IN THE SUPREME COURT OF FLORIDA

CASE NO. SC95506

CEDRIC FRASER.,

Petitioner,

vs.

FLORIDA DEPARTMENT OF HIGHWAY SAFETY
AND MOTOR VEHICLES.,

Respondent.

****
ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
****

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner, CEDRIC FRASER. (hereafter referred to as "Claimant" or by name, as appropriate), was the claimant in the Circuit Court and the Respondent, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES (hereafter "DHSMV") was the Plaintiff for forfeiture. The parties will be referred to in this brief as they stand before this Court. The symbol "R," will be used in this brief to refer to the Record on Appeal in the District Court and the symbol "A," together with the exhibit number assigned, will designate the Appendix to the Petitioner's Brief on the Merits. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and the Facts contains numerous statements of fact not supported by the record references given, a number of which are not supported by the record, at all and numerous argumentative statements. Therefore, the Respondent shall attempt, in the Statement of the Case and Facts below, to provide record references for all facts given and to note when there is dispute over fact or law:

Trooper Michael Van Leer, on June 15, 1993, stopped a car for speeding on the Florida Turnpike. (A, 1). The car was registered to the driver, Murph McNaughton, who consented to a search of the car. (A, 1-2). The Trooper, during the search, found $41,500.00 in the bumper of the car, which was seized. (A, 1). Mr. Fraser requested an adversarial preliminary hearing and filed an affidavit in support thereof which stated:

> That the entire FORTY-ONE THOUSAND FIVE HUNDRED DOLLARS ($41,500.00) seized from Murph O.K. McNaughton on June 15, 1993 by Florida State Highway Patrol Trooper Michael Van Leer in West Palm Beach belongs to me, CEDRIC FRASER.

(R. 18).

The Preliminary Hearing was held on July 16, 1993 and an Order Finding Probable Cause and a Rule to Show Cause were entered by the Court on that date. (R. 3-4, 48-52). The Court found that the Plaintiff had established that there was probable cause to believe that the $41,500.00 was used or intended to be used in violation of Sections

932.702 (1-5) Florida Statutes (1991). (R. 3-4, 48-52). During discovery phase of the litigation below, Mr. Fraser's deposition was taken. The following took place:

> THE WITNESS: What's he say?
>
> MR. LIDA: He wants to know if the $41,000 that was found in the bumper of Murph McNaughton's car was your money.
>
> A Yes. It was my money.
>
> Q How did it get in the bumper of Murph McNaughton's car, Mr. Fraser?
>
> A It was parked in my garbage [sic], and it was in the bumper unknown to me.
>
> MR. LIDA May I have two minutes alone outside?
>
> MR. FAHLBUSCH: Okay.
>
> (Whereupon a brief recess was taken)
>
> A I put it there.

(See, A, 1 p. 2).

Mr. Fraser subsequently took the Fifth Amendment and refused to answer the following questions:

What led you to put $41,500.00 cash in the bumper of the car?

Where did you get the $41,500?

Why did you put the money in that specific car?

What's the name of any person or corporation from whom you got the $41,500.00 or any portion thereof?

Does anyone other than yourself know where you got the $41,500.00?

Other than Elegant Man [Fraser's business] or the purchase and sale of cars that we've talked about, have you had any other source of income within the last two years? (See, A, 1 p. 2).

Subsequently, the claimant filed a Motion for Summary Judgment (126-145) which was granted (R. 147-151) and appealed. (R. 152-158). The Fourth District reversed, at State, Dept. Of Highway Safety and Motor Vehicles v. Fraser, 673 So. 2d 570 (Fla. 4th DCA 1996), in a case in which standing was not an issue.

Litigation continued in the Circuit Court and, on December 11, 1996, a Pretrial Stipulation signed by the attorneys for all the parties was filed. (R. 216-19) It provided, in material part:

> B. Agreed Law and Stipulated Facts:
>
> **Stipulated Facts:**
>
> 1. $41,500.00 was found inside the right front bumper of the car being driven by Murph McNaughton on June 15, 1993 on the Florida Turnpike in Palm Beach County, Florida.

2. Murph McNaughton consented to a search of the vehicle.

3. Cedric Fraser timely claimed that he was the lawful owner of the money.

Rules of Law:

1. The Department of Highway Safety and Motor Vehicles (DHSMV), to be entitled to the funds, must show by clear and convincing evidence that the funds were used, attempted to be used or intended to be used in violation of the Florida Contraband Forfeiture Act.

2. Funds that were used, attempted to be used or intended to be used in violation of any provision of chapter 893 (The Florida Comprehensive Drug Abuse Prevention and Control Act) are properly forfeited under the Florida Contraband Forfeiture Act.

3. A Claimant is a person with a proprietary interest in the funds concerned. (Counsel for Plaintiff and for the Claimant disagree on how this is proven. See (C)2.)

(C) Issues of Law and Fact for Determination at Trial.

1. Whether the funds concerned were used, attempted to be used or intended to be used in violation of the Florida Comprehensive Drug Abuse Prevention and Control Act or, otherwise, in violation of the felony laws of Florida.

2. Whether Cedric Fraser is a person with a proprietary interest in the funds concerned. (Issue that Plaintiff contends is an issue of fact but Claimant contends is an issue of law previously determined by the Court or has been waived by not previously having been raised)

(R, 216-17).

Pursuant to a request by the Court, the Plaintiff submitted a memorandum on the standing issue which was filed on February 20, 1997. (R. 220-264). The Argument portion of the memorandum alleged, in material part:

> Thus, it appears that the only evidence that the claimant has a proprietary interest in the funds is an affidavit sworn under some kind of oath (although we don't know what it was) stating that the money, "belongs" to him. If that is sufficient, we can certainly expect to see claims every time a forfeiture is filed, since it provides a virtually risk free way to obtain substantial amounts of money, whether or not the claimant ever had any proprietary interest in the funds claimed.
>
> First, it is comparatively simple to show why no motion to dismiss on the ground of standing is necessary to raise the standing issue at any time. This is easily demonstrated by *State v. McCluster*, 668 So. 2d 1000 (Fla. 2d DCA 1996):
>
> > The state filed a complaint seeking forfeiture of the seized currency pursuant to the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993). The currency was seized during a warrantless search of an automobile that had been involved in an accident. The appellee/claimant's son, Eddie McCluster, Jr., had been driving the automobile at the time of the accident. In response to the forfeiture complaint, Eddie Jr. filed an answer and affirmative defense raising the illegality of his detention at the accident

> scene and asserting that Eddie Sr., his father, had an interest in the seized currency. Eddie Jr. was later dropped as a claimant. Eddie Sr. was substituted in his place and adopted Eddie Jr.'s answer and affirmative defenses.
>
> At the non-jury trial, the court agreed to hear all forfeiture issues at the same time, including the suppression issue. At the conclusion of the state's case, and before Eddie Sr. had presented any evidence, the trial court dismissed the state's complaint on the ground that Eddie, Jr. had been illegally detained. The trial court never reached the issue of probable cause under the Florida Contraband Forfeiture Act.
>
> * * *
>
> The record before us also fails to establish that Eddie Sr. had any lawful property interest in the seized currency. Although the attorney for Eddie Sr. told the court the basis for his client's claim, no proof was ever offered. Thus the trial court erred in awarding the seized currency to Eddie Sr.

Id. At 1000-01.

Rather clearly, the State had filed no motion to dismiss the claim on standing grounds, where the case was dismissed in the middle of a non-jury trial. Eddie Jr. had asserted that his father had an interest in the seized property. Nevertheless, the court was without jurisdiction to award the funds to Eddie Sr. where he had failed to establish standing. Rather clearly, no motion to dismiss the claim was necessary.

According to federal law, as well, the burden of establishing standing in forfeiture proceedings is upon the claimant. *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437 (11th Cir. 1984); *See also*, *United States v. $15,500.00* (9th Cir. 1977). Thus, a money changer who paid out $900,000 upon a representation that the money had been transferred by wire to his New York bank account was found not to have standing where the funds were seized before the wire transfer was executed. *Five Hundred Thousand Dollars*. Similarly, a defendant's mother, whose name appeared on the title of the forfeited car and who claimed that she gave her son $8,000.00 toward the purchase of the car which contained the forfeited currency was held not to have standing to contest the forfeiture where she could not document the manner in which she had obtained the money or the manner in which she could afford to give her son such a substantial sum. *United States v. $280,505 Dollars*, 655 F.Supp. 1487 (S.D. Fla. 1986). A bald allegation of ownership unaccompanied by factual allegations has been held to be insufficient to establish standing. *See United States v. One 18th Century Columbian Monstrance*, 802 F.2d 837 (5th Cir. 1986); *cert. denied*, 481 U.S. 1014 (1987). Similarly, in *United States v. Fourteen Handguns*, 524 F.Supp. (S.D. Tx. 1981), it was held that the failure of the claimant to file a claim consisting of a verified statement which stated the interest of the claimant giving rise to the demand for the return of the seized property rendered the claimant's defense invalid. Sufficient ownership interest may be evidenced by showing actual possession, control, title and a financial stake. *See, Unites States v. One Douglas C-54 Aircraft,* 647 F.2d 864 (8th Cir. 1981); *cert. denied*, 454 U.S. 1143 (8th Cir. 1982).

It would appear that the money changer in *Five Hundred Thousand Dollars*, could have alleged that the money, "belongs" to him, just as the claimant has. Yet he was found to be without standing. Mr. Fraser has failed to

> show actual possession, control, title, any documentation or evidence of where he obtained the money.
>
> Additionally, although the claimant's affidavit says he was sworn, it does not contains [sic] the oath he took and we have no idea what oath was administered. Therefore, it would appear to be insufficient to expose the claimant to the possibility of perjury and should be insufficient for that reason, as well. *See, State v. Moore*, 423 So. 2d 1011 (4th DCA 1982).

(R. 222-25).

The Court entered its order on February 20, 1997, as follows:

> This action came before the Court on the issue of standing. The Court finds that standing is an issue in this case and that standing is not decided by a jury but is a preliminary issue decided by the Court. *Byron v. Gallagher,* 578 So. 2d 715 (Fla. 5 DCA 1990), *quashed on other grounds*, 609 So. 2d 24 (Fla. 1992). "Unless the standing issue is decided initially, a trial court can never determine who may argue the nexus issue. Thus, the standing issue must be addressed first." *Idem.* Lacking standing there is no case or controversy to settle. The burden of proof of standing is always on the party seeking the standing. Here the evidence is the affidavit of Cedric Fraser which says, "the money belongs to me". That is not sufficient to establish standing. Therefore it is
>
> ORDERED AND ADJUDGED that Mr. Cedric Fraser lacks standing to contest the forfeiture of the $41,500.00 in this action.
>
> ORDERED at West Palm Beach, Florida, this 20 day of February, 1997.

_____

EDWARD FINE, Circuit Judge

(R. 265).

Mr. Fraser, on March 4, 1997, filed a "Petition for Rehearing on Order Denying Standing". It alleged, in material part:

> 14. The claimant, Cedric Fraser, has standing to claim this money and has done so.
>
> 15. There is no procedure outlined in the Florida Contraband and Forfeiture Act to establish a procedure for standing.
>
> 16. Money is fungible and is not like a car, where one can have title to it, as in the cases cited by the court.
>
> * * *
>
> 19. Claimant argued that it was a legal issue and that it had already been resolved in favor of the claimant, Mr. Fraser.
>
> 20. Certainly Judge Mounts' has ruled on the standing issue preliminarily, and granted standing to the claimant, Mr. Fraser. No new facts are present at this time that were unknown to Judge Mounts to warrant a reversal of that ruling.
>
> 21. If for no other reason, Judge Mounts' ruling has become the law of the case and was not disturbed on appeal by the Fourth District.
>
> * * *
>
> 25. A showing of standing should be able to be made by a preponderance of the evidence standard. Clearly in the

> case before the bar, the preponderance of the evidence rests with Fraser in his claim against the Florida Highway Patrol.
>
> 26. To require that Fraser actually had been in the car, or the car registered to him, to allow him to make a claim for his own money, would produce an absurd result.
>
> 27. The federal courts have allowed bailees to make claims for money. United States of America v. $38,000.00 in U.S. Currency, 816 F.2d 1538 (11th Cir. 1987).
>
> 28. Claimant respectfully requests this Honorable Court to reconsider its prior ruling that he has no standing, or to conduct whatever evidentiary hearings seems necessary to the court to determine that Fraser has standing. [This was the Claimant's first request for an evidentiary hearing on the matter, understandable where, as he notes in paragraph 19, he always previously contended that it was a legal issue.]
>
> 29. As previously stated, Florida statute lays out no specific guide for claimants in making their claim for standing. Some jurisdictions allow standing just by the simple writing of a letter asserting a claim.

(R. 268-271).

The Plaintiff filed its response, which contained a preliminary statement readopting its original memorandum (R. 281-84, A, 72). It also alleged,

> The undersigned does not recall that either the previous trial Judge or the District Court of Appeal ever ruled on the standing issue (See Petition, paras. 5, 12, 13, 19, 20, 21). If that is the case then, certainly, the "fact" that the claimant has standing has not become the law of the

case, as alleged in paragraph 21).

> The undersigned does not recall conceding, at the status conference, that Mr. Fraser has standing to claim the money, as alleged in paragraph 18 of the Petition, although he does recall arguing that whether Mr. Fraser has sufficient proprietary interest in the money to claim it is that issue which DHSMV should be permitted to argue to the jury. If this fact is critical, it is respectfully submitted that the claimant should provide a transcript of the hearing so that it can be determined if its factual assertion is correct or not. The undersigned does recall making essentially the following argument, which is included in the final paragraph of the memorandum DHSMV submitted on the issue (a quotation of the entire last paragraph of Plaintiff's Memorandum on Standing Issue is then set forth.
>
> Therefore, the Petition concerned should be denied or, alternatively, proprietary interest of Mr. Fraser in the Funds concerned should be an issue properly presented to the jury.

(R. 283.

The Petition for Rehearing was denied on March 18, 1997 (R. 280) and a Final Judgment of Forfeiture was rendered on June 2, 1997. (R. 288-89). Mr. Fraser subsequently filed his Notice of Appeal. (R. 290-93).

The Fourth District rendered its decision on February 17, 1999 in an opinion which stated, in part:

> We glean from Byrom [1] that in order to have

[1] Byrom v. Gallagher, 609 So. 2d 24 (Fla. 1992).

standing to be heard in a forfeiture proceeding, the alleged claimant has the burden of proving bona fide ownership of the seized property. The bona fide nature of the ownership is a factual matter for the trial judge to determine before the person is given the opportunity to be heard at the forfeiture hearing. While Byrom dealt with tangible property, we see no reason why a person claiming ownership of intangible property, such as the currency claimed here, should not also be required to show a bona fide claim to the money. Proof of the bona fide nature of the claim is required to prevent fraudulent statements of ownership, just as proof of bona fide purchaser status in Byrom would prevent fraudulent transfers of titled property in order to defeat forfeiture actions.

We therefore hold that appellant had the burden to prove his bona fide interest in the seized monies in order to have an opportunity to be heard at the forfeiture hearing. Cf. United States v. $280,505 in U.S. Currency, 655 F.Supp. 1487 (S.D.Fla.1986)(mother, whose name appeared on title, and who claimed that she gave her son money to purchase car in which the forfeited currency was found, had no standing to contest forfeiture of vehicle where she could not offer any proof as to how she had obtained the money or the manner in which she could afford to give her son such a substantial sum). Factors to be considered include, but are not limited to, physical possession of the property and sources from which the money or other intangible property may have originated, such as employment, business ventures, loans, gifts and the like. The mere assertion, sworn or otherwise, that "the money is mine" is insufficient to carry this burden. [2]

Nevertheless, because this is a factual determination to be made by the trial judge, the claimant ought to have the opportunity to present his evidence on

> the issue to convince the court of the bona fide nature of his claim. Indeed, Fraser's proprietary claim to the money was listed as a disputed issue in the pretrial stipulation. In this case, appellant's right to prove the nature of his interest was truncated by the court's determination based upon the affidavit alone that appellant lacked standing. Relying on Byrom, in which the supreme court reversed for a factual determination of the bona fide nature of the claim of ownership, we reverse and remand to afford appellant a hearing before the trial court in which he can present evidence of his claim of ownership. If the facts as presented convince the court that appellant has a bona fide claim of ownership to the money, then appellant should be given the opportunity to be heard on the forfeiture. On the other hand, if the trial court finds that appellant has not carried his burden to prove his claim of ownership, then the trial court may dismiss appellant's claim for lack of standing.
>
> Reversed and remanded.
>
> [2] We distinguish Munoz v. City or Coral Gables, 695 So. 2d 1283 (Fla. 3d DCA 1997). While Munoz stated that "[a]t a bare minimum, we conclude that a claimant to seized currency must come forward with sworn proof of a possessory and/or ownership interest in the same to acquire standing to contest the forfeiture proceeding," the case involved the standing requirement at an adversarial preliminary hearing, not the actual forfeiture proceeding. See City of Fort Lauderdale v. Baruch, 718 So. 2d 843, 846 (Fla. 4th DCA 1998) (discussing Munoz).

Fraser v. Department of Highway Safety and Motor Vehicles, 727 So.2d 1021, 1025 (Fla. 4 Dist. 1999).

This review follows.

POINT(S) ON APPEAL

WHETHER THE DISTRICT COURT PROPERLY RULED THAT CEDRIC FRASER HAD FAILED TO ESTABLISH HIS STANDING TO CONTEST THE FORFEITURE IN THE CIRCUIT COURT WHERE HE HAD DONE NOTHING MORE THAN STATE THAT THE MONEY, “BELONGS TO ME”? (Restated).

SUMMARY OF THE ARGUMENT

The district court did not reversibly err in ruling that simply stating, "the money belongs to me" is insufficient to establish standing to contest a forfeiture action. The issue is one for preliminary determination by the trial judge, numerous cases have held that evidence was insufficient to establish standing where it would have supported a statement such as, "the money belongs to me" and the Florida Supreme Court has held that, in order to establish standing, a claimant must establish that he or she has a bona fide interest in the seized property. Further, to hold otherwise would permit anyone off the street to demand, and be entitled to, a jury trial by simply stating that the seized money was his and would certainly, as the District Court noted, encourage fraudulent transfers.

The burden to establish standing lies squarely on the claimant and, in this case, the claimant failed to meet it.

ARGUMENT

THE DISTRICT COURT PROPERLY RULED THAT CEDRIC FRASER HAD FAILED TO ESTABLISH HIS STANDING TO CONTEST THE FORFEITURE IN THE CIRCUIT COURT WHERE HE HAD DONE NOTHING MORE THAN STATE THAT THE MONEY, "BELONGS TO ME." (Restated).

The position of the Petitioner is that, once intangible property is seized, anyone can file a sworn statement saying, simply, "the property belongs to me" and force a jury trial on the issue by doing nothing else. The law does not support the Petitioner's position.

A. Does Anyone Who Says, "The Money Belongs to Me" have standing?

The trial court and district court properly found that simply stating, "the money belongs to me" is insufficient to establish standing to contest a forfeiture action. (R. 265). Indeed, to hold otherwise is to open the door to numerous potential claimants who have no connection with the seized contraband involved and who may require the seizing agency to prove every element of a forfeiture action by clear and convincing evidence at a jury trial [required by § 932.704(3), Florida Statutes (1999), unless waived in writing or on the record by the claimant], by simply stating, "the money belongs to me." It is respectfully submitted that such could not have been the intent of

the legislature. Therefore, the position of the Petitioner is incorrect, on this issue and the district court should be affirmed.

The Petitioner's first argument in support of his position is that requiring a claimant to establish standing before trial, "impermissibly shifts the burden of proof to the claimant . . ." allegedly contrary to Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991) and Alonzo Munoz v. The City of Coral Gables, 695 So. 2d 1283 (Fla. 3d DCA 1997). (Brief of Petitioner, 6). He alleges that requiring a claimant to establish standing before the forfeiture Plaintiff has proven its case is in violation of due process considerations of the United States and Florida Constitutions. (Brief of Petitioner, 6-7). Therefore, according to Petitioner, making standing a threshold requirement violates the Constitution. According to this Court, however, there is a, "threshold requirement that only persons who have standing can participate in a judicial proceeding." Byrom v. Gallagher at 26. The Petitioner claims, it is unconstitutional to determine if a potential claimant has standing until the Plaintiff has met its initial burden at trial. (Brief of Petitioner, 6-7). Therefore, according to the Petitioner, the threshold requirement cannot be determined until the close of evidence. Stated otherwise, whether or not a potential claimant has a right to participate in a proceeding may not be required to be established until the end of the proceeding. This reasoning, along with being logically indefensible, is in direct violation of the primary

case on which the Petitioner relies:

> It is undisputed and established that to contest a forfeiture action, a party must **first** demonstrate an interest in the seized property sufficient to satisfy **the court** of the party's status as a claimant. *See Byrom v. Gallagher*, 609 So. 2d 24, 26 (Fla. 1992) (only persons who have standing can participate in a judicial proceeding); *see also In re Forfeiture of One 40' Fiberglass Boat White in Color with Black Bottom, Florida Registration FL 0346EM, Hull No. Per 40014M1C*, 453 So. 2d 207, 208 (Fla. 4th DCA 1984) (court declined to entertain issues regarding whether crime was committed and whether the property seized was utilized during commission of crime where no appeal was taken of lower court's finding that claimant had no ownership interest in property); *In re Forfeiture of a Cessna 401 Aircraft, N8428F*, 431 So. 2d 674, 675 (Fla. 4th DCA 1983), *rev. denied*, 444 So. 2d 416 (Fla. 1984) (court declined to address claimant's constitutional issues "because the claim of standing . . . is so vacuous as to preclude such consideration."); *United States v. Twenty Cashier's Checks, Having the Aggregate Value of Two Hundred Thousand Dollars in U.S. Currency*, 897 F.2d 1567, 1571 (11th Cir. 1990); *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437, 1439 (11th Cir. 1984) ("[A] party seeking to challenge the government's forfeiture of money or property used in violation of federal law must first demonstrate an interest in the seized item sufficient to satisfy the court of its standing to contest the forfeiture."). The burden of establishing standing in a forfeiture proceeding rests squarely with the claimants to the seized property. *See In re Forfeiture of 1983 Wellcraft Scarab,* 487 So. 2d 306, 309 (Fla. 4th DCA, *cause dismissed*, 494 So. 2d 1150 (Fla. 1986). (emphasis added).

Munoz v. City of Coral Gables, 695 So. 2d 1283, 1286-87 (Fla. 3d DCA 1997).

As the Fourth District has held, "The burden of establishing standing in forfeiture proceedings is on the claimant." Forfeiture of 1983 Wellcraft Scarab, 487 So. 2d 306, 309 (Fla. 4th DCA 1986), cause dismissed, 494 So. 2d 1150 (Fla. 1986). "The claimant in a forfeiture action bears the burden of showing that he owns or has an interest in the forfeited property." United States v. $20,193.39 U.S. Currency, 16 F.3d 344, 346 (9th Cir. 1994). Indeed, in a case relied upon by Petitioner, the Court noted, "Standing ... is literally a threshold question for entry into a federal court', because of the constitutional limitation of federal court jurisdiction to cases and controversies. (footnote omitted) 'This Circuit has held that the burden of establishing standing to contest a forfeiture is on the claimant seeking to come before the court.'" U.S. v. $321,470.00, U.S. Currency, 874 F.2d 298, 302 (5th Cir. 1989). Thus, the driver of the truck in which the money was found, who had disclaimed ownership and said that he was transporting the money for someone else, whose identity he could not or would not reveal, was found not to have standing to contest the forfeiture. Id. Clearly, physical possession of the currency, alone, is not enough to establish standing, according to the cases relied upon by the Petitioner.

B. The Authorities Relied Upon by Petitioner do not Establish his Position.

Petitioner suggests that nothing more should be required than an affidavit stating ownership, allegedly in accord with Munoz. There are a number of problems with this

position. First, nothing in Munoz holds that such an affidavit is sufficient. It involved a claimant from whose residence some $85,803.00 was seized. He told the police that it was his money, but he didn't have any receipts for it because he conducts all his business matters using checks and not cash. He requested an adversarial preliminary hearing by letter of counsel and filed an unsworn general claim to the money with the Court. The Court stated:

> We also reject Munoz's argument that his standing was established by the allegations of the police contained in the City's verified complaint. Apart from the fact that Munoz, and not the seizing agency, has the specific burden of affirmatively establishing his standing, we first of all do not find Munoz's mere possession of the currency to be legally determinative of his possessory and/or ownership interest in the same. See In re: Forfeiture of Approximately $19,050.00 in U.S. Currency, 519 So.2d at 1135. We similarly do not find Munoz's unsworn oral statements to the seizing officers that the money was his to be sufficient to establish his standing to contest his proceeding. At a bare minimum, we conclude that a claimant to seized currency must come forward with sworn proof of a possessory and/or ownership interest in the same to acquire standing to contest the forfeiture proceeding.
>
> Thus, where Munoz failed to meet his burden of proving his standing, we find that the trial court correctly concluded that he had waived his right to an adversarial preliminary hearing. Moreover, based upon the undisputed allegations of the verified complaint, we find that the court correctly determined that the City had probable cause or reasonable grounds to believe that the

> currency had been used in the manner proscribed by Chapter 893, Florida Statutes (1995). For these reasons, we affirm the order under review.

Munoz v. City of Coral Gables, 695 So.2d 1283, 1287-88 (Fla. 3 Dist. 1997)

It is respectfully submitted that finding that a claimant from whose possession currency was seized did not have standing because he had not even presented a sworn statement is not equivalent to holding that such a statement would be sufficient when presented by a person never shown to have had possession of the seized currency.

Second, the Munoz case, as the Fourth District noted, involved the standing requirement at an adversarial preliminary hearing, not the actual forfeiture proceeding. See Fraser, 727 So. 2d at 1025, n. 2.

Third, Petitioner's position totally ignores this Court's language in Byrom v. Gallagher, in which it stated:

> We recognize that relying solely on title registration or compliance with the title requirements in order to grant standing may result in some persons attempting fraudulent transfers in order to avoid a forfeiture. Consequently, in determining whether a person has standing the trial judge should consider: 1) whether that person holds legal title at the time of the forfeiture hearing or has complied with the requirements for receiving title; and 2) whether that person is in fact a bona fide purchaser. The trial judge should consider the facts surrounding the sale to

> determine whether the transfer is in fact a bona fide purchase. The relationship of the parties, the date the instruments were executed, the value of the property, the sale price, and cancelled checks or bank deposits to show actual payment and receipt of money are all factors which the trial court should consider in determining whether the transfer is a bona fide purchase. This list is not intended to be exhaustive but rather illustrative of the consideration to be made by the trial judge. In making the determination whether a title holder is also a bona fide purchaser, the trial judge should be able to sift the wheat from the chaff.[3]
>
> [3] We note that this decision is limited to property which the State has required that a person have a title or compliance with title requirements to show ownership. Thus, a party would only have to show that he or she is a bona fide purchaser where the seized property is not subject to the State's title laws.

Byrom v. Gallagher, 609 So.2d 24, 26-7 (Fla. 1992).

However, Petitioner claims that being required to show that the claimant has a bona fide interest, as stated by this Court, is improper and unconstitutional, albeit without any authorities which support such a position. (Brief of Petitioner, 6-8). This Court's concern, expressed in Byrom, to discourage fraudulent transfers in order to avoid a forfeiture is even more applicable to cash than titled property. Should Petitioner's position be adopted, drug dealers would be strongly motivated, if their cash was seized, to transfer ownership to a potential claimant with a

comparatively clean criminal record in return for a substantial percentage of the recovered funds. Then, the transferee could make the claim, saying, "the money belongs to me," and refuse to answer any further questions about it based upon the Fifth Amendment. Thus, fraudulent transfers of properly seized currency would be strongly encouraged, resulting in a substantial increase in cases like this one, where the simple statement, "the money belongs to me," without more, would require a full jury trial to resolve. The situation which this Court was attempting to avoid by its decision in Byrom would be strongly stimulated if the Petitioner's position is adopted.

Petitioner's contention that the situation in this case is remarkably similar to Wohlstrom v. Buchanan, 884 P.2d 687 (Az. 1994) and The People of the State of Illinois v. $1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van, 685 N.E. 2d 1370 (Ill. 1997) (Brief of Petitioner, 9-11) disappears under analysis.. The claimant in Wohlstrom asserted he owned the currency in question, gave the date and place that he had acquired it and the funds were seized directly from his possession. Id. He did assert his Fifth Amendment privilege as to other circumstances surrounding its acquisition. Id. Here, of course, the Petitioner did not give the date and place of his acquisition and the funds were not seized from his direct possession. While the claimant, in Wohlstrom, may not have established that

he was a bona fide purchaser of the funds concerned, he may well have established that he had a bona fide interest in them, where there were no other claimants.

The Court in the Illinois case, relying on Illinois law, noted that any standing requirement must be imposed by statute and that, "the Act does not place any initial burden on a claimant to prove his interest in the property." $1,124,905 in U.S. Currency at 1378. Thus, a default judgment entered on behalf of the State on the grounds that the potential claimant had no standing to Answer was required to be reversed. This situation contrasts nicely with § 932.701(2)(h) Florida Statutes (1992 Supp.) Which states:

> (h) "Claimant" means any party who has proprietary interest in property subject to forfeiture and has standing to challenge such forfeiture, including owners, registered owners, bona fide lienholders, and titleholders.

Thus it is understandable why, in Munoz, a finding that the potential claimant had failed to establish his standing at the preliminary hearing was affirmed. Indeed, this Court's determination that only persons who have standing can participate in a judicial proceeding [in Byrom at 26] would be meaningless if the issue couldn't be determined until the proceeding had taken place. Further, the funds in the Illinois case were seized from a stranded van that the claimant and his family were with. Rather clearly, both the applicable law and the facts are distinguishable from the

situation here.

A number of states have no difficulty requiring that a claimant show a bona fide interest in the seized property. For example, in Tuggle v. State, 480 S.E. 2d 353 (Ga. App. 1997), the State seized currency and a cellular phone found on Tuggle's body and Tuggle filed a verified claim of ownership, alleging that the seized funds represented money saved by the claimant from numerous jobs. The trial court found that Tuggle had failed to establish that he was the owner or interest holder of the currency and the appellate court agreed, noting that Tuggle's Answer had failed to specify the date, identity of the transferor and circumstances of acquisition, as required by the Georgia statute to establish standing. Id. The inability to describe the packaging accurately or to show that he had the means to accumulate the approximately $45,000 concerned supported the decision of the Commissioner that the claimant had not substantiated his claim of ownership to the seized money at a hearing on pretrial motions in Jones v. Greene, 946 S.W. 2d 817 (Tenn. App. 1996).

The authorities relied upon by Fraser simply do not support his position.

C. Petitioner's Position is Inapplicable and Unworkable.

Mr. Fraser urges this Court to adopt a position holding that, "[i]n cases where a person has possession of the money, or the money is found in a persons home, the

attending facts and circumstances would support a colorable claim to the currency if the claimant signed a sworn affidavit making claim to the money." (Brief of Petitioner, 8). However, the first problem with this contention is that it has nothing to do with the situation in this case. The cash, in this case, was not seized from the Petitioner's home or possession, it was seized from the bumper of a car that the Petitioner didn't own, that wasn't registered to him, that he wasn't driving and that he wasn't riding in.

Second, it ignores other relevant facts and circumstances. For example, if cash was seized from Mr. A's home, but he told police that it wasn't his money, it belonged to Ms. B. Then, subsequently, after forfeiture was filed, Mr. A filed a claim stating that he claimed the money and Ms. B also filed such a claim, with documents showing the bank account it had been taken from. According to Petitioner, Mr. A's claim would have to be allowed. Indeed, all of the people who might claim that A and B owed them money would also have the right to be claimants in the forfeiture case if they filed the necessary "the money belongs to me" statement. If the forfeiture Plaintiff failed to show by clear and convincing evidence that the seized currency was contraband, would it then owe the full amount of the seized currency to all claimants? Petitioner's suggestion creates a likelihood of multiple claimants (including all the creditors of the owners or possessors of the

money) and is unworkable, from a practical standpoint. It is respectfully submitted that the trial court must be granted sufficient discretion to determine who is a bona fide claimant and who is not.

D. "It Belongs to me" is not enough.

The case law is replete with examples of cases in which persons who might well have filed affidavits saying, essentially, "the property belongs to me" were found not to have standing.

Two claimants, the parents of the person cash was seized from, claimed that they had given him the money to finance a joint venture in which he was to use the money to purchase used oil drilling bits for reconditioning and resale. The cash was seized from the son, who was negotiating, at the time, to buy eighty pounds of marijuana, an activity the parents contended they had no knowledge of. The trial court found that the parents had standing and were unaware of their son's illegal activity (although it found forfeiture warranted because they could have done more to prevent the proscribed use of the money). The appellate court affirmed the forfeiture on the ground that the claimants failed to establish a cognizable legal or equitable interest in the currency. United States v. $47,875.00 un U.S. Currency, 746 F.2d 291 (5th Cir. 1984). The claimant in United States v. Forty-Three Thousand, Five Hundred Twenty Dollars ($43,520.00) in U.S. Currency, 902 F.2d

1570 (6th Cir. 1990) (unpublished opinion) claimed that he had given the person the money was seized from $42,500.00 of the money to take to a relative of his in New York. He testified that $31,626.54 was from a workers compensation settlement and the rest from various sources, his and his wife's jobs and work he did on the side. The possessor of the money had said, when initially stopped at the airport, that he was a jewelry salesman and the money was the proceeds of sales. The trial court properly held that the claimant had no standing. People who hold checks against a forfeited bank account have no standing to contest the forfeiture of the account. United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895 (11th Cir. 1985). A claimant who wired $1.3 million to a person who falsely represented himself to be a Nigerian money exchanger was without standing to challenge the forfeiture of funds seized from various bank accounts belonging to the alleged exchanger. United States v. Moylan, 103 F.3d 121 (4th Cir. 1996) (unpublished opinion). A loan or gift of the money concerned essentially abdicates standing:

> If Ms. Coluccio did indeed give or loan the money to Mr. Coluccio, then she would not have standing to contest the forfeiture of the cost bond. *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) (general creditors do not have sufficient interest to contest forfeiture); *United States v. $280,505*, 655 F.Supp. 1487, 1495 (S.D. Fla. 1986) (mother who gave son the money to purchase

> vehicle lacked standing to contest forfeiture of vehicle); *United States v. One 1971 Porsche Coupe Auto., Vehicle Identification No. 9111100355,* 364 F.Supp. 745, 748 (E.D. Pa. 1973) (since vehicle was gift from father to son, father did not have standing to contest forfeiture of vehicle); see also *United States v. $38,570 U.S. Currency*, 950 F.2d 1108, 1113 (5th Cir. 1992) (to establish standing to contest a forfeiture, claimant must show some evidence of ownership).

U.S. v. Coluccio, 51 F.3d 337, 339 (2d. Cir. 1995). Indeed, this case is particularly interesting given that the money concerned was found in the bumper of a car which was neither owned by nor registered to Mr. Fraser (R. 216-17, 221) and where Mr. Fraser initially, under oath, denied that he knew the money was in the bumper but then, after consultation with his attorney, testified that he put it in the bumper. (See R. 222).

Further, as noted in the Plaintiff's memorandum in the lower court, a money changer who paid out $900,000 upon a representation that the money had been transferred by wire to his New York bank account did not have standing to claim the funds which were, in fact, seized before the wire transfer was executed. United States v. Five Hundred Thousand Dollars, 730 F.2d 1437 (11th Cir. 1984).

Each of these persons could have filed an affidavit which said, "the money belongs to me" and then refused to say anything more. Under the Petitioner's interpretation, if they had done so, they would have had to be considered persons

with standing to contest the forfeitures concerned and, had the seizing agency not met their evidentiary burden on each element, the funds would have had to be awarded to them. Thus, under Petitioner's theory, people with no standing could have walked away with the money if they had kept their mouths shut, except to say, "It's my money." There are numerous persons who could have legitimately said, "the property belongs to me" who did not, in fact, have standing to contest the forfeiture concerned. Stating "the money belongs to me," without further explanation or evidence, should not be held as necessarily legally sufficient to establish standing.

E. The Fifth Amendment is not a Sword.

Mr. Fraser, however, claims that this Court is required to hold that stating, "the property belongs to me" is enough because otherwise, the Court is de facto requiring a waiver of the Fifth Amendment right against self incrimination in order to claim one's property. (Brief of Petitioner, 9-11-14). However, that situation has been ruled upon against Mr. Fraser's position in an extremely analogous situation:

> Before a claimant can contest a forfeiture he must demonstrate standing. *United States v. $38,000.00 in United States Currency,* 816 F.2d 1538, 1543-44 & n. 12 (11th Cir. 1987). The burden was on Mercado to prove that he had standing and he could not avoid meeting this burden by claiming a Fifth Amendment privilege. *Baker v. United States,* 722 F.2d 517, 518-19 (9th Cir. 1983).

> Mercado's claim, verified "to the best of [his attorney's] knowledge, information and belief," stated only that on March 1, 1985 Mercado was in possession of the $147,690 and the baggage check for the suitcase containing $33,900 and that the money was not subject to seizure and forfeiture. Mercado contends that he need do no more than thus allege possession of the currency to demonstrate the requisite standing, and he relies on several cases which, he says, so hold. *See, e.g., United States v. 1982 Sanger 24' Spectra Boat,* 738 F.2d 1043, 1046 (9th Cir. 1984). However, unless we know the facts giving rise to the findings of "possession" in the decisions upon which Mercado relied, those decisions have little precedential value in the instant case. *See Unites States v. One 18th Century Colombian Monstrance*, 802 F.2d 837, 838 (5th Cir. 1986). "[T]here is no word more ambiguous in its meaning than Possession." *National Safe Deposit Co. V. Stead,* 232 U.S. 58, 67 34 S.Ct. 209, 211, 58 L.Ed.2d 504 (1914). As former Judge Frank of this Court wrote, "The word 'possession' drips with ambiguity." *City of New York v. Hall,* 139 F.2d 935, 936 (2d Cir. 1944). The conclusory and factually unsupported statement of Mercado's attorney that Mercado was "in possession" of the money does not suffice to give Mercado standing.

Mercado v. U.S. Customs Service, 873 F.2d 641 (2d Cir. 1989).

It is respectfully submitted that, if there is a word equally ambiguous, it is the word used by Mr. Fraser, "belongs" and that the conclusory and factually unsupported statement of Fraser should be no more sufficient than that in Mercado. (R. 221).

Therefore, while Mr. Fraser certainly has a right to invoke his Fifth Amendment rights, as he has, he cannot use this invocation as a sword to cut away

the requirement that he establish his standing to contest the forfeiture concerned. Mr. Fraser, at the very least, was required to show that he had a bona fide interest in the funds concerned, pursuant to Byrom v. Gallagher, 690 So.2d 24, 26 (Fla. 1992), which he clearly failed to do.

Petitioner is being deliberately obtuse in his claim that standing cannot require that evidence of a bona fide interest be presented because innocent ownership is an ultimate issue. (Brief of Petitioner, 11-12). "Innocent owner" and "bona fide purchaser" are simply not equivalent terms. The "innocent owner" defense to a forfeiture action is established by the Act, itself, which states:

> (6)(a) No property shall be forfeited under the provisions of the Florida Contraband Forfeiture Act if the owner of such property establishes by a preponderance of the evidence that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity.

§932.703(6)(a), Fla. Stats. (1992 Suppl.); See also, Forfeiture of 1985 Fort Ranger Pickup Truck, 598 So. 2d 1070 (Fla. 1992); Forfeiture of 1989 Isuzu Pickup Truck, VIN 1AACL11L7K202483, 612 So. 2d 695 (Fla. 1st DCA 1993). This is entirely consistent with the definition of "innocent party," "Person who did not consciously or intentionally participate in event, transaction, etc." Black's Law Dictionary 788 (6th ed. 1990).

This contrasts nicely with "bona fide purchaser," the term used in the opinion concerned herein and by this Court in Byrom v. Gallagher, 609 So. 2d 24 (Fla. 1992):

> A "bona fide purchaser" is defined as follows: (1) a purchaser, (2) for value, (3) in good faith and without notice of any adverse claim . . . Section 678.302(1)(a), Fla. Stat. (1991).

First Nat. Bank of Florida Keys v. Rosasco, 622 So. 2d 554 (Fla. 3d DCA 1993). Although the above definition concerns securities, it certainly appears to be a reasonable working definition of the phrase grounded in Florida Law.

If a potential claimant could be a "bona fide purchaser" and yet not be an "innocent owner," then the entire assumption upon which the Petitioner's argument is based crumbles. However, one could clearly have purchased currency for value, such as receiving it by selling a car, and still not be an innocent owner, where, for example, one were intending to use that money to purchase narcotics at the time it was seized. Thus, such a person would have no difficulty establishing that they had standing under the requirements of the Fraser opinion, but would be unable to prove innocent ownership. Obviously, requiring that evidence of standing be shown is not equivalent to demanding that the claimant prove he or she is an innocent owner.

Requiring that a potential claimant present evidence that he or she has a bona

fide interest in the seized property in order to establish the threshold issue of standing before going through a jury trial is not unconstitutional or improper and is completely consistent with this Court's decision in Byrom v. Gallagher. Requiring that nothing more be done than saying, "the property belongs to me," is in contradiction of the law on the issue, would encourage fraudulent claims and is otherwise unworkable.

CONCLUSION

Based on the forgoing facts and arguments, the decision of the Fourth District Court of Appeals should clearly be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to CARL H. LIDA, ESQ., LAW OFFICES OF CARL H. LIDA, P.A. 8751 W. Broward Boulevard, Suite 305, Plantation, Florida 33324, on this _____ day of May. 2000.

_____
CHARLES M. FAHLBUSCH
Assistant Attorney General