

VIRGINIA: IN THE CIRCUIT COURT

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

Case No. _____

JOHN J. SMITH,

Defendant.

**DEFENDANT'S REPLY BRIEF TO THE COMMONWEALTH'S
MEMORANDUM OF LAW IN OPPOSITION TO SMITH'S MOTION
TO DISMISS FORFEITURE**

Defendant John Smith, through counsel, submits the following Reply Brief countering the Commonwealth's opposition to Defendant Smith's Motion to Dismiss its civil forfeiture petition.

ARGUMENT

I. UNDER RECENTLY ENACTED VA. CODE ANN. § 19.2-386.1, THE COURT CANNOT ORDER A STATE FORFEITURE OF REAL PROPERTY OF SOMEONE WHO WAS NOT CONVICTED NOR HAS PLEADED GUILTY TO A CRIMINAL DRUG OFFENSE THAT HAD A MINIMUM SENTENCE OF FIVE YEARS

The Commonwealth filed its Information against Defendant Smith and his wife, stating that the Defendants' real property was being seized

due to the fact that said property was used in substantial connection with the illegal manufacture, sale or distribution of controlled substances in violation of §18.2-248 or the sale or distribution of marijuana or possession with intent to distribute of marijuana in violation of §18.2-248.1 subsections (a)(3) or (c), and is therefore subject to forfeiture pursuant to §19.2-386.22 of the Code of Virginia.

The Commonwealth affirmed that the civil forfeiture action was a proceeding based on a drug offense under §§ 19.2-386.1 et seq. by detailing information about drugs found in the Smiths' home.

The Virginia General Assembly has the power to prescribe limitations and provisions for the forfeiture of property used in the violation of penal statutes, including amending state forfeiture laws when necessary to protect state residents' rights or to curb governmental abuse. *See Commonwealth v. Hall*, 297 Va. 143, 823 S.E.2d 485 (2019); *McNellis v. Commonwealth*, 171 Va. 471, 198 S.E. 493 (1938). During the 2020 Virginia General Assembly, state representatives did exactly that. They passed an amendment to Va. Code Ann. § 19.2-386.1, which became effective July 1, 2020. *See* Va. H.B. 1522 (2020 Legis. Sess.) ("Forfeiture of property used in connection with the commission of crimes; finding of guilt required"). This bill passed with unanimous approval in the Senate and near unanimous vote in the House (97-1). *See id.*

Under this new amendment, any forfeiture action must be stayed until the owner of the property is "*found guilty of any offense that authorizes forfeiture of such property.*" Va. Code Ann. § 19.2-386.1(C) (emphasis added). This amendment resulted from many years of strong and very vocal advocacy for reform of Virginia's seizure and forfeiture laws because of concerns of police abuse of the system, excessive fines, and violations of Virginians' liberties. *See* Rachel Jones, *Excessively Unconstitutional: Civil Asset Forfeiture and the Excessive Fines Clause in Virginia*, 25 Wm. & Mary Bill of Rights J. 1393, 1394 (2017); James Simon, *Civil Asset Forfeiture in Virginia: An Imperfect System*, 74 Wash. & Lee L. Rev. 1295, 1330-31 (2017); *Virginia Earns a D- for Its Civil Forfeiture Laws*, Abuse

of Civil Asset Forfeiture (Policing for Profit, Institute of Justice); *see also Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting denial of certiorari). Virginia began its reform when it changed the government's burden of proof from preponderance of the evidence to clear and convincing evidence to support forfeiture. Va. S.B. 457 (2016 Legis. Sess.) (Asset forfeiture; changes burden of proof); *see also* Tony Bergida, *Virginia General Assembly Unanimously Passes Civil Asset Forfeiture Reform*, Am. Legis. Exch. Council (Mar. 11, 2016) (noting how the passage of S.B. 457 signals a shift in attitude toward Virginia's civil asset forfeiture laws); Simon, *supra*, 74 Wash. & Lee L. Rev. at 1341.

Forfeiture actions in connection with or derived from illegal drug transactions commenced under the provisions of § 19.2-386.22 are bound by that section's limitations on seizures of real property and must follow the procedures and limitations also prescribed in § 19.2-386.1. Va. Code Ann. § 19.2-386.22(A)(i) states that "real property shall not be subject to lawful seizure unless the minimum prescribed punishment for the violation is a term of not less than five years."

First, Mr. Smith was not convicted of any drug offense. The Commonwealth affirmed that Mr. Smith was convicted only of the possession of a firearm after being convicted of a felony after the charge was severed from the drug offense charged in the Information. Second, even if the Commonwealth had not proceeded under the forfeiture law for drug offenses, there is no Virginia law that allows forfeiture of a person's home for possession of a firearm, likely because such an idea would be absurd. Logically, Virginia forfeiture laws relating to the possession of firearms under Va. Code Ann. §§ 19.2-386.27 to -.29 authorize seizure and forfeiture of only the weapons or firearms. Third, even under a more comprehensive forfeiture statute, Va. Code Ann. § 19.2-386.35, real

property cannot be seized or forfeited "unless the minimum prescribed punishment for the violation is a term of imprisonment of not less than five years." Mr. Smith was sentenced to only two years' incarceration for a weapons offense, the mandatory minimum under Va. Code Ann. § 18.2-308.2. This Court is bound by these legislative limitations and facts regardless of how many culpable statements about drug activity were made by Mr. Smith or the amount of drugs found at the home. Mere suspicion is not sufficient. The statutes are clear that forfeiture of property is not permitted unless there is a finding of guilt for an offense justifying seizure under the forfeiture statute cited. Simply put, if not found guilty of a drug offense with a minimum five-year sentence, real property cannot be seized. Thus, this Court cannot order the forfeiture of this property against Mr. Smith, co-owner of the seized real property.

Under the recent amendments to Va. Code Ann. § 19.2-386.1, the legislature set forth two exceptions that allow seizure of the real property even if there is no finding of guilt: (i) such forfeiture is ordered by a court pursuant to a lawful plea agreement, or (ii) the owner of the property has not submitted a written demand for the return of the property with the law enforcement agency that seized the property within 21 days from the date the stay terminates. Neither exception is applicable here. Mr. Smith submitted a written demand for the return of his real property to the County Sheriff's Department. Additionally, there is no plea agreement between the Commonwealth and Mr. Smith to any drug offense, nor is there any specific mention of the need to establish an innocent owner defense for co-owners of real property in the new amendments, even if Mr. Smith had claimed this defense (which he did not). Mrs. Smith's guilty plea to a drug offense does not change this analysis. Mrs. Smith

pleaded guilty to one felony charge of conspiracy to possess more than five pounds of marijuana with the intent to distribute and was placed on two years' probation. Obviously, punishment was less than the five-year minimum requirement for forfeiture of real property.

II. TO BE IN CONFORMITY WITH THE LANGUAGE AND INTENT OF THESE NEW AMENDMENTS TO § 19.2-386.1 AND THE NONSEVERABILITY OF TENANCY-BY-THE-ENTIRETY PROPERTY, A VIRGINIA STATE COURT CANNOT GRANT FORFEITURE OF THE SMITHS' REAL PROPERTY UNLESS BOTH SPOUSES ARE FOUND GUILTY OR HAVE PLEADED GUILTY TO THE APPROPRIATE OFFENSE GRANTING FORFEITURE OF SUCH PROPERTY

In countering the forfeiture of his real property, Mr. Smith has not asserted the *innocent owner* defense to state forfeiture available under Va. Code Ann. § 19.2-386.8. Mr. Smith merely asserted that the court should assess the immunity provided to tenancy-by-the-entirety property against other the spouse's creditors as set forth in *Rogers v. Rogers*, 257 Va. 323, 512 S.E.2d 821 (1999), and other state precedent. Although similar to the innocent owner defense, the immunity defense is not the same. It flows from the nature of the property classification as a matter of law. Thus, the Commonwealth's arguments surrounding the innocent owner's defense are pointless.

Mr. Smith merely claims that his property should be treated differently from other property subject to forfeiture due to the nature of it being held as a tenancy by the entirety. Virginia law holds that property held as tenancy by the entirety is immune from the debts of individual property owners. *Pitts v. United States*, 242 Va. 254, 408 S.E.2d 901 (1991). In *Pitts*, the Virginia Supreme Court justified this opinion by stating that "each owned the entire, undivided estate as tenants by the entireties, and neither could sever the tenancy by

alienating its interest during coverture." *Id.* at 259, 408 S.E.2d at 903 (citing *Vasilion v. Vasilion*, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951)). The Virginia Supreme Court reaffirmed state support of this view in *Jones v. Phillips*, ___ Va. ___, ___, 850 S.E.2d 646, 649 (2020) (discussing the 2000 General Assembly's breaking of "new ground by authorizing 'a husband and wife to convey certain tenancy by the entirety real estate to their joint revocable or irrevocable trust, or in equal shares to their separate revocable or irrevocable trusts' without losing its tenancy by the entirety status" in Va. Code Ann. § 55.1-136 (quoting J. Rodney Johnson, *Wills, Trusts, and Estates*, 34 U. Rich. L. Rev. 1069, 1076 (2000))). Furthermore, under Va. Code Ann. § 55.1-136(B), one spouse cannot sever this title on his/her own. *Hausman v. Hausman*, 233 Va. 1, 353 S.E.2d 710 (1987). "The tenancy by the entirety may only be severed by mutual consent of the spouses or by divorce." *In re Bunker*, 312 F.3d 145, 151 (4th Cir. 2002); *see also In re Sampath*, 314 B.R. 73, 92 (Bankr. E.D. Va. 2004) ("The tenancy by the entirety estate retains its full vitality in Virginia."). Accordingly, a spouse cannot waive contest to forfeiture of real property held as tenants by the entirety in a plea agreement because that would result in severing of the title without the other spouse's consent.

The Commonwealth's reliance on the unpublished opinion of the *United States v. Franco*, No. 5:14CR00011, 2017 WL 3187392 (W.D. Va. July 26, 2017), or on any federal circuit court decisions regarding forfeiture of tenancy-by-the-entirety property is totally misplaced and inconsequential in a state forfeiture proceeding. In *Franco*, the district court determined forfeiture of the property based on federal forfeiture laws:

This state law protection from creditors does not necessarily shield tenancies by the entirety from federal forfeiture, however. Where federal and state law conflict, federal law prevails. U.S. Const., Art. VI, cl. 2. Thus, though

state law defines the nature of the property interest in question, federal law governs whether the subject property is forfeitable. *See United States v. Buk*, 314 Fed.Appx. 565, 568 (4th Cir. 2009); *United States v. 2525 Leroy Lane*, 910 F.2d 343, 347 (6th Cir. 1990) ("We conclude that recognition of state laws governing property rights does not contravene the federal forfeiture scheme, and that the application of state law is the most appropriate method of determining the interest of an innocent owner."). Even where state law forbids criminal forfeiture of property held in a tenancy by the entirety in state court, the guilty spouse's interest is still forfeitable in a federal proceeding. *See United States v. Fleet*, 498 F.3d 1225, 1227-30 (11th Cir. 2007).

Id. at *2.

In sum, a state court cannot ignore a state characterization of real property in a state forfeiture proceeding. Neither state forfeiture statutes nor state case law precedent specifically provides for the forfeiture of property held as tenants by the entirety against both spouses when only one has been found guilty. Notably, when applying the new forfeiture law to such a characterization of property, both spouses must be found guilty or have pleaded guilty before the property can be seized and forfeited. Thus, property held as tenancy by entirety is immune from forfeiture claims against the other spouse, so this forfeiture action must be dismissed.

III. FORFEITURES UNDER THE NEW STATE LAW MUST ENTAIL A BROADER, EXCESSIVE-FINES FACTOR ANALYSIS UNDER THE EXCESSIVE FINES CLAUSE OF THE VIRGINIA CONSTITUTION TO CONFORM WITH THE LAW'S UNDERLYING INTENT TO STRICTLY PRESERVE LIBERTIES AND TO CURB ABUSE

In interpreting the Excessive Fines Clause of Article 1, Section 9 of the Virginia Constitution, state courts have relied on federal precedent relating to the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution "because of the shared text and

history" of these two constitutional provisions. *Metro. Washington Airports Auth. v. Hagarty*, 92 Va. Cir. 307, 2016 WL 8231180, at *1 (Fairfax County 2016). Under the federal standard, "the fine must be 'so plainly disproportioned to the offence [sic] or act, for the violation of which it is affixed, as to shock the sense of mankind,' *Southern Exp. Co.*, 92 Va. at 66, 22 S.E. at 811, or, in other words, the fine must be grossly disproportional to the gravity of the offense." *Id.* at *4. Defendant still maintains his arguments that this forfeiture of real property is excessive under this federal standard previously presented.

However, as noted in Part I, *supra*, Virginians have been fighting for years to obtain stronger protections of Virginians' property rights. One primary concern voiced was the need to preserve a property owner's rights to not have his property forfeited unless the person has been found guilty or pleaded guilty to a crime under the forfeiture statutes. As noted in one editorial in Fredericksburg, Virginia, in 2017: "While forfeiting property may well be a suitable punishment for someone who is convicted of a crime, judges and juries are the ones to make that call, not law enforcement agencies. The potential for abuse is just too great." Editorial Staff of the Free Lance Star, *Protecting Virginians' Property Rights*, Free Lance Star (Fredericksburg, Va. Jan. 24, 2019). This holds especially true for real property. "Given the irreplaceable nature of real property to its owners, no excuse exists as to why further real property protections should not be added to the current system." Simon, *supra*, 74 Wash. & Lee L. Rev. at 1330. Accordingly, the Virginia legislature finally answered that call.

The state courts must now follow that mandate to provide more protections for property owners in their excessive fines analysis under the state constitution. This is especially needed, as the Virginia Crime Commission found that "in Virginia, seventy-five

percent of cases result in forfeiture and twenty-five percent of cases result in the item being returned to the owner or a lienholder, 'most forfeitures are a result of default or some type of plea agreement or settlement,' and very few cases go to trial." Jones, *supra*, 25 Wm. & Mary Bill of Rights J. at 1407 n.125 (quoting *Presentation, Va. State Crime Comm'n, Asset Forfeiture* (SB 684/HB 1287) 85 (Oct. 27, 2015), attached as Ex. C). A Commonwealth's broader, *excessive fines* factor analysis must include consideration of the criminal determination of guilt of the crime of the person whose property was seized in addition to proportionality and instrumentalities factors. *See id.* at 1416 (proposed five-factor test for Virginia).¹ "The conviction of a property owner of an underlying crime should be considered because the crime the defendant was convicted of will have a considerable impact on the determination of what is and is not considered proportionate." *Id.* at 1418.

In line with preserving and protecting Virginians' liberties, the court must evaluate the excessiveness of the fines based on "real-world" consequences of forfeiture of a Virginian's real property.

Some lower courts have already taken steps toward such an approach, recognizing that "certain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others, including the imposition of significant hardship to the owner and his or her family." . . . Taking into account the financial hardship inflicted by property forfeitures as part of the excessiveness inquiry will help ensure

¹In Virginia, courts can provide protection from excessive fines by articulating a factor-based test that considers "(1) the gravity of the offense compared with the harshness of the forfeiture, and whether the property was an integral part of the commission of the crime; (2) *whether there has been a conviction or acquittal for the underlying crime and any punishment already received for the underlying offense*; (3) the nature and extent of the criminal activity; (4) the owner of the defendant property and the owner's knowledge and approval of the criminal use of the property; and (5) the harm caused by the charged crime." 25 Wm. & Mary Bill Rights J. at 1409 (emphasis added).

that the Excessive Fines Clause remains the "constant shield" against "[e]xorbitant tolls" that it has been "throughout Anglo-American history."

Beth A. Colgan & Nicholas M. McLean, *Financial Hardship, and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 Yale L.J. Forum 430, 432-33 (2020) (footnotes omitted).

In considering all the real-world consequences of this forfeiture and the liberties at stake, justice demands denial of forfeiture in this case. Mr. Smith had not been found guilty of any drug crime. In fact, any evidence was destroyed by law enforcement. Even if considering Mrs. Smith's plea to a one -count felony of possession with intent to distribute, taking a person's residence without this evidence and any conviction is grossly disproportionate. The real property was nothing more than the situs of the offense, not an instrumentality. *See the similar California case of United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 738 (C.D. Cal. 1994) (property owners' son sold drugs in home; property owners were acquitted; forfeiture of property would violate the Excessive Fines Clause, so was denied).

Lastly, Mr. Smith was found mentally incompetent to stand trial on the criminal drug charges. Thus, Mr. Smith was unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Property cannot be forfeited for tax purposes if a person is deemed incompetent. *See Covey v. Town of Somers*, 351 U.S. 141 (1956). Such a prosecution would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See Dang v. Commonwealth*, 287 Va. 132, 752 S.E.2d 885 (2014). Yet the Commonwealth seeks to take Mr. Smith's property away via civil forfeiture for a drug crime even though he was found incompetent to be able to defend

against that charge. *See United States v. Mason*, 121 F.3d 701 (4th Cir. 1997) (unpublished opinion). Although the defendant in *Mason* was found competent, the court completed an evaluation to determine if he was competent to defend forfeiture, and it would not have proceeded if the defendant had been found incompetent. No less should be expected for Mr. Smith in this case.

CONCLUSION

Under recent amendments to Virginia's forfeiture law, this Court cannot order the forfeiture of Mr. Smith's real property because he has not been convicted of a drug crime nor pleaded guilty to one. Furthermore, since the property is held as a tenancy by the entirety, the court cannot sever the property in forfeiture under Virginia law, even though Mrs. Smith pleaded guilty. The Commonwealth's cited case of *Franco* does not apply because it involves a federal forfeiture, and this is a state forfeiture proceeding. Lastly, the new Virginia forfeiture law amendments evoke an intent to grant broader protections of Virginians' property rights. Accordingly, any excessive fines analysis should be in line with the intent of those amendments and include assessing the property holder's adjudged criminal guilt. Justice and the protection of liberties further demand assessment of real-world consequences, underlying circumstances, the nature of the property, related fines available under the drug offense, and the competence of the defendant to defend against such forfeiture. All these factors easily lead to the conclusion that the forfeiture of the Defendants' home is an excessive fine under Virginia's constitution and laws.

Considering the arguments and authorities cited herein and previously in Defendant's Memorandum in Support of Motion to Dismiss, the Information should be dismissed, and clear title returned to Mr. and Mrs. Smith by this Court's also ordering a lifting and releasing of the *lis pendens* heretofore filed by the Commonwealth.

Respectfully submitted,

JOHN J. SMITH

By: _____
Counsel for Defendant