IN THE SUPREME COURT OF FLORIDA

CASE NOs. SC03-446 and SC03-552 (consolidated)

Lower Court Case Nos. 4D02-2584 and 4D02-3315 (consolidated)

JOHN M. and PATRICIA A. HAIRE, CAROLYN SELIGMAN, LAZ and ELLEN SCHNEIDER, SUSAN B. PETERSON, STEPHEN M. WOLFMAN, ROBERT SCHERER, SUSAN and HIRAM FRANK, JUDITH and BERNARD MACNOW, BROWARD COUNTY, MIAMI-DADE COUNTY, CITY OF PLANTATION, CITY OF FT. LAUDERDALE, CITY OF POMPANO BEACH, CITY OF CORAL SPRINGS, TOWN OF DAVIE, CITY OF HOLLYWOOD, CITY OF BOCA RATON and VILLAGE OF PINECREST,

Petitioners,

vs.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES and STATE OF FLORIDA,

Respondents.

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I: The District Court Denied Due Process By Deciding The Ultimate Constitutionality Of The Canker Law.

The state argues plenary review was proper since the constitutionality of a statute is a pure question of law and, thus, limiting the presentation of evidence was harmless. But the constitutionality of a statute may present mixed questions of law and fact. *Lykes Bros. v. Bd. of Commn's of Everglades Drainage District*, 41 So.2d 898, 900 (Fla. 1949). Here, tellingly, the state's assertion that the issues presented are purely legal appears after the state's twenty-two (22) page statement of facts.

The state also erroneously claims the temporary injunction hearing was, in reality, a full trial, and that although there was no new discovery, Petitioners had full discovery in prior cases. Petitioners conducted no written discovery in the November 2000 proceeding, which was tried within weeks after filing. The only relevant discovery was in connection with a DOAH administrative challenge. However, as detailed in the initial brief, the state refused to produce most of the documents sought, including the Gottwald data. This led to an order compelling production and granting a continuance of the final hearing. The state never complied, choosing instead to seek review of the order, which the First District upheld, ruling that due process includes the right to conduct "full and fair discovery prior to the hearing." *Dept. of Agriculture v. Broward County*, 810 So.2d 1056, 1057-58 (Fla. 1st DCA 2002).

The limited scope of earlier discovery is best shown by the fact that Petitioners did not depose any of the four experts upon whom the state relies in its answer brief. Dr. Madden's testimony was given during the November 2000 proceeding, and he was not deposed before that testimony. (Reply Appendix ("RA"):2:178). Likewise, Petitioners have never deposed Drs. Graham, Scherm or Gottwald. The state and Gottwald each refused to produce Gottwald's data prior to the temporary injunction hearing. (T:1044). Petitioners presented the strongest temporary injunction case

possible without Gottwald's data and without deposing the state's experts.

The state's assertion that the trial court acknowledged it conducted a full trial is equally specious. The state twice mischaracterizes the temporary injunction order on page 24 of its answer brief. First, the state claims the trial court acknowledged its ruling adjudicated "the fundamental constitutionality of a statute." Read in context, the referenced language merely contrasted the instant claims with those addressed in the November 2000 proceeding, to show why exhaustion of administrative remedies is not required. Second, the state claims the trial court recognized that, after its ruling, there remained "only a trial upon damages under inverse condemnation law." In language that speaks for itself, the trial court was merely stating the extent to which it was permitting intervention by parties outside Broward County.

Elsewhere in the answer brief, the state claims that the temporary injunction hearing was a "full-blown" trial involving a "full evidentiary presentation," and that the constitutionality of the Canker Law was "fully litigated." These claims are belied by the trial court's repeated direction that the parties limit their evidence and argument to issues relating to the temporary injunction. (T:277, 301, 370, 378, 490-91, 680, 954-55, 1393, 1437, 1516). Instructively, the state periodically objected to questions on the ground they were irrelevant to a temporary injunction (T:1477-78), and Petitioners' closing focused on the elements of a temporary injunction. (T:1676).

Simply stated, Petitioners conducted no discovery and were, therefore, unable to present a complete case. Important constitutional principles should not be established on the basis of a stunted record. The trial court did not abuse its discretion in preserving the status quo pending reasonable discovery and trial.

II: The Canker Law Denies Due Process Under *Corneal*, Which The District Court Erroneously Determined Was Inapplicable.

Corneal is the controlling substantive due process case when the state destroys

private property, which is "an extreme exercise of the police power." *Corneal v. State Plant Board*, 95 So.2d 1, 4 (Fla. 1957). The state continues to argue that the Canker Law should not be subjected to *Corneal*'s exacting judicial scrutiny since, in §581.1845, the state "[chose] to pay compensation" within the meaning of *Corneal.*

The state's choice under §581.1845 is clear. For the first tree destroyed on any property, the state chose not to pay any money. The owner is eligible for a "shade" card. Nothing in the record suggests the "shade" program is even a state program. Thus, the state did not choose to pay compensation for the first tree on each property.

With regard to each additional tree, the state chose to pay $55, "subject to the availability of appropriated funds." §581.1845(1). The state has, therefore, expressly reserved the right not to pay. Since the initial brief was filed, the appropriations bill for next fiscal year was enrolled and, not surprisingly, the state took full advantage of the district court's interpretation of *Corneal*. Conf. Rpt. on Fla. Sen. S2-A, Item 1396A (May 27, 2003). Despite that the state has targeted 200,000 trees for imminent destruction, only $1 million was appropriated for compensation. (RA:3). Thus, the state chose to pay $55 for about 18,000 trees, and chose to pay no compensation, whatsoever, for the remaining 182,000 trees. Even fewer tree owners will receive the $55 payment if the state, as authorized, uses $500,000 of the $1 million to administer the compensation program. §581.184(5), Fla. Stat. The remaining property owners will receive the $55 when the state decides to appropriate sufficient funds, if ever.

Even for the "lucky" few who receive any compensation, $55 is a token payment. The state estimates the average targeted tree is worth $438.00. (RA:4). The state argues that token compensation satisfies *Corneal* because it would be improper to legislatively fix compensation.

There is a distinction, of course, between fixing compensation and conceding that state action effects a compensable taking. While the state is not permitted to do

the former, it is required to do the latter to avoid *Corneal*'s "narrowest limits of actual necessity" scrutiny. Recognizing this obligation, the state attempts to nuance the position it has taken here and in *Patchen v. Dept. of Agriculture*. 817 So.2d 854 (Fla. 3d DCA 2002), *rev. granted*, 829 So.2d 919 (Fla. 2002). In footnote 16 of its answer brief, the state claims it does not challenge whether the destruction is compensable, but rather only that, beyond the $55, the "courts should award zero dollars of additional compensation." This argument is pure sophistry.

Appellate courts do not determine the amount of compensation. The state claims, without merit, in *Patchen* and here that the targeted trees are nuisances, so their destruction is not a taking. The state is refusing to concede a taking, and is trying to hide that fact. If the state truly conceded a compensable taking, as required under *Corneal*, all it had to do was comply with this Court's decisions in *Smith* and *Bonanno*, both cited in the answer brief. *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959); *Dept. of Agriculture v. Bonanno*, 568 So.2d 24 (Fla. 1990).

Bonanno discussed the compensation statutes enacted after this Court's *Corneal* and *Mid-Florida Growers* decisions:

> The administration of the Canker Program and the subsequent judicial and legislative response are remarkably similar to that which occurred as a result of efforts to eradicate the citrus disease known as spreading decline caused by the burrowing nematode. In *Corneal v. State Plant Board*, 95 So.2d 1 (Fla. 1957), this Court held that the State Plant Board could not destroy healthy trees thought ultimately to be subject to the disease without paying compensation to the owners. Thereafter, the legislature enacted a statute providing for the destruction of uninfested trees upon the payment of "just and fair compensation ..."

568 So.2d at 27. Similarly, in *Dept. of Agriculture v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla. 1988), "this Court held that the state was required to compensate the owners of healthy but suspect citrus plants destroyed under the Canker Program."

Bonanno, 568 So.2d at 26-27. The state responded with Chapter 89-91, Laws of Florida, pursuant to which the Legislature recognized its obligation to provide "full and fair compensation," established a schedule of "presumptive full and fair compensation," and provided for hearings so tree owners wishing to do so could seek to prove the presumptive compensation was insufficient.

The compensation statutes at issue in *Smith* and *Bonanno* show what is required for the state to "choose to pay compensation" within the meaning of *Corneal*. §581.1845 falls woefully short of those compensation statutes, and therefore is not an effective surrogate for the exacting judicial scrutiny otherwise applicable under *Corneal*. The district court's ruling eviscerates *Corneal*, and gives the state unchecked power to destroy private property. Because the state did not choose to pay full compensation, the Canker Law is unconstitutional.

III: Even If The *Corneal* Standard Was Inapplicable, Petitioners Sufficiently Demonstrated, For Purposes Of A Temporary Injunction, That The Canker Law Denies Both Substantive And Procedural Due Process.

Substantive Due Process If *Corneal* Test Inapplicable.

After finding *Corneal*'s test inapplicable, the district court ruled that the Canker Law should receive mere rational basis scrutiny. In support of such test, the state relies on only one case which addressed state destruction of private property. *Miller v. Schoene*, 276 U.S. 272 (1928). *Miller* addressed cedar trees infected with a disease the evidence demonstrated was fatal to apple orchards. The Supreme Court ruled that, "whenever both existed in dangerous proximity" (two miles), the state was required to make a choice. It could either destroy the infected trees, or do nothing and allow the infected trees to destroy the commercially important orchards. *Id*. at 278-80. Here, it remains disputed whether canker would even materially impact groves, let alone prove fatal. More importantly, however, the Canker Law mandates the destruction of potential host trees statewide; *Miller* approved the destruction of trees

in close proximity to the orchards only to create the necessary buffer zone. The fatal nature of the disease, coupled with the close proximity, is what made the choice necessary. The answer brief completely glossed over this crucial distinction.

Other cases cited by the state actually demonstrate that, when state action abridges a fundamental right, the rational basis test is inapplicable. *E.g. Lane v. Chiles*, 698 So.2d 260, 263 (Fla. 1997) (strict scrutiny should be applied when state action abridges a fundamental right (fishing is not fundamental right)); *Lite v. State*, 617 So.2d 1058, 1060 n.2 (Fla. 1993) (same; driving is not fundamental right). In arguing that the rational basis test is the "bedrock principle" of due process analysis, the state cites a plethora of economic and business regulation cases which do not abridge fundamental rights. For these cases, the state correctly notes that "the burden is on the party challenging legislation to negat[e] every conceivable rational basis which might support it," and that a statute should be upheld even if "based on rational speculation unsupported by evidence or empirical data."

The fallacy in the state's argument is that this type of non-scrutiny is patently inconsistent with the nature of the rights at issue here. In *In re Forfeiture of 1969 Piper Navajo*, this Court made clear that the reason strict scrutiny is applicable when the state seeks to confiscate private property is because "property rights are protected by a number of provisions in the Florida Constitution" including Article I, §2. 592 So.2d 233, 235-36 (Fla. 1992). *Corneal* made clear the foundational importance of private property rights, and the catastrophic consequences of the state possessing excessive power over private property. If the state is permitted to destroy private property based on rational speculation unsupported by evidence, the state will possess an unacceptable level of power over private property.

What separates this case from any case cited by the state, even the cases where private property was confiscated and strict scrutiny applied, is the unprecedented level

of state intrusion. The Canker Law goes far beyond a temporary seizure of property or even isolated destruction of property. It is perhaps the statute most destructive of private property in state history.

The destructive impact is exacerbated by the district court's authorization of de facto perpetual licenses permitting constant, surprise intrusions into residential property. This Court has recognized the "substantial constitutional principle" that "residential property" has "special significance" and that "an individual's expectation of privacy and freedom from governmental intrusion in the home merits special constitutional protection." *Dept. of Law Enforcement v. Real Property*, 588 So.2d 957, 963-4 (Fla. 1991). *Accord Oliver v. U.S.*, 466 U.S. 170, 178 (1984) (curtilage area of private home entitled to same heightened protection as home itself).

The Canker Law is not a business regulation. It mandates the mass destruction of private property on residential property, an extreme exercise of the police power. The state has not presented any precedent for applying mere rational basis scrutiny.

The state next argues the Canker Law survives even strict scrutiny. The state's lead argument is that the compelling state interest is demonstrated by preamble language from a prior statutory amendment, which purportedly states that any interference with the eradication program will devastate the citrus industry. The state asserts that Florida's courts must yield to legislative claims when they are sufficiently alarmist. The separation of powers principle requires more of courts. Clever legislative staff should not be permitted to circumvent fundamental constitutional rights by formulating artful characterizations. *Keshbro v. City of Miami*, 801 So.2d 864, 873 n.16 (Fla. 2001). When property and privacy rights are so gravely impinged, courts should not be expected to rubber-stamp state action. As this Court held in *Smith*, when fundamental constitutional rights are at stake, the actual facts, and not legislative claims, govern the due process analysis. The extreme deference to the Legislature

sought by the state is the antithesis of strict scrutiny.

The state further notes that Gottwald's study was endorsed by a state task force, peer review and the testimony of three scientists, implying that the study has already survived strict, albeit nonjudicial, scrutiny. Even if this private scrutiny could substitute for judicial scrutiny and the adversarial process, none of these persons or entities strictly scrutinized Gottwald's study. The state task force made its recommendation in 1999, without ever seeing Gottwald's data, and well before Gottwald's "re-analysis" resulted in radical data changes.[1] The peer reviewers did not see the data.[2] Dr. Madden, who testified during the November 2000 proceeding, never even saw Gottwald's preliminary data. (RA:2:176-77, 79). Dr. Graham, who co-authored the Gottwald report and was therefore defending his own work, testified that he "accepted," but did not verify, Gottwald's spread distance tables and crucial assumptions. (T:723, 755). Dr. Scherm only reviewed Gottwald's publications, not his data, and received his largest grants from Gottwald's employer. (T:1527, 1579).

Drs. Scoggins and Stall, Petitioners' principal experts, each shot enough holes in Gottwald's study to justify the temporary injunction. The state claims Dr. Scoggins said he lacked the expertise to opine on the study. Dr. Scoggins testified the study used a very simple statistical analysis he fully understood, and that the only limitation

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[1] On page 8 of its answer brief, the state argues that the data in the preliminary draft reviewed by the task force was already more "weighty" than data typically collected. Gottwald admitted, however, that he included only selective data in the preliminary draft. Petitioners are not concerned with the amount of data collected, but rather, as the trial court noted, Gottwald's arbitrary decision to include only that data supporting his pre-conceived conclusions.

[2] On page 47 n. 18 of its answer brief, the state implies the peer reviewers had access to Gottwald's data. This is unsupported by the record. Gottwald could not have been clearer that no one aside from his USDA colleagues had access to his data. Others had only the spread distance tables resulting from Gottwald's subjective analysis of selective data. (T:602-3, 619-20, 625).

on his analysis was he did not have Gottwald's underlying data. (T:119-20).

The state could not impugn Dr. Stall's credentials. Not only is he a renowned canker expert, but he works for the state. Dr. Stall's testimony on dormancy proves Gottwald's spread distance tables are useless. The state's handling of the crucial dormancy issue demonstrates yet another inconsistency in Gottwald's explanations.

On pages 11-12 of its answer brief, the state claims that Gottwald denied dormancy was a problem for his study since any dormancy would not exceed the 18-month time period of his study. Gottwald's true position on dormancy was stated during a scientific meeting in 2000. At that meeting, Dr. Stall stated that trees can have dormant infections for up to two years, so, during Gottwald's study, Gottwald may have wrongfully assumed that newly-detected infections represented disease spread. In a word, Gottwald responded that he "absolutely" agreed with Dr. Stall. (RA:5). In fact, Gottwald went further, stating "when you talk about the time periods of dormancy for citrus canker, a year or two probably is a gross underestimate there, too. These things can survive multitudes of years under the proper conditions ...."[3]

Simply stated, since Petitioners did not have Gottwald's data and never deposed him, Gottwald could say whatever he wished with relative impunity. The state's experts had the right to accept Gottwald at his word without any verification. Petitioners have the right to conduct discovery and to present at trial a full evidentiary record upon which basis the court may strictly scrutinize the Canker Law.

Likewise, none of the state's witnesses claimed canker could not be addressed through less destructive means. According to the state, since the Legislature decided

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[3] (RA:5). On page 10 of its answer brief, the state also claimed the lesion dating performed during Gottwald's study accounted for dormancy. The referenced testimony actually refers to latency, which is the 7-14 day period after infection but before symptoms appear. Dormancy is a completely different concept, resulting in the disappearance of previously-existing canker symptoms.

to eradicate canker statewide, no other options can be considered; and since Petitioners did not prove that less-destructive measures would achieve statewide eradication, the Canker Law is constitutional. Answer Brief at 44.

Neither the district court nor the state identified a single case supporting the statewide destruction of potential host plants to protect a geographically-concentrated industry. The state failed to demonstrate that statewide eradication is required and that the 1,900-foot zone is necessary to achieve statewide eradication. In fact, in its answer brief, the state did not even address the fact that the destruction zone was dramatically increased as a matter of convenience, and that Brazil, which focuses on prompt inspection, is able to eradicate using destruction zones 90% smaller.

Other facts showed statewide destruction is not necessary. Since the longest spread shown by Gottwald was only 2.16 miles, the state failed to demonstrate why a buffer around the citrus growing region, like the 2-mile buffer in *Miller*, would not be sufficient. In footnote 6 and on page 16 of its answer brief, the state concedes that infected trees in southeast Florida cannot spread canker into groves. On pages 42-43 of the answer brief, the state claims only that a buffer would not work because canker can be transported 6-7 miles by hurricane (T:741-42) or farther by human movement.

Even if the state's claim about hurricanes was proven, a 7-mile buffer around the commercial region would prevent spread into the region. To control human spread, the state has enacted regulations to prevent the movement of plant materials from canker-infested areas, and regulations requiring thorough decontamination of those entering groves. Fla. Admin. Code R. 5B-58.001. For canker to spread into groves, both the quarantine regulations must be violated and the groves must fail to protect themselves by not enforcing clear decontamination requirements.

Additionally, on pages 44-45 of its answer brief, the state asserts its experts testified that endemic canker, unlike dozens of other plant pests, cannot be managed

by groves. To the contrary, the state's experts admitted that windbreaks, chemical treatments and other management practices effectively control canker in groves, and allow production of blemish-free fruit. (T:607-08, 612, 750-51). The state's top eradication manager also admitted non-destructive measures do control canker, but claimed that was irrelevant since the state's policy is to eradicate canker. (T:1460).

Procedural Due Process.

The temporary injunction is also proper under *Smith*, which controls the procedural due process analysis. In *Smith*, this Court ruled that a predeprivation hearing may be denied only when a trial court finds, from the actual facts developed, that the targeted property presents an imminent threat to a compelling state interest. 110 So.2d at 408-09. Here, the facts show that trees in southeast Florida do not imminently threaten the citrus industry.

In its answer brief, the state does not deny that it routinely waits months before removing known infected trees in southeast Florida, or that it allowed thousands of known infected trees to remain standing for up to two years during Gottwald's study. Rather, the state argues only that when the district court noted that the state's own conduct "suggests that even [the state is] not concerned that these trees pose an immediate danger to the citrus industries," the district court was not implying that there was enough time for a predeprivation hearing.

The only obstacle to a predeprivation hearing identified in the answer brief is that a jury trial would take too much time. The state ignores the fact that if canker could directly, let alone imminently, spread from southeast Florida to the distant commercial growing region, that region would have been infested shortly after Gottwald's study began, since thousands of known infected trees were allowed to remain in place. The state also ignores that the right to have a jury determine compensation is statutory, not constitutional. *Bonanno*, 568 So.2d at 28. The state

could have established an administrative panel to quickly resolve compensation. *Id*.

The state tried to distinguish canker from spreading decline, the plant disease at issue in *Smith*. On page 31 of its answer brief, the state claims "canker's spread potential is not limited, but instead progresses towards the groves by leaps and bounds with each rain storm." A state expert testified that routine rainstorms, at most, spread canker to immediately neighboring trees. (T:741). The longest distance Gottwald claimed to observe during his two-year study was 2.16 miles. Even if the state's claim of 6-7 mile spread by hurricane was true, the targeted trees in southeast Florida are counties away from the commercial growing region.[4] The state's own conduct, and the results of Gottwald's study, support the trial court's preliminary finding that the fundamental right to a predeprivation hearing cannot be denied.

Unable to reconcile *Smith*, the state tries to confuse the issue by citing to a series of inapposite cases. *Fuentes v. Shevin* involved a temporary seizure of property, followed by a hearing during which the property owner could regain possession. 407 U.S. 67, 73 (1972). *Hodel v. Va. Surface Mining & Reclam. Assoc, Inc.* also addressed a temporary cessation of property rights. 452 U.S. 264, 301 (1981). This was allowed only because "swift action [was] necessary to protect the public health and safety." *Id*. at 266. The U.S. Supreme Court noted that deprivation of property to protect human safety is "'[o]ne of the oldest examples' of permissible summary action." *Id*. at 300-01 (citations omitted). *Catanzaro v. Weiden* was the only case cited by the state that permitted summary destruction of property. 188 F.3d 56, 63 (2d Cir. 1999). A car crashed into a building, creating an "obviously dangerous and crumbling building," an imminent threat to human safety which made summary destruction permissible. *Id*. at 58-59. No one disputes that a state may summarily

[4] While humans could conceivably transport canker even farther, the same is true of human spread of spreading decline. *Corneal*, 95 So.2d at 2.

destroy property when it presents an imminent threat to human safety.[5]

Finally, the state argues that appealing an immediate final order ("IFO") provides a meaningful predeprivation hearing. The opportunity to be heard must be meaningful. *Fuentes*, 407 U.S. at 79; *Real Property*, 588 So.2d at 960. On page 32 of its answer brief, the state argues that IFO review is meaningful since a stay can prevent irreparable injury. But no stay can be obtained by the owners of the 200,000 trees targeted by the state. The district court determined that the only issue relevant to a stay request is whether a targeted tree is within a 1,900-foot zone. *Haire*, 836 So.2d at 1053-54. If within a 1,900-foot zone, no stay is available.

IV. This Court Should Address The Search And Seizure Issues.

The state contends the search and seizure issues are non-jurisdictional because they are "bereft of any constitutional challenge to the Fourth District's decision." The district court expressly construed Article I, §12, when it ruled that the "Florida Constitution impliedly permits" multiple warrants from a single application. *Haire*, 836 So.2d at 1055. This Court has jurisdiction to review a decision which expressly construes a provision of the state constitution. Fla. R. App. P. 9.030(a)(2)(A)(ii). On page 38 of the initial brief, Petitioners stated that the ruling misconstrued Article I, §12, but that it may be unnecessary to reach the constitutional standards since the warrant applications also fail to satisfy the statutory standards. The state fails to recognize the difference between raising a constitutional issue and reaching it.

Even if the search and seizure issues were non-jurisdictional, they meet the court's guidelines for consideration. In *Cantor v. Davis*, jurisdiction was based on

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[5] Despite earlier conceding canker has no impact, whatsoever, on human health and safety (T:472), the state now argues, on page 31 of its brief, that since the Florida Citrus Code says the citrus industry is important to health and welfare, this case fits within *Hodel* and *Catanzaro*. As made clear by those cases, only a direct, imminent threat to human health and safety, and not some indirect economics-driven eventual threat, may justify summary destruction.

a finding that a statute was facially constitutional, but the Court decided the case on an issue not directly considered by the lower court, stating: "Once this Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case." 489 So.2d 18, 20 (Fla. 1986) (citations omitted).[6] Indeed, this Court has stated that it should "dispose of the entire cause" and "avoid a piecemeal determination of the case." *Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) (deciding the case on a non-jurisdictional issue not addressed by the district court). Where, as here, the resolution of a "fully briefed and argued" legal issue is required to "dispose of the entire cause," that issue should be addressed by the Court. *Id*.

Importantly, failure to address the issue will allow the continuation of widespread unreasonable searches and seizures, in violation of the Florida Constitution, including, as described on pages 11-12 of the initial brief, the perfunctory issuance of thousands of warrants to search high-rise dwellings with no yards. Nor is there any principled basis for limiting the district court's erroneous legal ruling to canker-inspection warrants. Adjudication is warranted here, where the incorrect resolution of a legal issue "will only cause more problems in the future." *Holly v. Auld*, 450 So.2d 217, 218 n.1 (Fla. 1984).

With regard to the statutory standards, the state's answer brief merely echoes the district court's assertion that in the absence of a "statutory proscription," the issuance of multiple warrants based on a single application and the use of electronic signatures are permissible. That argument turns the applicable strict construction

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[6] The cases employing this standard to consider non-jurisdictional issues are legion. *See e.g. Caufield v. Cantele*, 837 So.2d 371 (Fla. 2002); *Murray v. Regier*, 2002 WL 31728885 n. 5 (Fla. 2002); *State v. T.G.*, 800 So.2d 204, 210 n. 4 (Fla. 2001); *PK Ventures, Inc., v. Raymond James & Assoc.*, 690 So.2d 1296, 1297 n.2 (Fla. 1997). *Cf. Tucker v. Dept. of Corrections*, 301 F.3d 1281, 1286 (11th Cir. 2002) (collecting Florida Supreme Court cases declining to consider non-jurisdictional issues).

standard, which requires an express statutory authorization, on its head. *See* initial brief at 38-39.[7] On page 49 of its answer brief, the state concedes there is no statutory language expressly authorizing the procedure approved by the district court.[8]

V. FCM Ignores Both The Record And The Governing Cases.

Florida Citrus Mutual's ("FCM") amicus brief provides a broad factual and legal overview without any record cites and without addressing the two central cases. FCM starts by describing the alleged devastating impacts of canker. None of these impacts, however, is substantiated by the record. For example, unquantified yield loss must be claimed since canker blemishes obviously do not impact the predominant juice segment of the industry.[9] Additionally, the likelihood, extent and financial impact of any quarantine of fresh fruit is devoid of record support.

The present record provides some limited insight into the impacts of canker. First, canker is successfully managed in citrus-producing regions worldwide. Second, at least on residential trees, canker is so innocuous, and the symptoms so similar to other endemic conditions, that canker existed on thousands of trees over a 14 square mile area for 4 years before it was happened upon by inspectors. (T:479; A:2:1).

FCM's claims of devastation are primarily based on statutory preamble language containing undeniable misstatements of Gottwald's "conclusions." The Legislature claimed Gottwald's study showed canker spread is limited to 1,900 feet. The

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[7] The *Haire* ruling is also in direct but unexpressed conflict with the uniform case law requiring that search warrant statutes be strictly construed.

[8] The statutes the state cites on page 50 of its answer brief as authorization for electronic signatures on search warrants are expressly limited to electronic commerce and financial instruments. *See* Chs. 668 and 116, Fla. Stat.

[9] The yield loss claim has replaced the prior claim that canker kills trees, which has since been debunked.

Legislature also claimed, based on a fallacious reading of *Sapp Farms, Inc. v. Dept. of Agriculture*, that all trees within 1,900 feet of an infected tree were already infected.[10] At the time the recitals were made, Gottwald's study claimed spread up to 58,850 feet. And Gottwald found that few trees within any 1,900-foot zone will become infected. Rather than demonstrate support for the Canker Law, the recitals cited by FCM show the danger in relying on unsubstantiated claims.

FCM grossly exaggerates the harms of canker in a strained effort to mirror the legislative choice faced in *Miller*. The choice in *Miller* was required by two factors - evidence that the disease would be fatal to the orchards, and the necessity to destroy one category of property because of its close proximity to another. *Miller*, 276 U.S. at 278-79. In *L. Maxcy v. Mayo*, also cited by FCM, this Court recognized that *Miller* "presses to the extreme the scope of the police power" and should not be extended "beyond the strict necessities of a situation shown to exist ...." 139 So. 121, 131 (Fla. 1932). Those strict necessities, fatality and proximity, do not exist here.

Most tellingly, while FCM advises this Court not to depart from precedent, FCM conveniently ignores *Corneal* and *Smith*, the two most important due process cases governing state destruction of private property. FCM instead evokes "uniform precedent" purporting to show that courts always sustain state action aimed at protecting the citrus industry. Every case FCM cites fits one of two categories; IFO challenges and inverse condemnation cases. Unlike due process challenges, the validity of an IFO is determined solely by whether it facially alleges an imminent threat, not whether such threat actually exists. *See e.g. Denney v. Conner*, 462 So.2d 534,

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[10] 761 So.2d 347 (Fla. 3d DCA 2000). The *Sapp Farms* recital is so off base that both the state and FCM omitted it from their respective briefs.

535-36 (Fla. 1st DCA 1985). Inverse condemnation cases also involve a different analysis than due process challenges. *Tampa-Hillsborough County Expwy. Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 57 (Fla. 1994). Petitioners have never contested the exercise of police power to protect the citrus industry in general. Rather, it is the Canker Law's extreme exercise of police power that Petitioners challenge.

Additionally, aside from *Dept. of Agriculture v. Varela*, 732 So.2d 1146 (Fla. 3rd DCA 1999), all cases FCM cites involved smaller-scale destruction of trees in commercial groves, an action far different than mass destruction in urban residential areas statewide, which is unprecedented.[11] FCM's members engage in regulated commerce and assume business risks. Their trees are inventory and their losses insurable. Petitioners are not engaged in commerce and have not assumed any risks on behalf of the citrus industry. Petitioners seek to preserve the sanctity of their residential property and their privacy, interests not at issue in any case cited by FCM.

As FCM notes, this Court in *L. Maxcy* acknowledged that the state has broad power to protect the citrus industry. But the Court also warned that the judiciary must remain available to prevent excessive exercises of that power pursuant to which:

> the constitutional rights of the individual to possess and enjoy that which is his own, may be unlawfully submerged. When appealed to in a proper case, the judiciary can render no greater service toward the perpetuation of free government than to accord to an individual litigant ... the just protection of our fundamental law, when that protection is sought as a means to forestall aggressive combinations bent on employing the power of statutes to penalize the citizen for ... refusing to surrender his constitutional rights to what may be a contrary minded political majority.

139 So. at 131. FCM's brief omits this portion of the *L. Maxcy* decision. Preserving

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[11] *Varela*, which rejected a class-action inverse condemnation claim based on its reading of *Dept. of Agriculture v. Polk*, 568 So.2d 35 (Fla. 1990), resulted in *Patchen*, which is presently being reviewed by this Court.

the citrus industry's profit margins may be important, but fundamental constitutional rights are sacred. Petitioners seek nothing more than a trial on the merits to protect their constitutional rights from improper encroachment.

CONCLUSION

This Court should reverse the district court's ruling and remand for trial. Alternatively, if this Court determines that the record presented permits a final merits ruling, this Court should reverse and rule that the Canker Law is unconstitutional.

CERTIFICATE OF SERVICE

We certify that copies hereof were mailed on June 19, 2003 to all persons on the attached service list.

CERTIFICATE OF COMPLIANCE

We certify this brief was prepared in Times New Roman 14-point font.

Respectfully submitted this 19th day of June, 2003.

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