IN THE SUPREME COURT OF FLORIDA
CASE NO: SC09-1401

ZENAIDA GOMEZ,

Appellant,

vs.

VILLAGE OF PINECREST,
a Florida Municipal Corporation,

Appellee.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

APPELLEE, VILLAGE OF PINECREST'S ANSWER BRIEF

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STATEMENT OF THE CASE

This is a forfeiture action brought by Appellee, Village of Pinecrest, Florida (hereinafter "Respondent," "Appellee" or "Pinecrest"), against real property located at 9101 SW 69th Court in Pinecrest, Florida (hereinafter the "property"). References to the Record will be cited as "R." followed by the appropriate section and page number if applicable.

A verified complaint was filed on February 4, 2008. [R. p. 3-5]. As a person entitled to notice, Claimant Zenaida Gomez (hereinafter "Petitioner," "Appellant" or "Gomez"), was sent a notice of seizure. Gomez, through counsel, requested an adversarial preliminary hearing. The hearing was held on February 11, 2008 [R. p. 60-90] before the Honorable Gerald D. Hubbart. At the conclusion of the hearing, the trial court found probable cause for the seizure of the property. [R. p. 96].

On February 20, 2008 Gomez filed a Notice of Appeal with the Third District Court of Appeal. The Third District Court of Appeal heard oral argument on January 22, 2009. On July 1, 2009, the Third District Court of Appeal affirmed the Trial Court's Order that Pinecrest had established probable cause at the adversarial preliminary hearing. The Third District Court of Appeal, in affirming the Order of the Trial Court, certified conflict with the First and Fifth District

Courts of Appeal.[1] On July 29, Gomez filed a Notice to Invoke Discretionary Jurisdiction.[2] On August 10, 2009, this Court issued an Acknowledgment of New Case. On November 10, 2009, this Court accepted jurisdiction of this case.

STATEMENT OF THE FACTS

On January 17, 2008, Village of Pinecrest Police Officer Jorge Luis Paez responded to the property in Pinecrest, Florida. [R: p.63, lines 23-25; p.5, line 1]. The officer responded to the address as a result of an anonymous call. [R: p.64, lines 3-6]. The anonymous caller had stated that three armed males had entered the property and had arrived in a white van. [*Id.;* R: p.64, lines 3-6]. Village of Pinecrest Police Officer Robert Laricci also arrived at the location. [R. p.64, lines 14-16]. The Pinecrest Police officers looked for signs of an entry and discovered that a window pane was broken and they noted that there was a white van parked in front of the property. [R. p.64, lines 19-22; p.65, lines 19-22].

The officers then checked the front door of the house on the property and found that the front door was closed, but unlocked. [R. p.66, lines 1-3]. The officers called for back up, and once additional units arrived, officers Paez, Laricci

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[1] Specifically, the *Gomez* Court certified conflict with *In re Forfeiture of a 1993 Lexus ES 300 et al. v. Karr*, 798 So. 2d 8 (Fla. 1st DCA 2001) and *Brevard County Sheriff's Office v. Baggett*, 4 So. 3d 67 (Fla. 5th DCA 2001).

[2] Gomez filed an Amended Notice to Invoke Jurisdiction on August 1, 2009.

and Pinecrest Sergeant Willock entered the property to look for possible victims or perpetrators. [R. p.66, lines 17-20]. Upon entering the property, the officers noticed a bright light illuminating in a particular room. [R. p.67, lines 1-3]. At that point, the officers went to the source of the light and discovered that the room was being used as a cultivation area for growing marijuana plants. [R. p.67, lines 3-6]. After discovering the marijuana grow room, officers continued to search the house and discovered an additional room that was used to cultivate marijuana plants. [R. p.67, lines 10-17]. The officers did not find any victims, perpetrators, residents, or owners inside the property. [R. p.11, lines 11-14].

At the adversarial preliminary hearing, Officer Paez was shown twenty-four photographs that depicted the property, the white van, the broken window pane, the inside of the bathroom where the broken window pane was found, the front door of the house, the living room area of the house on the property, the garage, and several of the rooms in the house that were used to grow marijuana. [R. p.68, line 11 through R. p.70, line 2].[3] Officer Paez stated that the photographs fairly and

[3] Footnote 1 of Petitioner's Brief states that Exhibits 1-24 depicted the illegal marijuana hydroponics system inside the property. This statement is inaccurate. Paez testified that Exhibits 12 through 24 depicted items throughout the house, bathroom and garage that were used to grow marijuana. [R. p.69, line 20 through R. p.70, line 2]. Exhibits 1 through 5 depicted the white van, the actual house on the property, the broken window from inside the bathroom of the house, and the front door of the house. [R. p.68, line 11 through R. p.69, line 9].

accurately represented the contents of the house on the property. [R. p.70, lines 3-7]. The photographs were published to the Court. [R. p.70, lines 9-11].

As admitted below, Gomez decided to rent the property. [R. p. 79, lines 16-18]. When Gomez decided to rent her property, she was not concerned that the lease was solely in the name of Rolando Herrera, a man whom she had never met. [R. p. 85, lines 11-21]. Prior to renting the property, Gomez met only a woman who claimed that she was married to Herrera. [R. p. 85, lines 11-21]. Gomez did not think it strange that only Rolando Herrera's name appeared on the lease. [R. p. 85, lines 11-21]. Gomez did not make any effort to determine the validity of the driver's license presented as belonging to Rolando Herrera. [R. p. 86, lines 1-2]. Gomez did not ask for any references. [R. p. 86, lines 3-4]. Gomez did not take any steps to investigate the background of Rolando Herrera. [R. p.86, lines 5-8].

ISSUE ON APPEAL

Whether the Florida Contraband Forfeiture Act requires that an agency, in a forfeiture proceeding, must demonstrate at the adversarial preliminary hearing stage, that a claimant knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal

activity?[4]

STANDARD OF REVIEW

The standard of review for interpreting statutory provisions of the Florida Contraband Forfeiture Act is *de novo*. *Velez v. Miami-Dade County Police Dep't,* 934 So. 2d 1162, 1164 (Fla. 2006).

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal properly held that a seizing agency does not have to have to make a showing that an individual has knowledge that property sought to be seized was used in violation of Sections 932.701-932.706, Fla. Stat.

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[4] Petitioner has stated that the issue on appeal is "[w]hether the adversarial preliminary procedure under Florida Statute § 932.703(2) unconstitutional because it violates due process by not giving an innocent property owner a meaningful hearing in that he or she cannot present any defenses at this stage, according to the Third District Court of Appeals and, because it results in the taking of property before the final adjudication on the merits?" The Third District Court of Appeal held that a seizing agency did not have to present evidence that the property owner either knew, or should have known after a reasonable inquiry, that her property was employed or was likely to employed in criminal activity at the adversarial preliminary hearing. *Gomez v. Vill. of Pinecrest,* 17 So. 3d 322, 327 (Fla. 3d DCA 2009). Neither constitutional nor due process issues were raised before, nor addressed by, the *Gomez* Court. This is the first time that Petitioner has raised a constitutional issue. An appellant cannot raise a constitutional argument on appeal that was not raised at the trial level unless the issue in considered fundamental error. *State v. Johnson,* 616 So. 2d 1, 3 (Fla. 1993). Petitioner has not stated that the decision below constituted fundamental error. Further, appellate courts should be reluctant to find fundamental error in raising a due process claim. *See Rubin v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) ("The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.").

(2007), the Florida Contraband Forfeiture Act (hereinafter "the Act") at the adversarial preliminary hearing stage. The Third District Court of Appeal correctly noted that a forfeiture proceeding involves two distinct and separate stages: the initial seizure stage and the later forfeiture stage. The Third District Court of Appeal correctly held that a seizing agency does not have to present evidence of an owner's knowledge at the initial adversarial preliminary hearing of a forfeiture proceeding, but that the seizing agency must bear that burden at the later forfeiture proceeding pursuant to the clear language of the statute.

Petitioner's due process rights have not been violated under either the United States or Florida Constitutions. The United States Supreme Court has held that due process rights are not violated when a seizing agency does not prove that an individual had knowledge that property was being used in violation of a state forfeiture statute. This Court has previously held that the Act is constitutional. Further, Petitioner's due process rights are not violated under the *Mathews v. Eldridge*, 424 U.S. 319 (1976) framework. Petitioner makes several public policy arguments, however, none of her public policy arguments are supported by the facts or the record in this case. Assuming *arguendo* that knowledge must be shown at an adversarial preliminary hearing stage, in this case sufficient evidence was presented at the adversarial preliminary hearing that Appellant Gomez had

constructive knowledge of the illegal activity. Gomez testified that she did not make any reasonable inquiry to determine the legitimacy of the tenant renting the property or his intended uses for the property.

ARGUMENT

I. The Third District Court of Appeal Correctly Held that a Seizing Agency does not have to Present Evidence that a Claimant Knew, or Should Have Known, that the Property was Used in Violation of the Act at the Adversarial Preliminary Hearing Stage of a Forfeiture Proceeding.

A. Based Upon a Plain Reading of the Florida Forfeiture Contraband Act, a Seizing Agency is only Required to Show Probable Cause that the Seized Property was Used in Violation of the Act in an Adversarial Preliminary Hearing.

The Act defines an 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(f), Fla. Stat. (2007). Further, § 932.703(2)(b), Fla. Stat. (2007), states in part that "[t]he purpose of the adversarial preliminary hearing is to determine whether probable cause exists to believe that such property has been used in violation of the Florida Contraband Forfeiture Act." Section 932.703(2)(c), Fla. Stat. (2007) states:

> 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 . . . .

§ 932.703(2)(c), Fla. Stat.(2007). *See also, Chuck, et al. v. City of Homestead Police Dep't, et al.*, 888 So. 2d 736, 750 n.4 (Fla. 3d DCA 2004).

The determination of probable cause involves "the question of whether the information relied upon by the state is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation has occurred." *In re Forfeiture of $171,900 in U.S. Currency*, 711 So. 2d 1269, 1274 (Fla. 3d DCA 1998)(citations omitted). Further, "[i]n determining whether probable cause exists in a forfeiture proceeding, the court must consider whether the information provided by the state is 'adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation had occurred.'" *Dep't of Highway Safety & Motor Vehicles v. Frey*, 965 So. 2d 199, 200-1 (Fla. 5th DCA 2007) (internal citation omitted). Thus, the adversarial preliminary hearing is conducted in order to determine whether there is a sufficient relationship between the property that has been seized or sought to be seized and a violation of the Act. The adversarial preliminary hearing is not conducted to determine whether a person knew or should have known that the property was employed or likely to be employed in violation of the Act.

It is inconsistent with the plain language of the Act to require the seizing agency, at the adversarial preliminary hearing stage of the forfeiture process, to show actual or implied knowledge on the part of a property owner. "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning." *Velez*, 934 So. 2d at 1164 (*quoting Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 960 (Fla. 2005) (citation omitted)). "Courts should 'avoid readings that would render part of a statute meaningless.'" *Velez*, at 1156, *quoting Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (citation omitted).

When plainly read, § 932.703(2)(c) of the Act does not require a seizing agency to establish probable cause that an individual had knowledge that the property was being used for an unlawful purpose. Requiring such a showing at the adversarial preliminary hearing stage would effectively add language to the Act, add a new legal requirement and usurp the providence of the legislature. "While this Court is obliged to establish rules to enforce the provisions of the Florida and federal constitutions in the courts of this state, it may not transgress the proscription of article II, section 3 of the Florida Constitution, which forbids one of the branches of government from invading the province of another." *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 961-2 (Fla. 1991) Thus, this Court

should reject reading language into the Act and adding a new legal requirement to the statute that simply is not present.

B. This Court Should Affirm the Decision of the Third District Court of Appeal.

The Florida legislature amended the Act in 1995. Along with several other changes, the legislature shifted the burden of establishing a claimant's knowledge concerning the property that has been seized or sought to be seized. Prior to 1995, the claimant had the burden of establishing the "innocent owner defense." *See* Ch. 95-265, § 3, Laws of Fla. After the change, the seizing agency had to establish "by a preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity." § 932.703(6)(a), Fla. Stat. (2007).

During this same session that the Florida legislature shifted the burden of proof of claimant knowledge, nonsubstantive changes were made to §§ 932.703(2)(a)-(d), Fla. Stat. (2007), the subsection pertaining to adversarial preliminary hearings. *See* Ch. 95-265, § 3, Laws of Fla. Notably, during the 1995 amendments, the legislature could have easily rewritten the Act to require a seizing agency to prove owner knowledge at the adversarial preliminary hearing stage, but it chose not to make such an amendment.

Though the legislature did not make any substantive amendments to the Act's subsection pertaining to adversarial preliminary hearings, Petitioner argues that this Court should infer that the legislature intended to change the law to require a seizing agency to establish claimant knowledge at the adversarial preliminary hearing. Petitioner relies principally on two cases in making her argument, *In re: Forfeiture of a 1993 Lexus EX 300, et al. v. Karr*, 798 So. 2d 8 (Fla. 1st DCA 2001) and *Brevard County Sheriff's Office v. Bagget*, 4 So. 3d 67 (Fla. 5th DCA 2009). Petitioner's argument, and the cases that she relies upon, fail to consider the plain meaning and the words that the legislature chose to use when amending the Act. The Third District Court of Appeal carefully read the Act's provisions and language and correctly concluded that the legislature did not intend for a seizing agency to demonstrate an individual's knowledge at the adversarial preliminary hearing stage. *Gomez v. Vill. of Pinecrest*, 17 So. 3d 322 (Fla. 3d 2009).

The *Gomez* Court stated that the issue to be decided was "whether section 932.703(2)(a) of the Act requires the seizing agency to present some evidence at the adversarial preliminary hearing stage that the property owner knew or should have known that the property was employed or was likely to be employed in criminal activity in addition to establishing probable cause to believe that the

property was used in violation of the Act." *Id*. at 325-5.

First, the Court correctly noted that a civil forfeiture proceeding involves various stages. *See Velez*, 934 So. 2d at 1164. The first stage, is the adversarial preliminary hearing or seizure stage, which is a probable cause hearing conducted to ensure that there is a sufficient connection between the property seized or sought to be seized and criminal activity under the Act. *Id*. The second stage is the actual forfeiture proceeding. *Id*. The *Gomez* Court correctly held that the words "seizure" and "forfeiture" have clear and distinct meanings when used in the Act to refer to the adversarial preliminary hearing (seizure stage) and forfeiture proceeding (forfeiture stage).

The *Gomez* Court stated that subsection (2) of section 932.703 exclusively governs the adversarial preliminary hearing or "seizure" stage of the forfeiture process. *Id*. at 325. The *Gomez* Court further stated that subsection (6) of section 932.703, the subsection governing a seizing agency's burden to establish a claimant's knowledge by the preponderance of the evidence applied exclusively to the *forfeiture* stage, the second stage of the proceedings: "Unlike subsection (2) which addresses the **seizure** stage, subsection (6) addresses the **forfeiture** stage of the proceedings. Thus, forfeiture proceedings in Florida involve a two stage process, with each stage clearly defined by statute." *Id*. (emphasis in original).

The *Gomez* Court based its holding on the plain meaning of the words the legislature chose to use in the Act. The *Gomez* Court carefully read the subsection of the act pertaining to the *seizure* of real property:

> (b) Real property may not be **seized or restrained**, other than by lis pendens, subsequent to a violation of the Florida Contraband Forfeiture Act until the persons entitled to notice are afforded the opportunity to attend the preseizure adversarial preliminary hearing. A lis pendens may be obtained by any method authorized by law. Notice of the adversarial preliminary hearing shall be by certified mail, return receipt requested. **The purpose of the adversarial preliminary hearing is to determine whether probable cause exists to believe that such property has been used in violation of the Florida Contraband Act . . .**

Id. at 325-6 (*quoting* § 932.703(2)(b), Fla. Stat. (2007)) (emphasis in original).

After analyzing the above statute, the *Gomez* court stated:

> The *unambiguous* language of subsection (2), the section dealing with the seizure / adversarial preliminary hearing stage of the process, clearly focuses on the property. If law enforcement establishes probable cause to believe that the property was used in violation of the Act, the court shall authorize the seizure or continued seizure of the property and order that the property be restrained by the least restrictive means to protect against its disposal or illegal use pending disposition of the forfeiture proceeding.

Id. at 326 (emphasis supplied).

The court then went on to analyze subsection (6) of § 932.703, the subsection of the Act that applies second stage forfeiture process, the actual

forfeiture proceeding:

> Property may not be **forfeited** under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that **the owner either knew, or should have known after reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.**

Id. at 326 (*quoting* § 932.703(2)(b), Fla. Stat. (2007)) (emphasis in original).

The *Gomez* Court, after analyzing language subsection (6) and comparing the language in subsection (2) stated:

> A careful review of section 932.703 reveals that the focus at the first stage of the process, the seizure stage, is on the property and whether there exists probable cause to believe that the property was used in violation of the Act (to conceal, transport, or possess contraband). At the second stage, the forfeiture stage, however, the seizing agency must not only prove the property was in fact being used to conceal, transport or possess contraband, it must also prove that the owner or owners know or should have known that the property was being used or was likely to be used for an illegal purpose.

Id.

After closely and diligently applying the plain language of the Act, the *Gomez* court correctly held that a seizing agency does not have to make any showing of claimant knowledge at the preliminary adversarial hearing stage. *Id*. The *Gomez* Court properly interpreted the meaning of the unambiguous language in the Act and the Florida Legislature's use of the words of "seizure" and

"forfeiture."

The *Gomez* Court certified its decision in conflict with *In re Forfeiture of a 1993 Lexus ES 300, et al. v. Karr*, 798 So. 2d 8 (Fla. 1st DCA 2001). In *Karr*, an owner's automobile was operated outside of his presence, in such a manner as to constitute a violation of the Act. *Karr*, 798 So. 2d at 9. As did the *Gomez* Court, the *Karr* Court faced the issue of "whether there must be some preliminary showing of . . . ownership knowledge in order to establish probable cause in a section 932.703(2)(c) adversarial preliminary hearing." *Id.* at 10.

The *Karr* Court held that at the adversarial preliminary hearing, the seizing agency must make "a preliminary showing of a basis for belief that the owner knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity." *Id*. The *Karr* Court reached its decision by applying the general principle that forfeitures are not favored in law or equity and must be strictly construed. *Id*. The law is well-established that the Act is to be strictly interpreted in favor of the person being deprived of their property. *Chuck, et al.*, 888 So. 2d at 744 (*quoting State Dep't. of Highway Safety & Motor Vehicles v. Metiver*, 684 So. 2d 204) (Fla. 4th DCA 1996)).

In uncertain cases, strict construction means that the courts will construe

ambiguous statutes, or even clear forfeiture provisions resting on uncertain authority, against any loss and in favor of an owner's retention of property. *Chuck, et al.*, 888 So. 2d at 744, *citing Williams v. Christian*, 335 So. 2d 358, 361 (Fla. 1st DCA 1976). Here, there is no ambiguity nor uncertain authority in the Act. Section 932.703(6)(a) (2007) plainly states that property is not to be *forfeited* when there is an absence of knowledge of the criminal activity on the part of the property owner. Thus, the *Karr* Court erred in reaching its holding. The *Gomez* Court noted that the *Karr* Court "failed to consider that property seized, after demonstrating probable cause that the property was used in criminal activity, is not *forfeited* at this initial stage of the proceedings." *Gomez*, 17 So. 2d at 327 (emphasis added).

In *Brevard County Sheriff's Office v. Bagget*, 4 So. 3d 67 (Fla. 5th DCA 2009), the Fifth District Court of Appeal also faced the issue of whether a seizing agency must establish owner knowledge at the adversarial preliminary hearing. *Baggett*, 4 So. 3d at 69. The *Baggett* Court relied upon the *Karr* decision and held that a seizing agency must show probable cause to believe that the owner is not innocent. *Id*. at 70. However, unlike the *Karr* Court, the *Baggett* Court stated that its holding was predicated on the Act's statutory language and legislative history. *Id*. The *Baggett* Court reasoned that:

> Prior to 1995, the burden was on the owner of the seized property to establish lack of knowledge as an affirmative defense. (internal citation omitted). This was commonly known as the "innocent owner" defense. (internal citation omitted). In 1995, section 932.703(6)(a) was amended and the legislature placed the burden of proof on the seizing agency to show that the owner was not innocent. Under the current version, "[p]roperty **may not be forfeited**" unless the seizing agency proves the owner is not innocent (internal citation omitted). If property is not subject to forfeiture unless the seizing agency proves the owner is not innocent, we do not see how a forfeiture proceeding can be maintained if this showing is not made at the adversarial preliminary hearing.

Id. (emphasis in original).

While the *Baggettt* Court did analyze the legislative history of Act and noted that forfeiture proceedings are a two stage process, the Court chose to shift the requirements for the ultimate forfeiture proceeding to the adversarial preliminary hearing. The *Baggett* Court emphasized the "property may not be forfeited" language in § 932.706(6)(a), Fla. Stat. (2007), yet held that a seizing agency had to make a showing of owner knowledge at the adversarial preliminary hearing or *seizure* stage. The *Baggett* Court's reasoning misconstrues the two stage process of forfeiture proceedings. The *Gomez* Court is the only court that has properly distinguished the difference between the showings that must be made at the adversarial preliminary seizure stage hearing and the forfeiture proceeding. Thus, this Court should adopt the Third District Court of Appeal's holding.

C. Due Process is not Violated Under the *Mathews* Standard when an Owner of Real Property is Provided with Notice and an Opportunity to be Heard at an Adversarial Preliminary Hearing.

Petitioner asserts that this Court should apply the framework articulated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and reach the conclusion that her due process rights have been violated. Although Petitioner had cited numerous federal cases in which the *Mathews* framework has been utilized, Petitioner fails to cite a case in which the *Mathews* framework has been applied to determine whether due process has been violated when a seizing agency is not required to prove knowledge at the adversarial preliminary hearing stage of a civil forfeiture proceeding. However, even when applying the *Mathews* standard to this case, Petitioner's due process rights have not been violated.

The *Mathews* test requires a Court to weight private and governmental interests in order to determine whether an individual has been afforded due process. A court applying the *Mathews* framework makes three relevant inquires: (1) the degree of private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail. *Id*. at 335. The Act provides all necessary procedural and substantive due process rights under the *Mathews* standard.

1. The Private Interest that will be Affected by Official Action.

Undoubtedly, an individual has significant interest in the security of real property. The Supreme Court has addressed the issue of what due process rights are required when an individual's real property is subject to forfeiture. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993). In *Good*, police officers executed a search warrant and found 89 pounds of marijuana in Good's residence. *Id*. at 46. The Government sought to seize Good's home and obtained a warrant of arrest *in rem* in an *ex parte* proceeding before a United State Magistrate Judge. *Id*. at 47. The *ex parte* proceeding failed to provide Good with notice or an opportunity for a hearing. *Id*. A warrant of arrest was issued to seize Good's real property. *Id*. Good appealed and the Court of Appeals for the Ninth Circuit was unanimous in holding that Good's due process rights had been violated because he was not provided with notice or a hearing. *Id*.

The United States Supreme Court, had previously held that seizures with only *ex parte* proceedings did not offend due process when an individual owed

money to the Government. *Springer v. United States*, 102 U.S. 586 (1880). Further, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Supreme Court held that it was permissible to seize property without notice and an opportunity for hearing. However, in *Good*, the Supreme Court held that the government, without exigent circumstances, could not seize real property without notice and an opportunity for a hearing. *Good*, 510 U.S. at 62. Thus, the Supreme Court has stated that, due to the importance in the private interests of real property rights, notice and a hearing were required before a government agency seized real property.

Florida's Act comports with the due process requirements outlined by the Supreme Court in *Good*. The Florida legislature has afforded owners of real property constitutional protections by requiring that seizing agencies give notice and an opportunity for a hearing, thus preventing the specific ills of confidential *ex parte* proceedings identified in *Good*. Section 932.703(2)(b), Fla. Stat. (2007) provides potential claimants with an opportunity for an adversarial hearing: "Real property may not be seized or restrained, other than by lis pendens, subsequent to a violation of the Florida Contraband Forfeiture Act until the persons entitled to notice are afforded the opportunity to attend the preseizure adversarial preliminary hearing." § 932.703(2)(b), Fla. Stat. (2007).

Further, the Act provides that a seizing agency must provide notice: "the seizing agency shall make a diligent effort to notify any person entitled to notice of seizure." *Id*. The Florida Legislature's safeguards insure that real property is not seized in an *ex parte* proceeding similar to the circumstances in the *Good* case. The private interests and rights of property owners are protected under the Act. Indeed, in this case, the Claimant was provided with notice and an adversarial preliminary hearing before a neutral magistrate.

2. The Risk of an Erroneous Deprivation of such Interest Through the Procedures used, and the Probable Value, if any, of Additional or Substitute Procedural Safeguards.

Petitioner relies heavily on the decision in an unpublished case of *Del. Valley Fish Co. v. Fish & Wildlife Serv*., No. 09-CV-142-B-W, 2009 WL 1706574 (D. Me. June 12, 2009) to argue that her risk of erroneous deprivation is great. In *Delaware Valley Fish Company*, the Fish and Wildlife Service seized a truck used to transport live eels and retained the truck in excess of one year without instituting a hearing to justify the ongoing detention of the truck. *Id*. at *4. The *Delaware Valley Fish Company* Court stated that the Fish and Wildlife Service had to follow the seizure procedures that Congress had set forth in 28 U.S.C. § 2641(c) and 21 U.S.C § 853(e). *Id*. at *11. Thus, the *Delaware Valley Fish Company* Court held

nothing more than a seizing agency should have followed the procedures that Congress had previously instituted when seizing property.

As previously stated, the Florida legislature has placed safeguards in the Act that prevent the risk of deprivation of property. In Florida, a seizing agency must provide notice and an adversarial preliminary hearing. See, *supra*. Further, in Florida, a seizing agency cannot deprive an owner of property for an indefinite period of time. Pursuant to § 932.703, Fla. Stat. (2007), if a potential claimant requests an adversarial preliminary hearing, a hearing must be held within ten days after the request is received or as soon as practicable thereafter. §§ 932.703(2)(a)-(b), Fla. Stat. (2007). Further, the Act allows an owner to seek relief when a seizing agency fails to promptly initiate seizure proceedings:

> Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided in this act; however, such action may be maintained if forfeiture proceedings are not initiated within 45 days after the date of seizure. . . .

§ 932.703 (3), Fla. Stat. (2007).

Simply put, the Act and Florida case law affords due process and prevents the risk of extended deprivations mentioned in Petitioner's brief. *See Dep't of Law Enforcement,* 588 So. 2d at 968 (construing the Florida Contraband Forfeiture Act to comport with due process rights). Further, even more due process protection is

afforded to owners of real property by the Act. *Id*. at 965; (holding that real property may not be restrained by any method, other than by a lis pendens, prior to notice and a hearing); *see also* § 932.703 (2)(b), Fla. Stat. (2007).

Other provisions in the Act eliminate erroneous deprivation of property. Pursuant to § 932.704(9)(b), Fla. Stat. (2007), "[t]he trial court shall also require the seizing agency to pay to the claimant any loss of income directly attributed to the continued seizure of income-producing property during the trial or appellate process." § 932.704(9)(b), Fla. Stat. (2007). Further, a prevailing claimant can be awarded attorneys' fees, "[w]hen the claimant prevails, at the close of forfeiture proceedings and any appeal, the court shall award reasonable trial attorney's fees and costs to the claimant if the court finds that the seizing agency has not proceeded at any stage of the proceedings in good faith . . . ." § 932.704(10), Fla. Stat. (2007). These provisions are not "illusory" as Petitioner suggests. The Act's recovery provisions provide compensation to a prevailing claimant and force a seizing agency to proceed with caution during all stages of the forfeiture process.

Authorizing probable cause for seizure, does not leave proprietary interests of innocent owners unprotected. In the case of real property, courts are authorized to enter any necessary orders to "protect against disposal, waste, or continued illegal use of such property pending disposition of the forfeiture proceeding."

§ 932.703(2)(d), Fla. Stat. (2007). Here, Gomez does not use the property as her residence and she can seek to replace her tenant if she so desires. Seizure does not equate to an automatic deprivation of property or a forfeiture of property. When a home has been seized, the government can enter into an occupational agreement and allow residents to continue living in a home until a forfeiture proceeding has concluded. *See United States v. One Parcel of Real Prop., Commonly Known as Star Route Box 1328, Glenwood, Washington County, Or.*, 137 B.R. 802, 803 (D. Or. 1992) (occupants were allowed to continue living in their residence pursuant to an occupancy agreement).

3. The Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens that the Additional or Substitute Procedural Requirement Would Entail.

The governmental interest in enforcing laws and preventing crime cannot be overstated. Forfeiture laws deter owners from allowing the use of their property to commit criminal acts. The Supreme Court has stated "to the extent that . . . forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Calero-Toledo,* 416 U.S. at 687-88. Requiring a seizing agency to demonstrate at

the adversarial preliminary hearing stage that a claimant knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity would completely undermine this State's forfeiture laws.

Requiring that a seizing agency produce a showing of an individual's knowledge at the adversarial preliminary hearing stage would turn the hearing into a trial on the merits. At the adversarial preliminary hearing stage, the seizing agency has not had the benefit of completing its investigation or engaging in discovery and therefore, could not be expected to have obtained evidence to refute a claimant's assertions of innocence. It is instructive that in the context of standing, Florida courts have held that an individual should not have to prove his case at the adversarial preliminary hearing. *See Vasquez v. State*, 777 So. 2d 1200, 1202 (Fla. 3d DCA 2001) ("[W]e have recognized that a claimant should not have to prove his or her case to establish standing.").

Similarly, a seizing agency should not have to prove its case at the adversarial preliminary hearing. A seizing agency should at a minimum be allowed to engage in discovery and have the opportunity to prove that an individual had knowledge that the property was used in violation of the Act at the forfeiture stage. *See e.g. Fraser v. Dep't of Highway Safety & Motor Vehicles*, 727

So. 2d 1021, 1025(Fla. 4th DCA 1999) ("[T]he claimant ought to have the opportunity to present his evidence on the issue to convince the court of the bona fide nature of his claim.").

The seizing agency has the burden of ultimately demonstrating a claimant's knowledge of illegal activity, "[p]roperty may not be forfeited . . . unless the seizing agency establishes by a preponderance of evidence that the owner knew, or should have known after reasonable inquiry, that the property was being employed . . . in criminal activity." § 932.703(6)(a), Fla. Stat. (2007). It is appropriate to place this additional burden of demonstrating an individual's knowledge at the ultimate forfeiture proceeding.

However, at the adversarial preliminary hearing stage, when an investigation may not be complete, when discovery has not commenced and the seizing agency has not had an opportunity to obtain evidence concerning an individual's knowledge, it would be nearly impossible for a seizing agency to overcome an individual's assertions of lack of knowledge. "[T]hose who assert the innocent owner defense have unique access to evidence regarding such claims. They know precisely what information was brought to their attention and why facts of which owners are generally aware were unknown to them." *United States v. One Parcel of Prop. Located at 194 Quaker Farms Rd., Oxford, Conn.*, 85 F.3d 985, 990 (2d

Cir. 1996). The forfeiture process created by the Florida legislature would be nullified if the seizing agency were required to demonstrate *any* showing of a claimant's lack of knowledge at the adversarial preliminary hearing stage.

D. There are no Due Process Rights Implicated when a Seizing Agency is not Required to Present Evidence of a Claimant's Knowledge at the Adversarial Preliminary Hearing Stage of a Forfeiture Proceeding.

The law is well-established that an owner's due process rights are not violated when the government seizes property that was used in violation of the law; this principle holds even when the property owner had no knowledge that the property had been used in violation of the law. In *Dobbin's Distillery v. United States*, an owner of real property leased his premises for use as a distillery. 96 U.S. 395, 296 (1877). The lessee used the property in violation of federal revenue laws and the government seized the property. *Id*. at 397. The owner of the real property defended the government's forfeiture on the grounds that he had no knowledge that the leased property was being used in violation of the law. *Id*. The Supreme Court held that it was of no consequence that the owner lacked knowledge concerning the lessee's unlawful use of the property. *Id*. at 400. The Court stated that the forfeiture was applied against the property, not the innocent owner: "the real and personal property . . . must be considered as affected by the unlawful doings and

omissions of the lessee . . . ." *Id* at 400.

The historical principle that a forfeiture action is against the property as opposed to a potential innocent owner has withstood the test of time. More recently, the Supreme Court squarely addressed the issue of whether a forfeiture claimant has the right to present their lack of knowledge as a defense to a forfeiture action and has explicitly held that due process rights are not impinged when an individual is precluded from asserting that he is an innocent owner. *Bennis v. Michigan*, 516 U.S. 442 (1996). In *Bennis*, the petitioner and her husband were joint owners of an automobile. *Id*. at 443. The Petitioner's husband engaged in illegal sexual activity while inside the automobile and was arrested and later convicted for public indecency. *Id*. The state then sued the claimant and her husband to have their jointly held automobile declared a nuisance and abated. *Id*. at 443-44.

The Supreme Court framed Bennis' argument as "petitioner's due process claim is not that she was denied notice or an opportunity to contest the abatement of her car; she was accorded both. Rather, she claims she was entitled to contest the abatement by showing she did not know her husband would use it to violate Michigan's indecency law." The Supreme Court held that Michigan's forfeiture provision, which failed to provide an innocent owners defense, did not violate

Bennis' due process rights: "[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know it was to be put to such use." *Id*. at 445.

Like the claimant in the *Bennis* case, the Petitioner does not argue that she was denied notice and an opportunity to be heard, but that she was denied a meaningful opportunity to be heard because Respondent does not have to establish lack of knowledge at the probable cause hearing. Petitioner's argument fails because there are no due process rights in presenting an innocent owner defense or having the seizing agency prove that the claimant is an innocent owner under the Federal Constitution. If not allowing an innocent owner to present their lack of knowledge defense does not violate due process, then not requiring a seizing agency to show lack of knowledge at a preliminary proceeding, but requiring it before the property is forfeited, certainly does not violate a claimant's due process rights.

Pursuant to the Act, a seizing agency must establish, by a preponderance of the evidence that the owner knew or should have known after reasonable inquiry that the property was being employed in criminal activity as a forfeiture proceeding – not at the adversarial preliminary hearing. § 932.703(6)(a), Fla. Stat.

(2007). The Act provides far more protection to property owners than due process mandates. Further, the Petitioner made the affirmative decision to lease the property to an individual who used it to cultivate marijuana. *See Towers v. City of Chicago*, 173 F.3d 619, 627 (7th Cir. 1999) ("The plaintiffs had the sole authority to decide to whom their vehicles would be lent and to set the restrictions and checks that were appropriate to ensure that the vehicle would not be used to support illegal conduct."). The Petitioner had the ability to investigate her potential tenant, to monitor her property and to impose preventative measures to ensure that the property would not be used for unlawful purposes.

Finally, this Court has had already addressed the issue of due process rights concerning an individual's ability to assert the innocent owner defense under the Florida Constitution.[5] *Dep't of Law Enforcement*, 588 So. 2d at 95. The *Department of Law Enforcement* court construed the Act to comply with due process requirements. The *Department of Law Enforcement* court stated that due process requires that a seizing agency must provide notice and offer an adversarial

[5] Petitioner does not explicitly state whether her due process rights have been violated under the United States or Florida Constitution. However, since Petitioner relies almost exclusively on federal cases which were interpreting due process under the United States Constitution, it is valid to assume that Petitioner's argument is that her due process rights have been violated under only the Federal Constitution.

preliminary hearing prior to seizing real property. *Id*. at 965. Further the *Department of Law Enforcement* Court stated that "[l]ack of knowledge of the holder of an interest in the property that the property was being employed in criminal activity is a defense to forfeiture, which, if established by a preponderance of the evidence, defeats the forfeiture action as to that property interest." *Id*. at 968. Thus, this Court, in imposing due process requirements under the Act, held that lack of knowledge is a defense to a *forfeiture*. This Court had the opportunity to state that an individual had due process rights in presenting the innocent owner defense at the adversarial preliminary hearing stage, but chose not to impose that requirement. The Florida legislature has provided more protection than either the United States or Florida Constitutions require by placing the burden of demonstrating lack of knowledge on the seizing agency at the ultimate forfeiture proceeding, not at the adversarial preliminary hearing. Clearly, Petitioner's due process right have not been violated when a seizing agency does not have to demonstrate owner knowledge at the adversarial preliminary hearing, but is required to do so prior to the property being forfeited.

E. Petitioner's Public Policy Arguments are Unsupported by the Record in this Case.

Petitioner, in the latter section of her initial brief, makes several public

policy arguments that are unsupported by the facts and record in this case. For instance, Petitioner states that forfeiture of real property affects more than just the owner of the property. Petitioner claims that forfeitures can impact real estate prices in the surrounding neighborhood and negatively affect innocent neighbors. However, allowing individuals to produce, cultivate and sell drugs could have a devastating affect real estate values and subject innocent neighbors to violent crime.

Petitioner has also argued, in this case, that innocent residents can be forced from their homes if a trial court finds probable cause that a violation of the Act occurred and that banks will foreclose on seized homes. Petitioner's unsupported public policy arguments assume the worst horrors and ignore the facts and the law. In reality, the a seizing agency can enter into an occupancy agreement with a resident, as noted *supra*, and mortgage payments can continued to be paid to a lender after a seizure has occurred. In sum, Petitioner's public policy arguments are a string of unsupported, improper and improbable scenarios.

II. Assuming *Arguendo* that a Preliminary Showing of Owner Knowledge is Required at an Adversarial Preliminary Hearing, Evidence was Presented that the Owner Should have Known After Reasonable Inquiry that the Property was Likely to be Employed in Criminal Activity

If this Court were to hold that knowledge is an element to be shown at the

adversarial preliminary hearing stage of the forfeiture process, the case of *City of Daytona Beach v. Bush*, 742 So. 2d 335 (Fla. 5th DCA 1999) is instructive in that it shows that not all courts have concurred that knowledge is an element to be shown at the adversarial preliminary hearing stage. In *Bush*, there was an adversarial preliminary hearing and a forfeiture hearing. In its opinion, the *Bush* court stated that at the forfeiture proceeding, the City "had to establish by clear and convincing evidence that the vehicle had been used in the violation of the Act." *Id*. at 335. Further, the *Bush* Court stated that City had to burden of proving that the claimant was an innocent owner at the forfeiture proceeding. *Id*.

The court did not make the additional finding that knowledge on the part of the owner also had be shown at the adversarial preliminary hearing stage of the proceeding. The opinion further discusses the fact that the trial judge found, at the conclusion of the forfeiture proceeding, that the City had not met its burden of proof (during the forfeiture proceeding) with regard to knowledge on the part of the vehicle owner as required by § 932.703(6)(a) (2007).

The *Bush* Court concluded that the trial court used the wrong legal standard in determining the type of knowledge to be shown. Further, the *Bush* Court held that the city did not have to prove actual knowledge on the part of the property owner and that demonstrating constructive knowledge was sufficient. At the

forfeiture hearing, evidence was produced that the driver of the vehicle in question was the son of the owner and that the mother knew of the son's prior criminal activity. The *Bush* court stated that "a person cannot avoid being charged with constructive knowledge, as in this case, by hiding her head in the sand like an ostrich, and proclaim lack of actual knowledge." *Bush*, 742 So. 2d at 337 (citations omitted).

Similarly, in the instant case, evidence was presented that Gomez never met the person to whom she rented the property; she only dealt with a person who identified herself as the wife of the tenant; Gomez did not think it strange that her tenant would rent the home in his name only, even though he was married; she did not verify his identification nor did she ask for or check any references. [R. p. 85, line 11 through p.86, line 8]. Not only did Gomez not make a reasonable inquiry, such as the purposes for which the property would be used, or the financial capability of the tenant, she made no inquiry. Ms. Gomez testified that she went to the property to collect rent, however she did not inspect the property or attempt to discovery illegal activity. [R. p. 85, lines 10-15].[6] Therefore, as in *Bush*, there has

[6] Petitioner's Brief states that "she went to the property once in November and once in December of 2007 (to pick up rental payments) . . . ." This statement is inaccurate. The hearing transcript does not reveal when Ms. Gomez went to the property to receive the rent payments or state exactly what she observed when when she went to the property to obtain the rental payments.

been a showing of constructive knowledge, and the decision of the lower court finding probable cause for the seizure of the property should be affirmed.

CONCLUSION

This Court should affirm the Third District Court Appeal's decision. A seizing agency does not have to make a showing of an owner's knowledge at the initial adversarial preliminary hearing. The Third District Court of Appeal correctly stated that a forfeiture proceeding is a two stage process and a seizing agency had the burden of establishing owner knowledge at the second forfeiture proceeding stage, not the initial adversary preliminary hearing stage. The purpose of an adversarial preliminary hearing is to ensure that there is probable cause to believe that property was used in violation of the Act. The *Karr* and *Baggett* Courts failed to give plain meaning to the Act, and therefore, were decided improperly.

Petitioner's due process rights have not been violated under either the *Mathews* framework nor the United States or Florida Constitutions. Assuming *arguendo* that knowledge must be shown at the adversarial preliminary hearing stage, sufficient evidence was presented that Appellant Gomez had constructive knowledge of the illegal activity as she testified that she made no reasonable inquiry of her tenant or his background.

Wherefore, Appellee, Village of Pinecrest, respectfully requests that the decision of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail upon Richard J. Diaz, Esquire, 3127 Ponce de Leon Blvd. Coral Gables, FL 33134, Guy Richard Strafer, Esquire, 201 South Biscayne Blvd., Suite 1380, Miami, FL 33131, and Jane Ellen Bond, Esquire, Butler & Hosch, P.O.

Box 628206, Orlando, FL 32862-8206 on this ___ day of January, 2010.

By:_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type size and style used throughout this Brief is 14-point Times New Roman double-spaced, and that this Brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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