

IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC01-1735

LOWER CASE NO.: 3D00-1469

STATE OF FLORIDA,

Petitioner,

-vs-

SERGIO VALDES, ET AL.,

Respondent(s).

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, Department of Environmental Protection, petitions for discretionary review of a decision of the Third District Court of Appeal which expressly declared valid a state statute. Petitioner was the Appellant in the district court and the Movant in the trial court. Respondent, CARLOS VALDES, is the registered owner of the property at issue and was the Appellee in the district court. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" refers to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On or about August 3, 1998, The Department of Environmental Protection (hereinafter "DEP") filed a Motion for Final Order of Forfeiture of a Nuisance in the County Court, Monroe County. (R. 11-23). The motion alleged the following:

1. This Court has jurisdiction to enter a final order of forfeiture pursuant to section 370.061, Florida Statutes (1997).

2. The property which is the subject of this motion is described as:
1980 43' TORRES, Commercial Fishing Vessel, "La Esperanza", , United States Coast Guard Documentation Number 929260, bearing Hull Identification Number TBP000350280, and all associated equipment. (Hereinafter referred to as the "VESSEL")

3. On September 21, 1997, Officer David Wigley of the Florida Marine Patrol arrested the defendant, SERGIO VALDES, on board the VESSEL, for, *inter alia*, being in possession 79 undersized crawfish tails and 137 out of season stone crab claws, in violation of sections 370.021 and 370.13(2), Fla. Stat. The particular circumstances of the arrest are set forth in the accompanying affidavit of Officer David Wigley. (Exh. A).

4. On June 15, 1998, SERGIO VALDES, entered a written plea of guilty to, *inter alia*, possession of 137 out of season stone crab claws, and possession of 79 under sized crawfish tails. (Exh. B).

5. On June 15, 1998, this Court accepted SERGIO VALDES'S guilty plea, entered adjudication in accordance with the plea, and imposed sentence of, *inter alia*, six (6) months in Monroe County Jail. (Exh. C).

6. Section 370.061, Florida Statutes (1997), provides in part:

In all cases of arrest and conviction for an illegal taking, or attempted taking, sale, possession, or transportation of saltwater fish or other saltwater products, such saltwater products and seines, nets, boats, motors, other fishing devices or equipment, . . . , 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....

7. The VESSEL is declared a nuisance by operation of section 370.061, Fla. Stat. (1997), in that the VESSEL was used in connection with the illegal taking and transportation of 79 undersized crawfish tails and 137 out of season stone crabs.

8 The nuisance is subject to forfeiture pursuant to section 370.061 because it was used in connection with the illegal taking and transportation of 79 undersized crawfish tails and 137 out of season stone crabs.

(R. 11-13).

On October 14, 1998, Sergio Valdes, through counsel, Howard Brodsky, Esquire, filed a Motion to Dismiss With Prejudice DEP's motion. (R. 24-32). In support of his motion, Sergio argued that section 370.061, Fla. Stat. is facially unconstitutional as it violates the due process clause of both the State and Federal constitutions. (R. 25-26). Sergio argued that the statute does not provide a claimant or any third party with any notice or a hearing before the forfeiture. (R. 26-27). Sergio argued in the alterna-

tive, that even if the statute provides for notice and a hearing, none was provided in this case. (R. 27). On December 13, 1999, the trial court entered an order denying Sergio's motion for lack of standing. (R. 38-39).

On January 18, 2000, Howard Brodsky filed a Motion to Intervene on behalf of Respondent, Carlos Valdes. (R. 40-42). In support of his motion, Respondent claimed to be the owner of the vessel at issue. (R. 41). The trial court granted Respondent's motion. (R. 43).

On March 2, 2000, Respondent filed a Motion to Dismiss with Prejudice the State's Motion for Final Order of Forfeiture of Nuisance. (R. 44-62). In support of his motion, Respondent argued that section 370.061 is facially unconstitutional as it violates the due process clause of both the State and Federal constitutions. Respondent argued that the statute makes no provision for notice and a hearing before the forfeiture. (R. 48-49). Respondent argued in the alternative that in his case, he received no notice or a hearing. (R. 50).

Respondent argued that the statute is also facially unconstitutional as violative of the equal protection clause of both the State and Federal constitutions. Respondent claimed that the statute provides protection for holders of recorded liens against motor vehicles but provides no such protection for holders of recorded liens against motor boats. (R. 49-50).

On March 16, 2000, DEP filed a Response to the motion to dismiss. (R. 63-72). DEP argued that Respondent lacked standing to raise the constitutional challenges that he has raised. DEP argued that Respondent had no standing to raise the due process challenge because he was provided with actual notice of the pending forfeiture and that since he is in fact before the court, he is being afforded a hearing. (R. 68-69). DEP pointed to the fact that the Motion for Final Order of Forfeiture of Nuisance was served on counsel for Respondent, that the court granted Carlos's motion to Intervene, and that since the motion is still pending, he is being afforded an opportunity to be heard. (R. 69).

Regarding Respondent's claim that the statute violates the equal protection clause, DEP argued that Respondent is not a member of the class for which he claimed the statute provides no protection. Specifically, that Respondent is not the holder of a recorded lien against a motor boat. (R. 69-70). Consequently, DEP argued, Respondent has no standing to raise that challenge. (R. 70).

On May 11, 2000, the trial court entered an Order Granting Carlos's Motion to Dismiss. (R. 75). The court ruled that the statute as applied to Respondent is violative of due process and is also violative of the equal protection clause of the U.S. Constitution. (R. 75).

DEP appealed that order to the Third District Court of Appeal.

(R. 76-77).

In that appeal, DEP maintained that Respondent had no standing to raise the due process challenge because he was in fact served with the motion, he was permitted to intervene, he was in fact before the court, and that the court had not yet entertained the motion nor entered the order of forfeiture. As to Respondent's equal protection claim, DEP argued that Respondent had no standing to raise the challenge because Respondent is not a member of the class of persons for which he claimed the statute provides no protection.

On April 11, 2001 the district court issued its opinion affirming the county court's dismissal of the DEP's Motion for Final Order of Forfeiture of a Nuisance. *State v. Valdes*, 788 So. 2d 300 (Fla. 3d DCA 2001). The Court opined that the statute could be construed in such a way as to preserve its constitutionality. The court held that the statute is constitutional only if the procedures outlined by this Court in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1996), is utilized in implementing the provision of the statute. The Court held that because DEP did not follow the procedure outlined in *Department of Law Enforcement v. Real Property*, the trial court was correct in dismissing its motion.

The court denied DEP's motion for rehearing and rehearing *en banc*. This Court subsequently granted review.

ISSUES ON APPEAL

I

WHETHER THE PROCEDURES OUTLINED IN *DEPARTMENT OF LAW ENFORCEMENT V. REAL PROPERTY*, 588 So. 2d 957 (Fla. 1991) APPLY TO CONFISCATION OF NUISANCES UNDER SECTION 370.061(1), FLORIDA STATUTES.

II

WHETHER SECTION 370.061(1) FLORIDA STATUTES IS CONSTITUTIONAL.

III

WHETHER THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS DEP'S MOTION FOR FINAL ORDER OF FORFEITURE.

SUMMARY OF ARGUMENT

The procedures outlined in *Real Property* do not apply to section 370.061(1) forfeiture proceedings. First, section 370.061 provides its own procedure for confiscation of nuisances. Second, section 370.061 confers jurisdiction over such forfeitures in the county court. Third, section 370.061 does not require the filing of a separate civil action. Section 370.061 does not require trial by jury of the ultimate issue of forfeiture, nor does it require proof by clear and convincing evidence. The statute vests discretion in the county court as to whether to order the forfeiture. The procedures outlined in *Real Property* is therefore clearly inconsistent with the plain language and legislative intent of section 370.061. Hence, the district court below erred in holding that the procedures outlined in *Real Property* must be followed in seeking forfeiture of nuisances under section 370.061.

Section 370.061 is constitutional. It is a valid exercise of the police powers of the State for the protection of the fishing industry. It provides sufficient procedural due process where it requires a conviction before the forfeiture is sought and where it vests the court with the discretion as to whether to order the forfeiture.

Respondent has no standing to raise the constitution challenges. Respondent, through his attorney, was served with the motion for final order of forfeiture. The court granted Respon-

dent's motion to intervene. Respondent is in fact before the court. The court has not heard DEP's motion and no order of forfeiture has been entered.

Respondent is not a member of the class of persons for which he claims the statute offers no protection. Respondent is not the holder of a recorded lien against a vessel. Respondent therefore has no standing to raise the equal protection challenge.

Thus, the procedures outlined in *Real Property* do not apply to section 370.061 confiscations. Section 370.061 is constitutional. Respondent has no standing to raise the constitutional challenges. Hence, the trial court erred in granting Respondent's Motion for Final Order of Forfeiture of Nuisance. This Court should therefore quash the district court's decision and remand the cause to that court with directions to reverse the county court's order.

ARGUMENT

I

THE PROCEDURES OUTLINED IN *DEPARTMENT OF LAW ENFORCEMENT V. REAL PROPERTY*, 588 So. 2d 957 (Fla. 1991) DO NOT APPLY TO CONFISCATION OF NUISANCES UNDER SECTION 370.061(1), FLORIDA STATUTES.

The county court judge granted Respondent's motion to dismiss DEP's Motion for Final Order of Forfeiture of a Nuisance on the finding that section 370.061(1), Florida Statutes (1997), is unconstitutional as applied to Respondent. The court found that even though Respondent is the owner of the seized boat, he was given no notice or the opportunity to be heard. The court also ruled the statute facially unconstitutional as violative of equal protection of the laws. The district court below, however, held that the statute can be construed in such a way as to preserve its constitutionality. The court held that the statute is constitutional only if the procedures outlined by this Court in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991), (hereinafter "*Real Property*"), is followed in seeking the forfeiture. It is DEP's contention that the procedures outlined in *Real Property* do not apply to section 370.061(1), that section 370.061(1) is constitutional, and that Respondent had no standing to challenge the constitutionality of section 370.061(1).

Contraband Forfeiture Act

Section 932.071-932.704, Florida Statutes, (1989), the Florida Contraband Forfeiture Act, (hereinafter "The Act"), declared as contraband property used or obtained in connection with criminal activities. That act provides, in part:

932.704. Forfeiture proceedings--

(1) The state attorney within whose jurisdiction the contraband article, vessel, motor vehicle, aircraft, other personal property, ... has been seized because of its use or attempted use in violation of any provisions of law dealing with contraband, ... shall promptly proceed against the contraband article, ... by rule to show cause in the circuit court within the jurisdiction in which the seizure or the offense occurred and may have such contraband article, ... forfeited to the use of, or to be sold by, the law enforcement agency making the seizure, upon producing due proof that the contraband article, ... was being used in violation of the provisions of this act. The final order of forfeiture by the court shall perfect in the law enforcement agency right, title, and interest in and to such property and shall relate back to the date of seizure.

In *Real Property*, this Court addressed the facial constitutionality of the Act against a due process challenge. This Court held that the Act is constitutional provided that the procedures it outlined in that case were followed in seeking the forfeiture. *Department of Law Enforcement v. Real Property*, 588 So. 2d at 959. The procedures included, *inter alia*, 1) ex-parte seizure of personal property; 2) immediate notification to all interested parties of their right to request a post-seizure

adversarial preliminary hearing after the ex parte seizure of personal property,; 3) a preliminary hearing held as soon as is reasonably possible after the request; 4) a *de novo* determination as to whether probable cause exists to maintain the forfeiture action; 5) the filing of a civil complaint in circuit court against the property; 6) application of the Florida Rules of Civil Procedures in the control of service of process, discovery, and the forfeiture proceeding; 7) trial by jury of the ultimate issue of forfeiture and; 8) proof by clear and convincing evidence. *Id* at 967. This Court concluded that these procedures are required to satisfy due process in the implementation of the Act and are not inconsistent with the language and intent of the Act. *Id.* at 968.

Section 370.061(1)

Section 370.061(1), Florida Statutes (1997), provides:

370.061. Confiscation of property and products

(1) CONFISCATION; PROCEDURE.--In all cases of arrest and conviction for the illegal taking, or attempted taking, sale, possession, or transportation of saltwater fish or other saltwater products, such saltwater 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 Fish and Wildlife Conservation Commission 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 provisions of s. 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 s. 319.27, and that, upon any default by the violator purchaser, the said lienholder may foreclose its lien and take possession of the motor vehicle involved. When any illegal or illegally used seine, net, trap, or other fishing device or equipment or illegally taken, possessed, or transported saltwater 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 saltwater products, seines, nets, traps, boats, motors, or other fishing devices to the commission. All things forfeited under the provisions of this law may be destroyed, used by the commission, disposed of by gift to charitable or state institutions, or sold and the proceeds derived from said sale deposited in the Marine Resources Conservation Trust Fund to be used for law enforcement purposes or into the commission's Federal Law Enforcement Trust Fund as provided in s. 372.107, as applicable. However, forfeited boats, motors, and legal fishing devices only, may be purchased from the commission for \$1 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.

§ 370.061(1), Fla. Stat. The district court below held that the procedures for forfeiture outlined in *Real Property* applies to section 370.061(1) forfeitures. However, it is evident from the

plain language of section 370.061(1) that the procedures outlined in *Real Property* cannot, consistent with the plain language of section 370.061(1) be applied to such forfeitures.

First, section 370.061(1) provides its own procedure for the for the confiscation of nuisances. It provides:

In all cases of **arrest and conviction** for the illegal taking, ... of saltwater fish or other saltwater products, such..., boats,... used in connection with such illegal 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.**

Thus, a forfeiture proceeding under section 370.061(1) cannot be initiated nor the forfeiture obtained until there has been a conviction involving the property. Under the Contraband Forfeiture Act, however, property may be seized and forfeited independent of any criminal proceeding or conviction.

Second, section 370.061(1) confers jurisdiction over such forfeitures in the county court. The statute declares as nuisances personal property used in connection with the illegal taking of saltwater fish, misdemeanor offenses. The statute provides that upon the arrest and conviction for such illegal takings, such nuisances may be brought before the court having jurisdiction over the offense, and the court may order such property forfeited. Since the court having jurisdiction over such offenses is the county court, the statute requires the forfeiture proceeding to be in the county court. The Contraband Forfeiture Act, however,

confers jurisdiction over such forfeitures in the circuit courts. It requires the filing of a civil complaint for forfeiture in the circuit court.

Further, the jurisdictional limit of the county court is \$15,000.00. See Chapter 34.01, Fla. Stat. The properties at issue in section 370.061 proceedings will invariably exceed the jurisdictional limit of the county courts. In fact, section 370.061 makes no mention of the value of the property. Hence, the value of the property is not relevant in section 370.061 forfeitures. The Legislature could not have intended for section 370.061 to alter the jurisdictional limit of the county court in civil cases. The district court cannot confer jurisdiction on the county court by requiring the State to initiate a civil action in the county court where the jurisdictional limit of the court is exceeded.

Third, the Contraband Forfeiture Act requires the filing of a separate civil action against the property. Section 370.061, however, does not require the initiation of a separate action. It provides that upon the arrest and conviction, the nuisance may be brought before the court having jurisdiction over the offense. It therefore does not require a separate action in a different court.

Fourth, the Contraband Forfeiture Act requires trial by jury of the ultimate issue of forfeiture. *Real Property* requires proof by clear and convincing evidence. By contrast, section 370.061

vests the county court with discretion as to whether to order the forfeiture. The statute provides that the court "may order such nuisances forfeited..." The statute clearly does not require trial by jury as is required in *Real Property*.

In *Real Property*, this Court observed that the procedure it outlined was not inconsistent with the language and intent of the Contraband Forfeiture Act. As is evident from the discussion above, the procedures outlined in *Real Property* cannot, consistent with the plain language of section 370.061(1) be utilized for forfeiture proceedings under that statute.

The procedures outlined in *Real Property* is also inconsistent with the legislative intent of section 370.061(1). In response to this Court's decision in *Real Property*, the legislature comprehensively revised the Florida Contraband Forfeiture Act. See Chapter 92-54, § 1, Laws of Florida. The legislature did not amend section 370.061(1) to conform with *Real Property*. Since then, the legislature has had occasion to revisit section 370.061 on two separate occasions. See Chapter 96-321, § 27 Laws of Florida, and Chapter 95-148, § 556, Laws of Florida. If the legislature intended for the procedures outlined in *Real Property* to apply to section 370.061, it would have revised the statute as it did with the Contraband Forfeiture Act. The Third District therefore erred in holding that the procedures outlined in *Real Property* applies to section 370.061 forfeiture proceedings.

II

SECTION 370.061(1) FLORIDA STATUTES IS CONSTITUTIONAL

Section 370.061(1) declares as nuisances¹ any boat or other equipment used in the illegal taking (or attempted taking) of salt water fish or products.

The purpose of Chapter 370, Florida Statutes ..., which regulates the taking and possession of saltwater fish, is to conserve Florida's marine life, which is valuable to its economy, and to protect certain species from extinction. *Tingley v. Brown*, 380 So.2d 1289 (Fla.1980);... To effectuate this purpose, the Florida legislature has declared that possession of undersized crawfish and possession of any crawfish during closed season is prohibited. § 370.14(2)(a)1, (4), Fla.Stat. ... [T]he Florida statutes which safeguard the crawfish industry and regulate the possession of saltwater fish [is] a valid exercise of the police power of the state.

National Fishermen Producers Co-Operative Soc. Ltd., of Belize City v. State, 503 So. 2d 430, 431 (Fla. 3d DCA 1987).

In *Lawton v. Steele*, 152 U.S. 133 (1894), the Court explained the genesis and ramifications of the police power of the State. The Court acknowledged the universal recognition that the police power of the State includes "everything essential to the public

¹Ballentine's Law Dictionary, Third Edition, defines "nuisance" as "Anything that works hurt, inconvenience, or damage to another." *Id.* at p. 870. The Third District, however, saw no distinction between a nuisance and a contraband. *State v. Valdes*, 788 So. 2d at 303, fn.4.

safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *Lawton v. Steele*, 152 U.S. at 500. The preservation of game and fish, the Court opined, has always been treated as within the proper domain of the police power. *Id.* While the Court recognized that it was within the police power of the State to authorize the abatement of such nuisances by law enforcement officers, the Court opined that where the property is of great value, the power for abatement should not be entrusted to law enforcement officers. In those instances, the Court opined, the forfeiture should be decreed by judicial proceedings. *Id.*

Since as early as 1932, the Florida Supreme Court has upheld the summary destruction of boats deemed nuisances. In *Wilkinson v. Woodward*, 141 So. 313 (Fla. 1932), the Court affirmed the summary destruction of fishing devices, including boats, which were used to commit fisheries violations pursuant to s. 25, Ch. 13644, Laws of Florida 1929, a statute similar to section 370.061.

In that case, a game warden of the game and fresh water fish commission seized and destroyed boats and nets that were used to commit the fisheries violation. The property owners sought an injunction to prevent the game warden from further enforcing the law. The owners argued that their property was being destroyed without affording them due process of law. *Id.* The Court disagreed. The Court held:

The complainants contend that section 25 of chapter 13644 is unconstitutional because of its derogation and violation of section 16 of article 3 of the Constitution, but the complainants in their brief have failed to point out wherein this section of the act offends against the constitutional provision, and we are unable to observe wherein such infirmity lies.

Id at 313-314.

Approximately ten years after deciding *Wilkinson*, the Court again addressed the constitutionality of section 25 of Chapter 13644. In *Bruce v. Malloy*, 7 So. 2d 123 (Fla. 1942), a county court granted the forfeiture of certain fishing devices, including boats, pursuant to section 25 of Chapter 13644. *Id* at 124. The complaint for forfeiture alleged that the owners of the property were unknown. The order of forfeiture permitted any owner of the property thirty days within which to bring appropriate action to recover the property.

More than thirty days after the order was entered, Malloy sought to recover his property on the theory that, *inter alia*, his identity was known to the seizing officer, that he was afforded no notice before the forfeiture, and that he had not been convicted of any offense. *Id.* at 124. Reaffirming the long recognized principle that the legislature is vested with wide discretion in the exercise of its police powers, the Court affirmed the forfeiture. The Court noted that in *Douglass v. Smith*, 63 So. 844 (Fla. 1913), it had previously affirmed the constitutionality of a

statute similar to the one at issue. *Bruce v. Malloy*, 7 so. at 125. The Court reaffirmed *Wilkinson*, and recognized *Lawton Steele*, *supra*, with approval. *Id.* at 126-127.

In *Board of County Commissioners v. Pate*, 221 So. 2d 732 (Fla. 1969), the Court again reaffirmed *Bruce v. Malloy*. In that case, proceeding under section 372.31, Fla Stat.², the successor of section 25 of Chapter 13644, the state sought the forfeiture of

²Florida Statutes s 372.31, F.S.A. reads:

'(1) In all cases of arrest and conviction for 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. When any illegal net, trap or fishing device is found in the fresh waters of the state, and the owner of same shall not be known to the officer finding the same, such officer shall immediately procure from the county judge an order forfeiting said illegal net, trap or fishing device to the game and fresh water commission. The game and fresh water fish commission may destroy such illegal net, trap or fishing device, if in its judgment said net, trap or fishing device is not of value in the work of the department.

'(2) When any nets, traps, or fishing devices are found being used illegally as provided in this chapter, the same shall be seized and forfeited to the game and fresh water fish commission as provided in this chapter.'

various implements, including a boat, used in violation of the statute. The county court granted the forfeiture of the various implements but denied forfeiture of the boat. On appeal by the County Commissioners, the Second District Court of Appeal affirmed holding that the legislature did not intend for boats to be included in the implements subject to forfeiture. *Board of County Commissioners v. Pate*, 212 So. 2d 811 (Fla. 2nd DCA 1968). On review, the Supreme Court reversed. The Court held that its holding in *Bruce v. Malloy* affirming the forfeiture of boats under that statute is still controlling. *Board of County Commissioners v. Pate*, 221 So. 2d at 733.

As the foregoing clearly establish, the Legislature is vested with wide discretion in the exercise of its police powers to determine what it deems harmful to the public welfare. [T]he police power is exercised by the sovereign to promote the health, morals and safety of the community, [co]; it rests 'upon the fundamental principle that everyone shall so use his own as not to wrong or injure another.' [co]...."To destroy property because it is a public nuisance is ... to prevent any use of it by the owner, and to put an end to its existence, because it could not be used consistently with the maxim, sic utere tuo ut alienum non laedas."³

3

"So use your own property as not to injure that of another. ...A principle constitution to a large extent the foundation of the police power. " Ballentine's Law Dictionary; Third Edition, p. 1178.

[co].

State Plant Board v. Smith, 110 So. 2d 401, 405 (Fla. 1959).

In section 370.061(1), by declaring as nuisances personal property used in connection with the illegal taking of salt water products, the Legislature has clearly made the determination that such use causes harm to the salt water fishing industry. Consequently, the purpose of the forfeiture under section 370.061(1) is to prevent the continued use of the property in such a manner rather than to divest the owner of property because of its connection with criminal activity.

This distinction is further evidenced by the purpose of the initial seizure of the property. The initial restraint of property under the Contraband Forfeiture Act is to ensure that the property will be available if it is found to be forfeitable. *Department of Law Enforcement v. Real Property*, 588 So. 2d at 962. In the case of a nuisance, however, the seizure is justified "because the danger exists that the property deemed malfic will ... be used for an illegal purpose, absent the seizure and pending a proceeding to determinethe propriety of the seizure." *State Plant Bd., v. Smith*, 110 So. 2d at 408.

It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a

determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The Legislature provided adequate due process in section 370.061(1), where it requires a conviction before the property is deemed a nuisance and where it provides that the forfeiture must be by order of the court.

In the instant case, the State followed the procedures outlined in section 370.061(1) in seeking the forfeiture of the vessel. The State served counsel for Respondent⁴ with the Motion for Final Order of Forfeiture of Nuisance. The trial court permitted Respondent to intervene and to raise his objections to the forfeiture. The court granted Respondent's motion to dismiss

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In it's opinion, the district court stated that the State served the motion for final order of forfeiture of nuisance on Sergio's attorney. *State v. Valdes*, 788 So. 2d at 301. However, at that time Mr. Brodsky represented both Sergio Valdes and Respondent. Mr. Brodsky represented Respondent at all times relevant to this case.

on the basis that Respondent was not notified of the forfeiture and was not afforded an opportunity to be heard even though the court has not yet entertained DEP's motion and no order of forfeiture has been entered. Respondent clearly has been afforded notice and an opportunity to be heard.

III

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS DEP'S MOTION FOR FINAL ORDER OF FORFEITURE BECAUSE RESPONDENT HAS NO STANDING TO RAISE THE CONSTITUTIONAL CHALLENGES.

The trial court erred in granting Respondent's Motion to Dismiss DEP's Motion for Final Order of Forfeiture of Nuisance because Respondent has no standing to raise the constitutional challenges. "A party to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may be applied unconstitutionally to others not before the court." *State v. Summers*, 561 So. 2d 191, 192 (Fla. 2nd DCA 1996), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

A

RESPONDENT HAS NO STANDING TO CLAIM A DUE PROCESS VIOLATION WHERE HE HAD ACTUAL NOTICE AND IS BEING AFFORDED A HEARING

DEP filed in the county court a Motion for Final order of Forfeiture of a Nuisance, a commercial fishing vessel, pursuant to section 370.061, Fla. Stat. DEP served a copy of the motion upon Howard Brodsky, Esquire, counsel for both Sergio Valdes and Respondent. (R. 14).

Mr. Brodsky filed, on behalf of Sergio Valdes, a Motion to Dismiss DEP's motion. (R. 24-31). The trial court denied Sergio's

Motion to Dismiss for lack of standing because he is not the registered owner of the vessel. (R. 38-39). The court subsequently granted Respondent's Motion to Intervene as the registered owner of the vessel. (R. 43). Respondent filed his Motion to Dismiss DEP's motion. (R. 44-62). As the basis for his motion, Respondent claimed, *inter alia*, that the statute is facially unconstitutional as it violates the due process clause of both the State and Federal constitutions. Respondent claimed that the statute provides no notice or opportunity for a hearing to himself or any third party before the order of forfeiture is entered.

The constitutional right to procedural due process requires, at a minimum, notice and an opportunity to be heard before a court can deprive an individual of his or her property. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972). Respondent has no standing to claim a due process violation because Respondent's attorney was served with a copy of DEP's motion. Respondent, through his attorney, therefore had notice of DEP's intent to seek forfeiture of his vessel.

Further, Respondent was provided an opportunity for a hearing before the forfeiture because the court granted his Motion to Intervene. Indeed, Respondent filed his objection to the forfeiture by filing his motion to dismiss DEP's motion. Since Respondent is before the court objecting to the forfeiture, he is

being afforded a hearing. Indeed, the trial court never reached the merits of DEP's motion because it granted Carlos's motion to dismiss.

Respondent was provided with actual notice of DEP's motion and is being afforded a hearing on his objections to the forfeiture. Respondent therefore has been afforded his due process, notice and hearing. Consequently, Respondent has no standing to raise a due process violation. The trial court therefore erred in finding that the statute violates the due process clause of the State and Federal constitutions.

B

RESPONDENT HAS NO STANDING TO CLAIM AN EQUAL PROTECTION VIOLATION

The trial court also erred in finding that the statute violates the equal protection clause of the State and Federal constitutions because Respondent has no standing to raise this claim. "It is well established in Florida that a person to whom a statute can be constitutionally applied may not challenge the statute on the grounds that it may result in an impermissible application to someone else." *State v. Ginn*, 660 So. 2d 1118, 1120 (Fla. 4th DCA 1995), *rev. den.*, 669 So. 2d 251 (Fla. 1996).

Respondent filed his motion to dismiss claiming, *inter alia*, that section 370.061 is facially unconstitutional as it violates

the equal protection clause of both the State and Federal constitutions. In support of his motion, Carlos claimed that the statute provides protection for holders of recorded liens with respect to motor vehicles but provides no such protection for holders of recorded liens with respect to vessels. (R. 49-50).

The portion of section 370.061 relevant to Carlos's equal protection argument provides:

[E]xcept that, if a motor vehicle is seized under the provisions of this act and is subject to any existing liens recorded under the provisions of s. 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 s. 319.27, and that, upon any default by the violator purchaser, the said lienholder may foreclose its lien and take possession of the motor vehicle involved.

The trial court found the statute violative of the equal protection clause and granted Respondent's motion to dismiss. However, Respondent has no standing to raise the equal protection argument. Respondent is not a member of the class of persons for which he claims the statute provides no protection. Respondent is not the holder of a recorded lien against a vessel, he is the registered owner of the vessel. In fact, there is no recorded lien against the vessel. Since Respondent is not the holder of a recorded lien against the vessel, he has no standing to raise a

claim that the statute violates the equal protection rights of holders of recorded liens against vessels. *Id.* Consequently, the trial court erred in finding that section 370.061 violates the equal protection clause.

Since Respondent has no standing to raise the due process and equal protection challenges to section 370.061, the trial court erred in finding the statute unconstitutional and in granting his motion to dismiss DEP's motion. This Court should therefore reverse the trial court's order and remand the cause to the trial court for consideration of the State's Motion for Final Forfeiture of Nuisance.

CONCLUSION

Based upon the foregoing argument and cited authorities, this Court should quash the district court's decision and remand the cause to that court with directions to reverse the county court's order dismissing DEP's motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was furnished by mail to, **HOWARD BRODSKY**, Law Offices of Gerald J. Tobin, P.A., 2701 South Bayshore Drive, Suite 602, Miami, Florida 33133, on this 18th day of March 2002.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 12 point Courier New type.