

STATE OF MINNESOTA

IN COURT OF APPEALS

Court of Appeals File No. A06-1507
A06-1757

DAVID TORGELSON,

Plaintiff/Respondent,

vs.

REAL PROPERTY KNOWN AS
17138 880TH AVENUE,
RENVILLE COUNTY,
MINNESOTA,

Defendant/Appellant.

APPELLANT FEIGUM'S BRIEF AND APPENDIX

MACK & DABY P.A.
John E. Mack
Atty. Reg. No. 65973
26 Main Street
New London MN 56273
(320) 354-2045
ATTORNEY FOR APPELLANT

RENVILLE COUNTY ATTORNEY
David Torgelson
800 East DePue
P.O. Box D
Olivia MN 56277
(320) 523-2661
ATTORNEY FOR RESPONDENT

STATE ATTORNEY GENERAL
Michael Hatch
Atty. Reg. No. 42158
102 State Capitol
St. Paul MN 55155
(612) 296-6196
ATTORNEY FOR RESPONDENT

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STATEMENT OF THE LEGAL ISSUE INVOLVED

DOES ARTICLE I § 12 OF THE MINNESOTA CONSTITUTION AS APPLIED BY MINN. STAT. § 510.01 EXEMPT APPELLANT'S HOMESTEAD FROM SEIZURE UNDER MINN. STAT. § 609.5311; AND TO THE EXTENT THAT IT DOES NOT, IS MINN. STAT. § 609.5311 CONSTITUTIONAL?

The District Court Held: In the AFFIRMATIVE.

MOST APPOSITE STATUTES:

Minn. Const. Art. I § 11

Minn. Const. Art. I § 12

Minn. Stat. § 510.01

Minn. Stat. § 609.5311

MOST APPOSITE CASES:

Cargill v. Hedge, 375 N.W.2d 477 (Minn. 1985)

Denzer v. Prendergast, 125 N.W.2d 440 (Minn. 1954)

State ex rel Braun, 829 P.2d 600 (Kan. 1992)

Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992)

INTRODUCTION

This case involves the right of the State to seize a homestead pursuant to Minn. Stat. § 609.5311 where (as here) the homestead's value is less than the statutory amount exempted from seizure under Minn. Stat. § 510.01. Real and personal property is exempt from seizure on account of "debt or liability" under Minn. Const. Article I § 12 to the extent authorized by statute.

Somewhat surprisingly, this is a case of first impression in Minnesota. Despite considerable litigation concerning the applicability of Minn. Stat. § 609.5311 to various items of real and personal property, no case has reached the Minnesota Appellate Courts, at least as of the date of this writing, concerning the effect of Minn. Const. Article I § 12 on § 609.5311. This is even more surprising given that at least ten states have addressed a virtually identical issue under their state constitutions. One would like to believe that Minnesota lawyers are a particularly skillful group, and this issue has been virtually crying out for resolution ever since § 609.5311 was enacted.

This brief will consider the issue from two perspectives, both discussed in one and the same section of the brief. First, appellant will argue that Minn. Const. Article I § 12 as applied through Minn. Stat. § 510.01 carves out an exemption from Minn. Stat. § 609.5311 to the amount of the monetary and territorial limits set forth in that statute. Second, appellant will argue

that if such an exemption is not applied to a homestead as the appellant claims, then Minn. Stat. § 609.5311 is unconstitutional both on its face and as applied to someone in Mr. Feigum's position.

STATEMENT OF THE CASE AND FACTS

The facts were stipulated orally by the parties. Before October 19th, 2005, Kent Feigum was the owner of the following described real estate located in Renville County, Minnesota:

That part of the Southwest Quarter (SW $\frac{1}{4}$) of Section 8, Township 116, Range 37, Renville County, Minnesota, described as follows: Beginning at the Southwest corner of said Section 8; thence East a distance of 577 feet, as measured along the South line of said Section 8 to the true point of beginning; thence continuing East along the South line of said Section 8 a distance of 523 feet; thence north at right angles a distance of 500 feet; thence West at right angles a distance of 523 feet; thence South at right angles a distance of 500 feet to the point of beginning, said tract containing 6 acres, more or less.

(A-2)

This property was his homestead.

On October 19th, 2005, Mr. Feigum was arrested for growing marihuana on this property. On march 16th, he pled guilty to a charge of Controlled Substance Violation in the Third Degree (A-2). The State commenced a forfeiture action against him by submitting a criminal complaint (A-2). Mr. Feigum claimed that his property was exempt from forfeiture because of Minn. Const. Art. I § 12 and Minn. Stat. § 510.01. The issue was heard before Hon. Randall Slieter at the Renville County Courthouse on March,

16, 2006. On June 23rd, 2006, Judge Slieter ruled that the property was subject to forfeiture (A-1ff). Judgment was entered, and Mr. Feigum appealed on August 7th, 2006 (A-12). The instant appeal was filed with the Court of Appeals on August 9th, 2006.

ARGUMENT

ARTICLE I § 12 OF THE MINNESOTA CONSTITUTION AS APPLIED BY MINN. STAT. § 510.01 EXEMPTS APPELLANT'S HOMESTEAD FROM SEIZURE UNDER MINN. STAT. § 609.5311; AND TO THE EXTENT THAT IT DOES NOT, MINN. STAT. § 609.5311 IS UNCONSTITUTIONAL.

Article 1, § 12 of the Minnesota Constitution states:

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. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

Under the Minnesota Constitution, the homestead exemption is a guaranteed right, and as such, it cannot be taken away without the owner's consent absent the existence of one of the constitutional exceptions to it. *In re Kasden*, 84 F.3d 1104 (8th Cir. 1995). The Minnesota homestead exemption has long been liberally construed in favor of the homeowner. *Kipp v. Sweno*, 683 N.W.2d 259; *Northwestern National Bank of South St. Paul v. Kroll*, 306 N.W. 2d 104 (Minn. 1981); *Denzer v. Prendergast*, 125

N.W.2d 440 (Minn. 1954); *Ryan v. Colburn*, 241 N.W. 388 (Minn. 1932). Just how strong this policy is can be demonstrated by the Supreme Court's language in *Cargill v. Hedge*, 375 N.W.2d 477 (Minn. 1985):

In this case, too, we have strong policy reasons for a reverse pierce, much stronger than in *Roepke*, namely, furtherance of the purpose of the homestead exemption. This state has long recognized the importance, notwithstanding the just demands of creditors, for a debtor's home to be a "sanctuary." *Denzer v. Prendergast*, 267 Minn. 212, 216, 126 N.W.2d 440, 443(1964). This "wise and humane policy" is not just for the debtor's benefit, but is also "in the interest of the state, whose welfare and prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and kindred – sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed." *Ferguson v. Kumler*, 27 Minn. 156, 159, 6 N.W. 618, 619 (1880). The importance of protecting the homestead is further illustrated by recent laws imposing a moratorium on the foreclosure of certain mortgages and contracts for deed when the property involved qualifies for homestead tax treatment. Minn. Stat. ch. 583 (1984); 1984 Minn. Laws ch. 474. Significant, too, is that the legislature has given homestead classification for real estate tax purposes to homesteads held in family farm corporations where a shareholder occupies and actively farms the land. Minn.Stat. § 273.13 subd. 6a (1984).

(*Id.* at 479)

The District Court, in its analysis, focused on the word "debt" as set out in Minn. Const. Art. I § 12 and concluded that a seizure pursuant to Minn. Stat. § 609.5311 is not a seizure for a debt. However, the mention of the term "debt" is only part of Article I § 12. Also important is the provision's use of the word "liability." Minnesota does not limit its constitutional

immunity to a judgment sale or to a sale to satisfy a debt. It applies to a "seizure" as well. Thus, any "liability" is safe from "seizure" as well as sale. See, e.g., *Denzer v. Prendergast*, 126 N.W.2d 440 (Minn. 1954).

This case would be close if the only question is whether a criminal act subjecting the defendant to forfeiture was a "debt" (even though several courts have ruled that a predicate act creates such a debt under the forfeiture statute). But the addition of the word "liability" makes it clear that the framers were interested in a plenary exemption from seizure, with three specific exceptions noted in Article I § 12.

A forfeiture for a criminal act is not one of the three exceptions cited in the constitutional provision. Minnesota, like Kansas, has a very strong policy with respect to protection of homesteads. *Cargill v. Hedge, supra.*, went on to say:

Significant, too, is that the legislature has given homestead classification for real estate tax purposes to homesteads held in family farm corporations where a shareholder occupies and actively farms the land. Minn.Stat. § 273.13 subd. 6a (1984).

(*Id.* At 479)

The statute which implements Article I, § 12, viz. Minn. Stat. § 510.01, does not provide an exception for criminal forfeitures:

The 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 defined¹, 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, except such as are incurred for work or materials furnished in the construction, repair, or improvement of such homestead, or for services performed by laborers or servants and as is provided in section 550.175.

Nor does Minn. Stat. § 510.01 make any exception for a debt or liability incurred because one has used property as a drug instrumentality.

The forfeiture statute itself does not purport to overrule Minn. Stat. § 510.01, much less Minn. Const. Art. I § 12:

All property, real and personal, that has been used, or is intended for use, or has in any way facilitated, in whole or in part, the manufacturing, compounding, processing, delivering, importing, cultivating, exporting, transporting, or exchanging of contraband or a controlled substance that has not been lawfully manufactured, distributed, dispensed, and acquired is subject to forfeiture under this section, except as provided in subdivision 3. (Minn. Stat. 609.5311 subd. 2).

Given the expansive policy of Minnesota Courts with respect to the protection of homestead right, and the explicit language of the constitution that it applies to any "seizure" for any "liability" except those specifically noted in the constitutional provision, it is clear that Article I § 12 need not be read to conflict with § 609.5311 and gives Mr. Feigum an exemption in his homestead to be carved out of § 609.5311 to the extent of 160

¹For rural property such as Mr. Feigum's, Minn. Stat. § 510.02 exempts \$200,000 in value and 160 acres in area.

acres and \$200,000.

Before discussing the application of the word "liability" to this case, it will be helpful to consider the decisions of other states when confronted with a similar issue. Were Minnesota subject to Kansas Law, *State ex rel Braun*, 829 P.2d 600 (Kan. 1992) would be directly in point:

The other view of the homestead laws, and the one which we adopt, is that no incumbrance or lien or interest can ever attach to or affect the homestead, except the ones specifically mentioned in the constitution." *Morris v. Ward*, 5 Kan. at 244. "The homestead provision specifically enumerates *the only circumstances* where a homestead claimant may be deprived of his status." *State, ex rel., v. Mitchell*, 194 Kan. at 467. (Emphasis added.) "The homestead cannot be subjected to forced sale to satisfy debts except in the following situations: (1) To pay taxes; (2) to pay obligations contracted for the purchase of the homestead; (3) to pay obligations contracted for the erection of improvements on the homestead; or (4) any process of law obtained by virtue of a lien given by the consent of both husband and wife.'" *Celco, Inc. of America v. Davis Van Lines, Inc.*, 226 Kan. 366, Page 762 370, 598 P.2d 188 (1979) (quoting *Iowa Mutual Ins. Co. v. Parr*, 189 Kan. at 478). The courts and the legislature do not have the power to create new exceptions to the constitutional homestead protections. See *State, ex rel., v. Mitchell*, 194 Kan. at 466 ("This court has no power to engraft amendments to our state constitution [art. 14, §§ 1, 2], and upon the matter of homestead, not only is legislative aid dispensed with, but legislative interference is foreclosed, and no conditions may be imposed by statute upon the enjoyment of the homestead right." [Emphasis added.]); *Iowa Mutual Ins. Co. v. Parr*, 189 Kan. at 479; *In re Estate of Casey*, 156 Kan. 590, 599, 134 P.2d 665 (1943) ("it is not within the equitable power of the courts of this state to declare an indebtedness, except those expressly authorized by the constitution, a lien on the homestead"); *West v. Grove*, 139 Kan. at 363 ("anything that the legislature might see fit to enact or did enact could in no way limit the constitutional

provisions with respect to a homestead"). Whether K.S.A. 1991 Supp. 65-4135(a)(7)(A) violates Article 15, § 9 of the Kansas Constitution is an issue of first impression. However, the case law concerning the homestead exemption supports a conclusion that K.S.A. 1991 Supp. 65-4135(a)(7)(A) must be declared unconstitutional. *State, ex rel., v. Mitchell* was an action "to abate a liquor nuisance" pursuant to K.S.A. 41-806 . 194 Kan. at 464. The Kansas Supreme Court concluded the provisions of K.S.A. 41-806, which permit padlocking of a building, could not be applied to a homestead. 194 Kan. at 467. The court concluded: "The padlocking of a homestead for the violation of any law is not specifically mentioned or even implied in the exceptions above stated. Admittedly, padlocking of a homestead is not a forced sale, but this section is enlarged by the clause 'and shall not be alienated without the joint consent of husband and wife.' The word 'alienated' as used in our constitution means a parting with or surrendering of some interest in the homestead." 194 Kan. at 465. The court's reasoning included: "The homestead provision of our constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. These exceptions are unqualified. They create no personal qualifications touching the moral character of the resident *nor do they undertake to exclude the vicious, the criminal, or the immoral from the benefits so Page 763 provided.* The law provides for punishment of persons convicted of illegal acts, *but the forfeiture of homestead rights guaranteed by our constitution is not a part of the punishment.*" 194 Kan. at 465-66. (Emphasis added). The legislature is without authority to create a new exception by statute. Forfeiture proceedings are not mentioned "or even implied" under the exceptions contained in § 9 of Article 15. 194 Kan. at 465. The only additional exceptions recognized by case law are based upon other constitutional powers granted to the government. For example, in *Brandon v. Brandon*, 14 Kan. 342, 346 (1875), the Kansas Supreme Court held that the constitutional authority of a district court to grant a divorce includes the power to award possession of the homestead. In *Blankenship v. Blankenship*, 19 Kan. 159, 161 (1877), the court held that a district court has the power to declare an award of alimony to be a lien upon homestead property. In *Jockheck v. Comm'rs of Shawnee Co.*, 53 Kan. 780, 790, 37 P. 621 (1894), the

court held that the homestead exemption could not defeat the State's power of eminent domain. In *Hawkins v. Social Welfare Board*, 148 Kan. 760, the State was able to obtain a lien against a homestead because the statutes creating the lien were consistent with the homestead provision. *Hawkins* involved a statute which granted the State a lien on the real property of an old-age assistance recipient. The statute specified that the lien could not be enforced while the property was being occupied as a homestead. 148 Kan. at 762. The *Hawkins* court reiterated the case law standard "that nothing less than the free consent of the resident owner of the homestead, and joint consent of husband and wife where that relation exists, will suffice to alienate the homestead." 148 Kan. at 763. The court concluded that the acceptance of old-age assistance constituted a consent to grant the State a lien upon the homestead and, therefore, the statute did not violate the constitutional homestead provision. 148 Kan. at 764. A forfeiture under K.S.A. 1991 Supp. 65-4135(a)(7)(A) is a forced sale which is not specifically authorized by any of the exceptions contained in Article 15, § 9 of the Kansas Constitution. As a result, we conclude that K.S.A. 1991 Supp. 65-4135 (a)(7)(A) is unconstitutional.

(*Id.* at 604, *aff'd* 840 P.2d 453 (Kan. 1992))

Minnesota is not Kansas. But its homestead provision and the sorts of cases which interpret the homestead provision are consistent with the Kansas Court's analysis. Both states have a strong policy of homestead protection. Neither states' forfeiture provision mention or references the homestead provisions in their statutes or constitutions. And both states have substantial precedents which hold that homestead provisions in their constitutions trump mere statutes which are in conflict with them.

If Minnesota were Iowa, the result would be the same as in Kansas. As the Court said in *Matter of Bly*, 456 N.W.2d 195 (Iowa

1990):

We are also mindful that forfeitures are severe sanctions not favored by our law. See, e.g., *State v. Kaufman*, 201 N.W.2d 722, 723 (Iowa 1972). Chapter 809 is to be strictly construed, with due regard for its legitimate purpose. See *In the Matter of Property Seized from Kaster*, 454 N.W.2d 876, 877 (Iowa 1990). In light of the legislature's choice not to refer to the homestead law in chapter 809, we conclude that the current Iowa statutes do not permit the State to forfeit a legitimately acquired homestead under section 809.1(2)(b) even though the homestead was used by its owner to facilitate the commission of a criminal offense.

Bly is interesting, because it upheld a purely *statutory* homestead exemption against a criminal forfeiture statute, a much weaker basis to avoid forfeiture than Minnesota's (and Kansas's) constitutional homestead provision.

Consider also *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992). In that case the Florida Court reversed a trial court order forfeiting a racketeering defendant's personal residence, reasoning that "forced sale" as set forth in the Florida Constitution, was not and could not be limited to sales for financial debt, but was intended to guarantee that the homestead would be preserved against any involuntary divestiture by the courts. It said:

The State argues that a forfeiture is not a "forced sale" and that the homestead exemption was not intended to apply outside the debtor context, and urges that, like the Fifth District, we interpret the constitutional provision as inapplicable to forfeiture. In light of the purpose and language of the provision, we are unable to do so.

A settled rule of constitutional interpretation is that:

The words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them. *City of Jacksonville v. Continental Can Co.*, 113 Fla. 168, 172, 151 So. 488, 489-90 (1933); see also *Wilson v. Crews*, 160 Fla. 169, 175, 34 So.2d 114, 118 (1948); *City of Jacksonville v. Glidden Co.*, 124 Fla. 690, 692-93, 169 So. 216, 217 (1936).

[1] [2] Additionally, Florida courts have consistently held that the homestead exemption in article X, section 4 must be liberally construed. E.g., *Graham v. Azar*, 204 So.2d 193, 195 (Fla.1967); *Hill v. First Nat'l Bank*, 79 Fla. 391, 401, 84 So. 190, 193 (1920). A liberal construction of the homestead exemption is particularly appropriate in the context of forfeiture. Forfeitures are considered harsh penalties that are historically disfavored in law and equity, and courts have long followed a policy of strictly construing such statutes. *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 961 (Fla.1991); *General Motors Acceptance Corp. v. State*, 152 Fla. 297, 302, 11 So.2d 482, 484 (1943); see Michael Paul Austern Cohen, Note, *The Constitutional Infirmary of RICO Forfeiture*, 46 Wash. & Lee.L.Rev. 937, 939 (1989).

(*Id.* at 58, 59)

Illinois, like Iowa, interpreted its homestead statute to carve out an exemption from the forfeiture statute. It said, in the case of *People v. One Residence Located at 1403 East Parham Street*, 621 N.E.2d 1026 (Ill. App. 1993). That Court said:

The fundamental rule of statutory construction, of course, is to give effect to the intent of the

legislature. (*State v. Mikusch* (1990), 138 Ill.2d 242, 247, 149 Ill.Dec. 704, 706, 562 N.E.2d 168, 170.) We note, as did the trial court, that neither the Controlled Substances Act nor the Drug Asset Forfeiture Procedure Act (hereinafter Forfeiture Procedure Act) mentions the homestead exemption in any respect. Section 8 of the Forfeiture Procedure Act does set forth certain exemptions from forfeiture. (Ill.Rev.Stat.1991, ch. 56 ½, par. 1678.) However, each of these exemptions is intended exclusively to protect the interests of an innocent owner of property which is otherwise subject to forfeiture. The section does not address exemptions available to the individual who has knowingly violated the Controlled Substances Act thus resulting in the forfeiture action. Thus, we find unconvincing the State's argument that, by failing to include homestead as an exemption in this section, the legislature intended to exclude homestead as an exemption. While ordinarily the enumeration of certain exceptions in a statute will be construed as an exclusion of all others (*State v. Mikusch* (1990), 138 Ill.2d 242, 250, 149 Ill.Dec. 704, 562 N.E.2d 168, 171), this is not a rule of law which is absolutely required to be applied in all cases. (*Dixon v. O'Connor* (1981), 94 Ill.App.3d 656, 658, 50 Ill.Dec. 216, 218, 419 N.E.2d 83, 85.) The *201 homestead exemption is of a different nature than the exemptions addressed in section 8. It is not an additional exemption under the Forfeiture Procedure Act. The failure to include the homestead exemption in section 8 is not, therefore, reflective of legislative intent to exclude its application to forfeiture of real property under the Controlled Substances Act. We conclude, therefore, that both the Controlled Substances Act and the Forfeiture Procedure Act are silent as to the applicability of the homestead exemption to the forfeiture of real property thereunder.

(*Id.* at 200, 201)

Oklahoma made its determination that homestead property was exempt from forfeiture based upon its state constitution.. In *State ex rel. McCoy v. Lot One in Block Seven of Oakhurst Addition, Section Two*, 831 P.2d 1008 (Okla. App. 1992), the Court said:

We find In the Matter of Bly, supra, persuasive. Oklahoma, like Iowa, requires that homestead exemption laws be liberally construed in favor of exemption. In the Matter of the Estate of Wallace, 648 P.2d 828 (Okla.1982). Likewise, Oklahoma's forfeiture statute does not specifically refer to forfeiture of a homestead. Because our Legislature does not refer to our homestead law in § 2-503(A)(8), Appellant may not forfeit a homestead, even though it is found the property was used by its owner to facilitate the commission of a criminal offense.

Appellant complains that the intent of the homestead statute is to benefit the family and points out that Mr. Drake is a single person with no spouse or children who depend on him for support; therefore, there is no family to benefit as intended by § 1. However, to allow such a construction violates the purpose of our homestead exemption statutes. Section 1 provides that the home be exempt from forced sale. We note that the 1980 amendment to § 1 deleted references to "head of family" and also deleted many references to "family" unless phrased in connection with "the personal, family or household use." To construe § 1 as suggested by Appellant would open the door to further erosion of the very basis for its enactment. Accordingly, the order denying Appellant's forfeiture motion is affirmed.

(*Id.* At 1010)

See Also, *State v. Pettis*, 333 N.W.2d 717 (S.D. 1983).

In fairness, it should be pointed it out that the states are about equally divided on this issue. Arizona (*In Re Parcel of Real Property*, 801 P.2d 432 (Az. App. 1990)); Colorado (*People v. Allen*, 767 P.2d 798 (Colo. App. 1988); Texas (*Lot 39, Section C., Northern Hills Subdivision, Grayson County, Texas v. State*, 85 S.W.3d 429 (Tex. App. 2002)); and Washington (*Tellevik v. Real Property Known as 6717 100th Street S.W.*, 921 P.2d 1088 (Wash. App. 1996)) hold that a forfeiture statute prevails over homestead exemption laws to

the contrary.

Thus, the jurisdictions divide about equally over the issue of the prevalence of homestead statutes over forfeiture statutes. The cases which hold that the forfeiture statutes prevail can be distinguished, and appellant will distinguish them in the course of this brief. However, candor compels the conclusion 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. Rather, 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. The cases which hold in favor of the homesteader stress the importance of the state homestead policy and the importance of making sure the offender has a roof over his head when he is finished with his incarceration period. The cases which hold in favor of the forfeiture stress the evils of drugs and the importance of using all tools available in the war on them. Most of the decisions on either side appear to be rather result-oriented, and perhaps even somewhat political. Given the nature of judicial elections in Texas, for example, it is hard to imagine that Court coming out any other way.

That said, let us consider the specifics of the negative decisions. The Arizona Court in *Parcel of Real Property, supra*, made its determination based upon the fact that it had no constitutional provision granting homestead protection and that

statute's homestead exemption statute was limited purely to debts.

It analyzed its statute thus:

A.R.S. § 33-1101(A) provides:

Any person the age of eighteen or over, married or single, who resides within the state may hold as a homestead exempt from attachment, execution and forced sale, not exceeding one hundred thousand dollars in value, any one of the following:

(Emphasis added.) The purpose of the homestead statutes is to save exempt to the family the amount of money designated as the value of a homestead by protecting the family from a forced sale to satisfy the debts of the owner. The forfeiture here is not predicated upon the debts incurred by the owner but rather is based on the illegal uses to which the property was put.

(*Id.* At 437)

Minn. Const. Art. I § 12, by contrast, is (1) a constitutional provision; (2) exempts property from seizure as well as sale; and (3) applies to "liabilities" as well as "debts."

Texas, in *Lot 39, supra*, also dealt with a pure "claim of creditors" provision. The Texas Court thus concluded:

The Texas constitutional and statutory provisions pertaining to the homestead exemption specifically indicate that homesteads may not be seized or subjected to forced sales for the payment of the owner's debts or the claims of creditors. The forfeiture of real property based upon the owner's use of that property to conduct criminal activity, such as the manufacture or delivery of methamphetamine, is not a forfeiture for the payment of the owner's debts or the claims of creditors.

(*Lot 39, supra*, at 431)

The Texas court helpfully distinguished the line of cases

cited in this brief which held in favor of the homesteader, stating:

We note that Helm's reliance on the cases from Florida, Illinois, Iowa, and Kansas is misplaced because the homestead provisions in those states contain broader exemption language than the Texas provisions and are, therefore, distinguishable. In Florida, homesteads are exempt from forced sale under process of any court. In Illinois, homesteads are exempt from attachment or judgment for the payment of debts or other purposes. In Iowa, homesteads are exempt from judicial sale unless there is a special statutory declaration to the contrary. In Kansas, homesteads are exempt from forced sale under any process of law. In none of those states is the homestead exemption limited to seizures based upon the owner's debts.

(*Lot 39, supra*, at 431, 432)

Minnesota, unlike Texas, does not have a pure "debt" provision.

It should be noted that Minn. Const. Art. I § 12, containing as it does, both the words "seizure" and "liability", is much closer in form to the laws cited in Illinois, Iowa, Kansas, and Florida than the laws of Texas, Alabama, Arizona, Washington or Colorado.

Washington has a mere "debt" exemption provision, and that provision is purely statutory. The Washington Court said in *Tellavik*:

According to RCW 6.13.070(1), the answer would appear to be no. That statute protects the homestead from forced sale "for the debts of the owner," and forfeiture under RCW 69.50.505 is not based on such

debts.

(*Tellavik, supra*, at 377)

Finally, Colorado's exemption law also applies only to civil debts. The *Allen* Court reasoned:

Defendant's third claim on appeal is that she is entitled to the full benefit of the homestead exemption even though the property is subject to forfeiture as a public nuisance. We disagree.

Section 38-41-201, C.R.S. (1982 Repl.Vol. 16A) provides that every homestead occupied as a home by the owner or his family shall be exempt, in the amount of \$20,000 in excess of any liens or encumbrances on the property, from execution and attachment "arising from any debt, contract, or civil obligation...." The execution and attachment to which the property is subject in this case did not arise from debt, contract, or civil obligation, but from the property's adjudication as a public nuisance because of its use for criminal activity.

(*Allen, supra*, at 800)

Thus, all the states to date which have decided that the forfeiture law trumps the exemption law limit their exemptions to debts only. All but one of the states which have decided that the forfeiture law prevails exempt property by statute rather than by constitutional provision.

By contrast, Minnesota's exemption provision is constitutional (Minn. Const. Art. I § 12). It exempts loss of property from "seizures" as well as judicial sales. And it applies not only to "debts" but also "liabilities."

It is perfectly clear that a taking under § 609.5311 is a "seizure." Minn. Stat. § 609.5311 subd. 2b explicitly uses the words "seize real property," so there is no doubt that the legislature was aware that the purpose of § 609.5311 was to effectuate a seizure of real property. See also Minn. Stat. § 609.301 subd. 4.

So the only remaining question is whether the use of property for drug related purposes constitutes a "liability" within the meaning of Minn. Const. Art. I § 12. There are many reasons to believe that it does. First, the framers deliberately added the words "liability" after debt. The Supreme Court itself has indicated not only that it construes "liability" as more expansive than "debt" but that liability includes virtually obligation a homesteader may have. As it said in *Denzer*:

The fact that in the revision of 1905 the limiting clause 'on account of any debt not lawfully charged thereon in writing' now appearing in the statute was employed for the first time, [FN8] and that the words 'or liability' appearing in the second sentence of Minn. Const. art. 1, s 12, are not included in the statutory phrase lead appellants to the contention that the legislature intended to distinguish between an obligation to pay money arising from contract, express or implied, and that arising from a judgment for damages caused by a wrong. The legislature, however, was under a constitutional mandate to exempt a reasonable amount of property from seizure or sale for the payment of 'any debt or liability.' These words as of 1905 had been construed to mean '**debts or liabilities of every kind or description, without exception.**' The exceptions to art. 1, s 12, made in 1888 by the constitutional amendment were made because of and in deference to these decisions. Although

appellants argue persuasively that considerations of public policy call for a different treatment of obligations based on express or implied contract and those based on damages caused by negligence, we do not think the legislature intended to, or could, make property exempt from satisfaction of one class of obligations and not the other in view of the language of the constitution as construed by this court.

(*Id.* at 220, 221; italics supplied)

Second, The farmers set Minn. Const. Art. I § 12 in a framework which indicates a disinclination to permit forfeitures. Article I, § 11 states:

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

While "forfeiture of estate" probably meant "forfeiture of all the defendant's property" at the time the Minnesota Constitution was adopted and thus might not directly apply to a forfeiture of homestead, the existence of this constitutional provision, coupled with its proximity to Article I, § 12 clearly indicates that the legislature was keenly aware of the possible seizure of property for criminal activities and was concerned to limit such seizures. These provisions must be read *in pari materia*. By Article I, § 11, the framers intended to preserve unto a criminal defendant at least some of his property. And by Article I, § 12, the framers intended to preserve unto a criminal defendant at least one portion of such property, viz., his

homestead.

Third, the natural use of the term "liability" refers, as the *Denzer* court indicated, to just about any obligation imaginable. As *Black's Law Dictionary*, Revised Fourth Edition, p. 1058, has it:

Liability. The word is a broad legal term. *Mayfield v. First Nat. Bank of Chattanooga, Tenn*, C.C.A. Tenn., 137 F.2d 1013, 1019. It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely. *Wenz v. State*, 108 Neb. 597, 188 N.W. 467, 468.

See also *United States Fidelity & Guaranty Company v. Haney*, 208 N.W. 17 (Minn. 1926.)

Fourth, note that Minn. Stat. § 609.5311 is a 2005 statute. By that time, surely at least one member of our lawyer-heavy legislature was familiar with the *Braun-Bly-Pettis* line of cases. If the legislature had intended that statute to trump § 510.01, it knew how to say so. By then, it should be noted, several states had indicated that such attempts to limit the application of the homestead exemption would be unconstitutional anyway.

Note that the legislature did not say "all real property shall be forfeited." Rather, it said that such property "is subject to forfeiture." And indeed no one would argue that the type of property owned by Mr. Feigum was "subject to forfeiture." But if the property (1) was homestead, (2) was less than 160

acres; and (3) was less than \$200,000 in value, it could not actually be forfeited. So § 609.5311 is compatible with § 510.01 (and thus Article I § 12): More than 160 acres? The excess is forfeited. More than \$200,000 in value? The excess is forfeited. Non-homestead property? All of it is forfeited. None of the above? The property is exempt.

The Appellant served notice on the Attorney General, both in the District Court and in the Court of Appeals, that he challenges the constitutionality of § 609.5311. However, it is almost surely not necessary to reach the issue of § 609.5311's constitutionality. It is only necessary to subject § 609.5311 to the strictures of Article I § 12 and, through it, § 510.01 and § 510.02. Such a procedure would in effect read § 609.5311 to apply to all real property owned by a relevant criminal defendant, but permit that defendant to retain some of his property exempt from the seizure.

Such a result is compatible with two important state interests. First, the rehabilitation of criminals should be of concern to all. Indeed, the constitutional provision against forfeiture, Article I § 11, reflects a policy that the state should not strip even criminals of everything. Depriving a criminal of his (and quite possibly his family's) homestead not only makes it more likely that the former criminal will be desperate to seek shelter by any means necessary, but will probably force the state to expend funds to support and shelter him. As productive policy, depriving a criminal of his homestead is akin to putting a screen

door on a submarine.

Second, Minn. Stat. § 609.5311 is extremely broad. It applies that has been used, or is intended for use, or that has in any way:

[f]acilitated, in whole or in part, the manufacturing, compounding, processing, delivering, importing, cultivating, exporting, transporting, or exchanging of contraband or a controlled substance....

As a result, there need be no proportionality between the offense and the size of the defendant's loss. Indeed, the house could be everything the defendant owns, which would create real Article 11 § 11 problems. The most passing brush with the drug laws - not throwing someone out of the house if he has several eight-balls in his pocket - could lead to the loss of a homestead. So could failure to turn in a relative, a friend, an overnight guest.

Indeed, this statute is likely to created *Blakely* problems unless subjected to Article I § 12 and Minn. Stat. § 510.01. One can, of course, argue that the loss of homestead is a collateral consequence, not a direct consequence, of the crime. But conviction of the crime does not automatically satisfy those provisions of § 609.5311 which are in addition to the conviction of a predicate crime - the value provision, the knowledge provision, etc.

Of course, if this Court cannot in good conscience read §

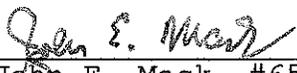
609.5311 in concert with § 510.091 or Minn. Const. Art. I § 12, then it will be squarely faced with the issue of § 609.5311's (partial) unconstitutionality. If forced to face the issue, the Court of Appeals should not hesitate to find that statute unconstitutional to the extent that it applies to exempt property. The constitutional provision, read through at least ten Minnesota cases, is clear: homesteads are sacred, and they are not to be forfeited except for the narrow reasons given in Article I § 12 itself. It may be that the forfeiture statute is to be interpreted broadly to effectuate its purposes. But Article I § 12 is to be interpreted broadly to effectuate its purposes, too. And if those two policies come into conflict, the constitution prevails over the statute.

CONCLUSION

For these reasons, the District Court's order and judgment should be reversed and the case should be remanded with instructions to preserve Mr. Feigum's homestead interest in his property.

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MACK & DABY P.A.



John E. Mack, #65973
P.O. Box 302
New London MN 56273
(320) 354-2045
ATTORNEYS FOR APPELLANT

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).