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AUG 9 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF FLORIDA
CASE NO. 77,981

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

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

This Reply Brief contains arguments in response and rebuttal to the argument presented in the Brief of Respondent. The Certified Question is based upon certain facts found to exist by the trial court. The Question assumes that Petitioner BYROM was a bona fide purchaser of the aircraft on November 1st, 1988, that the Petitioner BYROM had an equitable (bona fide) interest in the subject aircraft, and that BYROM's equitable interest was perfected prior to the filing of the forfeiture proceeding. The issue is **&** whether BYROM had standing to assert an affirmative "innocent owner" defense against the forfeiture, but in fact, whether BYROM had standing to point out to the Court that the use of the aircraft had no nexus with Capuzzo's crime of failure to appear. Denying standing to Petitioner BYROM who is a bona fide purchaser with an equitable, and later, perfected interest in the aircraft prior to the filing of the forfeiture proceeding is a denial of due process and access to the courts.

STATEMENT OF THE CASE AND OF THE FACTS

Judge Cecil Brown's October 10th, 1989, Final Judgment contains all of the facts upon which the appeal was

decided and upon which the Certified Question may be heard. Under the Statement of Facts in the Respondent's Brief, the Respondent seeks to insert doubt as to whether the November 1st, 1988 Bill of Sale was executed on November 1st. Judge Brown's Final Judgment as to the facts was based upon the October 10th, 1989 hearing. Judge Brown found, as a fact, that the Bill of Sale was executed on November 1st, 1988. (R35, paragraph [c])

Before an "innocent owner" affirmative defense can, or must be, mounted by an "owner" there must first be a determination that the property was illicitly used within the meaning of the forfeiture statute. It is only after the governmental entity has carried this initial burden that a bona fide claimant must go forward and rebut the probable cause or affirmatively show that the claimant is entitled to repossession of the item.

The Respondent's Brief (page 3) Statement of the Case, points out that Judge Brown determined that Randall C. Byrom lacked standing to contest forfeiture of the aircraft. (R37, paragraph [r]) Judge Brown's ruling of December 5th, 1989, is a little "unusual" in that it attempts to deny standing to BYROM to have made the argument on October 10th, 1989, that there was no connec-

tion between the aircraft seized and the crime of failure to appear (i.e., that the aircraft was not a "instrumentality" in the commission of the crime). In the Fifth District's May 9th, 1991 Order on the Motion for Rehearing and Certification, the Fifth District held that:

If Byrom had no standing to be heard and if no one else **appeared** to deny the claim by the Sheriff, then the Sheriff's allegations were deemed admitted and the judgment of forfeiture perfected the title.

By denying standing two (2) months after the hearing, Judge Brown and the Fifth District attempt to avoid the fact pointed out by Petitioner during the October 10th, 1989 hearing. The Sheriff's allegations, even if deemed admitted, clearly show there could be no forfeiture because the relation back of title occurs only if there is a forfeiture, It occurs only if the use of the property has a sufficient nexus with the crime to justify forfeiture. It did not!

SUMMARY OF ARGUMENT

A large part of the argument advanced in the Respondent's Brief is totally unsupported by the Record below. The Respondent, on pages 6 and 8 of the Brief, argues

that the only evidence presented by BYROM to prove ownership was the aircraft Bill of Sale and that the Petitioner never presented any evidence of a Contract for Sale or evidence of consideration. The Respondent argues that there was no proof of payment or proof of satisfaction of existing liens and then seeks to allege numerous **facts** as to Capuzzo a/k/a Camillo. Statements are made that the Federal Drug Enforcement Administration was continuing to monitor the activities of Capuzzo, that BYROM was "employed by Worldwide Air Services . . . (that) in July BYROM allegedly flew Capuzzo and his attorney to Orlando for the plea hearing . . . (that) BYROM was there in the Orange County Jail when bond was posted by Capuzzo . . . (that) BYROM was informed by an Assistant State Attorney as to Capuzzo or Camillo's real name". The fact is that there is not one scintilla of evidence in the record on **any** of these statements. The only "facts" upon which this Certified Question can be answered are contained in Judge Brown's December 5th, 1989 Final Judgment. The facts found by Judge Brown were and are the "law of the case" for both the appeal and this Certified Question.

Section 932.704(1) Florida Statutes (1989) provides that forfeiture proceeds by way of a Rule to Show Cause in the Circuit Court and shall relate back to the date of seizure.

By retroactively denying BYROM standing, the Trial Court and the Fifth District have denied the owner of record, who was and is the bona **fide** purchaser of the aircraft, the right to point out that the Respondent's own allegations clearly show that the aircraft was never used or employed as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony. See **Section** 932.701(2)(e) Florida Statutes (1989).

ARGUMENT

DOES A BONA FIDE PURCHASER POSSESSING
A PERFECTED RECORD TITLE PRIOR TO THE
FILING OF **A** FORFEITURE PROCEEDING
HAVE STANDING TO ASSERT THAT **THE USE**
OF **THE SUBJECT** PROPERTY DID NOT HAVE
A SUFFICIENT **NEXUS WITH** THE CRIME TO
JUSTIFY FORFEITURE?

Both the trial court and the Fifth District have attempted to avoid the issue of whether the aircraft was "used in the commission of a crime". If there is a central point upon which this Certified Question can be decided, it is whether BYROM, a bona fide purchaser

holding first an equitable then perfected interest has the standing to point out that the government's own factual allegations conclusively show that the aircraft could not be a subject of forfeiture under Sections **932.701-704** Florida Statutes. When a bona fide purchaser points out that the undisputed facts show that the property cannot be forfeited, then the "relation-back" of title to the date of the offense will never occur and the subsequently perfected title is never in doubt, (i.e., no "standing" problem would ever appear).

The Petitioner BYROM was served with the Rule to Show Cause pursuant to Section **932.704(1)** Florida Statutes because he was (and is) the registered certified owner of the aircraft, subject only to resolution of the subsequent forfeiture proceeding. The Fourth Circuit in its **case** entitled In Re: The Forfeiture of United States Currency in the Amount of Five Thousand, Three Hundred Dollars (\$5,300.00), **429 So.2d 800 (Fla. 4th DCA 1983)** held that a Rule to Show Cause must be served on all persons claiming ownership as well as those claiming a security interest as of the date the forfeiture proceedings is filed.

The uncontested facts found by Judge Brown in his December 5th, 1989 Final Judgment are remarkably on point with the facts in the Fourth District's Case of In Re: The Forfeiture of \$106.00 U.S. Currency and 1981 Isuzu Automobile, 448 So.2d 1146 (Fla. 4th DCA 1984). In that case, the husband held the recorded title of the automobile on the date of seizure and four (4) days later, his wife, the Appellant, registered the car in her name. Later, on June 21st, 1982, the State of Florida issued a Certificate of Title to the Appellant Wife and three (3) days later (not six (6) months later as in the case at bar) the City of Pompano Beach began the forfeiture proceeding. The Wife **was** never given notice of the proceedings. In Re: Forfeiture of \$106.00 U.S. Currency and 1981 Isuzu Automobile, 448 So.2d 1146, 1147 (Fla. 4th DCA 1984). The City of Pompano Beach's argument (and Respondent's argument in the case at bar) was that on the date of seizure, the record title was listed in the Husband as the owner of the vehicle and thus, the City properly sent notice of the forfeiture proceeding to the registered owner pursuant to Section 932.704(2) Florida Statutes. The Fourth District reversed the Trial Court pointing out that if the City had merely checked the

Motor Vehicle records immediately prior to filing the forfeiture proceeding, it would have discovered the registration of the vehicle in the wife's name and therefore, the City was an actual notice of the Wife's ownership of the subject property prior to the filing of the forfeiture proceeding. The Fourth District held:

The trial court should have permitted appellant to intervene because the City failed to make a diligent inquiry as to the owner of the vehicle and failed to furnish appellant with notice as required by Section **923.704(2)**. Therefore we reverse the Order denying appellant's motion for intervention and remand this **cause** far further proceedings consistent herewith. 448 So.2d at 1147-1148.

To permit intervention and deny standing defies logic! In the case at bar, BYROM's FAA title was registered in his name six (6) months prior to the commencement of the forfeiture proceeding. There can be no question that BYROM, having been served the Rule to **Show Cause** as owner, had standing to point out to the Court that the government failed to meet its initial burden of proving that the aircraft was illicitly used within the meaning of S932.701 et. seq. Florida Statutes.

The case of In Re: Forfeiture of One 1976 Chevrolet Corvette VIN 123726541240, 442 So.2d 307 (Fla. 5th DCA 1983), concerns the question of who has the initial burden of proof in a forfeiture action. In the Trial Court, counsel for the Sheriff contended that the burden was on the intervening claimant to proceed and show cause why the property should not be forfeited. The Trial Court disagreed with the Sheriff's contention as to the burden of proof and ruled that since the claimant had filed an Answer denying the allegations set forth by the Sheriff, the burden had shifted back to the Sheriff to go forward with proof in support of his claim of forfeiture. When counsel for the Sheriff declined to do so, the trial court discharged the Rule and entered Final Judgment Denying Forfeiture. 442 So.2d at 308. The Fifth Circuit affirmed and then denied review at 451 So.2d **849**. The Fifth Circuit, in In Re: Chevrolet Corvette, cited the Fourth Circuit's prior decision, In Re: The Forfeiture of United States Currency in the Amount of Five Thousand Three Hundred Dollars (\$5,300.00), 429 So.2d 800 (Fla. 4th DCA 1983). After a showing of probable cause that the res subject to forfeiture was illicitly used within the meaning of the forfeiture statute, the burden shifts

to the claimant to rebut the probable cause showing by a preponderance of the evidence. See also, In Re: The Forfeiture of Approximately Forty-eight Thousand Nine Hundred Dollars (\$48,000.001 in U.S. Currency, 432 So.2d 1382, 1385 (Fla. 4th DCA 1983).

To deny Petitioner BYROM, (a bona fide purchaser having an equitable interest prior to seizure which interest was perfected prior to the forfeiture proceeding) standing to contest whether the aircraft subject to forfeiture was illicitly used within the meaning of the forfeiture statute denies due process of law. The Doctrine of Relation-Back of Title from the date of the forfeiture to the date of the offense giving rise to forfeiture presupposes that the verified and uncontested allegations of the governmental entity show that the res subject to forfeiture was illicitly used within the meaning of the forfeiture statute.

On pages 8 and 9 of the Respondent's Brief, there are numerous factual allegations which are totally unsupported by the record below. It is frivolous and improper to make unsubstantiated factual allegations which were never even contemplated, much less mentioned, in the record below. Such information does not appear in any of

the allegations or evidence considered in this matter by the Court's below. The statement on page 9 of the Respondent's Brief that it is, "unknown whether the disposition of corporate assets was ratified by the corporation" . . . and that. . . "this question can only be answered by Joseph Camillo a/k/a Joseph Capuzzo a fugitive from justice" is a frivolous attempt to raise issues which were not raised in the trial court (nor on appeal) **and are** certainly outside the **scope** of the Certified Question which forms the sole basis for this Court's jurisdiction.

Page 10 of the Respondent's Brief contains the central argument upon which the Respondent's entire case must fall. The Respondent is correct in asserting that the right to property vests in the government immediately upon commission of the criminal act and it voids all intermediate sales and alienation even as to purchasers in good faith. The Respondent's assertion is undoubtedly true that persons who obtain assets with notice of forfeiture proceedings assume the risk that the government *may* forfeit them. (emphasis supplied) Finally, the Respondent is correct in asserting **that** innocent **pur-**chasers have no legal interest in forfeitable property

and are in the same position as purchasers of stolen property.

The last analogy drawn by the Respondents that an innocent purchaser has no legal interest in forfeitable property and is in the same position as a purchaser of stolen property, is central to the issues of this proceeding. Being able to point out that any newly acquired aircraft is not the model, nor the color, nor the type of aircraft which the government asserts was stolen is imperative if due process considerations are to be addressed. To deprive a subsequent purchaser of property, which the government insists is stolen, (or subject to forfeiture) from having standing to contest the government's action is to blindfold justice and lead her into a blind alley from which she can never return.

The Doctrine of Relation-Back of Title to the date of the commission of the criminal act giving rise to forfeiture pre-supposes that it is property which was illicitly used within the meaning of the forfeiture statute. There would be no need to publish the Notice of Forfeiture Proceedings or to give notice of the Order to Show Cause to a subsequent bona fide purchaser if it was

as simple as looking at the registered title on the date of the commission of the alleged criminal act.

In the case at bar, Petitioner **BYROM** does not seek to establish himself as a "innocent owner". This affirmative defense would only be necessary in the event there was an initial valid forfeiture. It is then, and only then, that title would "relate-back" to the date of the forfeiture offense.

CONCLUSION

The simple fact is that Petitioner BYROM had standing on October 10th, 1989 to point out that his aircraft was not a fruit or instrumentality of Capuzzo's crime. In the Conclusion on Page 12 of the Respondent's Brief, it is argued that the intent of the Act is to prevent the fraudulent transfer of property after seizure in an attempt to shield assets from forfeiture. If there is an offense giving rise to forfeiture, the Florida Statute certainly prevents a subsequent transfer of property from "shielding the assets" from forfeiture.

On December 5th, 1989, Judge Brown held that Petitioner **BYROM** received an executed Bill of Sale of the aircraft on November 1st, 1988 which was then sent to the

FAA to register the transfer of the ownership of the aircraft from Worldwide Air Service, Inc. to BYROM. (R35, paragraph [c]) It was one (1) week later that Capuzzo walked out of the courthouse and violated Section 843.15 Florida Statutes (Failure of Defendant on Bail to Appear). (R35-36, paragraph [f]) It is imperative that the Petitioner BYROM be allowed to point out that how Capuzzo "left the scene" of his offense had "nothing to do with the offense". In Re: Forfeiture of 1986 Rolls Royce VIN No. SCAZN42ACGC, 564 So.2d 215 (Fla. 4th DCA 1990), and Williams v. City of Edgewood, 541 So.2d 122 (Fla. 5th DCA 1989), affirmed, 556 So.2d 1390 (Fla. 1990), rehearing denied, 556 So.2d 1390 (Fla. 1990).

The Certified Question must be answered in the affirmative. A bona fide purchaser that has equitable, **but** not perfected interest in property which is the subject of a forfeiture action has standing to contest the forfeiture at least so far as contesting whether the res subject to forfeiture was illicitly used within the meaning of the forfeiture statute, i.e., whether there is any "relation back" of title. Standing to assert affirmative defenses such as "innocent owner" must be decided

by determining whether the bona fide interest of the claimant proceeded the date of the offense giving rise to the forfeiture.

Respectfully submitted,

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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 of 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 224-5S-01, St. Paul, Minnesota 55144, on this 7th day of August, 1991.



DAVID PAUL HORAN"