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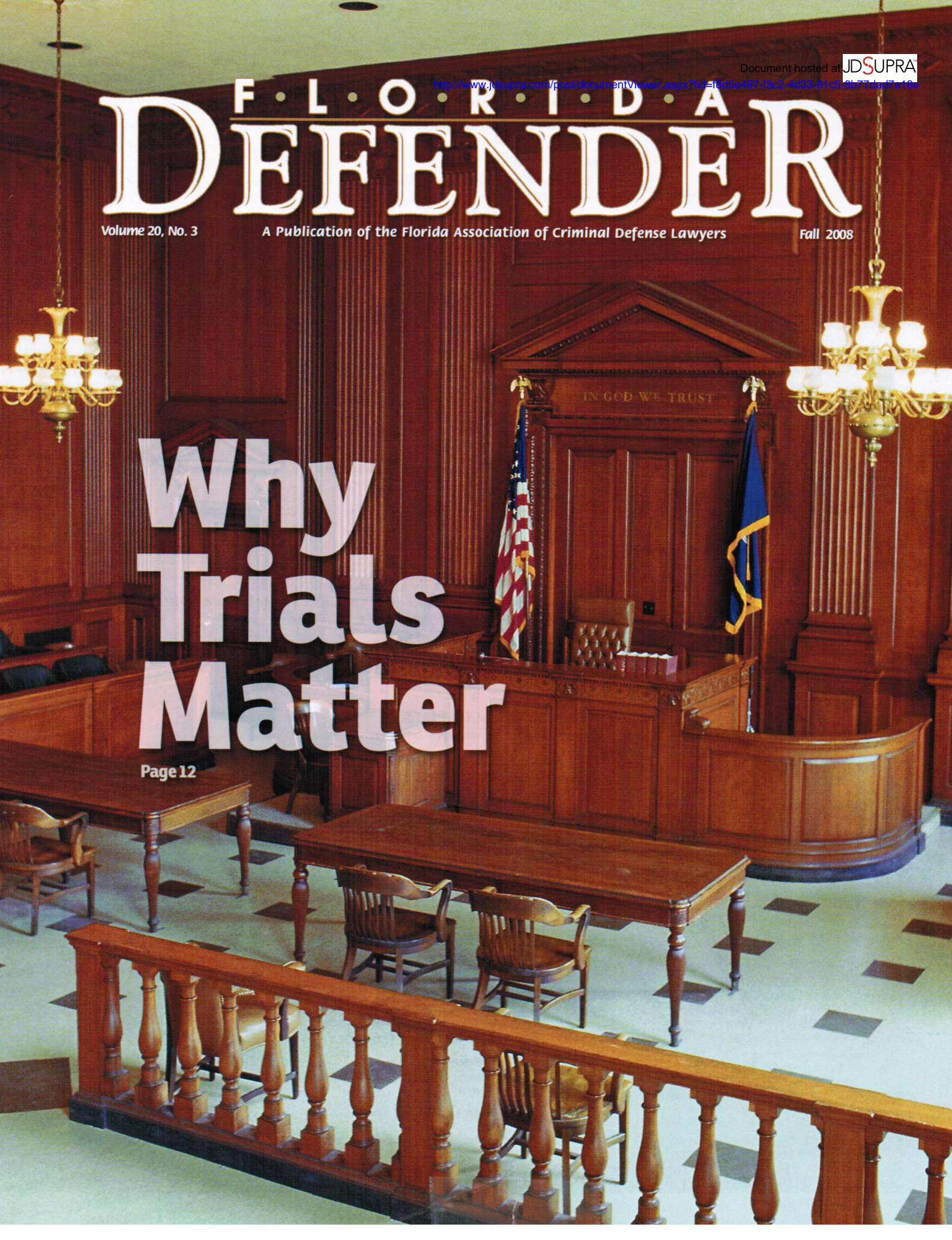
Volume 20, No. 3

A Publication of the Florida Association of Criminal Defense Lawyers

Fall 2008

Why Trials Matter

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Primer For Adversarial Preliminary Hearings Under the Florida Contraband Forfeiture Act



by
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It is Monday morning, and on the line is the first frantic phone call of the week. Over the weekend, the caller explains, she was stopped for DUI, found to have cocaine in her pocket and the police seized her car. She is in a panic and needs to get her car back ASAP so she can drive her kids to school.

Seizure of citizens' property under the Florida Contraband Forfeiture Act is occurring with greater frequency throughout the state of Florida. Given the highly punitive nature of a seizure and short timelines, it is important that all lawyers be prepared to quickly contest these State actions. It is crucial to be prepared to fight each step in the seizure and forfeiture process and this article addresses the first step, the adversarial preliminary hearing. While likelihood of success in the adversarial preliminary hearing may be low, it is possible to prevail. Also, it is a key hearing in fighting the forfeiture and a good tool for gaining evidence in the pending criminal case.

STATUTES YOU NEED TO KNOW

Florida Statute 932.703 provides for the adversarial preliminary hearing. However, you should familiarize yourself with the entire Florida Contraband Forfeiture Act, Florida Statutes 932.701 through 932.707.

DUE PROCESS AND PROCEDURAL CONSIDERATIONS

Under Florida Statute 932.703 personal property may be seized at the time of a violation or arrest or subsequent to the violation. The owner of the personal property is entitled to notice at the time of the seizure or may be noticed by certified mail, return receipt requested.¹ If noticed by certified mail, notice must be mailed within five working days after the seizure.² Whether delivered in person or by certified mail, the notice must state that a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice.

To request an adversarial preliminary hearing, the claimant must timely make the request in writing, and send it by certified mail, return receipt requested, to the seizing agency.³ There are no formal requirements for the form of the request for an adversarial preliminary hearing. It is recommended that you attach a copy of the Notice of Seizure and identify in your request the person claiming an interest in the property and the property seized. You should also verify that you are sending the request to the correct seizing agency.

Once the seizing agency has received a request for an adversarial preliminary hearing, the hearing must be held within ten days after the request is received or as soon as practicable thereafter. The burden is on the seizing agency to schedule this hearing. This hearing is intended to be held within ten days and if it is to be held at any time beyond that, the seizing agency must show good cause for the delay.⁴

STANDARD OF REVIEW AND CONDUCT OF HEARING Under Florida Statute §932.703(2)(c),

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 seized 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.⁵ Any felony can be grounds for forfeiture. Florida Statute §932.703(2)(c). The initial burden is on the state to show probable cause for the forfeiture. *City of Coral Springs v. Forfeiture of A 1997 Ford Ranger Pickup Truck*, 803 So.2d 847, 850 (Fla. 4th DCA 2002). In most cases, the seizing agency will present testimony from the officers who conducted the investigation to establish probable cause.

If the seizing agency meets its initial burden and the trial court determines that probable cause for forfeiture exists, the burden shifts to the claimant to rebut the probable cause showing or establish that the forfeiture law was not violated. In *re Forfeiture of One Hundred Seventy-One Thousand Nine Hundred Dollars (\$171,900) in U.S. Currency*, 711 So.2d 1269 (Fla. 3rd DCA 1998). Probable cause is a very low standard and if established, the Court shall authorize the seizure or continued seizure of the subject contraband.⁶ The Court is required to provide a copy of its finding of probable cause to any person entitled to notice.

FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

The law is clear that the exclusionary rule applies to forfeiture proceedings, and that evidence obtained in violation of the Fourth Amendment must be excluded from the adversarial preliminary hearing.⁷ The seizing entity must establish probable cause for violation of the forfeiture act without benefit of evidence obtained in violation of the Fourth and Fourteenth Amendments. Therefore, prior to making a determina-

tion of whether there is a nexus between the seized property and violation, the trial court must address any Fourth Amendment issues raised.⁸

Ideally, in an adversarial preliminary hearing under the Forfeiture Act, the claimant would file, simultaneously with a request for an adversarial preliminary hearing, a responsive pleading with affirmative defenses and a motion to suppress. See *State v. Glass*, 657 So.2d 934 (Fla. 1st DCA 1995). However, given the short time for response, a claimant may raise a Fourth Amendment issue ore tenus at an adversarial preliminary hearing. *Golon v. Jenne*, 739 So.2d 659 (Fla. 4th DCA 1999). In the event that a Fourth Amendment claim is raised orally at the adversarial preliminary hearing, and the government requests an opportunity to develop the evidence or to marshal the law in order to respond, the court should grant a continuance for a reasonable amount of time. *Golon* at p.663.

PRACTICAL TIPS FOR REPRESENTING CLAIMANTS IN FORFEITURE ACTIONS

Given the relatively low burden on the seizing agency to obtain Court authorization for continued seizure, it is difficult to prevail at adversarial preliminary hearings. However, valuable information can be gathered at this proceeding. Since it is the burden of the seizing agency to come forward with evidence to support their claim that the property was being used in violation of the Florida Contraband Forfeiture Act, this is an opportunity to gather early discovery. In most cases, the seizing agency will present testimony from the officers who conducted the investigation. You are entitled to cross-examine these officers and lock-down their statements at a stage much earlier than you would normally be able to depose them in the criminal case.

Your client has a right to testify at the adversarial preliminary hearing. However, most likely there will be a criminal charges pending at the time of the hearing and you do not want to jeopardize your client's position in the

criminal case. While the Fifth Amendment provides protection against self incrimination for matters outside of the direct examination, it would only be under unique circumstance that a client should testify at the adversarial preliminary hearing.

As an alternative to fighting the forfeiture, you may want to ask the seizing agency if your client can buy back their property prior to the preliminary adverse hearing. Another solution may be an agreed upon plea in the associated criminal case predicated on the return of the vehicle. You may able to negotiate a reduced price of buying back the property by entering into early negotiations.

FEES

As a final and positive note, if you are successful in challenging a seizure at the adversarial preliminary hearing you are entitled to fees and costs from the seizing agency, up to a limit of \$1,000. Fla. Stat. §932.704(10). The language of the statute is mandatory and does not require a finding of bad faith or abuse of discretion. A motion for fees should be made immediately upon a finding of no probable cause.

Most criminal defense lawyer charge flat fees for services. You may want to enter into an hourly fee agreement with your client or consider a contingency agreement. There is a great amount of uncertainty in how these cases progress. They may be settled quickly or they may involve protracted litigation. ☝

¹ 932.701(2)(e), Fla. Stat. defines "person entitled to notice" as "any owner, entity, bona fide lien holder, 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."

² *Town of Oakland v. Mercer*, 851 So.2d 266 (Fla. 5th DCA 2003) (it is the date of the seizure of the item sought to be later forfeited which

starts the running of the time period for the five day notice. Document hosted at JDSUPRA
<http://www.jdsupra.com/post/documentViewer.aspx?fid=f8d5e487-f3c2-4d33-81c5-8b77dad7e18e>

³ In re Forfeiture of 2003 Chevrolet Corvette, 932 So.2d 623, 625 (Fla. 2nd DCA 2006) (statutory language providing for notice by certified mail, registered mail or hand delivery eliminates problems in proving timely service, but when actual notice is conceded, strict compliance is not required.)

⁴ See *Cochran v. Harris*, 654 So.2d 969 (Fla. 4th DCA 1995) (23 day delay violated due process rights); *DHSMV v. Metriver*, 684 So.2d 204 (Fla. 4th DCA 1996) (five-day delay violated due process rights) and *Chuck v. City of Homestead Police Dept.*, 888 So.2d 736, 754 (Fla. 3rd DCA 2004) (Any exception to the rule that a post-seizure adversarial hearing must be held within ten days of the claimant's request, as contemplated by the language "or as soon as practicable thereafter," is limited to extraordinary circumstances.)

⁵ "Hearsay evidence [such as the police affidavit utilized in this case] can ... be used to establish probable cause... although it may not serve as the basis for the forfeiture." *Medioius v. Department of Highway Safety & Motor Vehicles*, 534 So. 2d 729, 732 (Fla. 5th DCA 1988) (citing In re Forfeiture of 1983 Wellcraft Scarab, 478 So. 2d 306 (Fla. 4th DCA) [cause dismissed, 494 So. 2d 1150 (Fla. 1986)]), rev. denied, 542 So. 2d 1333 (Fla. 1989).

⁶ *Alvarez v. City of Hialeah*, 900 So.2d 761, 765 (Fla. 3rd DCA 2005) (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)

⁷ See *Alvarez v. City of Hialeah*, 900 So.2d 761 (Fla. 5th DCA 2005) citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (exclusionary rule applicable to forfeiture proceedings); *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) (evidence obtained in violation of Fourth Amendment cannot be relied upon to uphold civil forfeiture.)

⁸ *Alvarez v. City of Hialeah*, 900 So.2d 761 (Fla. 5th DCA 2005); See also § 932.704(1), Fla. Stat. (2004) providing that:

...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.

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