IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CASE NO. _____

IN RE: FORFEITURE OF
ONE PIPER SENECA AIRCRAFT
N300DE, SERIAL NO. 34-7770157

RANDALL C. BYROM,

Petitioner,

v.

WALTER J. GALLAGER, as Sheriff
of Orange County, Florida,

Respondent.

ON CERTIFICATION OF A QUESTION OF
GREAT PUBLIC IMPORTANCE
FROM THE FIFTH DISTRICT COURT OF APPEALS

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This is a discretionary review of a Final Judgment forfeiting a Piper Seneca Aircraft to the Sheriff of Orange County, Florida. The sole issue to be addressed in these proceedings is whether a person having a recorded interest in personal property at the time forfeiture proceedings are initiated has standing to contest whether the use of the property had a nexus with the crime under which forfeiture is requested. Reference to the Record on Appeal will be the letter R followed by the number of the page according to the Clerk's Index to the Record on Appeal. There were absolutely no facts whatsoever which were found to be in dispute by the trial court and the standard of review is de novo.

STATEMENT OF THE CASE AND OF THE FACTS

All of the facts which form the basis for the appeal and this Court's Discretionary Review are found in the December 5th, 1989 Final Judgment of Forfeiture entered by the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. (R35-37)

On November lst, 1988, Worldwide Air Service, Inc., a Florida corporation sold Piper Seneca Aircraft N300DE to Randall C. Byrom. The Bill of Sale was then sent to the FAA to register the transfer of ownership of the aircraft from Worldwide Air Service, Inc. to Byrom. (R35-paragraph [c]). On November 7th, 1988, a week after the notarized Bill of Sale had been executed, Joseph A. Capuzzo, a/k/a Joseph A. Comillo, borrowed the Piper Seneca Aircraft from Byrom in order to fly himself and his attorney, Dan Carusi, from Ft. Lauderdale to Orlando in order to attend the sentencing of Capuzzo which was set before Judge Michael Cycmanick. (R35-paragraph [d]) Upon arriving in the Courthouse in Orlando, Mr. Capuzzo's attorney, Mr. Carusi, requested a continuance of the sentencing hearing. Upon Capuzzo learning that his sentencing was not going to be continued, he left the Courthouse. (R35-paragraph [e]) Judge Cycmanick called Capuzzo's case for sentencing (twice) and when Capuzzo failed to appear, Judge Cycmanick sentenced him in

abstencia and ordered a capias to be issued for Capuzzo's arrest for the crime of "failure of defendant on bail to appear". Capuzzo's failure to appear was a violation of Section 843.15 Florida Statutes. (R35,36 -paragraph [f]).

Thirty (30) minutes after Judge Cycmanick ordered Capuzzo's arrest for failure to appear, Capuzzo arrived at the airport in Orlando and boarded the Piper Seneca Aircraft and flew it to Pompano Beach Airport where he abandoned the airplane. (R36-paragraph [h]). Later in the day, on November 7th, 1988, the aircraft was located where Capuzzo had abandoned it. At some time thereafter the aircraft was returned to the Orlando Airport and seized by the Orange County Sheriff's Department.

Although the Bill of Sale had been sent to the FAA by Randall C. Byrom after it was notarized and executed on November lst, 1988, the FAA records show that the actual transfer of the Registration was not recorded in Oklahoma City until November 15th, 1988. (R36-paragraph [n])

Over six (6) months after the Bill of Sale had been executed and the Registration transferred by the FAA to Byrom, Walter J. Gallagher as Sheriff of Orange County, Florida, filed the May 26th, 1989 Forfeiture Complaint. (R1-5) The Complaint showed Randall C. Byrom as being the owner (or co-owner) the aircraft as of the date of

the Forfeiture Complaint. The Complaint stated that the aircraft was seized as a result of having been used "as an instrumentality in the commission of the violation of Florida Statute Section 843.15 (Failure to Appear)." (R1)

On May 31st, 1989, a Notice of Forfeiture Proceedings was provided by publication to all known and unknown claimants of the property pursuant to the provisions of the Florida Forfeiture Statute. (R6-7) On August 3rd, 1989, the Proof of Publication of the Notice of Forfeiture Proceeding was filed of record and on that day, Judge Cecil Brown issued an Order for a Rule to Show Cause finding that Randall C. Byrom owned part or all of the aircraft. (R9) The Rule to Show Cause ordered Randall C. Byrom and other persons OF entities who claimed an interest in the aircraft to show cause why the Court should not enter an Order forfeiting the aircraft to the Sheriff of Orange County, Florida. (R9-10)

On August 23rd, 1989, Randall C. Byrom, the Petitioner herein, filed his Response to the Order for Rule to Show Cause and the Sheriff of Orange County filed his Reply to Byrom's Response. (R11-22)

On October 10th, 1989, there was a Final Hearing before Judge Brown at which time all of the relevant facts (cited by Judge Brown in his December 5th Final

Judgment), were stipulated by the parties and legal arguments on whether the use of the aircraft had a nexus with the crime of failure to appear were made to Judge Brown. Judge Brown requested both Claimant, Byrom, and the Sheriff of Orange County to prepare proposed Final Judgments. Although Byrom's proposed Final Judgement was submitted to the Court on October 17th, 1989, (R27-33) counsel for the Orange County Sheriff's Department never submitted a proposed Final Judgment. Nearly two (2) months after Randall C. Byrom's proposed Final Judgment had been provided to the Court, the Final Judgment dated December 5th, 1989 was entered. Byrom's Notice of Appeal was filed January 2nd, 1990.

On October llth, 1990, the panel of Judges from the Fifth District Court of Appeals affirmed Judge Brown's Final Judgment holding that Byrom "lacked standing" since the title to the aircraft "related back" to November 7th, 1988. The Fifth District decided that since Byrom's November lst, 1988 notarized Bill of Sale was not acted upon by the FAA until November 15th, 1988, Byrom lacked standing to assert the fact that the use of the aircraft by Capuzzo had no nexus with his crime of failure to appear. The crime was committed before Judge Cycmanick some thirty (30) minutes prior to Capuzzo's arrival at the Orlando Airport and his (Capuzzo's) subsequent use of the aircraft.

On October 23rd, 1990, Byrom, as Appellant, moved for Rehearing and Suggested Certification of a Question of Great Public Importance to this Court. Over six (6) months after the Motion for Rehearing and Motion for Certification had been filed with the Fifth District Court of Appeal, the Fifth District entered its Opinion of May 9th, 1991. The Court stated, "The last issue (standing to contest whether the use of the aircraft had a nexus with the crime of failure to appeal) is troublesome." The Fifth District Court of Appeals then certified the following question as a matter of great public concern:

> Does a bona fide purchaser of alleged contraband property in which he has equitable but not perfected interest have standing to contest a forfeiture of such property if it is seized as contraband by a law enforcement agency pursuant to Section 932.702, Florida Statutes (1987), when the purchaser's record title is perfected subsequent to the seizure but prior to the forfeiture proceeding?

SUMMARY OF ARGUMENT

The Fifth District Court of Appeals Opinion is primarily grounded in this Court's decision in Lamar v. Wheels Unlimited Inc., 513 So. 2d 135 (Fla. 1987) and the Fifth District's decision in Lauderdale Investments, Inc., v. Miller, **456** So. 2d **539** (Fla. 5th DCA **1984).**

At times, it seems that in our complex society it becomes counter-productive to make a "common sense" argument. However, at the risk of being thought of as "simplistic", there has been very little common sense used in these proceedings heretofore. It is uncontested that Randall C. Byrom had a valid, notarized November 1st, **1988 Bill** of Sale **and** an FAA Certificate of Title for over six (6+) months prior to the time that the forfeiture proceeding was filed in the Ninth Judicial Circuit. One common sense question would concern why there would be any provision for a "Notice of Forfeiture Proceeding" to be published (R6-7) if the FAA records in Oklahoma City disclosed no recorded interest (other than Worldwide Air Service, Inc.) on the date of the offense giving rise to the forfeiture proceeding. **Why** would all "known and unknown claimants" be put on notice by publication if the only party having standing to contest the forfeiture was the party shown on the FAA records on the

date that the aircraft was "used" in the commission, or to facilitate the commission of the crime giving rise to the forfeiture?

Common sense and clear thinking discloses that the Circuit Court and the District Court's rulings misapply the "Relation-Back" Doctrine. The District Court's interpretation of the Relation-Back Doctrine effectively prevents any purchaser or any person having a recorded or unrecorded interest from ever contesting a probable cause determination in a forfeiture proceeding. By it's "Relation-Back" rational, the trial court and District Court interpretation has created a time barrier which prohibits someone who has acquired the property from pointing out the fact that the property was never used in such a way as to have a nexus with the crime under which forfeiture proceedings have been instituted. If this Court allows the Circuit Court and the Fifth District Court of Appeals decisions to stand, then no subsequent purchaser of an aircraft will ever have "standing". There would be no standing to challenge the naked assertion by government that the aircraft, at some time prior to purchase, had been used in some illicit activity. By using the "Relation-Back" of the title to preclude Byrom, who had an equitable, but not perfected, interest from being able to argue on the merits, effectively has prevented the owner

of record from effectively demonstrating that there was no causal nexus between Capuzzo's failure to appear (a crime which was completed when Capuzzo failed to appear) and the subsequent use of the airplane by Capuzzo. Case law has made it clear that "failure to appear" is not a "forfeiture offense".

The only constitutional way to answer the Certified Question is to allow any person, firm or corporation having an equitable, contingent interest (whether it is perfected or unperfected), to contest the government's initial burden of proving that an offense giving rise to forfeiture did, in fact, occur. The initial proof must be offered by the government and the contrary argument and proof must be allowed to be offered by potential claimants. If, at this point, if the Court concludes that a forfeitable offense has been proven, then the Relation-Back of title will then (at that time) determine any further "standing" on the part of such claimants to assert equitable defenses such as the "innocent owner" defense.

ARGUMENT

1. THE AIRCRAFT WAS NOT ILLICITLY USED WITHIN THE MEANING OF THE FORFEITURE STATUTE

The Respondent, Sheriff of Orange County, had the initial burden of proving illicit use within the meaning of Florida Statutes 5932.703 et. seq., the Florida Forfeiture Statute. In a forfeiture proceeding, the governmental entity seeking forfeiture bears the initial burden of going forward, but it must only show probable cause that the property subject to forfeiture was illicitly used within the meaning of the forfeiture statute. In Re: Approximately Forty-eight Thousand Nine Hundred Dollars ($48,900.00) in U.S. Currency, 432 So. 2d 1382 (Fla. 4th DCA 1983). Based upon the stipulated and undisputed facts below, it is clear that the Respondent could not meet the initial burden of proving illicit use. This Court affirmed the Fifth District's decision in Williams v. City of Edgewood, 541 So. 2d 122 (Fla. 5th DCA 1989), aff'd, 556 So. 2d 1390 (Fla. 1990), reh'g denied 556 So. 2d 1390 (Fla. 1990). In Williams, forfeiture was sought on an automobile which was driven to an apartment where the driver/owner Williams, committed the crime of lewd and lascivious assault on a child. The Fifth District and this Court held that Williams' the use of the automobile was only "remotely incidental" to the

criminal conduct and thus, the automobile was not subject to forfeiture. The Court held that how Williams left the scene of the offense had "nothing to do with the offense", Williams v. City of Edgewood, 541 So. 2d at 122-23.

In the Fourth Circuit's decision in In Re: Forfeiture of 1986 Rolls Royce, 564 So. 2d 215 (Fla. 4th DCA 1990), the driver of a Rolls Royce, Mr. Pell, struck a pedestrian. Without rendering aid, Pell left the scene of the accident driving his 1986 Rolls Royce. Forfeiture was petitioned on the basis that the vehicle was used in "aiding or abetting" the commission of the felony offense of "leaving the scene of an accident". The Court denied the forfeiture by pointing out that:

> The use of the Rolls Royce here was not closely related to the commission of the criminal act. How Pell left the scene had nothing to do with the offense. 1986 Rolls Royce at 215.

How Pell left the scene of the offense in his Rolls Royce, or how Williams chose to transport himself to the scene of the crime is, if anything, more involved with the alleged "forfeiture offense'' than the alleged "forfeiture offense" in the case at bar (Failure to Appear for Sentencing). Both Pell and Williams used their vehicles to get to and leave the scene of the alleged

"forfeiture offense" while in the case at bar, Capuzzo had already committed the offense by leaving the Courthouse and failing to appear for his sentencing before Judge Cycmanick. It was at least thirty (30) minutes after the offense had been committed and a Warrant issued for his arrest that Cappuzo arrived at the airport and flew the subject aircraft. How Williams, Pell, or Capuzzo "left the scene" of their respective offenses had "nothing to do with the offense". 1986 Rolls Rovce, **564 So. 2d** at **215;** Williams, 541 **So.** 2d at **122-23.**

An appropriate analogy to illustrate the difference between aiding or abetting in a crime and "remotely incidental" to a crime is best illustrated by reference to a breakfast of bacon and eggs. The facts are clear that the pig "aided or abetted in" the breakfast while the chicken was only "remotely incidental". **The** aircraft was not employed or used by Capuzzo as an "instrumentality" in the commission of the crime of Failure to Appear nor did it "aid or abet" in the crime. Ironically, the Petitioner, Byrom, allowed the **use** of the aircraft he had purchased in support of judicial process. Byrom had loaned his aircraft to Capuzzo and his attorney, to enable them to appear in Court, **not** "fail to appeal'' as ultimately occurred. Byrom's reward for his

support of the judicial process was the forfeiture of his aircraft!

The Respondent failed to show any connection whatsoever between Capuzzo's crime of "Failure of Defendant on Bail to Appear" and Capuzzo's use of the aircraft (thirty [30] minutes later) to fly to Pompano Beach. The felony, i.e. "the forfeiture offense", occurred in the Orange County Courthouse when Judge Cycmanick (twice) called the case for sentencing and then issued the warrant charging Capuzzo with Intentional Failure of Defendant on Bond to Appear for Sentencing. The actual location of Capuzzo at the time of the sentencing is irrelevant to the crime of "Failure to Appear". The mere absence from the room where the sentencing was occurring constituted the felony and it made no difference whatsoever as to where the Defendant was or what he was doing at the time he was called for sentencing or thirty (30) minutes after his failure to appear.

The common sense conclusion that has to be reached is that the crime of "Failure to Appear for Sentencing" would have occurred regardless of Capuzzo's location thirty (30) minutes before or thirty (30) minutes after his case was called. Capuzzo's later mode of transport was completely irrelevant to the alleged "forfeiture offense". The government did not and could not carry its

burden of showing probable cause that the aircraft was illicitly used within the meaning of the Forfeiture Statute.

II. BYROM'S NOTARIZED BILL OF SALE EXECUTED NOVEMBER 1ST, 1988 PROVIDED STANDING TO CONTEST WHETHER THE USE OF THE AIRCRAFT HAD A SUFFICIENT NEXUS WITH THE CRIME OF "INTENTIONAL FAILURE OF DEFENDANT ON BOND TO APPEAR FOR SENTENCING".

The Trial Court and the Fifth District Court of Appeal have held that the Petitioner, Randall C. Byrom, lacked standing to contest the forfeiture of the aircraft. (R37) The facts are clear that Byrom purchased the aircraft one (1) week prior to the commission of the alleged "forfeiture offense". The facts are clear that Byrom was registered with the FAA and issued a Certificate Title by the FAA more than six (6) months prior to the filing of the original Forfeiture Complaint an May 26th, 1989. (R1) Having been named as the owner of record in the Complaint, the Trial Court in its August 3rd, 1989 Order for Rule to Show Cause properly considered Randall C. Byrom as being either the owner ox co-owner of the property. (R9) Randall Byrom, in his August 22nd, 1989 Response to the Court's Order for Rule to Show Cause, appeared as the owner of record of the aircraft and he attached as Exhibits, a copy of the notarized Bill

of Sale (R16) and a copy of the Certificate of Title issued by the FAA. (R17) It is interesting to note that in the Respondent's Reply to Byrom's Response to the Order for Rule to Show Cause, (R18-22) and in the Respondent's October 13th, Addendum Reply (R24-26), the issue of Byrom's "standing" as owner is never even discussed, contested or referenced as an issue.

In a 1986 Opinion, the Fourth District Court of Appeal held that the holder of a valid Power of Attorney obtained before the seizure of a vessel, stood in the shoes of the boat's owner and had standing to contest forfeiture of a vessel. In Re: Forfeiture of a 1983 Wellcraft Scarab, 487 So. 2d 306 (Fla. 4th DCA 1986). In Wellcraft Scarab, the District Court reversed the Trial Court that had held that the Respondent/Claimant lacked standing to contest the forfeiture. On page 308 of the District Court Opinion, Judge Herley stated:

> The underlying intent of these provisions is to allow individuals with valid possessory interests in the res to protect those interests by asserting various defenses permitted by the statute. See, In Re: Forfeiture of Approximately Forty-eight Thousand, Nine Hundred Doilars ($48,900.00), 432 So. 2d 1382 (Fla. 4th DCA 1983)

This Court, in Griffis v. State, 356 So. 2d 297, 299 (Fla. 1978), held that it was an express legislative

intent that the Florida Forfeiture Statute be in uniformity with its federal counterpart. Both the Federal and the Florida courts have consistently followed a one hundred (100) year old case of the Supreme Court of the United States which stated that, "No third party can acquire a legally valid interest in the property from anyone other than the government after the illegal act takes place". United States v. Stowell, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed 555 (1890). This case law on the "Relation-Back" Doctrine continues today.

In this proceeding there is not one shred of evidence, nor could there be, that the interest acquired by the Petitioner Randall C. Byrom on November lst, 1988 was not the final act of Mr. Byrom in perfecting his ownership of the subject aircraft. This case falls squarely within the legislative intent that only those parties that have acquired a legally valid interest in the property prior to the time the illegal act takes place should be protected from the forfeiture of the property. Mr. Byrom asserts no interest in the aircraft which arose after the alleged "illegal act" took place

The Fifth District's decision in Lauderdale Investments, Inc. v. Miller, 456 So. 2d 539 (Fla. 5th DCA 1984) stands for the proposition that only those claimants who acquire interests prior to the forfeiture may retain

their interests. Lauderdale Investments made it clear that any attempt at an assignment which is executed after the seizure will be ineffective to confer standing on the assignee. The stipulated and uncontested facts before the Circuit Court and the Fifth District Court of Appeal show that Byrom acquired his interest on November lst, 1988. Byrom acquired his equitable, but not perfected interest one (1) week prior to the alleged "forfeiture offense". These factual holdings clearly show a pre-forfeiture interest in Petitioner, Randall C. Byxom.

The Bill of Sale executed a week before the alleged "forfeiture offense" constituted compliance with all the valid requirements for the transfer of the Registration of the aircraft from Worldwide Air Service, Inc., to Byrom. Common sense tells us that if one has complied with all the requirements of transfer of title to an item of personal property, and the only thing left is the ministerial task of some agency (hundreds or thousands of miles away) to process the paperwork completed prior to the incident giving rise to the forfeiture, an agency "back-log" in processing would create economic chaos in the financial community.

CONCLUSION

The public policy is against forfeitures and the public interest is served by title to property subject to forfeiture being subject to a constitutional due process argument. It certainly is not in the public interest to establish a precedent that relieves the government of its constitutional burden of proof. The Legislature has clearly stated that government must be supported in asserting a forfeiture complaint requesting title to property if the property was, in fact, used in the commission of a crime or used to facilitate the commission of a crime. This burden of proof is, however, a necessary precedent for forfeiture of property to the government.

Common sense tells us that there can be no "Relation-Back**of title to property unless the government has met its burden of proof. The only way the burden of proof by government can be constitutionally enforced is for interested parties being able to contest and question this initial burden of proof by government. On the other hand, once government has carried its burden of proof, the title does "Relate-Back" to the time of the offense. Unless the person holding an equitable, contingent interest is able to prove that that interest arose prior to the time of the offense, then that person would be denied

standing to assert any "innocent owner" or other equitable defenses. At the point where the government has maintained its burden, no one who has acquired an interest after the time of the offense can be considered a "owner" because of the "Relation-Back" of the title.

The question certified to this Court must be answered in the affirmative. The bona fide purchaser of alleged contraband property who acquires the interest prior to the criminal activity giving rise to the seizure and/or forfeiture proceeding has standing to contest whether the use of the property has a nexus with the crime such as to justify forfeiture.

Respectfully submitted,

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For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the office of Margaret S. Marshal, Assistant General Counsel, Sheriff or Orange County, P.O. Box 1440, Orlando, Florida 32801; Myranda F. Fitzgerald, Esq., c/o Maguire, Voorhis & Wells, P.A., P.O. Box 633, Orlando, Florida 32802; and Minnesota Mining and Manufacturing Company, Minesco Division, 3M Center, Building 224-58-01, St. Paul, Minnesota 55144, on this 27th day of June, 1991.

David Paul Horan

DAVID PAUL HORAN