ORIGINAL

20-7027

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Susanne Stephanie Nikola Kynast — PETITIONER
(Your Name)

vs.

State of Florida — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Susanne Stephanie Nikola Kynast
(Your Name)

5409 Overseas Highway Box #59
(Address)

Marathon, FL 33050
(City, State, Zip Code)

305-417-2206
(Phone Number)

QUESTION(S) PRESENTED

Is Petitioner entitled to the return of property taken as evidence without a warrant and held in *custodia legis* subsequent to a motion to suppress in regards to that evidence having been granted by the trial court on the grounds that the search resulting in the seizure of said evidence was illegal, with the motion to suppress specifically having demanded the return of the property?

Is Petitioner entitled to the return of property taken as evidence and held in *custodia legis* subsequent to the case having been terminated by a *nolle prosequi,* it being the Petitioner's personal property, not the fruit of criminal activity, and it not being held as evidence in Petitioner's or in any related case, and Petitioner having filed a motion for the return?

Is Petitioner entitled to an evidentiary hearing in the trial court if the property is not returned, and if the trial court refuses to hear such a motion to the issuance of a writ of mandamus directing the trial judge to exercise jurisdiction and order the return of the property or to entertain motion for same?

Is the existence of a Disposition of Case and Evidence Memorandum directing the evidence custodian to return the property which is ambiguous and unclear in nature regarding the exact items to be returned sufficient to supersede Petitioner's rights to a hearing for the return of her property if Petitioner has been able to prove through law enforcement property receipts from the time of seizure and a release for returned property / evidence form that it has not resulted in the return of all or even most of the property entered into *custodia legis*?

Is Petitioner entitled to an evidentiary hearing if the State and evidence custodian make claims about the status of the property which Petitioner has brought into question by valid timely argument?

Is the fact that the evidence custodian has not returned Petitioner's property in response to a Disposition of Case and Evidence Memorandum and has not provided any evidence to the court in regards to the missing property (non-performance in response to a lawful order) sufficient proof that the property has ceased to exist and therefore grounds for Petitioner's petition for writ of mandamus to be denied as moot?

If the evidence custodian does not comply with a Disposition of Case and Evidence Memorandum does this permit Petitioner to petition the court by motion to intervene to achieve compliance?

If the evidence custodian were to make a claim of the property having ceased to exist would the evidence custodian be required to give a detailed accounting of the circumstances of loss for each item in order for the court to determine the veracity of that claim and to enable Petitioner to possibly take civil action against the evidence custodian?

If the evidence custodian were to make a claim that it can no longer locate property entered into *custodia legis* is it the duty of the trial court which took possession of the property to initiate an investigation and elicit testimony from the evidence custodian in order to locate the property?

If the evidence custodian has disposed of property it was holding in *custodia legis* without the authority of the court by means which resulted in the continued existence of the property such as sale, donation, adoption, or any other temporary or permanent custody arrangement, is it the responsibility of the court to compel the evidence custodian to retrieve such property so it can be restored to Petitioner?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Honorable Judge Ruth Becker, County Judge of Monroe County, Sixteenth Judicial Circuit, Marathon Courthouse, 3117 Overseas Highway, Marathon, Florida 33050 (party to the Petition for Writ of Mandamus, Fla. R. App. P. 9.100 (e)(2).

RELATED CASES

• *Kynast v. Florida*, No. 3D19-0640, District Court of Appeals of the State of Florida, Third District. Per Curiam Affirmed Sep. 16, 2020, Rehearing Denied Oct. 28, 2020.

• *Kynast v. Florida*, No. 18-CA-375-M, Circuit Court of Appeals of the Sixteenth Judicial Circuit of the State of Florida, in and for Monroe County. Order Denying Amended Petition for Writ of Mandamus entered Feb. 12, 2019.

• *Florida v. Kynast*, No. 18-AP-4-M, Circuit Court of Appeals of the Sixteenth Judicial Circuit of the State of Florida, in and for Monroe County. Closed July 31, 2018.

• *Florida v. Kynast*, No. 16-MM-438-A-M, County Court of the Sixteenth Judicial Circuit of the State of Florida, in and for Monroe County. Nolle Prosequi entered July 31, 2018.

• *Florida Keys Society for the Prevention of Cruelty to Animals (FKSPCA) v. Kynast and Geisel*, No. 16-CC-79-M, County Court of the Sixteenth Judicial Circuit of the State of Florida, in and for Monroe County. Order Granting Amended Voluntary Dismissal entered July 30, 2018.

• *Florida v. Geisel*, No. 16-CF-108-A-M, Circuit Court of the Sixteenth Judicial Circuit of the State of Florida, in and for Monroe County. State "No Actions" all charges pertaining to search and seizure, Aug 26, 2019.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Circuit Court of the 16th Judicial Cicuit of the State of Florida in and for Monroe County court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was Sept. 16, 2020. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: Oct. 28, 2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America 1789 (rev. 1992) Amendment IV
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Constitution of the United States of America 1789 (rev. 1992) Amendment V
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States of America 1789 (rev. 1992) Amendment XIV
"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall and State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rule of Criminal Procedure Rule 41(g)
"MOTION TO RETURN PROPERTY. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."
[Formerly Rule 41(e)"Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.]

Section 933.14, Florida Statutes (1989)
"Return of property taken under search warrant. (1) If it appears to the judge before whom the warrant is returned that the property or papers taken are not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds upon which the warrant was issues, or if it appears to the judge before whom any property is returned that the property was secured by an "unreasonable" search, the judge may order a return of the property taken; provided, however, that in no instance shall contraband such as slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets, or other gambling devices, paraphernalia, or equipment, or narcotic drugs, obscene prints and literature be returned to anyone claiming and interest therein, it being the specific intent of the Legislature that no one has any property rights subject to be protected by any constitutional provision in such contraband; provided, further, that

the claimant of said contraband may upon sworn petition and proof submitted by him or her in the circuit court of the county where seized, show that said contraband articles so seized were held, used, or possessed in a lawful manner, for a lawful purpose, and in a lawful place, the burden of proof in all cases being upon the claimant. The sworn affidavit or complaint upon which the search warrant was issued or the testimony of the officers showing probable cause to search without a warrant or incident to a legal arrest, and the finding of such slot machines, gambling tables, lottery tickets, tally sheets, rundown sheets, scratch sheets, or other gambling devices, paraphernalia, and equipment, including money used in gambling or in furtherance of gambling, or narcotic drugs, obscene prints and literature, or any of them, shall constitute prima facie evidence of the illegal possession of such contraband and the burden shall be upon the claimant for the return thereof, to show that such contraband was lawfully acquired, possessed, held, and used."

STATEMENT OF THE CASE

Petitioner Susanne Kynast was taken into protective custody pursuant to a Baker Act on 7/5/2016 by deputies from the Monroe County Sheriff's Office (herein after referred to as "MCSO") and officers from the Florida Fish and Wildlife Conservation Commission (herein after referred to as "FWC"). The Baker Act was initiated based on an erroneous report made by Petitioner's husband who is disabled with a traumatic brain injury and suffers from perception, communication, and emotional deficits and had misinterpreted Petitioner's reaction to the sudden cancer death of her dog. It was not supported by the initially responding officers (Record pg. 505) and not upheld be the receiving facility (Record pg. 484). At that time her dog Slinky was seized and logged into evidence by FWC officer Kyle Plussa. (Appendix J) Despite assuring Petitioner that they would do so, MCSO failed to notify Petitioner's designated animal caretaker of her custody and the need to care for her animals. The following day (7/6/2016), 18 hours after their initial entry, while Petitioner was still at the Guidance Care Center awaiting her release which was allegedly delayed due to low holiday staffing levels, FWC and MCSO returned to her home without a warrant and seized the following animals from there: 4 cats (a 5th cat was left behind and seized on 7/11/2016), 8 long-term pet iguanas, 1 iguana which she had rescued from the road after it had been hit by a vehicle, and 5 pet freshwater turtles, claiming that they were without food, water, and shelter, statements which were contradicted by multiple videos taken on scene (Record pg. 474) Those were also logged into evidence by FWC officer Kyle Plussa along with approximately 1,000 dollars worth of custom caging, carriers, and accessories (Appendix J). Petitioner was charged with numerous fish and wildlife violations and criminal charges relating to an alleged failure to care for her animals in the County Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida in case number 2016-MM-438-A-M. On 7/7/2016 2 more dogs were seized from her disabled husband's vehicle during his arrest on charges of threatening officers in an attempt to reclaim the animals. This seizure occurred in spite of the fact that he had designated a person to retrieve them and that that person as

well as a second designated caretaker showed up at the scene to do so but were refused access to the dogs (Record pg. 347 - 349), negating any claims that the dogs were left without care and taken for safekeeping. They were also logged into evidence by FWC officer Kyle Plussa in Petitioner's case (Appendix J). All evidence receipts stipulate that the animals be held as evidence for trial (Appendix J). All pets taken from Petitioner's home were assessed by a veterinarian immediately following the seizure and were except for the iguana which had been hit by a vehicle and had predictable injuries which were healing found to be healthy as documented in veterinary records provided to Petitioner in her discovery. They were transferred to animal control officer Hugh Smith (herein after referred to as "ACO Smith") to be held in *custodia legis* by the Florida Keys Society for the Prevention of Cruelty to Animals (herein after referred to as "FKSPCA") (Appendix J). On 8/12/2016 the FKSPCA filed a "Verified Petition for Custody, Control, and Disposition of Animals Pursuant to Fla. Stat. 828.073 and Monroe County Code Sec. 4-47", 2016-CC-79-M against Petitioner and her husband in the County Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida under an incorrect case number (Record pg. 570). It was corrected with the appropriate case number and sent out to be served by 10/27/2016 (Record pg. 584), after the FKSPCA attempted to have a hearing on the matter on 10/26/2016 and were advised in court that they were required by statute to have the Petition served on Petitioner and her husband (Record pg. 581). This petition states that the FKSPCA has custody of all 21 seized animals (the 22nd one already being deceased at the time of filing). (Record pg. 573) It names Petitioner and her husband as joint owners of all of them (Record pg. 573) which is in accordance with *Bennett v. Bennett*, 655 So.2d 109 (Fla. 1st DCA 1995) (animals as property in the State of Florida). It also states that the FKSPCA housed the animals at an undisclosed "specially outfitted sheltering facility" supposedly to protect them from Petitioners. (Record pg. 574) Petitioner answered in the civil case in part that the FKSPCA lacked the legal standing to file the petition since they were holding the animals in *custodia legis* as evidence in a criminal trial and this was not a humane society seizure. The

difference is discussed in detail in *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995) which differentiates between a humane society seizure where the humane society "acted independently and seized [the animal] pursuant to a civil complaint based on animal cruelty [where] the right to possess [the animal] should be resolved by complying with the procedure set forth in Fla. Stat. 828.073", and instances where the animal is seized by law enforcement as evidence in a criminal case and is turned over to the humane society to be held for the state as evidence, in which case the society is the state's agent and is holding the animal in *custodia legis*. For property held in *custodia legis* the trial court having jurisdiction over the criminal charges has to determine whether a valid basis exists to retain the property. The FKSPCA *de facto* abandoned the civil case after Petitioner filed a number of defensive motions (Record pg. 363, 568 - 569) followed by interrogatories (Record pg. 377). On 7/5/2017 the state dropped all the wildlife charges in the criminal case, agreeing with a motion filed by Petitioner that they had been in error since the animals seized were in fact pets, not wildlife and therefore not subject to captive wildlife statutes. In the criminal case Petitioner filed a motion to suppress all evidence and find the seizure of her animals illegal. (APPENDIX I) This motion and the identical section of the defensive motions in the civil case raised the federal prohibition against unreasonable search and seizure and the consequent demand for the return of the seized items sought to be reviewed in this case in the following manner:

> "The Fourth Amendment of the Constitution protects against warrantless search and seizure except in a very narrowly defined set of circumstances falling under the emergency exception to the warrant requirement." (Record pg. 463)
>
> "As stated by the United States Supreme Court in *Johnson v. United States* 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948): The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." (*Hornblower v. State*, Supreme Court of Florida Oct. 27, 1977 351 So. 2d 716)." (Record pg. 466)

> "Respondents therefore respectfully request that this Honorable Court find that the search and seizure conducted on Susanne Kynast's vessel and residence FL 6272NW was not reasonable and therefore prohibited by the Fourth Amendment, and that this Honorable Court therefore order all evidence suppressed and all seized items – physical property and animals – returned immediately." (Record pg. 468)

Petitioner based her argument on the lack of a warrant, the fact that the officers had stated a previous intent to search and arrest while executing a community caretaker function, that they had artificially created an exigency by removing her from her home and not notifying the animal caretaker she had appointed, and the fact that her Baker Act was not sustained by the receiving facility. (Record pg. 500 - 536) During the first suppression hearing on 2/21/18 FWC Officer Kyle Plussa stated under oath that the seized pet iguanas were at that time "located at an appropriate facility".[1] In her closing argument Petitioner continued to raise the federal prohibition against unreasonable search and seizure:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized." U.S. Const., Amdt. 4.
>
> "When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable. See *United States v. Johnson, 63 F.3d 242,* 245 (3d Cir.1995)." *Hilton v. State,* 961 So. 2d 284 (Fla. 2007)
>
> "The Fourth Amendment to the United States Constitution is an expression of our founding fathers' uneasiness with the potential omnipotence of a federal government. It reflects the notion that an individual can never enjoy the tranquility which he deserves if the government is free to tamper with his expectations of privacy through arbitrary searches. Consequently, the central theme of the Fourth Amendment is its prohibition against general searches. Practices like random entries into people's homes or random searches of people walking the streets, to acquire information or obtain evidence are repulsive to our concept of a democratic society. See *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). In essence, the Fourth Amendment forbids those occurrences and evinces the axiom that privacy is not a gratuity which we hold at the whim of our government. Only when there is a special governmental need that can be stated with particularity, will we allow the government to intrude on an individual's privacy. To implement this principle, the Supreme Court of the United States has mandated that warrantless searches "are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). *Accord, United States v. United States District Court,* 407 U.S. 297, 317, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). These exceptions have been "jealously and

1 Defendant has very limited financial means due to the cost of this case and her support for her disabled husband and is financially unable to pay for a transcript of that hearing.

carefully drawn," *Jones v. United States,* 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), and the burden is upon the State to demonstrate that the procurement of a warrant was not feasible because "the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948). See also *Coolidge v. New Hampshire*, 403 U.S. 443, 445, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *United States v. Jeffers,* 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951); *Vale v. Louisiana,* 399 U.S. 30, 34, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925); *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir.1971); *Shepard v. State,* 319 So.2d 127 (Fla. 1st DCA 1975); *Hannigan v. State,*307 So.2d 850 (Fla. 1st DCA 1975)." *Hornblower v. State*, 351 So. 2d 716 (Fla. 1977)

"the Fourth Amendment establishes a procedure for effectuating the rights of individuals — the deliberation of a dispassionate and detached magistrate who initially makes an independent determination as to probable cause before a warrant may issue. Only under special circumstances is it unnecessary to follow this procedure. Were a magistrate not interposed between the policeman and the individual before a person's privacy was threatened, that precious equilibrium between individual privacy and orderly society would be disrupted. As stated by the United States Supreme Court in Johnson v. United States, supra: The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Hornblower v. State*, 351 So. 2d 716 (Fla. 1977)

"The United States Supreme Court has repeatedly identified "physical entry of the home [as] the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York,* 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (quoting *United States v. United States District Court,* 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)). Throughout the Supreme Court's caselaw, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590, 100 S.Ct. 1371. *Riggs v. State* 918 So2d 274 (Fla 2005)"
(Record pg. 502 – 503)

"The entry into Defendant's private home and subsequent search and seizure on 7/5 was illegal because the legal requirements allowing a warrantless entry into a home were not met." (Record pg. 505)

"The entry into Defendant's home and subsequent search and seizure on 7/5 was illegal because if warrantless entry is made under the emergency exception to the warrant requirement, officers must not enter with an accompanying intent to search or arrest." (Record pg. 515)

"In his testimony, the officer acknowledged that he intended to enter and search the trailer before he ever approached the mobile home. To sustain respondent's argument would be to

> endorse the precise kind of conduct which the Fourth Amendment seeks to proscribe. [...] Additionally, the "emergency exception" permits police to enter and investigate private premises to preserve life, property, or render first aid, provided they do not enter with an accompanying intent either to arrest or search, *Johnson v. United States, supra; United States v. Barone,* 330 F.2d 543 (2d Cir.1964), cert. Denied, 377 U.S. 1004, 84 S.Ct. 1940, 12 L.Ed.2d 1053 (1964). *Hornblower v. State*, 351 So. 2d 716 (Fla. 1977)" (Record pg. 515)

> "All subsequent searches, investigations, and seizures at Defendant's home were unconstitutional as well since no warrant was ever obtained." (Record pg. 534)

The motion was granted on 5/4/2018 by the Honorable Judge Ruth Becker (Record pg. 537). The State appealed on 5/15/2018 (Case Number 18-AP-4-M) (Appendix H) and neither the seized animals nor the seized property was returned. Petitioner immediately filed a Emergency Motion for the Return of Seized Property (Animals) based on § 924.19, Fla. Stat. which states in relevant part "An appeal by the state shall not stay the operation of an order in favor of the defendant." Petitioner demanded the return of her seized animals and property based on the Fourth Amendment as sought from this court in the following manner:

> "1. The Honorable Judge Becker granted Defendant's motion to suppress on 5/4/2018. This motion applied in part specifically to "animals seized from the vessel". The motion pertained to "All iguanas, cats, turtles, dogs, and other animals found and illegally seized." and the text states in relevant part (f) "Respondents therefore respectfully request that this Honorable Court find that the search and seizure conducted on Susanne Kynast's vessel and residence FL 6272NW was not reasonable and therefore prohibited by the Fourth Amendment, and that this Honorable Court therefore order all evidence suppressed and all seized items – physical property and animals – returned immediately." 2.The State appealed the order on 5/10/2018. 3. In case of an appeal by the State, Fla. Stat. 924.19 applies which states in relevant part "An appeal by the state shall not stay the operation of an order in favor of the defendant." The order validates Defendant's claim that the warrantless seizure of Defendant's animals was against the law. Its operation is therefore the immediate restoration of those animals to their rightful owner. " (Record pg. 540)

On 7/30/18 the FKSPCA filed a notice of voluntary dismissal of their civil case (hereafter referred to as "NVD") which reads in relevant part:

> "Respondents' animals, of which Petitioner has had custody, are listed as evidence in the misdemeanor case styled: State of Florida v. Susanne Kynast, Case No.: MM-M-16-438; as such, this instant action which Petitions for Custody, Control and Disposition of Animals pursuant to F.S. 828.073 and Monroe County Code 4-47 is moot as the FKSPCA has no authority to release Respondents' animals. Custody and Disposition of the animals will be in accordance with the resolution and disposition of Case MM-M-16-438." (Record pg. 594 - 597)

The Honorable Judge Becker issued an Order granting the NVD on 7/30/2018 (Appendix G). On 7/31/18 Petitioner voluntarily dismissed the appeal (Record pg. 452) and a *nolle prosequi* was entered in case number 2016-MM-438-AM (Appendix F). Petitioner paid 4,000 dollars to the FKSPCA for the care of all of her animals. On 7/25/18 the State issued a Disposition of Case and Evidence Memorandum which states in part "Release animals & any items (cages/watering dishes/etc) currently being held @ FKSPCA." (Record pg. 316), and is unnecessarily vague by arguably limiting the return of property specifically to that stored at that specific location, the FKSPCA building, at that specific date. The FKSPCA is the evidence custodian as per the FWC property receipts (Record pg. 185 – 189), and admits to having had custody of the animals (Record pg. 108, 594) but per their own admission in the Verified Petition for Custody, Control, and Disposition (Record pg. 574), their statements made to Petitioner, veterinary/boarding records in the discovery, and FWC Officer Plussa's testimony during the first suppression hearing (Initial Appeal Brief, pg. 42) they did in fact specifically not hold the animals at the FKSPCA but rather placed them in "a specially outfitted sheltering facility, whose location is undisclosed" (Record pg. 574), at Marathon Veterinary Hospital, at Aquarium Encounters of the Florida Keys, and with fosters. When Petitioner presented herself at the FKSPCA on 7/26/18 in the presence of the FWC property officer she was told that only the following animals were available to her: 3 turtles, 4 cats, and 1 dog. This is proven by the FWC Release of Returned Property / Evidence from 7/26/18, which lists turtles, cats, and 1 dog, and specifically nothing else. (APPENDIX K) Petitioner was advised in the presence of her attorney William Heffernan that the numbers in the form for the cats and turtles were not filled in since the FWC was unsure how many of each would be returned. Petitioner picked up 4 cats and dog Slinky, and 2 turtles (the third promised turtle was allegedly no longer available to her). The FKSPCA also provided 4 transport crates (not her own, 3 of which were damaged to the point of being barely usable, at a total value of approximately 30 dollars) to Petitioner. The FKSPCA had previously provided documented proof of the death of one iguana in

their custody and had requested authorization for the medically necessary euthanasia of a second one which Petitioner had granted. The FKSPCA refused to release the remaining 2 dogs Chrissy and Dozer but claimed that they were alive and well. No consistent or verifiable claims were made about the missing 3 turtles, 7 iguanas, cat, and valuable caging and accessories seized. As per the FWC property receipts (APPENDIX J) the animals were transferred into the custody of the FKSPCA as evidence to be held for trial. As such they were being held in *custodia legis* see *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995) (Initial Brief pg. 3 - 4), items held in *custodia legis* are "confiscated temporarily for evidentiary purposes" *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972). Animals are physical property in the State of Florida. *Bennett v. Bennett*, 655 So. 2d 109 (Fla. 1st DCA 1995). "Property once placed in *custodia legis* will remain there, by operation of law, until it is withdrawn by order of a competent court." *Adams v. Burns*, 172 So. 75 (Fla. 1936) No court orders withdrawing the animals or property exist in the case and no documentation was provided to indicate that the missing animals no longer existed and there is no reasonable expectation that they would not. When the first iguana died in the custody of the FKSPCA and a second one had to be euthanized for medical reasons dozens of pages of medical documentation were included in Petitioner's discovery and provided to her via e-mail. Most of the reptiles had carried pet health insurance policies allowing them free veterinary care of which the FKSPCA was aware (Record pg. 371) and which Petitioner continues to pay to this day in the hope of recovering them. Had any of them gotten sick or injured and passed away in their custody their veterinary health insurance policies should have been billed (which they were not) and extensive records would exist which would have been easy to provide to Petitioner. With the exception of one individual the pet iguanas and turtles which Petitioner had in most cases owned for more than 20 years had been healthy animals with decades of projected life expectancy ahead of them. On 2/21/18 FWC Officer Kyle Plussa had stated under oath that the iguanas were at that time "located at an appropriate facility", meaning that they were alive at that time, years after the seizure. The

inanimate property (which included marine rated custom caging and UV stable ponds) sought by Petitioner could certainly not be expected to have deteriorated to the point of non existence within 2 years.

Petitioner had consistently throughout the case personally and through her attorney begged and pleaded with the attorney for the FKSPCA for the safe return of her animals, explaining how they meant everything to her as members of her family for which she had paid tens of thousands of dollars in veterinary care, housing, and sustenance over the years, providing care information, offering to pay for costs incurred, agreeing to engage in negotiations, and had never once given the impression that she was no longer interested in their welfare or ownership (Record pg. 356, 366 - 379). Petitioner's husband Mr. Geisel who was found to be incompetent to stand trial in his case 2016-CF-108-AM on 1/26/2017 due to his disability (Record pg. 613), was only involved in any negotiations through Petitioner.

On 8/2/2018 Petitioner filed a demand with Attorney Limbert-Barrows (Attorney for the FKSPCA) for the return of the missing animals (APPENDIX M). On 8/7/18 Petitioner filed a request with the Florida Fish and Wildlife Commission Division of Law Enforcement for the return of the missing animals pursuant to the procedure on the FWC Property Receipt (APPENDIX L). Petitioner therefore exhausted all other available remedies by filing timely demands for the return of the evidence with the FWC which seized the animals and the FKSPCA to whom the evidence was transferred to be held *in custodia legis*, both of which were ignored. Petitioner then filed a Motion for the Return of all Evidence on 8/16/2018 in case 2016-MM-438-AM requesting the return of her remaining property (Record pg. 547 - 552). The hearing took place on 10/15/2018 when the Honorable Judge Becker denied / declined to hear the motion, citing her apparently sincere belief that she did no longer had jurisdiction to do so subsequent to a *nolle prosequi* having been entered, and suggesting that this should be a civil matter. However, during the hearing Assistant State Attorney Christina Cory stated clearly that the State no longer has any need for or claim over the

remaining animals as evidence in either Petitioner's case or her husband's case 2016-CF-108-AM (Appendix E). On 10/16/2018 Petitioner attempted to locate the 2 missing dogs through their microchip registrations. She found Chrissy in a foster dog hospice program and Dozer placed with an unknown individual who is according to HomeAgain, the microchip provider, rejecting Petitioner's attempts to obtain contact information (Record pg. 222). Only the involvement of law enforcement or a court order would be considered sufficient by HomeAgain to release that information.

On 11/13/2018 Petitioner filed her first petition for a writ of mandamus pursuant to Florida Rules of Appellate Procedure 9.030(c)(3), 9.100(e) and 9.100(f)(2) in the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida directing Respondent, the Honorable Judge Ruth Becker-Painter, Judge of the County Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida to exercise jurisdiction and order the return of Petitioner's seized personal property subsequent to the *nolle prosequi* in case 2016-MM-438-AM or to entertain motion for same (Record pg. 9). That petition was dismissed without prejudice on 12/5/2018 (Record pg. 87). Petitioner filed an amended petition on 1/3/2019 along with a second amended petition due to a formatting error discovered during the filing process (Record pg. 89 – 300), arguing that the lower court in fact did have jurisdiction to hear her motion and seeking the following relief, pertaining directly to the questions Petitioner brings before this court:

> "Petitioner seeks this Honorable Court's writ of mandamus directing the Respondent, the Honorable Judge Becker to entertain her motion for the return of all evidence or preferably to order the return of all the animals seized by FWC in this case as per the property receipts as well as all the remaining evidence which the State admits has no longer any evidentiary value. Specifically the order should state that Petitioner is the legal owner of dogs Chrissy (microchip number HomeAgain 4A286C576D) and Dozer (microchip number HomeAgain 985112007130225), the iguanas known as per their veterinary records as Iggy, Lenny, Laverne, Kugel, Quasimodo, Curly, Spike, and Baby (documented in evidence records as iguanas #1 - 8), turtles Tabby, Lily, and Myrtle (documented in evidence records as turtles # 1, 4, and 5), and cat Emily (documented in evidence records as "Feline Grey Tabby Kynast male"), and direct the FWC as the agency legally responsible for the property to determine from its evidence custodian the FKSPCA (and / or by any other reasonable means necessary) the present location of the evidence it is holding in *custodia legis*, whether it is at one of the FKSPCA facilities, or currently temporarily transferred to any of its agents (including but

not limited to fosters, veterinarians, facilities, and rescues) to ensure its safety (if still alive in case of the animals) and to deliver it to Petitioner at no cost to Petitioner. In cases where the animals are alleged to be deceased, a proper investigation needs to be initiated into the veracity of that claim to determine whether any of the animals are in fact still alive and the evidence custodian or its agents are merely refusing to return them. If they are in fact deceased as proven by reliable veterinary records those records need to be provided to Petitioner. Petitioner has every reason to doubt the veracity of any statements made by the FKSPCA especially in the person of ACO Smith since he throughout this case provided statements under oath which were unsupported or shown to be outright falsehoods by videos taken on scene and veterinary examination and since it has throughout the case been the stated aim of the FKSPCA and FWC Officer Kyle Plussa (as documented on video and in writing) to deprive her permanently of her animals." (Record pg. 238)

Petitioner made reference to Federal Rule of Criminal Procedure 41(e) in her argument:

"It is not, of course, a prerequisite to a motion for return of property that a criminal prosecution be brought following the seizure of the property. *Harvey v. Drake*, 40 So. 2d 214 (Fla. 1949); *Golding v. Director, Public Safety Department, Metropolitan Dade County*, 400 So. 2d 990 (Fla. 3d DCA 1981). However, once a criminal prosecution is instituted, the court in which that prosecution is pending acquires jurisdiction over that property to hear and determine all questions concerning its ownership if the property seized has an evidentiary purpose. *Garmire v. Lake*, 265 So. 2d 2 (Fla. 1972). If, on the other hand, the property seized is not held as evidence or no criminal prosecution ensues, then the court to which the warrant and property are returned obtains jurisdiction to order its return. *Harvey v. Drake*, 40 So. 2d 214 (Fla. 1949); *Golding v. Director, supra.* [...] We hold further that the termination of the criminal case, here by the entry of a *nolle prosequi*, did not divest the trial court of jurisdiction to entertain Sawyer's motion for return of property. While concededly neither Section 933.14, Florida Statutes (1979), nor any other statute, confers jurisdiction on the court before which the criminal proceedings are held to return property seized after the termination of the criminal case, that power inheres in the court's jurisdiction over the criminal case. *Garmire v. Lake, supra*; *Estevez v. Gordon*, 386 So. 2d 43 (Fla.3d DCA 1980). If criminal courts have the inherent power in the absence of a statute to provide for the recovery of evidentiary items held by them, as the Supreme Court said in *Garmire*, then it is implicit that that power, to be effective, must exist after the termination of the criminal case when the items are no longer needed as evidence. See *Jenkins v. State*, 41 So. 2d 554 (Fla. 1949). See also *State ex rel. Gerstein v. Durant*, 348 So. 2d 405 (Fla.3d DCA 1977); *Carlisle v. State ex rel. Smith*, 319 So. 2d 624 (Fla. 4th DCA 1975). *Cf. United States v. Wright*, 610 F.2d 930 (D.C. Cir.1979); *United States v. Palmer*, 565 F.2d 1063 (9th Cir.1977); *United States v. LaFatch*, 565 F.2d 81 (6th Cir.1977), cert. denied, 435 U.S. 971, 98 S. Ct. 1611, 56 L. Ed. 2d 62 (1978); *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir.1976) (all holding that under Federal Rule of Criminal Procedure 41(e), the Federal District Court does not lose jurisdiction to return seized property after termination of the criminal case). [...] It should be obvious that a person who asserts that the State is unlawfully holding his property would be deprived of due process if the law did not afford him a prompt hearing on his assertion. [...] Accordingly, we grant the petition for writ of mandamus. We deem it unnecessary to issue the writ. We direct the judge now presiding in the respondent's stead in the Criminal Division of the Circuit Court, in and for Dade County, Florida, to exercise jurisdiction over Sawyer's motion for return of property." *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981) (Record pg. 240 - 241)

> *"Sawyer v. Gable, supra* discusses in detail the interplay under Federal Rule of Criminal Procedure 41(e) of return of property and suppression of evidence due to illegal search and seizure, stating uneqivocally that once a seizure is found to be illegal (as in this case), the Defendant is entitled to the lawful possession of the property.
> "Rule 41(e) provides: "Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12." *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981)" (Record pg. 243)

The State in this matter filed a response on 2/7/2019, conceding that the County Court Judge, the Honorable Judge Becker did in fact have jurisdiction to act on Petitioner's Motion for the Return of all Evidence, but argued that the petition was moot since the FKSPCA had allegedly never seized the dogs but had merely taken them for safekeeping and then unsuccessfully attempted to return them to Petitioner's husband and failing to make contact with him had subsequently adopted them out. The State provided no evidence thereof or as to the fate of the other missing animals and property. (Record pg. 305 - 316)

On 2/12/2019 the Circuit Court issued an Order Denying Amended Petition for Writ of Mandamus as moot (pg. 317). This order was never served on or sent to Petitioner and only came to Petitioner's attention during a routine check of the court file. On 2/20/2019 Petitioner filed a Motion to Reconsider (pg. 318 - 323), referring to Fla. R. App. P. 9.100 (k) which states: *Reply. Within 20 days thereafter or such other time set by the court,the Appellant may serve a reply, which shall not exceed 15 pages in length, and supplemental appendix.* Petitioner stated that she did not believe that the Circuit Court would be able to make a fair decision without being made aware of the facts and supplementary evidence contained in the reply and that the untimely dismissal of the petition would constitute a violation of her due process rights. (Record pg. 318 – 323). Petitioner subsequently filed her reply on 2/26/2019 (pg. 324 – 343) Petitioner showed that the claims made in regards to the status of the dogs were false as shown by case records and reiterated again that she is

entitled to the return of her property as stated in the questions presented to this court:

> "Regardless, there is a *nolle prosequi* in the case, the civil action action has been voluntarily dismissed with the admission that it was moot, and Petitioner is entitled to the return of her property." (Record pg. 326)
>
> "After receiving only 2 turtles, 4 cats, and dog Slinky, Petitioner notified Attorney Limbert-Barrows, the FWC, and the court that the FKSPCA had failed to comply. While Petitioner obviously greatly appreciates the directive of ADA Cory, it is clearly Respondent's responsibility to ensure with the authority of the court that an agent of the court complies with what amounts to a legal court order. It has been apparent throughout this case that Respondent has expected the FKSPCA and FWC to act according to law. However, several instances of perjury by both ACO Smith as well as FWC Officer Plussa should have made it abundantly clear to Respondent that the FKSPCA continues to display a total disregard for the truth in this case. As shown above, the story line of the attempt to return the dogs taken for safe-keeping provided by the FKSPCA to Respondent is completely untrue as per verifiable evidence. It is the responsibility of Respondent having been notified of the FKSPCA's failure to comply to bring the weight of the court to bear on the issue and hold the offending parties in contempt until compliance is achieved." (Record pg. 338 – 339)
>
> "The sole 'proof' provided by Respondent that the animals no longer exist is the fact that the FKSPCA was ordered to return them but did not. This is merely proof of failure to comply, and the exact reason why Petitioner seeks the writ, so that the FKSPCA will be forced to account for those missing animals. Since Respondent clearly does not have any proof whatsoever that even a single animal ceased to exist, the animals continue to legally be considered in the custody of the FKSPCA, which remains in contempt of a legal court order." (Record pg. 339 -340)
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> "Respondent has been unable to provide any proof that all the animals and physical property seized from Petitioner's vessel were either returned to Petitioner or that they at the time of the disposition of the case had ceased to exist. Petitioner has provided proof that they were not returned and that it is unlikely that they are dead. Respondent's statement that the dogs were not seized was shown to be false by documentary evidence. If they were as Respondent asserts not made part of the case, then the court should have returned them as part of the proceedings in the criminal case. Petitioner has shown the story of the attempted return of the dogs by the FKSPCA to be a lie. The truth is that both Petitioner and Mr. Geisel pleaded for their return and were denied. Consequently this Honorable Court should issue the requested Writ of Mandamus demanding that all the evidence be returned to Petitioner or proof that it "ceased to exist" be provided to her so she can find closure and can stop incurring costs for their insurance policies." (Record pg. 340)

The reply included with the electronic supplemental appendix (pg. 344 - 400) two video files from her discovery in the criminal case (one in the original AV viewer format used by Appellee, the second one originally converted into standard video by Appellee), along with detailed viewing instructions, which unambiguously showed claims made in the Response, specifically the claim that the two dogs were taken for safekeeping because no other caretaker was available to have been

false. Petitioner filed her request for oral argument on 3/4/2019 (Record pg. 401 - 405). On 3/6/2019 the Circuit Court issued an Order Denying Motion to Reconsider without stating the grounds for that decision (Record pg. 406). On 3/11/2019 Petitioner received a letter from the Clerk of the Circuit Court returning her video file and electronic supplemental appendix prepared in accordance with Fla. R. App. P. 9.220 (c) stating that both needed to be printed as photos (pg. 413), which is obviously impossible. Since a petition for a writ of mandamus is considered an original, not an appellate proceeding (Fla. R. App. P. 9.030 (c) (3)), Petitioner believes that she was within her rights to file the videos which were by virtue of the filing brought to the attention of the lower court.

Appellant filed a Notice of Appeal on 4/3/2019 (Record pg. 407) and additional Directions to the Clerk on 4/15/2019 (Record pg. 417) along with a Statement of the Judicial Acts to be Reviewed (Record pg. 435) as required by Fla. R. App. P. 9.200 (a) (2). Petitioner also filed a motion with the Third District Court of Appeal on 7/2/19 to supplement the record with the video files the circuit court had refused to accept which was denied. In her initial appeal brief filed on 11/12/19 Petitioner made the following statements in regards to the questions presented to this court:

> "Appellant files this appeal to continue her quest to regain her property consisting specifically of a number of beloved pets, specifically 3 pet turtles, 7 pet iguanas, 1 cat, and one registered service dog as well as a number of cages, carriers, and accessories. through the issuance of a writ of mandamus." (Initial Appeal Brief pg. 12)
>
> "Appellant argues that the Disposition of Case and Evidence Memorandum (pg. 316) presented by Appellee as evidence of the resolution of the case has failed to secure the return of a number of animals and any of the inanimate property the FKSPCA has per their own admission been holding in *custodia legis* to Appellant. This may have been due to the fact that the Disposition of Case and Evidence Memorandum is unnecessarily vague by referring alternately to animals and property "currently in the custody/control of the FKSPCA" and "@ FKSPCA". This is a significant legal difference which has to be clarified by the court, especially in light of the fact that the majority of Appellant's animals were in fact not returned while she is entitled to their return subsequent to their suppression as evidence and the *nolle prosequi* having been entered in her case." (Initial Appeal Brief pg. 15)
>
> "That the animals and inanimate property were subject of a motion to suppress (pg. 112) which was granted (pg. 119), which legally requires the restoration of the property to the owner.
> "Rule 41(e) provides: "Motion for Return of Property. A person aggrieved by an unlawful

search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12." *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981)" (Initial Appeal Brief pg. 18)

"That the entry of a *nolle prosequi* legally entitles the Defendant to the return of her property and that it is the responsibility of the trial court to ensure its return. *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972), *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991), *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995)." (Initial Appeal Brief pg. 19)

"Appellee in their Response then provided a copy of the Disposition of Case and Evidence Memorandum (pg. 316), a directive to the evidence custodian which specifies to "release all animals that were seized from the Defendant's vessel that are currently in the custody/control of the FKSPCA back to Ms. Kynast." and "release animals + any items (cages / watering dishes / etc.) currently being held @ FKSPCA Hold all items being held @ FWC". The FKSPCA had listed all 22 animals (9 iguanas, 5 cats, 5 turtles, and 3 dogs) in their civil complaint as "seized animals" (pg. 573). It then refers to those animals as "Respondents' animals, of which Petitioner has had custody" in the NVD not exempting any. In fact it further specifies the animals as "listed as evidence in the misdemeanor case". FWC property receipts list all 22 animals and inanimate property "Transferred to Animal Control. Animal Control Officer (Custodian)" (pg. 185 – 189). The pertinent pages of the Incident Summary Report list all 22 animals as "Property: Seized Species" and "In Custody of Monroe County Animal Control (FKSPCA)" and all inanimate property as "Property: Seized Article" and "Currently in Custody of Monroe County Animal Control" (pg. 352 - 355). In the NVD the FKSPCA specifies that "Custody and Disposition of the animals will be in accordance with the resolution and disposition of Case MM-M-16-438." As such the Disposition of Case and Evidence Memorandum should apply to all 22 animals and inanimate property regardless of their current location (pg. 316). That order is however unnecessarily vague by asking for the animals "currently in the custody / control of the FKSPCA" to be returned but then stating "release animals and any items (cages / watering dishes / etc. currently held @ FKSPCA Hold all items being held @FWC" instead of "by the FKSPCA / FWC". At is a physical location which if read as an restriction to "animals" (which is unclear since no punctuation is used) would theoretically exempt animals at that point in time being at the veterinarian, foster homes, or other facilities, and any property stored off site. As such the memorandum would be in conflict with the law which entitles Appellant to the return of all of her property subsequent to the suppression of the evidence and the *nolle prosequi*. It would also be in conflict with the belief of the Honorable Judge Becker that "everything had been returned" subsequent to the *nolle prosequi* (pg. 564)." (Initial Appeal Brief pg. 19 – 21)

"Appellant wants her remaining animals and inanimate items returned to her and she seeks an order from the Court to achieve this. Since the case was terminated by the *nolle prosequi* it is her legal right to do so. " (Initial Appeal Brief pg. 25)

"As such she was willfully denied the right to be heard. "The Due Process Clause of the Fourteenth Amendment requires that deprivation of life, liberty, or property be preceded by a notice and opportunity for hearing appropriate to the nature of the case. *Armstrong v. Manzo*,

380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)." *County of Pasco v. Riehl*, 635 So. 2d 17 (Fla. 1994) It is obvious that by declaring the Petition as moot, Appellant was permanently deprived of her animals / property without being afforded the ability to be heard in regards to Appellee's assertions regarding that property." (Initial Appeal Brief pg. 48 - 49)

"The case is not moot and this Court should remand this case to the Circuit Court directing it to issue the writ of mandamus compelling Respondent, the Honorable Judge Ruth Becker-Painter, Judge of the County Court of the 16th Judicial Circuit in and for Monroe County, Florida to exercise jurisdiction and order the return of all of Appellant's seized personal property at no cost to Appellant, or if the lower court is procedurally unable to do so direct Respondent, the Honorable Judge Becker to entertain Appellant's motion for same, since the Disposition of Case and Evidence Memorandum is too vague or limited in scope to affect the return of all the seized animals and property or is being ignored by the FWC / FKSPCA. A Writ of Mandamus unlike apparently the Disposition of Case and Evidence Memorandum would bring the power of the court to bear on the issue, allowing the FWC / FKSPCA to be sanctioned for failure to comply. As such it should result in the recovery of the animals and property or at least reliable answers regarding their fate. If they are alleged to be deceased this needs to be proven by reliable veterinary records due to the fact that the FKSPCA continues to lie in this case, and those records need to be provided to Appellant so she can find closure and recover the money spent on their insurance policies since their death. " (Initial Appeal Brief pg. 50)

On 6/2/20 the State filed its answer brief. Of significance is the State's admission that "On October 15, 2018, a hearing was held to address Appellant's Motion for Return of Property. The State did not objection to the return of evidence or property related to the lower court proceeding." (Answer pg. 5) The State once again remained silent regarding the fate of the missing iguanas, turtles, cat, and inanimate property, except for claiming that they were ordered to be returned to her by the trial court. But now contrary to its prior assertion in the Response to the Petition the State claimed that the dogs were in fact seized but retained as evidence in the parallel case the State had filed against Petitioner's husband Raymond Geisel No. 16-CF-108-A-M on the same day as Petitioner's criminal case, alleging the same charges in addition to charges of threatening officers in an attempt to reclaim the animals. (Answer pg. 9 -10) No explanation was given for the discrepancy with the prior assertion that the dogs were never seized or why in that case the State did as stated not objection to the return of evidence when the Motion for Return of Property came before the lower court, especially considering that the same prosecutor was responsible for both cases and the Disposition of Case and Evidence Memorandum (Record pg. 316) had specifically made reference

to Mr. Geisel's case. By the time the State filed the answer all the charges relating to the animals and seized evidence had also been no actioned in Mr. Geisel's case. The State also now claimed that the recovery of the dogs should be a civil, not a criminal matter. On 7/31/20 Petitioner filed her reply, stating again that the two dogs were not the entire property sought and that the directive for the return of property was insufficient to achieve that return:

> "Appellee incorrectly claims that "the trial court had already ordered all of the property that was seized in connection with Appellant's case to be returned." (Answer pg. 9) The directive for the return of the animals was not a court order. As Appellee states on page 4-5 of the answer brief the State had directed the return of some of the property in a Disposition of Case and Evidence Memorandum (pg. 316). That is not the order of the Court Appellant seeks." (Reply Brief pg. 2)
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> "Unlike a court order the Disposition of Case and Evidence Memorandum, the directive by the State to release the property was not subject to further court proceedings as well as unenforceable. Had it been a court order a motion to clarify could have been filed by Appellant to remove the contradictory language in regards to which animals were in fact subject to it and to bring it in line with the Notice of Voluntary Dismissal for 2016-CC-79-M (hereafter referred to as "NVD") which specifies that all animals are subject to the resolution of the case (pg. 594) as well as case law that the entry of a *nolle prosequi* entitles the Defendant to the return of her property and that it is the responsibility of the trial court to ensure its return. *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972), *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991), *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995). Appellant through a motion notified the lower court of the failure of the FWC to comply (pg. 547). Appellee states: "On October 15, 2018, a hearing was held to address Appellant's Motion for Return of Property. The State did not objection to the return of evidence or property related to the lower court proceeding." (Answer pg. 5) Even though the State did not object, they did not offer to facilitate the return in any way. The Motion Court Minutes (pg. 564), show that the Court having been notified that the animals had not been returned felt that it was unable to intervene, a position which the State concedes in its Response was incorrect. (pg. 311) It is for that reason that Appellant seeks the writ of Mandamus so that an enforceable court order will be issued for the return of her animals and that if the failure to comply on the part of the FWC and FKSPCA persists contempt proceeding can be initiated to force compliance." (Reply Brief pg. 4-6)
>
> "Appellee makes extensive argument as to why the trial court could have retained evidence. The trial court however did not decide to retain evidence, but denied the motion because it felt that it did not retain jurisdiction after the case had been *nol prossed.* (pg. 564), which Appellee admits was in error, not for any other reason (property not held *in custodia legis*, property retained for use in Mr. Geisel's case, etc.). "Respondent does not dispute that the lower court has jurisdiction over the animals seized from the vessel which were the subject of a criminal case." (pg. 311) No decision of the court in regards to the evidence was ever made beyond the order granting of the motion to suppress (pg. 537), which had requested that "all seized items – physical property and animals – returned immediately." (pg. 468) There was no evidentiary hearing. Appellant was therefore deprived of due process in the matter. " (Reply Brief pg. 12)

Petitioner also showed why the assertion by the State that any part of the proceeding should be a civil matter was incorrect which pertains directly to the questions she asks this court to review:

> "The record demonstrates that all animals and physical property in question were seized by the FWC and placed in the custody of the FKSPCA. The two forms of evidence listings in that case are the FWC property receipts which list all 22 animals and property equally as "Type of Seizure: Evidence, Type of Case: State Misdemeanor, Purpose: Trial" and "Transferred to Animal Control. Animal Control Officer (Custodian)" (pg. 185 – 189). The pertinent pages of the Incident Summary Report list all 22 animals as "Property: Seized Species" and "In Custody of Monroe County Animal Control (FKSPCA)" and all inanimate property as "Property: Seized Article" and "Currently in Custody of Monroe County Animal Control" (pg. 352 – 355) In the Response to the Petition Appellee states in regard to the animals except for the two dogs "The animals were seized as evidence and after being treated at Dr. Mader's office were transferred to the FKSPCA as FWC did not have adequate facilities to accept live animals." (pg. 309) The case videos (pg. 347 – 349) also clearly show the taking of the two dogs having been a law enforcement seizure. Appellee concedes in the Answer Brief "Property is held in *custodia legis* when it is obtained for use as evidence in the criminal proceeding." (Answer pg. 8) The FKSPCA admits in the NVD to having had custody of all the animals (the animals listed as evidence in Appellant's case) but no authority to dispose of them since they were evidence in Appellant's case. (pg. 596) *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995) clearly speaks to the issue of *custodia legis* in the case of a law enforcement seizure with a transfer to the FKSPCA as evidence custodian. "The possession of the sheriff's bailee or custodian, is the possession of the sheriff; and so the property is still *in custodia legis.*" A*dams v. Burns*, 172 So. 75 (Fla. 1936) There was no court action that ever removed the animals from the custody of the FKSPCA / court. The animals were placed in *custodia legis* and therefore remain under the jurisdiction of the court. A civil case cannot intrude on a criminal case.
>
> "We do not believe the civil courts should be permitted, as here attempted, to cross over and intrude in criminal matters pending within the jurisdiction of the criminal courts. It would seriously conflict with and hamper criminal processes if evidence or contraband seized for criminal trials or purposes could be made the subject of recovery proceedings in the civil courts through procedures bypassing the criminal courts." *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972)
>
> "Mandamus is the proper procedural vehicle to compel a trial court to order the return of property which was seized from a defendant after it is no longer needed as evidence in a case. It is unnecessary to commence a separate civil suit and in the event the court refuses to act the proper remedy is a petition for writ of mandamus" *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995) (internal citations omitted)
>
> "A separate action for replevin or conversion is not required." *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991) The return of evidence in a criminal case rests with the trial court. The chain of custody section of the FWC property receipts clearly shows for every animal and piece of physical property that it was transferred by law enforcement into the custody of the FKSPCA but was never transferred out. It therefore remains *in custodia legis* in the custody of the FKSPCA to this date which makes it an issue of the criminal court, not a civil issue. Property held in *custodia legis* can only be withdrawn by a court order. A*dams v. Burns*, 172 So. 75 (Fla. 1936) Appellee never made any claim that the animals or property sought no longer remain in the law enforcement agency's possession with the exception of the legally impossible hearsay story about the two dogs. (Initial Brief pg. 23-25, 33-39)"

(Reply Brief pg. 6 – 8)

> *"Brown v. State,* 613 So. 2d 569 (Fla. 2d 1993) which states: "When a trial court has assumed jurisdiction over criminal charges, it is thereafter vested with an inherent power to assist the true owner in the recovery of property held *in custodia legis.* This power has been extended to situations such as that depicted in the present case, *viz.*, where property has been seized from a criminal suspect. A separate suit for replevin or conversion is not necessary. [...] Upon receipt of a facially sufficient motion the trial court is obligated to exercise this inherent jurisdiction, and relief by mandamus may be available in the event it does not." *Brown v. State,* 613 So. 2d 569 (Fla. 2d 1993) (internal citations omitted) It states "we agree that Brown is entitled to a hearing", directs "further inquiry into the whereabouts of the items allegedly taken" (Reply Brief pg. 9)
>
> "A court has the inherent power to direct the return of property seized from a criminal defendant, if it is no longer needed as evidence against him. *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972); *Estevez v. Gordon*, 386 So. 2d 43 (Fla. 3D DCA 1980). Except where property taken pursuant to a warrant is concerned, in which instance section 933.14, Florida Statutes (1987), governs, there are no established methods for exercising this inherent power. *Estevez.* Nonetheless, the power continues to exist after the underlying criminal case has terminated. *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981). A separate civil suit is not required. In the event the court refuses to act, the proper remedy is a petition for writ of mandamus. *Estevez*" *Moore v. State*, 533 So. 2d 924 (Fla. 2d DCA 1988)
> "Although the statutes provide procedures for the return of certain evidence taken under a search warrant, *see* Section 933.14, Florida Statutes (1989), and for the return of money or a motor vehicle taken under circumstances constituting larceny, *see* Section 812.061, Florida statutes (1989), the statutes do not provide a procedure for return of property seized from a criminal defendant *without* a warrant. *Moore v. State*, 533 So. 2d 2, 5 (Fla. 1972); *Estevez v. Gordon*, 386 So. 2d 43, 45 (Fla. 3D DCA 1980). [...] In any event, appellant clearly asserted that the state is unlawfully holding his property; therefore, he would be deprived of due process of law if he were not afforded a prompt hearing on this matter." *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991) Appellant was never granted an evidentiary hearing before her timely filed motion for return of property was denied. (Reply Brief pg. 10)

On 9/16/20 the District Court of the State of Florida, Third District issued a Per Curiam Affirmance in the case. Petitioner filed a motion for rehearing, certification, and written opinion and/or rehearing en banc where she made the arguments shown as reasons for granting this petition on 10/1/20. Rehearing was denied on 10/28/20. Meanwhile Petitioner recovered dog Chrissy in a private legal transaction from a third party finding that she had been neither adopted out nor retained as evidence in Mr. Geisel's case and proving conclusively that the State and FKSPCA had perjured themselves in regards to the status of the evidence sought. Petitioner therefore now seeks the assistance of the Supreme Court of the United States to recover the remainder of the missing animals and physical items.

REASONS FOR GRANTING THE PETITION

Here comes Petitioner Susanne Stephanie Nikola Kynast and states the following: Contrary to the protections guaranteed in the 4th, 5th, and 14th Amendment of the Constitution of the United States, Petitioner has been denied the right to recover her property taken without a warrant in a search and seizure found to have been illegal by the lower court and being held in *custodia legis* subsequent to a *nolle prosequi* having been entered in her case.

1. Petitioner respectfully argues that the issue of whether a defendant in a case terminated by a *nolle prosequi* should be granted a hearing in regards to recovering property seized without a warrant in an illegal search and seizure is one of enormous national importance. Denying an individual aggrieved by a search and seizure found to have been illegal by a court of law the right to regain said property and to even be heard in regards to that property tramples on the protections guaranteed by the constitution to all persons both in regards to enjoyment of property and due process. The principle that a person is innocent of a crime unless proven guilty is a core tenet of the law. Petitioner had her property removed from her possession by law enforcement officers in an unlawful search and seizure. Since Petitioner's case ended in a *nolle prosequi*, Petitioner was never found guilty of any crime. Consequently no entity has the right to retain Petitioner's lawfully acquired and owned property, and the retention of the property by the evidence custodian while denying Petitioner the right to be heard in regards to the return of that property denies Petitioner the basic right to security and possession of property. If any Defendant, subsequent to the entry of a *nolle prosequi* in a case is not afforded a means to recover property taken without a warrant, especially if that property was taken during an illegal search and seizure, it leaves the system open to the discretion of law enforcement officers who could through their actions permanently deprive an individual of their property even if the individual is subsequently cleared of all charges in a court of law. Because it removes the protections of the legal process from what may be spur of the

moment decisions made in the field by law enforcement officers eager to collect the evidence to have an arrest lead to a successful prosecution, it fails to afford individuals the fundamental right of due process. This leaves the system open to abuse by law enforcement officers and prosecutors who as in this case through the frivolous arrest and prosecution of Petitioner have so far succeeded in depriving her of her most precious belongings. In the most basic terms it means that if this case is allowed to stand, a law enforcement officer can enter the home of any individual on a personal whim, may it be dislike, jealousy, or a desire for that individual's possessions, remove the property from the home, place it with a evidence custodian, and simply never return it. This is precisely the due process violation which the constitution of this country seeks to prevent. It is directly contrary to the constitutional guarantee that individuals shall not be deprived of their property without due process of law, and that they shall be secure in their houses and effects. In the event that the State takes property from an individual and the individual is not found guilty in a court of law, said property has to be restored to the aggrieved individual without undue burden and a proper means has to be provided in the courts for the individual to achieve such restoration or the individual by virtue of having lost their property will have been punished for a crime they did not commit, and as such this would constitute arbitrary punishment without conviction and result in catastrophic losses to innocent individuals. This is precisely the due process violation which the the 4th, 5th and 14th Amendments of the Constitution seek to prevent. Requiring an individual as happened in this case to pay thousands of dollars for the care of animals which were illegally seized and subsequently not returning the majority the animals while not allowing a hearing in the matter is a due process violation of huge consequence. Due process is the foundation of our legal system which separates us from countries where property can be taken from individuals and distributed among those who desire to possess it without recourse, from places and times where officers in trucks show up

outside of homes and empty them of valuables while the owners watch helplessly. The difference between a couple of pets and their accessories and a million dollar art collection taken under a totalitarian regime is in numbers only. Petitioner has since the seizure never been able to watch law enforcement drive by her home without wondering what they might take from her again and never return.

2. In the State of Florida there is no clear method for a defendant to recover their property once their case is terminated if the property was taken without a warrant. The Florida District Courts of Appeal while consistently affirming the aggrieved party's right to a prompt hearing have in previous cases pointed out the lack of statutory clarity in those circumstances:

> "A court has the inherent power to direct the return of property seized from a criminal defendant, if it is no longer needed as evidence against him. *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972); *Estevez v. Gordon*, 386 So. 2d 43 (Fla. 3D DCA 1980). Except where property taken pursuant to a warrant is concerned, in which instance section 933.14, Florida Statutes (1987), governs, there are no established methods for exercising this inherent power. *Estevez.* Nonetheless, the power continues to exist after the underlying criminal case has terminated. *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981). A separate civil suit is not required. In the event the court refuses to act, the proper remedy is a petition for writ of mandamus. *Estevez*" *Moore v. State*, 533 So. 2d 924 (Fla. 2d DCA 1988)
>
> "Although the statutes provide procedures for the return of certain evidence taken under a search warrant, *see* Section 933.14, Florida Statutes (1989), and for the return of money or a motor vehicle taken under circumstances constituting larceny, *see* Section 812.061, Florida statutes (1989), the statutes do not provide a procedure for return of property seized from a criminal defendant *without* a warrant. *Moore v. State*, 533 So. 2d 2, 5 (Fla. 1972); *Estevez v. Gordon*, 386 So. 2d 43, 45 (Fla. 3D DCA 1980)." *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991)
>
> " While we agree that Brown is entitled to a hearing, again, the published case law is not abundant regarding the extent of such a hearing." *Brown v. State,* 613 So. 2d 569 (Fla. 2d DCA 1993) (internal citations omitted)
>
> "there is a need for statutes, rules, and forms to facilitate the process of returning personal property to defendants in criminal cases once the cases have been resolved." *Almeda v. State,* 959 So. 2d 806, 808 (Fla. 2d DCA 2007)

This results in the unconstitutional situation that defendants as in this case are denied the opportunity to recover their property subsequent to a successful motion to suppress and a *nolle prosequi*. Petitioner unsuccessfully attempted every legal remedy available to her: a

timely motions for the return of the evidence, timely demands to the evidence custodian, a petition for a writ of mandamus, and the subsequent appeal.

3. Even though there is is a lack of statutory clarity in regards to the method of achieving the return of evidence in the State of Florida, the courts there have consistently affirmed that a defendant has the absolute right to a hearing in those cases. The Third District Court of Appeal in fact issued an opinion in a prior case which is in direct conflict with their *per curiam* affirmance which denies Petitioner the right to a hearing in her case. In *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981) the court clearly states on the same issue "It should be obvious that a person who asserts that the State is unlawfully holding his property would be deprived of due process if the law did not afford him a prompt hearing on his assertion." *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981) The court states in detail:

> "Implicit, however, in the authority given to the court to order the property's return is the right of the person from whom it was seized to move for its return. *Harvey v. Drake*, 40 So. 2d 214 (Fla. 1949) It is not, of course, a prerequisite to a motion for return of property that a criminal prosecution be brought following the seizure of the property. *Harvey v. Drake*, 40 So. 2d 214 (Fla. 1949); *Golding v. Director, Public Safety Department, Metropolitan Dade County*, 400 So. 2d 990 (Fla. 3d DCA 1981). However, once a criminal prosecution is instituted, the court in which that prosecution is pending acquires jurisdiction over that property to hear and determine all questions concerning its ownership if the property seized has an evidentiary purpose. *Garmire v. Lake*, 265 So. 2d 2 (Fla. 1972). If, on the other hand, the property seized is not held as evidence or no criminal prosecution ensues, then the court to which the warrant and property are returned obtains jurisdiction to order its return. *Harvey v. Drake*, 40 So. 2d 214 (Fla. 1949); *Golding v. Director, supra.* [...] We hold further that the termination of the criminal case, here by the entry of a *nolle prosequi*, did not divest the trial court of jurisdiction to entertain Sawyer's motion for return of property. While concededly neither Section 933.14, Florida Statutes (1979), nor any other statute, confers jurisdiction on the court before which the criminal proceedings are held to return property seized after the termination of the criminal case, that power inheres in the court's jurisdiction over the criminal case. *Garmire v. Lake, supra*; *Estevez v. Gordon*, 386 So. 2d 43 (Fla.3d DCA 1980). If criminal courts have the inherent power in the absence of a statute to provide for the recovery of evidentiary items held by them, as the Supreme Court said in *Garmire*, then it is implicit that that power, to be effective, must exist after the termination of the criminal case when the items are no longer needed as evidence. See *Jenkins v. State*, 41 So. 2d 554 (Fla. 1949). See also *State ex rel. Gerstein v. Durant*, 348 So. 2d 405 (Fla.3d DCA 1977); *Carlisle v. State ex rel. Smith*, 319 So. 2d 624 (Fla. 4th DCA 1975). *Cf. United States v. Wright*, 610 F.2d 930 (D.C. Cir.1979); *United States v. Palmer*, 565 F.2d 1063 (9th Cir.1977); *United States v. LaFatch*, 565 F.2d 81 (6th Cir.1977), cert. denied, 435 U.S. 971, 98 S. Ct. 1611, 56 L. Ed. 2d 62

(1978); *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir.1976) (all holding that under Federal Rule of Criminal Procedure 41(e), the Federal District Court does not lose jurisdiction to return seized property after termination of the criminal case). [...] It should be obvious that a person who asserts that the State is unlawfully holding his property would be deprived of due process if the law did not afford him a prompt hearing on his assertion. [...] Accordingly, we grant the petition for writ of mandamus. We deem it unnecessary to issue the writ. We direct the judge now presiding in the respondent's stead in the Criminal Division of the Circuit Court, in and for Dade County, Florida, to exercise jurisdiction over Sawyer's motion for return of property. [...] Rule 41(e) provides: "Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12." *Sawyer v. Gable*, 400 So. 2d 992 (Fla. 3d DCA 1981)

As a matter of fact State in their response cites *Sawyer* when conceding that the Honorable Judge Becker has in fact jurisdiction over Petitioner's animals sought in Petitioner's motion (Record pg. 311). *Sawyer* is identical to Petitioner's case in regards to the motion to suppress (even though the case was dismissed prior to the full suppression hearing unlike in Petitioner's case where the motion to suppress was granted) (Record pg. 537) and the termination of the case through a *nolle prosequi* (Record pg. 546). The sole difference between *Sawyer* and Petitioner's case appears to be the fact that in *Sawyer* the property was taken under a warrant while in Petitioner's case it was not. However in *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991) the First District Court of Appeal addressed a case where the property was taken without a warrant by clarifying that there is no difference in regards to how the property was seized, stating "In any event, appellant clearly asserted that the state is unlawfully holding his property; therefore, he would be deprived of due process of law if he were not afforded a prompt hearing on this matter." *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991)

Besides the Third District Court of Appeal three other Florida District Courts of Appeal also affirm a defendant's right to a hearing in similar cases. Certainly this case most closely

mirrors *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995):

> "Samy Helmy and Nadia Helmy petition this court to issue a writ of mandamus directed to the Honorable William T. Swigert, directing him to respond to their motion by ordering the return of their personal property, Popeye, a male Pekinese dog. Popeye was allegedly seized as evidence in a criminal case which was later *nol prossed.* [...] It appears to this court that the Helmys have alleged and provided proof in the form of a transcript and other documents, that Popeye, their dog, was taken and held by the State as evidence in a criminal prosecution. [...] In this case, the trial court failed to resolve any factual issue, and simply denied the Helmy's motion. The court should have addressed the conflicting claims and determined whether Popeye is being held in *custodia legis*. If he is, the court should grant the Helmys the relief they seek. Accordingly we grant the petition for writ of mandamus, and direct that the trial court hold an evidentiary hearing and make findings of fact resolving the factual disputes discussed above. These matters should be incorporated in a written order, which will then be appealable." *Helmy v. Swigert*, 662 So. 2d 395 (Fla. 5th DCA 1995)

In fact Petitioner's case mirrors *Helmy* so closely that Petitioner has great difficulty finding any differences as it involves property seized as evidence, the property was an animal, the case was *nol prossed*, the Helmys filed requests as well as motions for the return of the animal, and the animal was in the custody of the humane society. The only significant difference is that in Petitioner's case the FKSPCA has already admitted in a court filing that Petitioner's animals are being held as evidence (in *custodia legis*) and that the FKSPCA consequently had no authority over them (Record pg. 594), while in *Helmy* that was a question the court needed to resolve, which should only strengthen Petitioner's case. In regards to property as in Petitioner's case continuing to be held in *custodia legis* until removed by court order, the Florida Supreme Court has clarified that "The possession of the sheriff's bailee or custodian, is the possession of the sheriff; and so the property is still *in custodia legis.*" and "Property once placed in *custodia legis* will remain there, by operation of law, until it is withdrawn by order of a competent court." *Adams v. Burns*, 172 So. 75 (Fla. 1936).

The Second District Court of Appeal also addressed this issue of recovering property held in *custodia legis*:

> "When a trial court has assumed jurisdiction over criminal charges, it is thereafter vested

with an inherent power to assist the true owner in the recovery of property held *in custodia legis*. This power has been extended to situations such as that depicted in the present case, *viz*., where property has been seized from a criminal suspect. A separate suit for replevin or conversion is not necessary. [...] Upon receipt of a facially sufficient motion the trial court is obligated to exercise this inherent jurisdiction, and relief by mandamus may be available in the event it does not. [...] While we agree that Brown is entitled to a hearing, again, the published case law is not abundant regarding the extent of such a hearing." *Brown v. State,* 613 So. 2d 569 (Fla. 2d DCA 1993) (internal citations omitted)

Opinions by the Second and Fifth District Court of Appeal even affirmed the right to an evidentiary hearing in cases where *pro se* litigants may have presented facially insufficient motions and vague descriptions of the property sought:

"The circuit court might have concluded that Mr. Almeda's motion was facially insufficient because the motion did not include an allegation that the property was not the fruit of criminal activity. Instead, based on the State Attorney's response, the circuit court denied the motion on the merits. Alternatively, if the circuit court deemed the motion's allegations to be facially sufficient, the circuit court should have either attached portions of the record that conclusively refuted Mr. Almeda's claim or held an evidentiary hearing. Unfortunately, the circuit court failed to do either. It may be true that the requested items are evidentiary in nature and that they "could be admissible" to establish both the commission of one or more crimes and Mr. Almeda's identity as the perpetrator. Nevertheless these facts alone – if true – would not establish that the State Attorney's Office was entitled to retain Mr. Almeda's property. In short there is no evidentiary support for the circuit court's conclusion that Mr. Almeda is not entitled to the return of his property. Accordingly, we reverse the circuit court's order, and we remand for the circuit court to reconsider Mr. Almeda's motion. On remand, the circuit court should determine whether Mr. Almeda's motion is facially sufficient. If the circuit court determines that the motion is facially sufficient, it may hold an evidentiary hearing. If the circuit court again summarily denies Mr. Almeda's claim, it must attach to its order those portions of the record that conclusively refute the claim. Conversely, if the circuit court determines that Mr. Almeda's motion is facially insufficient, it should identify any deficiencies and grant Mr. Almeda leave to amend his motion within a reasonable time." *Almeda v. State,* 959 So. 2d 806, 808 (Fla. 2d DCA 2007) (internal citations omitted)

"In this case, appellant, John Forrest Coon, contends that the trial court improperly denied his motion for return of property. Because we find no basis for the summary denial of appellant's motion, we reverse and remand for further proceedings. Appellant alleged in his motion that his residence was searched on April 23 and April 24, 1989, and that property was seized as a result of those searches without benefit of a warrant. He stated that the items seized from his house, storage shed, and automobile, and his father's automobile were not used as evidence in his prosecution or presented as such. He therefore requested the court to grant a hearing and order the return of the property to him. [...] Although appellant's description of the property allegedly set forth "tools, radios, speakers, etc." is somewhat vague, he alleged the dates of the alleged illegal seizures April 23 and April 24, 1989. Section 933.12, Florida Statutes (1989), requires

> the police to attach to the returned search warrant a true inventory of property taken under that warrant. We know of no reason why a comparable procedure should not exist in situations where property is seized without a warrant. Consequently, production of police records should satisfy any uncertainty regarding a proper description of the property sought. In any event, appellant clearly asserted that the state is unlawfully holding his property; therefore, he would be deprived of due process of law if he were not afforded a prompt hearing on this matter." *Coon v. State*, 585 So. 2d 1079 (Fla. 1st DCA 1991)

Petitioner's detailed description of the remaining property sought consisting of 1 cat, 2 dogs, 3 turtles, 7 iguanas, caging, pools, and accessories, with 4 cats, 1 dog, and 2 turtles having been returned (Record pg. 399) and 2 iguanas having been confirmed deceased is found in both her motions for the return of her property (Record pg. 540, 547) as well as the Amended Petition for Writ of Mandamus (Record pg. 224 – 259).

The Florida Supreme also clearly rejected any notion that the criminal courts are not responsible for the recovery of items held *in custodia legis.*

> "We do not believe the civil courts should be permitted, as here attempted, to cross over and intrude in criminal matters pending within the jurisdiction of the criminal courts. It would seriously conflict with and hamper criminal processes if evidence or contraband seized for criminal trials or purposes could be made the subject of recovery proceedings in the civil courts through procedures bypassing the criminal courts. This does not mean that persons claiming money or other things of value held in *custodia legis* in a criminal court for evidentiary or other purposes should be without remedy. It simply means that the criminal courts have inherent jurisdiction on proper application of claimants for such items and upon due notice to the state and others of interest to determine questions concerning the ownership as well as the appropriate time to release such items held in *custodia legis* by the criminal courts." " *Garmire v. Red Lake*, 265 So. 2d 2 (Fla. 1972)

Therefore *per curiam* affirmance appears to Petitioner to be in direct conflict with opinions by the First, Second, Third and Fifth District Courts of Appeal and constrained by opinions of the Florida Supreme Court in regards to *custodia legis* and jurisdiction. In fact all the above cases clearly mandate the precise relief which was denied to Petitioner.

4. Throughout this case the State has successfully argued that Petitioner is not entitled to a hearing since the case is moot. This was based on the argument that a Disposition of Case and Evidence Memorandum (Record pg. 316) was issued. However there is a clear and significant discrepancy between the evidence seized as per the property receipts from the

seizure (Appendix L) and the property returned as per the Release for Returned Property / Evidence form (Appendix M) which needs to be resolved in a court proceeding. An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Dehoff v. Imeson*, 15 So. 2d 258 (Fla. 1943). Non-compliance of the custodian with a memorandum or insufficiency of the memorandum which lacked clarity, and was ambiguous and limited in scope supports instead of negates the need for a court proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

S. Kunst

Date: January 25, 2021