

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO.: 5:01cr07 RH

PATRICK PFEFFER, THORSTEN G.  
PFEFFER, and SEA WATCH OF  
PANAMA CITY BEACH, INC., d/b/a  
Club La Vela,

Defendants.

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**DEFENDANTS MOTION TO DISMISS INDICTMENT FOR  
FACIAL UNCONSTITUTIONALITY WITH INCORPORATED  
MEMORANDUM OF LAW**

Defendants PATRICK PFEFFER, THORSTEN G. PFEFFER and SEA WATCH OF PANAMA CITY BEACH, INC., d/b/a Club La Vela, by and through the undersigned attorneys and pursuant to F. R. Crim. P. 12(b), hereby file their Motion to Dismiss Indictment for Facial Unconstitutionality with incorporated Memorandum of Law, and would state as follows:

1. The Defendants are charged in the Indictment in the instant action with a violation of the Crack House Statute and a conspiracy to violate same under Title 21 U.S.C. /856(a)(2) and (b) and Title 18 U.S.C. /2, as well as forfeiture of all business related properties under Title 21 U.S.C. /853(a)(1) and (2).

2. The Defendants are entitled to the granting of a Motion to Dismiss under Rule 12(b), Federal Rules of Criminal Procedure, based on the following facts:

- a. The prosecution of Defendants under 21 U.S.C. /856(a)(2), violates the First Amendment.
- b. The prosecution of Defendants violates their equal protection rights under the Fourteenth Amendment.
- c. Prosecution under the Crack House Statute violates Defendants due process rights under the Fifth Amendment.
- d. 21 U.S.C. /856(a)(2), is unconstitutionally vague, overbroad and not narrowly tailored to materially advance a legitimate governmental interest.
- e. The use of the forfeiture provisions of 21 U.S.C. /853(a)(1) and (2), on the basis of 21 U.S.C. /856(a)(2), operates as a complete violation of the Eighth Amendment.

3. Based on the foregoing, the Indictment in the instant action must be dismissed with prejudice as to all Defendants.

### **MEMORANDUM OF LAW**

#### **I. FACTUAL BACKGROUND**

The indictment in the instant action has been filed against PATRICK PFEFFER and THORSTEN G. PFEFFER, allegedly for actions undertaken in connection with SEA WATCH OF PANAMA CITY BEACH, INC., d/b/a Club La Vela. The gravamen of the indictment alleges that from a date unknown but at least by January, 1996, and continuing until on or about June 30, 2000 the Defendants, while managing and controlling Club La Vela, did knowingly and willfully conspire and did make available for use said building for the purpose of unlawfully distributing and using controlled substances, in violation of Title 21 U.S.C. /856(a)(2), and 856(b), and Title 18 U.S.C. /2. On the basis of the above charges, the entirety of all interests in the subject

property are sought to be forfeited to the United States pursuant to Title 21 U.S.C. /853(a)(1) and (2).

In order for this Court to properly address the constitutionality of 21 U.S.C. /856(a)(2), it is critical to embrace the characteristics of Club La Vela and to understand the plain language of this code section, the legislative intent of this code section, and the impact of the forfeiture count on the instant scenario. In related proceedings, Club La Vela has been described as a place of public assembly specializing in the presentation of live and recorded musical and dance performances, and licensed for the distribution of alcoholic beverages. The business premises are located at 8813 Thomas Drive, Panama City Beach, Florida 32408.

Club La Vela was designed and built in 1984 by talented and respected German architect Alois O. Pfeffer. Club La Vela is located directly on the Gulf of Mexico and the robust natural sandy beaches of Panama City Beach, Florida. The Club originally opened and operated as La Vela Beach Club and Concert Hall, and presented various performing acts and festive events.

Since its opening, Club La Vela has grown from a small locally popular beach Club with a capacity of hundreds to what has been described as the largest night Club and event facility in the United States, with a current capacity of over 6,000 people.

Every year since 1984, Club La Vela has expanded by adding rooms focusing on different themes and settings and appealing to different clientele and demographic groups, decks, gift shops, bars, and an enormous swimming pool. All of Club La Vela is equipped with high tech sound and light systems maximizing the appeal and

pleasurability of the musical and dance performances presented. The facility is more than simply a nightclub, and is more accurately described as an entertainment complex.

Since 1991, Club La Vela has focused on expansion of the business and format improvements which have dramatically increased the popularity of Club La Vela. This popularity has enabled the initiation of live radio broadcasts as well as securing the privilege and prestige of establishing Club La Vela as the headquarters for live and videotaped Spring Break festivities as the Spring Break Headquarters for the MTV cable network for the years of 1996, 1997, and 1998.

As part of the overall growth and success enjoyed by Club La Vela, each successive year has reflected an increase in the previous year's attendance and revenue. This is further reflected by the fact that Club La Vela has hosted national tours and events such as World Championship Wrestling, the Vans Warped Tour, the Skoal Roar Tour, the Bay Watch Talent Search, the Earthlink Live Web Cast of Spring Break 1999, and many other events, including nationally and internationally known rock, country, and hip hop musical performances. Many of these performances have been simulcast and/or reported on the cable video networks of ESPN, MSNBC, TNT, MTV, E!TV, and Travel Channel, as well as many local and national networks, radio and television stations. From an international perspective, Club La Vela has been featured on the French television program Canel Plus, and the German program RTL2.

To categorize the club from a zoning standpoint, Club La Vela is characterized as a place of public assembly which caters to producers, performance artists, participants and patrons engaging in the presentation and/or attendance of events that incorporate

original and recorded music, original light shows, performance dance and other forms of expression, all of which make this place of public assembly an enormous entertainment complex.

These forms of expression have artistic, political and spiritual content and connotations presented for the express purpose of providing and communicating such expression to the attendees of the events occurring at Club La Vela. The attendees of these events assemble and associate to receive, enjoy, share and disseminate such expression and engage in the robust exchange of ideas and information.

An integral component of these events is that they focus on trend setting, cutting edge, and non-traditional issues and forms of communication. The characteristics of Club La Vela provide a specific forum for performance artists and patrons to be involved in their respective spiritual and expressive performances and to engage in constitutionally protected assembly and associational activities. The non-traditional aspects of the communication at issue express, among other things, the common, timeless and immemorial messages of exuberance, stamina, rebellion and societal non-conformity, which are primary and inextricable themes of the assembly, expression and associations which take place at these events.

The above specified assemblies and performances are protected by the First Amendment to the Constitution of the United States, and pursuant to Article I, Section 4 of the Constitution of the State of Florida. Patrick Pfeffer, Thorsten Pfeffer, and Sea Watch of Panama City Beach, Inc. d/b/a Club La Vela believe that providing these forms of assembly, association and expressive communication to the public is a

beneficial social activity which manifests the organic and inalienable right to the pursuit of happiness. They also appreciate the enjoyment of the fruits of their labors from the successful operation of Club La Vela.

As the popularity of Club La Vela began to increase, and the number of patrons began to increase exponentially, the numbers of people, the content of the performances, and the surrounding and resulting exuberance associated with both the special events and the normal presentation of entertainment, all resulted in modifications of procedures to deal with the large number of people utilizing the establishment for their personal recreational and associational activities as well as the proportional percentage of patrons, perhaps identical to the percentage of the general public, that engage in less than temperate consumption of alcoholic beverages and/or the consumption of controlled substances.

Beyond the primary use of Club La Vela as a place of public assembly and entertainment complex, the management of Club La Vela, including the Defendants herein, have recognized and responded with great diligence to the social harms presented by the increased popularity and use of controlled substances at all places of public assembly popularized by similar demographic groups to those attending Club La Vela.

Club La Vela imposes extensive operational procedures to prohibit and minimize drug use and/or distribution during its hours of operation and presentation of specific events.

Club La Vela has instituted a zero-tolerance policy that absolutely forbids possessing, selling or using drugs on the premises. This zero-tolerance policy is stressed at all management meetings and Club La Vela also employs **two** responsible vendor

services, a voluntary state statutory option that includes frequent training sessions of all personnel to address concerns caused by alcohol consumption and/or issues involving controlled substances. See F.S. /561.701, et seq., attached hereto as Exhibit A.

Signs throughout the venue announce this policy and security staff continually monitor the establishment to ensure compliance with this zero tolerance policy. All employees are required to review and sign a controlled substance policy agreement that absolutely forbids the use and/or distribution of controlled substances, and this document is reviewed and renewed each year by every employee. Over the past several years, the Defendants have summoned law enforcement<sup>1</sup> in an effort to report and/or assist in the ejection and/or arrest of individuals deemed to be in violation of the zero-tolerance drug policies.

Historically, Club La Vela management has met with local law enforcement to discuss all enforcement concerns and any methods that would be useful to address such concerns. In response, Club La Vela has installed additional lighting, employed additional security personnel, modified performance formats, initiated background checks on employees, and implemented numerous other procedures.

Despite the history of efforts to cooperate with law enforcement, the Bay County Sheriff's Office, in conjunction with numerous other law enforcement agencies, executed a search warrant on April 27, 2000, and effected the arrests of Patrick Pfeffer and Thorsten Pfeffer for violations of Florida State Statute /893.1351, Lease or rent for the

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<sup>1</sup> Indeed, Club La Vela has been publicly criticized for the number of calls for service directed to law enforcement. This criticism is misplaced clearly because the calls for service for any establishment can be the subject of diligent management and huge numbers of patrons, the exact basis for this phenomenon at Club La Vela.

purpose of trafficking in a controlled substance. The execution of the search warrant for Club La Vela turned up no evidence of Defendants involvement with drug activity. Nonetheless, Defendants Patrick Pfeffer and Thorsten Pfeffer were arrested on State charges which were ultimately the subject of the filing of no information documents, ostensibly to clear the way for Federal charges. Ultimately, on June 5, 2001, the Defendants were indicted for alleged violation of the Crack House Statute, 21 U.S.C. /856(a)(2). As will be expanded on in the following sections, the Florida State statutory violation (F.S. /893.1351), even if the Pfeffers were convicted, would most likely have resulted in a term of probation and would not have resulted in a forfeiture of the subject corporate assets, worth over \$30 million.

By contrast, the Crack House Statute prohibits any individual from the following acts:

manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance. 21 U.S.C. / 856(a)(2), in pertinent part.

The punishment provisions of this section provide for a maximum sentence of twenty (20) years, an individual fine of \$500,000.00, a corporate penalty of \$2 million, and, as the indictment in the instant action shows, government forfeiture of all related properties.

As the owners and management of any place of public assembly fully know, any location which brings in large numbers of patrons, and particularly a location, such as Club La Vela, which brings in an average of three-quarters of a million people per year, involve situations where patrons may be involved in events that pose some risk of

injury from overheating, exhaustion or fights, as well as some risk that some members of the audience may suffer the effects of controlled substances or over-indulgence in alcohol. For these reasons, Club La Vela, just as any responsible vendor, ensured that medical personnel and emergency medical treatment were immediately available to assist or transport anyone in need of such services. Based on previous discovery in the instant action, the government clearly suggests that this reasonable precaution - one taken for sports events, festivals, and many other public gatherings - reveals Defendants connivance in running a drug operation or in some way violating the Crack House Statute. One fundamental consideration that must be stressed is the fact that even the most diligent operator of any place of public assembly can never fully guard against the surreptitious introduction of controlled substances into any subject facility. See *The Agony of Ecstasy, Nightclub and Bar Magazine, June, 2001* (attached hereto as Exhibit B).

Equally absurd, as gleaned from excerpts of Grand Jury testimony provided by the government in the instant action, is the government's presumed belief that the fact that Defendants sold bottled water, glow sticks, blow pops, or other merchandise at an event involving thousands of enthusiastic dancers and patrons as evidence of some sort of criminal activity or some indicia that the Defendants knowingly and intentionally focused the use of Club La Vela as a location for the use and distribution of illegal, controlled substances. These alleged items of merchandise, questionably asserted as a characteristic to support the government's charges, are clearly not paraphernalia as the

government suggests.<sup>2</sup> As stated by other learned counsel, the government's stance is akin to charging that any concert permitting tie-dyed clothing or dreadlocks is guilty of marijuana-related crimes.

Despite the fact that Defendants are conscientious, responsible providers of music, entertainment, and the responsible ingestion of alcoholic beverages by those patrons of legal age to do so, the government has targeted them as part of what appears to be a broader campaign directed at electronic music concerts and similar places of public assembly. The details of the expressive functions of such places of public assembly and of the government's and the DEA's campaign against them reveals that the DEA campaign will do little to deter drug use or improve safety, but is certain to trample the First Amendment rights of the Defendants, many other concert promoters and operators of places of public assembly and the public at large.

In what is truly the most surprising aspect of the instant case, there has undoubtedly been a strenuous assault on the part of the government to focus enforcement efforts against raves. These events are characteristically enormous, all night events, often occurring in unlicensed and unsafe warehouses or other non-traditional locations. Raves, at least in the understanding of the government, are largely unsupervised and specialize in the presentation of electronic music, the innuendo being that they go hand in hand with the exchange, distribution and use of illegal club drugs. What makes this

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<sup>2</sup> Defendants have not been, and could not be, charged with violating 21 U.S.C./863, which criminalizes the sale of drug paraphernalia. That statute defines drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." Thus, a syringe for injecting heroin or a pipe for smoking marijuana would be paraphernalia; a glow stick or blow pop would not.

issue important is the fact that the format of Club La Vela has *nothing* in common with raves, and any reference to raves or any related issue is simply advertisement jargon, since no true rave would be the subject of professional advertising. Club La Vela is strictly operated, strictly scrutinized and an enormous investment manifested as a place of public assembly, clearly under the jurisdiction of the State of Florida's alcoholic beverage laws and the local limitations on hours of operation of such alcoholic beverage facilities.

As recent intelligence has shown, federal prosecutors and the DEA erroneously equate electronic music concerts with Ecstasy and other club drugs. These Federal prosecutors and the DEA, reacting to growing public concern about Ecstasy (MDMA) and other club drugs, have apparently devised a strategy that targets not the users or sellers of the club drugs, but rather the promoters of concerts of one particular genre of music which, in the stereotyped view of the DEA, is associated with ecstasy use.

This government strategy operates as a direct and obvious First Amendment violation because it does not cause a merely incidental curtailing of protected speech, but clearly chills protected speech and, either as an intended or unintended consequence, seeks the elimination and restraint of speech (i.e., the elimination of electronic music concerts).

In what has become the most notorious recent case involving the expansive use of the Crack House Statute against a place of public assembly, and perhaps the first such use of the Crack House Statute in this fashion, the government indicted the operators of the State Palace Theater in New Orleans, Louisiana. This case, *United*

*States of America v. Robert J. Brunet, Brian J. Brunet, and James D. Estopinal*, Case Docket No. 01-010, United States District Court, Eastern District of Louisiana, was the focal point of the novel use of the Crack House Statute against places of public assembly, clearly not a consideration when Congress adopted this legislation in 1986. Attorneys in that case felt that, dissatisfied with current federal ecstasy sentencing guidelines, and feeling pressure from the media and the public, the DEA was targeting electronic music concert promoters throughout the country, instead of going after those who are actually involved with drugs. It was asserted that, rather than apply federal law as written and intended, the DEA had revised its strategy, ignoring drug dealers, and instead set about prosecuting electronic music concert promoters, whom the government did not accuse of providing drugs, assisting anyone in providing drugs, or of being directly involved with drugs in any way, whatsoever.

Similar to the instant action, the individuals involved in the State Palace Theater found that the government's chosen tool in addressing their apparent frustration with the popular ingestion of controlled substances was the federal Crack House Statute, which imposes up to twenty (20) years imprisonment and a \$500,000 fine, etc. Notable, however, is the fact that the State Palace Theater actually put on and promoted raves, a format completely different than that of Club La Vela, notwithstanding any marketing jargon to the contrary. In either event, this new application of the Crack House Statute is inappropriate, not in keeping with the legislative intent of this draconian legislation, and is not justified by any judicial interpretation of 21 U.S.C. §856, elaborated upon in prior decisions involving the statute. In the fifteen (15) years since its passage, other than

the State Palace Theater case, the statute has only been applied to individuals who actually distributed or manufactured drugs, or who were directly assisting those who did so. These cases are discussed more fully in the following sections.

As the following sections will show, the use of 21 U.S.C. /856, as applied to the instant action, operates as a violation of the First Amendment and, in conjunction with the forfeiture provisions of 21 U.S.C. /853(a)(1) and (2), also operates as a total violation of the Eighth Amendment due to the disproportionate and draconian punishment and loss of property, purportedly justified by the use of this legislation in the instant action.

## **II. ARGUMENT**

### **A. An analysis of the legal standards of a Motion to Dismiss under Rule 12(b), Federal Rules of Criminal Procedure.**

Defendants move to dismiss the indictment pursuant to Rule 12(b), F. R. Crim. P. In essence, the mere existence of the prosecution at issue herein clearly violates Defendants constitutional rights, and, as such, dismissal is the appropriate relief. See *United States v. Seuss*, 474 F.2d 385, 387 (1st Cir. 1973). More specifically, the instant indictment must be dismissed because it is simply not an appropriate prosecution, nor is the indictment authorized under that portion of the Crack House Statute which serves as the basis for the instant prosecution, 21 U.S.C. /856(a)(2). In order for this statute to pass constitutional muster and comport with the First Amendment, it cannot be construed to even permit the subject prosecution.

In the context of using 21 U.S.C. /856(a)(2), against a place of public assembly such as Club La Vela, the very essence of this business is critical. It is well settled that

dance, music, assembly, association and artistic expression are protected by the First Amendment.

Speech, be it in the form of film, live presentations, or printed matter, ..., is protected under the First Amendment. *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir. 1997).

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. See 2 Dialogues of Plato, Republic, bk. 3, pp. 231, 245-248 (B. Jowett transl., 4th ed. 1953) ("Our poets must sing in another and a nobler strain"); Musical Freedom and Why Dictators Fear It, N.Y. Times, Aug. 23, 1981, section 2, p. 1, col. 5; Soviet Schizophrenia toward Stravinsky, N.Y. Times, June 26, 1982, section 1, p. 25, col. 2; Symphonic Voice from China Is Heard Again, N.Y. Times, Oct. 11, 1987, section 2, p. 27, col. 1. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all [t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalize states which we cannot externalize by rational means. This is basic dance. Martin, J., Introduction to the Dance (1939). Aristotle recognized in Poetics that the purpose of dance is "to represent men's character as well as what they do and suffer." The raw communicative power of dance was noted by the French poet Stephane Mallarme, who declared that the dancer "writing with her body . . . suggests things which the written work could express only in several paragraphs of dialogue or descriptive prose." *Barnes v. Glenn Theater*, 501 U.S. 560 (1991) (White, J. dissenting, in this decision that found even nude dance to be protected by the first amendment).

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge v. Oregon*, 299 U.S. 353, 364; *Thomas v. Collins*, 323 U.S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and

ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow v. New York*, 268 U.S. 652, 666; *Palko v. Connecticut*, 302 U.S. 319, 324; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *Staub v. City of Baxley*, 355 U.S. 313, 321. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. *N.A.A.C.P. v. Patterson*, 357 U.S. 449 (1958).

There can be no doubt that Club La Vela is fully cloaked by the protections of the First Amendment and that the use of 21 U.S.C. /856(a)(2), operates to destroy the enjoyment of the First Amendment freedoms described herein. As it relates to the instant challenge, there can be no doubt that the Defendants enjoy standing to raise same:

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

**B. The prosecution of Defendants under 21 U.S.C. /856(a)(2), violates the First Amendment**

The prosecution of Patrick Pfeffer and Thorsten Pfeffer under 21 U.S.C. /856(a)(2), infringes upon Defendants free speech and associational rights in violation of the First Amendment to the U.S. Constitution. This virtually unprecedented application of the Crack House Statute against a place of public assembly, particularly in light of the invasive tactics of law enforcement during concert events clearly imposes fear amongst all promoters of popular music events.

The government s prosecution has both the effect and the purpose of shutting down concerts and other events and eliminating a form of expression which the

government claims is associated with drug use. [T]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

Indeed, where the government targets a particular genre of music, even one popularly associated with drug use, the First Amendment stands as a barrier to such content-based restrictions. A city's attempt to ban all hard rock concerts because the concerts attract narcotics users to the community was rejected as a violation of concert promoters' First Amendment liberties. *Cinevision v. City of Burbank*, 745 F.2d 560, 566 (9th Cir. 1984). Because all - political and non-political - musical expression, like other forms of entertainment, is a matter of first amendment concern, *Id.* at 569, a general fear that state or local narcotics or other laws will be broken by people attending the concerts cannot justify a content-based restriction on expression. *Id.* at 572. Censorship cannot be used as a tool to prevent drug use, rather law enforcement officers can deal adequately and effectively with unlawful activity ... at the time it occurs. That is a proper exercise of the police power; censorship is not. *Id.*

The chilling effect imposed by the arrest of a corporate entity and the management of a place of public assembly, ostensibly because of the popularity of controlled substances amongst patrons, is undeniable. The draconian nature of the penalties for violating 21 U.S.C. § 856 (a)(2), clearly acts in a fashion that will ultimately censor both the instant Defendants and all promoters of similar music or other places of public assembly, none of whom can host a concert or conduct continuing musical events

without the fact that, to some extent and due to general societal influences clearly *not* caused or created by the Defendants, some drug use will occur.

Non-criminal activity cannot be transformed into criminal activity simply because a venue owner plays music believed to be associated with criminal activity. In *Torries v. Hebert*, 111 F.Supp.2d 806 (W.D. La. 2000), the court ruled that the confiscation of rap compact discs and the issuance of criminal charges against owners of a skating rink where rap music was played violated the owner's First Amendment rights. The court noted that the seizure of the compact discs and the prosecution of the rink owners for contributing to the delinquency of a juvenile were presumptively invalid content-based restrictions on expression that are subject to strict scrutiny review. *Id.* at 817. The government's interests in preventing harm to children may have been substantial, but that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 716 (1977)). Because the actions of the police and prosecutor violated the defendants' First Amendment liberties, the court ordered the return of the compact discs and declared the prosecution invalid. *Id.* at 824.

In the context of the First Amendment, any exercise of governmental regulation must be achieved in the least restrictive fashion, and must be narrowly tailored to serve any legitimate governmental interest. See *United States v. O'Brien*, 391 U.S. 367 (1968); and *Sable Communications of Cal. Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Although the prevention of illegal drug activity is certainly a legitimate governmental interest, the prosecution of a corporate entity and the management of a

place of public assembly is clearly *not* the least restrictive means available to achieve the subject governmental interest, nor is it narrowly tailored under any analysis.

Based on information and belief, many of the drug related incidents allegedly related to Club La Vela, which were not the subject of Club La Vela personnel contacting law enforcement, were *never* brought to the attention of Club La Vela management, thus undermining the presumed good faith of the tactics used by law enforcement to support the prosecution herein. The tactics of law enforcement, which apparently never included direct notification to management of Club La Vela of individuals presumed to be involved in controlled substances, or the practice of not arresting any drug users or dealers, until such time as law enforcement engaged these individuals numerous times in illegal drug transactions, clearly supports the belief that law enforcement set up this entire action with the specific intent of making it appear that Club La Vela had problems with controlled substances when, as the facts of this case will ultimately show, had law enforcement notified management of such individuals, they would have been barred from the premises and the prosecution of these individuals would have been fully supported by Club La Vela management. Zero tolerance *means* zero tolerance, and it would make absolutely no business sense for a place of public assembly to encourage or allow the use of controlled substances when same would clearly undermine and jeopardize the profitable sale of alcoholic beverages.

The swift and severe pursuit of the individuals actually engaged in illegal drug activity is far less restrictive of First Amendment freedoms because it would not diminish the speech and associational rights of Defendants and all others who wish to operate

and/or attend popular places of public assembly. Prosecuting the Defendants in this case will serve to ensure a substantial chilling effect on other individuals who would consider the operation and/or promotion of virtually all places of public assembly.

**C. The prosecution of the Defendants herein under 21 U.S.C. /856(a)(2), cannot be supported by even the broadest consideration of the legislative intent underlying the statute.**

21 U.S.C. /856(a)(2), was adopted in 1986 as part of the Anti-Drug Abuse Act of 1986. This enormous Act addressed virtually every aspect of the serious drug problems then, and certainly now, experienced in American society. As it pertains to the section of the Act at issue in the instant action, the Crack House Statute found its genesis in locations used for the manufacture and distribution of controlled substances. In the fifteen (15) years since its passage, every application of this statute has involved owners or managers of property who in some way assisted the manufacture, storage, distribution, or use of drugs. The majority of cases under the statute specifically involve the operation of a literal crackhouse, e.g., *United States v. Morgan*, 117 F.2d 849 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 1400 (9th Cir. 1995); *United States v. Cabbell*, 35 F.3d 1255 (8th Cir. 1994); *United States v. Banks*, 987 F.2d 463 (7th Cir. 1993); *United States v. Church*, 970 F.2d 401 (7th Cir 1992); *United States v. Roberts*, 913 F.2d 211 (5th Cir. 1990).

Beyond these cases, every other case has involved a defendant who was directly involved in the sale or production of drugs, eg. *United States v. Becker*, 230 F.3d 1224 (10th Cir. 2000) (defendant manufactured methamphetamine in his home); *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000) (defendant restaurant owner arranged and

negotiated drug purchases, ran conspiracy to distribute cocaine, used business to conceal drug trafficking); *United States v. Moore*, 184 F.3d 790 (8<sup>th</sup> Cir. 1999) (defendant unloaded drug shipments, used his home for storage facility in drug conspiracy); *United States v. Bilis*, 170 F.3d 88 (1st Cir. 1999) (defendant bar owner purchased drugs, warned drug dealers of police surveillance); *United States v. Soto-Silva*, 129 F.3d 340 (5th Cir. 1997) (defendant handled money for drug trafficking enterprise, smuggled drugs and provided his property for packaging); *United States v. Gibson*, 55 F.3d 173 (5th Cir. 1995) (defendant manufactured and possessed methamphetamine with intent to sell); *United States v. Cooper*, 966 F.2d 936 (5th Cir. 1992) (defendant distributed crack out of his private club); *United States v. Clavis*, 956 F.2d 1079 (11th Cir. 1992) (defendant used his home for temporary storage of drugs, distribution to drug sellers); *United States v. Lancaster*, 968 F.2d 1250 (D.C. Cir. 1992) (defendant arranged for drug sales on his property); *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991) (defendant used car dealership for cocaine trafficking, used cocaine, and purchased cars for business with proceeds from illegal drug activity); *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990) (defendant motel owner alerted drug sellers of police presence, stored drugs on premises, loaned money for the purchase of drugs for resale); *United States v. Onick*, 889 F.2d 1425 (5th Cir. 1989) (defendant Tolliver manufactured and distributed drugs out of his apartment).

In the instant action, the prosecution alleges that the Defendants knowingly and intentionally made available for use the entire Club La Vela for the purpose of unlawfully distributing and using controlled substances. It is not alleged that the

Defendants assisted in illegal drug activity in any way, but simply that it took place on property that they either owned or controlled.

This expansive use of 21 U.S.C. /856(a)(2), is totally unjustified by any of the legislative intent supporting the adoption of this specific statute, as referenced in Exhibit C, and properly a request for judicial notice.

**D. The prosecution of Defendants violates their equal protection rights.**

Defendants Patrick Pfeffer, Thorsten Pfeffer, Sea Watch of Panama City Beach, Inc., d/b/a Club La Vela, have no connection whatsoever to drug activity. Bay County, Florida, as a whole, has long had serious problems with controlled substances, none of which can be attributed directly or disproportionately to Club La Vela. Among many Bay County, Florida venues, drug use flourishes, many of which do not even approach the zero tolerance policies of Club La Vela, however, the government has targeted Club La Vela in large part, Defendants believe, because of the overwhelming popularity and associational characteristics of the subject location. The basis for this prosecutorial selection violates the Constitution's guarantee of equal protection under the law.

Equal protection prohibits selective prosecution on the basis of the exercise of constitutional rights. [J]ust as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities. *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973). Although the Fourteenth Amendment's Equal Protection Clause does not directly apply to the federal government, the tenets of equal protection apply fully to the federal

government through the Fifth Amendment requirement of due process. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

A prosecution must be dismissed upon a showing that other persons similarly situated were not prosecuted, and that the selective prosecution was based on discrimination on the basis of race, religion, or the exercise of constitutional rights. See *Wayte v. United States*, 470 U.S. 598, 608-609 (1985). The Defendants here having made a prima facie showing of discriminatory prosecution, the burden shifts to the government to prove a proper motive. See *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972).

There can be no question that the U.S. Attorney has singled out these Defendants for prosecution. Numerous studies suggest that drug use is a common occurrence at virtually all rock concerts, at many other clubs, and in many other venues. Indeed, studies conducted in the State of Florida clearly show that drug abuse is an across the board social phenomenon, and cannot be attributed directly or indirectly to places of public assembly generally, or the Club La Vela specifically.

Under the government's instant and virtually unprecedented application of the Crack House Statute, virtually all owners of clubs and concert venues, as well as promoters of music events, are potentially liable - not to mention the person who manages other institutions where drug use commonly occurs: prisons, high schools, and college dormitories, to name a few. Of the thousands of similarly situated individuals, other than the State Palace Theater case in New Orleans, only the instant Defendants have been subjected to prosecution.

The government cannot hide behind the argument simply that drug use occurred at Defendants' place of public assembly and that the government can punish drug use wherever it is detected, by any means available. Again, it must be stressed that in the indictment, the Defendants themselves are not alleged to be involved in drug use in any way. Of particular and compelling note is the authority of *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972). In *Crowthers*, a group of protesters arrested in front of the Pentagon argued that they were targeted because of their religious views. The government resisted such a claim, arguing that, although it tolerated many other protesters, these particular defendants were unusually noisy. Ultimately, upon finding the targeted group to be no more noisy than numerous other protesters, the court held that, [i]n choosing whom to prosecute, it is plain that the selection is made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused. *Id.* at 1079.

In this prosecution, there is no other explanation for the government's action other than the impermissible motives of damaging a business deemed to promote new age ideas and associational activities, not to mention controversial new music, but the more serious and troubling explanation centered on the belief that the prosecution is largely being pursued to support the forfeiture at issue herein. Under either analysis, the instant prosecution cannot be supported by any Constitutional theory.

**E. Prosecution under the Crack House Statute violates Defendants due process rights.**

The prosecution of these Defendants under the unique and unsupportable theory that their activities suffice to justify prosecution under 21 U.S.C. /856(a)(2), despite a

complete lack of evidence or any allegation that they assisted or specifically engaged in illegal drug activity at Club La Vela violates due process. In *Scales v. United States*, 367 U.S. 203 (1961), the Supreme Court, holding that mere membership in the Communist Party could not constitute a criminal offense under the due process clause, noted that:

In our jurisprudence, guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity.... that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. *Id.* at 224-25.

A number of other cases illustrate the general principle that punishment can only attach to individuals who have engaged in some blameworthy conduct. In particular, the Supreme Court has held that it is unconstitutional to penalize innocent persons for the blameworthy acts of others. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court held that the denial of public education benefits to children of illegal aliens violated due process because it amounted to the punishment of children for the wrongs of their parents. Similarly, in *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972), the Court held that denying worker's compensation benefits to illegitimate children violates due process because the penalization of children for the wrongful acts of their parents is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.

The Fifth Circuit recognized an individual's substantive due process right to be free from punishment in the absence of personal guilt in *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974). In that case, a public school suspended two minor children as a result of

their mother's assault on the school's assistant principal. The Fifth Circuit held that the children could not be punished for the misconduct of their mother, stating that freedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice. *Id.* at 425.

In this prosecution, the Defendants are not charged with participating in the sale or use of illegal drugs on their property, they are charged with knowingly and intentionally making the property *available* for the purpose of unlawfully distributing and using controlled substances. The lack of active participation in illegal activity makes the entire prosecution herein entirely inappropriate and a violation of Constitutional rights.

**F. 21 U.S.C. §856(a)(2), is unconstitutionally vague, overbroad and not narrowly tailored to materially advance a legitimate governmental interest.**

The government's use and interpretation of 21 U.S.C. §856(a)(2), as applied to the instant scenario, clearly reveals the fact that this statute is unconstitutionally vague, and simply was never intended to be used against places of public assembly such as that being done in the instant action. The operative language of 21 U.S.C. §856(a)(2), states as follows:

- a) Except as authorized by this subchapter, it shall be unlawful to  
(2) manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

On its face, the statute does not appear in any way to be applicable to a place of public assembly of the magnitude of Club La Vela. Indeed, the language of this statute is extremely problematic for many reasons. The statute incorporates the use of

several terms without definition and, in many instances, uses language that would leave persons of common intelligence unsure as to the specific meaning of such language, forcing them to necessarily guess as to what specific actions and/or characteristics would be subject to regulation. Perhaps the most troubling aspect of the statute is the fact that there is no numerical or other guidance to put a citizen on notice of what would comprise criminal activity. If one individual was caught smoking marijuana at a place of public assembly, certainly not a rare occurrence in Bay County, would that one instance substantiate prosecution under 21 U.S.C. /856(a)(2)? Would two times do it? What of the scenario where a five hundred (500) room hotel contained a linen closet where bored hotel maids would use controlled substances, possibly with the approval of the head housekeeper? Would this instance justify a forfeiture of the entire hotel?

The vagueness and subjective construction of the above terms would lead human beings of common intelligence to necessarily guess as to the meaning of these terms and differ as to their application. The vagueness and subjective construction of the above terms do not provide adequate guidance to law enforcement or governmental officials, who themselves would have to necessarily guess as to the meaning of these terms and differ as to their application, thus leading to differential application of the law.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an

ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104 (1972)

In addition, the ambit of 21 U.S.C. /856(a)(2), reaches so broadly that it would encompass every place of public assembly, such as movie theaters, playhouses, arenas, stadiums, hotels with ballrooms, ballroom dance studios, health spas and fitness centers, or any other imaginable building, room or enclosure that the statute is susceptible of being applied to restrict the free exercise of fundamental rights against parties who are similarly situated, against whom, as set forth herein, the Crack House Statute should not be directed.

Most importantly, the substantive acts which purportedly support the application of the Crack House Statute are already the subject of extensive state and federal remedial legislation, which legislation is far more narrowly targeted at any potential offending conduct, and can be used address such conduct without infringing upon fundamental rights. The Crack House Statute was not intended to be used in the fashion it is being misused in, and such an application is clearly not narrowly tailored to materially advance a legitimate state interest within the allowable area of governmental control.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Herndon v. Lowry*, 301 U.S. 242, 258 (1937); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Grayned v. City*

of *Rockford*, 408 U.S., at 116-117. As a corollary, the Court has altered its traditional rules of standing to permit - in the First Amendment area - "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Dombrowski v. Pfister*, 380 U.S., at 486. Litigants, therefore, are permitted to challenge a statute not because their own right of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). See *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Shelton v. Tucker*, *supra*. Facial [413 U.S. 601, 613] overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, see *Grayned v. City of Rockford*, *supra*, at 114-121; *Cameron v. Johnson*, 390 U.S., at 617-619; *Zwickler v. Koota*, 389 U.S. 241, 249-250 (1967); *Thornhill v. Alabama*, 310 U.S. 88 (1940), and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 553-558 (1965); *Kunz v. New York*, 340 U.S. 290 (1951); *Lovell v. Griffin*, 303 U.S. 444 (1938). *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *NAACP v. Button*,

371 U.S. 415, 433 (1963). It is a basic First Amendment principle that we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When policies have uncertain meanings, affected persons will "steer far wider of the unlawful zone" than they would if the boundaries of the forbidden areas were clearly marked. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The Supreme Court has expressly held: Free speech may not be so inhibited. *Baggett*, 377 U.S. at 372.

Further, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *Grayned*, 408 U.S. at 108. Where a law has "no articulated standards" or "objective factors" such that it vests "unbridled discretion in a government official," it is facially unconstitutional under the First Amendment. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (striking down ordinance requiring variable fee to be set by administrator for assemblies on public property).

Moreover, case law makes clear that the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (ruling that "a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or that "is so indefinite that it

encourages arbitrary and erratic arrests and convictions," is void for vagueness) (internal citations and quotation marks omitted). If "a statute's literal scope," the Supreme Court has found, "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). When a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 499 (1982).

In the instant action, the government's use of 21 U.S.C. §856(a)(2), is so sweeping that it is, and must be, facially invalid because, if left in place, [it] may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions." *Massachusetts v Oakes*, 491 U.S. 576, 581 (1989).

Here, the government's enforcement policy is vague and overbroad. This sweeping application of this clearly inapplicable statute criminalizes virtually every place of public assembly in the nation, and thereby curtails and chills the First Amendment rights of every concert provider, bar owner, dance hall operator, or any other place of public assembly that caters to any demographic group that may surreptitiously use or transfer illegal narcotics. Knowing that the management of no place of public assembly can guarantee the complete absence of drugs, the only way to avoid criminal liability would be to forego the operation of any such establishment or venue. It is precisely this damage to free expression to which the First Amendment stands as a steadfast barrier.

**G. The use of the forfeiture provisions of 21 U.S.C. /853(a)(1) and (2), on the basis of 21 U.S.C. /856(a)(2), operates as a complete violation of the Eighth Amendment.**

Under any analysis, the forfeiture issues involved in the instant action, and the possible seizure of property worth approximately \$30 million should shock the conscience of any reasonable or just individual. Clearly, such a loss would be grossly disproportional to even the most sordid, worst case scenario imaginable, involving Club La Vela.

As a fundamental consideration, the Eighth Amendment states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. In analyzing the Eighth Amendment, the courts have determined that a punishment is excessive and unconstitutional if it makes no measurable contribution to the acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering, or it is grossly disproportionate to the severity of the crime. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d. 982 (1977).

In determining whether a sentence is disproportionate, the factors to be considered include the gravity of the offense, the harshness of the penalty, and the sentences imposed on other criminals for the same crime. See *United States v. Gaggi*, 811 F.2d 47 (2nd Cir. 1987), *cert. den.* 483 U.S. 1007 (1987). This is particularly noteworthy in the instant action because of the enormous disparity and gross disproportionality of the sentences involved for *identical* alleged conduct.

As was stated in the earlier sections of this Memorandum, Patrick Pfeffer and Thorsten Pfeffer were originally charged with violations of Florida Statutes /893.1351, which states:

**Lease or rent for the purpose of trafficking in a controlled substance.**

- (1) A person may not lease or rent any place, structure, or part thereof, trailer, or other conveyance, with the knowledge that such place, structure, trailer, or conveyance will be used for the purpose of trafficking in a controlled substance, as provided in s. 893.135, or the sale of a controlled substance, as provided in s. 893.13.
- (2) A person who violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

This state offense is punishable only as a third degree felony, providing only a maximum penalty of a term of imprisonment not exceeding 5 years and/or a \$5,000.00 fine. Regardless of this maximum sentence, as a first offense, even if convicted, Patrick Pfeffer and Thorsten Pfeffer would have been eligible for any non-state prison sanction under the Florida Sentencing Guidelines, since they have no prior record.

Additionally, forfeiture would not be an issue unless, under Florida Statutes, Chapter 895 (the Florida RICO Statute), it could be shown that someone with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity (F.S. /895.03). Indeed, it is difficult to formulate an idea of predicate acts upon which any civil or criminal forfeiture would be pursued under Florida law.

With even greater contrast, enforcement under Chapter 562, Florida Statutes, which deals with the enforcement of the alcoholic beverage laws of the State of Florida, pursuant to the responsible vendor protections afforded Club La Vela under Chapter 561, a licensed establishment deemed to be in violation of the beverage laws due to the

distribution and use of controlled substances on a licensed premises would be subject to only minimal suspensions and/or fines, with possible revocation of a liquor license after *many* offenses. (See Exhibit A). Even a worst case scenario could result only in penalties equaling a third-degree felony subject to the penalties specified above.

Ultimately, the forfeiture at issue in the instant action is totally unsupported by any legal theory.<sup>3</sup> In the recent case of *U.S. v. Bajakajian*, 111 S.Ct. 2028 (1998), the Supreme Court took a long, hard look at what was increasingly becoming governmental abuse of well-intended criminal statutes. In so doing, the Court articulated a compelling proportionality consideration:

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." [\*Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.\*, 492 U.S. 257, 265, 109 S.Ct. 2909, 2915, 106 L.Ed.2d 219 \(1989\)](#). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" [\*Austin v. United States\*, 509 U.S. 602, 609-610, 113 S.Ct. 2801, 2805, 125 L.Ed.2d 488 \(1993\)](#) (emphasis deleted). Forfeitures--payments in kind--are thus "fines" if they constitute punishment for an offense. *Id.* at 2033.

The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. See [\*Austin v. United States\*, 509 U.S., at 622-623, 113 S.Ct., at](#)

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<sup>3</sup> Under any analysis, the forfeiture of a \$30 million business and property, in the context of some alleged approximately sixty (60) drug arrests over a three and one-half (3½) year period, at a place of public assembly that attracts an average of 750,000 people per year would indicate that the forfeiture is being based on criminal activity which involves less than .00125% (a little over one thousandth of one percent of their patronage), is clearly disproportional and not justified by any application of the government's forfeiture powers.

[2812](#) (noting Court of Appeals' statement that " 'the government is exacting too high a penalty in relation to the offense committed' "); *Alexander v. United States*, 509 U.S. 544, 559, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted ... that the question whether the forfeiture was 'excessive' must be considered"). Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.

The text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be "excessive." Excessive means surpassing the usual, the proper, or a normal measure of proportion. See 1 N. Webster, *American Dictionary of the English Language* (1828) (defining excessive as "beyond the common measure or proportion"); S. Johnson, *A Dictionary of the English Language* 680 (4th ed. 1773) ("[b]eyond the common proportion"). The constitutional question that we address, however, is just how proportional to a criminal offense a fine must be, and the text of the Excessive Fines Clause does not answer it.

Nor does its history. The Clause was little discussed in the First Congress and the debates over the ratification of the Bill of Rights. As we have previously noted, the Clause was taken verbatim from the English Bill of Rights of 1689. See [Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.](#), 492 U.S., at 266-267, 109 S.Ct., at 2915-2916. That document's prohibition against excessive fines was a reaction to the abuses of the King's judges during the reigns of the Stuarts, *id.*, at 267, 109 S.Ct., at 2916, but the fines that those judges imposed were described contemporaneously only in the most general terms. See *Earl of Devonshire's Case*, 11 State Tr. 1367, 1372 (H.L.1689) (fine of & pound;30,000 "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land"). ***Similarly, Magna Charta--which the Stuart judges were accused of subverting-- required only that amercedments (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood:***

"A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage." Magna Charta, 9 Hen. III, ch.

14 (1225), 1 Stat. at Large 6-7 (1762 ed.).

None of these sources suggests how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive.

We must therefore rely on other considerations in deriving a constitutional excessiveness standard, and there are two that we find particularly relevant. The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature. See, e.g., [Solem v. Helm](#), 463 U.S. 277, 290, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983) ("Reviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"); see also [Gore v. United States](#), 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958) ("Whatever views may be entertained regarding severity of punishment, ... these are peculiarly questions of legislative policy"). The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents. See, e.g., [Solem v. Helm](#), *supra*, at 288, 103 S.Ct., at 3008; [Rummel v. Estelle](#), 445 U.S. 263, 271, 100 S.Ct. 1133, 1137-1138, 63 L.Ed.2d 382 (1980).

In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, [\[FN10\]](#) must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional. *Id.* at 2037, 2038. *Emphasis added.*

The forfeiture at issue herein is blatantly unconstitutional and clearly violates the Eighth Amendment.

### III. CONCLUSION

Based on the foregoing, the indictment at issue herein must be found violative of the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and must therefore be dismissed with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via U.S. Mail / Hand Delivery to Gregory R. Miller, Esquire, Assistant United States Attorney, 111 North Adams Street, Tallahassee, Florida 32301, on this \_\_\_\_\_ day of July, 2001.

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Luke Lirot, Esq.,  
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