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 REPLY BRIEF

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REPLY 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 OBTAIN AN ADVERSARIAL PRELIMINARY HEARING.

The Department is asking this Court to construe the Forfeiture Act *in favor of* the seizing agency. The Department overlooks the well-settled body of law from this Court requiring that the Forfeiture Act be strictly construed *against* the seizing agency. As this Court stated in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla.1991) [*Real Property*]:

> In construing the [Forfeiture] Act, we note that forfeitures are considered harsh exactions, and as a general rule, they are not favored either in law or equity. Therefore, this Court has long followed a policy that it must strictly construe forfeiture statutes. *See, e.g., General Motors Acceptance Corp. v. State*, 152 Fla. 297, 302, 11 So. 2d 482, 484 (1943); *City of Miami v. Miller*, 148 Fla. 349, 350, 4 So. 2d 369, 370 (1941).

Real Property, 588 So. 2d at 961. The required strict construction of the Act and decisional authorities requiring same are not acknowledged in the Department's brief.

Not only does the Department fail to afford the Forfeiture Act strict construction, the Department offers a construction that is illogical, conflicts with the plain language of the Act, and negates the Legislature's clear intent to afford

procedural due process of law to a "person entitled to notice" by affording him the opportunity to be heard at an adversarial preliminary hearing.

§ 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." Despite the foregoing unambiguous language, the Department argues that a "person entitled to notice" has no statutory standing to participate in the adversarial preliminary hearing. The Department's position is without merit for several reasons:

• If the Legislature did not intend for a "person entitled to notice" to have standing to participate at the preliminary hearing, it would not have expressly required the seizing agency to notify the person of the right to the hearing nor conferred upon such person the right to request the hearing;

• The right to be heard is an essential component of the notice requirement of procedural due process of law. The Legislature amended the Forfeiture Act in response to this Court's concerns in *Real Property* that the Act must comply with traditional notions of due process of law. By requiring notice, the Legislature complied

with *Real Property* by ensuring procedural due process of law in the initial probable cause stage of the forfeiture process. As this Court stated in *Real Property*: "In evaluating 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 (e.s.). It is well-settled that the "notice" contemplated by the state and federal constitutional guarantees of procedural due process of law includes the "meaningful opportunity to be heard." *N.C. v. Anderson*, 882 So. 2d 990, 993 (Fla.2004) (citing *Real Property*, 588 So. 2d at 960). "The notice must be 'reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonably time for those to make their appearance.'" *Id*. at 993 (quoting *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). See also *Real Property*, 588 So. 2d at 965 (when personal property is seized, due process permits an *ex parte* seizure only if "notice is sent *and* the opportunity for an adversarial preliminary hearing is made available as soon as possible after the seizure.") (e.s.). The Legislature, aware of these constitutional requirements, intended that a person entitled to notice be

afforded the opportunity to be heard;

• The Forfeiture Act requires the seizing agency to notify persons entitled to notice "that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists...". § 932.703(2)(a). The Department argues that notification to a person that there "is" a right to a hearing is not the same as notifying that the person "has" a right. The Department's argument is as far from a strict construction of the Forfeiture Act as one can imagine;[1]

• § 932.703(2)(b) provides that real property cannot be seized "until the persons entitled to notice are afforded the opportunity to attend the preseizure adversarial preliminary hearing." The Department's absurd construction would mean that the Legislature intended that a person entitled to notice has the right to attend an adversarial preliminary hearing, but no right to participate in the hearing; and

• The Legislature would not have used the word "adversarial" if it intended that a person entitled to notice would not be permitted to participate at the preliminary hearing.[2]

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[1] Furthermore, the words "have" and "is" in this context carry the same meaning. *See, e.g.*, *Real Property, supra* at 966 ("In personal property forfeiture actions, notice must advise interested parties that they *have* a right to an adversarial preliminary hearing upon request.") (e.s.).

[2] For a discussion of the adversarial preliminary hearing process, see *City of Coral Springs v. Forfeiture of a 1997 Ford Ranger Pickup Truck*, 803 So. 2d 847

Additionally, when the mechanism of the Forfeiture Act is viewed as a whole, the Legislature's enactment of two categories of standing makes perfect sense. As the Fourth District stated in *City of Fort Lauderdale v. Baruch*, 718 So.2d 843 (Fla. 4th DCA 1998):

> The imposition of a standing requirement at an adversarial preliminary hearing is consistent with the general rule that only a person with standing may participate in a judicial proceeding. *** The legislature's 1992 amendments to the forfeiture act added the statutory definitions of "claimant," "person entitled to notice," "adversarial preliminary hearing," and "forfeiture proceeding." *** These definitions shaped the standing requirements for the two stages of a forfeiture proceeding within the constitutional parameters of due process.

Id. at 847.

In the first stage, a "person entitled to notice" receives notice of the right to an adversarial preliminary hearing, requests the hearing, and must be afforded the hearing within 10 days. In the first stage, the Legislature defined "adversarial preliminary hearing" 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 Florida Contraband Forfeiture Act." § 932.701(2)(f). Because the sole burden at the adversarial preliminary hearing is upon the seizing agency and ownership is not at issue, there is no additional standing requirement. The only issue at the hearing is whether the seizing agency can justify the seizure with a showing of probable cause.

(Fla.4th DCA 2002).

In the second stage, there is an additional standing requirement. The "forfeiture proceeding" is defined as a "hearing or trial in which the court or jury determines whether the subject property shall be forfeited." § 932.701(2)(g). In order to contest a forfeiture, a person must be a "claimant," defined as "any party who has a *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) (e.s.).

In creating these two categories of standing, the Legislature was responding to this Court's discussion in *Real Property* of the two levels of forfeiture proceedings[3] and protecting each stage's differing interests. The Legislature conferred rights upon a person entitled to notice because an *ex parte* seizure of property from a person's personal possession is highly disfavored. Thus, the seizing agency must prove within 10 days of the hearing request from the person entitled to notice that there was probable cause for the seizure. If the agency fails, the property must be returned. If the seizing agency meets its burden of showing probable cause, then the question of

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[3] See *Real Property*, 588 So. 2d at 962 ("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.").

forfeitability of the property is to be addressed. Only a claimant, with the requisite standing and proprietary interest in the seized property, can challenge the forfeiture at this second stage of the proceedings.[4]

Thus, there is a logical and meaningful distinction between *a person entitled to notice* and a *claimant*. The Department fails to recognize the distinction, as does the Third District in the decisions relied upon by the Department. See *Vasquez v. State*, 777 So. 2d 1200 (Fla.3d DCA 2001); *Munoz v. City of Coral Gables*, 695 So. 2d 1283 (Fla.3d DCA 1997). Like the Department's argument, those decisions similarly fail to afford the Forfeiture Act a strict judicial construction. The fault in the reasoning of the Third District was discussed by the Fourth District in *Baruch*. In that case, the Fourth District observed that the Third District in "*Munoz* appears to confuse the standing requirement of a final forfeiture hearing with that of an adversarial preliminary

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[4] In *Real Property*, this Court stated: "Under no circumstances may the state continue its restraint on the property pending final disposition unless notice and an opportunity to be heard in an adversarial proceeding are provided to all potential *claimants*." *Id*. at 966 (e.s.). The Department argues that by using the word *claimants* "this Court did not intend to allow any person other than a 'claimant' to participate in an adversarial preliminary hearing." Department's Answer Brief at 10. The Department is incorrect. In *Real Property*, this Court was reviewing the prior Forfeiture Act before "person entitled to notice" and "claimant" were statutorily defined. Thus, in *Real Property*, the term "claimant" was employed in its generic sense in forfeiture cases to describe a broad category of interested persons. Regardless, this case is now governed by the post-*Real Property* statutory distinction between "person entitled to notice" "claimant."

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."

Recently, in *Chuck v. City of Homestead Police Department*, No. 3D-20233, 2004 WL 2885902 (Fla.3d DCA December 15, 2004) (en banc), the Third District acknowledged that its decision in *Munoz* treated "adversarial preliminary hearing" and "forfeiture proceeding" interchangeably. *Id*. at *12. Nevertheless, the Third District in *Chuck* surprisingly concluded that *Munoz* "is still good law." Thus, the Third District continues to construe the Forfeiture Act in the light most favorable to the seizing agency rather than afford the Act the required strict construction against forfeiture by denying procedural due process of law to persons entitled to notice.[5]

The Department also makes a "Pandora's Box" argument. According to the Department, if this Court holds that a person entitled to notice is allowed to participate

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[5] To make matters worse, the Third District in *Chuck* announced new and unprecedented prerequisites for victims of violations of the Forfeiture Act. Pursuant to *Chuck*, where the 10-day deadline for providing an adversarial preliminary hearing is not met, there is no remedy where the blame for the violation lies with the courts unless there is a showing of harm. The Act requires no such excuse for violating the deadline and no such showing of "harm" for return of the property. Thus, in the Third District, the Forfeiture Act is not being afforded a strict construction, the plain language of the Act is not controlling, and the Act is being judicially re-drafted.

in the adversarial preliminary hearing, there will be a flood of fraudulent claims. One might argue just as easily that in denying a person entitled to notice the right to be heard, there will be a flood of seizures not supported by probable cause because the seizing agencies will know that their actions will not be tested at an adversarial hearing. The true answer is that it is up to the judicial system to ferret out fraudulent claims in forfeiture matters as it does in any other matters where parties are making claims for money or property. If the Department has proof that fraudulent claims are being made and cannot be prevented except by denying an interested person the opportunity to be heard at the adversarial preliminary, the Department must take such proof to the Legislature and seek an amendment to the Forfeiture Act.

In sum, 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 and be heard at an adversarial preliminary hearing. The hearing had to be held within 10 days of his request. The petitioner made the request but the hearing was never held[6], much less within statutory deadline, because the Department incorrectly but successfully argued that the petitioner lacked standing to request a

[6] The Department's claim that an adversarial preliminary hearing was held is belied by the trial judge's ruling that the petitioner did not have standing to request a hearing, much less participate in one. (R. 33-40).

hearing. The trial judge thereafter summarily ruled that there was probable cause and ordered forfeiture of the funds seized. 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 v. Balkwill*, 853 So. 2d 371 (Fla.2003) (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); *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). Any remedy other than return of the property will render the deadline meaningless and conflict with the requirement that the Act be strictly construed against forfeiture.

CONCLUSION

The Forfeiture Act provides that where an agency conducts an *ex parte* seizure of property from a person's personal possession, the property must be returned unless the agency timely honors that person's request for an adversarial preliminary hearing. At the hearing, the agency must prove probable cause for the seizure and the person must be afforded an opportunity to be heard in opposition. In this case, the Department seeks to negate the due process protection provided by the Legislature by conditioning the person's right to be heard upon proof of a proprietary interest in the seized property. The Forfeiture Act requires no proof of ownership at the adversarial preliminary hearing. Such proof is required only if probable cause is established and a person seeks to challenge forfeiture. Where the right to the hearing is denied in violation of the statute, the agency has no right to keep the property regardless of the agency's allegations. The property must be returned to the person from whom it was seized.

The petitioner was not afforded a adversarial preliminary hearing in violation of the Forfeiture Act. Therefore, the petitioner respectfully requests that this Court afford the Forfeiture Act the required strict construction[7], quash the decision of the Third

[7] "The construction of a statute is an issue of law subject to *de novo* review." *Aramark v. Easton*, No. SC02-2190, 2004 WL 2251847 (Fla. October 7, 2004).

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 directing the return of the seized property to the petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this reply brief was mailed to Roberto E. Fiallo, Counsel for Respondent, 73 West Flagler Street, Suite 2201, Miami, FL 33130, this 30th day of December, 2004.

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CERTIFICATE OF COMPLIANCE

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

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PAUL MORRIS