IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1944

WALTER VELEZ,

Petitioner,

v.

MIAMI-DADE COUNTY POLICE DEPARTMENT,

Respondent.

*** ***

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

*** ***

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 3

SUMMARY OF THE ARGUMENT 8

ARGUMENT

PURSUANT TO THE PLAIN LANGUAGE OF THE FLORIDA CONTRABAND FORFEITURE ACT, A "PERSON ENTITLED TO NOTICE" NEED NOT DEMONSTRATE A PROPRIETARY INTEREST IN THE PROPERTY SEIZED BUT ONLY THAT HE WAS "IN POSSESSION OF THE PROPERTY WHEN IT WAS SEIZED" IN ORDER TO HAVE STANDING TO REQUEST AN ADVERSARIAL PRELIMINARY HEARING 10

CONCLUSION 19

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE 20

TABLE OF CITATIONS

Cases

Beary v. Bruce,
804 So. 2d 579 (Fla.5th DCA 2002) 17

Butterworth v. Caggiano,
605 So. 2d 56 (Fla.1992) 11

Byrom v. Gallagher,
609 So. 2d 24 (Fla.1992) 11

Chuck v. Forfeiture of 380,015.00 in U.S. Currency,
27 Fla. L. Weekly D2140,
___ So. 2d ___, 2002 WL 31159461
(Fla.3d DCA September 30, 2002) (reh. en banc granted) 18

City of Coral Springs v. Forfeiture of a 1997 Ford Ranger Pickup Truck,
803 So. 2d 847 (Fla.4th DCA 2002) 17

City of Fort Lauderdale v. Baruch,
718 So.2d 843 (Fla. 4th DCA 1998) 1, 7, 14, 15, 16

City of Miami v. Miller,
148 Fla. 349, 4 So. 2d 369 (1941) 11

Cochran v. Harris,
654 So. 2d 969 (Fla.4th DCA 1995) 18

Crepage v. City of Lauderhill,
774 So. 2d 61 (Fla.4th DCA 2001) 4, 17

DeGregorio v. Balkwill,
853 So. 2d 371 (Fla.2003) 11, 16, 19

Department of Law Enforcement v. Real Property,
588 So. 2d 957 (Fla.1991) 8, 11-13

Ford Ranger Pickup Truck,
803 So. 2d 847 (Fla.4th DCA 2002) 16

General Motors Acceptance Corp. v. State,
152 Fla. 297, 11 So. 2d 482 (1934) 11

Holly v. Auld,
450 So. 2d 217 (Fla.1984) 11, 16

Hotel and Restaurant Commission v. Sunny Seas No. One,
104 So. 2d 570 (Fla.1958) 11, 16

In re Forfeiture of One 1994 Honda Prelude,
730 So. 2d 334 (Fla.5th DCA 1999) 18, 19

Jean-Louis v. Forfeiture of $203,595.00 in U.S. Currency,
767 So.2d 595 (Fla. 4th DCA 2000) 1, 3, 7, 16

Jenne v. Meadows,
792 So. 2d 518 (Fla.4th DCA 2001) 18

McLaughlin v. State,
721 So. 2d 1170 (Fla.1998) 11, 16

Munoz v. City of Coral Gables,
695 So. 2d 1283 (Fla.3d DCA 1997) 4-6, 14, 15

Murphy v. Fortune,
857 So. 2d 370 (Fla.1st DCA 2003) 17

State Department of Highway Safety and Motor Vehicles v. Metiver,
684 So. 2d 204 (Fla.4th DCA 1996) 18

Vasquez v. State,
777 So. 2d 1200 (Fla.3d DCA 2001) 4-6, 14, 15

Velez v. Miami-Dade County Police Department,
881 So. 2d 1190 (Fla.3d DCA 2004) 1, 6

Constitution of the State of Florida

Art. I, § 9 12

Art. I, § 17 12

Art. I, § 21 12

Art. V, § 3(b)(4) 7

Florida Statutes

§§ 932.701-932.707, Florida Statutes (2004) 1, 4, 6, 8, 13-16

INTRODUCTION

In the decision under review, *Velez v. Miami-Dade County Police Department*, 881 So. 2d 1190 (Fla.3d DCA 2004), the Third District certified conflict with the decisions of the Fourth District in *City of Fort Lauderdale v. Baruch*, 718 So.2d 843 (Fla. 4th DCA 1998) and *Jean-Louis v. Forfeiture of $203,595.00 in U.S. Currency*, 767 So.2d 595 (Fla. 4th DCA 2000) concerning the Florida Contraband Forfeiture Act, §§ 932.701-932.707, Florida Statutes (2004) [Forfeiture Act]. The certified conflict question is whether a "person entitled to notice," as defined in the Forfeiture Act, need only prove that he was in possession of the property when it was seized in order to request and obtain an adversarial preliminary hearing.[1] The Fourth District answers the question in the affirmative. The Third District, however, requires proof of a proprietary interest in the property, thereby answering the question in the negative.

As a result of the conflict, proceedings under the Forfeiture Act can reach opposite results depending upon where in the State of Florida the property was seized. Had this case arisen within the jurisdiction of the Fourth District, the property seized

[1] § 932.701(2)(e) of the Forfeiture Act defines "person entitled to notice" as including any "person in possession of the property subject to forfeiture when seized...". § 932.703(2)(a) provides that "a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice" and that the "seizing agency shall set and notice the hearing which must be held within 10 days after the request is received or as soon a practicable thereafter."

from the petitioner's possession would be returned to him due to the denial of his request for an adversarial preliminary hearing in violation of the Forfeiture Act. However, because the seizure took place within the jurisdiction of the Third District where "a person entitled to notice" has no standing to request a preliminary hearing, the property was ordered forfeited.

The petitioner requests that this Court resolve this important conflict, quash the decision of the Third District and approve the decisions of the Fourth District as consistent with both the plain text of the Forfeiture Act and the long-standing requirement of this Court that forfeiture statutes be afforded strict construction.

In this brief, "R" designates the record on appeal filed in the Third District and "App." designates the appendix filed in the Third District by the petitioner.

STATEMENT OF THE CASE AND FACTS

The respondent, the Miami-Dade County Police Department [Department] filed a complaint seeking forfeiture of currency seized from the possession of the petitioner. (R. 1-9). The Department's complaint alleged in pertinent part the following: on December 12, 2002, the petitioner was stopped for a traffic infraction by a Miami-Dade County police officer; the petitioner presented a valid driver's license and vehicle registration in his name; the officer obtained the petitioner's consent to search the vehicle; the petitioner was asked about a suitcase in the rear seat of the vehicle and he responded that it contained clothing; the only passenger in the vehicle stated that he was on his way to having dinner with the petitioner and did not know about the suitcase; the suitcase was searched and contained $489,880.00 secured with rubber bands; the petitioner stated that the money did not belong to him but was given to him by a person he did not know; a subsequent records check showed that the petitioner had a suspended driver's license in another name; another records check revealed no state license in the petitioner's name for money transmitting or that a Currency Transaction Report (IRS 8300) form was on file in his name. (R. 1-9). The money was seized. The Department's complaint sought forfeiture on the ground that the foregoing allegations showed that the money was the product of narcotics activity or money laundering. *Id*.

On December 27, 2002, the petitioner requested an adversarial preliminary hearing pursuant to § 932.703(2)(a). (App. A -- certified mail letter sent by the petitioner's counsel to the Department). On December 30, 2002, the Department filed an emergency request for the trial judge to conduct an adversarial preliminary hearing. (App. B). At 10:30 a.m. on January 2, 2003, the petitioner's counsel received verbal notice that an adversarial preliminary hearing would be held that same day at 1:30 p.m. The petitioner's counsel filed a written objection on the ground that the notice was insufficient as a matter of law.[2] (App. C).

The preliminary hearing was reset for January 6, 2003. On that date, the trial judge asked the petitioner's counsel: "Do you have anything to substantiate that your client has standing to request this hearing?" (R. 33). Counsel responded that because the currency was seized from the petitioner's possession, the petitioner met the Forfeiture Act's definition of a "person entitled to notice" and therefore had the right to request and obtain an adversarial preliminary hearing. (R. 33-34). The Department opposed a preliminary hearing. Citing *Vasquez v. State*, 777 So. 2d 1200 (Fla.3d DCA 2001) and *Munoz v. City of Coral Gables*, 695 So. 2d 1283 (Fla.3d DCA 1997), the Department contended that the petitioner was required to prove an ownership interest

[2] In support of his objection, the petitioner cited *Crepage v. City of Lauderhill*, 774 So. 2d 61 (Fla.4th DCA 2001) (24-hour notice of adversarial preliminary hearing in forfeiture action violated due process right to "reasonable notice").

in the seized money in order to request an adversarial preliminary hearing. (R. 35-36). The trial judge agreed with the Department and orally ruled that the petitioner lacked standing under decisions of the Third District in *Vasquez* and *Munoz.* The judge further ruled that the Department's complaint proved probable cause. The petitioner's counsel unsuccessfully objected and renewed the request for an adversarial preliminary hearing. (R. 39-40). The trial judge subsequently reduced the oral finding of probable cause to writing in an order that also directed the petitioner to respond to the complaint. (R. 11). The petitioner complied by filing an answer to the complaint and asserting affirmative defenses which included a claim of innocent ownership of the seized funds and unlawful seizure of the funds. (R. 13-15).

On April 1, 2003, the Department deposed the petitioner. (App. D).[3] On April 8, 2003, the petitioner moved to dismiss the complaint alleging that the failure to afford him an adversarial preliminary hearing at all, much less within 10 days of his request,

[3] The petitioner testified upon deposition that he was driving his automobile when he was stopped by police. His friend, Juan Agudelo, was a passenger. In the automobile was a suitcase containing currency in bundles of $10,000. The petitioner testified that both the currency and suitcase belonged to him. The petitioner invoked his Fifth Amendment right not to answer other questions including those concerning his acquisition of the currency and his employment. *Id*.

violated § 932.703(2)(a) of the Forfeiture Act[4] thereby requiring dismissal and return of the funds seized from the petitioner. (R. 29-41).

The petitioner noticed for deposition the lead detective. (App. E). The Department moved for a protective order. (App. F). At the hearing on the motion for protective order held on April 24, 2003 (App. G), the petitioner's counsel argued that he had the right to depose the detective on the issues of standing and ownership of the seized currency. *Id*. at 4, 7. The Department argued that there should be no deposition until the trial judge ruled on the Department's motion for protective order. The trial judge granted the Department's motion for protective order. *Id*. at 7.

The Department moved to strike the petitioner's pleadings and dismiss his claim. (R. 22-28). The motion was granted. (App. H, I). Thereafter, the trial judge entered final judgment against the petitioner and ordered the forfeiture of the seized funds. (R. 47).

On appeal by the petitioner, the Third District affirmed, reiterating its previous holdings in *Vasquez* and *Munoz* that in order to have standing at the preliminary hearing stage of a proceeding under the Forfeiture Act, there must first be a showing of a proprietary interest in the seized property. *Velez, supra.* The Third District

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[4] As noted, § 932.701(2)(a) provides in pertinent part that the "seizing agency shall set and notice the [adversarial preliminary] hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter."

expressly certified conflict with decisions of the Fourth District as follows:

> In so holding, however, we recognize that our decision directly conflicts with our sister court's holdings in *City of Fort Lauderdale v. Baruch*, 718 So.2d 843 (Fla. 4th DCA 1998) ("A 'person entitled to notice' need not demonstrate a proprietary interest in the property at issue, but only that he was 'in possession' of the property when it was seized") and *Jean-Louis v. Forfeiture of $203,595.00 in U.S. Currency*, 767 So.2d 595, 598 (Fla. 4th DCA 2000) (holding that "appellants have standing in the preliminary hearing, as at the very least, they were in possession of the money at the time of its seizure"). Accordingly, pursuant to Art. 5, § 3(b)(4) of the Florida Constitution, we certify conflict between the Third District and Fourth District Courts of Appeal on the following: DOES A PERSON IN MERE POSSESSION OF PROPERTY AT THE TIME OF SEIZURE HAVE STANDING AT AN ADVERSARIAL PRELIMINARY HEARING TO CHALLENGE THE SEIZURE WITHOUT SHOWING A PROPRIETARY INTEREST IN THE PROPERTY? We affirm and certify the above conflict.

SUMMARY OF THE ARGUMENT

In *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla.1991) [*Real Property*], this Court explained that forfeiture actions entail two stages: (1) the initial restraint on property; and (2) the forfeiture itself. *Id*. at 962. In order to comply with due process of law, the initial stage must be "expeditiously completed" and afford any interested party an adversarial preliminary hearing within ten days of its request. *Id*. at 966.

In response to *Real Property*, the Legislature amended the Forfeiture Act in several respects. For each of the two stages of a forfeiture action, a category of standing was established as follows: (1) a "person entitled to notice" and (2) a "claimant." A "person entitled to notice" is defined as including any "person in possession of the property subject to forfeiture when seized...". See § 932.701(2)(e). A "claimant" is defined as a party who has a proprietary interest in the seized property. *Id*. The Forfeiture Act affords a "person entitled to notice" the right to request an adversarial preliminary hearing. § 932.703(2)(a).

In this case, the Department sought to forfeit property seized from the personal possession of the petitioner. Thus, the petitioner meets the statutory definition of a "person entitled to notice." Accordingly, the petitioner requested an adversarial preliminary hearing. The Forfeiture Act requires that the preliminary hearing be held

within 10 days after the request is received or as soon as practicable. Based upon Third District precedent, the Department argued that the petitioner lacked standing to request a preliminary hearing and the trial judge agreed. No adversarial hearing was ever held and the trial judge ordered the currency forfeited. The Third District affirmed and certified conflict with decisions of the Fourth District.

The Third District only recognizes one category of standing, that of a "claimant." Thus, according to the Third District, in order to request an adversarial preliminary hearing, a person is required to submit sworn proof of an ownership interest. As the Fourth District correctly holds, the Forfeiture Act unambiguously confers upon a "person entitled to notice" standing to request an adversarial preliminary hearing. The decisions of the Fourth District should be approved as consistent with: the plain text of the Forfeiture Act; the well-settled policy that forfeiture statutes must always be construed strictly in favor of the one against whom the penalty is imposed; and the rule that statutes are never to be modified by judicial construction.

ARGUMENT

PURSUANT TO THE PLAIN LANGUAGE OF THE FLORIDA CONTRABAND FORFEITURE ACT, A "PERSON ENTITLED TO NOTICE" NEED NOT DEMONSTRATE A PROPRIETARY INTEREST IN THE PROPERTY SEIZED, BUT ONLY THAT HE WAS "IN POSSESSION OF THE PROPERTY WHEN IT WAS SEIZED" IN ORDER TO HAVE STANDING TO REQUEST AN ADVERSARIAL PRELIMINARY HEARING.

The police conducted an *ex parte* seizure of currency from the petitioner's possession. Thereafter, the Department sought forfeiture of the currency pursuant to the Forfeiture Act. The petitioner timely requested an adversarial preliminary hearing. The Department could have complied with the plain language of the Forfeiture Act simply by holding the hearing. Instead, the Department took the position that the petitioner lacked standing to request the hearing. The trial judge agreed and the currency was ordered forfeited. On appeal by the petitioner, the Third District affirmed on the ground that absent a showing of a proprietary interest in the currency, the petitioner lacked standing. The Third District certified conflict with decisions of the Fourth District holding that pursuant to the Forfeiture Act, a "person entitled to notice," defined as a person in possession of the property at issue when seized, has standing to request a preliminary hearing. The decisions of the Fourth District are correct.

The case at bar calls for the construction of several provisions of the Forfeiture

Act. "When interpreting statutes and discerning legislative intent, courts must first look at the actual language of the statute." *DeGregorio v. Balkwill*, 853 So. 2d 371, 373 (Fla.2003). "Legislative intent is determined primarily from the statute's language." *Id.* "[T]he courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla.1998) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla.1984)). "Moreover, because forfeiture actions are considered harsh extractions, this Court has long followed a policy of strictly construing forfeiture statutes." *Id.* (citing *Real Property*, 588 So. 2d at 961; *Byrom v. Gallagher*, 609 So. 2d 24, 26 (Fla.1992)). See also *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla.1992); *Hotel and Restaurant Commission v. Sunny Seas No. One*, 104 So. 2d 570 (Fla.1958); *General Motors Acceptance Corp. v. State*, 152 Fla. 297, 302, 11 So. 2d 482 (1934); *City of Miami v. Miller*, 148 Fla. 349, 350, 4 So. 2d 369, 370 (1941). This policy means that forfeiture statutes "must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction." *Hotel and Restaurant Commission*, 104 So. 2d at 571. "Therefore, any ambiguity in the statute must be construed against forfeiture." *DeGregorio*, 853 So. 2d at 373.

In *Real Property*, this Court construed the predecessor to the present Forfeiture Act. The Court noted that the *ex parte* seizure of property authorized by the Forfeiture Act is "an extreme measure because seizure effectively ousts an individual from all rights concerning the property...". *Real Property*, 588 So. 2d at 962. "In evaluating the due process concerns, it is clear that individuals have compelling interests to be heard at the initiation of forfeiture proceedings against their property rights to assure that there is probable cause to believe that a person committed a crime using that property to justify a property restraint." *Id*. at 964. "Additionally, Floridians have substantive rights to be free from excessive punishments under article I, section 17 of the Florida Constitution, and to have meaningful access to the courts pursuant to article I, section 21 of the Florida Constitution. All of these substantive rights necessarily must be protected by procedural safeguards including notice and an opportunity to be heard." *Id*. See also article I, § 9, Fla. Const. (Florida constitutional right against deprivation of property without due process of law).

With these due process concerns in mind, the statute's constitutionality was upheld by this Court in *Real Property*, but only upon the implementation of several safeguards required to ensure minimal due process requirements. To place those requirements in context, this Court explained that there are two stages of a forfeiture proceeding:

> The process of forfeiture actions involves two major components: (1) the initial restraint on property, by seizure or otherwise, to ensure that the property will be available if it is found to be forfeitable; and (2) the forfeiture itself, whereby a court must determine if the property was in fact used to violate the law under the controlling statutes, and if so, who under the law is entitled to acquire legal title to the property.

Id. at 962.

With regard to the first stage, this Court held that after the *ex parte* seizure of personal property, all interested parties must be notified of the seizure and that they have the right to request a post-seizure adversarial preliminary hearing which must take place within 10 days of the request. *Id*. at 965-66.

In response to *Real Property*, the Florida Legislature amended the Forfeiture Act in pertinent part as follows. With regard to the initial stages of the forfeiture process, § 932.701(2)(e) defines "person entitled to notice" as including any "person in possession of the property subject to forfeiture when seized...". Section 932.703(2)(a) provides that "a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice" and that the "seizing agency shall set and notice the hearing which must be held within 10 days after the request is received or as soon a practicable thereafter."

With regard to the second or forfeiture stage, the Forfeiture Act defines "claimant" as "any party who has proprietary interest in property subject to forfeiture

and has standing to challenge such forfeiture, including owners, registered owners, bona fide lienholders, and titleholders." § 932.701(2)(h). If probable cause is found at an adversarial preliminary hearing and a complaint is served, a "claimant" can then contest the forfeiture by filing responsive pleadings and affirmative defenses pursuant to § 932.704(5)(c).

In the case at bar, the petitioner meets the definition of "person entitled to notice" because he was in possession of the currency when it was seized. See § 932.701(2)(e). Consequently, as provided by the plain language of § 932.703(2)(a), the petitioner had standing to request an adversarial preliminary hearing and the hearing had to be held within 10 days of his request. The petitioner made the request but the hearing was never held, much less within statutory deadline, because the trial judge agreed with the Department's argument, based upon the decisions of the Third District in *Vasquez* and *Munoz*, that the petitioner lacked standing to request a hearing. The trial judge thereafter summarily ruled that there was probable cause (based solely upon the allegations contained in the complaint) and ordered forfeiture of the funds seized. The Third District affirmed based upon *Vasquez* and *Munoz*, but certified conflict with the decisions of the Fourth District in *Baruch* and *Jean-Louis.*

In *Baruch*, the Fourth District construed the Forfeiture Act as creating the two aforementioned categories of standing: (1) a "person entitled to notice" as defined in

§ 932.701(2)(e); and (2) a "claimant" as defined in § 932.701(2)(h). The Fourth District also noted that the "'standing required of a 'person entitled to notice'" is less stringent than that required of a 'claimant' at a forfeiture hearing." *Baruch*, 718 So. 2d at 846.

In the Third District, however, no standing is conferred upon a "person entitled to notice." According to the Third District;s construction of the Forfeiture Act, only a "claimant" has standing. The Third District first reached this determination in its decision in *Munoz* which was re-affirmed both in *Vasquez* and in the case at bar. *Munoz* held that a party cannot participate in any aspect of a forfeiture action unless he qualifies as a "claimant" by showing an ownership interest in the property seized. However, as the Fourth District noted in *Baruch*, the Third District in *Munoz* apparently overlooked the Forfeiture Act's separate treatment of a "person entitled to notice." The Fourth District observed that "*Munoz* appears to confuse the standing requirement of a final forfeiture hearing with that of an adversarial preliminary hearing to establish probable cause." *Baruch*, 718 So. 2d at 846. The Fourth District concluded that "it appears that Munoz fell within that definition as a person 'in possession of the property ... when seized' so that he did have standing to challenge probable cause at a preliminary hearing." *Id.*[5]

[5] In *Jean-Louis*, the Fourth District reiterated its holding in *Baruch*, holding that "... the appellants have standing in the adversarial preliminary hearing, as at the very least, they were in possession of the money at the time of its seizure. See *Baruch*,

The decisions of the Fourth District should be approved. Their reasoning is supported by the plain and unambiguous text of the Forfeiture Act. In contrast, the Third District has nullified the standing which the Legislature clearly affords persons entitled to notice. In so ruling, the Third District has run afoul of the prohibition against a court construing an unambiguous statute in a way which would modify its express terms or its reasonable and obvious implications, thereby abrogating legislative power. *McLaughlin, supra; Holly, supra.* The decisions of the Third District are also inconsistent with the requirement that forfeiture statutes be strictly construed in favor of the one against whom the penalty is imposed, *DeGregorio, supra*; *Hotel and Restaurant Commission, supra.*

The failure to afford the petitioner his right to an adversarial preliminary hearing not only resulted in an improper restraint of the property seized, but also the elimination of a constitutionally significant initial step in the forfeiture process. "An adversarial preliminary hearing is defined as a hearing in which the seizing agency is required to establish probable cause that the property subject to forfeiture was used in violation of the Act." *City of Coral Springs v. Forfeiture of a 1997 Ford Ranger Pickup Truck*, 803 So. 2d 847, 849 (Fla.4th DCA 2002) (citing § 932.701(2)(f)). The Forfeiture Act further provides in § 932.703(2) as follows:

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718 So. 2d at 846." *Jean-Louis*, 767 So. 2d at 598.

> When an adversarial preliminary hearing is held, the court shall review the verified affidavit and any other supporting documents and take any testimony to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act. If probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband.

The purpose of the adversarial preliminary hearing is not to determine whether probable cause exists to forfeit the seized property. Rather, the purpose of the hearing is to determine if probable cause exists at the time of the hearing in order to enable the seizing agency to continue holding the seized property pending a final disposition at a final forfeiture hearing. *Beary v. Bruce*, 804 So. 2d 579, 581 (Fla.5th DCA 2002). An adversarial preliminary hearing under the Act is "not just an advisory hearing or a status conference." *Crepage*, 774 So. 2d at 65. It is "an evidentiary hearing, requiring the attendance of witnesses and production of affidavits, documents, and other evidence." *Id*.

As a result of the trial judge's ruling, no adversarial preliminary hearing was held at all, much less within 10 days of the petitioner's request for such a hearing, thereby violating the mandatory statutory deadline. Because the Forfeiture Act must be strictly construed against forfeiture, the violation of the 10-day deadline requires reversal with directions to dismiss the forfeiture action and return the funds. See *DeGregorio* (remedy for seizing agency's violation of deadline for filing forfeiture complaint is

dismissal). See also *Murphy v. Fortune*, 857 So. 2d 370 (Fla.1st DCA 2003) (failure to hold timely adversarial preliminary hearing mandates return of seized money); *Chuck v. Forfeiture of 380,015.00 in U.S. Currency*, 27 Fla. L. Weekly D2140, ___ So. 2d ___, 2002 WL 31159461 (Fla.3d DCA September 30, 2002) (same) (rehearing en banc granted); *Jenne v. Meadows*, 792 So. 2d 518 (Fla.4th DCA 2001) (affirming dismissal of forfeiture action for failure to hold adversarial preliminary hearing within 10 days of request); *In re Forfeiture of One 1994 Honda Prelude*, 730 So. 2d 334 (Fla.5th DCA 1999) [*Honda*] (approved in *DeGregorio*) (violation of statutory time period for filing forfeiture complaint mandated return of seized property); *State Department of Highway Safety and Motor Vehicles v. Metiver*, 684 So. 2d 204 (Fla.4th DCA 1996) (affirming dismissal of forfeiture complaint where there was a five-day delay between the 10th day after the hearing was requested and the date the hearing was held); *Cochran v. Harris*, 654 So. 2d 969 (Fla.4th DCA 1995) (affirming dismissal of forfeiture proceedings due to 23-day delay).

Police have no right to conduct an *ex parte* seizure of property from a person's possession, violate that person's due process rights as ensured by the Forfeiture Act, and keep the property. A violation of the strict due process requirements of the Forfeiture Act, such as denial of the right to a preliminary hearing, requires that the seizing agency's complaint be dismissed and the property returned. See *DeGregorio*;

Honda. The courts must be vigilant to approve forfeiture of such property only where the seizing agency has scrupulously honored the constitutional protections codified by the Legislature in the Forfeiture Act.

CONCLUSION

The petitioner respectfully requests that the Court quash the decision of the Third District and remand with directions that the final judgment of forfeiture be reversed and the cause remanded to the circuit court for entry of an order dismissing the forfeiture proceeding and returning the seized property to the petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed to Roberto E. Fiallo, Counsel for Respondent, 73 West Flagler Street, Suite 2201, Miami, FL 33130, this

___ day of November, 2004.

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PAUL MORRIS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 14-point font.

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