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Contraband Forfeiture

Richard Purdy*

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Contraband Forfeiture: 1993 Survey of Florida Law

Richard A. Purdy*

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I. INTRODUCTION

"If an ox gore a man or woman, and they die, he shall be stoned and his flesh shall not be eaten." Exodus 21:28

Forfeiture has its roots in biblical times. The common law followed with the view that property used to cause the death of a King's subject was forfeited to the King. The King would convert the property to a charitable use. Forfeiture later became a source of Crown revenue. America adopted forfeiture with a proliferation of in rem and in personam statutes designed both to punish the offender and to take contraband property from the careless property owner.¹ Although Florida has both in personam and in rem

* J.D., University of Cincinnati, 1969; B.A., Miami University, 1964; M.B.A., Miami University, 1965; Chief Assistant State Attorney, 1974-76; President, Florida Association of Police Attorneys, 1982-84. Mr. Purdy is a partner in the law firm of Shailer, Purdy and Jolly, P.A., Fort Lauderdale, Florida. The firm has represented law enforcement agencies in forfeiture cases since 1980. Mr. Purdy is the author of the *Florida Police Advisor*, a monthly police legal bulletin published since 1976. Mr. Purdy co-authored (with Judith A. Secher, Esquire) *Florida Forfeiture Practice and Procedure*, first published in 1990.

1. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In *Calero-Toledo*, the Supreme Court approved forfeiture of a yacht worth over \$100,000 because it

statutes, this article is limited to in rem forfeitures pursuant to the Florida Contraband Forfeiture Act, sections 932.701 through 932.707 of the Florida Statutes.

It is inherently just and proper that the vehicle used as the getaway car in an armed robbery be taken from the robber for subsequent use by the sheriff to provide road patrol protection for the public. This is called contraband forfeiture, which is a great concept. In practice, however, forfeiture threatens due process because an in rem forfeiture is not limited to vehicles owned by the criminal. Furthermore, neither an arrest nor a conviction is required for, or relevant to, forfeiture proceedings.² The legal fiction that the vehicle is the offender eliminates the need for a conviction. Originally, in federal courts, innocence of the vehicle owner was not a defense to forfeiture, even if the owner was not present or did not otherwise know of the crime. To prevent forfeiture, the innocent owner had to prove that the vehicle was stolen from him by the robber, or that he had done all that reasonably could be expected to prevent the use of his vehicle in the robbery.³

Prior to 1980, Florida had a limited, weak, ineffective and seldom used forfeiture statute.⁴ Three times in the past thirteen years the Florida Legislature made substantial changes to forfeiture law. In 1980, Florida made a serious entry into the forfeiture arena with the enactment of The Florida Contraband Forfeiture Act.⁵ Prior law applied only to vessels, motor vehicles, and aircrafts, and forfeited only those items used in committing crimes related to drugs, gambling, beverage or tobacco laws, and motor

contained one marijuana cigarette. *Id.* The owner, Pearson Yacht Leasing Co., had no knowledge of the violation. *Id.* at 663, 690.

2. *City of Tallahassee v. One Yellow 1979 Fiat 2-Door Sedan*, 414 So. 2d 1100, 1101-02 (Fla. 1st Dist. Ct. App. 1982).

3. *Calero-Toledo*, 416 U.S. at 689-90. The *Calero-Toledo* Court stated:

It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. (citations omitted).

4. See FLA. STAT. §§ 943.41-943.44 (Supp. 1974) (Florida Uniform Contraband Transportation Act) (renumbered at FLA. STAT. §§ 932.701-932.704 (1981)).

5. FLA. STAT. §§ 943.41-943.44 (Supp. 1980).

fuel tax violations.⁶ The 1974 to 1980 law was further limited by courts to apply only in “drug trafficking operations.”⁷ The 1980 amendments expanded forfeiture to *any* personal property, including currency, used in *any felony*.⁸ The new law shifted the burden of proof from the state or agency to the property owner.⁹

Incentive for law enforcement and attorneys to use the Contraband Forfeiture Act of 1980 was provided by allowing the seizing agency to use funds from the sale of property forfeited and by allowing agencies to use their own or outside counsel to file the action.¹⁰ Formerly, proceeds from sold property went into the general revenue fund of the municipality or county, and only the often reluctant State Attorney could file the action.¹¹

In 1989, the Act was amended to add real property used “to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.”¹² It is obvious that forfeiture of real estate that is used to conduct a ten dollar crack cocaine sale or to store over twenty grams of marijuana substantially increased the value of potential forfeitures. The 1989 amendments also added proceeds from the sale of contraband property and provided that other property of the defendant could be forfeited if the contraband property was sold or otherwise gone prior to seizure.¹³

Since 1980, Florida law enforcement agencies have benefitted by the forfeiture of currency and property, valued in many millions of dollars. However, the use of the forfeiture law has not been without detractors in both the courts and public domain. Forfeitures are considered harsh exactions and they are not favored in law or equity.¹⁴ They are strictly construed against the government.¹⁵ Justice Barkett, Chief Justice of the Florida Supreme Court, described the authority granted to law enforcement by the Florida Contraband Forfeiture Act as “awesome.”¹⁶ Judge Glick-

6. FLA. STAT. § 943.42 (1979) (renumbered at FLA. STAT. § 732.702 (1981)).

7. *See, e.g.,* Griffis v. State, 356 So. 2d 297, 299 (Fla. 1978).

8. FLA. STAT. § 943.41(e) (1980) (emphasis added) (renumbered at FLA. STAT. § 932.701(e) (1981)).

9. *Id.* § 943.43 (renumbered at FLA. STAT. § 732.703 (1980)).

10. *Id.* § 943.44(1) (renumbered at FLA. STAT. § 732.704 (1980)); *id.* § 943.44(3)(a) (renumbered at FLA. STAT. § 732.704(3)(a) (1980)).

11. *Id.*; FLA. STAT. § 943.44(5) (1979).

12. FLA. STAT. § 932.702(3) (1989).

13. *Id.* § 932.703(1).

14. Department of Law Enforcement v. Real Property, 588 So. 2d 957, 961 (Fla. 1991).

15. *In re* Forfeiture of \$91,357.12, 595 So. 2d 998, 999 (Fla. 4th Dist. Ct. App. 1992).

16. *In re* Forfeiture of 1969 Piper Navajo, 592 So. 2d 233, 236 (Fla. 1992).

stein of the Fourth District Court of Appeal termed forfeiture a “draconian remedy” in a stinging dissent to a majority opinion that upheld the forfeiture of an aircraft used in a registration felony and owned by a “player in the Noriega trial because of reported drug smuggling activities.”¹⁷ Judge Glickstein was greatly influenced by the series of newspaper articles in the *Stuart News* and the *Pittsburgh Press* entitled “Presumed Guilty,” which he adopted in great detail in an unusual “Epilogue to Dissent.”¹⁸ Other Florida newspapers have attacked the forfeiture law by describing it as an apparently unjust and excessive use of the law against “innocents.”¹⁹

It is against this background of judicial and public negativity that the Florida Legislature made its third substantial alteration of forfeiture law. Our lawmakers were aided by the Florida Supreme Court’s decision in *Department of Law Enforcement v. Real Property*.²⁰ The court held the 1989 Florida Contraband Forfeiture Act to be constitutional but only by its interpretation that the statute included substantive and procedural safeguards that were not in the wording of the Act.²¹ In July of 1992, the Florida Legislature substantially adopted the requirements of the *Department of Law Enforcement* opinion by enacting Florida Session Laws chapter 92-54.²²

This survey of Florida law necessarily starts with the 1991 *Department of Law Enforcement v. Real Property* decision and the July 1992 amendments to the Florida Contraband Forfeiture Act. The decision and the amendments substantially changed the law affecting several important legal issues in forfeiture.

II. DUE PROCESS—JUDICIAL AND LEGISLATIVE ACTION

After holding that the Florida Contraband Forfeiture Act was facially constitutional in *Department of Law Enforcement v. Real Property*,²³ a case of first impression, the Florida Supreme Court explained that the Act was applied with minimum due process requirements, but not found in the

17. *In re* Forfeiture of One 1980 Cessna, 587 So. 2d 553, 556 (Fla. 4th Dist. Ct. App. 1991) (Glickstein, J., dissenting).

18. *Id.* at 556-58.

19. See, e.g., *Profit in the Name of the Law*, SUN SENTINEL, Mar. 10-14, 1991. This was a week-long series of articles by several authors critical of the forfeiture law.

20. 588 So. 2d at 957.

21. *Id.*

22. Ch. 92-54, 1992 Fla. Laws 500 (codified at FLA. STAT. §§ 932.701-932.707 (Supp. 1992)).

23. 588 So. 2d at 957.

wording of the act that were specified in the opinion.²⁴ The forfeiture action was initiated by the seizure of 480 acres of land that included an airstrip, a mobile home subdivision, a restaurant, a bath house, a personal residence, garages and other improvements by the Florida Department of Law Enforcement ("FDLE"). FDLE filed a forfeiture petition seeking to forfeit the property on the grounds that it was used for drug trafficking. Based upon the affidavit of a FDLE agent, the circuit court issued warrants to seize the property. The FDLE filed notice of lis pendens the same day. The 1989 Act did not provide for the filing of an affidavit, the issuing of a "seizure" warrant, or the filing of a notice of lis pendens. The claimants, property owners, moved to dismiss the petitions. The circuit court dismissed the action on two grounds.²⁵ First, the Act failed to provide substantive due process.²⁶ Second, it was void for vagueness because it required "parties to guess the proper procedures and protections" and required insufficient notice as to what specific property was subject to forfeiture.²⁷

The Florida Supreme Court accepted jurisdiction from the First District Court of Appeal to decide a matter of great public importance that required immediate resolution.²⁸ The court acknowledged that the Act "does not set out any procedures for filing the petition or issuing the rule to show cause, except that a rule shall issue upon the showing of 'due proof'."²⁹ Prior district court opinions characterized forfeiture proceedings as "procedural quagmires"³⁰ and "murky."³¹ The Fifth District Court of Appeal stated that "the Forfeiture Statute leaves much to the judicial imagination in guaranteeing procedural due process . . ."³²

In deciding the issue of whether The Florida Contraband Forfeiture Act comports with substantive and procedural due process of law, the Florida Supreme Court recognized that it must resolve the conflict between the

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Department of Law Enforcement*, 588 So. 2d at 957.

29. *Id.* at 966.

30. *Id.*; see *In re Forfeiture of \$5300*, 429 So. 2d 800, 801-02 (Fla. 4th Dist. Ct. App. 1983).

31. *Department of Law Enforcement*, 588 So. 2d at 966; see *One 1978 Green Datsun Pickup Truck v. State ex rel. Manatee County*, 457 So. 2d 1060, 1061 (Fla. 2d Dist. Ct. App. 1984).

32. *Department of Highway Safety & Motor Vehicles v. Charles*, 606 So. 2d 750, 751 (Fla. 5th Dist. Ct. App. 1992).

principle that forfeiture statutes are strictly construed and not favored in law or equity, and the traditional judicial policy that all doubts as to the validity of a statute are to be resolved in favor of constitutionality where reasonably possible.³³ The court recognized its rule making powers but cautioned that it could not legislate and violate the separation of powers prohibition.³⁴ The court resolved that it could require the missing safeguards by relying on the procedures set forth in prior case law and thus construe the Act to comport with minimal due process requirements.³⁵ Thereafter, Florida's high court vociferously legislated several substantial changes to the Act.

The following fourteen requirements were added to the 1989 Act by the opinion. Each is followed by the provision added to the 1992 Act that corresponds to and adopts the Florida Supreme Court opinion:

1. Immediately after ex-parte seizure of personal property for forfeiture, the seizing agency must notify all interested parties that the property has been taken and that they have the right to request a post seizure adversarial preliminary hearing. The hearing is "anticipated" to be within 10 days of any such request.³⁶

1992 Statute: "Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act . . . it shall be held within 10 days after the request or as soon as practicable."³⁷

2. Prior to any initial restraint of real property other than *lis pendens*, the seizing agency must provide notice of and schedule an adversarial hearing for interested parties. The petition for forfeiture and recording of notice of the petition (*lis pendens*)

33. *Department of Law Enforcement*, 588 So. 2d at 961.

34. *Id.* at 961-62; see FLA CONST. art. I, § 3.

35. *Department of Law Enforcement*, 588 So. 2d at 959.

36. *Id.* at 965-66.

37. FLA. STAT. § 931.703(2)(a) (Supp. 1992).

should be filed simultaneously. The hearing is anticipated to be within 10 days of filing the petition.³⁸

1992 Statute: “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 pre-seizure adversarial preliminary hearing. . . . [T]he pre-seizure adversarial preliminary hearing provided herein shall be held within 10 days of the filing of the *lis pendens* or as soon as practicable.”³⁹

3. The agency seeking forfeiture may file its complaint by applying to the circuit court for issuance of a rule to show cause.⁴⁰

1992 Statute: “The seizing agency shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred.”⁴¹

4. The “petition” must be verified and supported by verified affidavit.⁴²

1992 Statute: “The complaint shall be styled, ‘In RE: FORFEITURE OF _____.’ (followed by the name or description of the property). The complaint shall contain a brief jurisdictional statement, a description of the subject matter of the proceeding, and a statement of the facts sufficient to state a cause of action that would support a final judgment of forfeiture. The complaint must be accompanied by a verified supporting affidavit.”⁴³

5. The court shall sign and issue a rule to show cause if it *ex-parte* determines that the petition on its face states a cause of action.⁴⁴

38. *Department of Law Enforcement*, 588 So. 2d at 965.

39. FLA. STAT. § 932.703(2)(b) (Supp. 1992).

40. *Department of Law Enforcement*, 588 So. 2d at 967.

41. FLA. STAT. § 932.704(4) (Supp. 1992). The 1992 Act eliminated the “Rule to Show Cause” language and requirement.

42. *Department of Law Enforcement*, 588 So. 2d at 967.

43. FLA. STAT. § 932.704(5)(a) (Supp. 1992).

44. *Department of Law Enforcement*, 588 So. 2d at 967.

1992 Statute: “If no person entitled to notice requests an adversarial preliminary hearing, as provided in s. 932.703(2)(a), the court, upon receipt of the complaint, shall review the complaint and the verified supporting affidavit to determine whether there was probable cause for the seizure. Upon a finding of probable cause, the court shall enter an order showing the probable cause finding.”⁴⁵

6. A copy of the petition and the rule shall be served on all persons the agency knows or should know have a legal interest in the property.⁴⁶

1992 Statute: “If the property is required by law to be titled or registered, or if the owner of the property is known in fact to the seizing agency, or if the seized property is subject to a perfected security interest in accordance with the Uniform Commercial Code, chapter 679, the attorney for the seizing agency shall serve notice of the forfeiture complaint by certified mail, return receipt requested, to each person having such security interest in the property.”⁴⁷

7. The rule to show cause shall require that responsive pleadings and affirmative defenses be filed within twenty days of service of the rule to show cause.⁴⁸

1992 Statute: “The court shall require any claimant who desires to contest the forfeiture to file and serve upon the attorney representing the seizing agency any responsive pleadings and affirmative defenses within 20 days after receipt of the complaint and probable cause finding.”⁴⁹

45. FLA. STAT. § 932.704(5)(b) (Supp. 1992). The “Order” replaces the former requirement of a “Rule to Show Cause.”

46. *Department of Law Enforcement*, 588 So. 2d at 967.

47. FLA. STAT. § 932.704(6)(a) (Supp. 1992).

48. *Department of Law Enforcement*, 588 So. 2d at 967.

49. FLA. STAT. § 932.704(5)(c) (Supp. 1992).

8. “The Florida Rules of Civil Procedure shall otherwise control service of process, discovery, and other administration of forfeiture proceedings.”⁵⁰

1992 Statute: “The Florida Rules of Civil Procedure shall govern forfeiture proceedings under the Florida Contraband Forfeiture Act unless otherwise specified under the Florida Contraband Forfeiture Act.”⁵¹

9. Forfeiture is decided by a jury trial unless the claimants waive that right.⁵²

1992 Statute: “Any trial on the ultimate issue of forfeiture shall be decided by a jury, unless such right is waived by the claimant through a written waiver or on the record before the court conducting the forfeiture proceeding.”⁵³

10. The seizing agency has the burden of establishing probable cause at the adversary preliminary hearing.⁵⁴

1992 Statute: “ ‘Adversarial preliminary hearing’ means 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.”⁵⁵

11. At trial, the seizing agency has the burden of establishing by clear and convincing evidence that the property has been used in violation of the forfeiture statute. “Due proof” in the statute means by clear and convincing evidence.⁵⁶

1992 Statute: “Upon clear and convincing evidence that the contraband article was being used in violation of the Florida

50. *Department of Law Enforcement*, 588 So. 2d at 967.

51. FLA. STAT. § 932.704(2) (Supp. 1992).

52. *Department of Law Enforcement*, 588 So. 2d at 967.

53. FLA. STAT. § 932.704(3) (Supp. 1992); *see In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433 (Fla. 1986).

54. *Department of Law Enforcement*, 588 So. 2d at 966.

55. FLA. STAT. § 932.701(2)(f) (Supp. 1992).

56. *Department of Law Enforcement*, 588 So. 2d at 967-68.

Contraband Forfeiture Act, the court shall order the seized property forfeited to the seizing law enforcement agency.”⁵⁷

12. At trial the claimant (owner) has the burden of establishing by the preponderance of the evidence the defense of lack of knowledge that the property was used in criminal activity.⁵⁸

1992 Statute: “No property shall be forfeited under the provisions of the Florida Contraband Forfeiture Act if the owner of such property establishes by a preponderance of the evidence that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity.”⁵⁹

13. If probable cause is found during an adversarial preliminary hearing, the court must order the property restrained by the least restrictive means that will protect against disposal. Restraining order, property bond and notice of lis pendens were suggested.⁶⁰

1992 Statute: “If the court determines that probable cause exists to believe that such property has been, is being, or was attempted to be used in violation of the Florida Contraband Forfeiture Act, the court shall order the property restrained by the least restrictive means to protect against disposal, waste, or continued illegal use of such property pending disposition of the forfeiture proceeding.”⁶¹

14. “Forfeiture must be limited to the property or the portion thereof that was used in the crime.”⁶² The court does not discuss the reasoning for this potentially devastating limitation on real property forfeiture. Although the trial court listed vagueness as one of the reasons for finding the act violates due process because the act does not require “what specific property is subject to

57. FLA. STAT. § 932.704(8) (Supp. 1992). The term “due proof” was eliminated from the Act.

58. *Department of Law Enforcement*, 588 So. 2d at 968.

59. FLA. STAT. § 932.703(6)(a) (Supp. 1992).

60. *Department of Law Enforcement*, 588 So. 2d at 964-65.

61. FLA. STAT. § 932.703(2)(d) (Supp. 1992).

62. *Department of Law Enforcement*, 588 So. 2d at 968.

forfeiture,”⁶³ there is no other discussion of the reason or meaning of this limitation in the Florida Supreme Court opinion.

1992 Statute: The legislature ignored this limitation. Section 932.701(2)(a)(6) expanded the definition of real property as contraband to include “any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used . . . in the commission of . . . any felony”⁶⁴

III. OTHER STATUTORY CHANGES AND ADDITIONS: 1992

In addition to adopting the requirements of the *Department of Law Enforcement* opinion, the 1992 Legislature made the following significant changes and additions to the Act:

1. The 1992 Act added a policy statement:

It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes.⁶⁵

2. “Promptly proceed” or time to file the complaint from the date of seizure was reduced from ninety days to forty-five days.⁶⁶
3. “Complaint” is now defined as “a petition for forfeiture in the civil division of the circuit court”⁶⁷ The former Act did not specify the original pleading to be a “complaint” or a “petition.” As noted earlier in this article, the court in *Department of Law Enforcement* found that the agency “may file its complaint”

63. *Id.* at 959.

64. FLA. STAT. § 932.701(2)(a)(6) (Supp. 1992).

65. *Id.* § 932.704(1).

66. *Id.* § 932.701(2)(c).

67. *Id.* § 932.701(2)(d).

and then “the petition must be verified.”⁶⁸ Since the Act now defines complaint as a petition, it is apparently proper to call the initial pleading a petition.

4. The party with proprietary interest in the property is designated as a “claimant.”⁶⁹ Litigants and courts, including the Florida Supreme Court, had often referred to interested parties as “defendants” despite the in rem nature of the proceedings.
5. Use of seized property by the seizing agency is prohibited until title is perfected. Operation for maintenance is permitted only to minimize loss of value.⁷⁰ This was in reaction to media coverage that was critical of police using vehicles and other seized property prior to obtaining a final order of forfeiture.
6. Vehicle rental or leasing companies are now specifically excluded from forfeiture if the claimants establish that they neither knew nor should have known the vehicle was used in criminal activity.⁷¹ Claimants do not have the added burden of reasonable inquiry imposed on other innocent owners and lienholders. They also have the right to immediate possession.⁷²
7. Innocent co-owners other than spouses have the same protection as other innocent owners up to the value of their interest in the property. Co-owner spouses retain the right to defeat the forfeiture entirely if they make the requisite showing of no knowledge and reasonable inquiry.⁷³
8. The “attempt” to use property in violation of the Act was added to the definition of “contraband article,” i.e., real and personal

68. See *supra* notes 40, 42 and accompanying text.

69. FLA. STAT. § 932.701(2)(h) (Supp. 1992).

70. *Id.* § 932.703(1)(c).

71. *Id.* § 932.703(6)(d).

72. *Id.*

73. *Id.* § 932.703(7). This amendment was to conform the Act to *In re Forfeiture of 1985 Ford Pick-Up Truck*, 598 So. 2d 1070 (Fla. 1992), which held that the interest of innocent co-owners must be protected in order to construe the statute in a constitutional manner. In November 1992, in a forfeiture case brought under the Florida RICO Act, the Florida Supreme Court held that forfeiture of homestead property is forbidden under article X, section 4 of the Florida Constitution. *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992).

property that may be subjected to forfeiture.⁷⁴ Formerly, attempted use was not sufficient.

9. Settlements made prior to conclusion of the forfeiture proceeding must be approved by the court, a mediator, or an arbitrator unless waived by the claimant in writing.⁷⁵ This was also in response to media publicity of some prior claimants who settled pre-trial and then complained they were coerced or “extorted” into paying money to the agency to avoid the delay and cost of litigation. It is expected that forfeiture litigation will continue to be settled pre-trial as any other civil litigation, and that the settlement will now include the required waiver.
10. If the claimant prevails at trial, any decision to appeal must be made by “the chief administrative official of the seizing agency.” If the claimant prevails on appeal, the court may require the agency to pay the claimant lost income and lost value of the seized property if the seizing agency retained the property during the appeal.⁷⁶
11. If the claimant prevails at trial, the court may award reasonable attorney fees and costs if it finds the agency did not proceed in good faith or the action was a gross abuse of the agency’s discretion.⁷⁷
12. The 1992 Act retained the agency right to use or sell forfeited property and retained the contraband forfeiture “law enforcement trust fund” for deposit of currency and proceeds from sale. The Act established priority in payment of liens (where lienholders established their “innocent” defense), storage, maintenance, security, forfeiture costs and court costs. Remaining funds may, as before, be used by the agency, upon approval of the governing body, for law enforcement purposes, but not for “normal operating needs of the law enforcement agency.” Fifteen percent of trust funds over \$15,000 annually must be donated to drug treatment,

74. FLA. STAT. § 932.701(2)(a) (Supp. 1992).

75. *Id.* § 932.704(7).

76. *Id.* § 932.704(9)(b); see *In re Forfeiture of 1976 Kenworth Tractor Trailer*, 546 So. 2d 1083 (Fla. 4th Dist. Ct. App. 1989), *aff'd*, 576 So. 2d 261 (Fla. 1990).

77. FLA. STAT. § 932.704(10) (Supp. 1992).

abuse education and prevention, crime prevention, safe neighborhood, or school resource programs. Reporting requirements by the agencies to the Department of Law Enforcement and the Legislature were changed and specified in the 1992 Act.⁷⁸

13. The 1992 Act requires training of law enforcement officers in the area of seizure and forfeiture of property. Training is to begin by October 1, 1993.⁷⁹
14. Strength was added to the previously largely ignored reporting requirement by the addition of penalties of up to \$5000 against agencies that fail to comply.⁸⁰
15. The 1992 Act became effective July 1, 1992.⁸¹

IV. CASE LAW, JULY 1992 TO JULY 1993

A. *Burden and Standard of Proof—Sufficiency of Evidence*

In *In re Forfeiture of 1987 Chevrolet*,⁸² a son used his mother's vehicle to commit a felony. The trial court found that the mother "did not use reasonable care to see that her son did not use the car for criminal purposes."⁸³ Accordingly, the court held that the agency failed to meet the statutory requirement of actual or constructive knowledge that property was employed or likely to be employed in criminal activity.⁸⁴ The statute does not provide a defense for effort to prevent use although such evidence or lack of same may be relevant in proving constructive knowledge.⁸⁵

Application of the *Department of Law Enforcement* standard of proof was made in *Fink v. Holt*.⁸⁶ Martin County Sheriff's Deputies chased a doctor for three miles until he crashed his 1985 Chevrolet Corvette. Deputies found a partially smoked marijuana cigarette on the driver's seat

78. *Id.* § 932.7055 (tentatively renumbered at § 932.7055).

79. *Id.* § 932.706.

80. *Id.* § 932.707.

81. Florida Contraband Forfeiture Act, ch. 92-54, § 11, 1992 Fla. Laws 500, 513.

82. 605 So. 2d 1322 (Fla. 1st Dist. Ct. App. 1992).

83. *Id.* at 1323.

84. *Id.*

85. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

86. 609 So. 2d 1333 (Fla. 4th Dist. Ct. App. 1992).

and several controlled substances that were not in marked containers in his briefcase. Possession of controlled drugs without a prescription or without labels are both felonies in Florida. The Sheriff initiated forfeiture proceedings against the Corvette. The doctor contested the forfeiture on grounds that no crime was committed because, as a doctor, he was privileged to possess the unlabeled drugs. The trial court found that there was probable cause to seize the vehicle under the totality of circumstances.⁸⁷ On appeal, the Fourth District Court of Appeal held that the evidence did not establish probable cause because the Sheriff failed to overcome the presumption of innocence accorded to a physician that possession of schedule II substances is in the normal course of practice.⁸⁸ “We do not believe that the mere presence in a physician’s un- or mislabeled containers is enough to suggest that the physician is not using the schedule II drug ‘in the usual course of [his] business or profession’ or ‘in good faith and in the course of professional practice.’”⁸⁹ Further, the district court held that the trial court erred in using the probable cause standard.⁹⁰ Relying on *Department of Law Enforcement*, the court found that the Sheriff’s proof was “at best in equipoise” and does not establish the Sheriff’s entitlement to forfeiture by clear and convincing evidence.⁹¹

The City of Deland appealed a trial court’s directed verdict in a forfeiture action against \$301 and a 1979 Ford van in *City of Deland v. Miller*.⁹² City police seized the van and cash after observing the owner transport stolen property in the van. The only evidence to support forfeiture of the cash was that the owner acquired the money through his television and stereo business from which he had not reported sales for the months of June through September, 1990, to the Department of Revenue.⁹³ The trial court did not permit this evidence and entered a directed verdict. The Fifth District Court of Appeal affirmed as to the cash but reversed and remanded as to the van, noting that it was undisputed that stolen property was transported in the van and that the owner admitted the identity of the van in pleadings and joint pre-trial compliance.⁹⁴

87. *Id.* at 1335.

88. *Id.* at 1336.

89. *Id.* (citations omitted).

90. *Id.*

91. *Fink*, 609 So. 2d at 1337.

92. 608 So. 2d 121 (Fla. 5th Dist. Ct. App. 1992).

93. *Id.* at 122.

94. *Id.*

In *Department of Highway Safety & Motor Vehicles v. Charles*,⁹⁵ the Florida Highway Patrol had probable cause to believe \$39,390 was intended to be used to purchase drugs (contraband) where they stopped a Chevy pickup truck that was southbound on I-95 in Volusia County and the cash was found under a tarpaulin in a metal can stacked in bundles secured by different colored rubber bands. A baggie with marijuana was also found in the can. The three men in the van denied ownership of the money and knowledge of how it got in the truck. A K-9 drug-trained dog alerted positive to the presence of narcotics on the truck seat, the metal can and a separate baggie of cash found in one of the men's pockets. Troopers gave expert opinions regarding the method of packaging money and the notoriety of Miami, Florida as a center for drug smuggling and as a source of supply.⁹⁶ Two of the truck occupants had prior drug crime records. Valium prescribed to another person was found in the coat pocket of one of the occupants and he gave two conflicting accounts of how it got into his pocket. The truck and occupants were from Kentucky. On this evidence, the Fifth District Court of Appeal reversed the trial court's dismissal of the forfeiture and found probable cause did exist based upon "the totality of the circumstances."⁹⁷ The court cautioned that upon remand the department must show grounds for forfeiture by clear and convincing evidence pursuant to *Department of Law Enforcement*.⁹⁸

In a case that gives no facts other than that the trial court forfeited jewelry worn by a person during a drug sale, the First District in *Jenkins v. City of Pensacola*⁹⁹ reversed and remanded for entry of an order dismissing the forfeiture.¹⁰⁰ The reversal was based upon the *Department of Law Enforcement* clear and convincing standard.¹⁰¹ It is difficult, however, by any standard to imagine how the drug dealer used jewelry worn by him as an instrumentality in the crime or in aiding or abetting the crime. Perhaps the "jewelry" was a watch and he looked at it to verify the appointed time for the drug sale thus establishing a nexus between the watch and the crime.

95. 606 So. 2d 750 (Fla. 5th Dist. Ct. App. 1992).

96. *Id.* at 752. In a footnote, the court said "Regrettably Miami, Florida, has achieved a degree of notoriety for being a center for drug smuggling and a source of supply." *Id.* at n.4 (citing *United States v. \$4,255,000*, 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986)).

97. *Id.* at 754.

98. *Id.* at 751; see *Department of Law Enforcement*, 588 So. 2d at 755.

99. 602 So. 2d 988 (Fla. 1st Dist. Ct. App. 1992).

100. *Id.*

101. *Id.*

*In re Forfeiture of \$8489*¹⁰² was another reversal of forfeiture, based upon *Department of Law Enforcement*. The Second District Court of Appeal questioned whether the “clear and convincing” standard of proof will result in greater protection for Floridians or will just result in forfeiture cases being filed in federal court where the standard of proof remains by the preponderance.¹⁰³ Judge Altenbernd wrote the opinion questioning the value of the new standard in a case where \$8489 was forfeited by the trial court upon evidence that the currency was found in a home pursuant to execution of a search warrant that also produced eight and one-half pounds of marijuana, a triple beam scale and other paraphernalia common for drug sellers.¹⁰⁴ The district court reversed and remanded for a new hearing to consider the evidence in light of the higher standard.¹⁰⁵ Certainly the evidence in this case provided probable cause and, under pre-*Department of Law Enforcement* law, the claimant had the burden to prove by a preponderance of the evidence that the currency was not drug money. On remand, the agency has the burden to prove it was drug money by clear and convincing evidence. Given that most similar cases are based solely upon the circumstances, it appears many of these cases may not rise to the level of clear and convincing proof.

The positive alert of a trained drug dog has long been sufficient to supply probable cause to search cars and arrest persons.¹⁰⁶ This rule, however, was questioned by Third District Court of Appeal Judge Ferguson in a concurring opinion of *Metro-Dade Police Department of Dade County v. Hildalgo*.¹⁰⁷ Judge Ferguson opined that an alert by a drug dog coupled with association with a criminal suspect supplied only “founded suspicion” and not “probable cause” to seize a vehicle for forfeiture.¹⁰⁸

Where claimants, who were in a 1986 Ford truck, picked up two minor females who had solicited a ride, and took them to a place where they had illegal sexual activity, the Second District Court of Appeal held that the use of the truck was only incidental to the crime and accordingly it was not subject to forfeiture.¹⁰⁹ The men, however, then drove the females

102. 603 So. 2d 96 (Fla. 2d Dist. Ct. App. 1992).

103. *Id.* at 98.

104. *Id.* at 97.

105. *Id.* at 98.

106. *See In re Forfeiture of \$62,200*, 531 So. 2d 352, 356 (Fla. 1st Dist. Ct. App. 1988).

107. 601 So. 2d 1259 (Fla. 3d Dist. Ct. App. 1992) (affirming forfeiture dismissal on other grounds).

108. *Id.* at 1261 (Ferguson, J., concurring).

109. *In re Forfeiture of 1986 Ford PU*, 619 So. 2d 337 (Fla. 2d Dist. Ct. App. 1993).

looking for a motel and ended up staying overnight where one of the men lived and there further illegal felony sex occurred. The court held that this second incident was sufficient to provide a nexus between the illegal acts and use of the truck to transport the girls to the scene of the crime.¹¹⁰ Forfeiture of the truck was affirmed because it was used in the second incident to aid the commission of a felony by transporting the parties to the scene.¹¹¹

B. *Ownership—Standing*

An important question of standing was clarified by the Florida Supreme Court in *Byrom v Gallagher*.¹¹² An aircraft was seized as contraband after it had been used illegally and sold but prior to the Federal Aviation Administration's recording of the bill of sale. Since the prior owner was the "registered" owner at the time of seizure, the Fifth District Court of Appeal denied standing to Byrom who was the registered owner at the time of the forfeiture hearing.¹¹³ In reaffirming a prior decision, the Florida Supreme Court held that "[t]he fact that a person is a bona fide purchaser in itself is not adequate to give a party standing."¹¹⁴ However, in prior cases, the party making a claim in the forfeiture was not the registered owner at the time of the forfeiture. The court decided to allow Byrom and future claimants to establish standing if they prove the additional element that they were bona fide purchasers.¹¹⁵

Consequently, in determining whether a person has standing the trial judge should consider: 1) whether that person holds legal title at the time of the forfeiture hearing or has complied with the requirements for receiving title; and 2) whether that person is in fact a bona fide purchaser. The trial judge should consider the facts surrounding the sale to determine whether the transfer is in fact a bona fide purchase. The relationship of the parties, the date the instruments were executed, the value of the property, the sale price, and canceled checks or bank deposits to show actual payment and receipt of money are all factors which the trial court should consider in determining whether the transfer

110. *Id.* at 339-40.

111. *Id.*

112. 609 So. 2d 24 (Fla. 1992).

113. *Id.* at 24-25 (citing *Byrom v. Gallagher*, 578 So. 2d 715 (Fla. 5th Dist. Ct. App. 1990)).

114. *Byrom*, 609 So. 2d at 26 (citing *Lamar v. Wheels Unlimited, Inc.*, 513 So. 2d 135 (Fla. 1987)).

115. *Id.* at 27.

is a bona fide purchase. This list is not intended to be exhaustive but rather illustrative of the consideration to be made by the trial judge. In making the determination whether a title holder is also a bona fide purchaser, the trial judge should be able to sift the wheat from the chaff.¹¹⁶

The sword cut from the other side on the titled owner principle of standing in forfeiture in *In re Forfeiture of 1987 Chevrolet*.¹¹⁷ The court rejected the contention that the son who used a 1987 Chevrolet titled to his innocent mother was the “de facto” owner.¹¹⁸ It was again held that the term owner in section 932.703(2) “is limited to one who has obtained a title certificate”¹¹⁹ The final order of forfeiture was reversed because the trial court made no finding that the mother had the requisite knowledge that her son used the vehicle in a felony.¹²⁰

Without reference to its holding in the previous case, and without reference to, but probably because of, *Byrom*,¹²¹ the First District inexplicably cited *Department of Law Enforcement* to support its holding that the presumption of title by co-ownership of a motor vehicle *can* be overcome by clear and convincing evidence.¹²² In this case, the court held that the pickup truck titled to a father and son jointly was not a true co-ownership and the innocent father had no standing because he was only a nominal owner.¹²³ The district court remanded for a new hearing on the issue of the father’s interest under a clear and convincing standard.¹²⁴ The case is in a hopeless legal morass. Standing must be shown by the claimant not the agency. “[O]nly persons who have standing can participate in a judicial proceeding.”¹²⁵ Furthermore, “standing is limited only to those persons who can show a recorded title or compliance with the requirements for

116. *Id.* at 26-27. The court also noted that this requirement for standing is limited to property where the state requires a title or compliance with title requirements to show ownership. *Id.* at 27 n.3. In other types of property, a party would only have to show he or she is a bona fide purchaser. *Id.*

117. 605 So. 2d 1322 (Fla. 1st Dist. Ct. App. 1992).

118. *Id.* at 1323.

119. *Id.* (citing *Lamar*, 513 So. 2d at 137).

120. *Id.* at 1325.

121. *Byrom*, 609 So. 2d at 24.

122. *In re Forfeiture of 1989 Isuzu Pickup Truck*, 612 So. 2d 695 (Fla. 1st Dist. Ct. App. 1993).

123. *Id.* at 697.

124. *Id.*

125. *Byrom*, 609 So. 2d at 26 (citation omitted).

receiving title."¹²⁶ The First District has remanded with directions for the trial court to require the wrong party to establish standing by the wrong standard of proof! The case should have been remanded with instructions to follow *Byrom*.

C. Notice Requirements

In *State Department of Natural Resources v. 62 Ft. White De Vries Len Ketch Sailboat*,¹²⁷ the trial court dismissed a forfeiture for failure to give notice of right to a post seizure hearing where the agency had sent notice of the seizure prior to *Department of Law Enforcement* but did not send a supplemental notice advising of the right to post seizure hearing.¹²⁸ The Third District reversed, holding that *Department of Law Enforcement* did not require a supplemental notice and even if it did, the omission was harmless since claimant knew of the right and did not request a hearing.¹²⁹ In another case, where there was no notice at all, the Third District held that the notice requirement was not grounds for reversal because the seizure was prior to *Department of Law Enforcement*.¹³⁰ The district court also held that neither the statute nor *Department of Law Enforcement* requires a warrant, consent or exigent circumstances to seize property for forfeiture.¹³¹ In a decision handed down this year, without citing *Department of Law Enforcement*, the Fifth District reversed a forfeiture of a co-owners interest in a 1973 Trojan boat because the rule to show cause was not directed to that co-owner and the sheriff failed to comply with the notice provisions of the forfeiture statute.¹³²

V. CONCLUSION

Since 1980, Florida contraband forfeiture law has been a dynamic force in the courts and in the Legislature. The use of forfeiture has gone from virtual nonoccurrence to a peak. More recently, the laws regarding

126. *Id.*

127. 617 So. 2d 773 (Fla. 3d Dist. Ct. App. 1993).

128. *Id.* at 774-75.

129. *Id.* at 775.

130. *In re Forfeiture of 1986 Ford PU*, 619 So. 2d 337 (Fla. 2d Dist. Ct. App. 1993).

131. *Id.* at 338.

132. *Blanchard v. Osceola County Sheriff's Office*, 618 So. 2d 366 (Fla. 5th Dist. Ct. App. 1993).

forfeiture have been redefined and limited to avoid unduly oppressive results against innocent owners.

Although federal statutes and the United State Supreme Court have permitted forfeiture of contraband property from innocent owners,¹³³ Florida has always had innocent owner protection in it's forfeiture law.¹³⁴ Despite this protection, because forfeitures are not favored by the courts and are absolutely loathed by the fourth estate, the Florida Supreme Court and the Legislature have reacted by imposing numerous additional due process requirements since 1991.¹³⁵ The 1992 amendments to the Act finally provided a procedural framework that was not in the original 1980 Act, an omission that caused much confusion and misunderstanding in the intervening twelve years.

Forfeiture will continue to be a useful vehicle to punish offending property owners and convert criminal assets to good public use. However, with the new clear and convincing standard of proof, forfeitures will have to be supported by stronger proof of illegal use. It is the foremost desire of the author that law enforcement agencies act responsibly and with great discretion in continuing to use this awesome law. The goose that laid the golden egg in 1980 was seriously wounded by the few excessive applications, the media exposure and the court and legislative response. Hopefully, the goose will fully recover and resume its productive life.

133. *E.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (forfeiture of a yacht worth over \$100,000 because it contained one marijuana cigarette even though the owner had no knowledge of the violation).

134. FLA. STAT. §§ 943.41-943.44 (Supp. 1974) (Florida Uniform Contraband Transportation Act) (renumbered at FLA. STAT. §§ 932.701-932.704 (1981)).

135. *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991); FLA. STAT. §§ 932.701-932.707 (Supp. 1992).