

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC01-1735

LOWER CASE NO. 3D00-1469

THE STATE OF FLORIDA,

Petitioner,

v.

SERGIO VALDES, ET. AL.

Respondent(s).

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

On September 21, 1997 the Defendant, SERGIO VALDES, (hereinafter SERGIO) was arrested for and charged by amended information dated October 13, 1997 with the following four counts:

- a) Possession of out of season stone crabs.
- b) Possession of undersize crawfish.
- c) Interference with a conservation officer.
- d) Contributing to the delinquency of a minor.

On June 15, 1998 SERGIO pled guilty and was sentenced with respect to the above-mentioned counts pursuant to a negotiated plea as follows:

a) As to Count I, SERGIO was adjudicated guilty and ordered to pay a \$500.00 fine as well as \$1,370.00 to the Marine Biological Trust Fund and \$105.00 in court costs.

b) As to Count II, SERGIO was adjudicated guilty and ordered to pay a \$500.00 fine and spent 45 days in Monroe County Jail.

c) As to Count III adjudication was withheld and the Defendant was ordered to pay a \$300.00 fine.

d) Count IV was nolle prossed by the State.

Additionally, SERGIO was required to pay \$25.00 for cost of prosecution, \$100.00 to the Florida Marine Patrol, was placed on six (6) months probation consecutive on Counts I through III and was ordered to do 100 hours of community service. There was no objection to early termination of probation after six months had elapsed.(R 9-10).

On or about July 14, 1998 Officer Wigley of the Florida Marine Patrol seized one 1980, 43 foot Torres commercial fishing vessel "La Esperanza" United States Coast Guard documentation number: 929260, bearing hull identification number TBP000350280 and all associated equipment. This vessel was being stored at a marina and the owner, CARLOS VALDES (hereinafter CARLOS) was not present when the vessel was seized by Officer Wigley. (Appendix Exhibit "A" and Exhibit "B" attached thereto).

On or about July 14, 1998 the subject fishing vessel was seized by the State.

On or about July 31, 1998 the State filed its Motion for Final Order of Forfeiture of Nuisance some forty-six (46) days after SERGIO pled guilty and was sentenced. (R 11-23).

From May 20, 1988 to present, CARLOS VALDES, (hereinafter CARLOS) was and is 100 percent owner of the vessel "La Esperanza" which is the subject matter of the State's forfeiture motion. (R 11-23).

On or about October 12, SERGIO filed his Motion to Dismiss with Prejudice the State of Florida's Motion for Final Order of Forfeiture of Nuisance. (R 24-31).

On or about October 19, 1998 the State filed its response to SERGIO's Motion to Dismiss with Prejudice. (R 32-37).

On March 19, 1999, the court started a hearing on SERGIO's Motion to Dismiss the State's Motion for Final

Order of Forfeiture of Nuisance.

At the conclusion of that hearing the court gave SERGIO leave to file a Supplemental Memorandum of Law and gave the State leave of court to file a response to SERGIO's supplemental memorandum.

SERGIO did file a supplemental memorandum of Law and thereafter the State responded to SERGIO's memorandum. (Appendix Exhibit "A" and Exhibit "B").

It was not until its last response that the State for the first time, raised the issue of standing and argued that SERGIO did not have standing to contest this forfeiture.

On September 10, 1999, the court concluded the hearing on SERGIO'S Motion to Dismiss with Prejudice the State's Motion for Final Order of Forfeiture.

On December 13, 1999 the court entered an order denying SERGIO'S Motion to Dismiss the State's Motion for Final Order of Forfeiture on the basis that SERGIO did not have standing to contest this forfeiture and thereby avoided ruling on SERGIO's claims of unconstitutionality.(R 38-39).

On or about January 14, 2000, CARLOS filed his Motion to Intervene in this matter.(R 40-42).

On or about February 15, 2000 the lower court granted CARLOS'S Motion to Intervene.(R 43)

On or about February 28,2000 CARLOS filed his Motion to Dismiss with Prejudice the State of Florida' Motion for Final Order of Forfeiture of Nuisance.(R 44-62).

On or about March 9, 2000 the State of Florida filed

its Response to CARLOS' Motion to Dismiss with Prejudice.
(R 63-72).

On April 12, 2000 the court heard CARLOS' Motion to Dismiss with Prejudice the State of Florida's Motion for Final Order of Forfeiture of Nuisance and granted same. In its order the court wrote that:

1. The Statute as applied to CARLOS VALDES is violative of due process.
2. The statute is violative of the equal protection clause of the U.S. Constitution. (R 75).

The entry of this order by the lower court is what gave rise to the State's filing its Notice of Appeal.

On or about June 2, 2000 the lower court granted CARLOS VALDES' Motion for Return of Property. (R 83). Based upon that order the State sought relief from Third District Court of Appeal by way of an Emergency Motion to Stay which Motion was granted by the Third District. The State appealed the lower court's order to the Third District Court of Appeal. The Third District Court of Appeal found Florida statute 370.061 to be constitutional but further upheld the lower court's decision to dismiss the State's forfeiture action with prejudice and found that the State applied Florida statute 370.061 as to Carlos Valdes in an unconstitutional manner.

ISSUES ON APPEAL

I

WHETHER FLORIDA STATUTE 370.061 IS VIOLATIVE OF DUE PROCESS ON ITS FACE AND/OR FLORIDA STATUTE 370.061 AS APPLIED TO CARLOS VALDES BY THE STATE OF FLORIDA IS VIOLATIVE OF DUE PROCESS.

II

WHETHER FLORIDA STATUTE 370.061 IS A CRIMINAL FORFEITURE STATUTE AND THEREFORE MANDATED THAT THE STATE WAS COMPELLED TO SEEK A FORFEITURE OF THE SUBJECT VESSEL BY ALLEGING A FORFEITURE COUNT IN THE INFORMATION IN THE CRIMINAL CASE WHICH THE STATE DID NOT DO.

III

WHETHER FLORIDA STATUTE 370.061 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE OF BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

SUMMARY OF ARGUMENT

Florida Statute 370.061 is unconstitutional on its face in that it does not provide for fundamental due process. Even if the Statute can be construed as being constitutional the State applied the Statute in an unconstitutional manner as it relates to CARLOS in that the State did not afford CARLOS due process of law and did not follow the dictates of Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991).

Florida Statute 370.061 is a criminal forfeiture statute because it is based upon a conviction. Therefore, the State had an obligation to seek a forfeiture in the underlying criminal case by way of including a forfeiture count in the information in that criminal case. The State failed to follow the law and did not seek a forfeiture in the criminal action and therefore they are barred from seeking a forfeiture after the fact. Had the State included a forfeiture count in the underlying criminal case we would not be here arguing these issues because the State would have then complied with due process. However, the State chose not to afford due process.

CARLOS has standing as the owner of the subject fishing vessel to raise a due process claim. Additionally, Florida Statute 370.061 violates the equal protection clause of the Florida and United States Constitutions because it treats boat owners and owners of vehicles differently.

The trial court and the Third District Court of Appeal were both correct in entering orders granting and upholding CARLOS' Motion to Dismiss the State's Motion for Final Order of Forfeiture of Nuisance with Prejudice.

ARGUMENT

I

FLORIDA STATUTE 370.061 IS VIOLATIVE OF DUE PROCESS ON ITS FACE AND/OR FLORIDA STATUTE 370.061 AS APPLIED TO CARLOS VALDES BY THE STATE OF FLORIDA IS VIOLATIVE OF DUE PROCESS.

The State sought to forfeit the subject fishing vessel which forms the basis of this Appeal pursuant to §370.061 Florida Statutes (1997).

Paragraph 1 of that Statute is styled Confiscation; Procedure and states:

In all cases of arrest and conviction through the illegal taking, or attempted taking, sale, possession, or transportation of salt water fish or other salt water products, such salt water products and seines, nets, boats, motors, other fishing devices or equipment, and vehicles or other means of transportation used in connection with such illegal taking or attempted taking are hereby declared to be nuisances and may be seized and carried before the court having jurisdiction of such offense and said court may order such nuisances forfeited to the Division of Marine Resources of the Department immediately after trial and conviction of the person or persons in whose possession they were found, except that if a motor vehicle is seized under the provisions of this act and is subject to any existing liens recorded under the provision of §319.27 all further proceedings shall be governed by the expressed intent of the legislature not to divest any innocent person, firm or corporation, holding such a recorded lien of any of its reversionary rights in such motor vehicle or of any of its rights as prescribed in §319.27 and that, upon any default by the violator, purchaser, that said lien holder may foreclose its lien and take possession of the motor vehicle involved. When any illegal or illegally used, seine, net, trap or other fishing devise or equipment or illegally taken, possessed or transported salt water products are found and taken into custody, and the owner thereof shall not be known to the officer finding the same, such officer shall immediately procure from the county court judge of the county wherein they were found an order forfeiting said salt water

products, seines, net, traps, boats, motors or other fishing devices to the Division. All things forfeited under the provisions of this law may be destroyed, used by the Division, disposed of by gift to charitable or State institutions, or sold and the proceeds derived from such sale deposited in the Marine Resources Conservation Trust Fund to be used for law enforcement purposes. However, forfeited boats, motors and legal fishing devices only may be purchased from the Division for \$1.00 by the person or persons holding title thereto at the time of the illegal act causing the forfeiture, if such person shall prove that he or she in no way participated in, gave consent to, or had knowledge of such act.

This Statute is unconstitutional on its face because it violates the due process clauses of both the United States and Florida Constitutions. Article I, Section IX of the Florida Constitution provides " No person shall be deprived of Life, Liberty or Property without due process of law... . The due process clause of the Fourteenth Amendment requires that deprivation of life, liberty or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case, County of Pasco v. Riehl, 635 So2d. 17, 18, 19 (Fla. 1994). Florida Statute 370.061 does not provide for or require notice and hearing. It simply provides that upon arrest and conviction the court may order a forfeiture. It does not give the claimant or any third party a right to notice or an opportunity to be heard before a forfeiture is ordered when dealing with a fishing vessel.

In a light most favorable to the statute, if it can be inferred that the statute does require notice and an opportunity to be heard, in this case there was no notice nor an opportunity to be heard. Either way the statute

itself and/or the application of the statute by the State violates the due process clause of both the United States and Florida constitutions and therefore the statute must be declared unconstitutional and/or the State's Motion for Forfeiture must be dismissed with prejudice inasmuch as the State applied the statute as it relates to CARLOS in an unconstitutional manner.

In the case of Department of Law Enforcement v. Real Property, 588 So2d. 957 (Fla. 1991) this Court set forth the requirements of a forfeiture statute and/or the application of same such that due process is afforded. The analysis of the Court is as follows:

It is clear that real and personal property are substantially different both in the interests of the parties involved and in the ability of the owners or lien holders to dispose of their interests. Therefore, the manner in which due process applies to the preliminary restraint notice and hearing requirements varies when distinguishing between the forfeiture of interests in real and personal property. Regarding matters of personal property, due process permits the State to seize personal property prior to notice or an opportunity for a hearing, provided that notice is sent and the opportunity for an adversarial preliminary hearing is made available as soon as possible after seizure. We envision that the situation will arise in two types of circumstances: when the State has not yet taken possession of the property; and when the State has already lawfully taken possession of the property, such as while making an arrest.

In those situations where the State has not yet taken possession of the personal property that it wishes to be forfeited, the State may seek an ex-parte preliminary hearing. At the hearing, the State shall authorize the seizure of the personal property if it finds probable cause to maintain the forfeiture action. In those situations where a law enforcement agency

already has lawfully taken possession of personal property during the course of routine police actions, the State has effectively made an ex-parte seizure for the purposes of initiating a forfeiture action.

After the ex-parte seizure of personal property, the State must immediately notify all interested parties that the State has taken their property in a forfeiture action; and that they have the right to request a post-seizure adversarial preliminary hearing. If requested, the preliminary hearing shall be held as soon as it is reasonably possible to make a de novo determination as to whether probable cause exists to maintain the forfeiture action; and to determine whether continued seizure of the property is the least restrictive means warranted by the circumstances to protect against disposal of the property pending final disposition. Again, as with real property forfeitures, this initial stage should be expeditiously completed, and we anticipate that the adversarial preliminary hearing, if requested, will take place within 10 days of the request.

In all forfeiture cases, due process under Article I, Section IX, of the Florida Constitution, requires that notice shall be served on all persons whom the agency knows, or with reasonable investigation should know, have a legal interest in the subject property. Notice shall advise these persons that a forfeiture action is pending against the particular property or properties. In real property forfeiture actions, notice must advise interested parties of the time and place for which the preliminary adversarial hearing has been scheduled. In personal property forfeiture actions notice must advise interested parties that they have a right to an adversarial preliminary hearing upon request.

In this preliminary stage of real and personal property forfeitures, due process requires the State to establish probable cause to believe that the property was used in the commission of a crime pursuant to the terms of the act. Article I, Section IX, Florida Constitution. If the State establishes probable cause, the court shall order the property restrained throughout the pendency of the forfeiture action by the

least restrictive means necessary under the circumstances. Under no circumstances may the State continue its restraint on the property pending final disposition unless notice and an opportunity to be heard in an adversarial preliminary hearing are provided to all potential claimants. Article I, Section IX, Florida Constitution. (The act the court was dealing with was the Florida contraband forfeiture act), provides that after the property is first seized, the State must file a Petition for a Rule to Show Cause in the circuit court, and upon producing due proof that the property was used in violation of the act, the court shall issue a Final Order of Forfeiture vesting legal title in the appropriate agency under the Act. However, that is the sum total of direction given by the Act. The Act does not set out any procedures for filing the petition or issuing the rule to show cause, except that a rule shall issue upon the showing of due proof. The Act does not address any requirements for filing the petition; which procedural rule should apply to control the litigation; what standard or burden of proof is due for issuance of the rule; whether a trial, with or without a jury is required to decide the merits of the action once the rule has been issued; what standard and burden of proof apply in deciding the ultimate issue, including defenses; and whether and how property is to be divided or petitioned to insure that only the guilty property is forfeited. As the Fourth District Court appropriately characterized the Act, forfeiture proceedings are "procedural quagmires on account of the failure of the Statute to provide measures to be followed other than to say . . . by Rule to Show Cause in the Circuit Court." Id. at 965, 966.

Like the former Florida Contraband Forfeiture Act as analyzed in Department of Law Enforcement supra, Florida Statute 370.061 does not provide for due process of law and/or the State did not comply with due process of law in the pursuit of the subject vessel pursuant to Florida Statute 370.061 because Florida Statute 370.061 and/or the State's application of Florida Statute 370.061 does not:

a) provide that notice be sent and an opportunity for an adversarial preliminary hearing is made available as soon as possible after seizure.

b) provide that after an ex-parte seizure of personal property the State must immediately notify all interested parties that the State has taken their property in a forfeiture action and that they have a right to request a post-seizure adversarial preliminary hearing.

c) that if requested, the preliminary hearing shall be held as soon as it is reasonably possible to make a de novo determination as to whether probable cause exists to maintain a forfeiture action and to determine whether continued seizure of the property is the least restrictive means warranted by the circumstances to protect against disposal of the property pending final disposition.

d) Provide that notice shall be served on all persons whom the Agency knows or with reasonable investigation should know, have a legal interest in the subject property and the notice shall advise those persons that a forfeiture action is pending against the particular property or properties.

e) Provide that notice must advise interested parties that they have a right to an adversarial preliminary hearing upon request; require the State to establish probable cause to believe that the property was used in the commission of a crime pursuant to the terms of the Statute; provide for notice and an opportunity to be heard and an adversarial proceeding to all claimants before the State can continue its restraint on the personal property pending final disposition.

f) Set any procedures by which the State can seek forfeiture except that the State may seize and carry before the court having jurisdiction over the offense that which exists to be forfeited.

g) Address any requirements for filing whatever pleading it is that the State should file.

h) Address which procedural rule should apply or control the litigation.

i) Determine which standard and what burden of proof is due.

j) Determine whether a trial with or without a jury is required to decide the merits of the action.

k) Determine what standard and burden of proof apply in deciding the ultimate issue, including

defenses.

1) Determine whether and how property is to be divided or petitioned to insure that only the guilty property is forfeited.

To date, CARLOS has never been sent notice by the State of Florida that the State has taken his property in a forfeiture action and that he has a right to request a post-seizure adversarial preliminary hearing. It was not until February 8, 2000, that CARLOS became a party to this action, and the only reason that CARLOS has become a party to this action is because he was forced to intervene. This is so, even though the State has known since July of 1998 that CARLOS is the owner of the subject fishing vessel.

Notwithstanding this knowledge which the State has had now for over two years, it has not taken the first step toward affording CARLOS basic fundamental due process. Because the State did not comply with due process the lower courts were correct in dismissing the State's Motion for Final Order of Forfeiture in this case in reliance on Department of Law Enforcement Real Property wherein this Court affirmed the Circuit Court's decision to dismiss the forfeiture action on the basis that the State did not comply with due process.

The State attempts to distinguish the case of Department of Law Enforcement v. Real Property from the case at Bar because in that case this Court was dealing with the Florida Contraband Forfeiture Act. It is however abundantly clear, that the Department of Law Enforcement v. Real Property is not distinguishable and is right on point with this case because although dealing with the Florida

Contraband Forfeiture Act, the principals of law which where analyzed and enforced are principals of law that deal specifically with forfeiture actions in general. All of the principles of law which where discussed and enforced in Real Property are directly relevant and control the instant action.

The State then relies on the case of Lawton v. Steel, 152 U.S. 133, 1894 as the case that controls this case. As it will be shown below, the case of Lawton v. Steel is clearly distinguishable, not relevant and does nothing more than support CARLOS' position. In Steel the court was dealing with fifteen (15) hoop and fyke nets. The nets were taken and summarily destroyed. That court was dealing with an Act which provided in pertinent part " Any net, pound or other means or devise for taking or capturing fish or whereby they may be taken or captured, set, put, floated, had, found or maintained in or upon any of the waters of this State... in violation of any existing or hereinafter enacted statutes or laws for the protection of fish, is hereby declared to be and is a public nuisance and may be abated and summarily destroyed by any person and it shall be the duty of each and every protector aforesaid of every game constable to seize and remove and forthwith destroy the same."

In Steel the court stated " It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are

necessary for its condemnation. If the property were of great value as for instance if there was a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a customs officer to permit him to sell or destroy it as a public nuisance and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trivial value and if destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order a summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would be like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips and dice of a gambling room." The quote went on to say the value of the nets in question was but \$15.00 a piece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of a net and doubtless the state would in many cases, be deterred from executing the law by the expense. They can only be removed from the water with difficulty and were liable to injury in the process of removal. The object of the law is undoubtedly beneficent and the State ought not be hampered in its enforcement by the application of constitutional

provisions, which are intended for the protection of substantial rights of property"... .The Court further went on to say that "it is true that there are several cases of contrary purport. Some of these cases, however, may be explained upon a ground that the property seized was of considerable value." (The items the Court was talking about with respect to considerable value are explained as boats, nets, tins and supplies in lumbering and a horse.)

This case stands for nothing more than the proposition that property which is alleged to have been used in an illegal manner, can be summarily destroyed provided that the property has a trivial value. In the case at Bar we are dealing with a forty-three (43) foot Torres fishing vessel, fully equipped with electronics, which is of great value and is anything but trivial. Obviously, this vessel has a significant value and does not even come close to fit into the definition of trivial. The only thing that this case stands for is that CARLOS' position that he was entitled to notice and due process of law is correct.

The State then relies on the case of Wilkinson v. Woodard, 141 So. 313 (Fla. 1932). The most cogent way to analyze the Wilkinson case is to look to a case cited by the State styled Bruce v. Malloy, 7 So.2d 123 (Fla. 1942). In Malloy the Court wrote " the holding of this Court in Wilkinson v. Woodard supra, is in line with the weight of authority as expressed in 22 Am. Juris. Par. 55, p.708, viz:

"55. Forfeiture and Seizures: the general rule is that

the constitutional requirement of due process of law does not forbid a state summarily to forfeit nets or other fishing appliances of small value which are used in illegal fishing. In the case of such nets and other fishing appliances which clearly appear to have been used in the unlawful taking of fish, the State may declare them to be nuisances; and the fact that it is possible for them to be used for legal purposes will not save them from summary forfeiture or destruction."

Therefore, the same distinction lies in Wilkinson as that in Steel supra. Again, the Wilkinson case stands for the proposition that property which is alleged to have been used in an illegal manner, can be summarily destroyed provided that the property has a trivial value. In the case at Bar we are dealing with a forty-three (43) foot Torres fishing vessel, fully equipped with electronics, which is of great value and is anything but trivial. Obviously, this vessel has a significant value and does not even come close to fit into the definition of trivial. This case likewise, stands for the proposition that Carlos' position that he was entitled to notice and due process of law is correct.

The state then goes on to rely on the case of Bruce v. Malloy, 7 So.2d 123 (Fla. 1942). Based upon the foregoing analysis of Wilkinson it is also clear that this case is irrelevant and does nothing but bolster Carlos' position that he was entitled to notice and due process of law because the Malloy case cites the proposition that the only

way a summary abatement of a nuisance without judicial process can take place is if whatever it is that the State is seeking to summarily destroy must be of trivial value. Additionally, in Malloy the Court stated that "the foregoing petition coming on this day for hearing and the Court being fully advised in the premises, it is now ordered that the prayer of said petition be granted and that the illegally used fishing devices therein described be, and the same is hereby declared forfeited to the Commission of Game and Fresh Water Fish of the State of Florida; provided that this order shall not become final for a period of thirty (30) days during which time owners thereof shall be allowed to bring appropriate action for recovery of said illegally used fishing devices if any rights they have in that respect". Id at 124. Therefore, in Malloy the Court was giving the claimants an opportunity for hearing prior to the forfeiture becoming final. Therefore, this case is also distinguishable in that Carlos Valdes would not be afforded due process prior to the forfeiture being final.

Thereafter the State cites Board of County Commissioners v. Pate, 221 So.2d 732 (Fla. 1969). In Pate the only thing this Court was considering was whether or not the phrase "net, traps or fishing devices excluded or included boats, motors and related paraphernalia used directly and on the water in poaching operations". Therefore this case is irrelevant.

Interestingly, the State in its analysis of Pate supra

cites the lower court's decision in Pate styled Board of County Commissioners v. Pate, 212 So.2d 811 (Fla. 2DCA 1968). In the Second District's opinion of the Board of County Commissioners v. Pate, the Court stated that the forfeiture action again included a twelve (12) foot boat, electric motor and battery, wooden boxes, rain pans, a trap, drag hook and line, eight soybean cakes, a Styrofoam ice chest and a paddle. Again, these are items of trivial value which clearly distinguish both Pate cases from the case at Bar. Additionally, the Second District outlined the statute that it was dealing with. That Statute was Florida Statute §372.31 which read in pertinent part;

"(1) In all cases of arrest and conviction free use of illegal nets or traps or fishing devices, as provided in this Chapter, such illegal net, trap, or fishing device is declared to be a nuisance and shall be seized and carried before the Court having jurisdiction of such offense and said Court shall order such illegal trap, net or fishing device forfeited to the Game and Fresh Water Fish Commission immediately after trial and conviction of the person in whose possession they were found." Florida Statute 370.061 states in pertinent part " In all cases of arrest and conviction such salt water products . . . , nets, boats, motors. . . . in connection with such illegal taking or attempted taking are hereby declared to be nuisances and may be seized and carried before the court having jurisdiction of such offense, and the court may order such

nuisances forfeited immediately after trial and conviction". From a reading of these statutes side by side it appears that Florida Statute §372.31 required the seizure at the time of arrest and not until after trial and conviction did that statute mandate forfeiture. Said statute complies with due process because at the time of the arrest the boat is seized and it is not until after trial and conviction is there a forfeiture. Obviously, the boat owner is notified of the seizure at the time of arrest and has an opportunity to be heard prior to the trial and conviction and is therefore afforded due process. It should also be pointed out that this Court when dealing with Pate relied upon Bruce v. Malloy supra and therefore this case is also dealing with items of trivial value.

II

FLORIDA STATUTE 370.061 IS A CRIMINAL FORFEITURE STATUTE AND THEREFORE MANDATED THAT THE STATE WAS COMPELLED TO SEEK A FORFEITURE OF THE SUBJECT VESSEL BY ALLEGING A FORFEITURE COUNT IN THE INFORMATION IN THE CRIMINAL CASE WHICH THE STATE DID NOT DO.

With respect to forfeiture in general " civil forfeiture may occur without regard to a criminal conviction, whereas a criminal forfeiture may only be commenced following a criminal conviction." U.S. v. Dean, 835 F. Supp. 1383, 1384 (M.D. Fla. 1985).

Criminal forfeiture is an in personam action against the alleged criminal. Id. at 1394. Additionally, "a forfeiture proceeding is a civil in rem action that is independent of any factually related criminal action. Neither a conviction nor an acquittal in a criminal case is determinative of the issues in the forfeiture proceeding. In fact, neither the record nor the judgment in the criminal case is admissible in the civil action seeking in rem forfeiture." Kearn v. State, 706 So2d. 1366 (Fla. App. 5DCA 1988). Florida Statute 370.061 is clearly a criminal forfeiture statute in that it is based upon a conviction, the State's Motion for Forfeiture was filed in the underlying criminal case, and the State as part of its Motion for Final Order of Forfeiture of Nuisance attached thereto as Exhibit "C" and relies on said Exhibit which is the Judgment and Sentence of the Defendant, SERGIO VALDES, in the criminal case. Florida Statute 370.061 is obviously a criminal forfeiture statute.

In Liberetti v. United States, 116 S.Ct. 356 (1995) the Supreme Court of the United States was dealing with a criminal forfeiture statute. In Liberetti in upholding the

forfeiture of the Defendant's property, the court stated "accordingly the indictment further alleged that the government was entitled to forfeiture of property that was obtained from or used to facilitate Liberetti's drug offenses, including but not limited to various assets specified in the indictment. See Federal Rule of Criminal Procedure 7c(2) ("No judgment or forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to the forfeiture"). The obvious reason for this requirement is so that a defendant is put on notice and has an opportunity to be heard with respect to forfeiture of property if he either pleads guilty or is convicted at trial.

In the case at Bar the defendant entered into a negotiated plea with the State of Florida on June 15, 1998, to three of the four counts contained in the amended information filed by the State. He was also sentenced on that same day. Neither the information nor the negotiated plea make any reference to a potential forfeiture. At the time that the Defendant entered into the negotiated plea with the State of Florida, counsel for the defendant discussed a potential forfeiture of the vessel with the Assistant State Attorney handling the case, who assured undersigned counsel that a forfeiture was not going to take place and that the negotiated plea contained all of the conditions with respect to disposing of all of the issues in

the entire case.

Again, Florida Statute 370.061 is clearly a criminal forfeiture statute. As such, the State was required to seek forfeiture of the subject fishing vessel in the underlying criminal case which it did not.

Furthermore, "it is well settled that where a lawful sentence has been imposed and the sentencing heard and concluded, it is a violation of the defendant's constitutional protection against double jeopardy to increase the sentence at a latter time." Strickland v. State, 681 So2d. 929, 930 (Fla. App. 3DCA 1996). For this court to enter an order of forfeiture after the defendant pled guilty, was convicted, sentenced and placed on probation with various and sundry conditions, including going to jail with a forfeiture never contemplated nor raised at any time leading up to an including the time of sentencing is a violation of the Defendant's constitutional protection against double jeopardy.

Florida Statute 370.061, which is the statute that the State is traveling under in this case, provides in all cases of arrest . . . and said court may order said nuisances forfeited to the Division of Marine Resources of the Department immediately after arrest and conviction. The Defendant was convicted and sentenced on June 15, 1998. It was not until July 31, 1998 that the State filed its Motion for Final Order of Forfeiture. This is forty-six (46) days after the Defendant was convicted and sentenced. Immediately

means immediately. It does not mean 46 days after the fact. "Forfeitures are considered harsh exactions, and as a general rule, they are not favored either in law or equity. Therefore, this court has long followed a policy that it must strictly construe forfeiture statutes." Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991). Based upon the foregoing this case must be dismissed with prejudice.

III

FLORIDA STATUTE 370.061 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE OF BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

This statute is likewise unconstitutional on its face

because it violates the equal protection clauses of both the United States and Florida constitutions. "To be constitutionally permissible, a classification must apply equally and uniformly to all persons within the class and bear a reasonable and just relationship to a legitimate state objective." State v. Leicht, 402 So.2d 1153, 1155 (Fla. 1981). Florida Statute 370.061 provides that it is the expressed intent of the legislature not to divest any innocent person, firm or corporation holding a recorded lien with respect to a motor vehicle of any of its reversionary rights in said motor vehicle or any of its rights as prescribed in Section 319.027. Owners of boats are not afforded the same protection as those of motor vehicles in that the statute provides that it does not matter if there is an innocent owner of a fishing vessel or if there is a person holding a lien on a fishing vessel. The fishing vessel may be still summarily forfeited and then only after forfeiture can an innocent owner buy back the fishing vessel for \$1.00.

This statute, by virtue of the fact that it treats persons within the same class differently, must be declared unconstitutional on its face as violating the equal protection afforded to all persons under both the United States and Florida constitutions.

For the State to argue that CARLOS has no standing to claim a due process violation because he had actual notice

and is being afforded a hearing is disingenuous on two fronts. First, the fact that the State argues that CARLOS was afforded due process (which he obviously was not) and then argues that because he was afforded due process he has no standing makes no sense. By virtue of the fact that the State argues that CARLOS was afforded due process in and of itself shows that CARLOS has standing as it relates to due process. Secondly, for the State to argue that CARLOS was afforded due process because undersigned counsel was served with a copy of the State's Motion for Final Order of Forfeiture of Nuisance some forty-six(46) days after SERGIO took his plea in the criminal case and some seventeen (17) days after the subject vessel was seized likewise makes no sense. Without repeating CARLOS' entire argument, the State did not follow the dictates of Department of Law Enforcement; did not seek a forfeiture in the underlying criminal action; never notified CARLOS of the seizure of the vessel; and has put CARLOS in a position such that the only way that he could possibly get the subject vessel back is after it has been forfeited by the Court. CARLOS could then attempt to buy the subject vessel back from the State for \$1.00. All of this clearly shows that he was not afforded due process.

CONCLUSION

For all of the foregoing reasons the lower courts'

orders dismissing the State's Motion for Final Order of Forfeiture with Prejudice must be affirmed and the subject fishing vessel must be returned to its rightful owner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of April, 2002 to:
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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 12 point Courier New type.

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