grove, 79 MINN. L. REV. 1447, 1460 (1995). In Article X, Section 4 of the Florida Constitution, this special protection is extended to homestead in Florida. Section 4 provides in relevant part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, *except* for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person: (1) a homestead . . . .
>
> Art. X, § 4, Fla. Const. (emphasis added).

State Supreme Courts dealing with this issue generally find that the homestead protection provisions prohibit the forfeiture of real property, reasoning that the property is exempt from forced sale. Most recently, the support cited by other state courts for this proposition is Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992), see State ex Rel. Means v. 10 acres of land, 877 P. 2d 597 (Oka. 1994). The discussion of Caggiano reveals that other courts perceive that the Florida

Constitution expressly provided for only three exceptions to the homestead exemption and that forfeiture was not one of these exceptions. In re: Bly, 456 NW 2d 195 (Iowa. 1990), the Iowa Supreme Court held that the forfeiture was a judicial sale within the meaning of the homestead provision and that in Iowa, homestead statutes are broadly and liberally construed in favor of the exemption while forfeiture statutes are severe sanction disfavored by the law and must be strictly construed. In Bly the Iowa Supreme Court held that where the forfeiture statutes did not mention the homestead exemption that it could not be construed to override the same homestead exemption.

The Iowa case of Cox v. Wauddy, 433 NW 2d 716 (Iwa. 1988) is to be distinguished both from Bly and the case at bar. In Wauddy, the Respondent was found to have committed a fraud in the transactions by which he obtained title to 420 acres of land from the Plaintiff, Cox. The trial court returned the ownership of this land to the Plaintiff and it is important to note that Wauddy did not appeal from the District Court's 1986 judgment and decree returning that land to the Plaintiff id at p. 718. Wauddy did not take an Appeal until after there was an attempt to execute a levy against the homestead property.

The other point of distinction noted by the Iowa Supreme Court was that as a general proposition, a constructive trust which is created by the fraudulent activity

of the Respondent creates a very unique situation. The Court there found that where the wrongfully obtained funds were fraudulently used to purchase the property, the property itself never belonged to the purchaser and therefore, Mr. Wauddy never obtained a homestead interest at any time. This is to be distinguished from the case at bar where the Stewarts clearly obtained a homestead interest in 1985 when they purchased the property at a time which preceded the modification of the Florida Statutes pertaining to forfeiture to include real property transactions. If the Stewarts had failed to take their initial appeal, as in Wauddy, they may find themselves in the same predicament. However that is not the case that this Court finds the parties to be in.

In State ex rel. Braun v. Tract of land, 251. Kan. 685, 840 P 2d 453 (1992), the Kansas Supreme Court found that a forced sale of homestead property was inappropriate. The Court clearly stated, "The Kansas Constitution specifically provides for three exemptions to the homestead exemption and that forfeiture is not one of them." It is here argued that the Florida Supreme Court in Caggiano and the First District Court of Appeals in the above-styled cause has held exactly the same position.

Two courts of appeal have taken an opposite view reasoning that homestead laws were not intended to shield criminal activity. In the matter of a Parcel of Real

Property, 166 Ariz. 197 801 P 2d 432 (App. 1990) it was held that the homestead exemption did not protect the forfeiture of that property. It is important to note that the homeowner, in that case however, had filed for his homestead exemption, only after, the forfeiture proceedings have been commenced. In People v. Allen, 767 P 2d 798 (Colo. App. 1988), the homestead exemption was held not to protect the property from forfeiture after it is used in criminal activity. It is most significant to underscore that both the Colorado and the Arizona courts in these two cases relied upon the Florida case of DeRuyter v. State, 521 So. 2d 135 (Fla. 5th Dist. 4, 1988) a case that has been superseded by this court's decision in Butterworth v. Caggaino, supra.

State ex rel. Means v. 10 Acres of Land, 877 P 2d 597 (Okl. 1994) is the most analogous case decided by another supreme court. In that case, Mr. and Mrs. Lawrence plead nolo contendere to the unlawful cultivation of marijuana among other offenses and received a five-year suspended-sentence. The state filed a Notice of Seizure of the 10 acres on which the property rested based on the identification of 67 marijuana plants found on the property. Both sides stipulated that the land in question was the homestead of Mr. and Mrs. Lawrence and they had moved to dismiss the forfeiture proceeding on the basis of Oklahoma's homestead exemption. The Court, after reviewing many of the same cases previously cited,

found that the homestead exemption was liberally construed in the state of Oklahoma and that there were only three exceptions to that protection listed, and that forfeiture was not one of them. The Court clearly states that while homestead exemption provisions were to be liberally construed, the forfeiture provisions were to be strictly construed and concluded that Oklahoma dangerous substance act forfeiture provision did not subject homestead to forfeiture, Much like this Court's ruling in Caggiano.

### C. A SIGNIFICANT PORTION OF THE FUNDS USED TO CONSTRUCT STEWART'S REAL PROPERTY CAME FROM STEWART'S PREVIOUS HOMESTEAD, AND SHOULD BE PROTECTED.

The Stewarts used funds from a previous homestead to pay for the construction of the homestead in the instant case (T. 662-63), making the funds protected by the protected by Florida's homestead protection. In Orange Brevard Plumbing & Heating Co. v. La Croix, the Florida Supreme Court held that funds from the voluntary sale of a homestead continue to be protected if the homeowner invests the proceeds into another homestead within a reasonable time. 137 So. 2d 201, 206 (Fla. 1962); See Sun First Nat'l Bank of Orlando v. Gieger, 402 So. 2d 428, 431-32 (Fla. 5th DCA 1981) (holding that intent to reinvest homestead proceeds into new homestead protects the proceeds under homestead exemption).

The Stewarts sold their old house for approximately $44,000, leaving approximately $27,0000 after they paid off the existing mortgage on the old house. (T. 662). Furthermore, testimony revealed that the Stewarts paid about $51,000 for the material to construct their homestead, including the barn. (T. 738-39). Thus, over half of the money necessary to construct the Stewarts' current homestead came from the proceeds of a previous homestead. In light of the Florida Supreme Court's decision to protect homestead proceeds as they are transferred from one homestead to another, at least half of the Stewart homestead should be exempt from forfeiture, regardless of the jury's finding in the instant case. See Orange Brevard Plumbing & Heating Co., 137 So. 2d at 206.

## II. IT IS INAPPROPRIATE TO ARGUE THAT THE RESPONDENT'S NEVER ACQUIRED TITLE TO THEIR HOMESTEAD PROPERTY

The Petitioner conceded both at trial, and at the appellate level, and still continues to concede in his brief that the real property at issue is homestead. The Respondents purchased the land in 1985 and built their home with their own hands in 1986. Title clearly vested in 1985 and it was homestead by 1986. While it is true that the Florida legislature provided that real property used in or acquired by drug sales could be the subject of forfeiture, it did not do this until four years later in

1989. Florida Statute §932.701 (2)(a)(6) and (5). The Petitioner's attempt to argue an *Ex Post Facto* application of this statute is inappropriate and not persuasive.

The reliance upon the personal property cases such as Battles v. State, 60 So. 2d 1287 (Fla. 1992) is inappropriate. In those cases, the thief was not able to transfer title he never received. Clearly in this case, the Respondents received clear title by valid purchase of this real estate in 1985.

The federal cases of U.S. v. Tilly, 19 F. 3d 551 (6th Cir. 1995) and U.S. v. Salinas, 65 F. 3d 551 (6th Cir. 1995) are decisions on the issue of double jeopardy, not homestead exemption. The distinction in the federal framework between forfeiture and punishment does not diminish this Court's compelling and "unqualified holding in Caggiano." (p 5. of the First District Court of Appeals' opinion in this case)

## CONCLUSION

The Respondent argues that, as conceded previously by the Petitioner, this is simply not the factual case to argue that Respondent never acquired title in his homestead property and the Constitutional protection therefore bars forfeiture of the Respondent's home.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Roderick Bowdoin, 327 North Marion Street, Lake City, Florida 32055 on this 20 day of November 1996.

Respectfully submitted,

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