THE FLORIDA CONTRABAND FORFEITURE ACT AND THE EIGHT AMENDMENT

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Introduction

The Florida Contraband Forfeiture Act (the "Act") is found in Florida Statutes §§932.701-706 (2010). The Act establishes a narrow set of circumstances in which a Florida law enforcement agency may seize the property of a citizen, and cause that citizen to forfeit their ownership rights in that property.[1] The stated purpose of the Act is:

> 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. The potential for obtaining revenues from forfeitures must not override fundamental considerations such as public safety, the safety of law enforcement officers, or the investigation and prosecution of criminal activity. It is also the policy of this state that law enforcement agencies ensure that, in all seizures made under the Florida Contraband Forfeiture Act, their officers adhere to federal and state constitutional limitations regarding an individual's right to be free from unreasonable searches and seizures, including, but not limited to, the illegal use of stops based on a pretext, coercive-consent searches, or a search based solely upon an individual's race or ethnicity.[2]

Brief Background of Civil Forfeiture

The Act, in one form or another, has been in effect since 1974, but the principle of civil forfeiture has a long history within the United States legal system. "Since the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events."[3]

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[1] See generally Fla. Stat. §§932.701-706.

[2] § 932.704, Fla. Stat.

[3] United States v. Ursery, 518 U.S. 267, 274 (1996) (citing, inter alia the Act of July 31, 1789 ch. 5, § 12, 1 Stat. 39 which subjected goods to forfeiture where they were unloaded at night, without permit.)

Historically, Florida has utilized civil forfeiture provisions to deter specific behaviors.[4] While § 526.27 is still a viable ground for certain types of forfeitures, the Florida Contraband Forfeiture Act, is the most often utilized provisions in forfeiture cases today.

Forfeiture proceedings have been challenged in a myriad of ways, from challenges regarding the implications of double jeopardy[5] to due process concerns regarding innocent owners[6]. This article focuses on the application of the Eight Amendment of the US Constitution's prohibition on excessive fines as applied in Florida Courts.

The Florida Contraband Forfeiture Act

The current provisions have been in effect since 1974, and have been subject to several amendments, most recently in 2010. Forfeitures are disfavored in Florida, and the Act is to be strictly construed.

> The Act raises numerous constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a policy that it must strictly construe forfeiture statutes.[7]

[4] E.g., § 562.27, Fla. Stat., which is the "Seizure and Forfeiture" provision in the Beverage Law Enforcement Chapter of the Florida Statutes; see also Scarborough v. Newsome, 7 So. 2d 321, 323 (Fla. 1942) (construing Chapter 19301, Acts of 1939, Laws of Florida, which was the rough equivalent of today's Florida Statutes § 562.27).

[5] Waterloo Distilling Corp. v. United States, 282 U.S. 577, 581 (1931) (holding that double jeopardy does not preclude civil forfeitures); United States v. Ursery, 518 U.S. 267, 292 (1996) ("*in rem* civil forfeitures are neither punishment nor criminal for purposes of the Double Jeopardy Clause.) (internal quotations omitted)

[6] Van Oster v. State of Kansas, 272 U.S. 465, 468 (1926) ("It has long been settled that statutory forfeitures of property intrusted [sic] by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.")

[7] Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 961 (Fla. 1991).

The Act allows for the seizure and eventual forfeiture of "Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act…".[8,9] Contraband, as defined in the Act, not only includes obvious things, such as controlled substances, but it also includes just about any other type of personal property which

> "was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.[10]

The Act contains five categories of prohibitions. The contravention of any of the enumerated prohibitions would constitute a violation of the Act.[11]

Pursuant to the Act, "The seizing agency shall promptly[12] … [file] a complaint in the circuit court within the jurisdiction where the seizure or offense occurred." The Act does not define "seizing agency". However, the public policy behind the Act[13] explicitly states the legislatures' intent that the law enforcement agencies of Florida utilize the Act. "Law Enforcement Agency" is defined in § 934.50(d) of the Florida Statutes, as "a lawfully established

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[8] § 932.703, Fla. Stat. (2010).

[9] Under Fla. Sta. § 932.701(1)(b), the Act requires the seizure of certain personal property in the possession of or belonging to any person who takes aquaculture products in violation of § 812.014(2)(c). Florida law defines aquaculture products as "aquatic organisms and any product derived from aquatic organisms that are owned and propagated, grown, or produced under controlled conditions. Such products do not include organisms harvested from the wild for depuration, wet storage, or relay for purification." Fla. Stat. § 597.0015.

[10] Fla. Stat. § 932.701(2)(a).

[11] See Fla. Stat. § 932.702.

[12] "Promptly" requires that the seizing agency do so within 45 days. § 932.704 (2)(c)

[13] § 932.704 (1) explicitly states the policy of the Act.

state or local public agency that is responsible for the prevention and detection of crime, local government code enforcement, and the enforcement of penal, traffic, regulatory, game, or controlled substance laws." [14]

"Any owner, entity, bona fide lienholder, or person in possession of the property subject to forfeiture when seized, who is known to the seizing agency after a diligent search and inquiry" is entitled to notice of the seizure.[15] Upon receiving such notice, the person is entitled to an adversarial preliminary hearing, upon request.[16]

There are two phases of any forfeiture proceeding.[17] The first phase, often referred to as the "seizure phase", requires the seizing agency to establish probable cause that the property subject to forfeiture was used in violation of the Act.[18] While hearsay evidence is admissible in probable cause hearings, it may not be the sole basis for a finding of probable cause.[19]

The second stage, often referred to as the "forfeiture phase" requires Petitioner to meet a higher burden, to wit- clear and convincing evidence. The forfeiture stage not only requires a higher burden of proof, but it also requires the seizing agency to prove a wider range of elements. For example, at the forfeiture stage, the seizing agency is required to demonstrate by

[14] Fla. Stat.§ 934.50.

[15] Fla. Stat. § 932.704 (2)(e).

[16] Fla. Stat. § 932.703 (2)(a).

[17] See e.g., Velez v. Miami-Dade County Police Dept., 934 So. 2d 1162 (Fla. 2006).

[18] Id.; See also Fla. Stat. 932.703(1).

[19] Perry v. Bradshaw, 43 So. 3d 180, 181 (Fla. 4th DCA 2010) (finding "that the (underlying) trial court erred in relying on nothing but inadmissible hearsay to find probable cause that he committed the offense.").

clear and convincing evidence that the owner had actual or constructive knowledge that the property was being employed or was likely to be employed in violation of the Act.[20]

The US Constitution's Eight Amendment's Excessive Fines Clause

The Eight Amendment to the US Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Florida law recognizes that the Eight Amendment's "excessive fines" clause applies in forfeiture cases under the Act.[21]

Florida law requires courts to apply two multifactor tests in order to ensure that a forfeiture does not violate the Eight Amendment's excessive fines clause.[22]

A court must first perform an instrumentality test. If the instrumentality test is met, the court must then apply a "proportionality" test.[23]

As applied in Florida courts, the "instrumentality" test weighs five factors:

> (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.[24]

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[20] See Gomez v. Vill. of Pinecrest, 41 So. 3d 180 (Fla. 2010).

[21] Town of Jupiter v. Garcia, 698 So. 2d 871 (Fla. 4th DCA 1997); see also In re Forfeiture of 2006 Chrysler 4-Door, Identification No. 2C3KA53GX6H258059., 9 So. 3d 709 (Fla. 2d DCA 2009).

[22] E.g., Town of Jupiter 698 So. 2d 871.

[23] Id.

[24] Town of Jupiter, 698 So. 2d at 872 (citing United States v. Chandler, 36 F.3d 358, 365 (4th Cir.1994), cert. denied, 514 U.S. 1082, 115 S.Ct. 1792, 131 L.Ed.2d 721 (1995).

If the court finds, subject to the application of the above factors, that the property to be forfeited was an instrumentality under the test, the court must then consider the proportionality test.[25] "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[26]

Florida law is unsettled regarding the precise factors to be considered in the proportionality test.

The Second Circuit has cited United States v. Bajakajian, 524 U.S. 321, 334 (1998) for the use of a three prong test. The Second Circuit considers: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature or sentencing commission; and (3) the harm caused by the defendant. [27]

In Bajakajian, 524 U.S. at 336, the US Supreme Court adopted the proportionality test as articulated in Solem v. Helm, 463 U.S. 277, 288 (1983) and Rummel v. Estelle, 445 U.S. 263, 271, 100 S.Ct. 1133, 1137–1138, 63 L.Ed.2d 382 (1980).

In Solem v. Helm, the Court stated that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same

[25] Id. at 872.

[26] In re Forfeiture of 2006 Chrysler 4-Door, Identification No. 2C3KA53GX6H258059., 9 So. 3d 709, 711 (Fla. 2d DCA 2009) (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

[27] In re Forfeiture of 2006 Chrysler 4-Door, Identification No. 2C3KA53GX6H258059., 9 So. 3d 709, 712 (Fla. 2d DCA 2009) (citing United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[28]

In Town of Jupiter v. Garcia, that court used a four-part proportionality analysis, considering (1) the culpability of the claimant; (2) the gravity of the crime; (3) the sentence that could be imposed on the perpetrator for the offense; and (4) the nature and value of the property forfeited.[29]

Florida courts have applied various factors as part of proportionality tests, but central to every court's inquiry is a balancing of the value of the property forfeited with the gravity of the offense alleged to have been committed.[30]

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Conclusion

A practitioner should approach a civil forfeiture case with a wide lens. A person who receives notice of a forfeiture must demand an adversarial hearing to determine probable cause. Each case will have its own unique factors regarding probable cause at the seizure phase, as well as the forfeiture stage which not only requires a higher burden of proof, but also requires that the

[28] Solem v. Helm, 463 U.S. 277, 292 (1983).

[29] Town of Jupiter v. Garcia, 698 So. 2d 871, 872 (Fla. 4th DCA 1997).

[30] Compare In re Forfeiture of 2006 Chrysler 4-Door, Identification No. 2C3KA53GX6H258059., 9 So. 3d 709, 712 (Fla. 2d DCA 2009) with Town of Jupiter v. Garcia, 698 So. 2d 871, 872 (Fla. 4th DCA 1997).

[31] In re Forfeiture of 2006 Chrysler 4-Door, Identification No. 2C3KA53GX6H258059., 9 So. 3d 709, 711 (Fla. 2d DCA 2009) (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

seizing agency to prove a wider range of elements. While these two phases present their own opportunities for an attorney to advocate, a practitioner should also review the various constitutional mechanisms which are available in these cases. This article only briefly examined Florida's application of the Excessive Fines clause of the Eighth Amendment to the US Constitution. This is one in a myriad of viable challenges to a forfeiture proceeding. However, Florida courts have yet to determine a definitive test for establishing proportionality. The absence of a defined rule provides an opportunity for practitioners. A skilled practitioner can, and should, present a test that encompasses the various tests being applied in Florida, in a way that best serves the particular facts of their case. In doing so, the attorney must present the various tests as they appear in the relevant caselaw, but he or she will have some flexibility to present the rule in a way that favors their client.