

**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).

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ON PETITION FOR DISCRETIONARY REVIEW

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REPLY BRIEF OF PETITIONER

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### **SUMMARY OF ARGUMENT**

The procedures outlined in *Department of Law Enforcement v. Real Property* do not apply to forfeiture of nuisances under section 370.061(1), Florida Statute. Section 370.061(1) provides the procedure by which the nuisance is to be forfeited by court order. Valdes has been afforded his due process since he was served with DEP's Motion for Final Order of Forfeiture of Nuisance. Valdes was permitted to intervene and is being heard. The court has not heard the merits of DEP's motion. No final order of forfeiture has been entered. Consequently, Valdes is being afforded his due process.

## 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.**

Carlos Valdes argues that section 370.061(1) is unconstitutional on its face because it provides for the forfeiture of property without due process. Valdes argues alternatively, that if the statute does provide for due process, he was not afforded due process because he had no notice or opportunity for a hearing. Thus, according to Valdes, the statute is facially unconstitutional or was applied in an unconstitutional manner to his case.

Valdes's argument that the statute is facially unconstitutional rests on Valdes's claim that the procedures outlined by this Court in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991), apply to forfeitures under section 370.061(1). In its initial brief Petitioner argued at length that the procedures outlined in *Real Property* do not apply, and cannot be applied, to section 370.061(1) forfeitures. Valdes does not address Petitioner's argument. Instead, Valdes argues that the cases cited by Petitioner support his argument because the property at issue is of "great value". Thus, according to Valdes's argument, section 370.061(1) is not unconstitutional when applied

to property of small value but is unconstitutional when the property at issue is of great value, as in the instant case.

Petitioner responds that the value of the property is not the determining factor in determining what process is due. The consideration of what process is due depends, not on the value of the property at issue, but on the nature of the government function and the private interest that is affected by the governmental action. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The nature of the governmental action at work in section 370.061 is the exercise of the police power 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).

In *Lawton v. Steel*, 152 U.S. 133 (1894), 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, such abatement should be by order of court. *Id.* In the instant case, Valdes argues that because the Court in *Lawton v. Steel* opined that the abatement ought to be by court order, it supports his claim that the procedures outlined in *Real Property* must be followed in section 370.061 forfeitures. However, section 370.061 clearly requires that the abatement of such nuisances be by court order. It provides that upon arrest and conviction for the illegal taking, all property used in connection with the illegal

taking are declared nuisances which may be seized and brought before the court having jurisdiction over such offense and the court may order such nuisances forfeited. Section 370.061(1), Fla. Stat.<sup>1</sup> The statute therefore provides for the forfeiture through a judicial proceeding.

Valdes argues, in the alternative, that if section 370.061(1) is constitutional, it was unconstitutionally applied in his case because he had no notice or the opportunity to be heard. As argued in Petitioner's brief, considering the procedural posture of this case, this argument is meritless. Valdes, through his attorney, was served with DEP's Motion for Final Order of Forfeiture of Nuisance. The county court granted Valdes's motion to intervene. The court has yet to hear the merits of DEP's motion. No order of forfeiture has been entered. Valdes has interposed his objection to the forfeiture. Valdes is therefore being afforded his due process.

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<sup>1</sup>Section 370.061(1) does not specify the procedure by which the nuisance is to be "carried before the court." However, in its most recent session, the Legislature substantially amended section 370.061(1) to clarify the procedure to be used in obtaining the forfeiture of the nuisance. See Chapter 2000-264, Section 3, Laws of Florida.

## II

### **SECTION 370.061(1) FLORIDA STATUTES IS CONSTITUTIONAL**

Valdes argues that the forfeiture at issue is a criminal forfeiture and as such should have been obtained as part of the criminal proceeding. However, as argued above, the forfeiture is the exercise of the police power of the State. It is intended to protect the fishing industry by abating a nuisance. The legislature has provided the procedure by which the nuisance is to be forfeited.

Valdes next argues that the forfeiture results a double jeopardy violation since it increases the punishment for the crime. However, Carlos Valdes was not a party to the criminal action. Carlos Valdes therefore has no standing to assert a double jeopardy violation.



**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 20th day of May 2002.

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PAULETTE R. TAYLOR  
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**CERTIFICATE OF TYPE SIZE AND STYLE**

This brief is composed in 12 point Courier New type.