

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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Case No. 89,792

4th DCA Case No. 95-1679

Eric Ilkanic,
Petitioner,

v.

City of Fort Lauderdale, et al.,
Respondents.

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The City of Fort Lauderdale was the prosecution in the County Court of the 17th Judicial Circuit, Criminal Division, Broward County, Florida and the appellant in the Fourth District Court of Appeal. The petitioner was the defendant in the trial court and the appellee in the district court. The parties will be referred to as they appear before this Honorable Court. The City of Fort Lauderdale will be referred to as “city.”

References to the record on appeal will be designated by the symbol “R.” References to petitioner’s appendix will be designated by the symbol “A.”

ISSUE ON APPEAL

WHETHER THE TRIAL COURT CORRECTLY DECLARED UNCONSTITUTIONAL THE CIVIL RESTITUTION LIEN ACT?

WHETHER THE ACT VIOLATES THE HOMESTEAD PROTECTION GUARANTEED BY SECTION 4, ARTICLE X OF THE FLORIDA CONSTITUTION?

WHETHER THE CIVIL RESTITUTION LIEN ACT VIOLATES EQUAL PROTECTION?

WHETHER THE CIVIL RESTITUTION LIEN ACT VIOLATES DUE PROCESS?

WHETHER THE CIVIL RESTITUTION LIEN ACT IS UNCONSTITUTIONALLY VAGUE?

STATEMENT OF THE CASE AND FACTS

The petitioner was arrested for trespass on February 3, 1995 and plead guilty to that offense on March 29, 1995. He was sentenced to forty-five days in the Fort Lauderdale City Jail. The petitioner was not represented by counsel. The city moved for the imposition of a lien of \$50.00 a day for each day of the petitioner's sentence. Neither the city nor any "victim" moved for the imposition of a lien for victim damages. The trial court denied the city's motion and *sua sponte* declared unconstitutional the civil restitution lien act (hereinafter the act). The city filed a notice of appeal.

The trial court declared unconstitutional both the liquidated damages schedule and the incarceration assessment portions of the statute. Pertinent to this petition, the court held that "the liquidated damages of \$50.00 per day incarceration costs set forth in Section 5(2) bears no rational relationship to actual costs of incarceration or other correctional costs." (R 4) The court further held that the statute violates equal protection because it is particularly onerous when applied to clients of the public defender, "as they are by **definition** indigent and it (the act) is designed to ensure that they remain indigent." (R 5) The trial court also found the statute to be unconstitutionally vague based on contradictory and ambiguous language employed by the legislature. Specifically, the court ruled:

The Act is unconstitutional for vagueness because of inherent contradictions and ambiguities within the law. For example, Section 5(2) states that "a convicted offender shall be liable to the State and its local subdivisions for damages and losses for incarceration costs and other correctional costs" and yet in section 5(2)(b) the Act states that "if the conviction is for an offense other that (sic) a capital or life felony, a liquidated damage amount of \$50.00 per day of the convicted offender's sentence shall be assessed against the convicted offender and in favor of the State or its local subdivisions" without specifying whether such assessment shall be made only against those offenders who are incarcerated, The

Act is unconstitutional due to vagueness because, while Section 5(2)(b) provides that \$50.00 per day incarceration costs be assessed against the offender and “in favor of the State or its local subdivision,” the statute fails to provide a mechanism for payment of such assessment to the State or its local subdivisions. , . . The Act is unconstitutional for vagueness because it does not define the circumstances under which the incarceration costs are to be imposed. The Act is unconstitutional for vagueness in that it distorts the definitions of “convicted” and “victims,” among others, so that neither word connotes its generally accepted meaning.

(R 6-7) The trial court also found the act unconstitutional because it violates the prohibition against excessive fines. (R 7)

The Fourth District Court of Appeal reversed the trial court. City of Fort Lauderdale v. Ilkanic, 21 Fla.L.Weekly D 2292 (Fla. 4th DCA November 1, 1996) (A 7) The court held that a liquidated damage of \$50 per day is “reasonable compensation to the state for costs incurred in incarcerating convicted offenders and bears a reasonable relationship to the valid legislative purpose of alleviating the burden of incarcerating criminal offenders.” Id. In addition, the court acknowledged that a defendant must be provided notice and an opportunity to be heard before costs may be assessed. In light of this requirement, the court held that the defendant’s ability to pay must be determined before the state enforces payment by seeking the imposition of a lien.

The district court denied rehearing and a request that it certify the constitutionality of the statute as a question of great public importance. (A 8) This Court accepted discretionary jurisdiction by order dated March 26, 1997.

SUMMARY OF ARGUMENT

The trial court correctly held found unconstitutional the civil restitution act. The statute violates section 4, Article X of the Florida Constitution by allowing a lien to be placed on an individual's homestead. The statute violates equal protection treating differently persons liable for damages or losses in criminal cases from persons liable for damages or losses in civil cases. The statute also violates due process by arbitrarily setting the amount of liquidated damages and by denying a convicted person a hearing to determine the amount of damages owed and his ability to pay that amount. Furthermore, the statute is unconstitutionally vague.

ARGUMENT

THE TRIAL COURT CORRECTLY DECLARED UNCONSTITUTIONAL THE CIVIL RESTITUTION LIEN ACT.

THE ACT

Florida Statutes 960.29 through 960.297 constitute the Civil Restitution Lien and Crime Victims' Remedy Act. The act allows the imposition of "a long term civil liability for the costs of incarceration, by means of the civil restitution lien, against a convicted offender, regardless of the offender's financial status at the time of the conviction." Section 960.29(1)(d) Florida Statutes (1995). The act defines the civil restitution lien as "a lien which exists in favor of crime victims, the state, its local subdivisions, or aggrieved party and which attaches against the real or personal property owned by a convicted offender." Section 960.291(1) Florida Statutes (1995) The act further defines "damages or losses" as "damages or losses to the state and its local subdivisions which are caused by imposition of a convicted offender's sentence." Section 960.29 1(5)(b) Florida Statutes (1995) These damages or losses include the cost of incarceration, to be determined according to the schedule of liquidated damages set out in Section 960,293. Section 960. 291(5)(b)(1) Florida Statute (1995). The civil restitution lien attaches to any real or personal property owned by the convicted offender, but may not be foreclosed on homestead, Section 960.291(7), Florida Statutes (1995).

Legislative Intent

The Florida Legislature found--based on what appears to be supposition since neither the statute nor the legislative history cite any support for such an overall finding--that "former approaches to the problem of compensating crime victims through restitution have proven

inadequate or have been inconsistently applied in many cases.” Section 960.29, Fla. Stat. (1995)

The legislature also found “an urgent need to alleviate the increasing financial burdens on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders.” Id.

The legislature purportedly seeks to remedy these problems by establishing a schedule of “liquidated damages” which specifies the monetary liability that a person convicted of committing a crime has to (1) the crime victim or the aggrieved party for restitution, and (2) the state, or its local subdivisions, for damages and losses for incarceration and other correctional costs. Upon a person’s conviction, the court must enter a judgment or order for the scheduled amount, without the safeguards and due process required for obtaining other civil judgments.

The Act then provides for a civil lien to be imposed automatically, and recorded, if the convicted person is unable immediately to satisfy the judgment. The lien can be satisfied and levied in the same manner as any other civil lien, despite the absence of safeguards and due process required for obtaining other civil judgments.

The lien is entered by the court against the convicted person regardless of the person’s financial status at the time of his conviction. However, the statute prohibits duplicate recovery by crime victims, aggrieved parties, the state or its local subdivisions.

The legislature, in support of the schedule of liquidated damages, states that the schedule is intended to “facilitate swift and uniform determinations of the amounts of civil restitution liens, and to facilitate judicial convenience in entering restitution lien orders.” Section 960.29(1)(c), Fla. Stat. (Supp. 1994). The legislature’s stated intent in passing the act was to provide “rough remedial justice” to crime victims, the state, and its local subdivisions for damages and losses they suffer as a result of the convicted person’s criminal act and subsequent

incarceration and other correctional costs (but not including costs for which the person may be liable under Chapter 939, Florida Statutes, which primarily provides for costs of prosecution). The statute identifies a further intent to ensure that the amount of liquidated damages, as specified by the schedule, bears a rational relation to the actual damages incurred by 1) the victim as a result of the crime; and, 2) by the state and its local subdivisions as a result of the convicted person's incarceration and other correctional costs.

THE ACT VIOLATES THE HOMESTEAD PROTECTION
GUARANTEED BY SECTION 4, ARTICLE X OF THE FLORIDA CONSTITUTION

The act directly conflicts with the Florida Constitution by specifically authorizing liens for damages and costs to be placed on any real or personal property owned by the convicted person (including property that comes into the person's possession subsequent to his conviction). Section 960.29 1(7) of the Act specifies that "[n]o civil restitution lien created pursuant to the provisions of this act may be foreclosed on real property which is the convicted offender's homestead under s. 4, Art. X of the State Constitution," Nonetheless, the Act is in violation of the Florida Constitution in that it allows liens to exist on homestead property. In Downing v. State, 593 So. 2d 607 (Fla. 5th DCA 1992), the court confronted the issue of whether, in determining a defendant's financial resources for purposes of restitution, the court could consider the defendant's ownership interest in homestead property and order a defendant to execute a note and mortgage in favor of the victims of a criminal act. The appellate court determined that the purpose of the homestead act is to protect the homeplace against financial misfortune. Therefore, Florida's public policy prohibits the victim from attaching the defendant's homestead directly through a tort action judgment, Consequently, to allow the victim or court to reach the property

through a criminal court proceeding also would be unconstitutional.

Section 4, Article X of the Florida Constitution prohibits judgment liens, decrees or execution on homestead property “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.” Such an exemption from liens also exists under the same section of the Florida Constitution for “personal property to the value of one thousand dollars.” Consequently, this section of the act allowing for the imposition of liens on any personal property and any real property is unconstitutional in that it is in conflict with the Florida Constitution.

THE ACT VIOLATES EQUAL PROTECTION

The act also is unconstitutional because it violates the right to equal protection. The United States Supreme Court’s decision in James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), supports this conclusion. In James, the Court refused to uphold a Kansas statute because it failed to provide the same exemptions from collection of a judgment for repayment of counsel fees as those allowed, under the code of civil procedure, from collection of other judgment debts. The Supreme Court found that “strip[ping] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors . . . embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.” Id. at 135, 142.

In contrast, the U.S. Supreme Court in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct 2116, 40 L. Ed. 2d 642 (1974), upheld an Oregon “recoupment statute” requiring convicted persons to repay the government for the costs of their court-appointed counsel. The Supreme Court upheld

the recoupment statute, **finding** that “Oregon’s legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.” Fuller v. Oregon, 417 U.S. at 54. The Court noted that “[s]ince an order to repay can be entered only when a convicted person is financially able but unwilling to reimburse the State, the constitutional invalidity found in James v. Strange simply does not exist,” Id. at 48 n.9. The Supreme Court also found that the Oregon statute gave a convicted person all the exemptions provided to other judgment debtors and, additionally, allowed the convicted person to show at any time that recovery of the costs would impose a “manifest hardship” on him. Therefore, it provided equal protection.

Even if the exemptions from liens provided under the act were in compliance with the State Constitution--and were exactly the same as the exemptions provided for other civil judgments--the act would, nonetheless, violate both Federal and State equal protection rights. The act mandates that a person convicted of a crime be ordered to pay liquidated damages to the victim, aggrieved **party**, State, or its local subdivisions, even though there may have been no actual damages suffered, or the amount of the actual damage had absolutely no relation to the amount of liquidated damages. Under the act, none of the persons or entities to whom payment is to be made has to produce proof of the amount of damage or even show that damage occurred.

By contrast, Florida law mandates that before a judgment may be entered against a person for damages in a **civil** action, the victim or aggrieved person must first prove the amount of

‘A civil judgment for restitution against an appellant (who was currently unable to pay) in case he should become able to pay (e.g., “win the lottery”), was held impermissible in McInnis v. State, 624 So. 2d 856 (Fla. 4th DCA 1993).

damages in a court of law. Further, courts have repeatedly rejected pre-determined liquidated damages provisions when they fail to have some rational relation to the actual amount of damages. In Bayshore Royal Co. v. Doran Jason Co., 480 So. 2d 65 1,654 (Fla. 2d DCA 1985), the Court noted that “a liquidated damages clause may be struck down as an unlawful penalty if the amount of actual damages was readily ascertainable at the time the contract was entered into and if the liquidated amount is excessively disproportionate to the actual damages.” In United States v. Commercial Construction Corp., 741 F.2d 326,328 (11th Cir. 1984), the federal court stated that “in order for a Florida court to enforce a liquidated damages clause, it must be clear that the amount called for in the clause is compensatory and not in the nature of a penalty”

Courts have sometimes refused to uphold the amount of damages due under a liquidated damages provision which was valid, ~~the~~ Florida Supreme Court explained in Hutchinson v. Tompkins, 259 So. 2d 129 (Fla, 1972), that a court may refuse to uphold a liquidated damages clause which was valid at the time an agreement was entered into (Le., because the damages for breach of contract could not readily be determined at that time), if the court determines as a matter of equity that the amount of liquidated damages is out of proportion to the amount of actual damages. In Secrist v. National Service Industries, Inc., 395 So. 2d 1280 (Fla. 2d DCA 198 1), the district court stated that a liquidated damages provision providing for excessive or unreasonable damages will be viewed as a penalty and the injured party will be allowed to recover only the actual damages proven at trial, The court also noted that courts should use their equity powers to “relieve against the liquidated sum if it appears unconscionable in light of the circumstances existing at the time of the breach.” Id. at 1283.

These protections and procedures in a civil action ensure that an injured party seeking

damages does not receive a “windfall.” However, a convicted person cannot avail himself of such protections and procedures. Rather, the act mandates that he be liable--without any opportunity to object or present opposition--for liquidated damages to the State and its local subdivisions without proof of actual damages. Thus, in regard to a determination of damages, the act treats differently convicted persons from persons against whom actions for damages are lodged in civil court. The district court, although requiring a finding that the defendant has the ability to pay before imposition of the lien, did not address the statute’s failure to require proof of damages.

This differential treatment results in a denial of equal protection to the convicted person and is a violation of his constitutional right. In Iacovone v. State, 639 So. 2d 1108, 1109 (Fla. 2d DCA 1994), the district court noted that “[t]he test to be used in examining a statutory classification on equal protection grounds is whether the classification rests on a difference bearing a reasonable relation to the object of the legislation.”) H o w e v e r , t h e reasonable relation or rational basis standard for reviewing equal protection is only applicable to challenges involving non-fundamental rights. In Lite v. State, 617 So. 2d 1058, 1060 (Fla. 1993), the Florida Supreme Court held that a strict scrutiny standard should be applied in cases involving the abridgement of fundamental rights.

The civil restitution lien infringes on the convicted person’s property rights which are considered fundamental rights under both the United States and Florida Constitutions. Thus, a strict scrutiny standard must be used in determining whether the disparate treatment of convicted persons who are ordered to pay damages results in an unconstitutional violation of equal protection. In Laskey v. State Farm Insurance Co., 296 So. 2d 9, 18 (Fla. 1974), the Florida

Supreme Court held that "[i]n order to comply with the requirements of the Equal Protection clause, statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike,"

The act fails to satisfy the equal protection guarantee. The classification that automatically makes a convicted person liable for liquidated damages, without proof or any basis for the amount of damages, is arbitrary and bears no relationship whatsoever to the legislative purpose of ensuring full restitution for damages and losses caused by the person's sentence. Moreover, the equal protection clause prohibits states from passing legislation that results in different treatment of "persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." Reed v. Reed, 404 U.S. 71, 76, 92 S. Ct. 25 1, 30 L. Ed. 2d 225 (1971). There is no legitimate reason to require convicted persons to make restitution for unproven damages, while requiring persons not charged under a criminal statute to make restitution only for damages proved in court. Also in Reed, 404 US. at 76, the Supreme Court stated that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment" This rationale is just as applicable to the legislature's disparate treatment of convicted persons who are ordered to pay liquidated damages (as opposed to actual damages) because a liquidated damages schedule eliminates the need for court hearings to determine the amount of actual damages.

"In evaluating claims of statutory discrimination, a statute will be regarded as inherently 'suspect' and subject to 'heightened' judicial scrutiny if it impinges too greatly on fundamental

constitutional rights flowing either from the federal or Florida Constitutions . . ." DeAyala v. Florida Farm Bureau Casualty Insurance Co., 543 So. 2d 204,206 (Fla. 1989). The Florida Supreme Court in DeAyala declared unconstitutional a section of the state's workers' compensation statute that provided death benefits for some nonresident alien dependents that were different than those provided for Florida citizens. The court found that "[w]hile the legislature certainly has authority to dictate the mechanism for computing a particular worker's compensation, it may not attach conditions to those computations that discriminate against persons based on constitutionally impermissible grounds." Id. at 206. The same applies to legislation providing for damages.

While the legislature has authority to dictate the mechanism for computing damages, it may not attach conditions to those computations that discriminate against persons based on constitutionally impermissible grounds (e.g., conviction status). The fact that the act treats all persons convicted of a certain degree of crime the same does not satisfy the equal protection requirement. In Rinaldi v. Yeager, 384 U.S. 305, 308-309, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966), the Supreme Court reaffirmed that the "Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes . . . It also imposes a requirement of some rationality in the nature of the class singled out."

Not only does the distinction between civil litigants and criminal litigants violate equal protection, but the further classification of persons convicted of capital or life felonies and persons convicted of other crimes establishes two irrational classes within the criminal class. The "cost" of a person's incarceration is based on the degree of the offense the person is convicted of committing. The equal protection clause requires that statutory distinctions have

some relevance to the purpose for which the classification is made. Rinaldi v. Yeager, 384 U.S. 305, 308-309, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). The person's liability for cost of incarceration is based on that secondary classification rather than on the actual amount of damages caused by, or incurred as a result of, his incarceration. Sub judice, the secondary classifications based on the degree of the offense has no relation to the legislature's stated purpose of ensuring that restitution is made for actual damages. A classification based on degree of crime fails to achieve the legislature's stated purpose and results in a denial of equal protection. The Equal Protection Clause requires that, "in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" Id. However, under the act, there is no relation between the classifications and the legislature's stated purpose of ensuring that restitution is made for actual damages. A classification based on degree of crime fails to achieve the legislature's stated purpose and results in a denial of equal protection.

If the purpose of the act is to ensure full restitution or compensation for actual damages and losses to the state and its subdivisions, then neither the overall class of convicted persons nor any of its sub-classes has any relevance to the purpose for which the classes were purportedly established. In addition, the statute does not limit the \$50.00 per day charge to those cases that result in incarceration. Section 960.291(3) defines "conviction" as a "guilty verdict by a jury or judge, or a guilty or nolo contendre plea by a defendant, regardless of adjudication of guilt." "Sentence" is defined as a court-imposed sentence of a convicted offender." Section 960.291(8) ~~Elect Stat. 960.293(2)~~ makes liable a convicted offender for "incarceration costs and other correctional costs." (emphasis added) Thus, a defendant placed on probation is liable

for \$50.00 per day for his probationary term. This amount has no reasonable relationship to the cost incurred by the state or its local subdivisions. Further, defendants convicted of capital or life felonies are assessed \$250,000 in liquidated damages. This amount is assessed even when a trial court lawfully departs downward from the sentencing guidelines and imposes a relatively short prison sentence on a life felony. Thus the liquidated damages schedule can result in an extraordinary windfall to the state and is not reasonably related to the valid state purpose of compensating the state or its local subdivisions.

The act suffers from the same basic constitutional **infirmity** as the New Jersey statute that the Supreme Court rejected in James v. Strange, *supra*. **u l d b e f o u n d** unconstitutional.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES
SUBSTANTIVE DUE PROCESS

In determining whether a statute violates substantive due process, “the test is whether statute bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary or oppressive.” Folmar v. Young, 591 So. 2d 220,224 (Fla. 4th DCA 1991). See also St&. 526 So. 2d 104 (Fla. 4th DCA 1987), app’d 526 So. 2d 63, cert. den. 109 S.Ct. 178,488 U.S. 870,102 L.Ed 2d 147 (1988); Department of Insurance v. Dade County Consumer Advocate’s Office, 492 So. 2d 1032 (Fla. 1986); Young v. Broward County, 570 So. 2d 309 (Fla. 4th DCA 1990). The petitioner recognizes that the restitution is a valid legislative goal. However, the act violates due process in that it is not reasonably related to the state’s legitimate purpose.

The legislature noted, as part of its statement of intent, a desire to bring uniformity to

restitution determinations by the courts. Nonetheless, the legislature also states as its intent -- and makes a **finding**-- that the liquidated damages provided for in the act bear a rational relation to the actual damages and losses suffered. Clearly, restitution cannot be both uniform and rationally related to actual damages. In Moore v. Thompson, 126 So. 2d 543 (Fla. 1961), the Florida Supreme Court held that courts are not bound by legislative findings and declarations of policy when they are clearly erroneous or arbitrary.

The schedule of liquidated damages pertaining to compensation to the State or its local subdivisions for incarceration or other correctional costs is unsubstantiated by both the statute and its legislative history. The figure of \$50.00 a day is purely arbitrary. There is nothing in the act which suggests any other conclusion.

Due to the legislature's apparent failure to base the amount of liquidated damages to victims or the State and local subdivisions on anything more than an arbitrary and capricious **determination**,² its findings that the act's liquidated damages bear a rational relation to actual damages suffered is **irrebuttably** erroneous. The legislature's declarations that the provisions of the act are rationally related to its goal of fully compensating crime victims, the state, and its local subdivisions for actual damages and losses are without foundation. Consequently, the legislature's findings should be rejected by this Court.

² The legislature, obviously cognizant of the lack of rational relation between liquidated damages and actual damages, included a provision to ensure that restitution for actual damages and losses could be realized if the liquidated damage amount was insufficient. Section 960.29(4) of the Act specifies that an order imposing a civil restitution lien pursuant to the Act will not bar any subsequent civil remedy or recovery and will not preclude the victim, the state or aggrieved parties from collecting money also awarded by a restitution order under section 775.089, Fla. Stat. (1993), so long as there is no duplicate recovery.

The setting of a compensatory damage amount without any evidence supporting a finding that the amount set is related to actual damages is an arbitrary determination. The arbitrariness is not extinguished by the fact that the statute mandates that all persons within a certain classification are subject to the same arbitrary deprivations of property. In Honda Motor Co. v. Oberg, 512 U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336,348 (1994), the United States Supreme Court, noted that “abrogation of well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violates the Due Process Clause.” The legislature could have prevented a due process attack by simply allowing for a hearing to determine the amount of damages. In Honda Motor Co., 129 L.Ed.2d at 348-349, the Court explained that “[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process.” The legislative intent to provide rough remedial justice does not excuse the arbitrary deprivation of property:

[T]he interference with or sacrifice of the private rights must be necessary, i.e. must be essential, to the reasonable accomplishment of the desired goal. Such interference or sacrifice can never be justified nor sanctioned merely to make it more convenient or easier for the State to achieve the desired end. . . .

State v. Leone, 118 So. 2d 781,785 (Fla. 1960)

Although the legislature is authorized by its police powers to pass laws that affect or regulate a person’s property rights, those laws “**must** not infringe constitutional guarantees by invading personal or property rights unnecessarily or unreasonably or by denying due process or equal protection of laws. Gates v. City of Sanford, 566 So. 2d 47, 49 (Fla. 5th DCA 1990) In In Re Forfeiture of 1969 Piner Navaio, 592 So. 2d 233,235 (Fla. 1992), the supreme court stated

that the basic test in considering whether a statute violates substantive due process is “whether the state can justify the infringement of its legislative activity upon personal rights and property.” One such right, guaranteed under the Fourteenth Amendment to the United States Constitution, is the personal right to acquire, use and dispose of property without arbitrary, capricious or unjustly discriminatory action or interference of the State. Id. at 235. Kass v. Lewin, 104 So. 2d 572, 578 (Fla. 1958).

In addition, the “windfall” potential discussed above substantiates that there is no rational relation between the actual correctional and incarceration costs and the liquidated damages assessment mandated by the act. This is demonstrated by the provisions that mandate that convicted persons, as restitution for incarceration and other correction costs, pay \$50 per day of their sentence unless the conviction is for a capital or life felony. For a capital or life felony the convicted person is liable for a total of \$250,000~--regardless of the actual amount of time he spends incarcerated, There is no rationale for such an arbitrary assessment.

Furthermore, if the amount of actual damages caused by a person’s sentence cannot be determined, compensatory damages should not be awarded. Case law holds that compensatory damages shall not be awarded unless there is some basis in fact for determining the amount of the damage. In Florida Outdoor, Inc. v. Stewart, 318 So. 2d 414,415 (Fla. 2d DCA 1975), the Court said, “[i]t is rudimentary, of course, that damages cannot be based upon speculation, guesswork or conjecture. They must have some reasonable basis in fact , . . .” Although the Court recognized in John Hancock Mutual Life Insurance Co. v. Mark-A. Inc., 324 So. 2d 674 (Fla. 2d DCA 1975), that the trial judge may use reasonable discretion in making awards of damages when the actual amount of damages cannot be precisely and mathematically

determined, it, nevertheless, reaffirmed “the well-established principles that awards for damage must be supported by evidence and cannot be based on speculation and conjecture.” Id. See also, Farrington v. Richardson, 16 So. 2d 158 (Fla, 1944) (there can be no substantial recovery for damages that are so conjectural and speculative as to be immeasurable pecuniarily); George Hunt, Inc. v. Dorsey Young Construction, Inc., 385 So. 2d 732 (Fla. 4th DCA 1980) (evidence as to the amount of damages must be proven with certainty).

Florida Statute 775.089 mandates that the court order the defendant to make restitution to the victim for damage or loss caused by his criminal act “unless it finds clear and compelling reasons not to order such restitution.” It also provides for the order of restitution to be enforced by either the state or the named victim in the same way as a judgment in a civil action. Section 775.089, Fla. Stat. (1993), already provides a workable, constitutional mechanism for determining and ordering restitution. Consequently, there also is no compelling purpose for the section of the act that provides for compensation, in the form of liquidated damages, to the State for incarceration and other correction costs that justifies the act’s obliteration of the convicted person’s right to due process.

THE ACT VIOLATES PROCEDURAL DUE PROCESS

However, even if this Court finds that the amount of costs mandated by the act are not arbitrary, the act is still unconstitutional in that it allows imposition of a lien prior to any determination of the convicted person’s ability to pay. The petitioner recognizes that statutorily mandated costs may be imposed on an indigent defendant without a determination of the defendant’s ability to pay. State v. Vamper, 579 So. 2d 730 (Fla. 1991). Imposition of a lien, however, is more than a mere assessment of costs or financial liability* The recitation or

assessment of court costs does not carry with it the legal ramifications and interference of property rights accompanying the imposition of a lien. In State v. Beasley, 580 So. 2d 139, 142

(Fla. 1991), the Florida Supreme Court stated:

A trial court is not required to determine a convicted criminal defendant's ability to pay statutorily mandated costs prior to assessing costs unless the applicable statute specifically requires such a determination. **It is only when the state seeks to enforce the collection of costs that a court must determine if the defendant has the ability to pay.**

(Emphasis added.) See also Mays v. State, 519 So. 2d 618 (Fla. 1988). The Beasley Court also recognized that a defendant must be given a full opportunity to object to the imposition and amount of the costs. 580 So. 2d at 141.

The district court applied Beasley to the statute at bar and held that the lien could not be imposed without a determination of a defendant's ability to pay. However, the court did not address the statute's failure to provide a hearing regarding the actual damages incurred.

Moreover, absent a hearing to determine what property is exempt³ from imposition of a lien, exempt property may be wrongfully subject to a lien and hence, wrongfully "taken."

THE ACT IS UNCONSTITUTIONALLY VAGUE

"A statute which either forbids or requires an act in terms so vague that anyone of common intelligence must guess at its meaning and differ as to its application violates the first essential element of due process of law." Falco v. State, 407 So. 2d 203,206 (Fla. 1981); Bertens v. State, 453 So. 2d 92 (Fla. 1st DCA 1984) "In a vagueness challenge, the doubt should be resolved in favor of the citizen and against the state" resulting in

³ In Bennett v. Arkansas, 485 U.S. 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988), the United States Supreme Court held that social security benefits are exempt from legal process,

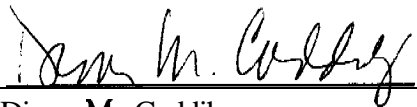
the statute being held facially invalid. Brown v. State, 629 So. 2d 841, 843 (Fla. 1994). The provisions of the act are not all capable of being defined and interpreted consistently. Section 960.292(1) of the act states that “upon conviction, the convicted offender shall incur civil liability for damages and losses. Section 960.292(2) of the act then says that the court shall enter civil restitution lien orders upon petition of the local subdivision, crime victim, or aggrieved party, or on its own motion. Section 960.297(1) allows the state and its local subdivision, in a separate civil action or as a counterclaim in any civil action, to seek recovery of damages and losses. The procedure for seeking recovery is anything but clear. If no petition or motion is filed, is the court is required to enter an order of lien? The act is vague because persons of common intelligence are left to guess at its meaning.

CONCLUSION

The argument presented above support the trial court's order declaring unconstitutional the civil restitution lien. The act violates the constitutional protection of the homestead, due process, equal protection and is unconstitutionally vague. The appellee respectfully requests this Honorable Court to declare unconstitutional the civil restitution lien act.

Respectfully submitted,

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17th Judicial Circuit

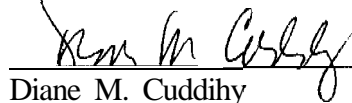


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to Assistant Attorney General David M. Schultz, Department of Legal Affairs, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, 33401-2299, this 20th day of May, 1997.



Diane M. Cuddihy