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STATE OF MINNESOTA

IN COURT OF APPEALS

Thomas G. Kramer,

Respondent,

vs.

Real Property Located At 860 10th Avenue,
Granite Falls, Yellow Medicine County, Minnesota

Defendant,

Luverne Johnson,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUE

Is Minnesota's drug forfeiture statute unconstitutional insofar as it permits the forfeiture of a person's homestead property?

The district court ruled in the negative.

Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986)
State v. Fingal, 666 N.W.2d 420 (Minn. Ct. App. 2003), *rev. denied* (Minn. Oct. 21, 2003)
State v. Rhude and Fryberger, 266 Minn. 16, 123 N.W.2d 196 (1963)
Independent School District of White Bear Lake v. The City of White Bear Lake, 208 Minn. 29, 292 N.W. 777 (1940)

STATEMENT OF THE CASE

The county attorney commenced an *in rem* forfeiture action against the defendant real estate. The owner, appellant Luverne Johnson, interposed an answer and claimed that the property was exempt from forfeiture under Minn. Const. art. 1, § 12, as implemented by Minn. Stat. § 510.01 (2004), which together provide for a homestead exemption from seizure or sale for the payment of any debt or liability. The matter was heard in Yellow Medicine County District Court, the Honorable Paul A. Nelson presiding. The issues before the trial court were "(1) whether it is constitutionally permissible for the State to forfeit a homestead pursuant to Minn. Stat. § 609.5311 and, more specifically, (2) whether the forfeiture of a home as a criminal punishment is a 'debt' or 'liability,' which would prohibit forfeiture according [to] Minn. Const. art. 1, § 12." *See* trial court's 7-27-06 Order on Motion for Summary Judgment.

Appellant now brings this direct appeal.

STATEMENT OF FACTS

On February 14, 2006, appellant pled guilty to controlled substance crime in the first degree, in violation of Minn. Stat. § 152.021 (2004). In this forfeiture case in the trial court, the parties agreed that appellant's property meets the definition of homestead property, as provided under Minn. Const. art. 1, § 12, and Minn. Stat. § 510.01 (2004), and appellant raised no claims that any of the explicitly delineated limitations on forfeiture set forth in Minn. Stat. § 609.5311, subd. 3 (2004) apply.

ARGUMENT

THE MINNESOTA DRUG FORFEITURE STATUTE IS NOT UNCONSTITUTIONAL FOR FORFEITING HOMESTEAD PROPERTY.

As appellant points out, this case is very similar to *Torgelson v. Real Property Known As 17138 880th Avenue, Renville, County, Minnesota,* appellate file number A06-1507. *See* Appellant's Brief ("App. Br.") at 1. The appellants in both cases are represented by the same counsel. Appellants in both cases raise virtually identical constitutional challenges to the application of the drug forfeiture statute to homestead property. Indeed, counsel for the respective appellants has moved to consolidate the appeals for purposes of oral argument. Consequently, in this brief, the respondent will respond to arguments raised in appellant's reply brief in *Torgelson*, anticipating that some of these same arguments may be raised in the reply brief in this case. Indeed, appellants' motion to consolidate anticipates that respondent's arguments in this brief "may include some further analysis prompted by appellant's reply brief in *Feigum* [i.e. *Torgelson*]."

A. The Forfeiture Statute Provides For The Forfeiture Of The Defendant Property In This Case.

Minn. Stat. § 609.5311, subd 2(a) (2004), provides that, "All property, real or personal, that has been used, or is intended for use, or has in any way facilitated in whole or part," various activities involving illegal controlled substances "is subject to forfeiture under this section, except as provided in subdivision 3." The exceptions in subdivision 3 include defenses of (1) allowing the forfeiture of real property "only if the retail value of the controlled substance or contraband is $1,000 or more," (2) a good faith owner, (3) a good faith secured party, and (4) a good faith purchaser for value. *See, e.g.,* Minn. Stat. § 609.5311, subd. 3(b),(d),(e), and (f) (2004). Appellant does not contest the fact that his drug activities had a sufficient connection with his homestead property in order to satisfy section 609.5311's the requirements for forfeiture or the fact that none of the enumerated exceptions, including the foregoing, apply to his situation.

B. Appellant Faces A High Burden In Claiming That A Statute Is Unconstitutional.

Appellant challenges the drug forfeiture statute's constitutionality insofar as it is used to forfeit homestead property. Appellant's challenge is based upon the following provisions: Article 1, § 12 of the Minnesota Constitution provides that, "[a] reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law." Insofar as the homestead exemption is concerned, this constitutional provision is implemented by Minn. Stat. ch. 510 (2004). Minn. Stat. § 510.01 (2004), defines the homestead exemption as, "[t]he house owned and occupied by a debtor as the debtor's dwelling place, together

with the land upon which it is situated to the amount of area and value hereinafter limited and defined, shall constitute the homestead of such debtor and the debtor's family, and be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing . . . ."[1]

This Court's power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. *See State v. Fingal,* 666 N.W.2d 420, 423 (Minn. Ct. App. 2003), *rev. denied* (Minn. Oct. 21, 2003). The presumption of constitutional validity governs until a statute is proved unconstitutional beyond a reasonable doubt. *See Hickman v. Group Health Plan, Inc.,* 396 N.W.2d 10, 13 (Minn. 1986).

The question here is whether, in the language of Minn. Const. art. 1, § 12, the drug forfeiture of a homestead is a "seizure or sale for the payment of any debt or liability." This issue is a matter of first impression for Minnesota appellate courts, although the following language regarding the drug forfeiture of a homestead in the unpublished case of *Arney v. One Parcel Known As Lot 3, Block 1, Schumann Addition, Grant Township, Washington County,* 1992 WL 383437, No. CX-92-1355 (Minn. Ct. App. Dec. 29, 1992)[2], is helpful in framing the issue:

> Appellant correctly asserts that the term "liability," as used in the constitutional exemption provision, is broad. *See Denzer v. Prendergast,* 267 Minn. 212, 220, 126 N.W.2d 440, 445 (1964) (homestead exemption applies to tort as well as contract claims). There is, however, a substantial

[1] Minn. Stat. § 510.02 (2004), describes the area and value limitations. As stipulated in the district court, the value and area of appellant's homestead fall within these limits.
[2] Since *Arney* is unpublished, a copy is attached.

> question whether the exemption encompasses a claim to the property itself, a claim which is not based on the personal liability of the owner but which is imposed as a "penalty" for a criminal offense.

As the following discussion demonstrates, a forfeiture is a claim to the property itself and is not based upon the personal liability of the owner. Thus, the Minnesota drug forfeiture statute creates neither a debt nor a liability. Therefore, the homestead exemption does not bar the forfeiture of homestead property.

C. The Homestead Exemption Does Not Apply Because An *In Rem* Forfeiture Is Neither A Debt Nor A Liability.

1. *In rem* proceedings do not create debts or liabilities.

The forfeiture of both real and personal property under Minnesota's drug forfeiture statutes is *in rem*. *See* Minn. Stat. § 609.5315, subd. 6a(a) (2004) ("An action for forfeiture is a civil *in rem* action and is independent of any criminal prosecution, except as provided in this subdivision and section 609.5318"); *Johnson v. Multiple Miscellaneous Items Numbered 1-424,* 523 N.W.2d 238, 241 (Minn. Ct. App. 1994) ("respondent forgets that a forfeiture action is 'in rem' and not 'in personam.' In other words, *the property* and not the complainant is the subject of the forfeiture action") (emphasis in original). The provisions of the drug forfeiture statute "must be liberally construed to carry out the following remedial purposes . . . ." Minn. Stat. § 609.531, subd. 1a (2004).

An *in rem* action means that the action proceeds against the property itself and is not based upon any personal liability of the property's owner. Since the property's owner has no personal liability in an *in rem* action, the owner (in the terminology of the

homestead exception) has no debt and has no liability that the property is being sold to pay. *State v. Rhude and Fryberger,* 266 Minn. 16, 21, 123 N.W.2d 196, 200 (1963), pointed out "the difference between the liability for taxes assessed against personal property and that assessed against real estate" as follows:

> The proceeding for the collection of taxes upon personal property is one in personam, and not in rem. This radical distinction must be kept in mind: In the one case the tax is against the person, although estimated in amount according to the value of the personal property possessed, and is never a lien upon the property assessed; in the other the tax is against the land, and becomes a lien thereon, but is never made a personal obligation against the owner.

(Citation and internal quotation marks omitted). *Independent School Dist. of White Bear Lake v. City of White Bear Lake et al.,* 208 Minn. 29, 35-36, 292 N.W. 777, 781 (1940), likewise held:

> The liability for the benefits is imposed on the land, not the owner. All the proceedings for levying, collecting and enforcing payment of the assessment are in rem against the land and are not in personam against the owner. The liability thus imposed and the remedy thus provided for its enforcement are exclusive. The statute defines and limits the liability so as to impose it exclusively on the land without any liability in personam on the landowner.

(Citation omitted).

Appellant's attorney argues in his *Torgelson* reply brief that, "What the State needs here is a state case holding that the homestead exemption does not apply to a situation other than a claim for labor or materials." *Torgelson* reply brief at 14. In fact real estate taxes are one such situation.

As already pointed out, property taxes, like forfeitures, are *in rem*. The liability for those taxes lies only against the property and not against the property's owner. *See*

Rhude and Fryberger, 266 Minn. at 21, 123 N.W.2d at 200; *White Bear Lake*, 208 Minn. at 35-36, 292 N.W. at 781. Since the only liability is against the land, the only way to collect unpaid taxes is, ultimately, to sell the homestead. Thus, homestead property may be sold to pay real estate taxes. For example, in *Hickman v. Sutherland*, 222 Minn. 161, 23 N.W.2d 593 (1946):

> Marion P. Satterlee and wife became the fee owners of the premises on December 14, 1930, as joint tenants. From then and at least until April 22, 1941, the premises were in their possession and occupancy as their homestead.
>
> * * *
>
> In the meantime, taxes had become delinquent and tax sales there under had taken place. On May 17, 1940, the county auditor filed the statutory certificates that the time to redeem the premises had expired and that title absolute had vested in the state.

222 Minn. 162, 163, 23 N.W.2d at 594-95, 595.

In *Johnson v. Anderson*, 1988 WL 95559, No. C6-88-859 (Minn. Ct. App. Sept. 20, 1988),[3] a more recent, albeit unpublished, opinion, this Court explained in somewhat more detail that homestead property may be sold to pay real estate taxes.

> Appellants failed to pay property taxes which were due in 1977. A real estate tax judgment was entered in the district court in Ramsey County on the 11th day of April, 1978. On May 8, 1978, the property was bid in for the state, and deemed sold to it. On August 22, 1984, the Ramsey County auditor certified that the land remained unredeemed, and that the time for redemption of the land had expired after notice was given to the owners. Absolute title to the land vested in the State of Minnesota at that time. On April 24, 1987, the state sold the land to respondents Ronald Johnson and James Donnelly.
>
> * * *

[3] Because *Johnson* is unpublished, a copy is attached.

> Because they failed to pay the taxes and failed to appeal, a tax judgment was entered against the property. Minn. Stat. § 278.01 (1976). Minn. Stat. § 510.05 (1976) clearly states that a valid lien for taxes or assessments may be placed on a homestead.

Id. at *1, *2

Johnson cited Minn. Stat. § 510.05 for proposition that real estate tax liens may be placed on homestead property. Minn. Stat. § 510.05 (2004) provides that a "homestead exemption shall not extend . . . to any valid lien for taxes or assessments." Appellant may argue that this specific statutory provision means that there is a distinction between *in rem* tax obligations and *in rem* forfeitures. However, under these circumstances it is a distinction without a difference; if the constitutional provision includes *in rem* actions within the homestead exemption, obviously section 510.05, a statutory provision, could not countermand that. Since real estate taxes are the liability only of the property, not of the owner, the only way to collect homestead property real estate taxes that the owner is unwilling or unable to pay is to sell the homestead property. If real estate taxes are not paid, the state cannot sue the owners. It can only sell the property. Likewise, for forfeitures, the only liability is against the property. If a drug dealer sells his property, the state cannot pursue its frustrated *in rem* forfeiture by suing the drug dealer personally, by forfeiting substitute property up to the value of the sold real estate, or by executing or garnishing upon any other assets of the drug dealer.

A county attorney or other prosecutor who successfully forfeits real estate, whether a homestead or other real estate, can take the property. However, because the action is *in rem*, the county attorney has no judgment against the drug dealer personally

for any amount whatsoever, regardless of the egregiousness of the drug dealer's activities. That being the case, there is no debt nor liability, and the constitutional provision exempting homestead property from seizure or sale for the payment of any debt or liability does not bar the *in rem* forfeiture.

When a person owns a homestead or other property and also has both debts and other liabilities, the liabilities and the debts will remain even if the property were, for example, destroyed or sold. However, the basis for a drug forfeiture of any particular property (which appellant claims is a "liability") would disappear if the property were, for example, destroyed or sold, and the drug dealer would have no *in personam* liability (at least under the forfeiture statute) for the drug trafficking that he had done with his property.[4]

To sum up, a drug forfeiture is a claim to the property itself, and is not based upon any debt or liability that is owed by the owner personally.

2. The purpose of the remedial forfeiture statute is to protect the public by depriving drug dealers of the instrumentalities of drug trafficking, and it does not create any kind of debt or liability.

Forfeiture of criminal instrumentalities protects the public from continued crime by diminishing its profits and providing obstacles to its pursuit. For example, when a drug dealer's car is forfeited he has to find other transportation. Walking or using public

[4] A drug trafficker might, for example, have *in personam* liability (1) for nuisance claims for, among other things, the constant stream of disreputable customers to his establishment, (2) for damaging the property values of his neighbors, (3) for damages to neighboring lawns and gardens if customers park on neighbors' lawns and tramp through their flower beds, or (4) for any other causes of action his neighbors might have against him.

transit makes transporting drugs less flexible, more time-consuming, and less secure. The same holds true for a drug dealer's use of his home to conduct his drug sales out of the public eye. *See Borgen v. 418 Eglon Avenue et al,* 712 N.W.2d 809, 815 (Minn. Ct. App. May 2, 2006) ("The use of the house made the [drug] sales easier to conceal, as they could be kept out of the sight of the public"). The remedial sanctions of the drug forfeiture statute remove the tools of the drug dealer's trade. *See United States v. Usery,* 518 U.S. 267, 290-91 (1996) (discussing various remedial and non-punitive goals of forfeiture statutes, such as "forfeiture prevents further illicit use of property") (internal brackets and quotation marks omitted). Without the various property and instrumentalities necessary to conduct his business, the manufacturer or distributor of illegal drugs will have difficulty remaining in business, and society will be spared the harm inflicted by his crimes.

Since the forfeiture statute is remedial, it follows that it does not create either debts or liabilities. Creating debts and liabilities would not have any direct or immediate effect on drug trafficking. Taking away drug dealers' instrumentalities does.

3. The homestead exemption only applies to contract and tort damages and has never been extended to *in rem* proceedings.

Citing *Denzer v. Prendergast*, 267 Minn. 212, 126 N.W.2d 440 (1964), appellant correctly notes that the homestead exemption applies to both debts and liabilities and that "liability" is broader than "debt." App. Br. at 4-5. However, that hardly means that *in rem* drug forfeitures are a "liability" encompassed by the homestead exemption. While *Denzer* held that "liability" is broader than "debt," and also held that "liability"

encompasses tort claims, as well as contract claims, *Denzer* did not hold that *in rem* proceedings are "liabilities" or that the homestead exemption applies to in rem actions.[5] This contract and tort liability is based upon damages. The *in rem* forfeiture of drug instrumentalities is not based upon damages but is rather based upon the remedial public policy of hampering the drug trade, including depriving drug dealers of the tools of the trade. *See Borgen*, 712 N.W.2d at 815; *Usery*, 518 U.S. at 290-91; discussion, *supra* at 7-8.

Appellant's attorney argues in his reply brief in the similar *Torgelson* case that there are cases extending the homestead exemption beyond contracts and torts. *See* reply brief at 13-14. He cites a case on child support obligations and a case on an attorney's lien. *See County of Nicollet v. Havron*, 357 N.W.2d 134 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 19, 1985) (relating to child support); *Northwestern National Bank of South St. Paul v. Kroll*, 306 N.W.2d 104 (Minn. 1981) (relating to attorney's lien). However, *Havron* and *Kroll* do not say anything about extending the reach of the homestead exemption beyond the debts and liabilities resulting from contracts and torts.

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[5] In *Denzer*, one of the parties contended that the legislature intended to distinguish between debts, (articulated by *Denzer* as "an obligation to pay money arising from a contract, express or implied,") and other liabilities (articulated by *Denzer* as "arising from a judgment for damages caused by a wrong"). *Id.* at 220-21, 126 N.W.2d at 445. *Denzer* rejected this contention and held that "obligations based on express or implied contract and those based on damages caused by negligence" were both within the purview of the homestead exemption. *Id.* at 221, 126 N.W.2d at 445. That, however, does not assist appellant because damages caused by negligence, and the liability therefor, are not comparable to an *in rem* forfeiture action that does not determine or award any damages, and that does not result in other liability.

The nature of the claims in *Havron* and *Kroll* themselves do not support appellant's implicit claim that these claims were something other than a contract or tort. Appellant provides no reasoning why the failure to support one's child is not a tort, or wrongful act. And, an attorney's lien can be acquired only if there is a contract, or retainer agreement, between the attorney and his client, as *Kroll* recognized when it said that the attorney who filed an attorney's lien on the homestead property "was retained by the defendants to represent them." 306 N.W.2nd at 104.

Neither *Havron* nor *Kroll* is an *in rem* case like the forfeiture here. Neither case mentioned *Denzer*, let alone held that the scope of *Denzer* was being expanded. Neither case said that it was expanding the scope of the homestead exemption from what it had previously been, and neither *Havron* nor *Kroll* said that it involved anything other than a contract or tort.[6]

Appellant's attorney argues in the *Torgelson* reply brief that a wide variety of criminals can avoid any sale of their homesteads to enforce a civil judgment that might be obtained against them for the damages caused by their crimes. *See* reply brief at 14. This claim lacks any relevance to the issue of whether an *in rem* drug forfeiture is a debt or liability under the homestead exemption. Appellant's hypothetical criminals were not using their homes to perpetrate their crimes, and the judgments for crime victims that appellant posits are not *in rem* forfeitures of those defendant's homes.

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[6] Moreover, in both *Havron* and *Kroll*, the plaintiffs could attempt to satisfy their claims by a number of creditors' remedies such as garnishing wages and levying execution on other property. This, of course, is something that is not available to the state in a drug forfeiture case, where it can only look to the defendant property.

Appellant's attorney argues that, if civil judgments against murderers, assailants, and terrorists cannot be collected by selling homestead property, the homestead exemption should apply in this case because "[t]here is nothing special about drug crimes." *See id.* This argument misses the point. The state is not arguing that it is because appellant committed a drug crime that the homestead exemption does not apply. Rather, the homestead exemption does not apply because the drug forfeiture is an *in rem* forfeiture.

Appellant's attorney argues that there is a great deal of overlap between criminal liability and tort liability. *See* reply brief at 13, n.2. However, just because many, if not most, crimes are also torts has nothing to do with *in rem* actions, and does not provide any reason for extending the homestead exemption to *in rem* actions such as *in rem* forfeitures and real estate taxes. Appellant's argument is essentially that perceived or actual leniency in one area should require leniency in other areas as well. This claim should be rejected. If some criminals can take advantage of the homestead exemption to avoid paying a civil tort judgment for a heinous crime, that is no reason to allow drug dealers to avoid *in rem* forfeitures by invoking a homestead exemption that does not apply to *in rem* forfeitures.

In conclusion, appellant does not cite any case that has extended the homestead exemption to *in rem* proceedings.

4. Public policy does not favor extending the homestead exemption to forfeitures.

Citing *Cargill v. Hedge*, 375 N.W.2d 477, 479 (Minn. 1985), appellant points to strong policy reasons for the homestead exemption. However, using one's home for drug trafficking is the very antithesis of these policies. Appellant argues that one's home should be a sanctuary. However, nothing in *Cargill* says that a home is intended to be a sanctuary in which one can commit crimes, whether the crime be child abuse, domestic abuse, or drug trafficking. As for the language that appellant cites in *Cargill* about the homestead exemption fostering the state's welfare and prosperity, as well as positive sentiments among its citizenry, these goals and sentiments are hardly fostered by a drug trafficker's drug activities in his homestead.

5. Without an identifiable creditor or tort victim, there cannot be a debt or liability.

When there is a debt, there is a readily identifiable creditor. Likewise, when there is tort liability, there is a readily identifiable tort victim. In a drug forfeiture proceeding, there is neither. The governmental entities that receive either the defendant property itself, or the proceeds from its sale, do not receive it because of any monetary loss or other damages suffered at the hands of the property's owner. And, the forfeited value received is determined solely by the value of the forfeited property, not by the amount of harm inflicted by the property's owner.

If a person is liable, that liability does not exist in a vacuum. A person is liable to a specific person(s) and/or entity or entities for a particular amount of damages.

In the case of an *in rem* drug forfeiture, however, a drug dealer is not liable to the recipients of the forfeited property (*i.e.,* the police, the county attorney, or the state general fund earmarked for victims) for any particular damages or liability. The ultimate disposition of forfeited property is without regard to any specific liability of the property's owner to any specific entity or entities. For example, when property is forfeited, there are a number of possible dispositions. *See* Minn. Stat. § 609.5315, subd. 1(a)(1) to (8) (2004). Two of these possibilities are: (1) the forfeited property can be kept "for official use by the [law enforcement] agency and the prosecuting agency," Minn. Stat. § 609.5315, subd. 1(a)(8) (2004); and (2) if the property is sold, the property is distributed 70 per cent to the law enforcement agency, 20 per cent to the prosecuting agency, and 10 per cent to the state's general fund (from which it is directed into a fund for victims). Minn. Stat. § 609.5315, subd. 5 (2004). None of these options need be selected until after the property is forfeited. *See* Minn. Stat. § 609.5315, subd. 1(a) (2004). These possible, varying dispositions of the forfeited property,[7] without regard to anything that the property's owner may have done to harm any particular entity, are inconsistent with a drug dealer owing any specific liability to any particular entity or entities.

[7] Among the possible dispositions of the property in regard to the county attorney, the county attorney might (1) keep *all* of the property, (2) get nothing (if the police agency kept the property for official use), or (3) collect 20 per cent of the proceeds. *See* Minn. Stat. § 609.5315, subd. 1(a)(2) and (8), and subd. 5 (2004).

D. Decisions In Other States Should Not Determine The Constitutionality Of The Minnesota Forfeiture Statute At Issue Here.

A large part of appellant's argument relies upon decisions in other states, which appellant concedes are evenly split and which he characterizes as "decisions on either side appear to be rather result-oriented, and perhaps even somewhat political." *See* App. Br. at 7-14, 14. In addition, the constitutions, statutes, and case law of the foreign jurisdictions upon which appellant relies differ from Minnesota.

Appellant quotes at length from a Kansas decision that bars the forfeiture of homestead property. *See* App. Br. at 7-9. However, whereas the Minnesota Constitution states an exemption for "any debt or liability," the Kansas constitution is broader: "A homestead . . . shall be exempted from forced sale under any process of law . . . ." Kan. Const. art. 15, § 9. "Any process of law" in the Kansas Constitution is broader than "any debt or liability" in Minnesota's Constitution. Consequently, the Kansas decision holding that "any process of law" included forfeitures is hardly instructive regarding Minnesota's language.

Appellant also relies on Iowa and Florida cases. App. Br. at 9-10. However, appellant acknowledges that the Iowa decision that he cites says: "We are also mindful that forfeitures are severe sanctions not favored by our law," and, "Chapter 809 [the forfeiture law] is to be strictly construed . . . ." App. Br. at 10 (citations omitted). Likewise, the Florida case strictly construes forfeiture statutes. *See* App. Br. at 11. Both Florida and Iowa differ from Minnesota in this respect, since, as previously discussed,

Minnesota's forfeiture statutes are to be liberally construed. *See* Minn. Stat. § 609.531, subd. 1a (2004).

Regarding cases in other states, appellant argues "that the specific wording of the state provisions regarding homestead exemption and forfeiture do not appear to have been critical to most of the decisions either way," and that "what was critical was whether the state court in question viewed the state policy in favor of homesteads more important [than] the state policy in favor of drug forfeitures, or vice versa." App. Br. at 14. To the contrary, there should be no stark dichotomy, in Minnesota at least, between the importance of homesteads versus the importance of law enforcement. Both can easily be accommodated, since it is hardly pernicious to the state homestead exemption if it does not cover conduct that denigrates the very policies and personal attributes that appellant cites as the strong policy reasons supporting the homestead exemption. *See* discussion, *supra* at 8.

In conclusion, the trial court properly concluded that the homestead provisions in other states are dissimilar to Minnesota's and that the cases from the other jurisdictions do not support appellant's claim. Therefore, this question should be resolved with reference to Minnesota's own laws and constitution, not those of a foreign jurisdiction.

E. Appellant's Arguments For Using The Homestead Exemption To Bar *In Rem* Drug Forfeitures Should Be Rejected.

1. The reasons advanced by appellant in his brief in this case are no reason to invoke the homestead exemption.

After discussing the foreign jurisdictions at length, appellant lists many reasons (the first four of which he explicitly enumerates) to support his claim that the use of

homestead property for drug trafficking constitutes a "liability" within the meaning the Minnesota Constitution. Most of these reasons, however, do not explain why using a homestead for drug trafficking creates a liability. Indeed, few, if any, of these reasons articulate what determines whether something is a liability.

Appellant's first and third enumerated reasons claim that *Denzer* indicated (1) that "liability includes virtually [every] obligation a homesteader may have," and (2) that "liability" refers "to just about any obligation imaginable." *See* App. Br. at 18, 20. To the contrary, as previously discussed, *supra* at 10-11, all that *Denzer* held was that "liability" meant that the homestead exemption applied to "damages caused by a wrong" or "damages caused by negligence" in addition to "obligations based on express or implied contract." 267 Minn. at 221, 126 N.W.2d at 445. *Denzer* did not hold that "liability" included "virtually [every] obligation" or "just about any obligation imaginable."

Appellant's second enumerated reason (*see* App. Br. at 19) is that article 1, section 12 of the state constitution (the exemption provision raised here) is right next to article 1, section 11, which provides:

> No bill of attainder, ex post facto law, or any law impairing the obligations of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

Appellant contends that the language, "forfeiture of estate," in section 11 "coupled with its proximity to Article 1, § 12 clearly indicates that the legislature [*sic*] was keenly aware of the possible seizure of property for criminal activities and was concerned to limit such seizures." App. Br. at 19. However, section 11 does not pertain in any way to

homesteads or to exempting property from the payment of debts and liabilities. As such, section 11 cannot be deemed to apply to forfeitures of homestead property any more than it would apply to the forfeiture of any other property.

Appellant claims that sections 11 and 12 should be read *in pari materia*. "The doctrine of *in pari materia* is a tool of statutory instruction that allows two statutes with common purposes and subject matter to be construed together to determine the meaning of ambiguous statutory language." *State v. Lucas,* 589 N.W.2d 91, 94 (Minn. 1999). Thus, in order for the doctrine to be used, the two statutes must have common purposes and subject matter, and there must also be some ambiguity. Assuming for the sake of argument that *in pari materia* also applies to constitutional provisions (and appellant provides no authority that such is the case), it is clear that his argument fails on both prerequisites for *in pari materia*. On the first prerequisite of *in pari materia,* sections 11 and 12 do not have common purposes and subject matter. Section 11's prohibition of bills of attainder and similar arbitrary and/or harsh measures are a different subject than section 12's provision allowing debtors to exempt a portion of their property from sale and execution. Regarding the second *in pari materia* prerequisite, there is no ambiguity, particularly as it pertains to the issue in this case. Sections 11 and 12 say nothing at all (and therefore can hardly say anything ambiguous) regarding *in rem* actions against property.

Appellant's third enumerated reason essentially duplicates, as is discussed, *supra* at 13, appellant's first reason. *See* App. Br. at 20.

Appellant's fourth enumerated reason is that the drug forfeiture statute should have specifically said that it permitted the forfeiture of homestead property. *See id.* This claim has no relevance as to what "liability" in article 1, section 12 of the constitution encompasses. And, indeed, the fact that homestead property is not specifically listed hardly makes the forfeiture statute unconstitutional. The constitution nowhere provides that, in order for any real property statute to apply to homestead property, the statute must explicitly state that it so applies. Moreover, there is no reason why the forfeiture statute should have singled out homestead property in this manner. The drug forfeiture statute applies to *all* real property connected with drug trafficking. "All" means just that. If all real property is included, it is unnecessary, and possibly confusing,[8] to thereinafter list various types of real property. There are some exceptions, but none of these exceptions is homestead property. Therefore, any real property that is an instrumentality of drug trafficking, and that is not encompassed by one of the statutory exceptions, is subject to forfeiture. If the legislature had wished to exempt homestead property that was used for drug trafficking it would have said so, since it certainly knew how to articulate exceptions to the forfeiture of real property. Moreover, there is no reason for the legislature to say that, in appellant's words, it intended the forfeiture statute "to trump § 510.01." *See* App. Br. at 20. Section 510.01 nowhere states that it has any applicability to *in rem* actions.

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[8] By including a list, that might give an opening for an argument that anything not specifically listed is not included.

Appellant's fifth reason (unenumerated) is that the drug forfeiture statute provides that drug trafficking property "is subject to forfeiture" instead of providing that "all real property shall be forfeited." *See* App. Br. at 21. Appellant's argument overlooks the provision in Minn. Stat. § 609.5315, subd. 1(a) (2004), providing that "if the court finds . . . that the property is subject to forfeiture, it shall order the agency to do one of the following," namely selling it, using it, or some other disposition that is listed there. Appellant's reasoning is also fallacious because he does not point out any reason why the language "is subject to forfeiture" would somehow be a defense to the forfeiture of homestead property but would not be a defense to the forfeiture of any other property or any other real property. In addition, there would be no reason for the legislature to provide that all instrumentalities and proceeds are "subject to forfeiture," while at the same time intending that none will, in fact be forfeited.

Appellant's sixth reason (unenumerated) is that forfeiting criminals' homesteads would be counterproductive to their rehabilitation. *See* App. Br. at 21-22. This argument might be a policy consideration for the legislature, but it is not a reason why "liability" includes *in rem* forfeitures.

Appellant's seventh reason (unenumerated) is that the drug forfeiture statute does not require any "proportionality between the offense and the size of defendant's loss." App. Br. at 22. The alleged absence of proportionality has nothing to do with the scope of the term "liability." Moreover, if appellant had wished to invoke proportionality, as the claimant did in *Borgen,* he should have raised it in the trial court along with his

homestead claim. Having failed to do so in the trial court, he has forfeited the issue for appeal.

Appellant's eighth reason (unenumerated) claims that there may be *Blakely* problems. *See* App. Br. at 22-23. This claim has no basis. *Blakely* applies to sentences imposed for crimes. This *in rem* forfeiture was not a criminal action, and no sentence was imposed.

Appellant's ninth reason (unenumerated) claims that his house was only an incidental instrumentality of drug trafficking. *See* App. Br. at 23. However, if appellant claims that his house was not, in fact, an instrumentality sufficient to justify a forfeiture, he should have raised that issue below, rather than raising, as his sole defense, his homestead exemption claim. As it is, appellant's claim that his house was only an incidental instrumentality (whatever that is) versus some other type of instrumentality, does not in any way change the fact that the homestead exemption does not apply to *in rem* drug forfeitures.[9]

2. One cannot interpret the drug forfeiture statute as providing an exemption for homestead property.

On page 24 of appellant's brief and on pages 1 to 3 of the *Torgelson* reply brief, appellant's attorney argues that statutory interpretation can achieve the result that he wants, namely having the homestead exemption bar the forfeiture of the house where

[9] Appellant claims that the first-degree drug sale for which he was convicted just happened to take place in his house. Apart from this, appellant claims, he did not use his house to manufacture, store, or deal drugs. However, appellant does not identify the locations at which he sold drugs all of the other times that he was selling drugs and also does not identify any locations, other than his house, where he stored drugs.

appellant sold the drugs, without reaching any constitutional issue. However, appellant himself appears to impeach this argument by arguing that a statute that completely removed the homestead protection that appellant posits for drug forfeitures would not "pass constitutional muster," and that any restrictions on such homestead protection would have to be "reasonable." Reply brief at 2-3. The rest of the language in appellant's reply brief is replete with the well-settled maxim that the constitution is supreme to any statute, but it is devoid of any reference to any tools of statutory construction that would accord him the result he seeks.[10] Moreover, both the trial court in this case, and the trial court in *Torgelson*, only addressed the constitutional issue. In fact, appellant never really articulates any argument discussing and applying the maxims of statutory construction.

In any event, there is no viable basis for appellant's strictly statutory interpretation approach. As already discussed, the drug forfeiture statute contains a number of

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[10] Thus appellant argues:

(1) "we must never forget that it is the constitution we are expounding";
(2) "In statutory interpretation, the constitution trumps the statute";
(3) "Since the homestead right derives from the constitution . . . ";
(4) "the question is what the framers of the 1858 Minnesota Constitution intended";
(5) "The fictional nature of the proceeding cannot be used to deprive a person of his constitutional rights";
(6) "To determine what 'liability' means . . ., it is necessary to look back upon the sorts of evils the framers . . . ";
(7) "Because the word 'liability' is nowhere defined by the constitution or its framers";
(8) "Minn. Const. Art. I, § 12 takes precedence over Minn. Stat. § 609.5311";

Reply brief at 5-6, 6, 6, 6, 9, 18, 19, 20 (internal quotation marks and citations omitted).

exemptions regarding the forfeiture of real property and the forfeiture of other property. None of those exemptions, however, bars the forfeiture of homestead property. That being the case, it would clearly be a forced and unreasonable construction simply to add an exemption that is manifestly not there in the statute. *See* appellant's attorney's citation of *State v. Rawland,* 199 N.W.2d 774 (Minn. 1992). Reply brief at 1.

Appellant's attorney argues (reply brief at 2) that the legislature must surely have noticed the homestead/forfeiture decisions in other states and would have put some explicit provision in the forfeiture law or the homestead law allowing the *in rem* forfeiture of homestead property, if it wanted to allow such forfeitures. First, claiming such knowledge on the part of the legislature is quite speculative. Second, since the homestead exemption extends only to debts and liabilities, and not to *in rem* actions, there would have been no reason why the legislature would have thought it necessary to "clarify" something that was already clear, as both trial courts have found. Third, appellant's proposal would have resulted in an awkward, and very possibly confusing, provision. The forfeiture statute currently provides that *all* real property is subject to forfeiture with certain exceptions. Appellant's proposal would confuse that by specifically listing one category under "all property" that would also be subject to forfeiture. *See* discussion *supra* at 20 and at 20, n.8. In essence, appellant's attorney's argument is not based upon any recognized rules of statutory construction, but is instead based upon his claim that, because his proffered interpretation has not been explicitly rejected by the legislature, this somehow means that the legislature agrees with him.

Appellant's statutory argument also fails because the homestead statute, just like the constitutional provision authorizing it, limits the exemption to debts and liabilities. As discussed extensively, *supra* at 5 to 9, an *in rem* drug forfeiture is not a debt or liability.

Moreover, even if the statute authorizing the forfeiture of all property (with certain exceptions not including homestead property) and the homestead exemption statute were deemed irreconcilable, standard statutory interpretation tools, indicate that the forfeiture statute should control or prevail. Minn. Stat. § 629.26, subd. 1 (2004), provides that the particular statute controls the general. Thus, the particular language in the drug forfeiture statute, which is limited only to drug forfeitures, would control the general language about debts and liabilities in the homestead exemption statute. *See* Minn. Stat. § 645.26, subd. 1 (2004); *Zawels v. Edutronics, Inc.*, 520 N.W.2d 520 (Minn. Ct. App. 1984).[11] In addition, the drug forfeiture statute prevails because it has the latest date of final enactment. *See* Minn. Stat. § 645.26, subd. 4 (2004).[12] Therefore, based upon the

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[11] In *Zawels* the plaintiff recovered exemplary damages for misappropriation of trade secrets. The defendant argued that this award was improper because it did not meet the general requirements for punitive damages. *Zawels* held that the specific provision in the trade secrets statute, with its more liberal standards for granting exemplary damages cases, prevailed in a trade secrets case.

[12] The homestead exemption was initially enacted by the basic, Revised Laws, sections 3452 through 3460. The drug forfeiture statute in its current form was initially enacted by 1988 Minn. Laws, ch. 665, §§ 5 to 11, and 13 to 15. The most recent re-enactment or amendments to the homestead statutes were in 1993. *See* 1993 Minn. Laws, ch. 79, §§ 1 and 2. The most recent amendments to the drug forfeiture statute were in 2005. *See* 2005 Minn. Laws, ch. 136, art 13, §§ 8 to 10, 14.

foregoing, appellant's claim that statutory construction alone bars the drug forfeiture of homestead property should be rejected.

3. The additional reasons advanced by appellant's attorney in the *Torgelson* reply brief are also no reason for granting appellant any relief.

In the *Torgelson* reply brief, appellant's attorney makes a number of other arguments.

On page 7 of the reply brief appellant's attorney argues that the homestead exemption can be made to apply to *in rem* drug forfeitures by the doctrines of ancillary or pendent jurisdiction. However, there is no basis for this claim. Appellant fails to point out the nature of any case that would be ancillary or pendent to the forfeiture proceeding. Appellant also cites no authority holding that an otherwise-nonexistent defense can be created under the pendent jurisdiction doctrine by appropriating a defense that is permitted in a completely different type of action.

On page 11 of the reply brief appellant's attorney argues that, if the legislature had wanted to create *in personam* liability for selling drugs, it could have done so. This argument is beside the point. The fact is the legislature created an *in rem*, not an *in personam*, forfeiture statute. If the legislature had enacted an *in personam* forfeiture statute, its nature would be entirely different. Although appellant's attorney does not describe any of the particulars of the *in personam* forfeiture statute that he postulates, an *in personam* forfeiture could well be in essence a civil penalty, which could involve a specific dollar amount. *See* Minn. Stat. § 609.911, subd. 3 (2004) (providing for civil penalties in RICO cases). This would be different from an *in rem* action, where the drug-

trafficking instrumentality is taken from the drug dealer, regardless of its value. The actual dollar impact of an *in rem* forfeiture varies greatly depending upon the value of the property itself and the value of a drug dealer's equity in it.

Also on page 11 of the reply brief, appellant's attorney argues, in response to the state's argument that the remedial drug forfeiture act statute does not create either debts or liabilities, that remedial statutes can create debts or liabilities. Appellant's argument ignores the fact that this argument by the state, taken in its entire context, is that the drug forfeiture statute's remedy is taking the tools of a drug trafficker away from him. In appellant's example of remedial statutes regarding insurance companies, the remedy is a monetary one, which is a completely different remedy.

On page 10 of the reply brief, appellant's attorney argues that the constitution does not limit the type of liability shielded by the homestead exemption. This begs the question because there must be a liability before it can be shielded. By way of example, appellant's attorney argues that a criminal can be liable to a sentence of up to 30 years. This is not a liability within the sense of *Denzer* or any other case interpreting the homestead exemption. For example, it is hard to see how a 30-year prison sentence, to which a drug trafficker may be liable, could end up in any way being a charge against the drug trafficker's homestead property.

Appellant's attorney argues, at page 8 of the reply brief, that the *in rem* nature of a proceeding is simply a method of acquiring jurisdiction. That is not correct. Defendants are usually easy to serve (especially if in custody), which means that normally there is no impediment to acquiring personal jurisdiction. The *in rem* of the proceedings is not to

make it easy to acquire[13] jurisdiction, but rather to remove certain types of property, regardless of its value, that aid drug dealers and their drug trafficking.

Also on page 8 of the reply brief, appellant's attorney argues that, if the state's position were correct, the legislature can avoid the constitution by designating any action against the property as an *in rem* proceeding. Of course if the action is against the property, it is already an *in rem* proceeding by definition. But until the legislature provides, for example, that any plaintiff whose contract has been breached may proceed *in rem* against property owned by the defendant, as opposed to proceeding *in personam*, appellant's argument is only a diversion from the real question of whether an *in rem* action is a liability.

Appellant's attorney claims at page 19 of the reply brief that the word "liability" must have been intended to refer to any basis for depriving a homeowner of his property. This is only speculation and is based on no citation of case law. In fact, in addition to *in rem* forfeitures and *in rem* real estate taxes, a homeowner can be deprived of his homestead in at least two other situations: (1) an action for specific performance of a purchase agreement selling real property, and (2) a condemnation proceeding.

In conclusion, appellant has failed to prove, beyond a reasonable doubt, that the drug forfeiture statute is unconstitutional insofar as it forfeits a drug dealer's homestead.

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[13] Moreover, defendants are, in any event, personally served with notice of *in rem* drug forfeiture proceedings.

CONCLUSION

The trial court's order upholding the constitutionality of the drug forfeiture statute, insofar as it forfeits homestead property, should be affirmed.

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Respectfully submitted,

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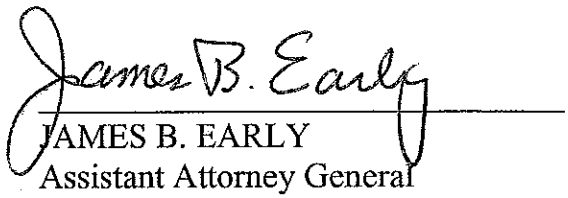

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).