097

SUPREME COURT OF FLORIDA

THOMAS S. TRAMEL, III,
as Sheriff of Columbia 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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

Florida Courts:

Federal Courts:

Other State Courts:

Florida Statutes:

Other Authorities:

I. SYNOPSIS OF ANSWER BRIEF AND SUMMARY OF ARGUMENT IN REPLY THERETO

Respondents attempt to misdirect the focus of this appeal away from the crucial distinction between the forfeiture of a homestead that was purchased with illegal drug proceeds and the forfeiture of a homestead that was merely used for illegal activity. This Court should expressly recognize such distinction and hold that property purchased by a drug dealer with drug sales proceeds is not clothed with constitutional homestead status and protection and, therefore, is subject to forfeiture. Respondents, however, are precluded from seeking a de novo review of the evidence in this case. The jury considered conflicting evidence regarding the sources of income Respondents used to purchase the property, and chose to believe Petitioner's, rather than Respondents', evidence. Because the record contains competent, substantial evidence supporting the jury's factual determinations, such determinations may not be overturned.

Finally, in a "last-ditch" effort to convince this Court that the First District Court of Appeal's decision should be affirmed, Respondents make a cursory argument, for the first time, that the forfeiture laws at issue violated the ex post facto prohibition of our state constitution. This argument must be summarily dismissed because it was not properly preserved for review, because ex post facto provisions do not apply to civil proceedings, and because the United States Supreme Court has expressly held that forfeiture of property in civil in rem proceedings is not punishment. Accordingly, the ex post facto provisions of The Constitution of The State of Florida are not applicable to this proceeding.

II. CONSTITUTIONAL CONSTRUCTION IN FLORIDA AND OTHER STATES

No state in this country has prohibited the forfeiture of a person's homestead property where such property was purchased with illegally obtained drug proceeds. Respondents and amicus curiae counsel would have this Court believe the contrary, based on their citations of a number of "use" cases. In none of those cases was the property sought to be forfeited purchased with illegally obtained monies. In fact, many of the cases prohibiting the forfeiture of illegally used homestead imply that forfeiture would be permitted if the homestead were not "legitimately acquired." The clear implication is that illegally or improperly obtained property either does not obtain a homestead status or that the homestead protection does not apply. See Oklahoma ex rel. McCoy v. 1844 Burnt Oak Drive, 831 P.2d 1008 (Okla. Ct. App. 1992); In re Bly 456 N.W. 2d 1995, 200 (Iowa 1990).

As discussed in the initial brief, courts sometimes get sidetracked regarding the use of the term homestead. For example, the First District Court of Appeal of Florida in this case below became entangled with the semantics of the term homestead and held that homestead property could not be forfeited. No consideration was given to whether the homestead status could be held never to have attached or as to whether the homestead status could, as a matter of law, be revoked and the status of the property be determined as of the time of its acquisition. The loose semantical use of the homestead terminology is clear in such cases as Oklahoma ex rel. McCoy and In re Bly in which the courts would not allow the forfeiture of a "legitimately acquired homestead". Such terminology is an oxymoron which is used although the same courts would obviously hold that the property was not homestead if it was not legitimately acquired. Such was clearly the case with the

Supreme Court of Iowa as that Court has held in Cox v. Wauby, 433 N.W.2d 716, 719 (Iowa 1988), that no homestead interest can be established in real property to the extent it was acquired with illegal funds, Id. at 719, despite its oxymoronic use of the term "homestead" in In re Bly.

The point of the above discussion is that this court should not let semantics and the technical and generic definitions of homestead become confused such that the result will allow drug dealers to launder and protect their illegal drug proceeds by investing them in property upon which they reside, which property may generically, but not legally, be homestead property. Amicus curiae counsel makes one argument with which Petitioner can agree. That is that the fundamental purpose in construing a constitutional provision is to "ascertain and give effect to the intent of the framers and the people who adopted it" City of Jacksonville v. Continental Can Co., 113 Fla. 168, 169, 151 So. 488, 489 (Fla. 1933).

As argued in the initial brief, the drafters of the constitution could not have envisioned or imagined the drug problem facing the State of Florida and certainly had no intent that the constitutional provisions drafted to protect hard working peoples' homes would protect drug dealers' properties, purchased with drug sales proceeds, from forfeiture. To the contrary, had such scenario been imagined by the framers of our constitution, such most certainly would have been worded so as to make it clear that the framers thereof did not condone, and certainly would not promote drug dealers by protecting their illegally obtained properties.

In giving consideration to constitutional construction, Petitioner would suggest that

there are other constitutional construction principals supporting a ruling by this Court to refuse to allow drug dealers to use the constitution as a shield against the forfeiture of illegally obtained properties. Such principles include that a constitutional provision should "never be construed in such a manner as to make it possible for the will of the people to be frustrated or denied." Gray v. Bryant, 125 So.2d 846, 852 (Fla. 1960). In construing a constitutional provision, "[t]he goal intended to be accomplished or the evil sought to be prevented or remedied must be examined to determine the intent of the people in initiating enactment of the provision." State of Florida Commission on Ethics v. Sullivan, 449 So.2d 315 (Fla. 1st DCA 1984), rev. denied Commission on Ethics v. Sullivan, 458 So.2d 271 (Fla. 1984). Finally, this court has indicated that in construing the constitution of this state, a court must seek to ascertain the intent of the framers and voters, and to interpret the provision before [it] in the way that will best fulfill that intent. Williams v. Smith, 360 So.2d 417, 419, (Fla. 1978); See also Gallant v. Stephens, 358 So.2d 536 (Fla. 1978). The question to be considered by this Court in construing the application of the homestead provisions of our state's constitution is whether the framers of the constitution and the people of this state intended that the homestead provisions of the constitution prohibit the forfeiture of property purchased with illegal drug sales proceeds.

A final point should be made in rebuttal to Respondents' reference to other state cases and constitutional construction, regarding the Arizona and Colorado cases of In The Matter of A Parcel of Real Property, 166 Ariz. 197, 801 P.2d 432 (Ariz. App. 1990) and People v. Allen, 767 P.2d 798 (Co. App. 1988). Petitioner asserts that Respondents misperceive the import of the rulings of those cases. Such cases did refer to DeRuyter v.

State, 521 So. 2d 135 (Fla. 5th DCA 1988). However, unlike this Court in Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992), the courts of Colorado and Arizona held that homestead property could be forfeited if it was used in illegal criminal activity. Such cases simply point out that all states and courts are not in philosophical agreement with this court's ruling in Caggiano. Furthermore, if Colorado and Arizona allow the forfeiture of homestead properties which are illegally used, such states most certainly will allow the forfeiture of such properties which are purchased with illegal drug sales proceeds.

III. JURY VERDICTS AND FACTUAL DETERMINATIONS SHOULD NOT BE OVERTURNED ON APPEAL.

A. RESPONDENTS TESTIMONY AND EVIDENCE AT TRIAL REGARDING ALLEGED LEGITIMATE SOURCES OF INCOME WAS CONTESTED BY PETITIONER AND REJECTED BY THE JURY.

The second major theme of Respondents' brief has been to attempt to paint a picture that the jury's finding that the property in question was purchased 100% with illegal drug proceeds was somehow improper. However, the foundation for such argument is based solely upon a presentation of references to testimony of the Respondents and their friends at trial. At trial the Respondents attempted to persuade the jury to believe that the properties in question had been purchased with legitimately obtained monies by presenting testimony about various alleged sources of income and monies as well as argument that they had performed some of the work relating to the improvements themselves or had assistance from friends.

All testimony presented by the Stewarts regarding alleged sources of legal proceeds for buying or improving real property was contested and the credibility of such testimony was effectively challenged. At pages 14 through 18 of Petitioner's Initial Brief

there is a thorough discussion of the trial testimony regarding the Stewart's sources of income and claims regarding their friends work on the house and how such evidence was shown to be unworthy of belief. Although appellate courts will not reweigh the credibility of trial evidence, Citibank v. Studley, Inc., 580 So. 2d 784 (Fla. 3d DCA 1991), Respondents attempt to reargue the facts of the case overlooks on even more crucial appellate principle. Respondents have failed to consider the standard of review which must be applied in this case.

B. STANDARD OF REVIEW WHEN BURDEN OF PROOF IS CLEAR AND CONVINCING EVIDENCE.

The burden of proof in this case was clear and convincing evidence. For such cases, the court in Kingsley v. Kingsley, 623 So. 2d 780, 787 (Fla. 5th DCA 1993), rev. denied, 634 So. 2d 625 (Fla. 1994), determined the requisite standard of review:

> [B]ecause the standard of proof below was clear and convincing evidence, this court may not overturn the trial court's findings unless it may be said as a matter of law that no one could reasonably find such evidence to be clear and convincing.

Id. at 787. This standard of review was established in the earlier cases of In the Interest of D.J.S., 563 So. 2d 655, 662 (Fla. 1st DCA 1990), and Florida Bar v. Hooper, 509 So. 2d 289, 290 (Fla. 1987).

The Stewarts have confused the burden of proof at trial with the standard of review on appeal and seek to have this court review the testimony de novo. In support of their erroneous argument, the Stewarts point out only the evidence favorable to their position and take the stance that the trier of fact must believe all of the self-serving testimony presented by the Stewarts and their witnesses. Such is not the case.

The court instructed the jury on the burden of proof of clear and convincing evidence before the jury began deliberations (T. 830), using an instruction requested by counsel for the Stewarts (T. 810-813). The definition of clear and convincing evidence given to the jury was that established by this Court in State v. Mischler, 488 So. 2d 523 (Fla. 1986), and reiterated by the fifth district in Kingsley, 623 So. 2d at 787; See also Smith v. Department of Health and Rehabilitative Services, 522 So. 2d 956, 958 (Fla. 1st DCA 1988). The court in Kingsley thoroughly reviewed the law of Florida with regard to the standard of review in cases involving the burden of clear and convincing evidence and discussed the precedents in this state relating to such review. Kingsley, 623 So. 2d at 786-87. The Kingsley court's decision pointed out that a trial court's findings of fact are presumed correct and appellate courts will defer to the evaluation of the credibility of the witnesses and the determination of the weight to be given their testimony made by the trier of fact. Id at 2786-87. See also Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982). Kingsley also cited to this court's pronouncement that the record on appeal must be reviewed in the light most favorable to the prevailing party below. Id. at 786-87. Carolina Lumber Co. v. Daniel, 97 So. 2d 156, 158 (Fla. 1st DCA 1957).

The Stewarts take the position that their testimony, no matter how preposterous, was required to be accepted by the jury. Florida courts have never taken such a position. Florida's courts have made it clear that the trier of fact is to weigh the evidence and evaluate the credibility of witnesses. Further, such trier of fact is entitled to disbelieve any part of the testimony of any witness. In re Forfeiture of 1981 Oldsmobile, 593 So. 2d 1087, 1089 (Fla. 1st DCA 1992). See also, Roach v. CSX, 598 So. 2d 246 (Fla. 1st DCA 1992);

Bryant v. CSX, 577 So. 2d 613 (Fla. 1st DCA 1991). Applying the above principles and the standard of review established by this court, this case must be reviewed as a case in which the jury has properly determined that 100% of the proceeds used to acquire and improve the real property of the Stewarts were obtained through illegal drug sales and that such property should be forfeited.

IV. EX POST FACTO PROHIBITION IS CONFINED TO CASES OF CRIMINAL PUNISHMENT AND DOES NOT APPLY IN THIS CIVIL FORFEITURE ACTION

Although Respondents took action below to expressly waive the right to make an argument regarding ex post facto law and knowingly failed to preserve the issue for appeal, they now raise such issue for the first time in these proceedings. As Respondents and amicus curiae counsel have alluded to the constitutional provision prohibiting ex post facto laws, Petitioner will respond by showing that the ex post facto argument is inapplicable and that such argument was waived by Respondents.

A. THIS CASE IS A CIVIL ACTION

This court, in Board of Com'rs of Everglades Drainage Dist. v. Forbes Pioneer Boatline, 86 So. 199 (Fla. 1920) held that Florida's constitutional prohibition against ex post facto laws did not apply in civil actions:

> "It is settled by the authorities that the prohibition against ex post facto laws is confined to laws respecting criminal punishment, and has no relation to retrospective legislation of any other character".

Id at 201.

The Supreme Court of the United States similarly interprets the prohibition against ex post facto laws in the Constitution of the United States as applying only to criminal or penal statutes. Collins v. Youngblood, 110 S. Ct. 2715, 497 US 37, 111 L.ED. 2d. 301

(1990).

Accordingly, the law is clear that for the ex post facto provision of our state's constitution to apply the statute subject to such prohibition must relate to criminal punishment. The Florida Contraband Forfeiture Act, Section 932.701-932.707, Florida Statutes, is not criminal and does not provide for punishment.

The courts of this state have long recognized that the Florida Contraband Forfeiture Act is a civil proceeding. The Fourth District Court of Appeal of Florida specifically stated in Wille v. Karrh, 423 So. 2d 963, 964 (Fla. 4th DCA 1982), that proceedings under the Florida Contraband Forfeiture Act are "civil in nature". The Second District Court of Appeal of Florida in In re Forfeiture of 1986 Pontiac Firebird, 600 So. 2d. 1178 (Fla. 2d DCA 1992) held that statutory forfeiture provisions are intended to serve a remedial, rather than punitive purpose, and that:

> "A forfeiture proceeding constitutes "a civil, in rem action that is independent of any factually related criminal actions"... Accordingly, it does not "trigger the panoply of constitutional safeguards present in criminal actions".

Id. at 1179.

The Supreme Court of the United States has held that in rem civil forfeitures are neither punishment nor criminal. United States v. Ursery, 116 S. Ct. 2135, 2149 (1996). In arriving at such conclusion the court considered whether the legislative branch intended such forfeiture proceedings to be civil and remedial in nature, or criminal and punitive. The court put emphasis on the legislative branch creating civil procedures for forfeiture actions and indicating a clear intent that the proceedings be civil in nature.

Under the reasoning of Ursery, the Florida Contraband Forfeiture Act is clearly a

civil proceeding. Section 932.704 Florida Statutes provides that all civil forfeiture cases shall be heard before a circuit court judge of the civil division and that the Florida Rules of Civil Procedure shall govern forfeiture proceedings under the Florida Contraband Forfeiture Act. Florida Rule of Civil Procedure 1.010 provides that such rules will apply to "all actions of a civil nature".

B. THE FLORIDA CONTRABAND FORFEITURE ACT DOES NOT PROVIDE FOR PUNISHMENT

Not only is the Florida Contraband Forfeiture Act civil in nature, it does not provide for any punishment. Courts of this state and the Supreme Court of the United States have held that civil in rem forfeiture actions are remedial, rather than punitive or for punishment purposes. In Re Forfeiture of 1986 Pontiac Firebird, 600 So. 2d. 1178 (Fla. 2d DCA 1992); DeLisi v. Smith, 423 So. 2d 934 (Fla. 2d DCA 1982); rev. denied, 434 So. 2d 887 (Fla. 1983); United States v. Ursery, 116 S. Ct. 2135 (1996).

Although Ursery dealt primarily with the issue of whether a civil in rem forfeiture would violate the double jeopardy clause, the case is important for all forfeiture actions as it is dispositive of many unanswered questions. As stated above, the court in Ursery determined that civil forfeitures did not constitute punishment. The Supreme Court of the United States also expressed its clear holding that compensation of both the government and society are remedial goals that forfeiture actions may serve, as opposed to punishment. United States v. Ward, 448 US 242, 254, 100 S. Ct. 2636, 2644, 65 L.Ed. 2d 742 (1980); See United States v. Tilley, 18 F.3rd 295, 298 (5th Cir. 1994), cert. denied, 115 S. Ct. 574 (1994).

The United States 5th Circuit Court of Appeals, in Tilley, emphasized that civil

forfeiture actions were not punishment but served,

> the wholly remedial purposes of reimbursing the government for the costs of detection, investigation and prosecution of drug traffickers and reimbursing society for the costs of combating the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity, etc.

Id. at 299. Ursery also pointed out that civil forfeiture serves "the additional non-punitive goal of insuring that persons do not profit from their illegal acts" Ursery at 2148-49.

As stated above, Florida courts have consistently held that civil forfeiture actions serve remedial purposes rather than punishment purposes. In Re Forfeiture of 1986 Pontiac Firebird, 600 So. 2d. 1178, 1179 (Fla. 2d DCA 1992); DeLisi v. Smith, 423 So. 2d 934 (Fla. 2d DCA 1982); rev. denied, 434 So. 2d 887 (Fla. 1983). The designation of civil forfeiture actions as remedial in nature is relevant as this court has held that a civil statute which is remedial in nature can and should be retroactively applied in order to serve its intended purposes. City of Orlando v. Desjardins, 493 So. 2d 1027, 1028 (Fla. 1986).

C. IMPORTANT FACTS RELATING TO PROHIBITED ACTS OCCURRING AFTER THE FORFEITURE ACT WAS AMENDED

Even if the Florida Contraband Forfeiture Act is a criminal, rather than civil statute, which it is not, the facts of this case would render an ex post facto argument moot. In Respondents' answer brief and the brief of amicus curiae counsel it is argued that the improvements on the property in question were built prior to an amendment of the Florida Contraband Forfeiture Act relating to real property. Such argument was abandoned at trial as it was established through sworn statements read at trial that neither the house or the barn on the property were completed as of June 28, 1994, five years after the statute was amended and four years after Respondents were arrested (T.368-370). In making a

motion for directed verdict trial counsel (present appellate counsel) for Respondents argued to the court that construction of the home was not completed at the time of the trial in September of 1995 (T.535). Such evidence and admissions must be coupled with the undisputed evidence that one of the drug dealers, Mr. Lutsko, had began buying drugs to resale from Respondents in 1984 and continued purchasing drugs for such purposes until the Respondents arrests in 1990 (T.223-241) and testimony that such drug dealer purchased drugs two to three times per week and multiple times on some days until the 1990 arrests and that multiple other drug dealers were purchasing drugs during this period of time (T. 229-239).

With such evidence, it is clear that Respondents were both selling drugs and continuing to use illegally obtained drug sales proceeds to improve their real property subsequent to the date of the amendment of the Florida Contraband Forfeiture Act. Even in criminal cases requiring multiple acts and violations of a statute, this court has held that the application of a statute will not be considered to violate the ex post facto prohibition where some of the acts occurred prior to the effective date of the statute, so long as one of the acts prohibited by the statute occurred after the effective date thereof. Carlson v. State, 405 So. 2d 173 (Fla. 1981); State v. Whiddon, 384 So. 2d 1269 (Fla. 1980). It should be noted that Carlson and Whiddon allowed prosecution under Florida's RICO Act, which act provides a civil forfeiture remedy for properties used or purchased with proceeds obtained in violation of said act. In similar case of Jenkins v. State, 444 So. 2d 1108 (Fla. 1st DCA 1984), the issue was whether changes in the substantive provisions of a statute could be applied in a conspiracy charge against the Defendant so that the Defendant

would be guilty of a felony rather than a misdemeanor. The First District Court of Appeal cited Carlson and Whiddon and held that a statute which applies to a course of on going criminal activities:

> "...may be applied to criminal activities occurring before the effective date of that act, and thus not offend constitutional prohibitions against ex post facto laws, as long as at least one act occurred after the effective date of the statute".

D. THE AMENDED FORFEITURE ACT DID NOT PROVIDE FOR MORE ONEROUS PENALTY EVEN IF SUCH WAS DEEMED TO BE FOR CRIMINAL PUNISHMENT PURPOSES

One other obstacle Respondents would have to overcome, if the Florida Contraband Forfeiture Act was criminal and provided for punishment, rather than civil, would be to establish that the 1989 amendment of the act relating to forfeiture of real property would violate the ex post facto law, as such law has been defined. Even if it were to be held that the statute in question was criminal and provided for punishment, for the law to violate the ex post facto prohibition it would have to be such that it would provide for more onerous punishment or penal consequences than the law of Florida which was previously in effect. See Weaver v. Graham, 101 S. Ct. 960, 965, 450 U.S. 24, 67 L. Ed. 2d 17 (1981). Respondents overlook that a Florida law in effect at the time of the amendment of the statute in question and in effect at the time Respondents began the improvement of their real property with illegal drug proceeds, the Florida RICO Act, provided that it was unlawful to sale drugs and was unlawful to purchase or improve real properties with illegal drug sales proceeds. Sections 895.01-895.06, Florida Statutes (1985). Respondents' properties could have been forfeited under Florida's RICO Act before the Florida Contraband Forfeiture Act was amended. Accordingly, the amendment

would not provide a greater or different punishment than already provided for by Florida law and would not violate the ex post facto provision of our state's constitution. Simply stated again, the provisions of the Florida Contraband Forfeiture Act are remedial and provide a remedy for the illegal procurement of real property, rather than a punishment. The Florida RICO Act provided the same remedy.

E. WAIVER OF RIGHT TO RAISE EX POST FACTO ISSUE

Finally, Respondents did not make a significant argument in their brief regarding the ex post facto theory as Respondents were aware that they did not preserve their right to appeal such issue and, in fact, took action to expressly waive the right to procure a ruling from the court on such issue. In 1991, four years before the trial in this case, one of the Respondents filed a Second Amended Answer to Amended Petition For Rule or Order to Show Cause which, in affirmative defense number four made the allegation that the Florida Contraband Forfeiture Act was amended in 1989 and the forfeiture of the real property in question was "beyond the clear limits of the act." (R 105-110). Said affirmative defense was obviously known to counsel for Respondents four years before the trial of this action. Although the matter was not raised nor argued at trial (apparently due to the facts established at trial which are discussed above), after the verdict and judgment were rendered against Respondents, a Motion for New Trial was filed (R 563-568) which, in paragraph four thereof, made the argument that the application of the Florida Contraband Forfeiture Act constituted a violation of the ex post facto clause of the constitution of the State of Florida. Counsel for the Respondents never sought a ruling or determination of the issue relating to the amendment of the statute before, during or after trial. Although

Respondents had raised such issue, counsel for Respondents did not call the motion up for hearing before the trial judge, but instead chose to waive the right to argue said matter before the trial judge by filing a Notice of Appeal (R 571). An Appellant who files a notice of appeal before the entry of an order denying his motion for new trial "is deemed to have waived or abandoned his own motion and thereby vested jurisdiction in the Appellate Court". Perez v. City of Tampa, 181 So. 2d 571, (Fla. 2d DCA 1966); Griffith v. State, 435 So. 2d 398 (Fla. 2d DCA 1983). Accordingly, the intentional waiver of the right to argue the issue before the trial court constituted a waiver and abandonment of the right to argue such issue. Furthermore, Respondents failed to obtain a ruling regarding the issue and clearly did not establish nor preserve any error for appeal. It is axiomatic that there must be error before a party on appeal can assert the commission of such. When a party fails to secure a ruling on a motion, the motion is considered waived and the issue is not preserved for appellate review. Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991). See also Le Retilley v. Harris, 354 So. 2d 1213 (Fla. 4th DCA 1978); cert. denied 359 So. 2d 1216 (Fla. 1978).

Respectfully submitted,
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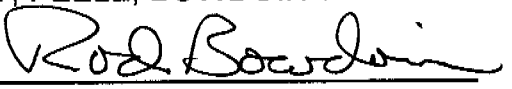

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished by U.S. Mail this 26 day of December, 1996, to Stephen N. Bernstein, Counsel for Respondents, Post Office Box 1642, Gainesville, Florida 32602, Robert S. Griscti, Counsel for Florida Association of Criminal Defense Lawyers, 204 W. University Avenue, Suite 6, Gainesville, Florida 32601 and Jacqueline H. Dowd, Assistant Attorney General, Counsel for State of Florida, 28 West Central Boulevard, Suite 310, Orlando, Florida 32801.

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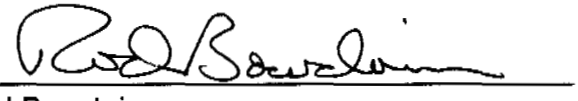
By: 

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