State of New Hampshire Supreme Court

NO. 98-174

2000 TERM

AUGUST SESSION

IN RE ONE THOMPSON CENTER CONTENDER HANDGUN, SERIAL NUMBER 158312

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF PROPERTY OWNER, JAMES McLOUD

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1. Did the court err in finding that Mr. McLoud's property was contraband?

2. Did the court err in assuming jurisdiction for a forfeiture when no statute provides for a forfeiture of a firearm unless it is contraband and Mr. McLoud was convicted of a crime involving the firearm?

3. Was James McLoud denied his right to due process by not being afforded a trial by jury and other procedural and substantive rights commensurate with a forfeiture of his property?

4. Did the court err in allowing the firearm to be used as evidence in a forfeiture proceeding when it was unlawfully seized without a warrant.

5. Did the court err in ordering a forfeiture of Mr. McLoud's night vision device and firearm when his suppressor, even if contraband, was not an integral part of the firearm in that it easily detaches and is not permanently attached to the firearm and when the night vision device also easily detaches and is not permanently attached.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In November 1996, James McLoud was arrested by officers of the New Hampshire Fish and Game Department for night hunting and use of a silenced firearm. The officers later seized the firearm after a search of his uncle's house. During trial of the criminal charges, the Laconia District Court (*Huot*, J.) found that the firearm had been unlawfully taken, suppressed it as evidence, and dismissed the charges.

The firearm is a Thompson Center Contender handgun. Mr. McLoud is a licenced firearm dealer and an amateur machinist, and had modified the firearm so that it could accept various accessories. As a hobbyist, Mr. McLoud takes his various rare and unusual firearms to various shows and exhibitions. Temporarily attached to the firearm at the time of seizure was a tripod, a night vision device, and a sound suppressor. All of these items are easily removed, and it is commonplace to do so during normal operation.

After the criminal charges were dismissed, the State petitioned for forfeiture of the sound suppressor, the firearm, and the night vision device. The Belknap County Superior Court (*Smuckler*, J.) found that it had jurisdiction to order the forfeiture under various statutes and under its general equity powers. The court also found that the suppressor was contraband, and ordered Mr. McLoud forfeit it, the night vision device, and the firearm itself.

This appeal was taken from the order of forfeiture.

SUMMARY OF ARGUMENT

Mr. McLoud first argues that his sound suppressor is not contraband. He bases his argument on the language of the statute, its purpose, the administrative gloss given to it by the Department of Fish and Game, federal interpretation of it, contemporary definitions of the statutory words, and comparison to neighboring states' and federal laws.

Mr. McLoud then argues that because he was not convicted, no statute provides jurisdiction for a forfeiture of his suppressor. He canvasses all the statutes mentioned by the State and the lower court to show that none of them authorize the forfeiture.

He next argues that because the night vision device, the firearm, and the suppressor were unlawfully seized, they cannot be used as evidence in a forfeiture proceeding.

Finally, Mr. McLoud argues that even if the suppressor were considered contraband, it and the night vision device were not so integrated with the firearm so as to make the night vision device and the firearm itself subject to forfeiture.

He requests return of all the items.

ARGUMENT

I. The Sound Suppressor Seized in this Case is not Contraband

The sound suppressor seized by the State in this case is not contraband. RSA 207:4 provides that

> "No person shall sell, offer for sale, use, have in his possession, any gun, pistol, or other firearm fitted or contrived with any silencer or device for deadening the sound of explosion. Nothing in this section shall prohibit the use of a muzzle brake, polychoke, or compensator."

A. Statute Clearly and Unambiguously Says Suppressors are not Contraband

The statute is clear and unambiguous. It bans a "silencer" or a "device for deadening" a firearm's report. By its terms, it bans items that make a firearm silent, or that make the sound dead. It doesn't purport to ban a muffler or suppressor, or any device that lessens or quietens the sound.

Both words "silencer" and "deaden" are superlatives which connote the extreme of the characteristic they describe. Words such as muffle, suppress, lessen, and quiet are not superlatives. These words are comparatives which connote some point along the continuum of the characteristic they describe, but at levels which are not the extremes. If, for example, 'loud' is a characteristic, than 'louder' is the comparative and 'loudest' is the superlative. 'Silence' alone is a superlative because one cannot conceive of something that is 'silencer.' 'Deaden' is a superlative because one cannot conceive of something being 'deader.'

RSA 207:4 uses the superlative form of these words. The legislature did not use any of the comparatives suggested above. Thus, it is apparent on the face of the statute that it bans only those devices which make the firearm's report inaudible.

The State admitted that the firearm here, with its suppressor, was clearly audible and in

fact as loud as other unsuppressed firearms. PETITION FOR FORFEITURE, *Appx. to NOA* at 10, 13.

B. Purpose of the Statute Shows Suppressors are not Contraband

The purpose of the statute bolsters this language. The legislation from which RSA 207:4 was codified is entitled "An Act Relating to the Use of Silencing Devices in the Taking of Game." 1947 N.H. Laws Ch. 69, *Appx. to Brief* at 14-15. This title shows the source of the statute, and its purpose to prevent poaching.

Although silencers and suppressors have been banned recently in some jurisdictions as a purported crime-control measure, the 1947 New Hampshire statute was enacted as a part of fish and game regulation for the purpose of preventing poaching. A silenced firearm prevents others from knowing the whereabouts of a hunter in the forest. For this purposes, a silenced firearm hinders agency officials from locating a shooter who may have taken game illegally or out of season. The report of a firearm is thus akin to the light required to shine on a car's licence number plate. RSA 266:44.

C. Administrative Gloss on the Statute Shows Suppressors are not Contraband

The Department of Fish and Game has given RSA 207:4 an administrative gloss. By generally agreeing, except for this case, that sound suppressors are not contraband, it has in effect created a definition of the statutory language to not include sound suppressors.

> "The administrative gloss doctrine, which finds its origins in zoning cases, applies when the provision in question is ambiguous, the agency responsible for its administration has interpreted it over a period of years in a consistent manner, and the legislature has not interfered with this interpretation."

Appeal of Public Service Company, 141 N.H. 13, 22 (1996).

> "If an administrative gloss is indeed found to have been placed on a clause, the municipality may not change such a *de facto* policy, in the absence of legislative action, because to do so would presumably violate legislative intent."

Hansel v. City of Keene, 138 N.H. 99, 104 (1993).

Firearm sound suppressors are widely available, bought, sold, and tolerated by the State. *Trn.* at 21-23. They are frequently demonstrated at gun shows, *Trn.* at 21, often used by gun clubs to maintain good relations with neighbors, *Trn.* at 22, and often bought and sold by members of the law enforcement community. *Trn.* at 22. All of this is readily apparent and known by the Department of Fish and Game. *Trn.* at 23. At gun shows, there has never been any effort to confiscate all the suppressors, or to arrest those who possess them. *Trn.* at 23. Mr. McLoud himself owns a variety of federally licenced sound suppressors, which he still has. *Trn.* at 23. The State admits these facts. *Trn.* at 31.

This condonation of the possession of suppressors shows that the Department does not consider the devices contraband. The General Court has apparently tolerated the Department's interpretation of the statute, as it has not changed it in over 50 years.

Accordingly, the statute cannot be singly enforced against Mr. McLoud just because the Department is perturbed at him having defeated the illegal hunting charges it filed against him.

D. Federal Interpretation of the Statute Shows Suppressors are not Contraband

Firearms are a highly regulated field by the federal government. *See* Federal Gun Control Act, 18 U.S.C. § 921 et seq.; National Firearms Act, I.R.C.§ 5841 et seq. All "firearms dealers" as defined by 26 U.S.C. § 5845, must register with the Secretary of the Treasury, 26 U.S.C. § 5802, and pay an annual registration tax. 26 U.S.C. § 5801. As part of its regulation, upon transfer of ownership the seller, buyer, and all items defined as a "firearm" must be properly identified. 26 U.S.C. § 5812(a)(6). A firearm cannot be transferred unless it has been registered, the federal tax paid, the transfer approved, and unless the federal tax stamp has been issued by the Bureau of Alcohol, Tobacco and Firearms (ATF). *Id.* A silencer or sound suppressor must

be registered and permitted independent from the firearm to which it may be attached, and must carry a separate tax stamp. 18 U.S.C. § 921; 26 U.S.C. § 5812(a)(6).

The ATF will not issue a permit for a transfer of a silencer in states where silencers are illegal. 26 U.S.C. § 5812(6); *Trn.* at 21.

The sound suppressor owned by Mr. McLoud which the State seized in this case has a valid federal tax on it, independent from the firearm to which it is temporarily attached. Department of the Treasury - Bureau of Alcohol, Tobacco and Firearms, SPECIAL TAX STAMP,[1] issued to James L. McLoud, License Number 6-02-008-07-6K-34193, June 20, 1995, *Appx. to Brief* a 1-3; DEFENDANT'S ANSWER, *Appx. to NOA* at 22.

In addition, as of the hearing date, there were 390 devices classified as silencers in New Hampshire. *Trn.* at 34. This figure, from a widely available sporting magazine, was derived from federal documents presumably available to the State. SMALL ARMS REVIEW, Oct. 1997, at 50-53, *Appx. to Brief* at 13-17.

Thus, it is clear that the ATF acknowledges that suppressors are not contraband in New Hampshire. While the ATF's interpretation of the statute of course is not binding, it is strong evidence that RSA 207:4 does not ban sound suppressors.

E. Contemporary Definition of Statutory Words Shows Suppressors are not Contraband

The lower court cited a modern dictionary to show that the statutory terms include the equipment seized by the State. In 1947, however, the common meanings of these words apparently differed from today's. Viewing a dictionary contemporary with the statute, "silencer"

[1]The federal revenue stamp for the suppressor was entered into evidence as an exhibit. *Trn.* at 33.

is defined, in part, as

> "One who or that which silences; specif[ically]: a. The muffler of an internal-combustion engine. b. Any of various devices for silencing the humming noise of telegraph wires. c. A silencing device for firearms, etc., as a tubular attachment for the outlet having circular or coiled passageways which permit the exit of the projectile but which trap the noise without materially impeding the escape of the exhausting or exploding gases. d. A device which, when applied to exhaust or suction lines, absorbs or silences the sound waves which produce undesirable noises."

Webster's New International Dictionary, Unabridged (2nd ed. Edition, 1950).[2] "Silence" is defined as "[t]o compel or reduce to silence; to cause to be still; to stop the noise of; still; as, to silence a crying child." *Id.* "Silenced" is defined as "Reduced to silence." *Id.*

"Deaden" is defined as "[t]o render impervious to sound, as a wall; to deafen." *Id.* (emphasis added). The meaning of "deaden" in New Hampshire in 1947 can be further gleaned from two decisions of this Court contemporary with the statute.

In *Manseau v. Railroad*, 96 N.H. 7 (1949), one Mr. Tibbetts met a tragic death when a train collided with his horse-drawn wagon. The collision occurred at a crossing, which was located just where an embankment stopped. The man was known to be very careful in his driving, and the horse was slow. The train was going its normal speed, and approaching the crossing it was sounding both its horn and bell. With the noise of the train, as well as its warning horn and bell, it should be presumed that Mr. Tibbetts heard it, but he apparently didn't. This court wrote that the "embankment was as high as twenty feet in places and would not only obstruct sight but would *deaden* and deflect sound as to anyone approaching from the south as was Tibbetts." *Manseau*, 96 N.H. at 8 (emphasis added).

Dahar v. Railroad, 95 N.H. 464 (1949) involved another railroad accident. Mr. Dahar's

[2]Available on the pedestal at the State Library in Concord.

truck was struck by a train at a crossing. The court found that the train was going its normal speed, and signaling its approach to the crossing by both horn and bell. Mr. Dahar had his window up, however, and apparently heard neither the sound of the train nor its warnings. To explain this, a witness testified that "'a solid body between the source of the sound and a person listening has a tendency to deflect and *deaden* the sound.'" *Dahar*, 95 N.H. at 467 (emphasis added). *See also Maryland Tel. & Tel. Co. v. Cloman*, 55 A. 681, 682 (1903) (a "deadened" wire is one that ends).

From these contemporary contexts, it is apparent that "deaden" meant a sound made quiet enough so that it could not be heard.

Statutory words must be construed according to their contemporary meaning. *Claremont School Dist. v. Governor*, 138 N.H. 183, 187 (1993). In 1947, silence meant the absence of noise, and not merely quiet; deaden meant that the sound was made inaudible, and not merely quiet. The contemporary definitions of these words make it apparent that the legislature intended to ban devices that make firearms soundless, and not merely sound suppressors.

F. Comparison to Other Jurisdictions Shows Suppressors are not Contraband in New Hampshire

Neighboring jurisdictions have laws explicitly banning silencers. For instance, Vermont's statute provides that:

> "A person who manufactures, sells or uses or possesses with intent to see or use, an appliance known as or used for a gun silencer shall be fined $25.00 for each offense. The provisions of this section shall not prevent the use or possession of gun silencers for military purposes when so used or possessed under proper military authority and restriction."

VT. STAT. ANN. tit. 13, § 4010. The Massachusetts statute was enacted in 1926 (with minor later revisions). It provides:

> "Any person . . . who sells or keeps for sale, or offers, or gives or disposes of by any means other than submitting to an authorized law enforcement agency, or uses or possesses any instrument, attachment, weapon or *appliance for causing the firing of any gun, revolver, pistol or other firearm to be silent or intended to lessen or muffle the noise of the firing of any gun*, revolver, pistol or other firearm shall be punished by imprisonment for not more than five years in state prison or for not more than two and one-half years in a jail or house of correction. . . . Upon conviction of a violation of this section, the instrument, attachment or other article shall be confiscated by the commonwealth and forwarded, by the authority of the written order of the court, to the commissioner of public safety, who shall destroy said article."

MASS. GEN. LAWS ANN. ch. 269 § 10A (emphasis added).

Both these statutes explicitly ban silencers. The Vermont law avoids the distinction between silencer and suppressor by banning any device "known as" a silencer. The Massachusetts statute makes the distinction between silencer and suppressor by banning any devices that causes a firearm to be "silent" and also any device that is "intended to lessen or muffle" a firearm. In contrast to New Hampshire, the ATF will not allow transfer of a silencer or suppressor in either Vermont or Massachusetts. *Trn.* at 21.

The Vermont statute was enacted in 1947, the same year as New Hampshire's. The Massachusetts statute was enacted in 1926 (with minor later revisions). These statutes show that state legislatures at the time understood the difference between a silencer and a suppressor, and also shows that if they chose they were explicitly capable of regulating both.

G. Comparison to Federal Law Shows Suppressors are not Contraband in New Hampshire

For the purpose of federal registration described above, federal statute and rules define "silencer." The Federal Gun Control Act provides:

> "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication."

18 U.S.C. § 921(a)(24); I.R.C. § 5848. Regulations pursuant to the act further define a "[f]irearm muffler or firearm silencer" as

> "Any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication."

27 C.F.R. 178.11. A second regulation broadly defines "Silencer" as "[a]ny device used for suppressing or diminishing the report of any firearm." 32 C.F.R. 552.100.

In a 1957 ruling, the Internal Revenue Service found that a barrel extension it considered there "neither silenced nor appreciably diminished the explosive report," thus making it not subject to registration. Rev. Rul. 57-34, 1957-1 C.B. 434. *Appx to Brief* at 6-8.[3]

H. Other Jurisdictions' Cases Defining Silencer

There are many court decisions defining silencer under the federal statutes. All of them find that a firearm sound suppressor is a "silencer" within the meaning of the federal act for registration purposes. *See United States v. Arce*, 118 F.3d 335 (5th Cir. 1997) (silencer under federal statute includes parts necessary for assembly); *United States v. Syverson*, 90 F.3d 227 (7th Cir. 1996) (silencer need not actually silence for requirement to be registered); *United States v. Poulos*, 895 F.2d 1113, 1120 (6th Cir. 1990) (silencer under federal statute includes parts for assembly into a device whose primary purpose is to reduce noise level of firearm); *United States*

[3]I.R.S. revenue rulings are reported in the Internal Revenue Bulletin Cumulative Bulletin. The ruling cited here is also included in the appendix to this brief for the convenience of the reader.

v. Endicott, 803 F.2d 506 (9th Cir. 1986) (silencer under federal statute includes parts for assembly into a device whose primary purpose is to reduce noise level of firearm); *United States v. Luce*, 726 F.2d 47 (1st Cir. 1984) (silencer includes parts readily assembled into a silencer); *United States v. Thomas*, 567 F.2d 299 (5th Cir. 1978) (silencer under federal statute is any device whose primary purpose is to reduce noise level of firearm); *United States v. Dodge*, 846 F.Supp. 181 (D.Conn. 1994); *United States v. Brown*, 438 F.Supp. 1002 (D.C. Conn. 1977) (silencer under federal statute is any device whose primary purpose is to reduce noise level of firearm); *United States v. Schrum*, 346 F.Supp. 537 (D.C. Va. 1972) (silencer under federal statute is any device whose primary purpose is to reduce noise level of firearm).

All these cases, however, construe the federal firearms laws which bring silencers and explicitly sound suppressors within their reach. There are no known cases defining silencer to mean merely a sound suppressor when the statute being construed does not specifically say so.

I. New Hampshire's Statute Does Not Ban the Sound Suppressor in this Case

Given the narrow New Hampshire statute, the purpose of the New Hampshire statute, the administrative gloss given the New Hampshire statute by the Department of Fish and Game, the federal interpretation of the New Hampshire statute, contemporary definitions of New Hampshire's statutory terms, the comparison of New Hampshire's statute to our neighboring states, and the comparison of New Hampshire's statute to federal law, it is apparent that New Hampshire's statute does not bring within its terms a firearm sound suppressor but only a device that makes a firearm inaudible.

A silencer is designed to eliminate the noise of a firearm. A suppressor reduces recoil and reduces noise for the benefit of the operator while still being loud enough to not escape detection. Alan Paulson, 1 SILENCER HISTORY AND PERFORMANCE ch. 2 (1996); *see Trn.* at 16.

Mr. McLoud's device in this case is a suppressor, not a silencer. The State tested the firearm and admitted that, with the suppressor installed, the sound was reduced, *Trn.* at 12, but that it made plenty of sound, PETITION FOR FORFEITURE, *Appx. to NOA* at 13, such that it was consistent with a small caliber rifle. *Id.* at 10. The court agreed that the suppressor lessened, but not eliminated, the sound of the firearm, COURT ORDER, *Appx. to NOA* at 29. Accordingly it is not contraband under the terms of the statute.

In fact, the firearm at issue here cannot, as a matter of practical technology, be made inaudible. Some firearms can. Several years ago, for example, the Department of Fish and Game conducted a deer hunt on Long Island in Lake Winnipesaukee due to the overpopulation. A sniper used a Winchester rifle with a "whisper silencer" and subsonic rounds. *Trn.* at 24.

Firearm noise is created by three things: the explosion of the gas within the barrel, the sound of the bullet when it breaks the speed of sound, and the click of the hammer. A conventional suppressor, and the one at issue in this case, reduces but does not eliminate the sound of the exploding gasses (elimination requires special equipment available only to law enforcement personnel). Alan Paulson, 1 SILENCER HISTORY AND PERFORMANCE ch. 5 (1996). Subsonic rounds for the Thompson Contender, according to the record, are not commercially available. *Trn.* At 25. The click of the hammer probably cannot be made inaudible on any firearm, but the noise is negligible on most.

II. There Is No Jurisdiction under Any New Hampshire Statute for a Forfeiture in this Case

A. There Is No Jurisdiction under RSA 617 for a Civil Forfeiture in this Case

RSA 617 is New Hampshire's general forfeiture statute. It provides that

> "Whenever personal property is forfeited for violation of law, any officer or person by law authorized to seize the same may take and retain it until he shall deliver it to a proper officer having a warrant to detain it."

RSA 617:1. Because of the words "whenever . . . property is forfeited," this statute is the general forfeiture statute. Thus, whenever property is forfeited it must comport with the provisions of this statute. *See Seizing Unstamped Tobacco Products*, 1986 Op. Att'y Gen. 225. In this case, the State agrees that RSA 617 "governs forfeiture proceedings." PETITION FOR FORFEITURE, *Appx. to NOA* at 15. It should be noted that the statute authorizes a seizure, but not a search. *State v. Spirituous Liquors*, 68 N.H. 47 (1894).

The statute does not apply to this case, however. It provides only for forfeitures upon a "violation of law," RSA 617:1, meaning that there must be a conviction for the crime associated with the property seized. *See State v. Ford Victoria Automobile*, 98 N.H. 114 (1953). In this case, the state admits the statutes does not confer forfeiture jurisdiction on the court in the absence of a criminal conviction. PETITION FOR FORFEITURE, *Appx. to NOA* at 15; *Trn.* at 7, 11. The lower court agreed. COURT ORDER, *Appx. to NOA* at 29. Because the underlying criminal charges against Mr. McLoud were dismissed, no violation of the law was proven, and RSA 617 does not allow for the forfeiture of the property associated with this case.

Constitutional due process requires that forfeitures be conducted pursuant to a warrant and in "rigid compliance with the formalities prescribed by law." *State v. Spirituous Liquors*, 68 N.H. 47, 48 (1894).

RSA 617 contains a variety of procedural requirements, including filing a forfeiture libel with the appropriate court, RSA 617:2, seizing the property according to a duly drawn warrant, RSA 617:3, notice to the owner, RSA 617:4, disposal only by consent of the owner, RSA 617:5, return to the owner for appraisal, RSA 617:6, trial of the forfeiture by jury, RSA 617:7, allocation of costs, RSA 617:8, appeal, RSA 617:9, and provision for destruction in appropriate cases, RSA 617:10. *See Seizing Unstamped Tobacco Products*, 1986 Op. Atty. Gen. 225. These provisions appear to comport with due process requirements, and must be complied with nearly to the letter for a valid forfeiture. *State v. Spirituous Liquors*, 75 N.H. 273 (1909).

Although it is clear that the present action was not, and could not be, brought under RSA 617, the procedures in any forfeiture action must nonetheless comport with the due process provisions contained in the statute, and in the constitution. Mr. McLoud in this case thus repeatedly requested a jury trial, DEFENDANT'S ANSWER, *Appx. to NOA* at 22; *Trn.* at 13, which was denied.

B. There Is No Jurisdiction Under RSA 595-A:6 for a Forfeiture in this Case

The State claims that the Superior Court has jurisdiction under RSA 595-A:6 to order the forfeiture of Mr. McLoud's property. PETITION FOR FORFEITURE, *Appx. to NOA* at 9 (full title is "Petition for Forfeiture & Request for Order Pursuant to RSA 595:A-6" [sic]), 6-7; *Trn.* at 32. Even the State, however, is not wholehearted in its claim of RSA 595-A:6 jurisdiction. During trial it's attorney said:

> "So I looked to the various statutes that are applicable to try and find what is the closest vehicle to step us into court, which is to look to the statutes of 595-A:6, which deals in some general terms with items that otherwise come in to the possession of the State and deals with other items of property.

Trn. at 7.

The statute is lengthy, with eight sometimes contradictory sentences. But broken into its component parts and fully analyzed, it is clear that it is the state's seizure and return statute, and not the state's forfeiture statute. Whatever else it does, it does not provide jurisdiction for a forfeiture in this case. RSA 595-A:6, in full, provides:

> "If an officer in the execution of a search warrant, or by some other authorized method, finds property or articles he is empowered to take, he shall seize and safely keep them under the direction of the court or justice so long as necessary to permit them to be produced or used as evidence in any trial. Upon application by a prosecutor, defendant, or civil claimants, the court, prior to trial or upon an appeal after trial, shall, upon notice to a defendant and hearing, and except for good cause shown, order returned to the rightful owners any stolen, embezzled or fraudulently obtained property, or any other property of evidential value, not constituting contraband. This section shall apply regardless of how possession of the property was obtained by the state. Photographs or other identification or analysis made of the returned property shall be admissible at trial as secondary evidence, in lieu of the originals, for all relevant purposes, including ownership. In the case of unknown, unapprehended defendants, or defendants wilfully absent from the jurisdiction, the court shall have discretion to appoint a guardian ad litem to represent the interest of such unknown or absent defendants. The judicial findings on such matters as ownership, identification, chain of possession or value made at such an evidentiary hearing for the restoration of property to the rightful owners shall thereafter be admissible at trial, to be considered with other evidence on the same issues, if any, as may be admitted before the finder of fact. All other property seized in execution of a search warrant or otherwise coming into the hands of the police shall be returned to the owner of the property, or shall be disposed of as the court or justice orders, which may include forfeiture and either sale or destruction as the public interest requires, in the discretion of the court or justice, and in accordance with due process of law. Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith."

RSA 595-A:6.

1. RSA 595-A:6, First Sentence (Beginning)

The first sentence provides, in part: "If an officer in the execution of a search warrant, or by some other authorized method, finds property or articles he is empowered to take, he shall

seize and safely keep them . . . ."

The sentence is conditional: it says if an officer finds an item. It does not provide any authority for an officer to go find an item, by warrant or any other method. *Spirituous Liquors*, 68 N.H. 47, 48 (1894) (words "authorize the seizure of property kept in violation of law, but do not authorize a search"). The sentence also is conditional on finding the item by "search warrant or by some other authorized method." There is authority for seizing an item when an officer is lawfully present, but when an officer conducts a search illegally there is no authority to seize under the statute. Further, the sentence limits itself to those "articles he is empowered to take." In order to seize an item, the State must show empowerment pursuant to this or some other provision of law.

Moreover, the word "empowered" recognizes that seizure and forfeiture is limited by the exclusionary rule. Like in a criminal case, illegally obtained evidence is barred from a forfeiture proceeding. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *State v. Spirituous Liquors*, 75 N.H. 273 (1909); *State v. Lager Beer*, 70 N.H. 454 (1900); *State v. Spirituous Liquors*, 68 N.H. 47 (1894); *Hussey v. Davis*, 58 N.H. 317 (1878).

2. RSA 595-A:6, First Sentence (End)

The first sentence provides in additional part that " . . . he shall seize and safely keep them under the direction of the court or justice so long as necessary to permit them to be produced or used as evidence in any trial."

The sentence provides authority to seize or keep items "under the direction of the court or justice." This makes clear that the State may apply to a court for permission to seize or keep them. It is theoretically unclear whether the word "justice" refers to a "*J*ustice" as in a judge, or "*j*ustice" as in fairness. If the former, the word is redundant with "court" and just emphasizes

that the State must get judicial permission. If the latter, the State may have more discretion, but may keep the item only as long as is just, not in perpetuity. But the latter construction is probably unconstitutional anyway, as the cases make clear that items may be seized only according to judicial permission, *State v. Spirituous Liquors*, 68 N.H. 47 (1894); *Hussey v. Davis*, 58 N.H. 317 (1878), and is also historically and grammatically unreasonable. *See* section II B. 10 of this brief, *infra*.

Moreover, the last portion of the sentence is a severe restriction on the length of time. It allows keeping an item only "so long as necessary" to be "used as evidence in any trial."

The restriction allows only the keeping of "evidence" for a trial. It does not purport to authorize keeping of an item that is not evidence or that won't be used for a trial. The restriction also allows the keeping for only as long as necessary for this purpose. It does not purport to authorize keeping an item beyond the time necessary for use as evidence. Thus, at the expiration of a case for which the item is useful as evidence, the State loses it authority to keep it.

3. RSA 595-A:6, Second Sentence (Beginning)

The second sentence provides in part that "[u]pon application by a prosecutor, defendant, or civil claimants, the court, prior to trial or upon an appeal after trial, shall," upon conditions, return the property. This portion of the sentence allows an application under this statute to be made only "prior to trial or upon an appeal after trial." The time for application expires, if no appeal is taken, when the trial is over. The statute thus allows for its application only during the pendency of the underlying criminal proceeding. *In re Trailer and Plumbing Supplies*, 133 N.H. 432 (1990); *State v. Hebert*, 122 N.H. 1089 (1982); *State v. Gullick*, 120 N.H. 99 (1980); *Decker v. Hills. Cnty. Att'y Office*, 845 F.2d 17 (1st Cir. 1988).

4. RSA 595-A:6, Second Sentence (Middle)

The next portion of the sentence allows the court, upon notice and hearing, to "order returned to the rightful owners" the property. The statute provides for a "return." This shows (further) that RSA 595 is not the state's forfeiture statute. There is no provision in the statute for application by any party for forfeiture of property. The only application allowed is one for "return." The statute "focuses on the owner of the items seized and provides procedures by which he or she may recover possession of the items." *State v. Brown*, 125 N.H. 346, 351 (1984). It thus creates a remedy for those dispossessed of property by some seizure, and does not purport to create a forfeiture remedy for the State.

All of the cases decided pursuant to the statute involve a return of property; none are forfeiture cases. *See In re Trailer and Plumbing Supplies*, 133 N.H. 432 (1990); *State v. Brown*, 125 N.H. 346, 351 (1984); *State v. Hebert*, 122 N.H. 1089 (1982); *State v. Gullick*, 120 N.H. 99 (1980); *Decker v. Hills. Cnty. Att'y Office*, 845 F.2d 17 (1st Cir. 1988).

5. RSA 595-A:6, Second Sentence (End)

The final portion of the second sentence specifies that "any stolen, embezzled or fraudulently obtained property, or any other property of evidential value, not constituting contraband" is to be returned. The statute provides for the return of all property, *In re Trailer and Plumbing Supplies*, 133 N.H. 432 (1990), excepting contraband.

This is the only place in the statute that excepts contraband. The other various portions of the statute, requiring for example, a warrant, conformity with due process, etc., do not make an exception for situations involving contraband property. If the statute did that, it would create the untenable situation wherein the State could, without any process or judicial intervention, enter private property for the purpose of seizing contraband. This statute does not create a *Fahrenheit 451* world empowering the police to enter and confiscate all that which they don't like or which

they desire to have.

6. RSA 595-A:6, Third Sentence

The third sentence provides in full that "[t]his section shall apply regardless of how possession of the property was obtained by the state."

The provision is unconstitutional to the extent that the State relies on it for authority for forfeiture. Both the United States Supreme Court and this Court have ruled that the exclusionary rule applies to forfeiture cases. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *State v. Spirituous Liquors*, 75 N.H. 273 (1909); *State v. Lager Beer*, 70 N.H. 454 (1900); *State v. Spirituous Liquors*, 68 N.H. 47 (1894); *Hussey v. Davis*, 58 N.H. 317 (1878). Thus, if RSA 595-A:6 is to be relied on as a forfeiture statute, allowing the State to produce as evidence in the forfeiture proceeding items that were seized without warrant or a valid exception to the warrant requirement, either this or the seizure portion of the statute cannot be constitutionally enforced.

Beyond that, it appears that the purpose of the statute is merely to bar the State from defending an application for return on grounds that it acquired the property in such a manner as (the State might otherwise claim) to make it non-returnable.

7. RSA 595-A:6, Fourth, Fifth, and Sixth Sentences

The provisions contained in the fourth, fifth, and sixth sentences of the statute involve use of seized evidence at trial. The provisions are not directly relevant to this case. The provision for the appointment of a guardian to represent the interests of "unknown or absent defendants," however, underscores the purpose of the statute as one for the return, and not the forfeiture, of property.

8. RSA 595-A:6, Seventh Sentence (Beginning)

The seventh sentence reiterates that property, whether it was acquired by the State pursuant to a warrant or not, "shall be returned to the owner of the property." This yet again underscores that the statute's primary purpose is to provide a remedy for those whose property has been taken by the State.

9. RSA 595-A:6, Seventh Sentence (Middle - First Part)

If not returned, the statute also allows property to be "disposed of . . . , which may include forfeiture and either sale or destruction as the public interest requires." This portion of the statute recognizes that seized property can come in many forms. It may be perishable, dangerous or illicit, making return expensive, impractical or illegal.

10. RSA 595-A:6, Seventh Sentence (Middle - Second Part)

When property is not returned, it is to be "disposed of as the court or justice orders" according to the "discretion of the court or justice." The words "court or justice" appear twice in this sentence, and for the third time in the statute overall. "Court" clearly means judicial permission. "[O]r justice" can, as above, mean either the other formal title for a judge or general fairness.

If it means a judge, it is redundant. If it means fairness, the statute would require an agent of the State to act in the role of prosecutor, jury, and judge over the disposition of a citizen's property. It is unlikely that it has this second meaning because it is unlikely that the legislature would cram so much meaning into a single word, especially when that meaning is at odds with the rest of the statute and is also unconstitutional. *State v. Spirituous Liquors*, 68 N.H. 47 (1894); *Hussey v. Davis*, 58 N.H. 317 (1878).

Moreover, the construction of the sentence does not lend itself to this second meaning. When the word "justice" is used for the third time, it follows the word "discretion" – disposal is

to be made "in the discretion of the court or justice." Clearly courts have discretion. So do justices. But to suggest that "fairness" has discretion, or that something can be done "in the discretion of fairness" is without rational meaning. Whatever word follows "discretion of" must be something which or someone who can exercise the discretion. "Fairness" in any understanding of the word is not a thing or being capable of discretion. The substitution of the word "fairness" for "justice" is not a ruse. In its non-person meaning, "justice" is likewise grammatically and logically incapable of discretion.

The formal title of the persons sitting on the bench of the New Hampshire Supreme Court is "Justice." N.H. Const., Pt. II, Art. 73-a & 74; RSA 490:1. The formal titles of those sitting on the benches of the Superior Court, RSA 491:1, the District Courts, RSA 501-A:3 and (though there are none) the Municipal Courts, RSA 502:1, are also "Justice." Justices of the Peace, also formally called "Justice," N.H. CONST. Pt. II, Art. 75 & 79, have traditionally had the authority to issue warrants. Newhall, JUSTICE AND SHERIFF, Ch. XXXII (1931); Douglas, NEW HAMPSHIRE MANUAL FOR NOTARIES PUBLIC AND JUSTICES OF THE PEACE, § 8.2 (1991). Throughout New Hampshire law, judicial officers are commonly called "justice," and it is reasonable to suppose the word means that here.

Accordingly, it is nearly impossible to suggest where the word "justice" in RSA 595-A:6 follows the words "court or" that the statute intends to refer to a concept rather than to a person.

The word "justice" appears all three times in the statute as part of the phrase "court or justice." The word should be read to have the same meaning all three times. *See Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629 (1998).

Given the grammatical exegesis, that it does not stand to reason or conventional statutory construction that "justice" would have two different meanings in the same statute, the history of

warrants, and that the alternative meaning would be unconstitutional, the word "justice" in the statute must be a redundant or formal title for a judicial officer. Accordingly, the presence of the word "justice" does not convert RSA 595-A:6 from a property return statue into a property forfeiture statute.

11. RSA 595-A:6, Seventh Sentence (End)

The seventh sentence of the statute ends with a requirement that the disposal, forfeiture, or destruction be done "in accordance with due process of law." This states, of course, the constitutional minimum. The Fifth Amendment to the Federal Constitution requires that a person shall not "be deprived of . . . property, without due process of law." The Fourteenth Amendment says "nor shall any State deprive any person of . . . property, without due process of law." Part I, Article 14 of the New Hampshire Constitution provides that "[e]very subject . . . is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his . . . property . . . conformably to the laws." Part I, Article 19 provides that "to seize . . . property . . . no warrant ought to be issued . . . but . . .[as] prescribed by law." Part I, Article 12 provides that "no part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people."

Even the narrowest and most constrained interpretation of the phrase "due process" is considered to mean that a legal proceeding is to be carried out according to existing law. Tribe, AMERICAN CONSTITUTIONAL LAW, ch. 10 (2nd ed. 1988). New Hampshire's existing forfeiture law is RSA 617. Thus, the plain meaning of RSA 595-A:6's call to obey due process is that, at the least, a forfeiture proceeding must be conducted in conformity with the procedures spelled out in RSA 617.

In addition, the presence in the statute of the due process clause is a statement by the

legislature that it does not intend summary forfeiture.

Accordingly, the State cannot claim that the statute creates some sort of summary forfeiture non-proceeding whereby the State can enter, confiscate at will, and then permanently convert to the state's use, people's valuable property.

12. RSA 595-A:6, Seventh Sentence (Overall)

While the statute appropriately carves out of itself some property not to be returned, it does not carve out procedure to be followed when that property is not returned. It specifically references judicial intervention and due process of law.

13. RSA 595-A:6, Eighth Sentence

The eighth, and final, sentence of RSA 595-A:6 provides that "[a]ny property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith." This sentence specifically references the State's forfeiture statute when the State intends to pursue a forfeiture. It is thus apparent that, while RSA 595-A:6 allows forfeiture of that property acquired pursuant to the statute, it does not provide the procedure by which the forfeiture is to be accomplished. Forfeitures of RSA 595-A:6 property are to be carried out according to the procedures contained in the forfeiture statute, that is, RSA 617.

If this last sentence of RSA 595-A:6 were not intended to reference the State's general forfeiture statute, and if RSA 595-A:6 could be construed as a stand-alone forfeiture statute, there would be obvious constitutional problems. Beyond providing for an "application" for a return of property, RSA 595-A:6 does not contain any procedural basics. *See e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972).

As a seizure and property return statute it has no obvious constitutional infirmities (beyond one discussed above).

As a forfeiture statute, however, it violates constitutional due process on its face. The statute certainly *allows* forfeiture of property gained pursuant to it. But it is not credible to maintain that RSA 595-A:6, on its own, tells us how the forfeiture is to be done.

14. There Is No Jurisdiction Under RSA 595-A:6 for a Forfeiture in this Case

For several reasons, RSA 595-A:6 cannot apply to this case. *First*, the property here was not seized by a search warrant or by any other authorized method. No agent of the State was "empowered" to take Mr. McLoud's property; it was done unconstitutionally. COURT ORDER, *Appx. to NOA* at 29. *Second*, the State's application was untimely. It was not made during the pendency of the underlying criminal case or during an appeal therefrom, but after the charges against him were dismissed. PETITION FOR FORFEITURE, *Appx. to NOA* at 14. *Third*, the State's application was not for a "return" of property, which is the only remedy created by the statute, but a petition for a forfeiture. *Id.* at 9. *Fourth*, the forfeiture proceeding was not conducted pursuant to New Hampshire's forfeiture statute nor according to the basics of due process, such as seizure by warrant and a jury trial.

RSA 595-A:6 may be the State's "closest vehicle," but the statute doesn't get it all the way there. Because forfeitures must be done in "rigid compliance with the formalities prescribed by law," *State v. Spirituous Liquors*, 68 N.H. 47, 48 (1894), and because "[t]he process of search, seizure, and forfeiture is subject to strict construction," *id.*, the State has the burden of finding a statute that is not merely "closest" to a forfeiture, but actually authorizes it. Accordingly, RSA 595-A:6 provides no jurisdiction in this case.

C. There Is No Jurisdiction under RSA 207:46 for a Civil Forfeiture in this Case

The State did not request that the court allow it to keep Mr. McLoud's property pursuant

to RSA 207:46. PETITION FOR FORFEITURE, *Appx. to NOA* at 6, 16. The Superior Court, nonetheless, found that it had jurisdiction pursuant to the statute.

RSA 207:46, II provides that "[a]ny person who [unlawfully possesses a silencer] shall be guilty of a misdemeanor and shall forfeit such firearms and silencing devices."

The statute, while it authorizes forfeiture, is not a forfeiture statute. Like RSA 595-A:6, it does not contain any of the procedural requirements necessary for a constitutional forfeiture. Thus, the statute, by mentioning forfeiture, is merely referencing New Hampshire's general forfeiture statute, RSA 617.

To suggest otherwise would make the statute inconsistent with itself. RSA 207:46, II provides that a person possessing the specified equipment "shall be guilty of a misdemeanor." By using the word "misdemeanor," the statute does not create a summary criminal conviction. Rather it references the entire gamut of criminal law and procedure.

Likewise, by requiring that a person possessing the specified apparatus "shall forfeit" it, the statute does not create a summary forfeiture. Rather, the statute references the law and procedure required for forfeiture. A summary criminal conviction is unconstitutional, as is a summary taking of property. Construing the word "misdemeanor" in the statute as a reference to criminal law, but simultaneously construing the word "forfeiture" as creating a summary process would create a tension that two similarly-used words cannot contain.

The words "shall forfeit" thus necessary means that the forfeiture must be in accordance with the constitutional and statutory forfeiture process, that is, RSA 617. *See State v. Spirituous Liquors*, 75 N.H. 273 (1909).

The Superior Court found that the word "and" in RSA 207:46, II means that the legislature created two independent remedies for possession of the specified equipment. This

construction of the word, however, is at odds with its grammatical place. "And" is a conjunction, conjoining two things together: when A occurs, Y *and* Z are the result. The second result (Z) is conjoined with, and therefore contingent on, the first (Y). Singer, SOUTHERLAND STATUTORY CONSTRUCTION, § 12.14 (5th ed. 1993). The Superior Court, however, construed the "and" as being an "or," *Boyce v. Concord General Mut. Ins. Co.*, 121 N.H. 774 (1981) (statute's use of the word "or" evinces an intent to require a choice) or perhaps the confusing "and/or." SOUTHERLAND at 665. The use of the lone conjunction in this statute, however, does not allow the Superior Court's interpretation.

RSA 207:46 must be distinguished from the statute construed in *In re Three Video Poker Machines*, 129 N.H. 416 (1987). There, this Court found that under RSA 647:2 civil forfeiture of gambling equipment could proceed even though criminal charges (involving use of the machines) had been dismissed for insufficient evidence. RSA 647:2, III provides that "[a]ll implements, equipment, and apparatus used in violation of this section shall be forfeited." Unlike the firearms statute, however, the provision for criminal charges in the gambling equipment statute is contained in a separate sentence and a separate section, RSA 647:2, I, with a string of statutory definitions in between. The two provisions are not, as in the firearm statute, made dependent by a conjoining "and." Because of the dissimilarity of the statutes, *Three Video Poker Machines* sheds no light on the forfeiture in Mr. McLoud's case. *See* Annotation, *Necessity of Conviction of Offense Associated with Property Seized in Order to Support Forfeiture of Property to State or Local Authorities*. 38 A.L.R.4th 515 (necessity of prior conviction depends upon statutory language).

Accordingly, without a finding of guilt, there can be no forfeiture under RSA 207. Because the criminal charges against Mr. McLoud were dismissed, he cannot be made to forfeit

his property.

D. There Is No Equity Jurisdiction for a Civil Forfeiture in this Case

While the State made no mention of equity jurisdiction, the Superior Court wrote that even if it had no statutory jurisdiction, "the Court has broad equitable powers with which to order a forfeiture in this case." COURT ORDER, *Appx. to NOA* at 30. The court cited *Keshishian v. CMC Radiologists*, 142 N.H. 168 (1997), which says nothing about equity jurisdiction in forfeiture.

While the Superior Court certainly has a "broad grant of equitable power," forfeiture of property to the state is not an issue that lies in equity. *See e.g.* Lyon, 3 STORY'S EQUITY JURISPRUDENCE, ch. XXXVII (14th ed. 1918). Given the principals of equity, and the limitations on government power in a constitutional republic, it is difficult to suggest that a court has an independent and undefined power to take a person's things and deed them to the state.

Moreover, the suggestion that a Court, or any government agency can summarily take a person's property runs afoul of the most basic principals of due process. Even in its most parsimonious construction, "due process" means a taking must be done pursuant to law and not in absence of legal standards. Tribe, AMERICAN CONSTITUTIONAL LAW, ch. 10 (2nd ed. 1988). The strict language of the various due process clauses makes this incapable of serious argument. U.S. CONST., 5th AMD. (person shall not "be deprived of . . . property, without due process of law"); U.S. CONST., 14th AMD. ("nor shall any State deprive any person of . . . property, without due process of law"); N.H. CONST. PT. I, ART. 14 ("[e]very subject . . . is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his . . . property . . . conformably to the laws"); N.H. CONST. PT. I, ART. 19 ("to seize . . . property . . . no warrant ought to be issued . . . but . . .[as] prescribed by law"); N.H. CONST. PT. I, ART. 12 ("no part of a

man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people").

Forfeiture must be done according to due process standards. *State v. Spirituous Liquors*, 75 N.H. 273 (1909); *Hussey v. Davis*, 58 N.H. 317 (1878). In *State v. Spirituous Liquors*, 68 N.H. 47, 48 (1894), an officer entered and seized contraband pursuant to a defective warrant. After quoting article 19 of New Hampshire's "Bill of Rights," this Court said that the "process of search, seizure, and forfeiture is subject to strict construction. Any one seeking to enforce a forfeiture must show a rigid compliance with the formalities prescribed by law."

The creation of a generalized equity basis for forfeiture jurisdiction, lacking any formalities or reliance on legislative authority, is a due process violation. It thus cannot constitutionally form the authority for the forfeiture in this case.

E. There Is No Other Jurisdiction for a Civil Forfeiture in this Case

Despite an effort, no other statute can be found that would confer upon any court jurisdiction for the forfeiture here. The State has not advanced any other.

If the lower court's decision is to stand, it would allow the State, without warrant or any other process, to enter, confiscate and convert to the state's use a person's valuable property. There would be no need for a conviction, proof it is contraband or the person possessed it, or the opportunity for any other defense. All this could be done without a jury or any other civil trial rights. Upon the finding, the State could keep and use the seized item. Such a process simply does not comport with American law.

The lower court correctly pointed out that the exercise of Mr. McLoud's rights in effect requires the state to go through the steps of:

"(1) returning contraband in its possession to the owner; (2) arresting the owner

> for his/her possession of same; (3) seizing the contraband, again; (4) charging the owner with illegal possession of same; and (5) convicting him;/her prior to pursuing forfeiture proceedings."

COURT ORDER, *Appx. to NOA* at 30. The court calls this an "absurd result."

It is absurd only if one assumes the item is contraband. New Hampshire law allows for forfeiture of numerous types of property that are not contraband, depending upon the manner or circumstances in which the property is possessed or used. *See e.g.*, RSA 78:16 (tobacco products); RSA 146:19 (misbranded cosmetics and food); RSA 149-M:14 (equipment used in solid waste management); RSA 185:55 (margarine); RSA 207:17 (birds and fish); RSA 217-A:12 (non-native plants); RSA 485-B:8 (floating lumber); RSA 570-A:4 (eavesdropping devices); RSA 638:24 (wireless telephone cloning devices); RSA 647:2 (gambling equipment). Equipment used for solid waste management, for instance, obviously is not *per se* contraband. If one possesses tractors and loaders in the course of their solid waste business, it is perfectly reasonable that the State cannot take them without going through the steps enumerated by the lower court. Unlike, for instance, forfeiture of gambling equipment, *In re Three Video Poker Machines*, 129 N.H. 416 (1987), the legislature simply has not authorized forfeiture of firearms without a conviction.

Even if the item were *per se* contraband, however, the State is not excused from complying with the law. While it appears statutorily possible for a dealer in cocaine (which is *per se* contraband) who has not been convicted to apply to get back his drugs, it is not likely to occur.

None of the State's forfeiture statutes allows or creates jurisdiction for a forfeiture in this case and Mr. McLoud's property must accordingly be returned.

III. Firearm Cannot Be Used as Evidence in this Forfeiture Proceeding

The State argued below that it does not matter how it came to be in possession of Mr. McLoud's firearm. *Trn.* at 12. To the extent that this Court finds jurisdiction for this proceeding pursuant to RSA 595-A:6, that statute seems also, by its terms, to apply to property regardless of how the State acquired it.

But it does matter. Property that is illegally confiscated cannot be used as evidence in a forfeiture proceeding. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). This court has written on the issue:

> "The mere fact that an officer has possession of spirituous liquors which were taken from the owner who kept them for illegal sale does not authorize their condemnation. If they were taken by him by virtue of a search warrant issued upon a complaint that does not allege that they were kept for an illegal purpose, a libel for their forfeiture cannot be sustained; or if whiskey is seized upon a warrant authorizing a search for lager beer, there can be no forfeiture of the whiskey, although the owner kept it in violation of law. It is essential to the maintenance of a libel in such cases that the seizure be legal. It seems that there can be no decree for a forfeiture of property taken under a search warrant, if the constitutional guaranty against illegal search has been violated."

State v. Spirituous Liquors, 75 N.H. 273, 274-75 (1909) (citations removed). In a similar case, this Court wrote that the"Bill of Rights, art. 19 . . . is a simple affirmation of the common law. It requires that the warrant which authorizes a search for and seizure of liquor, for the purpose of forfeiting it, must be founded on a complaint" that is properly drawn and contains all the allegations required of it. *State v. Spirituous Liquors*, 68 N.H. 47 48 (1894); *Hussey v. Davis*, 58 N.H. 317 (1878) In *State v. Lager Beer*, 70 N.H. 454 (1900), this Court held that upon a warrant to seize beer, whiskey also seized could not be forfeited because it was produced by distillation and not fermentation.

Thus, the exclusionary rule applies in forfeiture cases. This is because suits for

forfeitures incurred by the allegation of a crime, while technically civil proceedings, are bought by the prosecuting attorney and are criminal proceedings in substance and effect. The role of the exclusionary rule is the same in both. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *see* Annotation, *Forfeitability of Property under Uniform Controlled Substances Act or Similar Statute, Where Property or Evidence Supporting Forfeiture Was Illegally Seized*, 1 A.L.R. 5th 346 (and cases cited therein).

There is no dispute in this case that Mr. McLoud's property was illegally seized. In his underlying criminal case, a motion to suppress the firearm was granted, resulting in a dismissal of all charges. The State appealed neither the suppression nor the dismissal. Because the property was unlawfully seized, it cannot be used as evidence in this forfeiture proceeding, and thus there is no evidence supporting the forfeiture. Accordingly, and the order resulting therefrom must be nullified.

IV. Even If the Suppressor Is Contraband, Other Items Are Not and must Be Returned

Whether an item is to be considered contraband is a matter of law. *State v. Stiles*, 128 N.H. 81 (1986).

A. Description of the Property Seized

When Mr. McLoud's property was seized, the State took four separate items. It took his tripod, night vision device, firearm, and sound suppressor. The four items were temporarily attached togther in a manner consistent with their use as an attention-getting exhibit for gun shows.

The firearm was fitted with a metal rail on its top the purpose of which is to allow the temporary attachment of any number of interchangeable sighting devices. When it was seized, the night vision device was attached to the rail by thumb screws which allow for its remove in, literally, a matter of seconds.

The firearm has threads machined to the end of its barrel also for the purpose of allowing the temporary attachment of any number of interchangeable accessories such as compensators, which reduce recoil and muzzle flash, to be screwed on and off by hand. When it was seized, the sound suppressor, an oblong metal cylindrical "can," was screwed onto these threads, and could be easily removed, also in a matter of seconds.

The tripod, as quickly and easily detached from the firearm as the night vision device and sound suppressor, was mounted on a bracket commonly used to attach a carrying sling. The tripod was ordered returned by the lower court.

The four pieces of property were no more permanently or integrally attached together than the different bits which one might use in a power drill. Indeed the property here was less permanently attached than that – no special tool like a drill chuck key is necessary. Similar to a

drill, the design of the firearm here is intended to facilitate versatility and interchangeability of various temporary accessories.

The particular configuration of the firearm and the three accessories when they were unlawfully confiscated were in fact intended to be an oddity which Mr. McLoud uses as an attention-getting gadget at shows and exhibitions. The attachment of these accessories is in fact incongruous, completely impractical for most uses other than exhibition, and unsuited for the use to which the State had claimed in its failed criminal prosecution.

B. The Property is Seperate

The federal government regulates sound suppressors separately from firearms. 18 U.S.C. § 921; 26 U.S.C. § 5812(a)(6). As such, a federal tax stamp is issued to the owner of the suppressor alone. The Bureau of Alcohol, Tobacco, and Firearms (ATF) issued a tax stamp to Mr. McLoud for the suppressor, which was entered as an exhibit in the Superior Court. *Appx. to Brief* at 1-3. It thus considers the items separate. The ATF's standard for whether a suppressor must be separately taxed was set forth in two private letter rulings.[4] In one, the ATF wrote:

> "We consider the combination of a machinegun and silencer to be one unit subject to registration when the silencer is integral to the machinegun, such as when it is permanently affixed to the machinegun (not just to the barrel). A removable silencer is a separate unit, which requires registration."

A.T.F. Priv. Ltr. Rul. 179.11/97-1858 (1997), *Appx. to Brief* at 9. In the second, the ATF wrote:

> "An examination of the submitted [firearm] reveals that it is [a firearm] incorporating an integral silencer or muffling device. The alterations to the . . . firearm all take place in the trigger group with no modification to the actual receiver of the firearm. The muffling device . . . is permanently attached to the receiver of the firearm. Such a device, when so affixed to the receiver . . . would

[4]A.T.F. private letter rulings are issued pursuant to 27 C.F.R. § 70.471. They are not centrally collected or reported. Like I.R.S. private letter rulings, they are nonetheless federal agency opinions of which this Court may take judicial notice pursuant to N.H. R. Ev. 201(b)(3). Both letters are included in the appendix to this brief in the form they were received from the agency.

be subject to only the one . . . tax."

A.T.F. Priv. Ltr. Rul. 7540 (1983), *Appx. to Brief* at 10-12.

Both these letters hinge on whether the suppressor is "integral" and "permanently affixed" to the firearm or whether it is merely "removable" and screwed "just to the barrel."

Mr. McLoud's suppressor is clearly not integral or permanently affixed, was merely screwed to the barrel, and is easily removable by hand. It is thus segregable from the firearm. Thus, even if the suppressor were to be considered contraband, the other equipment – night vision device, firearm, and tripod – are not subject to forfeiture.

V. Remedy is Return of the Property

When property is unlawfully forfeited, the remedy is its return. *State v. Spirituous Liquors*, 75 N.H. 273 (1909); *State v. Spirituous Liquors*, 68 N.H. 47 (1894); *see State v. Lager Beer*, 70 N.H. 454 (1900). *See also* RSA 595-A:6 (second Sentence).

CONCLUSION

In accordance with the foregoing, James McLoud requests that his night vision device, firearm, sound suppressor, or all of them, be returned to him.

Respectfully submitted,

James McLoud
By his Attorney,

Law Office of Joshua L. Gordon

Dated: August 3, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for James McLoud requests that Attorney Alfred J.T. Rubega be allowed 15 minutes for oral argument.

I hereby certify that on August 3, 2000, a copy of the foregoing will be forwarded to Alfred J.T. Rubega, Esq. and to Ann Rice, Assistant Attorney General.

Dated: August 3, 2000

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